J. Preston Stieff (4764)
J. PRESTON STIEFF LAW OFFICES, LLC
311 South State Street, Suite 450
Salt Lake City, Utah 84111
Telephone: (801) 366-6002
Email: jps@StieffLaw.com

Frances C. Bassett, *Pro Hac Vice*
Joanne H. Curry, *Pro Hac Vice*
Jeremy J. Patterson, *Pro Hac Vice*
Michael W. Holditch, *Pro Hac Vice*
Barry C. Bartel, *Pro Hac Vice Pending*
PATTERSON EARNHART REAL BIRD & WILSON LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 926-5292
Facsimile: (303) 926-5293
Email: fbassett@nativelawgroup.com
Email: jcurry@nativelawgroup.com
Email: jpatterson@nativelawgroup.com
Email: mholditch@nativelawgroup.com
Email: bbartel@nativelawgroup.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, ET AL., Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR, ET AL., Defendants.	**PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS** Civil Case No. 2:21-CV-00573-JNP-DAO Judge Jill N. Parrish Magistrate Judge Daphne A. Oberg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Plaintiff Ute Indian Tribe of the Uintah and Ouray Reservation and its individual Class Action Plaintiffs (collectively referred to as the "Tribe"), through undersigned counsel, submits this Response to the Motion to Dismiss the Tribe's Third Amended Complaint ("TAC") filed by the United States, the U.S. Department of Interior, Interior Secretary Deb Haaland, the U.S. Bureau of Reclamation, and the U.S. Bureau of Indian Affairs ("Federal Defendants").

REFERENCES TO THE RECORD

Evidentiary materials for the Tribe's opposition are contained in the three-volume exhibit appendix included as part of the present pleading.[1] References to this appendix are to volume and page number(s), i.e., "App. I, 1-10."

INTRODUCTION

In the arid American West, reliable access to water is the difference between an economically sustainable homeland rich with natural resources and a flourishing natural ecosystem, on one hand, and fallowed earth wholly incapable of supporting life, on the other. Recognizing that indispensability of water and the harsh reality for Indians who had ceded their aboriginal homelands to the United States, the Supreme Court found the Indians reserved rights to water appurtenant to their reserved lands:

> The Indians had command of the lands and the waters, command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock" or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?...If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators. Neither view is possible.

Winters v. United States, 207 U.S. 564 (1908).

[1] Evidentiary exhibits submitted herewith are being submitted in response to the Defendants challenges to subject-matter jurisdiction. Courts have "wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rules 12(b)(1)." *Native American Distributing*, 491 F. Supp. 2d 1056, 1061 (N.D. Okla. 2007).

Indian reserved water rights have been a focal point of the long and checkered history between the Ute Indian Tribe and its federal trustee. The Tribe's exceptional need for water has been recognized and documented by the United States for over a century. Yet, the United States has continuously betrayed the fundamental tenets of its trust relationship, leveraging existing water infrastructure held in trust for the Tribe, alongside the Tribe's well-documented need for supplemental water storage infrastructure, to advance its own agenda and satisfy the needs of non-Indian water users. Meanwhile, the Tribe's vested water rights are forsaken, and the Tribe continues to watch its waters flow away for the free use and enjoyment of downstream water users.

The Tribe has brought this lawsuit to vindicate its Indian reserved water rights and its ability to utilize and enforce these water rights. The Federal Defendants have been willing and eager to recognize the Tribe' water rights when they are exploitable. However, when faced with a reckoning of this past conduct, the Federal Defendants not only seek to shelter themselves from accountability, but also baselessly dispute the Tribe's right to seek a declaration of its own legal rights in relation to tribal trust assets. All of the grounds for dismissal asserted by the Federal Defendants is groundless and should be summarily rejected.

RESPONSE TO THE FEDERAL DEFENDANTS' STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. CORRECTION OF PROCEDURAL MISREPRESENTATION

At the outset, the Federal Defendants state this is the Tribe's "fourth attempt to plead justiciable claims." Defs. Mtn., ECF No. 200 at PageID. 935. This is patently false, and the procedural record is clear. On January 22, 2019, the Tribe timely filed its First Amended Complaint as a matter of right under Federal Rule of Civil Procedure 15(a)(1). ECF No. 25. On April 17, 2019, three months after the Tribe filed its Amended Complaint, the State of Utah filed its Motion to Intervene in the Tribe's lawsuit as a defendant. ECF No. 32. In its Memorandum in Partial Opposition to the State's Motion to Intervene, the Tribe specifically requested that the Court

grant the Tribe leave to amend its complaint to incorporate claims against the new defendant should the State be allowed to intervene. ECF No. 37. The court granted the requested leave.

There was never any order, judgment, or finding of any pleading deficiencies the Tribe's initial Complaint nor its First Amended Complaint. The Federal Defendants' insinuation that these each constituted failed "attempts" to allege justiciable claims is not only baseless conjecture but also immaterial given the Tribe's procedural right to amend.

II. THE UIIP IS AN INDIAN IRRIGATION PROJECT CONSTRUCTED TO IRRIGATE INDIAN LANDS

The Federal Defendants' description of the Uintah Indian Irrigation Project ("UIIP") as a "multi-purpose water management project involving an extensive irrigation system for Indians and non-Indians alike" is false and misleading. Defs. Mtn., ECF No. 200 at PageID. 936-937. Likewise, the Federal Defendants' suggestion that the Indian allottees were merely "included" within a larger pool of intended UIIP beneficiaries comprised of non-Indian water users is a profound mischaracterization.

As its title suggests, the UIIP is and has always been an *Indian* Irrigation Project. The UIIP was authorized in the Indian Appropriations Act of June 21, 1906, Pub. L. 59-258, 34 Stat. 325 ("1906 Act"), as a Congressional response to the response to the Indian Commissioner's 1905 Report that the "future of these [Ute] Indians depends upon a successful irrigation scheme, for without water their lands are valueless, and starvation or extermination will be their fate." Rept. of the Comm. of Ind. Aff., 1905, as quoted in *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. 1072, 1126 (D. Utah 1981).

The March 26, 1906, Senate Committee for Indian Affairs Report on the bill that was later enacted by Congress as the 1906 Act reiterated this urgent need to construct an irrigation project for the Utes:

> [I]t now rests with the Government to fulfill its portion of the implied contract with the State on behalf of its ward, and a failure on the part of Congress to do so…would blast the future of this tribe for generations, for they would then lose their priority of water right, which would be Secured by the whites, and owing to the scarcity of the low water flow in the streams tributary to the Duchesne River… a great number of them would be forced to lead a life of semistarvation.

App. III, 446.

The purpose of the UIIP is found in the plain statutory language of the 1906 Act: to "irrigate the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah." The 1906 Act also expressly establishes the UIIP as an Indian trust asset, stating that title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto[.]." Consistent its trust status, the UIIP has always been administered and operated by the Bureau of Indian Affairs (BIA). TAC ¶¶ 64-73, ECF No. 186 PageID 779-781. The BIA's function is *not* to serve the interests of Indians and non-Indians alike, but to "enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives."[2] BIA's central statutory directive is to "direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States." 25 U.S.C. § 13. Federal Defendants' characterization of the UIIP as a "multi-purpose water management project" built to benefit non-Indians controverts the plain language of the 1906 Act and is incongruent with BIA's administrative oversight over the UIIP.

III. WATER DEVELOPMMENT IN THE UINTAH BASIN WAS NEVER THE PRIORITY OF THE CENTRAL UTAH PROJECT

The "essential aim" of the Central Utah Project ("CUP") was never the "collection and distribution of water in the Uintah Basin." The Government's main priority in implementing the

[2] https://www.bia.gov/bia

CUP was to deliver water *from* the Uinta Basin, where the Tribe's vast and water-starved Reservation is located, to the more populous Wasatch Front. The Bonneville Unit, by far the largest and most intricate unit of the CUP, and was designed to achieve this very purpose. U.S. DEPT OF INTERIOR, Preliminary Information and Data Sheets on the Bonneville Unit (March 15, 1977) App. III, 473.

