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' REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL DISMISSAL** Civil No. 2:21-cv-00573-JNP

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The Court should dismiss Claims 1-8 and 11 of the Tribe's Third Amended and Supplemented Complaint (ECF No. 186, "Compl."). As was true when the U.S. District Court for the District of Columbia ("DC Court") dismissed the Tribe's nearly identical claims in September 2021, these claims still fail due to fundamental pleading and jurisdictional deficiencies, including failure to plead cognizable causes of action, failure to identify an enforceable fiduciary obligation, waiver and release, timeliness, and lack of standing.[1] The Tribe's opposition has not cured—and cannot cure—these defects.[2]

I. Threshold Matters

Before delving into those defects, a few threshold matters require attention: (1) the Ninth Circuit's decision in *Navajo Nation v. U.S. Department of the Interior*, 26 F.4th 794 (9th Cir. 2022); (2) the role of the Indian canons of construction; and (3) supposed judicial admissions in filings from two century-old water-rights adjudications.

1. ***Navajo Nation***. The Tribe heavily relies on the Ninth Circuit's recent *Navajo Nation* decision as support for its breach of trust claims. *See, e.g.*, Resp. 16-18 (citing *Navajo Nation v.*

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

[2] The Tribe has attached a voluminous appendix of documents to its response brief (ECF No. 212-1, Pls.' Corrected Resp. to Fed. Defs.' Mot. to Dismiss, "Resp."), most of which it does not even cite, including multiple declarations replete with improper opinion testimony and hearsay. *See* ECF Nos. 211 – 211-2. The United States has moved to dismiss the Tribe's claims under Rules 12(b)(1) and 12(b)(6). The Court's review under the latter is limited to the pleadings, documents incorporated by reference therein, and items of which a court can take judicial notice. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007). The Tribe has only asked that the Court take judicial notice of certain pleadings and "Government publications." *See* Resp. 9. While the Court can consider facts outside of the pleadings in considering its own jurisdiction under Rule 12(b)(1), the vast majority of the documents are not relevant to jurisdiction. For that reason, the Court should disregard them. To the extent the Tribe is submitting the appendix for use as evidence in any later stages of this proceeding, the United States objects to the documents as improper, irrelevant, and hearsay and reserves the right to move to strike or otherwise challenge them.

U.S. Dep't of the Interior, 26 F.4th 794 (9th Cir.), *cert. granted sub nom. Dep't of the Interior v. Navajo Nation*, 143 S. Ct. 398 (2022)). There are at least two problems with the effort.

First, the Supreme Court granted the United States' petition for a writ of *certiorari*. *Dep't of the Interior v. Navajo Nation*, 143 S. Ct. 398 (2022). The case is fully briefed and was argued on March 20, 2023. If there is precedential or persuasive value that attaches to *Navajo Nation*, it will come from the Supreme Court's opinion, not the Ninth Circuit's.

Second, even if the case were not presently before the Supreme Court, the Ninth Circuit's opinion in *Navajo Nation* is an out-of-circuit, nonbinding decision that conflicts with binding precedent in the Tenth Circuit, most notably *Flute v. United States*, 808 F.3d 1234, 1244 (10th Cir. 2015). There, the Tenth Circuit stated in no uncertain terms that in evaluating whether a tribe had pled a cognizable breach of trust claim, 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.

Third, the Ute Tribe is differently positioned than the Navajo Nation. This is primarily because of the Central Utah Project Completion Act ("CUPCA"), discussed further below. CUPCA resolved outstanding obligations relating to the Ute Tribe's water infrastructure and was intended to quantify the Tribe's reserved water rights. No similar statutory scheme exists for the Navajo Nation resolving its water rights (if any) in the mainstream Colorado River.

2. Indian canon. In resolving the United States' motion, the Tribe repeatedly urges the Court to apply the Indian canons of construction. *See, e.g.*, Resp. 7, 16, 20-21, 33, 36. But those interpretive principles have little relevance here because the treaties, statutes, and regulations at issue are not ambiguous. *See Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001) ("The Court has also said that 'statutes are to be construed liberally in favor of the Indians with

ambiguous provisions interpreted to their benefit.'") (citation omitted). "[E]ven Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). The Tribe does not argue that any of the treaties, statutes, or regulations at issue are ambiguous. And the Indian canons of construction do not permit the Court to infer obligations that do not exist in the plain text.

