UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Michael HILL, *et al.*, Plaintiffs, v. THE UNITED STATES DEPARTMENT OF THE INTERIOR; DEB HAALAND, in her official capacity as Secretary of the Interior; and BRYAN NEWLAND, in his official capacity as Assistant Secretary for Indian Affairs, Federal Defendants.	Civil Action No. 1:22-CV-01781

FEDERAL DEFENDANTS' MOTION TO DISMISS
AND MEMORANDUM OF LAW IN SUPPORT

The United States Department of the Interior ("Interior"), Deb Haaland, in her official capacity as Secretary of the Interior, and Bryan Newland, in his official capacity as Assistant Secretary for Indian Affairs, (collectively, the "United States" or "Federal Defendants") respectfully move to dismiss Plaintiffs' first amended complaint (ECF No. 14, "Compl." Or "Complaint") for lack of jurisdiction and failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Each of Plaintiffs' four claims for relief is subject to dismissal on various grounds, as detailed in the accompanying Memorandum of Law in Support. For that reason, the Court should grant Federal Defendants' motion and dismiss the case in full.

Dated: June 29, 2023

Respectfully submitted,

TODD KIM
Assistant Attorney General

Environment and Natural Resources
Division

/s/ Sally J. Sullivan
Sally J. Sullivan
D.C. Bar No. 1021930
U.S. Department of Justice
Environment and Natural Resources
Division, Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044
Tel.: (202) 514-9269
Fax: (202) 305-0275
sally.sullivan@usdoj.gov

Overnight delivery:
4 Constitution Square
150 M Street, Suite 3.113
Washington, D.C. 20002

Counsel for the United States

MEMORANDUM OF LAW

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INTRODUCTION

Through this case, Plaintiffs—members of the Crow Tribe and owners of allotments on the Crow reservation ("allottees")—once again challenge the validity of a water rights compact that was negotiated over twenty years ago and that Congress enacted into law over a decade ago. While the background surrounding that compact, related federal legislation, and continuing implementation is long and winding, the reasons the Court should dismiss this case are simple: Plaintiffs lack standing and fail to state claims upon which their requested relief could be granted.

Ostensibly, this suit challenges the Secretary of the U.S. Department of the Interior's ("Interior") publication of a 2016 notice in the Federal Register, which included a statutorily required statement of findings and that had the effect (again by statute) of cementing certain statutory waivers and releases of claims. Plaintiffs' grievances, however, reach back further and have been the subject of both state and federal court litigation since 2012. In 1999, the Crow Tribe and the State of Montana entered into the Crow Tribe-Montana Water Rights Compact (the "Compact"), which Congress ratified in 2010 through the Crow Tribe Water Rights Settlement Act (the "Settlement Act"). In 2012, pursuant to the Compact and Settlement Act, the Crow Tribe, Montana, and the United States filed a motion for entry of a proposed decree in the Montana Water Court. Some allottees, including some Plaintiffs, objected on various grounds. The Montana Water Court dismissed their objections and entered a final decree approving the Compact. The Montana Supreme Court affirmed, and the United States Supreme Court denied review. Allottees simultaneously challenged the Compact in federal court. The U.S. District Court for the District of Montana rejected their challenges and granted the United States' motion for judgment on the pleadings, and the Ninth Circuit affirmed (though, on alternative grounds).

Which brings us to our case. Plaintiffs assert four claims: Claims 1 and 2 allege violations of the Settlement Act; Claim 3 alleges a breach of common law trust duty; and Claim 4 alleges a taking and constitutional challenge under the Fifth Amendment. Plaintiffs seek an extraordinary remedy: they ask the Court to declare the Settlement Act, which was enacted in 2010 and became fully effective in 2016, "void and unenforceable," which could have the practical effect of nullifying the water rights compact agreed to between the Crow Tribe and State of Montana and implemented by the United States. The Court, however, need not concern itself with this possibility because each of Plaintiffs' claims fails and should be dismissed, for either lack of jurisdiction (Claims 1-4), or failure to state a claim under the APA (Claim 1), Settlement Act (Claim 2), fiduciary duties (Claim 3), or Fifth Amendment (Claim 4).

FACTUAL BACKGROUND

A. The Crow Reservation

The Crow Tribe has lived in what is now Montana for centuries. In more recent history, the Treaty of Fort Laramie of May 7, 1868, 15 Stat. 649, reserved a large tract of land within the Tribe's aboriginal territory to serve as a homeland for the Tribe. *See Montana v. United States*, 450 U.S. 544, 547-548 (1981); *United States v. Powers*, 305 U.S. 527, 528 (1939). The Crow Reservation originally encompassed approximately 8 million acres, but subsequent congressional acts reduced the Reservation to its present size of just under 2.3 million acres. *See Montana*, 450 U.S. at 548. Decades after the Crow Reservation was established, Congress enacted the General Allotment Act, ch. 119, 24 Stat. 388, which authorized the President to "allot" land within Indian reservations for use by individual Indians for farming or ranching. *See Montana*, 450 U.S. at 548. Congress also provided for the allotment of irrigation and grazing lands on the Crow Reservation through the Crow Allotment Act of 1920, ch. 224, 41 Stat. 751. Both acts provided

that the allotted land would be held by the United States in trust for a period of 25 years, after which the Secretary of the Interior was to issue a fee patent to the named allottee. *See Montana*, 450 U.S. at 548; *see also* 25 U.S.C. § 348 (patents to be held in trust for allottees).

Congress ended the allotment policy in 1934 by enacting the Indian Reorganization Act ("IRA"), ch. 576, 48 Stat. 984. *Hodel v. Irving*, 481 U.S. 704, 707-708 (1987). The IRA restored to tribal ownership unallotted, "reservation" lands, 25 U.S.C. § 5102, and it "extended and continued" indefinitely all "restriction[s] on alienation" on Indian lands, 25 U.S.C. § 5102. Those actions left the Crow Reservation divided primarily into three categories of land ownership: (1) unallotted lands held by the United States in trust for the Crow Tribe; (2) allotments as to which fee patents never issued (or were returned to trust), which the United States holds in trust for individual Indians; and (3) allotted lands that have passed out of trust and are now held in fee by individuals, mostly non-Indians. *See Montana*, 450 U.S. at 548; *see also Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 948 (9th Cir. 2000). Plaintiffs fall into the second category—each alleging that they hold trust allotments on the Crow Reservation. Compl. ¶¶ 42-49.

B. Indian Water Rights

The establishment of an Indian reservation under federal law includes an implied reservation of water necessary to accomplish the purposes of the reservation. *See, e.g.*, *Winters v. United States*, 207 U.S. 564, 576-78 (1908). The United States generally holds reservation lands and associated resources, including water rights pursuant to *Winters* and its progeny, in trust for the benefit of the tribe. *See, e.g., United States v. Shoshone Tribe*, 304 U.S. 111, 116-18 (1938) (United States holds legal title to reservation lands, but tribe holds beneficial ownership

of land and resources); *see also Arizona v. Navajo Nation*, No. 21-1484, 2023 WL 4110231, at *5 (U.S. June 22, 2023).