Revealing of the CUP's true "essential aim" were the Bureau of Reclamation's repeated, illegitimate attempts to augment the cost ceiling for the Bonneville Unit in an effort to obtain higher congressional appropriations designated this facet of the CUP. In a 2000 Memorandum from U.S. Department of Interior Western Regional Audit Manager Michael P. Colombo to the Assistant Secretary for Water and Science, Colombo summarized USBR's patterned conduct of providing inflated cost ceiling calculations for the Bonneville Unit, which included, *e.g.*, costs attributed to discontinued project features, costs that had been covered in prior appropriations, and costs that were simply unsupported by reliable information and data. App. III, 466-470. Much of this activity took place around the same time the Federal Defendants cited cost inefficiencies as its basis for indefinitely postponing construction of the Upalco and Uinta Units that would have supplied supplemental and full-service irrigation water to the Ute Indian Tribe. A. Eastman, Central Utah Projects: Upalco, Uintah, and Ute Indian (Ultimate Phase) Units, History Reclamation Projects Book at 22.[3]

IV. TITLE V OF THE CENTRAL UTAH PROJECT COMPLETION ACT WAS NOT A "COMPROMISE AGREEMENT"

Federal Defendants' assertion that Title V 1992 Central Utah Project Completion Act ("CUPCA") represented a "compromise agreement" to "resolve the Tribe's water rights and settle all potential claims under the [1965] Deferral Agreement" is baseless. The CUPCA is a not an

[3] Available on USBR's website at https://www.usbr.gov/projects/pdf.php?id=3.

agreement at all, but a piece of federal legislation unilaterally enacted by Congress. The Ute Indian Tribe has never entered into arms-length negotiations with the parties to the 1965 Deferral Agreement to compromise the Tribe's rights under the Agreement, nor has the Tribe ever agreed to or ratified the terms of what Congress referred to as the "proposed" Ute Indian Compact of 1990, which was approved by Congress under the CUPCA only upon ratification by the State of Utah and the Tribe. In 1990, then-serving Chairman of the Ute Indian Tribe Business Committee Luke Duncan testified before Congress in support of a prior proposed version of the CUPCA legislation and accompanying Water Compact. App. II, 343-359. However, the legislation and Water Compact that were ultimately approved (or, in the case of the Compact, *conditionally* approved) by Congress in 1992 were both substantially altered and amended without the prior knowledge or consent of the Tribe. App. II, 314-324.

In addition to numerous changes to the proposed Compact terms that sought to diminish the Tribe's inherent sovereign authority over the administration of its reserved water rights, the version of the Compact that that had garnered the Tribal supported expressed in Chairman Duncan's 1990 testimony specifically *preserved* the Tribe's rights under the 1965 Deferral Agreement, stating that "the provisions of said Agreement of September 20, 1965, shall remain binding upon the parties thereto and continue in full force and effect." *Id*.

The Tribe takes no responsibility for the aberrant sequencing of events culminating in Congress' conditional approval of an unratified compact. It is standard procedure that an Indian water rights settlement is not presented for Congressional approval until first being approved and executed a final written settlement agreement in accordance with each party's governing law. Declaration of Frances C. Bassett, Esq. App. III, 498-502. That did not happen here, and the fact remains that the Tribe has *never* entered into arms-length negotiations to compromise the Tribe's rights under the 1965 Deferral Agreement.

ARGUMENT

I. INDIAN CANONS OF CONSTRUCTION MUST BE APPLIED TO THE INTERPRETATION OF TREATIES, STATUTES, CONTRACTS, AND OTHER SOURCES OF FEDERAL LAW

The Indian canons of construction require courts to liberally interpret treaties, statutes, executive orders, regulations and contracts between the United States and Indians in favor of the Indians. *E.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (applying the Indian canons to interpret a federal statute); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) (applying the Indian canons to interpret a contract between the U.S. and the Choctaw and Chickasaw tribes).

The Indian canons of construction "are rooted in the unique trust relationship between the United States and the Indians." *Oneida Cty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The rule of liberal construction arises not from ordinary exegesis, but "from principles of equitable obligations and normative rules of behavior" applicable to the trust relationship between the United State and the Native American people. *Cobell v. Norton*, 240 F.3d 1082, 1102 (D.C. Cir. 2001).

The Tribe's Claims for Relief arise from various statues, treaties, and other contractual agreements. U.S. Supreme Court jurisprudence requires that these sources of federal law be construed in accordance with the Indian canons of construction. Federal Defendants have categorically neglected to follow this rule in its legal analysis, and the Court should reject any proffered construction of these federal laws that disregards this long-upheld rule.

II. THE COURT MAY TAKE JUDICIAL NOTICE OF ADMISSIONS OF THE FEDERAL DEFENDANTS AND OTHER GOVERNMENT RECORDS

The Federal Defendants have, at all times relevant, been keenly aware of the Tribe's reserved water rights, the United States' its legal duties to uphold and protect these reserved water

rights, and how these fiduciary duties and other legal obligations concerning the Tribe's reserved water rights have been defined and augmented by the Federal Defendants' own actions and omissions obstructing the Tribe's use and development of these critical rights.

Through its own judicial admissions, Federal Defendants have openly acknowledged its fiduciary obligations to protect the Tribe's water rights. In 1916, the United States filed suit to protect the Tribe's Indian reserved water rights in the U.S. District Court for the District of Utah. *United States v. Dry Gulch Irrigation Company et al.,* No. 4418 (D. Utah.), and *United States v. Cedarview Irrigation Company et al.,* No. 4427 (D. Utah), In its complaints in *Dry Gulch* and *Cedarview*, the United States readily admitted that the Tribe's reservation lands were valueless without irrigation and the has assumed enforceable trust obligations to the Ute Indians. In pertinent part, the United States affirmatively alleged: (i) that the Ute Indians are "wards" of the United States; (ii) that the Tribe's reservation lands are "of less value" than the lands the Tribe was forced to cede to the United States at the point of starvation; (iii) that "all" of the Tribe's reservation lands are "arid in character and will not produce crops without irrigation" and that "unless irrigated" the Tribe's lands "are comparatively valueless;" (iv) that it is the "intent and policy and the *duty*" of the United States "to protect" the Ute Indians "in their rights … and material welfare;" (v) that the Ute Indians "on account of their lack of development … and their dependent condition, are unable to cope with white men in the scramble for water;" and (vi) that non-Indian interference with the flow of surface waters through the Reservation has "caused …[the Ute] Indians to suffer the damage of and to lose large and valuable agricultural crops," resulting in "great and irreparable damage and injury" to the Indians. *See* U.S. Bills of Complaint in *Dry Gulch* and *Cedarview*, App. I, 45-76, 84-124.

These judicial admissions have been reinforced and expounded upon by the Federal Defendants through official Government records and publications. Official Federal government

records, including memoranda and correspondence with the Tribe acknowledging the United States' trust obligations and the Parties respective rights and obligations under the 1965 Deferral Agreement the CUPCA, are cited throughout this brief and included in the Tribe's appendix filed herewith. *E.g.*, U.S. DEPT OF INTERIOR, Regional Solicitor's Memorandum on the United States' Trust Obligations to the Ute Tribe (1988), App. II, 188-205; U.S. DEPT OF INTERIOR, Solicitor's Memorandum on Storage of Indian Water Rights Water in the Uinta Basin Replacement Project Facilities (1995), App. II 282-303; U.S. DEPT INTERIOR, Preliminary Information and Data Sheets on the Bonneville Unit (March 15, 1977) App. III, 471-490.

The Tribe asks the Court to take judicial notice of the Defendant's judicial admissions outlined above and other admissions or materials statements contained in the official Government publications cited herein. *Standing Akimbo LLC v. United States through Internal Revenue Service*, 955 F.3d 1146, 1152 n. 2 (10th Cir. 2020) (Courts "may take judicial notice of official government publications."); *St. Louis Baptist Temple, Inc. v. Federal Deposit Insurance Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).

III. THE TRIBE HAS PLED JUSTICIABLE CAUSES OF ACTION SUPPORTING ITS REQUESTS FOR DECLARATORY RELIEF

Each of the Tribe's First through Eighth Claims for Relief seeking, *inter alia*, declaratory and enforcement relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, arises out of a justiciable "case or controversy" that meets the minimum threshold standard under Article III of the United States Constitution.

The Declaratory Judgment Act "enables parties uncertain of their legal rights to seek a declaration of rights prior to injury." *Kunkel v. Continental Casualty Co.,* 866 F.2d 1269, 1275 (10th Cir. 1989). The Federal Defendants are correct in that the Declaratory Judgment Act does not establish an independent cause of action in the federal courts. What the Declaratory Judgment

Act does do, however, is establish declaratory relief as a judicial remedy for any case or controversy that satisfied the minimum requirements under Article III of the Constitution. To satisfy this minimum requirement, the controversy must be "definite and concrete, touching he legal relations of the parties have adverse legal interests" and must be "real and substantial and admi[t] to specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *MedImmune Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007); *Aetna Life Insurance Co. of Harford, Connecticut v. Haworth*, 300 U.S. 227, 240-41 (1937). The key question in each case is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune* at 127 (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941)).