3. Prior Filings. The Tribe's cited statements (Resp. 7-9) in 100-year-old briefs in the *Dry Gulch* and *Cedarview* cases—even if they could be considered judicial admissions—are irrelevant to the Tribe's breach of trust claims. Those statements do not (and cannot) create enforceable fiduciary obligations, and neither do the other government "records and publications" that the Tribe references. Resp. 8-9. Only treaties, statutes, and regulations, can create such enforceable obligations. *See United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). In any event, the cases are inapposite. Both involved allotments for *individual* Indians; neither decree sought to quantify the *Tribe's* reserved water rights, contrary to the Tribe's assertion, Resp. 34. *See Cedarview Irrigation Company*, No. 4427, slip op. (D. Utah 1923), and *Dry Gulch Irrigation Company*, No. 4418, slip op. (D. Utah 1923) ("1923 Decrees").

Similarly, the Court should reject the Tribe's argument that judicial estoppel based on these pleadings bars the United States' arguments here. Resp. 14-15. Judicial estoppel "is an equitable doctrine invoked by the court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). The Tenth Circuit applies the doctrine "both narrowly and cautiously." *BancInsure, Inc. v. FDIC*, 796 F.3d 1226, 1240 (10th Cir. 2015). And it only applies where two statements are "clearly inconsistent." *New Hampshire*, 532 U.S. at 750. Here, the statements are

not contradictory. In those prior cases, the United States defended the reserved water rights of individual Indian allottees under the *Winters* doctrine. The United States continues to recognize and defend the *Winters* reserved water rights of both the Tribe and individual Indian users. At issue in this case, however, are alleged affirmative duties relating to the Tribe's water storage and infrastructure, *see, e.g.*, Compl. ¶¶ 215-25; 246-52; 263-70—duties that are found nowhere in statute, treaty, or regulation.

II. The Tribe Has Not Identified Cognizable Causes of Action

As the United States explained in its opening brief, the Court should dismiss Claims 1-8 for one simple reason: the Tribe has not identified a cognizable cause of action. ECF No. 200, Fed. Defs.' Mot. to Dismiss and Mem. of Law in Support, ("Mot.") 14-18. In response, the Tribe does not attempt to identify any causes of action but instead explains why the Court has subject matter jurisdiction. Resp. 9-12. But the United States has not contested the Court's subject matter jurisdiction, aside from the Tribe's contract-based claims, which are discussed further below. Nor has the United States argued that the Tribe seeks an improper advisory opinion, as the Tribe suggests. *Id*. Rather, the United States focused on the Tribe's failure to identify cognizable causes of action, Mot. 14-18, which, in addition to subject matter jurisdiction and a waiver of sovereign immunity, it must identify in order to proceed on a claim against the United States in federal court. *See Flute*, 808 F.3d at 1239.

And the Tribe's opposition fails to explain how its Complaint fulfills this obligation. The parties agree that the Declaratory Judgment Act "does not establish an independent cause of action in the federal courts," and functions only as a remedy. Resp. 9. The cases the Tribe cites interpreting the Declaratory Judgment Act are unilluminating. All three concerned contract disputes between private parties and whether district courts could maintain subject matter

jurisdiction over those disputes under the Declaratory Judgment Act.[3] But the framework for asserting contract-based claims against the federal government is governed by statute, and parties must generally pursue those claims and remedies in the Court of Federal Claims. Mot. 29. This court is not empowered to order specific performance against the United States and does not have jurisdiction to decide the Tribe's contract-based claims. *Id*.

At issue here is not whether subject matter jurisdiction exists for the non-breach-of-contract claims, but whether the Tribe has pled cognizable causes of action. The Tribe's opposition clarifies that the only causes of action potentially underpinning Claims 1-8 are breach of trust or contract.[4] Resp. 11-12. Neither of which is viable for the reasons discussed below.

III. The Tribe Has Not Identified Enforceable Trust Duties

The Court should dismiss the Tribe's breach of trust claims—Claims 1-4, 7, and 8—because they do not rest on any specific fiduciary obligation that the United States has expressly accepted or breached. *See* Mot. 18-24. In its Response, the Tribe concedes that it "must identify a 'substantive source of law that establishes [a] specific fiduciary duty,'" Resp. 12 (citing *Flute*), and retreats into an argument that, "where the government assumes comprehensive, pervasive, or elaborate control over tribal trust property . . . the court will infer enforceable fiduciary obligations." Resp. 13. The Court should reject this argument for two reasons.

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[3] *See* Resp. 9-10; *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 120-121 (2007) (assessing whether "patent licensee [must] terminate or be in breach of its license agreement before it can seek a declaratory judgment"); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 236 (1937) (whether district court had jurisdiction)); *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1271 (10th Cir. 1989) (same).

[4] Though cited in the Complaint, the Tribe does not argue in its Response that any of these claims arise under the Administrative Procedure Act ("APA") or rebut the United States' showing that the Tribe has failed to plead cognizable APA claims. Mot. 15-17. The Tribe has thus abandoned reliance on the APA as a basis for any its claims.