Shortly after *Winters*, in a case involving allotments on the Crow Reservation, the U.S. Supreme Court subsequently interpreted 25 U.S.C. § 381 to entitle Indian allottees to water: "[W]hen allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." *Powers*, 305 U.S. at 532. In a series of decisions involving transferred allotments on the Colville Reservation, federal courts expanded on *Powers* and defined that to which non-Indian successors to Indian allottees may be entitled. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981). These and other cases establish the framework that allottees have a right to use water for irrigation purposes from the Reservation's federal Indian reserved water right.

The McCarran Amendment, enacted in 1952, ch. 651, 66 Stat. 560 (43 U.S.C. § 666), waives the sovereign immunity of the United States in a suit "for the adjudication of rights to the use of water of a river system or other source." In *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976), the Supreme Court held that the McCarran Amendment gives state courts "concurrent" jurisdiction to determine federal water rights as part of a comprehensive adjudication, including "federal reserved rights held on behalf of Indians." *Id*. at 809. In the wake of that decision, the State of Montana enacted a statute providing for the statewide adjudication of all water rights, including rights held by "the United States of America on its own behalf or as trustee for any Indian or Indian tribe." Mont. Code Ann. § 85-2-212 (1979). Montana subsequently established a commission to negotiate compacts to settle Indian water rights claims. Mont. Code Ann. § 85-2-702 (1979).

C. The 1999 Compact

In 1999, the efforts of the United States, the State of Montana, and the Crow Tribe to resolve disputes over the quantification and administration of water rights on the Crow Reservation culminated in the Crow Tribe-Montana Water Rights Compact (which appears, as ratified, at Mont. Code Ann. § 85-20-901 (1999)). The Compact is intended to "settl[e] any and all existing water rights claims of or on behalf of the Crow Tribe of Indians in the State of Montana." Compact Pmbl. It sets forth an agreed "Tribal Water Right" that includes specified rights to divert and use water from the Bighorn River, the Little Bighorn River, and creeks and drainages within the Crow Reservation and the "Ceded Strip" (defined to comprise certain former reservation lands, now outside the Crow Reservation, that the United States holds in trust for the Crow Tribe). *Id*. Art. III; *see also id.* Art. II.7; *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 700-01 (1998) (describing the ceded strip). The Tribal Water Right encompasses "the right[s] of the Crow Tribe, including any Tribal member," Compact Art. II.30, which are to be held in trust by the United States, *id*. Art. IV.A.1.

The Compact assigns responsibility for administering the Tribal Water Right to the Crow's Tribal Water Resources Department. Compact Art. IV.A.2; *see id.* Art. II.28. The Compact also requires the Crow Tribe to develop and adopt a Tribal Water Code. *Id*. Art. IV.A.2.b. In administering water rights, "the Tribe may not limit or deprive Indians residing on the Reservation or in the Ceded Strip of any right, pursuant to 25 U.S.C. § 381, to a just and equal portion of the Tribal Water Right." *Id*. Art. IV.B.1.

The Compact specifies that, once it has been ratified by the Crow Tribal Council, by the State of Montana, and by Congress, the parties shall file in the Montana Water Court a "motion for entry of [a] proposed decree," as set forth in an appendix to the compact. Compact Art.

VII.B.2; *see id*. App. 1 (proposed decree). In June 1999, the Compact was ratified and enacted into law by the Montana legislature. Mont. Code Ann. § 85-20-901 (1999). The Crow Tribe ratified the Compact by a vote of its members in 2011. *See In re Crow Water Compact*, 354 P.3d 1217, 1218 (Mont. 2015).

D. The 2010 Settlement Act

Congress approved the Crow Compact by enacting the Crow Tribe Water Rights Settlement Act of 2010, Pub. L. No. 111-291, §§ 401-416, 124 Stat. 3097. The Settlement Act's purpose is "(1) to achieve a fair, equitable, and final settlement of claims to water rights in the State of Montana for – (A) the Crow Tribe and; (B) the United States for the benefit of the Tribe and allottees[,]" as well as "(2) to authorize, ratify, and confirm the [Compact]." *Id*. § 402(1) and (2), 124 Stat. 3097.

The Settlement Act provides that the tribal water rights described in the Compact "are ratified, confirmed, and declared to be valid" and shall be "held in trust by the United States for the use and benefit of the Tribe and the allottees." *Id*. § 407(b)(1) and (c)(1), 124 Stat. 3104. With respect to allottees, the Act confirms Congress's intent "to provide to each allottee benefits that are equivalent to or exceed the benefits allottees possess[ed]" at the time of its enactment. *Id*. § 407(a), 124 Stat. 3104. The Act also provides that "[a]ny entitlement to water of an allottee under Federal law shall be satisfied from the tribal water rights," and that "[a]llottees shall be entitled to a just and equitable allocation of water for irrigation purposes." *Id*. § 407(d)(2) and (3), 124 Stat. 3105; *see also* § 407(d)(1), 124 Stat. 3104 (specifying that 25 U.S.C. § 381 "shall apply") .

The Settlement Act gives the Crow Tribe "authority to allocate, distribute, and lease the tribal water rights in accordance with the Compact." *Id*. § 407(e)(1), 124 Stat. 3105 (formatting

and punctuation altered). The Tribe must establish a Tribal Water Code, as specified in the Compact, that contains protections for allottee rights, including "a process by which an allottee may request that the Tribe provide water for irrigation use in accordance with [the Settlement Act]." *Id*. § 407(f)(2)(C), 124 Stat. 3105. The Secretary of the Interior must confirm that the Tribal Water Code contains necessary protections for allottees before it goes into effect. *Id*. § 407(f)(3), 124 Stat. 3106. To date, the Tribe has not established a Tribal Water Code, and the Secretary will continue to "administer the tribal water rights until the tribal water code is enacted[.]" *Id*. § 407(f)(3), 124 Stat. 3105-06.

The Settlement Act further authorizes hundreds of millions of dollars in federal appropriations for projects to benefit all users of the Tribal Water Right, including projects to rehabilitate and improve the Crow Reservation's municipal, rural, and industrial water system and to maintain and improve the Crow Irrigation Project. *Id*. §§ 405-406, 411, 414, 124 Stat. 3100-04, 3113-16, 3120-21. Those funds have been appropriated and deposited in the Crow Settlement Fund. *See* Statement of Findings: Crow Tribe Water Rights Settlement Act of 2010, 81 Fed. Reg. 40,720 (June 22, 2016).

In exchange for the Tribal Water Right, funding for water projects, and other benefits, the Settlement Act contains a comprehensive waiver and release of claims. The Settlement Act specifies that the "benefits realized by the allottees" under the Act "shall be in complete replacement of and substitution for, and full satisfaction of[,]" the allottees' water rights claims, including "any claims of the allottees against the United States that the allottees have or could have asserted[.]" Pub. L. No. 111-291, § 409(a)(2), 124 Stat. 3108; *see id*. § 410(a)(3), 124 Stat. 3110 (describing claims released) . It also directs the United States to waive and release any

claim that the United States, "acting as trustee for the allottees," had asserted or could have asserted on the allottees' behalf. *Id*. § 410(a)(2), 124 Stat. 3109.