Each of the Tribe's First through Eighth Claims for Relief quite clearly arise from one or more cases of controversies that meet these minimum Article III requirements. As the Third Amended Complaint reflects, each of these Claims for Relief arise from an active dispute over (1) whether there has been a full quantification of the Tribe's reserved water rights that is legally binding upon the Federal Defendants; (2) the scope and status of the Parties' legal rights and obligations concerning these water rights and related infrastructure, as the same is effected contracts, treaties, and statutes. These overarching controversies are of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment," and the Tribe is by no means seeking a mere "opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins.*, 300 U.S. at 240-241. Indeed, the controversy over the legally binding quantification of the Tribe's reserved water rights, this dispute has already had a substantial adverse impact on the Tribe, as illustrated in the Department of Interior's rejection of the Tribe's 2018 Water Resources Ordinance

on the alleged basis that the Tribe did not have a fully quantified water right to administer, an affront to inherent Tribal sovereignty and Tribal self-determination. TAC ¶¶ 145-146, ECF No. 186 at PageID. 797. Furthermore, the Tribe's Complaint contains myriad allegations of the Federal Defendants' failure to provide storage infrastructure and properly manage and administer the UIIP, resulting in substantial and ongoing losses to tribal water. *E.g.,* TAC ¶¶ 74-106, 221-222, 248-249.

Federal Defendants urge the Court to dismiss the Tribe's claims seeking declaratory based on the alleged lack of merit to the legal *theories* through which the Tribe's Claims for Relief are presented, arguing that the Tribe's declaratory judgment claims are non-justiciable because (i) the Tribe has allegedly not provided any sources of federal law conferring an enforceable duty on the Federal Defendants, (ii) the Tribe's so-called "contract-based" are outside the jurisdiction of the district court. Defs. Mtn., ECF No. 200 at PageID. 950-951. The Tribe addresses these incorrect assertions in greater substantive detail *infra.* However, as outlined above, alleged deficiencies in the merits of the Tribe's legal theories is not the correct standard for establishing a justiciable Article III case or controversy for the purpose of invoking declaratory relief.

The Tribe has demonstrated not just one but many actual controversies between the Parties underlying its requests for declaratory judgment – breach of trust being just one way in which these controversies have materialized. For instance, the Tribe's First and Third Claims for Relief seek declaratory relief in the form of an interpretation of an agreement between the Parties (the 1965 Deferral Agreement) and how that the legal reach and application of said Agreement may have been impacted by a federal statute.[4] While Federal Defendants' breach of their trust

[4] A party's right to seek declaratory relief in the form of an interpretation of legal effect of a contract or statute has been confirmed by the federal courts. *See Kunkel v. Continental Casualty Co.*, 866 F.2d at 1275 ("Issues of contract construction arising out of a justiciable controversy…are themselves justiciable and may be considered by the federal courts.").

responsibilities relating to the protection of tribal water and the construction of tribal water storage facilities is certainly sufficient on its own to establish an Article III case or controversy, the cases or controversies at the heart of its requests for declaratory relief arise from allegations of fact – not legal theory. The Tribe's Complaint is replete with allegations establishing a concrete controversy between the Parties that would be redressed through the requested declarations concerning the Tribe's legal rights under the 1965 Deferral Agreement and the enforceability of those rights. *E.g.,* TAC ¶¶ 144-146, 157-162, 209-216, 226-245. Therefore, the minimum "case or controversy" prerequisite to obtaining declaratory relief has been met without necessitating further analysis of the merits of the Tribe's breach of trust claims.

IV. THE TRIBE HAS PLED ENFORCEABLE FIDUCIARY DUTIES

The Tribe has cited various sources of federal law that establish an enforceable fiduciary responsibility on the Federal Defendants to protect the Tribe's reserved water rights and to develop and manage infrastructure to enable the Tribe to utilize these water rights for agricultural and economic development.

It is undisputed that a trust relationship exists between the United States and Indian tribes. *E.g., Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *Fletcher v. United States,* 730 F.3d 1206, 1208 (10th Cir. 2013). However, to establish a justiciable cause of action, the Tribe must identify a "substantive source of law that establishes [a] specific fiduciary duty." *Flute v. United States*, 808 F.3d 1234, 1245 (10th Cir. 2015). Overall, the relevant inquiry is "whether the particular statute or regulation establishes rights and duties that characterize a conventional fiduciary relationship." *Id*.

The U.S. Supreme Court has established a robust standard for determining whether the United States has accepted one or more fiduciary duties that are enforceable in money damages by the Indian beneficiar[ies]. *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"); U.S. *v.*

White Mountain Apache Tribe v. United States, 537 U.S. 465 (2003). "[W]here the Federal Government takes on or has control or supervision over tribal monies and properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *Mitchell II* at 225. This principle is especially applicable where the government assumes comprehensive, pervasive, or elaborate control over tribal trust property, such that the Tribal beneficiary does not have primary managerial control over the trust property. In that case, the court will infer enforceable fiduciary obligations. *Mitchell II* at 225. (citing the Government's "comprehensive" and "pervasive" responsibility over the management of Indian timber harvesting in finding that "[a] fiduciary relationship necessarily arises when the Government assumes such elaborate control over…property belonging to Indians."); *United States v. Navajo Nation*, 537 U.S. at 507 (finding that, under the principles outlined in *Mitchell II*, an enforceable fiduciary duty arises when the Government assumes a "comprehensive managerial role" over the trust asset).

While a "statute's invocation of trust language is not dispositive, it can be informative." *Flute*, 808 F.3d at 1245. "Trust" language is particularly informative where the Government has occupation or control over the Indian trust property. In *White Mountain Apache Tribe v. United States*, 537 U.S. 465 (2003), the Supreme Court found that an Act of Congress stating that the military post would be "held by the United States in trust for the…Tribe" created an enforceable fiduciary relationship where the Government also used and occupied the trust property. Following the precedent set by *Mitchell II*, the Supreme Court in *White Mountain Apache* concluded:

> The [1960 Act] expressly defines a fiduciary relationship in the provision that Fort Apache be held by the Government in trust for the Tribe, then proceeds to invest the United States with discretionary authority to make direct use of portions of the trust corpus…Although the 1960 Act…does not expressly subject the Government to management and conservation duties, the fact that the property occupied by the

> United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the Government as trustee.

Id. at 466-67 (emphasis added).

In determining whether a tribe or Indian trust beneficiary has identified federal law creating an enforceable trust responsibility, courts must review sources of federal law *in pari materia*. *Mitchell II* at 219-22 (reviewing federal statutes and regulations pertaining to Indian timber management in concert); *Bryan v. Isasca Cty.*, 426 U.S. 373, 390 (1976). The Court's *in pari materia* review should not be limited only to the language of statutes, regulations, and treaties cited, but also in the context of court-affirmed legal doctrines that bear a nexus to the issues at hand. *See Navajo Nation v. U.S. Department of the Interior*, 996 F.3d 623, 638 (9th Cir. 2021), *amended on denial of rehearing*, 26 F.4th (9th Cir. 2022).

a. The Federal Defendants are Estopped from Repudiating Admissions of Fiduciary Responsibility

As outlined *supra*, the United States made numerous statements in its 1916 Bills of Complaint in *Dry Gulch* and *Cedarview* to adjudicate the Tribe's reserved water rights in the Lake Fork and Uinta Rivers that affirmatively recognized and acknowledged the Federal Government's trust duties to secure and protect Tribal water rights. *Supra* pg. 13; App. I, 45-76, 84-124.

The United States' admissions in *Dry Gulch* and *Cedarview* constitute judicial admissions that the Federal Defendants are now estopped from repudiating. The doctrine of judicial estoppel prohibits parties from playing "fast and loose with the courts," thus parties are estopped from asserting one legal position in earlier litigation and a diametrically opposing legal position in later litigation. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, *especially if it be to the prejudice of the party who has acquiesced* in the position formerly taken by him." *Davis*

v. Wakelee, 156 U.S. 680, 689 (1895); *Johnson v. Lindon City Corporation,* 405 F.3d 1065, 1069 (10th Cir. 2005) (emphasis added).

The Ute Indian Tribe didn't just acquiesce but was effectively *forced* to acquiesce to the position taken by the United States in its 1916 Bills of Complaint. As the historical record reflects, the Ute Indians were forced at the brink of starvation to cede the vast majority of their aboriginal land base, leaving the Tribe with arid land openly deemed unfit for white settlement. TAC ¶¶ 33-34, ECF No. 186 at PageID. 771-772; *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. at 1094. The United States unilaterally filed its Bills of Complaint in its capacity as Indian trustee, resulting in the adjudication of water rights appropriated by the U.S. Department of Interior to be delivered to Uintah and Ouray Reservation lands as Indian reserved water rights under the *Winters* doctrine. *Hackford v. Babbitt*, 14 F.3d 1457, 1469 (10th Cir. 1994); U.S. DEPT OF INTERIOR, Solicitor's Memorandum on Storage of Indian Water Rights Water in the Uinta Basin Replacement Project Facilities (October 13, 1995), App. II, 282-283. As a result of the United States' unilateral actions, a substantial quantity of the Tribe's *Winters* reserved water rights were appropriated and subsequently adjudicated to supply water through irrigation facilities under the exclusive administration and control of the Federal government.