First, the Supreme Court has explicitly held that, when it comes to tribal claims for breach of trust, "[t]he Federal Government's liability cannot be premised on control alone." *United States v. Navajo Nation ("Navajo II")*, 556 U.S. 287, 301 (2009). In *Navajo II*, the Court addressed, in part, an argument identical to the one the Tribe makes here—that the government's "comprehensive control" over management of a resource (there, coal) could give rise to enforceable fiduciary duties. *Id.* at 301–02. The Supreme Court rejected that possibility, again making clear that fiduciary obligations only arise from "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id*. (citation omitted).

None of the cases the Tribe cites supports its contention that a court may "infer enforceable fiduciary obligations" based on control alone. Resp. 13. These cases look to the specific statutory and regulatory language in determining whether enforceable fiduciary obligations existed. *United States v. Mitchell ("Mitchell II")*, 463 U.S. 206, 224 (1983) (explaining that the "language of these statutory and regulatory provisions *directly* supports the existence of a fiduciary relationship") (emphasis added); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 466-67 (2003) (finding that the 1960 Act expressly defined a fiduciary relationship between the tribe and the United States, regarding specific trust property). And when, as here, "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." *Navajo II*, 556 U.S. at 302.

Second, the Tribe's suggestion that the Court must review the sources of law "*in pari materia*" and "should not be limited only to the language of statutes, regulations, and treaties," Resp. 14, finds no support in the cited case law. Neither *Mitchell II* nor *Navajo Nation* make any reference to this rule of statutory construction. The reference to the rule in *Bryan v. Itasca Cty*.,

426 U.S. 373, 390 (1976), simply recognized that a disputed law should be read in conjunction with contemporaneous acts passed by Congress. Reading laws in *pari materia* simply means that a court "may look at related statutes … in order to ascertain Congress' intent" and "assume[ ] that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject." *United States v. Fillman*, 162 F.3d 1055, 1057 (10th Cir. 1998) (citation and quotation omitted). This rule of construction has no relevance here.

Turning to the specific sources in the Complaint, the Tribe asserts that it included this "extensive list" only to show that its claims "arise under federal law," Resp. 15-6, and accuses the United States of bad faith in addressing each source individually. If that is so, then it must be true that the only sources the Tribe alleges to create enforceable fiduciary obligation are the laws on which the Tribe relies in its response, which it deems "particularly relevant." *Id*. at 16. But none of those sources creates enforceable trust duties—a conclusion that both the DC Court (in this case) and the Court of Federal Claims (in the Tribe's companion case) already reached in analyzing the same supposed sources.[5] *Ute DC Op.*, 560 F. Supp. 3d 247; *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, Civil No. 1:18-cv-359 (Fed. Cl.), ECF No. 38.

1849, 1863, and 1868 Treaties. Contrary to the Tribe's argument, the Ute Treaties of 1849, 1863, and 1868 do not create enforceable fiduciary obligations with respect to the Tribe's water rights. Tellingly, the Tribe fails to identify any provision in these three treaties that creates such a duty. Resp. 16-20. Instead, it argues that the treaties construed together with the *Winters* doctrine create enforceable duties "to protect Tribal water rights," Resp. 16, and hangs its hat on the Ninth Circuit's ruling in *Navajo Nation*. Resp. 17-18. As discussed above, however, *Navajo*

[5] Apart from the Treaty of 1849, which the Tribe cites for the first time here.

Nation conflicts with Tenth Circuit precedent. *See infra* at 2. In any event, dispositive here is that none of these treaties mentions water rights, irrigation, or infrastructure.

As explained in our opening brief, the Treaty of 1849 was intended to end hostilities between the United States and various bands of the "Utah tribe of Indians," and acknowledged that territorial boundaries for the Utahs would later be defined so they may "settle in such other manner as will enable them most successfully to cultivate the soil, and pursue such other industrial pursuits as will best promote their happiness and prosperity." Mot. 20-21 (citing Treaty with the Utah tribe, Dec. 30, 1849, 9 Stat. 984). It makes no mention of water.

The Ute Treaties of 1863 and 1868 are similarly unhelpful to the Tribe. While both contain references to farming and agriculture, neither mentions water. Mot. 21. That silence is dispositive with respect to the duties the Tribe seeks to impose, because "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts [them]." *Jicarilla*, 564 U.S. at 177. At most the treaties support an inference that the United States encouraged individual Indians to shift to an agrarian lifestyle in the mid Nineteenth Century and created incentives for that shift. *See* Ute Treaty of 1863, 13 Stat. 673; Ute Treaty of 1868, 15 Stat. 619.