Though the Settlement Act was enacted in 2010, the waivers and releases did not immediately go into effect and were tied instead to the enforceability date. The Settlement Act defines the "enforceability date," as the date that the Secretary of the Interior publishes, in the Federal Register, a statement of findings that specified conditions have been met. *Id*. § 410(e), 124 Stat. 3112; *see id*. § 410(b), 124 Stat. 3111 (Act's claim waivers "shall take effect on the enforceability date"). Despite its use of the word "findings," however, the Act did not require the Secretary to weigh factual evidence in the adjudicatory sense. Rather, the Secretary was to report that certain events had or had not occurred. Among other things, the Secretary was required to find that:

> (A) (i) the Montana Water Court has issued a final judgment and decree approving the Compact; or
> (ii) if the Montana Water Court is found to lack jurisdiction, the district court of jurisdiction has approved the Compact as a consent decree and such approval is final . . . .

Id. § 410(e)(1)(A), 124 Stat. 3112; *see id*. § 403(7), 124 Stat. 3098 (defining "[t]he term 'final' with reference to approval of the decree"). If all the events in section 410(e)(1)(A) did not occur such that the Secretary could not publish the required findings by March 31, 2016, or by an "extended date agreed to by the Tribe and the Secretary, after reasonable notice to the State of Montana," then the Settlement Act would be repealed. *Id*. § 415, 124 Stat. 3121. The date for publishing the findings was extended to June 30, 2016, as documented in March 21, 2016 letters from Secretary Jewell to the Chairman of the Crow Nation and the Governor of Montana. *See* Statement of Findings: Crow Tribe Water Rights Settlement Act of 2010, 81 Fed. Reg. at 40,720. Secretary Jewell published the statement of findings in the Federal Register on June 22, 2016. *Id*.

E. Prior Challenges

i. State Court (Montana Water Court, Montana Supreme Court, U.S. Supreme Court)

In accordance with the Settlement Act, the United States, Montana, and the Crow Tribe jointly submitted a Proposed Decree to the Montana Water Court and moved for "'entry of a final order issuing the decree of the reserved water right of the Tribe held in trust by the United States as quantified in the Compact.'" *See In re Crow Water Compact*, 354 P.3d at 1219 (quoting Compact Art. VII.C). The court issued a preliminary decree containing the Compact and published and served notice on affected parties of the preliminary decree. *Id*. Of more than 16,000 persons and entities who received notice, approximately 100 submitted objections to the court. *Id*.

Among those filing objections in the Spring of 2013 were allottees who are members of the Crow Tribe (including some Plaintiffs). *Id*. They alleged that they possess reserved water rights distinct from the rights of the Crow Tribe; that the Crow Compact would impair their rights by subordinating them to the Tribe's rights; and that the United States had failed, in its capacity as trustee, to adequately represent their interests in the negotiations. *Id*. at 1219-20. The allottees also argued that the Water Court was without jurisdiction to adjudicate their rights. *Id*. at 1220. In July 2014, the Water Court dismissed the allottees' objections and denied their request for a stay (which allottees sought after filing their federal suit, discussed below). Order Dismissing Allottee Objections and Denying Request for Stay, *In the Matter of the Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Crow Tribe of Indians of the State of Montana*, No. WC-2012-06 (Mont. July 30, 2014).

The court stated that the purpose of reviewing the Proposed Decree was not to assess its merits, but rather to determine whether it was "fair and reasonable to those parties and the public

interest that were not represented in the negotiation." *Id*. at 13 (citation omitted). Because the United States had, in its capacity as trustee, represented the allottees in negotiating and approving the Crow Compact, *id*. at 11, the court determined that the allottees could object only on the basis of "fraud, overreaching, or collusion" by the settling parties, *id*. at 13, 19. Although the allottees had alleged that representation by the United States was "not adequate," *id.* at 11, they did not allege fraud, overreaching, or collusion, *id*. at 14-15. Accordingly, the court held that the allottees had failed to state a valid claim for relief, *id*. at 15, 20. The allottees sought interlocutory review in the Montana Supreme Court of the Water Court's dismissal of their objections. In May 2015, after dismissing all the non-Indian objections, the Montana Water Court issued a final judgment approving the Crow Compact.

In a unanimous opinion issued in July 2015, the Montana Supreme Court affirmed the Water Court's dismissal of the allottees' objections, rejecting all of the allottees' arguments. *In re Crow Water Compact*, 354 P.3d at 1218-24. The Montana Supreme Court also held that the Water Court had not abused its discretion in denying the allottees' request for a stay pending resolution of their federal suit, which would have "work[ed] a hardship and a potential injustice on the parties who have worked for many years to develop and implement the Compact." *Id*. at 1223.

The allottees petitioned for a writ of certiorari in the United States Supreme Court, presenting two questions: (1) whether "the water rights owned by individual Crow Indian allottees—which [the Supreme] Court in *United States v. Powers*, 305 U.S. 527 (1939) recognized as distinct individual rights, separate from water rights possessed by the Crow Tribe—[can] be awarded to the Crow Tribe in negotiations between the United States, the tribe and the State of Montana"; and (2) whether "the Montana Courts have jurisdiction to decide

these questions of federal law related to allottees' rights." Petition for a Writ of Certiorari, *Crow Allottees v. United States*, No. 15-779 (U.S. Dec. 14, 2015). The Court denied the petition on April 25, 2016.

Meanwhile, in December 2015, the Montana Supreme Court affirmed the Water Court's final judgment, rejecting the arguments of the non-Indian objectors. *See In re Crow Water Compact*, 364 P.3d 584 (Mont. 2015). A petition for rehearing was largely denied on February 3, 2016 (other than the correction of a factual error in the opinion). The non-Indian objectors petitioned for a writ of certiorari in the United States Supreme Court in April 2016, presenting the question whether "the Crow Tribe and State of Montana violated federal law by failing to quantify the amount of water that is allocated to the Crow Tribe and when the total volume of water allocated to the Crow Tribe is far in excess of the amount of water the Crow Tribe could possibly use." Petition for a Writ of Certiorari, *Abel Family Ltd. P'ship v. United States*, No. 15-1327 (U.S. Apr. 27, 2016). The Court denied that petition on June 13, 2016.

ii. Federal Court (D. Montana and Ninth Circuit)

During this same period, allottees filed a putative class action in May 2014, in the United States District Court for the District of Montana against the Department of the Interior, federal officials, and two judges of the Montana Water Court. *See* Complaint, *Crow Allottees Ass'n v. U.S. Bureau of Indian Affs.*, No. 1:14-cv-62 (D. Mont. May 15, 2014), ECF No. 1. Their complaint sought a declaratory judgment regarding their *Winters* rights; alleged that the United States violated its fiduciary duties in negotiating the Compact without their participation or consent; complained that the terms of the Compact and Settlement Act deprived them of their *Winters* rights; alleged violations of their due process rights (by depriving them of their federal water rights without their participation or consent and by not providing them with independent

legal counsel); and alleged the United States violated 25 U.S.C. § 175 by not providing them with independent legal counsel. *See* First Amend. Class Action Complaint, *Crow Allottees Ass'n v. U.S. Bureau of Indian Affs.*, Case No. 1:14-cv-62 (D. Mont. Sept. 11, 2014), ECF No. 3. The United States moved for judgment on the pleadings. Fed. Defs.' Mot. for Judgment on the Pleadings, *Crow Allottees Ass'n v. U.S. Bureau of Indian Affs.*, No. 1:14-cv-62 (D. Mont. Feb. 25, 2015), ECF No. 34. The district court granted the motion, concluding that the United States had not waived its sovereign immunity. *Crow Allottees Ass'n v. U.S. Bureau of Indian Affs.*, No. CV 14-62-BLG-SPW, 2015 WL 4041303, at *1 (D. Mont. June 30, 2015).