Accordingly, the United States has recognized and carried out its fiduciary obligations to protect Tribal water rights in a manner that has augmented and reinforced the Tribe's position of reliance on its trustee. Federal Defendants are estopped from now repudiating the existence of these very same trust obligations that the Tribe has historically relied to its severe detriment.

b. The Sources of Federal Law Cited by the Tribe Exceed the Requirements to Show an Enforceable Fiduciary Duty

The Federal Defendants' argument that the Tribe has failed to demonstrate an enforceable fiduciary duty is based on a superficial and self-serving methodology for analyzing the sources of

federal law cited by the Tribe, which is incongruent with the applicable standard under *Mitchell II*. Federal Defendants have taken the extensive list of federal laws cited by the Tribe showing that the Tribe's claims arise under federal law (an issue that is separate and distinct from the existence of an enforceable fiduciary duty), reviewed each source of law in isolation, and performed a conclusory assessment of the language of each to determine whether the language includes an affirmative statement that there exists a duty on the United States. Defs. Mtn., ECF No. 200 PageID 955-957. In adopting this approach, Federal Defendants have flouted the Indians canons of construction and foregone the requirement to construe related sources of law *in pari materia*. Federal Defendants have also endeavored to minimize the pervasive control the Federal Defendants have over the Tribe's water rights and the UIIP.

Federal Defendants' approach in going through each source of law cited by the Tribe like an itemized laundry list is a vain attempt to deconstruct and obscure the narrative recited in the Tribe's Complaint, defined by the Federal Defendants continuous *modus operandi* to place the Tribe in a position of reliance on the Government to protect Tribal water, assume control over the means of protecting and developing tribal waters, fall woefully short on its commitments made in furtherance of protecting tribal water, and take whatever action it can to evade accountability as the Tribe and its members continue to suffer the impacts of the Federal Defendants' failings. This section analyzes sources of federal law cited by the Tribe that are particularly relevant in supporting the existence of an enforceable fiduciary duty.

i. Ute Treaties of 1849, 1863, and 1868

The Ute Treaties of 1849, 1863, and 1868 create enforceable fiduciary duties on the United States to protect Tribal water rights, especially read *in pari materia* with the *Winters* doctrine and sources of federal law giving the Secretary control over the Colorado River.

In 1849, the year following the Treaty of Guadalupe Hidalgo, the United States executed treaties with the Indian inhabitants of the lands ceded by Mexico, including the Ute Indians, and those 1849 treaties placed the Indian inhabitants of the ceded lands, "under the exclusive jurisdiction and protection of the … United States." Following the 1849 Treaty with the Ute Indians, the Utes entered into two successive treaties with the United States, the Ute Treaty of 1863 (13 Stat., 673), and the Ute Treaty of 1868 (15 Stat., 619), followed by the Act of April 29, 1874, Ch. 136 (18 Stat., 36).

Quite recently, the Court's sister circuit conducted a detailed and highly informative analysis of the Federal Government's fiduciary duty to protect Tribal water rights that arise under treaty. *Navajo Nation v. U.S. Department of the Interior*, 996 F.3d 623, 638 (9th Cir. 2021), *amended on denial of rehearing*, 26 F.4th (9th Cir. 2022). In *Navajo Nation*, the Ninth Circuit found that the *Winters* doctrine itself, viewed in concert with provisions from the Navajo Nation's 1868 Treaty with the United States facilitating agricultural development of the Navajo Nation, establishes an enforceable fiduciary duty to "protect the [Navajo] Nation's water supply." *Navajo Nation* at 28. The Ninth Circuit found that the Treaty provisions related to farming serves as the "specific statute" necessary to establish enforceable trust duties under Supreme Court precedent, particularly when viewed in light of the substantial control the United States is authorized to exercise of the Colorado River as a whole. *Id*. at 29.

The similarities between the Ninth Circuit's *Navajo Nation* decision and the case at bar are striking. Both reckon with the United States' trust responsibility over its management of *Winters* reserved water rights in the Colorado River, beneficially owned by Indian tribes with correlating treaty rights intended to encourage agricultural development on reserved Indian lands. Just like the treaties addressed in Navajo, the Ute Treaties of 1849, 1863, and 1868 "encourage the [Ute Indian Tribe's] transition to an agrarian lifestyle." *Navajo Nation* at 810-11. The Treaty of 1849

is foundational and contains language identical to the 1849 Treaty cited in *Navajo Nation*, reserving lands from the Tribe's much larger historical land base and establish federal control and supervision over these lands. App. I, 1-3. The Ute Treaty of 1868 contains provisions that are similar in form and indistinguishable in purpose from the "farming provisions" of the Navajo Nation's 1868 Treaty, ensuring federal support for agricultural development by supplying land, seeds, and agricultural implements to the Indians. App. I, 8-15. Beyond these two treaties, each having an analogous treaty that was cited in *Navajo Nation,* the United States' duty to provide means for agricultural development was also acknowledged in the Ute Treaty of 1863, requiring the United States to support agricultural development by supplying livestock and establishing a blacksmith shop to repair agricultural implements. App. I, 4-7. Significantly, in both the 1863 and the 1868 Treaties, agricultural development was the *only* manner of civilization that the United States committed to support.

Federal Defendants rest upon a conclusory assertion that the Treaties cited do not "establish any fiduciary obligations with respect to water rights, irrigation, or infrastructure," and that "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." Defs. Mtn, ECF No. 200, PageID 955. The Federal Defendants' argument not only shuns *Winters* but is profoundly ignorant of controlling precedent. The key concept informing the interpretation of the terms, scope, and impact of Indians treaties is that a treaty is a grant of lands *from* the Indians to the United States – not the other way around – and that such conveyance of aboriginal lands was done in exchange for the United States' protection of those lands and appurtenant property rights not ceded. This foundational principle was first spelled out by the U.S. Supreme Court in *United States v. Winans*, 198 U.S. 371 (1905), overturning the lower court's ruling that the Yakima Indians had not

"acquired" rights under their treaty with the United States to take fish from the Columbia River in Washington state:

> The remarks of the court clearly stated the issue and the grounds of decision…[I]t was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more…
>
> ***
>
> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted.

Winans at 380-381.

Central to the Tribe's contention "and rooted in *United States v. Winans*…is the concept that under the treaty the Indians were the grantors of a significant land cession and the United States was the grantee." *United States v. Michigan*, 471 F. Supp. 192, 212 (W.D. Mich. 1979):

> The [treaty] transaction is better understood if the focus is upon the concept of "reservation." The Indians gave up some rights, reserving all those not specifically conveyed.
>
> * * * *
>
> Western Indian tribes … reserved whatever water they needed to make use of their land….They are not required to show that the United States granted them [that water], but only that they reserved it. They need not show that they explicitly reserved it.
>
> * * * *
>
> The conceptual framework, then, for interpreting the treaty is that the grant or cession in the treaty is not made from the United States to the Indians. Rather the Indians were the grantors of a vast area they owned aboriginally and the United States was the grantee. The grant from the Indians must be narrowly construed, especially in light of the wardship existing between the Indian grantors and the grantee United States.

Id. at 213, 253-54, *aff'd*, 653 F.2d 177 (6th Cir. 1981) (citing, *e.g.*, *Winters*, *United States v. Winans*, 198 U.S. 371 (1905), *United States v. Wheeler*, 435 U.S. 313 (1978) (superseded by statute)).

The Federal Defendants wrongly presume that the Tribe's treaty rights are concessions made to the Tribe from the United States. As such, the Federal Defendants analyze the rights and duties under the cited Treaties through a faulty lens of what was given *to* the Tribe, rather than was preserved *by* the Tribe, where the foundational canon of treaty interpretation dictates it is the latter which defines the scope of the Federal Government's trust duties.

ii. The 1899 Act

Having endured the hostilities of unabated white settlement on its aboriginal lands, the Ute Indians were on the brink of starvation by the mid nineteenth century. In 1861 the first federal Superintendent of Indian Affairs described the Utes as a defeated people, suffering in a "state of nakedness and starvation, destitute and dying of want." *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. at 1094 (quoting from Report of the Commissioner of Indian Affairs, 1861). The U.S. exploited the compromised state of the Ute Indians, guaranteeing a protected homeland by the establishing the Uintah Valley Reservation in 1861, in return for the cession of hundreds of millions of acres of valuable land.

Yet, the cession of the hundreds of millions of acres of Ute lands was insufficient to accommodate the United States' unflinching pursuit of manifest destiny. In 1899, Congress authorized the Secretary of the Interior to grants easements for canals and ditches within the Uintah Valley Reservation to facilitate water use by non-Indians. Act of March 1, 1899, 40 stat. 941, App. I, 24 ("1899 Act"). The 1899 Act authorized the Secretary to grant rights-of-way for the construction of ditches and canals on or through the Reservation for the purpose of diverting and appropriating said waters, subject to the following:

> all such grants shall be subject at all times to the paramount rights of the Indians on said reservation to *so much of said waters as may been appropriated, or may hereafter be appropriated or needed by them for agricultural and domestic purposes*; and it *shall be the duty of the Secretary of the Interior* to prescribe such rules and regulations as he may deem necessary to *secure to the Indians the quantity of water needed for their present and prospective wants*, and to otherwise protect the rights and interests of the Indians and the Indian service.