1899 Act. Similarly, the 1899 Act did not impose "a specific fiduciary duty on the Secretary to secure water …." for the Tribe. Resp. 21. Rather, it appropriated money to "construct ditches and reservoirs, purchase and use irrigation tools and appliances, and purchase water rights on Indian reservations," and provided the Secretary the authority to grant certain construction-related rights of way on the Uintah Reservation. 30 Stat. 924, 940, 941 (Mar. 1, 1899). The statute's reference to "the paramount rights of the Indians . . ." 30 Stat. 941, serves as a limiting condition on the Secretarial authority to issue those grants. The Tribe is incorrect to

expand the reference to "paramount rights" into a broad (and enforceable) duty to protect and develop water rights that appears nowhere in the statutory text. *See* Resp. 20-23.

Nor does an enforceable trust duty arise from the clause starting "it shall be the duty of the Secretary . . . ." Resp. 23 (citing 30 Stat. at 941). The duty imposed by the Act is for the Secretary *to issue regulations* that "he *may deem necessary* to secure to the Indians the quantity of water needed . . . ." *Id*. (emphasis added). It is discretionary and is not a duty to secure or protect water rights. The Tribe counters that such "discretionary language" can be squared with enforceable fiduciary duties. Resp. 22. But, even if true, this would have the Court put the cart before the horse. The threshold question is whether the statutory language creates a specific, enforceable fiduciary obligation. Only after this initial finding would the Court have need to consider how discretion may impact whether that obligation has been breached. *See Navajo II*, 556 U.S. at 302. The cases the Tribe cites are thus inapposite. Resp. 21-22. And its attempt to distinguish *Wolfchild* falls flat (Resp. 22-23) because, as in *Wolfchild*, the duty the Tribe seeks to enforce— a duty to issue regulations that may be necessary to secure water—is left to the "substantial discretion" of the Secretary. *Wolfchild v. United States*, 731 F.3d 1280, 1292 (Fed. Cir. 2013).

That the 1899 Act is an appropriations act further underscores the limited nature of the federal government's undertaking. As in *Hopi*—where the Federal Circuit noted that "several statutes appropriate funding for the extension, operation, and maintenance of water supplies on Indian lands,"—such appropriations do not create enforceable trust duties. *Hopi Tribe v. United States*, 782 F.3d 662, 670 (Fed. Cir. 2015).

1906 Act and Subsequent Federal Laws. The Tribe similarly fails to demonstrate that the 1906 Act creates any enforceable trust duties. While that Act places title to the Uintah Indian

Irrigation Project "in the Secretary of the Interior in trust for the Indians . . . ." 34 Stat. 325, it does not go beyond this bare "trust" language. Supreme Court precedent on this point is clear: bare "trust" language does not create enforceable fiduciary duties. *United States v. Mitchell*, 445 U.S. 535, 541-42 (1980); *see also Flute*, 808 F.3d at 1243. Indeed, the 1906 Act itself is contrary to the idea that enforceable fiduciary benefits inure to the Tribe—"the ditches and canals of such irrigation systems may be used, extended, or enlarged for the purpose of conveying water by *any* person, association, or corporation under and upon compliance with the provision of the laws of the State of Utah." 34 Stat. at 375 (emphasis added). The conclusion that the United States holds enforceable fiduciary obligations to the Tribe, one specific water user, is inconsistent with the very nature of water projects managed for the benefit of a wide array of local interests. Particularly here, where the statute places title in trust for the "Indians," not the Tribe. *Hackford v. Babbitt*, 14 F.3d 1457, 1468 (10th Cir. 1994) ("The 1906 Act's purpose was to provide irrigation for the allotted, not tribal, lands."). Indeed, as of 1994, "more than one-third of the land served by the [Irrigation] Project [was] held in fee by non-Indian successors to Indian allottees." *Id*. at 1461 n.2.

The Tribe's reliance on the Tenth Circuit's decision in *Hackford v. Babbitt* to support a claim under the 1906 Act is misguided. Resp. 24. There, the plaintiff, a mixed-blood Ute Indian who owned land within the Tribe's reservation, sought declaratory and injunctive relief based on his claimed rights to Irrigation Project water that he diverted with his own private ditches. *Hackford*, 14 F.3d 1457. Contrary to the Tribe's description, Resp. 24, the court found that plaintiff *had* standing to assert the tribal right to irrigation water from the Irrigation Project. *Id*. at 1467. And, contrary to the Tribe's assertion, the court did not analyze the "sue and be sued"

language in the 1906 Act or find that it supported a private right of action for Indians or non-Indians. *Id*.