In an unpublished decision, the Ninth Circuit affirmed, but on alternative grounds. *Crow Allottees Ass'n v. U.S. Bureau of Indian Affs.*, 705 F. App'x 489, 491 (9th Cir. 2017). It concluded that allottees had failed to state claims on which relief could be granted. *Id*. Specifically, the court found that allotees had pointed to no authority imposing a duty on the United States to provide allottees with private counsel, *id*., "[did] not provide a basis for rendering the Settlement Act invalid," *id*. at 491-92, had not stated a claim for violation of their due process rights "because the legislative process was the only process to which they were entitled," *id*. at 492, and could not obtain a declaration of their *Winters* rights because they failed to show the Compact and Settlement Act were invalid, *id*. at 491. The allottees did not seek Supreme Court review.

PROCEDURAL BACKGROUND

Plaintiffs filed suit in this Court on June 21, 2022. Compl., ECF No. 1. They filed an amended complaint on March 31, 2023. ECF No. 14. Their amended complaint asserts four claims: (1) violation of the Settlement Act by failing to properly extend the deadline for publishing the statement of findings; (2) violation of the Settlement Act by prematurely

publishing the statement of findings; (3) breach of trust; and (4) violation of Plaintiffs' Fifth Amendment rights. *Id*. ¶¶ 183-214. Federal Defendants move to dismiss Plaintiffs' Complaint in full under Federal Rules of Civil Procedure 12(b)(1), for lack of jurisdiction, and 12(b)(6) , for failure to state a claim.

ARGUMENT

I. Plaintiffs Lack Standing (Claims 1-4)

The Court should dismiss each of Plaintiffs' claims because Plaintiffs lack stacking. Article III standing requires that a plaintiff show that: (1) he has suffered an injury in fact; (2) there is a causal connection between his injury and the conduct complained of; and (3) a favorable decision on the merits is likely to redress his injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs bear the burden of demonstrating that they have standing to bring each claim they assert. *Huron v. Cobert*, 809 F.3d 1274, 1279 (D.C. Cir. 2016). Here, they cannot satisfy that burden because their injuries are not traceable to the federal actions they challenge nor are they redressable by this Court.

A. Plaintiffs' injuries are not traceable to Interior's actions.

To establish traceability, a plaintiff must show that the injury he complains of is "fairly traceable to the challenged conduct of the defendant." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, (2016), *as revised* (May 24, 2016). Traceability "examines whether it is substantially probable . . .that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996). Here, Plaintiffs' claimed injury underpinning all claims is the alleged "expropriation or diminishment" of their *Winters* water rights by operation of the waivers and releases in the Settlement Act. *See, e.g.*, Compl. ¶¶ 17, 205-07, 212-13. Even if accepted as an injury in fact,

that injury stems not from Federal Defendants' actions, but rather from the terms of the Settlement Act, which Congress enacted. Pub. L. No. 111-291 § 410(a)(2), 124 Stat. 3109-11. Plaintiffs suffered no injury traceable to the Secretary's actions they challenge here—the extension agreement and publication of the statement of findings. *See, e.g.,* Compl. ¶¶ 2, 147-179. Even if the Secretary had the authority to do so, neither of those actions purported to waive or release potential claims. The extension agreement simply expanded the time during which the Secretary could publish the statement of findings, as required under the Settlement Act. Pub. L. No. 111-291 § 415, 124 Stat. 3121-22. That agreement, between the Secretary and the Tribe, had no effect whatsoever on Plaintiffs. The Secretary's publication of the findings likewise did not harm Plaintiffs. That publication, which Congress mandated in the Settlement Act, simply determined the enforceability date of various provisions of the Settlement Act, including the waivers and releases. *Id*. § 410(e)(1), 124 Stat. 3112. The Settlement Act, not the Secretary, created the waivers and releases. *Id*. § 410(a)(2), 124 Stat. 3109-11. And, to trigger the waivers and releases, the Settlement Act, not the Secretary, delineated the events that would need to occur and on which the Secretary would report through publication in the Federal Register. *Id*. § 410(e)(1) . Plaintiffs' grievance, thus, lies with Congress, not the Secretary of the Interior. [1]

B. Plaintiffs' injuries are not likely to be redressed by a favorable ruling from this Court.

[1] To the extent Plaintiffs' breach of trust claim challenges the government's failure to take certain actions in the water compact negotiations or in litigation before the Montana Water Court, *see, e.g.,* Compl. ¶¶ 200-01, 207-08, those challenges are barred by the statute of limitations, as the conduct they complain of occurred prior to June 22, 2016. *See* 28 U.S.C. § 2401(a) (a) ("[E]very 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"). The claims would also fail because litigation decision-making generally does not give rise to a viable breach of trust claim. *See Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995).

"To establish redressability, a plaintiff must show from the outset of its suit that its injuries are capable of being remedied 'by a favorable decision.'" *United States v. Texas*, No. 22-58, 2023 WL 4139000, at *11 (U.S. June 23, 2023) (Gorsuch, J., concurring) (citing *Lujan*, 504 U. S. at 561). "We measure redressability by asking whether a court's judgment will remedy the plaintiff's harms." *Id*. "It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability." *See Haaland v. Brackeen*, 143 S. Ct. 1609, 1640 (2023).

Because Plaintiffs' grievance lies with Congress, and even if the Court were to find that the extension or the publication of the statement of findings caused Plaintiffs' injuries, those injuries are not likely to be redressed by a favorable ruling from this Court. Taking Plaintiffs' two APA claims first. "Except in rare circumstances," the remedy under the APA, "is to remand to the agency for additional investigation[.]" *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Thus, were the Court to find in favor of Plaintiffs on either APA claim, (neither of which is cognizable for the reasons discussed below), the appropriate remedy would be to remand to Interior for further consideration consistent with the Court's findings. *Id*. But neither the extension nor the publication can be reconsidered or undone on remand because both actions are complete. Interior cannot now withdraw its consent to the extension that it agreed to with the Tribe in March 2016. Nor can it unpublish the statement of findings that it already published in the Federal Register in June 2016. By operation of statute, that publication determined the enforceability date of certain provisions, including the waivers and releases. Pub. L. No. 111-291 § 410(b), (e)(1), 124 Stat. 3111-12. And per the Settlement Act's plain terms, those waivers and releases have already taken effect. *Id*. § 410(b), 124 Stat. 3111. Because these completed actions cannot be undone, there is nothing that Interior could do on remand that would change

the operation of these statutory waivers and releases, which Congress implemented through the Settlement Act.