(emphases added). The 1899 Act "establishes rights and duties that characterize a conventional fiduciary relationship." *Flute v. United States*, 808 F.3d at 1245. To track the analytical framework employed by the U.S. Supreme Court in *Mitchell II*, all the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Ute Indian Tribe), and a trust corpus (reservation water resources). Beyond these foundational trust elements, the plain language of this statute imposes a specific fiduciary duty on the Secretary to secure water to ensure the Ute Indians are able to utilize their "paramount" water rights for their "present and prospective wants."

Federal Defendants assert that "[n]either discretionary authorizations to act nor appropriations such as these create enforceable trust duties." Defs. Mtn., ECF No. 200 at PageID. 955. Though its analysis is scant, it appears the Federal Defendants are attempting shield themselves with the clause "as he may deem necessary," stripping this clause of all context and once again foregoing the Indian canons of construction. First, to the extent Federal Defendants argue that the 1899 Act cannot establish enforceable duties simply because it is an "appropriations act," this position is baseless. Defendants have cited no authority – as there is none – for a blanket exclusion of certain "categories" of Congressional statutes from the federal trust responsibility.

Second, the alleged "discretionary" nature of the 1899 Act is a false characterization. To the extent the clause "as he may deem necessary" confers discretion at all, that discretion exists only within the confines of a non-discretionary duty to ensure that present and future uses of the Tribe's "paramount" water rights are secured and protected from non-Indian obstruction.

Defendants' self-serving interpretation of the 1899 Act subverts the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, (2000); *Lal v. M.S.P.B.*, 821 F.3d 1376, 1378 (Fed. Cir. 2016). Moreover, the executive branch's discretion in carrying out its statutorily-imposed functions is subject to and limited by the fiduciary relationship, not the other way around. *White Mountain Apache*, 537 U.S. at 466-67 (2003) (federal statute that "expressly defines a fiduciary relationship in the provision that Fort Apache be held by the Government in trust for the Tribe, *then proceeds to invest the United States with discretionary authority to make direct use of portions of the trust corpus*" gives rise to money-mandating fiduciary duties) (emphases added); *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 588 (10th Cir. 1982) ("United States' function as a trustee over Indian lands necessarily limits the Secretary's discretion" in conducting activities that affect tribal trust assets). *Navajo Nation v. U.S.* 26 F.4th (9th Cir. 2022), ("… statutes that grant the Secretary *authority* to exercise pervasive control over the Colorado River" augments the duties of the United States to protect *Winters* reserved water rights). Thus, discretionary language is not only reconcilable with the presence of enforceable fiduciary duties, but in fact complements and gives shape to these fiduciary duties.

Federal Defendants rely on the Federal Circuit case of *Wolfchild v. United States* in an effort to show that discretion negates any fiduciary obligation. In *Wolfchild*, the Federal Circuit found that a federal statute authorizing the Secretary to set aside certain public lands for individual Sioux Indians who had exhibited loyalty to the federal government was "simply too discretionary to support a viable claim for damages on its own." *Wolfchild v. United States,* 731 F.3d 1280, 1292 (Fed. Cir. 2013). Setting aside that *Wolfchild* is a non-binding, out-of-circuit case that dealt specifically with whether a statute created *money-mandating* fiduciary duties – an issue immaterial

to the present case – The 1899 Act is distinguishable from the statute addressed in *Wolfchild*. In *Wolfchild*, the alleged "duty" was itself framed in purely discretionary language ("[T]he Secretary of the Interior is hereby authorized to set apart of the public lands…"). The 1899 Act, on the other hand, prescribes a non-discretionary duty in plain terms ("it shall be the duty of the Secretary…"). The only arguably "discretionary" component of the 1899 Act is that the Secretary is responsible for determining what measures are necessary to carry out Congress's prescribed trust duty.

iii. The 1906 Act and Subsequent Federal Laws Surrounding the Construction, Operation, and Management of the UIIP

In the wake of the Commissioner of Indian Affairs' ominous forecast that the Ute Indian would face starvation and extermination on their Reservation without irrigation, Congress responded by authorizing construction of the Uintah Indian Irrigation Project ("UIIP"), appropriating federal funds "for constructing irrigation systems to irrigate the allotted lands of the Uncompaghre, Uintah, and White River Utes in Utah…the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within the former Uintah Reservation," and subject to the following proviso:

> *Provided*, That such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah, and the *title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto*.

Pub. L. 59-258, Stat. 325, 375 ("1906 Act").

The 1906 Act expressly provides that the UIIP "shall be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto." By establishing both a trust relationship and an express cause of action in relation to this trust relationship, the plain language of the 1906 Act alone meets any and all requirements to establish an enforceable fiduciary duty on the Federal Defendants.

A "fundamental canon of statutory construction is that words generally should be "interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.* 571 U.S. 220, 227 (2014). Consistent with this fundamental canon, federal courts have consistently interpreted "sue and be sued" language as creating a cause of action for an unmet duty or obligation. *Lightfoot v. Cendant Mortgage Corp.*, 580 U.S. 82, 88 (2017); *Crowel v. Administrator of Veterans' Affairs of Washington*, 699 F.2d 347, 350-51 (7th Cir. 1983); *Marcus Garvey Square v. Winston Burnett Construction Co. of California*, 595 F.2d 1126, 1132 (9th Cir. 1979). Statutory language must also be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Accordingly, the Federal Defendants' superficial analysis of the 1906 Act, which omits any reference whatsoever to the "sue and be sued" clause, should be summarily disregarded.

Per the 1906 Act, the express purpose of the UIIP is to "irrigate the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah."[5] The 1906 Act further provides that the UIIP is held in trust "for the Indians," and not any other purported trust beneficiary. In fact, in 1994, this Circuit ruled issued an opinion finding that the "sue and be sued" clause in the 1906 Act does not give non-Indian water users standing to sue the Secretary in matters relating to its management of the UIIP. *Hackford v. Babbitt*, 14 F.3d 1457, 1466 (10th Cir. 1994). Lest the "sue and be sued" be rendered completely inoperative, contradicting established canons of statutory construction, the only possible interpretation of the "sue and be sued" clause is that the clause confirms the judicial enforceability Secretary's trust responsibilities over the UIIP.

Even in the absence of the dispositive "sue and be sued" clause, the 1906 Act is analogous to the 1960 Act at issue in *White Mountain Apache*, in which the Supreme Court found that that

[5] The three Bands referenced in this statutory language comprise what is today the federally-recognized Ute Indian Tribe of the Uintah and Ouray Reservation.

statutory language merely providing that the Federal Government would hold a former military post "in trust" of the Tribe was enough to establish enforceable trust duties where the Government had occupation and control over the facility. Indeed, in addition to having title ownership of the UIIP in trust for the Indians, the Federal Government has exercised exclusive and comprehensive control over the operations, administration, and management of the UIIP throughout its history.

Under the authority of the 1906 Act, the Federal Defendants unilaterally appropriated Tribal reserved water rights for delivery through UIIP infrastructure. U.S. DEPT OF INTERIOR, Solicitor's Memorandum on Storage of Indian Water Rights Water in the Uinta Basin Replacement Project Facilities (October 13, 1995), App. II, 282-283. In addition, the Congressional Act of May 28, 1941 (55 Stat. 209) ("1941 Act") authorized the Secretary to transfer water rights within the UIIP to different lands in order to maximize project efficiency. App. II, 156-157. Through these Acts, Congress gave the Secretary control over the disposition of Indian reserved water rights delivered through the project.

As further detailed in the Tribe's Complaint, federal regulations governing management of the UIIP were established in 1957. These regulations affirmed the exclusive authority of the BIA over the UIIP stating:

> The [UIIP] is in charge of an engineer of the Bureau of Indian Affairs who is fully authorized to administer, carry out and enforce the rules and regulations in this part, either directly or through project employees delegated by him, such as watermasters, ditchriders, foremen and other assistants.

22 Fed. Reg. 10479, 10637-38 (Dec. 24, 1957). The 1957 regulations go on to state that "No persons other than those specifically designated by the project engineer are authorized to regulate project structures or to interfere in any way' with project-operated canals or any works appurtenant thereto." *Id*.

The UIIP is currently administered by an Operation & Maintenance Company ("O&M Company") that serves under the direction of the BIA Superintendent. The BIA retains oversight and approval authority over the O&M Company operations. The Articles of Incorporation for the O&M Company specifically provide that the Secretary "shall retain *any and all trust responsibilities to the Uintah Indian Irrigation Project, the Ute Indian Tribe and the individual Indian land owners within the Project*." Articles of Incorporation for the UIIP Operation & Maintenance Company, App. III, 491-497.