The Tribe's sweeping claim that "federal courts have consistently interpreted 'sue and be sued' language as creating a cause of action for an unmet duty or obligation," Resp. 23, finds no support in the cited cases. Resp. 23-24 (citing *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 88 (2017) (considering whether "sue and be sued" language conferred subject matter jurisdiction); *Crowel v. Adm'r of Veterans' Affs. of Washington, D.C.*, 699 F.2d 347, 350-51 (7th Cir. 1983) (considering subject matter jurisdiction of state and federal courts); *Marcus Garvey Square, Inc. v. Winston Burnett Const. Co. of California*, 595 F.2d 1126, 1132 (9th Cir. 1979) (considering potential waivers of sovereign immunity)). At most, the "sue and be sued" language in the 1906 Act confers a waiver of sovereign immunity, but nothing more.

Finding no direct support in the 1906 Act, the Tribe suggests that subsequent federal statutes and regulations create the fiduciary obligations it seeks to enforce. *See* Resp. 25-26. Here again, the Tribe seems to suggest that the federal government's management of the Irrigation Project supports its breach of trust claim. *Id*. Not so. There is no dispute that the Secretary holds title to the Irrigation Project and oversees and manages its operations for all water users, including the Tribe. Its role in managing operations of the project does not, however, create enforceable affirmative duties that are found nowhere in the statutory text. In advancing this flawed control argument, the Tribe also conveniently ignores *Grey*, where the Court of Federal Claims concluded that Interior regulations governing BIA's operation and

maintenance of irrigation projects, which the Tribe relies upon here, Resp. 25, do not create such duties.[6] *See* Mot. 24 (citing *Grey v. United States*, 21 Cl. Ct. 285, 293–94 (1990)).

Finally, the Tribe argues that enforceable trust duties exist in the Act for the same reason as in *United States v. White Mountain Apache Tribe*. *See* Resp. 24 (citing 537 U.S. 465, 469 (2003)). But the Tenth Circuit has elsewhere rejected an attempt at a similar analogy. *See Flute*, 808 F.3d at 1246 ("Nor do these congressional directives contemplate the government's direct use of real property held in trust for an Indian tribe, as was the case in *White Mountain* … ").

CUPCA. The Tribe's efforts to read enforceable trust obligations into CUPCA—an effort that the Tribe undercuts in also seeking to have the Act declared unenforceable (*see* Compl. ¶¶ 242-43)—is similarly misguided. *See* Resp. 26-28. The Tribe focuses on subsection 203(f), alleging that it creates an enforceable duty to provide Tribal water storage and to construct the Uintah Basin Replacement Project (a storage project). *See id*. at 26-27. Subsection 203(f), however, says nothing about duties or responsibilities for Tribal water storage. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 203(f), 106 Stat. 4600, 4613. Rather, it grants the Secretary authority necessary to administer and operate the Irrigation Project, including authority for contracting, maintenance and construction, and to sell or lease irrigation equipment and facilities. *Id*. § 203(f)(1), (3)–(6). The subsection states that "[t]he Secretary shall *retain any* trust responsibilities to the Uintah Indian Irrigation Project," but does not state that any exist or purport to create any new ones. *Id*. § 203(f)(2) (emphasis added); *see id.* § 203(f)(4).

[6] The Tribe refers to these regulations as the 1957 regulations and cites 22 Fed. Reg. 10479, 10637–38 (Dec. 24, 1957). Resp. 25. Those regulations, however, have been replaced and are now found at 25 C.F.R. Part 171. *See* Mot. 22.

The Tribe attempts to overcome the statute's plain language by referencing a 1995 memorandum from an Interior Department attorney. *See* Resp. 27-28 (citing ECF No. 211-1 at APP 282). But that memorandum does not support the Tribe's argument. Though reaching conclusions on certain interpretations of CUPCA, it nowhere states that the United States has a trust duty to ensure that the Uintah Basin Replacement Project is constructed. *See id*. In any event, statements like these—even where they purport to express an agency's official legal position—cannot create enforceable fiduciary obligations. Only statutes, regulations, and treaties can create such obligations. *Navajo II*; *Jicarilla*.

IV. The Court Lacks Jurisdiction Over the Tribe's Contract-Based Claims

Claims 1, 3, 5 and 6, are all contract-based claims over which this Court lacks jurisdiction. Regardless of how the Tribe would like to now characterize these claims, Resp. 29, it is clear on the face of the Complaint that each seeks declaratory relief, or specific performance, based on a contract: the 1965 Deferral Agreement and the 1967 Midview Exchange Agreement. *See, e.g.*, Compl. ¶¶ 202-14, 226-45, 253-62. That the Tribe does not seek "contractual damages," Resp. 29, is of no moment. As explained in our opening brief, the sole remedy for a breach of contract action against the federal government is money damages. Mot. 29 (citing *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1080-2 (10th Cir. 2006)). Specific performance is not available. *Id*.