Further, even were the Court to entertain the possibility of declaring that either the extension or publication is "void and unenforceable," as Plaintiffs request, *see* Prayer for Relief, Compl. at 55, or of vacating either "decision," that still would not redress Plaintiffs' alleged injuries. By the Settlement Act's plain terms, the waivers and releases have already gone into effect. *See* Pub. L. No. 111-291 § 410(b), 124 Stat. 3111. The statute clearly provides that: "The waivers under subsection (a) shall take effect on the enforceability date," *id*. § 410(b), 124 Stat. 3111, and the enforceability date is defined as "the date on which the Secretary publishes in the Federal Register a statement of findings …", *id*. § 410(e)(1), 124 Stat. 3112, which was June 22, 2016. Statement of Findings: Crow Tribe Water Rights Settlement Act of 2010, 81 Fed. Reg. at 40,720. Regardless of any remedy the Court would issue, the statement of findings was published, and the enforceability date was established. There is, thus, no relief under the APA that this Court could grant that would redress Plaintiffs' injuries, which flow entirely from operation of the statutory waivers and releases.

As for Plaintiffs' breach of trust and Fifth Amendment claims, the only remedy likely to redress any such injuries is damages to compensate Plaintiffs for the alleged diminishment of their trust property. But, as discussed further below, Plaintiffs do not seek damages and, in any event, damages are not available in this Court based on the jurisdictional provisions of the Tucker Act, 28 U.S.C. § 1491(a)(1), and would likely fail because Congress substituted property of equivalent or greater value through the Settlement Act. *See* Pub. L. No. 111-291 § 407(a), 124 Stat. 3104; *id.* § 409(a)(2), 124 Stat. 3108; *United States v. Sioux Nation of Indians*, 448 U.S. 371, 416 (1980) (citation omitted).

Indeed, the only remedy that could potentially redress Plaintiffs' injuries is a declaration that the Settlement Act is unconstitutional. There are several problems with that, however.

First, the challenge is time-barred. President Obama signed the Settlement Act into law on December 8, 2010. Any district court challenge to the Settlement Act would had to have been brought within six years of its enactment, *see* 28 U.S.C. § 2401(a), so, on or before December 8, 2016. Plaintiffs filed suit on June 21, 2022, ECF No. 1, years after the statute of limitations passed. While Plaintiffs may argue that the statute of limitations on this challenge did not begin to run until the Secretary published the statement of findings on June 22, 2016, they would be mistaken.

The moment at which a cause of action first accrues within the meaning of section 2401(a) is when the person challenging the government action "can institute and maintain a suit in court." *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 190–91 (D.D.C. 2011), *aff'd*, 708 F.3d 209 (D.C. Cir. 2013). As the Supreme Court has held, "[a] constitutional claim can become time-barred just as any other claim can." *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983). Here, the waivers and releases that Plaintiffs claim injured them were included in the Settlement Act when President Obama signed it into law in 2010. While they did not go into effect until 2016, Plaintiffs knew all material facts giving rise to their constitutional challenge at the time the Settlement Act became law. *See, e.g.*, Compl. ¶¶ 110-112, 131. And because they could have instituted and maintained suit in 2010, their claim challenging the constitutionality of the waivers and releases is time-barred. *See Mason v. Judges of the U.S. Court of Appeals*, 952 F.2d 423, 425 (D.C. Cir. 1991) (statute of limitations under § 2401 begins to run when the "right of action," determined by reference to the "gravamen of the complaint," "first accrue[d]"); *Alaska Legis. Council v. Babbitt*, 15 F. Supp. 2d 19, 24 (D.D.C.

1998), *aff'd*, 181 F.3d 1333 (D.C. Cir. 1999) (holding that claim challenging Alaska National Interest Lands Conservation Act (ANILCA), on its face, violates equal protection principles accrued when Congress first enacted ANILCA).

Second, Plaintiffs have not pled any cognizable claim that would support declaratory relief regarding the Settlement Act's constitutionality, as discussed further below. Third, the Court arguably could not consider that remedy without joining the Crow Tribe and State of Montana, the other signatories to the Crow Water Compact, which the Settlement Act implemented, and whose legal rights and obligations would be directly affected by any finding that the Act is unconstitutional or otherwise unenforceable. Fourth, the Constitution grants Congress plenary authority over Indian affairs, U.S. Const. art. I, § 8, cl. 3, and, as discussed further below, the Settlement Act was a proper exercise of that authority and Plaintiffs have alleged no facts that would support a contrary finding.

In any event, Plaintiffs have not brought a cognizable claim alleging that the Settlement Act is unconstitutional. And because there is no basis for declaring the statute unconstitutional, Plaintiffs' injuries are not likely to be redressed by a favorable ruling in this Court on the operative complaint. The Court should dismiss Plaintiffs' claims for lack of standing.

II. Plaintiffs Do Not Plead Cognizable Claims Relating to the Settlement Act (Claims 1 and 2)

Even if the Court finds that Plaintiffs have standing, it should nevertheless dismiss both of Plaintiffs' claims relating to the Settlement Act. Claim 1 should be dismissed because, although reliant on the Administrative Procedure Act ("APA"), *see, e.g.*, Compl. ¶¶ 2, 38, 179, it does not challenge a final agency action reviewable under the APA. Claim 2 should be dismissed because the Secretary's statement of findings satisfied the Settlement Act's express

requirements. Therefore, Plaintiffs have failed to state APA claims upon which relief could be granted.

A. Claim 1 does not challenge agency action reviewable under the APA.

The action that Plaintiffs challenge in Claim 1—the extension agreed to by the Secretary and the Tribe (Compl. ¶¶ 184, 191)—is not final agency action reviewable under the APA. For that reason, Plaintiffs have failed to state a claim under the APA and the Court should dismiss Claim 1 under Rule 12(b)(6).[2]

Because the Settlement Act does not contain a private right of action, Plaintiffs' only avenue for bringing Claim 1 is the APA. *See El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 890 (D.C. Cir. 2014). Under APA section 704, judicial review is limited to "final agency action[s]." 5 U.S.C. § 704. To qualify for review, the action must be both agency action and final. *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) ("Whether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable." (citations omitted)). The extension agreement that Plaintiffs challenge in Claim 1 was neither.

The APA defines action to include: "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act …" 5 U.S.C. § 551(13). This definition, while broad, is "not so all-encompassing as to authorize [courts] to exercise 'judicial

[2] Even if the Court finds that Claim 1 is cognizable under the APA, based on the timeline, it is time-barred. Actions challenging government conduct are subject to a six-year statute of limitations. 28 U.S.C. § 2401(a). On March 21, 2016, the Secretary agreed by letter to the Tribe to extend the statutory publication deadline and gave notice by letter to the State of Montana that same day. *See* Statement of Findings: Crow Tribe Water Rights Settlement Act of 2010, 81 Fed. Reg. 40,720 (June 22, 2016). This means that the six-year statute of limitations for challenging that action expired March 21, 2022. Since Plaintiffs did not file this action until June 21, 2022, ECF No. 1, the challenge is time-barred.

review [over] everything done by an administrative agency.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.) (citation omitted) (concluding that agency letter articulating long-held position was not reviewable agency action). "Rather, the APA's definition of agency action focuses on an agency's *determination* of rights and obligations[.]" *Vill. of Bald Head Island v. Army Corp of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013), *aff'g* 833 F. Supp. 2d 524, 532 (E.D.N.C. 2011) (finding that agency letters did not constitute agency action). Here, the Secretary's agreement to extend the deadline for publishing the statement of findings—via an exchange of written letters with the Tribe—was not agency action. It does not constitute a "rule, order, license, sanction, relief, or equivalent[,]" *see* 5 U.S.C. § 551(13), nor does it determine the rights or obligations of any party. It is thus not reviewable under the APA.