The Federal government controls all facets of the UIIP. The applicable statutes, regulations, and contracts give the Tribe no independent authority whatsoever to access, use, operate, or administer the UIIP. Instead, the Tribe is forced into a position of reliance on its federal trustee to property manage and protect its reserved water rights.

iv. The CUPCA and Uintah Basin Replacement Projects

The Defendants also have an enforceable fiduciary duty to provide Tribal water storage under Uintah Basin Replacement Projects pursuant the 1992 CUPCA.

As the Federal Defendants admit in their Motion to Dismiss, the Tribe's agreement to defer development of a portion of its reserved water rights was indispensable to the completion of the Bonneville Unit of the Central Utah Project, as it "allowed the Secretary to certify to Congress that construction on the Bonneville Unit could proceed." Defs. Mtn., ECF No. 200 at PageID. 941. The Federal Government readily exploited the Tribe's need for storage by committing to provide the Tribe with the storage infrastructure it so desperately needed. USBR affirmatively acknowledged that this implicated the Secretary's "fiduciary responsibility" to the Tribe:

> The Tribe agreed to defer development of 15,242 acres of (Group 5) Indian owned land upon the condition that said lands would be included in the ultimate phase of the Central Utah Project. *The Secretary of the Interior has fiduciary responsibility for the welfare of the Ute Indian Tribe*. The Tribe has supported the Bonneville Unit to assure an orderly development of water resources for the Tribe through the

> Central Utah Project. Water for the Bonneville Unit is available through agreements made by the United States and the Ute Indian Tribe.

USBR also acknowledged Ute Indian Tribe's complete degree of reliance on its federal trustee to develop Tribal water through the Central Utah Project as a result of the Deferral Agreement:

> The Ute Indian Tribe have long looked to the Central Utah Project as a means to develop their water resources. To them, the discontinuation of this project would result in many years delay in development and as well as loss in public support throughout Utah and financial assistance of the Colorado River Storage Project and the Central Utah Water Conservancy District. The Ute Indian Tribe may be compelled to fight long legal battles to defend the Winters Doctrine Water Rights which have been conceded them in the Deferral Agreement.

Id.

Only in the foregoing context can the full impact and purpose of the CUPCA be properly discerned.

Congress expressly states that the purposes of the CUPCA were to "[a]llow increased beneficial use of such water" and "put the Tribe in the same economic position it would have enjoyed had the features contemplated by [1965 Deferral] Agreement been constructed." CUPCA § 501(b), App. II., 253. To carry out its legislative purpose, Congress authorized appropriations for construction of the Uinta Basin Replacement Project ("UBRP") to replace the foregone Uintah and Upalco Units of the Central Utah Project that were promised to the Tribe as part of the *quid pro quo* for the Tribe's deferral of its Group 5 water rights. App. II, 233. The same section of CUPCA states that "[t]he Secretary shall retain any trust responsibilities to the [UIIP]." *Id.*, Section 203(f)(2).

Defendant DOI admitted that the purpose of CUPCA was to provide storage necessary for the Tribe to develop these decreed water rights through irrigation. In an October 13, 1995, memorandum from the DOI Field Solicitor Lynn Collins to the CUPCA Program Director, the Solicitor opined in his legal memorandum that "Congress intended that Indian reserved water

rights water for the 1906 Project be stored in CUPCA Section 201(c) and Section 203 replacement facilities." App. II, 297. Understanding that Reservation lands with a UIIP water right could not be adequately irrigated without access to storage, the Solicitor concluded that "the 1906 Act authorization for irrigation facilities includes storage when the necessary facilities are funded." App. I, 80. The CUPCA provided funding for the storage of Tribal water in the UBRP facilities. Citing the express purposes recited by Congress in the CUPCA, Solicitor Collins concluded that Congress "intended to 'quantify the Tribe's reserved water rights" and "allow increased beneficial use of such [reserved' water].'" App. II, 298. Solicitor Collins stated that "[b]ecause an increased beneficial use of reserved water on Tribal lands can *only* be obtained *by storage*, we conclude storage of the Tribe's reserved water rights was intended as an incremental part of the CUPCA." App. II, 298 (emphasis in original).

Through its express recognition of (i) the United States' unfulfilled promises to provide storage infrastructure to benefit the tribe, (ii) the continuity of the United States' trust responsibilities to Tribe, and (iii) the legislative purpose of placing the Tribe "in the same economic position it would have enjoyed" had these promises been satisfied, Viewed in concert with the Secretary's ongoing statutory duty to secure and protect the Tribe's "paramount" water rights, Congress unambiguously affirmed the Federal Government's fiduciary duty to provide storage benefits to the Tribe through the Uintah Basin Replacement Projects.

V. THE TUCKER ACT DOES NOT BAR THE TRIBE'S CLAIMS

In a self-serving misreading of the Tribe's Complaint, Federal Defendants argue that this Court does have subject matter jurisdiction over the Tribe's so-called "contract-based" claims, which include the Tribe's First, Third, and Fifth Claims for Relief. The Tucker Act, 28 U.S.C. § 1491, gives the U.S. Court of Federal Claims exclusive jurisdiction over (1) breach of contract claims seeking over $10,000 in damages, and (2) some claims for specific performance of a

contract. *Robbins v. U.S. Bureau of Land Management*, 438 F.3d 1074, 1082-83 (10th Cir. 2006); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982).

The invocation of a contract or contractual rights is not dispositive, as "(l)itigants may bring statutory and constitutional claims in federal district court even when the claims depend on the existence and terms of a contract with the government." *Normandy Apartments, Ltd. V. U.S. Dept. of Housing and Urban Development*, 554 F.3d 1290, 1300 (10th Cir. 2009) (quoting *Robbins*, 438 F.3d at 1083-84). The Supreme Court has affirmed that the district court may exercise jurisdiction over disputes surrounding the Federal Government's assertion of ownership over property rights under the terms of a contract. *Land v. Dollar*, 330 U.S. 731, 738-739 (1947). *See also, Megapulse*, 672 F.2d at 968 (citing *Land v. Dollar* as confirmation of "a private party's cause of action outside the Tucker Act to challenge the statutory authority of federal officials to claim ownership rights in property allegedly transferred during the course of a contract.").

It is self-evident that none if the Tribe's Claims for Relief seek contractual damages exceeding $10,000. Further, none of the Tribe's five claims cited by the Federal Defendants request specific performance of a contract. The Tribe's First Claim asks for declaratory relief as to the legal impact of the Tribe's covenant to recognize the full quantity of the Tribe's reserved water rights without resort to litigation. The Tribe's Third Claim asks the Court to interpret the provisions of the CUPCA. The Tribe's Fifth Claim asks the Court to declare that the transfer of tribal water rights under the Midview Exchange violated federal statute 25 U.S.C. § 177.

Only the Tribe's Sixth Claim, requesting transfer of the Midview Property into trust, could even arguably be construed as a request for specific performance of a contract. However, just like the Claims outlined in the preceding paragraph, the Tribe's Sixth Claim is best understood as a claim to vindicate the Tribe's beneficial ownership in constitutionally protected property rights, rather than enforcement of a contractual right. As pled by the Tribe, the failure to transfer the

Midview Property into trust for the benefit of the Tribe is not only violates the terms of the Agreement but separately constitutes repudiation of the Federal Defendants' trust obligations. TAC ¶ 114, ECF No. 186, PageID. 790. Therefore, these claims are not barred. *Normandy Apartments,* 554 F.3d at 1300.

VI. THE TRIBE'S FIRST AND THIRD CLAIMS FOR RELIEF ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

The applicable statute of limitations for civil actions against the United States in the U.S. district courts is 28 U.S.C. § 2401, which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Unlike the statute of limitations applicable to actions for damages against the United States brought in the U.S. Court of Federal claims, the statute of limitations under 28 U.S.C. § 2401Statute of limitations is non-jurisdictional, and a defendant's treated as an affirmative defense not subject to a subject matter jurisdiction analysis. *Chance v. Zinke*, 898 F.3d 1025, 1030-32 (10th Cir. 2018). As a general rule, the burden falls on the defendant to assert affirmative defenses, and an affirmative defense does not necessitate response from the plaintiff. *Fernandez v. Clean House LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018). However, a district court may dismiss a complaint as time-barred under Rule 12(b)(6), but only "if the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements." *Id.*

The Federal Defendants argue that the Tribe's First and Third are barred by the statute of limitations. Both of these Claims seek prospective relief, based on a controversy arising from the Federal Defendants' refusal to recognize and uphold the full quantity of the Tribe's reserved water rights as recognized and upheld under the 1965 Deferral Agreement "without resort to litigation." TAC ¶¶ 132, 204, 207, 234, 289.