In response, the Tribe argues that "invocation of a contract or contractual rights is not dispositive," Resp. 28, of this Court's jurisdiction and cites *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urb. Dev.*, 554 F.3d 1290 (10th Cir. 2009). But that decision only highlights the Tribe's flawed reasoning. Unlike in *Normandy Apartments*, the Tribe's claims are not based

on federal statutes, regulations, or the Constitution, they are based on contracts. And the Tribe's attempt to paint them as something else is unavailing.[7]

The Tribe itself states that its "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 [sic] the legal reach and application of said Agreement may have been impacted by a federal statute." Resp. 11. Claim 1 rests on the Tribe's allegation that "an actual controversy exists between the parties in relation to the Deferral Agreement and … whether [Federal Defendants] are estopped from repudiating their agreement . . ." Compl. ¶ 210. If Claim 3 simply asked "the Court to interpret the provisions of the CUPCA," Resp. 29, as the Tribe now argues, the jurisdictional analysis may be different. But the Complaint tells a different story, arguing that CUPCA is "unenforceable," Compl. ¶¶ 242-43, and seeking relief premised on the Tribe's contention that the 1965 Deferral Agreement remains a valid and binding agreement. *Id*.

In Claim 5, the Tribe does not merely ask the Court "to declare that the transfer of Tribal water rights under the Midview Exchange violated federal statute," Resp. 29, it asks the Court to impose a constructive trust on the Tribe's alleged water rights. Compl. ¶ 260. Yet again, illustrating that the Tribe's contract-based claims seek contract-based remedies.

The Tribe concedes, as it must, that Claim 6 seeks the transfer of the Midview Exchange Property into trust for the Tribe (i.e., specific performance) and that this alleged failure "violates

[7] The Tribe also cites *Land v. Dollar*, 330 U.S. 731, 738-739 (1947), *Robbins v. U.S. Bureau of Land Management*, 438 F.3d 1074, 1082-83 (10th Cir. 2006), and *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982). Resp. 28-29. Each of these cases, like *Normandy Apartments*, recognizes that the existence of a contract does not necessarily prevent litigants from suing in federal district court where their claims are founded on the federal constitution, statutes, or regulations.

the terms of the Agreement." Resp. 29. Thus, like Claims 1, 3, and 5, it is a breach of contract claim for which there is no district court jurisdiction.[8]

V. The Statute of Limitations Bars the Tribe's Contract-Based Claims

Not only does the Court lack jurisdiction over the Tribe's contract-based claims, they are also time barred. Both the 1965 Deferral Agreement and the 1967 Midview Exchange Agreement were executed decades ago and claims arising from alleged breaches of those agreements likewise accrued decades ago. For that reason, the DC Court rightly dismissed the Tribe's nearly identical claims as time barred. *Ute DC Op.*, 560 F.Supp.3d at 257-58. The facts evidencing their untimeliness are clear on the face of the complaint, *see, e.g.,* Compl. ¶¶ 110-18; 142-44; 151; 227, thus allowing the Court to dismiss them on the government's Rule 12(b)(6) motion. *Miller v. Shell Oil Co.*, 345 F.2d 891, 893 (10th Cir. 1965).

The Tribe concedes that Claims 1 and 3 seek relief based on a controversy arising from the 1965 Deferral Agreement. Resp. 11, 30. The Tribe has been aware of those terms since 1965, Compl. ¶ 131, and has known since 1992 when Congress enacted CUPCA that the 1965 agreement was being replaced by a new statutory framework. *See id.* ¶¶ 227-32. The Tribe's new theory is that its claims accrued either in 2018 (when the government denied a tribal ordinance) or in 2019 (when the government published an environmental assessment concerning the Green River Block Exchange agreement). Resp. 30. But the new theory runs counter to the clear timeline and other facts alleged in the Complaint. *See id.*; *see also id.* ¶¶ 142-44; 151. Regardless of whether the Tribe now seeks "prospective relief," Resp. 30, its claims accrued decades ago when all material facts were known.

[8] Jurisdiction aside, the Midview Exchange Agreement's plain language did not authorize the Midview Property to be transferred to the Tribe. *See* Mot. 4, 28 (Ex. B to Mot. ¶¶ 6–8).

The Tribe's claims relating to the 1967 Midview Exchange Agreement (Claims 5 and 6) are likewise time barred, as we showed in our opening brief. Mot. 28-29. The Tribe makes no attempt to defend the timeliness of those claims in its Response.