Even if the Court were to determine that the extension agreement was an agency action, it was not final and thus is still not reviewable under the APA. In *Bennett v. Spear*, the Supreme Court established a two-part test for determining finality. 520 U.S. 154 (1997). It held that to be "final[,]" the action (1) "must mark the 'consummation' of the agency's decisionmaking process" and not be "merely tentative or interlocutory," and (2) "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow." *Id*. at 178 (citations omitted). Both prongs "must be satisfied independently for agency action to be final" and "deficiency in either is sufficient to deprive [plaintiff] of a cause of action under the APA." *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1267 (D.C. Cir. 2018).

The extension agreement does not satisfy these requirements. It is nothing more than an agreement to extend the deadline for taking a future action—publication of a statement of findings. The extension agreement therefore does not mark the consummation of any decisionmaking process with respect to the statement to be published and does not itself impact

anyone's rights or obligations. These circumstances are akin to *Hancock County Land Acquisitions, LLC v. United States*, in which the court concluded that "the IRS's decision not to sign the [tax form], and thereby decline to extend the statute of limitations, is not a final agency action within the meaning § 704, as it was a 'preliminary, procedural, or intermediate' step leading up to the issuance of the [statutory tax adjustment] and did not in any manner alter Plaintiffs' rights or obligations." 553 F. Supp. 3d 1284, 1293 (N.D. Ga. 2021), *aff'd*, No. 21-12508, 2022 WL 3449525 (11th Cir. Aug. 17, 2022), *cert. denied*, 143 S. Ct. 577 (2023). The same is true here. The extension agreement was an intermediate step in furtherance of publishing the statement of findings. It did not alter Plaintiffs' legal rights or obligations and imposed no legal consequences on any party. The extension merely maintained the status quo: the Settlement Act remained in effect, but certain provisions remained inchoate until publication of the statement of findings.

Finally, even if the Court concludes that the extension agreement was a "final agency action," the agreement is unreviewable because it is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Agency action falls within the section 701(a)(2) exception when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Agency actions in these circumstances are unreviewable because "the courts have no legal norms pursuant to which to evaluate the challenged action, and thus no concrete limitations to impose on the agency's exercise of discretion." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006) (quoting *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002)).

Here, the Settlement Act broadly directs the Secretary to execute and take all actions necessary to carry out the Compact, Pub. L. No. 111-291 § 402(3), 124 Stat. 3097, but the

specific act of agreeing to an extension of the publication deadline is nowhere detailed. Rather, the statutory text simply indicates that an extension may be agreed to by the Tribe and Secretary, so long as notice is given to the State of Montana. *Id*. § 415, 124 Stat. 3121 ("If the Secretary does not publish a statement of findings under section 410(e) not later than March 31, 2016, or the extended date agreed to by the Tribe and the Secretary, after reasonable notice to the State of Montana . . ."). Congress did not address the Secretary's authority and discretion to agree to an extension anywhere else in the Settlement Act, and there are no agency rules or regulations on the subject; there are, thus, no standards that would guide this Court's review of that decision. Given this statutory framework and the absence of "judicially manageable standards" to guide meaningful review, the extension is committed to agency discretion by law and not reviewable under the APA. *See, e.g., Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (concluding that FAA regulations, by specifically giving the Director sole authority to make determinations about the need for non-association pilots, failed to provide a judicially manageable standard by which to review such a decision).

B. Claim 2 does not allege a cognizable violation of the Settlement Act.

Even if the Court finds that Claim 2 constitutes a challenge to final agency action, the claim fails because Plaintiffs have not pled facts that would support a cognizable violation of the Settlement Act. To survive a Rule 12(b)(6) motion to dismiss, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Here, Plaintiffs allege that, based on the terms of the Settlement Act, the Secretary prematurely published the statement of findings in the Federal Register. Compl. ¶¶ 120, 177, 192-96. Plaintiffs allege that only one of the seven required findings was premature—that in §

410(e)(1)(A), *see, e.g.,* Compl. ¶¶ 155, 161—and do not challenge the other six. Accepting all facts as true, however, it is plain on the face of the Complaint that the Secretary properly published the statement of findings in accordance with the statutory requirements. For this reason, Plaintiffs have failed to adequately plead a claim for which relief could be granted, and the Court must dismiss this claim.

Parsing two disjunctive provisions of the Settlement Act evidences Plaintiffs' pleading deficiency. Section 410(e)(1) of the Settlement Act defines the "enforceability date" of the Act as "the date on which the Secretary publishes in the Federal Register a statement of findings" that must include the seven findings identified in subsections (A) – (G). As noted above, the only finding relevant here is subsection (A), *see, e.g.,* Compl. ¶¶ 155, 161, 192-96, which requires the Secretary to make one of two findings: *either* (i) that "the Montana Water Court has issued a final judgment and decree approving the Compact;" *or* (ii) "if the Montana Water Court is found to lack jurisdiction, the district court of jurisdiction has approved the Compact as a consent decree and such approval is final." Pub. L. No. 111-291 § 410(e)(1)(A), 124 Stat. 3112. Section 403(7) of the Act defines "final" for purpose of Section, 410(e)(1)(A), to mean *either*: "(A) completion of any direct appeal to the Montana Supreme Court of a decree by the Montana Water Court pursuant to section 85–2–235 of the Montana Code Annotated (2009), including the expiration of time for filing of any such appeal," *or* "(B) completion of any appeal to the appropriate United States Court of Appeals, including the expiration of time in which a petition for certiorari may be filed in the United States Supreme Court, denial of such petition, or issuance of a final judgment of the United States Supreme Court, whichever occurs last." *Id.* § 403(7), 124 Stat. 3098.

Here, the Secretary found that section 410(e)(1)(A)(i) was satisfied based on the finality definition found in section 403(7)(A). In other words, subparagraph 401(e)(1)(A) was satisfied because the "Montana Water Court has issued a final judgment and decree approving the Compact." Compl. ¶ 157. Plaintiffs themselves acknowledge that the requisite event had occurred: In 2015, the Supreme Court of Montana affirmed the Montana Water Court's final judgment on appeal; and the U.S. Supreme Court denied *certiorari* on June 13, 2016. Compl. ¶ 166-67. Thus, on Plaintiffs' own allegations and the statute's plain meaning, the Settlement Act's condition precedent in section 410(e)(1)(A) to the Secretary's statement of findings was satisfied at the time of publication.

Plaintiffs allege that publication was premature and violated the terms of the Settlement Act because appeal of *Crow Allottees Association v. BIA*, which challenged the jurisdiction of the Montana Water Court in federal district court, was not concluded until September 27, 2017. Compl. ¶¶ 170-75. Federal Defendants do not dispute that timeline. The problem for Plaintiffs is that it is irrelevant.