As pled in the Tribe's Complaint, the Federal Defendants' repudiation of the Tribe's reserved water rights came to light only recently, first when the Federal Defendants' rejected the Tribe's 2018 Ordinance to regulate its reserved water rights, and then when the USBR issued an Environmental Assessment for the Green River Block Exchange stating that the Tribe will have reserved water rights in the Green River only if the Tribe executes a water rights compact in the future. TAC ¶¶ 144-145, 183, ECF No. 186 at PageID. 797, 806. Therefore, Federal Defendants' position that these Claims accrued upon the execution of the 1965 Deferral Agreement and the enactment of the 1992 CUPCA, respectively, is devoid of merit. The salient controversy is the United States' failure to recognize and uphold the full, agreed-upon quantity of the Tribe's reserved water rights, had not come to pass upon the "accrual" dates proposed by the Federal Defendants, and the Tribe's Complaint certainly does not contain any factual allegations that "admit[] all the elements of the affirmative defense" under the Federal Defendants' theory. *Fernandez*, 883 F.3d at 1299.

VII. THE TRIBE STATES A CLAIM BASED ON VIOLATION OF THE INDIAN NONINTERCOURSE ACT

Defendants assert the Tribe cannot sustain a claim for declaratory relief that the improvident disposition of Tribal water under the Midview Exchange Agreement violated the Indian Non-Intercourse Act, 25 U.S.C. § 177, because § 177 is inapplicable to conveyances of Indian property made by the United States. This argument lacks merit because the Midview Exchange was effectively a transfer of tribal water rights for the benefit of a private association of water users, not an exercise of the United States' preexisting constitutional authority.

Defendants rely on the U.S. Supreme Court's finding in *Federal Power Commission v. Tuscarora Indian Nation,* 360 U.S. 99, 119 (1960), that "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.'" This finding was specific to the respondent tribe's position that § 177 required a *new* Congressional authorization for the United States and its delegees to condemn Indian lands, notwithstanding the United States' preexisting condemnation authority under the eminent domain clause of the United States Constitution. *Id*. at 118-20. The transfer of Indian reserved water rights under the Midview Exchange was not an exercise of the Government's existing constitutional authority to take private land for public use; it was an exchange of property rights, no different than as between private property right holders, implemented without the requisite authorization from Congress. Accordingly, the Tribe has raised a cognizable claim that this transfer is invalid.

VIII. THE 2012 SETTLEMENT AGREEMENT DID WAIVE ANY OF THE CLAIMS FOR RELIEF

The Federal Defendants' argument the Tribe's Second, Fourth, and Eighth Claims for Relief were waived in the 2012 Settlement Agreement between the Tribe and the United States is groundless. In the 2012 Settlement Agreement, the Tribe and the United States expressly agreed to *preserve*—not to waive and release—the Tribe's claims relating to the United States' mismanagement of the Tribe's water resources. Section 6 of the 2012 Agreement states that "nothing in this Settlement Agreement shall diminish or otherwise affect" in any way:

> a. Plaintiff's ability … to assert a claim for harms or damages allegedly caused by Defendant after the date of execution of this Settlement Agreement;
>
> b. Plaintiff's water rights, whether adjudicated or unadjudicated; Plaintiff's authority to use and protect such water rights; and Plaintiff's claims for damages for loss of water resources allegedly caused by Defendants' failure to establish, acquire, enforce, or protect such water rights….

By these terms, the Tribe preserved its claims for the United States' failure to "establish, acquire, enforce, or protect" the Tribe's water rights. Importantly, this preservation of claims is not limited to any particular type or theory of claim. It is instead broadly based on the whether the

claim in question was put forward to enforce or protect the Tribe's water rights. Each of the Tribe's Second, Fourth, and Eighth Claims for Relief are, at heart, Claims to protect the Tribe's reserved water rights. The Tribe's well-pled allegations of the harms that give the Tribe standing to seek recourse through these Claims for Relief (an issue not disputed by the Federal Defendants) all revolve around losses to Tribal water rights. TAC ¶¶ 222, 249, 274, ECF No. 186 at PageID. 815, 822, 826.

Furthermore, these Claims for Relief arise from controversies that are ongoing, including ongoing violations of the United States' trust responsibilities to supply storage and maintain the UIIP. While the 2012 Settlement Agreement included a waiver of certain accrued *claims*, there is simply nothing in the plain language of he 2012 Settlement Agreement that could be construed to relieve the United States of its ongoing trust *duties*, and, applying the Indian canons, certainly the Tribe would not have understood this to be the case.

IX. NO CLAIMS HAVE BEEN "WAIVED" UNDER TITLE V OF THE CUPCA

The Federal Defendants argue that the Tribe's Claims 1-4 were "waived" under Section 507 of the CUPCA, which states:

> The Tribe shall waive, upon receipt of the section 504, 505, and 506 moneys, any and all claims relating to its water rights covered under the agreement of September 20, 1965, including claims by the Tribe that it retains the right to develop lands as set forth in the Ute Indian Compact and deferred in such agreement. Nothing in this waiver of claims shall prevent the Tribe from enforcing rights granted to it under this Act or under the Compact.

In lieu of substantive analysis, the Federal Defendants merely ask the Court to summarily adopt the D.C. District Court's finding Section 507 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..." The foregoing finding is not only legally and factually incorrect, but also has no applicability whatsoever to three of the four of the Tribe's Claims for Relief cited by the Federal Defendants.

a. The Tribe's Second, Third, and Fourth Claims Fall Beyond of the CUPCA

The plain language of Section 507 provides that any so-called "waiver" applies only to the Tribe's rights under the 1965 Deferral Agreement. Only the Tribe's First Claim for Relief (asking for an interpretation of the Tribe's rights under the 1965 Deferral Agreement) falls within the scope of this hypothetical "waiver." The Tribe's Second Claim for Relief is based on the Federal Defendants' fiduciary responsibility to supply storage infrastructure to assist the Tribe in developing its reserved water rights that were adjudicated in 1923. TAC ¶¶ 215-225, ECF No. 186 at PageID. 814-816. This Claim is not based on any rights deriving from the 1965 Deferral Agreement. The Tribe's Complaint is based on the Federal Defendants' rights to storage infrastructure *under the CUPCA itself* through the Uintah Basin Replacement Projects. This Claim does not relate to the Tribe's rights under the 1965 Deferral Agreement, but even if it did, this Claim would fall under the statutory language in the very same section providing "[n]othing in this waiver of claims shall prevent the Tribe from enforcing rights granted to it under *this Act*…" Finally, the Tribe's Fourth Claim for Relief is based on the Federal Defendants' trust responsibility to maintain and rehabilitate the UIIP. TAC ¶¶ 246-252, ECF No. 186 at PageID. 821-822. Again, there is no mention of the 1965 Deferral Agreement in this Claim for Relief, as the Deferral Agreement has nothing to do with this Claim. The Tribe's reserved water rights that are designated for delivery through the UIIP were quantified by federal decree in 1923 – *not* the Deferral Agreement – and the Federal Defendants' fiduciary duties over UIIP infrastructure arise from the 1906 Act. Therefore, the Federal Defendants' argument is *prima facie* baseless as to Claims 2, 3, and 4.

b. The Statutory Prerequisites to Apply the "Waiver" have not been Met.

The alleged "waiver" of the Tribe's rights under the 1965 Deferral Agreement never went into effect because the statutory prerequisites have not been satisfied. First, the plain language of

Section 507 provides that the "waiver" shall only take effect upon the Tribe's "receipt of the section 504, 505, and 506 moneys." As the Tribe states in its Complaint, The Tribe has never received the 504, 505, and 506 moneys for the purpose of effectuating the Section 507 "waiver," and the funds under Sections 504 and 505 have not been properly placed into trust for the benefit of the Tribe, nor have they been treated as trust funds by the Federal Defendants. TAC ¶ 240, ECF No. 186 at PageID. 820. Because the Federal Defendants have brought their waiver argument under Rule 12(b)(6), the Court must "accept as true" these factual allegations. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). The Tribe's so-called "admission" in its 2006 Complaint that it has received its full entitlement to funds under Sections 504, 505, and 506 is no such thing; it is, at best, a statement suggesting that the Tribe received some level of payment from the Federal Government pursuant these provisions of the CUPCA, but is silent on the amount paid and makes no concession that the Federal Government's obligations under Sections 504, 505, and 506 of the CUPCA were fully satisfied.

Second, the "waiver" under Section 507 was conditioned upon all parties' ratification of the proposed 1990 Compact. The settlement is described by Congress, in Title V, Section 501(b), as consisting of *all* the provisions of "[t]his Act *and* the proposed Revised Ute Indian Compact of 1990." App. II, 253. In their Motion to Dismiss, the Federal Defendants concede that the relevant provisions of the CUPCA are inextricable from the proposed 1990 Compact, stating that the "purpose of the [CUPCA] *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." Defs. Mtn., ECF No. 200 at PageID. 941-942. Congress expressly conditioned its approval of the proposed 1990 Compact upon re-ratification

by both the Tribe and the State of Utah. CUPCA § 503(a), App. II, 254. The Tribe has never ratified the proposed 1990 Compact, rendering any "waiver" under Section 507 inoperative.