VI. The Tribe Waived and Released Certain Claims

In addition, as the United States showed in its opening brief, the Tribe expressly waived and released Claims 2, 4, and 8 through the 2012 Settlement Agreement, and Claims 1-3 through CUPCA. Mot. 24-27. The Tribe fails to rebut either showing.

The Tribe argues that Claims 2, 4, and 8 were preserved by two exceptions to the 2012 Settlement Agreement's waiver and release of claims. *See* Resp. 32-33 (relying on exception in Settlement Agreement paragraphs 6(a) and 6(b)). But neither exception applies.

Paragraph 6(a) excluded from the waiver and release claims for harms or damages allegedly caused by the United States after the execution of the Settlement Agreement. Ex. D to Mot. ¶ 6 (a). This exception is inapplicable because all material facts giving rise to Claims 2, 4, and 8 occurred decades before the execution of the Settlement Agreement. *See* Mot. 24-26. And the Tribe's unsupported allegation that the violations are "ongoing," Resp. 32-33, cannot save them from the plain terms of the waiver. As the Complaint makes clear, the harms and violations the Tribe seeks to remedy through these claims occurred before March 8, 2012. *See, e.g.*, Compl. ¶¶ 91-95, 125-26, 142-44, 215-25, 246-52.

Paragraph 6(b) excluded certain claims related to water rights from the waiver, but only those alleging "damages for loss of water resources allegedly caused by [Federal Defendants'] failure to establish, acquire, enforce or protect [ ] *water rights*." Ex. D to Mot. ¶ 6 (b) (emphasis added). The Tribe's assertion that Claims 2, 4, and 8 are "at heart, Claims to protect the Tribe's reserved water rights" is contradicted by the Claims themselves. Instead of water rights, the

claims pertain to water storage (Claim 2), maintenance of the Irrigation Project (Claim 4), and an accounting (Claim 8). Paragraph 6(b) is inapplicable to Claims 2, 4, and 8.[9]

Claims 1-3 fall under the scope of the waiver and release provision in section 507 of CUPCA because they each relate to, and arise from, the Deferral Agreement and pre-date enactment of CUPCA (October 30, 1992).[10] *See* Compl. ¶¶ 202-252. In response, the Tribe asserts that Claims 2-3 are not covered by the CUPCA waiver, and that the statutory prerequisites to apply the waiver have not been met. Resp. 33-36. Both arguments fail.

First, while Claims 2-3 may not directly seek to enforce the 1965 Deferral Agreement, they still arise from the obligations originally established in that agreement, which CUPCA superseded. Compl. ¶¶ 215-252. Claim 2 seeks additional water storage—the type of storage that was contemplated by the 1965 Deferral Agreement but replaced through CUPCA. *See, e.g.*, *id*. ¶ 225. The Tribe affirmatively states that Claim 3 "seek[s] declaratory relief in the form of an interpretation of an agreement between the Parties (the 1965 Deferral Agreement) …." Resp. 11.

Second, the statutory prerequisites triggering the section 507 waiver have been met—the Tribe has received the funds under sections 504-506. The Tribe has expressly acknowledged the payment in court filings, which are judicially noticeable, and cannot now recant its own admission. Mot. 26-27 (citing Ex. G to Mot.). The DC Court agreed that CUPCA's waiver barred the Tribe's nearly identical claims. *Ute DC Op.*, 560 F.Supp. 3d at 263 n. 12.

The Tribe's suggestion that the section 507 waiver was contingent upon the re-ratification of the 1990 Compact finds no support in the statutory text or legislative history. Resp. 35; *see*

[9] Separately, the Tribe offers no response to our argument that Claim 8 is barred by Paragraph 4 of the Settlement Agreement, which unambiguously waived and released historical accounting claims, like that the Tribe asserts here. *See* Mot. 24-26; Ex. D to Mot. ¶ 4 (a)–(b).

[10] Our opening brief stated that this waiver applies to Claims 1-4, Mot. 26. This was a scrivener's error tied to an earlier version of the complaint. We should have stated Claims 1-3.

106 Stat. 4655. By its plain terms, section 507 is contingent *only* upon receipt of the section 504-506 monies. *Id*. § 507(b) . The Tribe has received that benefit and is now bound by the terms of the applicable waiver. *See* Ex. G to Mot. To apply the wavier in this manner is only to apply the clear directive of Congress. It does not, as the Tribe charges, "fall[ ] outside Congress's constitutional authority to legislate over the affairs of the Tribe," Resp. at 35, nor amount to coercion or an unconstitutional taking under the Fifth Amendment. Resp. 36.