Plaintiffs do not allege that the Montana Water Court was ever found to lack jurisdiction. And the facts as alleged in the Complaint make clear that, over the course of many years and several litigations, no court made any such finding. Thus, section 410(e)(1)(A)(ii), which begins "*if* the Montana Water Court is found to lack jurisdiction," (emphasis added), could not apply, and the only finality option at issue was section 410(e)(1)(A)(i) requiring the Secretary find that "the Montana Water Court has issued a final judgment and decree approving the Compact[.]" Which brings us back to the definition of final in section 403(7)(A). Here again, the disjunctive phrase requires that only one definition be satisfied. And the Complaint concedes that section 403(7)(A)—"completion of any direct appeal to the Montana Supreme Court. . . including the

expiration of time for filing of any such appeal;" was satisfied. Compl. ¶ 156, 166-67. Indeed, in this context, the only sensible definition of "final" that could apply is section 403(7)(A). The alternative definition in section 403(7)(B), which refers to "any appeal to the appropriate United States Court of Appeals" would be nonsensical: United States Courts of Appeal have no jurisdiction to hear appeals from a state court, like the Montana Water Court. 28 U.S.C. §§ 1291, 1292, 1296. Thus, there is no possibility of any "appeal" of the Montana Water Court's judgment and decree to an "appropriate United States Court of Appeals[.]" Pub. L. No. 111-291 § 403(7)(B), 124 Stat. 3098. The second definition of finality is plainly tied to the alternative finality provision in 410(e)(1)(A)(ii), contemplating federal district court approval of the Compact as a consent decree, *if and only if*, the Montana Water Court was found to lack jurisdiction, in which case a United States Court of Appeal may have some role.

Because it is clear on the face of the Complaint and the text of the Settlement Act that, even if the Court accepts all facts as true, Plaintiffs could not succeed on Claim 2, the Court should dismiss for failure to state a claim.

III. Plaintiffs Fail to Allege a Cognizable Breach of Trust Claim (Claim 3)

The Court should dismiss Plaintiffs' breach of trust claim because they fail to identify any substantive source of law that establishes a specific fiduciary duty. Plaintiffs allege that the publication of the statement of findings violated the government's fiduciary obligations, Compl. ¶ 209, and rely exclusively on "common law fiduciary duties" and the *Winters* doctrine. Compl. ¶¶ 197-209. Neither, however, provides a basis for a cognizable breach of trust claim because neither is a treaty, statute, or regulation.

As the Supreme Court recently reaffirmed, to maintain a breach of trust claim, a tribal plaintiff "must establish, among other things, that the text of a treaty, statute, or regulation

imposed certain duties on the United States." *Navajo Nation*, 2023 WL 4110231, at *5. While there is "a general trust relationship between the United States and the Indian people," that general trust relationship does not, by itself, create legally enforceable obligations for the United States. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (quoting *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 225 (1983). "[T]he trust obligations of the United States to the Indian tribes are established and governed by treaty, statute, or regulation, rather than by the common law of trusts." *Navajo Nation*, 2023 WL 4110231, at *5 n.1 (citing *Jicarilla*, 564 U.S. at 165, 177). "Stated otherwise, the trust obligations of the United States to the Indian tribes are established by Congress and the Executive, not created by the Judiciary." *Id*.[3] In order to bring a claim for breach of trust, a tribal plaintiff "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 506 (2003) (citation omitted) (emphasis added); *see also Navajo Nation*, 2023 WL 4110231, at *5 n.1; *El Paso Nat. Gas Co.*, 750 F.3d at 892.

Here, Plaintiffs have identified no such source and their reliance on common law fiduciary duty and the *Winters* doctrine will not suffice. Plaintiffs allege, for example, that the government breached its trust obligation to protect allottees' *Winters* rights during the compact negotiations, the Montana Water Court proceedings, and in publishing the statement of findings. Compl. ¶¶ 200-01, 205, 209. Specifically, they allege that the "United States has a common law fiduciary duty to identify the *Winters* Doctrine water rights appurtenant to each of the Plaintiffs'

[3] Moreover, as the Supreme Court clarified in *Navajo Nation*, "*Jicarilla's* framework for determining the trust obligations of the United States applies to any claim seeking to impose trust duties on the United States, including claims seeking equitable relief. That is because *Jicarilla's* reasoning rests upon separation of powers principles—not on the particulars of the Tucker Acts." *Id*.

and other Allottees' individual Indian trust allotments on the Crow Reservation." Compl. ¶ 200. And Plaintiffs also accuse the government of "violation of the common law fiduciary duties of the Defendants to protect the Plaintiffs' water rights." Compl. ¶ 206. As shown above, however, the contours of the United States' fiduciary responsibilities are defined not by the common law or general notions of trust, but by specific "statutes and regulations." *Jicarilla*, 564 U.S. at 177. "Common-law principles are relevant *only* when applied to a 'specific, applicable, trust-creating statute or regulation.'" *Id*. at 184 (emphasis added) (citation omitted); *see also Navajo Nation*, 2023 WL 4110231, at *5-6, n.1. A breach-of-trust claim therefore cannot proceed unless the plaintiff can allege the violation of "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U.S. at 506. Because Plaintiffs identify no such source, they have failed to state a claim for breach of trust.

In any event, much of the conduct that Plaintiffs allege was in breach of the government's trust obligations occurred prior to the publication of the statement of findings, meaning that any challenge is time-barred. For example, Plaintiffs complain that the United States "failed to determine the extent" of their *Winters* rights and "to assert those rights in the Crow water rights adjudication before the [Montana Water Court]." Compl. ¶¶ 200-01, 207-08. But the Crow water rights adjudication before the Montana Water Court concluded in 2015. *Id*. ¶ 76. Any challenges to the government's action, or inaction, during that proceeding is thus time-barred. With respect to Plaintiffs complaints about the approval of a tribal water code, by their own admission the alleged deadline for enacting and approving that water code ran March 18, 2014.[4] *Id*. ¶ 204. Meaning that the statute of limitations for challenging the United States' action or

[4] Until the Tribe enacts a tribal water code, the Secretary will continue to administer the tribal water right, as provided in the Settlement Act. Pub. L. No. 111-291 § 407(f)(3), 124 Stat. 3106.

inaction ran in March 2020. Plaintiffs cannot use this lawsuit to relitigate their complaints surrounding the water compact negotiations, which concluded in 1999, or the Montana Water Court proceedings, which concluded in 2015. The time for such challenges has passed.

IV. Plaintiffs' Fifth Amendment Claim Fails (Claim 4)

The Court should dismiss Plaintiffs' Fifth Amendment claim for several reasons. To the extent Plaintiffs assert a taking through this claim, the Court lacks jurisdiction, and, in any event, the Complaint fails to state a cognizable takings claim. To the extent Plaintiffs assert a violation of their procedural or substantive due process rights, they have failed to state a claim.

First, if pled as a taking, this Court lacks jurisdiction. Through this claim, Plaintiffs assert that the Secretary's publication of findings deprived them of their *Winters* rights. *Id*. ¶ 213. The vehicle to redress this injury is a claim for just compensation under the Fifth Amendment for a taking of their property. The remedy for an alleged taking of property by the federal Government presumptively lies under the Tucker Act (or Little Tucker Act). *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984) (holding that the district court erred in enjoining provisions of the Federal Insecticide, Fungicide, and Rodenticide Act that effected a taking of property because the Tucker Act provided an adequate remedy). Under the Tucker Act, 28 U.S.C. § 1491(a)(1), the Court of Federal Claims has exclusive jurisdiction over such claims against the United States that exceed $10,000. Under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), district courts have concurrent jurisdiction over such claims not exceeding $10,000.