"The cardinal principle of statutory construction is to save and not to destroy." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 310 U.S. 1, 30 (1937). Thus, courts have a "plain duty" to avoid interpretations that would render a statute unconstitutional. *Id*. To apply the Section 507 "waiver" absent the Tribe's ratification of the proposed Compact is to construe Section 507 of the CUPCA as commandeering act by Congress, designed to coerce the Tribe to take a prescribed action in its capacity as a sovereign government by ratifying an unconscionable water settlement with no assent and meeting of the minds, lest the Tribe be unilaterally divested of its legal rights with no substitute or recourse. Under this interpretation, the CUPCA falls outside of Congress's constitutional authority to legislate over the affairs of the Tribe, because it would not be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. at 555. Furthermore, construing the CUPCA as a coercion of this nature is to construe the CUPCA as an unconstitutional taking in violation of the Fifth Amendment, as it would leave the Tribe with no choice but to accept a "waiver" of its authority to enforce its property rights to water, or ratify a proposed compact that would significantly and arbitrarily reduce the Tribe's Indian reserved water rights, including water rights that were adjudicated by decree in 1923. Declaration of Dr. Woldezion Mesghinna, App. III, 419-422. Such an interpretation is incompatible not just with the Indian canons and the "plain duty" to adopt constitutionally sound interpretation of federal statutes.

X. THE CLASS PLAINTIFFS HAVE STATED A CLAIM FOR VIOLATION OF THEIR CONSTITUTIONAL RIGHTS

a. The Class Action Plaintiffs[6] have Pled Animus

[6] As a preliminary matter, the Court should disregard the Federal Defendants' inapposite argument that the Tribe cannot serve as class representative; the Complaint makes clear that the class is represented by the Class Action Plaintiffs comprised of the six named individuals in the Case

To survive Federal Defendants' 12(b)(6) dismissal motion, the Tribe's complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" that the Defendants acted with any form of discriminatory intent. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) "[D]iscriminatory intent may be found even where the record contains no direct evidence of bad faith, ill will, or any evil motive on the part of public officials." 16B Am. Jur. 2d Constitutional Law § 837 (*citing Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 84 Ed. Law Rep. 122 (11th Cir. 1993)).

The Supreme Court has found not just plausibility but actual *proof* of discriminatory intent to be a "relatively easy" inquiry where there is a "clear pattern" of disproportionate impacts emerging from Government actions that are "unexplainable on grounds other than race." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 256 (1977). The "clear pattern" need not be based on statistical extremes. *Id*. n. 13. However, even where the pattern of disproportionate impacts does not rise to the level of establishing *prima facie* proof of discriminatory intent, any showing of such a pattern will, at the very least, warrant review of outside evidence to help discern any possible discriminatory intent. *Id*. at 266-267.

The Class Action Plaintiffs have pled a historical pattern of conduct by the Federal Defendants that has had an adverse and disproportionate impact on the class members as Indians and members of the Tribe, marked by, *inter alia*: (i) USBR's open and successful effort to secure a condemnation of 56,000 acres of Tribal land in 1910 – tribal land that had specifically been reserved to establish a reservoir to help address the Ute Indians' severe water deficiencies – to allow USBR to construct and operate a reservoir for the benefit of Non-Indian water users. TAC

Caption and Paragraph 186. Federal Defendants have not refuted the qualifications and eligibility of the Class Action Plaintiffs to represent the class in the case.

¶ 315, ECF No. 186 at PageID. 838; (ii) The vastly disproportionate impacts of the Federal Defendants' designation of lands within the service area of the UIIP as temporarily or permanently non-assessable. TAC ¶ 101 ("[O]ver 98% of the UIIP lands designated TNA are tribal or allotted lands. Similarly, over 93% of the UIIP lands designated PNA are tribal or allotted lands."); (iii) the Defendants' uninterrupted implementation of the Midview Exchange, despite the disproportionate impacts of the Federal Defendants' TNA/PNA designations resulting in non-Indian water users getting far more of the Tribe's reserved water rights than the Tribe is receiving in exchange year in and year out, TAC ¶¶ 110, 115, ECF No. 186 at PageID. 789-790; (iv) the Defendants' outright failure to Uintah Basin Replacement Facilities to store and supply water to Indian water users, despite having the means and funds to do so; and (v) the Defendants' open collusion with the State of Utah to continue to prioritize the water storage needs of non-Indian water users by executing the Green River Block Exchange Contract. TAC ¶¶ 168-177, ECF No. 186 at PageID. 802-804. This well-pled historical record is more than sufficient to support a plausible showing of discriminatory intent.

b. *Morton v. Mancari* Does not Permit Discrimination against Indians

The U.S. Supreme Court's ruling in *Morton v. Mancari*, 417 U.S. 535 (1974), does not give Federal Defendants free reign to discriminate against Indians. In *Morton*, the Court ruled Indian employment preference for BIA positions under the Indian Reorganization Act (IRA) did not constitute unlawful "racial preference," in part because membership of a "federally recognized Indian tribe" was a political, rather than racial, classification. *Id*. at 553-554. As support for this ruling, the Court found that classification based on tribal *membership* "operates to exclude many individuals who are racially to be classified as Indians," clarifying that the broader class of "Indians" remains racial in nature. *Id*. at 553 n. 24. Accordingly, the *Morton* Court did not allow or endorse Government discrimination against Indians. Rather, the applicable law is:

> [w]hether discriminatory treatment of Indians is correctly classified as based on race, ancestry, national origin, or is directed against them as a "discrete and insular minority," it is illegal . . . ."

Cohen's Handbook, § 14.02[2][b] at 937. *See, e.g., Ely v. Klahr*, 403 U.S. 108, 118-19 (Douglas, J., concurring) (unconstitutional legislative reapportionment), *on remand*, *Klahr v. Williams*, 339 F. Supp. 922, 926-28 (D. Ariz. 1992); *Navajo Nation v. San Juan County*, 929 F.3d 1270, 1280 (10th Cir. 2019) (illegal racial gerrymandering); *Pyke v. Cuomo*, 258 F.3d 107 (2d Cir. 2001) (disparate treatment of Native Americans); *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975) (deprivation of voting rights); *Fallon Paiute-Shoshone Tribe v. City of Fallon*, 174 F. Supp. 2d 1253 (D. Nev. 2001) (deprivation of utility services).

c. Defendants Have Provided no Basis to Exclude the Class Action Plaintiffs

Federal Defendants baselessly ask the Court to preclude the Class Action Plaintiffs on the basis that they do not meet the eligibility requirements for permissive joinder.

The "impulse" of the Federal Rules "is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966). Joinder under Rule 20(a)(1) requires only that "(A) [the plaintiffs] 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." Both of these criteria are easily met here. All plaintiffs assert claims for relief based on the same "series of transactions or occurrences," defined by the Federal Defendants' continuous partial treatment of Non-Indian waters users and flouting of its obligations to develop or otherwise maintain the infrastructure necessary to develop tribal water rights. Likewise, there are ample questions of fact common to all plaintiffs. Whether arising under a due process claim (for the Class Action Plaintiffs) or a breach of trust claim (for the Tribe), the factual allegations

surrounding the Federal Defendants' past and ongoing mismanagement and marginalization of Indian water rights is essential to the claims of all plaintiffs.

CONCLUSION

The Tribe and the Class Action Plaintiffs have pled cognizable claims against the Federal Defendants, seeking declaratory and other forms of equitable relief that are rooted cases or controversies under the jurisdiction of this Court. The Court should deny the Motion to Dismiss.

Respectfully submitted on this 27th day of February 2023.

PATTERSON EARNHART REAL BIRD & WILSON LLP
s/ Michael W. Holditch
Michael W. Holditch, *Pro Hac Vice*
Frances C. Bassett, *Pro Hac Vice*
Joanne Harmon Curry, *Pro Hac Vice*
Jeremy J. Patterson, *Pro Hac Vice*
Barry C. Bartel, *Pro Hac Vice Pending*
1900 Plaza Drive
Louisville, Colorado 80027
Phone: (303) 926.5292
Facsimile: (303) 926.5293
Email: mholditch@nativelawgroup.com
Email: fbassett@nativelawgroup.com
Email: jcurry@nativelawgroup.com
Email: jpatterson@nativelawgroup.com
Email: bbartel@nativelawgroup.com

J. PRESTON STIEFF LAW OFFICES, LLP
s/ J. Preston Stieff
J. Preston Stieff (4764)
311 South State Street, Suite 450
Salt Lake City, Utah 84111
Telephone: (801) 366-6002
Email: jps@StieffLaw.com

Attorneys for Plaintiffs