VII. The Tribe Fails to State a Claim under the Indian Non-Intercourse Act

As we showed in our opening brief, the Tribe has no claim against the United States under the Indian Non-Intercourse Act, 25 U.S.C. § 177 (*see* Claim 5, alleging the Midview Exchange Agreement violates this Act). Mot. 28. The Indian Non-Intercourse Act restricts "alienation of Indian land without Congressional approval." *Historic E. Pequots v. Salazar*, 934 F. Supp. 2d 272, 279 (D.D.C. 2013). To establish a violation of the Non-Intercourse Act, among other things, an Indian Tribe must establish that the United States never approved the conveyance. *See Seneca Nation of Indians v. New York,* 382 F.3d 245, 248 (2nd Cir. 2004). The Act does not prohibit property transfers *by* the United States—like that at issue here. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-19 (1960) (cleaned up). The Tribe cites no authority to the contrary and its attempt to characterize the transfer as "no different than as between private property right holders" finds no legal or factual support. Resp. 31.

Even if the Non-Intercourse Act applies to actions by the United States, the Midview Exchange Agreement would not be prohibited by the Act. Congress expressly 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*

Mot. 3-4 (Pub. L. No. 77-83, §§ 1–2, 55 Stat. 209 (1941)). By executing the Midview Exchange Agreement, the Tribe acknowledged and consented to the transfer it now contests. Ex. B to Mot.

VIII. The Tribe's Constitutional Claim Fails

The Tribe now acknowledges that it cannot litigate the constitutional claim (Claim 11) in its own right or as a class representative. Resp. 36 n.6. Thus, only two questions remain: (1) have the putative class plaintiffs stated a claim? And (2) if they had stated a claim, should the putative class plaintiffs be joined in this litigation? The answer to both questions is no.

First, the putative class plaintiffs have failed to adequately plead animus. "To plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision." *Dep't of Homeland Sec. v. Regents of the Univ. of CA*, 140 S.Ct 1891, 1915 (2020). All Plaintiffs offer in response is a laundry list of federal actions that have allegedly "had an adverse and disproportionate impact on the class members as Indian and members of the Tribe." Resp. 37. But even if the Court accepts that class plaintiffs have suffered disproportionate impacts because of federal actions, Plaintiffs have not alleged any facts to support an inference that those impacts are a result of their tribal status or motivated by a discriminatory purpose. Allegations of disproportionate impact are insufficient to raise a colorable claim. *See Vill. of Arlington Heights v. Metro Housing Dev. Corp*, 429 U.S. 252, 264-66 (1977).

This is not a case in which "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action," and, as the Supreme Court has cautioned, "such cases are rare." *Id*. at 266. This is especially true here given that tribal membership is a political not racial classification. Mot. 36-37. This distinction does not suggest, as the Tribe insinuates, that the United States argues it is free to discriminate against Indians. Resp. 38. Rather, it means

that the Court would apply a different level of scrutiny to such a claim, which would be premised on political rather than racial discrimination.

Second, even if the Complaint had stated a viable claim for relief, there is no basis for joining putative class plaintiffs to this litigation. The majority of the Tribe's claims seek to redress alleged breaches of trust and contract. Those claims, if cognizable, inure to the Tribe. The Tribe's APA claims (Claims 9-10), which the United States has not moved to dismiss, will be reviewed on the administrative record. In contrast, Claim 11, seeks to redress alleged violations of individuals' constitutional rights and would likely involve discovery. The claims arise on divergent paths, involve separate questions of fact and law, and different standards of review. Joinder is thus improper under Federal Rule of Civil Procedure 20(a).

Even if Rule 20(a) were satisfied, however, "[a] determination on the question of joinder of parties lies within the discretion of the district court." *Wynn v. Nat'l Broad. Co.*, 234 F. Supp. 2d 1067, 1078 (C.D. Cal. 2002) (citation omitted). The rule is "permissive in character" and "joinder in situations falling within the rule's standard is not required ..." 7 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1652 (3d ed. 2022). The Court "may deny joinder under Rule 20 if 'the addition of the party under Rule 20 will not foster the objectives of the rule, but will result in prejudice, expense or delay.'" *UWM Student Ass'n v. Lovell*, 888 F.3d 854, 863 (7th Cir. 2018) (citations omitted). Here, joinder would dramatically expand the scope of this litigation and cause unnecessary delay, expense, and confusion. For those reasons, the Court should not permit joinder of the putative class plaintiffs.

CONCLUSION

The Court should dismiss Claims 1-8, and 11 based on the numerous deficiencies identified in the United States' motion to dismiss and this reply in support thereof.

Dated this 3rd day of April 2023.

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 3.133
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 April 3, 2023, 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