Though Plaintiffs cite the Little Tucker Act as a basis for venue, Compl. ¶ 40, their Fifth Amendment claim does not ascribe a monetary value to this alleged taking. Indeed, neither this claim nor the prayer for relief seeks monetary damages. *Id*. ¶¶ 210-14; Prayer for Relief.

Presumptively, however, Plaintiffs would argue that the compensation they are owed for this alleged taking exceeds $10,000, meaning that this Court lacks jurisdiction.

Even if under $10,000 and within this Court's jurisdiction, their taking claim still fails. The Constitution grants Congress plenary authority over Indian affairs, U.S. Const. art. I, § 8, cl. 3, as the Supreme Court recently and unequivocally confirmed: "In a long line of cases, we have characterized Congress's power to legislate with respect to the Indian tribes as 'plenary and exclusive.'" *See Brackeen*, 143 S. Ct. at 1627 (citations omitted). That plenary authority extends to "the Indian trust relationship," including the power to protect, control, and manage Indian trust assets. *Jicarilla*, 564 U.S. at 175. Where an allotment is held in trust, both the land and associated water rights are subject to Congress's plenary authority. Congress's "[p]ower to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways[.]" *Shoshone Tribe of Indians of the Wind River Reservation in Wyo. v. United States*, 299 U.S. 476, 497 (1937). Where, however, Congress goes so far as "'to give tribal lands to others, or to appropriate them to its own purposes,'" Congress assumes an obligation to render just compensation. *Id*. (quoting *United States v. Creek Nation*, 295 U.S. 103, 110 (1935)). But Congress may "change the form of [Indian] trust assets" without subjecting the United States to liability for a taking as long as it acts, in good faith, to "provide [trust beneficiaries] with property of equivalent value." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 416 (1980). "If [a trustee] does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence." *Id*.

Here, there can be no doubt that Congress acted in good faith to provide the Crow Tribe and allottees with "property of equivalent value" through substitution of certain water rights with those provided under the Settlement Act. Congress exercised its authority, as trustee for the

Tribe and for allottees within the Crow Reservation, to "achieve a fair, equitable, and final settlement of claims to water rights in the State of Montana." Pub. L. No. 111-291 § 402(1), 124 Stat. 3097. The Settlement Act guarantees allottees a right to use the quantified Tribal Water Right specified in the Compact, as well as other valuable benefits, including funds for infrastructure improvements, in exchange for a waiver of their claims for *Winters* rights. *Id*. § 407, 124 Stat. 3104-06; *id*. § 409, 124 Stat. 3108-09. The Settlement Act is a proper exercise of Congress's power to manage trust property for the benefit of the Crow Tribe, its members, and allottees, without incurring any liability for taking their property. For these reasons, Plaintiffs takings claim fails.

Second, to the extent Plaintiffs allege that the publication of findings deprived them of procedural or substantive due process rights, they have failed to state a claim. As the Ninth Circuit previously concluded in analyzing a similar due process challenge asserted by Crow allottees: "This procedural due process argument fails because the legislative process was the only process to which Plaintiffs were entitled." *Crow Allottees Ass'n.*, 705 F. App'x at 492 (citing *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 283 (1984) ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy.")).[5] Moreover, Plaintiffs' assertion that the "expropriation" of their water rights was "without notice or due process" is belied by the allegations in the Complaint. Plaintiffs were on notice when Congress enacted the Settlement Act in 2010 that certain waivers and releases affecting their water rights would go into effect on the enforceability date, Compl. ¶¶16, 18 130-31, and Plaintiffs were on notice by the statute's terms that that date would be

[5] There, allotees alleged due process violations for not consulting them during Compact negotiations, not providing them with private counsel, and not obtaining their consent to waive their rights. *Id*.

March 31, 2016, or some later date agreed to by the Tribe and the Secretary. *Id*. ¶¶ 110, 112-13, 119-20, 149-50; *see also* Pub. L. No. 111-291 § 415, 124 Stat. 3121.

Finally, to the extent Plaintiffs attempt to lodge a facial challenge to the Settlement Act, by seeking its invalidation, they have failed to state a claim.[6] *See, e.g., Babbitt v. Sweet Home Chapter, Cmtys for Great Ore.*, 515 U.S. 687, 699 (1995) (facial challenge asserts that a challenged statute or regulation is invalid in every circumstance). Facial challenges to a legislative act are "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [a]ct would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, 505 U.S. 71, 82 (1992) ("The burden on one making a facial challenge to the constitutionality of a statute is heavy[.]"). The Settlement Act is not plainly unconstitutional, and Plaintiffs have not pled facts to make out a plausible case to the contrary. *See Francis v. Giacomelli*, 588 F.3d 186, 193 (5th Cir. 2009) (requiring "plausibility of entitlement to relief" to survive a motion to dismiss); *see also Sabri v. United States*, 541 U.S. 600 (2004) (resolving facial constitutional challenge on a motion to dismiss).

The Ninth Circuit, considering a similar constitutional challenge to the Settlement Act brought by Crow allottees, explained: "Plaintiffs only ask us to hold that the Settlement Act (and, by extension, the Compact) is unconstitutional. Though their allegations may support a claim for damages, they do not provide a basis for rendering the Settlement Act invalid." *Crow Allottees Ass'n.*, 705 F. App'x at 492 (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) ("Throughout the history of the Indian trust relationship, [the Supreme Court has]

[6] Any facial challenge to the Settlement Act is also time-barred, as discussed above, because the Settlement Act was enacted in 2010 and contained the terms of the waivers and releases that Plaintiffs now challenge.

recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress."); *Winton v. Amos*, 255 U.S. 373, 391 (1921) ("It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property.")). Plaintiffs have again provided no basis for holding the Settlement Act unconstitutional.

CONCLUSION

The Court should reject allottees latest challenge to the Compact and Settlement Act and dismiss Plaintiffs' Complaint in full. The injuries Plaintiffs complain of stem not from the federal actions they challenge here but rather from policy decisions that Congress made in enacting the Settlement Act and implementing the Compact. Moreover, those injuries cannot be redressed by a favorable ruling in this Court. Thus, the Court should dismiss under Rule 12(b)(1) because Plaintiffs lack standing (Claims 1-4). In addition, Plaintiffs have failed to state claims upon which relief could be granted under the APA (Claim 1), Settlement Act (Claim 2), fiduciary duty (Claim 3), or Fifth Amendment (Claim 4). Thus, the Court should dismiss under Rule 12(b)(6). For these reasons, Federal Defendants respectfully request that the Court grant their motion and dismiss this case.

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Respectfully submitted,

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division

/s/ Sally J. Sullivan
Sally J. Sullivan
D.C. Bar No. 1021930
U.S. Department of Justice
Environment and Natural Resources Division, Natural Resources Section

P.O. Box 7611
Washington, D.C. 20044
Tel.: (202) 514-9269
Fax: (202) 305-0275
sally.sullivan@usdoj.gov

Overnight delivery:
4 Constitution Square
150 M Street, Suite 3.113
Washington, D.C. 20002

Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that that a copy of the foregoing was served on all counsel of record by the Court's ECF system on June 29, 2023.

/s/ Sally J. Sullivan