**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-JEB

**REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

Plaintiffs' fundamental grievance lies with policy choices made by Congress in the Crow Tribe Water Rights Settlement Act of 2010 ("Settlement Act" or "Act"), and they have not brought cognizable claims against the Department of the Interior ("Interior") that would entitle them to the extraordinary relief they seek. As explained in Federal Defendants' motion to dismiss, ECF No. 16, Plaintiffs lack standing to challenge the actions by Interior at issue here. Plaintiffs have also failed to adequately plead any alleged violation of the Settlement Act (Claims 1 and 2), fiduciary duties (Claim 3), or the Fifth Amendment (Claim 4). Plaintiffs' response, ECF No. 21, makes fatal concessions, shifts focus from the discrete agency actions challenged in the Amended Complaint, and ignores controlling Supreme Court precedent. Because their response fails to rebut Federal Defendants' arguments for dismissal, the Court should dismiss the Amended Complaint in its entirety.

## ARGUMENT

### I. Plaintiffs lack standing to bring their claims.

Plaintiffs lack standing to bring their claims. To establish standing, a plaintiff must show that: (1) they have suffered an "injury in fact"; (2) there is a "causal connection between the injury and the conduct complained of"; and (3) a favorable decision on the merits is likely to redress their injury. *Lujan v. Def's of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs have failed to identify any injury that is traceable to the agency actions they challenge or redressable by the relief they seek.[1]

[1] To the extent Plaintiffs are claiming that Count 4 includes a facial challenge to the constitutionality of the Settlement Act, that is not how Count 4 is pled. The Amended Complaint's prayer for relief seeks a declaration that the Act is unconstitutional, but that request for relief is not tethered to any of Plaintiffs' four claims. Plaintiffs may have standing for a claim challenging the Act's constitutionality, but it would be barred for other reasons, including the statute of limitations.

**A. Plaintiffs have not identified an injury traceable to the agency actions they challenge.**

Plaintiffs have not met the first two prongs of the standing inquiry—they have not identified an injury that is "fairly traceable" to the agency actions they challenge in this suit. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), as revised (May 24, 2016). Plaintiffs' first claim challenges a 2016 agreement between the Crow Tribe and the Secretary of the Interior ("Secretary") to extend the deadline for publishing the statement that set the enforceability date for the waivers in the Settlement Act. The second, third, and fourth claims challenge the publication of the statement itself.[2] As to the first two standing prongs, Plaintiffs must first show that they "have suffered an injury in fact—an invasion of a legally protected interest" that is "concrete and particularized." *Lujan*, 504 U.S. at 560 (internal quotation omitted). Second, they must show that it is "substantially probable" that the challenged actions by Interior, "not of some absent third party, [] cause[d] the particularized injury[.]" *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996).

Plaintiffs' alleged injury is the "expropriation or diminishment" of their *Winters* water rights by operation of the waivers and releases in the Settlement Act. Am. Compl. ¶ 213, ECF No. 14. Even assuming that Plaintiffs' water rights have actually been "expropriat[ed] or diminish[ed]" (they have not), the Settlement Act itself caused that injury, not the Department of the Interior's extension agreement or statement. *Id.* Plaintiffs' response concedes the extension agreement merely granted Interior more time to complete certain steps contemplated by the Settlement Act. Pls.' Mem. of Points & Authorities in Resp. to Defs.' Mot. to Dismiss at 18, ECF No. 21 ("Resp."). Its effect was to maintain the status quo, not to alter any of Plaintiffs'

[2] Plaintiffs' response disclaims any challenge to the Government's actions in the Compact negotiations or subsequent Montana Water Court proceedings. Resp. at 32.

water rights. And while the Secretary's publication of the statement is what set the enforceability date for the waivers and releases in the Settlement Act, Congress mandated that publication in the Settlement Act. Pub. L. No. 111-291, §§ 402(3)(B), 410(e)(1), 124 Stat. 3097, 3112. Plaintiffs themselves concede that "publication of the [statement] . . . was a clear and mandatory directive under the [A]ct." Resp. at 19. The Settlement Act, not any Interior decision-making, set the enforceability date and created the waivers and releases. Any injury caused by the waivers and releases in the Settlement Act is thus wholly attributable to Congress.

Plaintiffs now appear to challenge the alleged lack of a Current Use List and Tribal Water Code as breaches of trust independent from the Secretary's publication of the statement. Resp. at 33. Those items concern shortage sharing and administration of the Tribal Water Right. Plaintiffs seem to be arguing that Interior has breached trust duties imposed by the Settlement Act by not producing the Current Use List or Tribal Water Code (despite also arguing that the Act is invalid), and that the absence of these items impacts the value of their water rights. Resp. at 6-8, 33. Injuries that Plaintiffs attribute to the lack of a Current Use List or Tribal Water Code cannot provide standing to challenge the extension agreement or statement, since "plaintiffs must prove separate standing as to each agency action challenged." *Sec. Indus. & Fin. Markets Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 400 (D.D.C. 2014).

In any event, Plaintiffs cannot trace any injury to a lack of a Current Use List because, contrary to their assertions, the Current Use List exists and was given final approval by the State of Montana in 2016. Decl. of John S. Anevski, Sept. 18, 2023, attached as Ex. 1.[3] Plaintiffs

[3] The Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction" under Federal Rule of Civil Procedure 12(b)(1). *Gulf Coast Maritime Supply, Inc. v. United States*, 867 F.3d 123, 128 (D.C. Cir. 2017) (quoting *Jerome Stevens Pharms. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)). And while courts should generally accept factual allegations in the complaint when deciding a motion to

were not suffering any injury in fact from the lack of a Current Use List when they filed their Complaint and would thus lack standing to bring a claim challenging that alleged inaction. And because the Settlement Act places responsibility for producing the Tribal Water Code on the Crow Tribe, not the United States, any injury caused by the absence of the code is caused by an absent third party—the Tribe—not Federal Defendants. Pub. L. No. 111-291, § 407(f), 124 Stat. 3105. Plaintiffs also cannot trace any injury to the Secretary's alleged failure to "promulgate regulations for the administration of the Tribal Water Right as authorized" by Section 407 of the Settlement Act in the absence of a Tribal Water Code because the delivery of tribal water through the Crow Irrigation Project is already subject to the regulations at 25 C.F.R. Part 171. Resp. at 8.

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

Even if Plaintiffs had shown injury and causation, they would fail at the redressability prong. The redressability element of standing asks whether a plaintiff's injury "is likely to be redressed by a favorable decision on the merits." *Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015). Plaintiffs seek declarations that the extension agreement and 2016 statement are "void and unenforceable" because they violated either the Settlement Act, fiduciary duties, or the Fifth Amendment. Prayer for Relief, Am. Compl. at 55-56; *see also id.* ¶¶ 191, 196, 209, 213. Such a finding, however, would not lead to the Act's invalidation, and

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dismiss, "[w]here a motion to dismiss a complaint 'present[s] a dispute over the factual basis of the court's subject matter jurisdiction . . . the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant.'" *Feldman v. Fed. Deposit Ins. Corp.*, 879 F.3d 347, 351 (D.C. Cir. 2018) (alterations in original) (quoting *Phoenix Consulting v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)). Standing is a jurisdictional issue and it is proper for the Court to consider evidence regarding the Current Use List at this stage. *See Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1285 (D.C. Cir. 2016).

therefore would not redress the alleged "expropriation or diminishment" of Plaintiffs' water rights by operation of the waivers and releases in the Act. *Id.* ¶ 213.

The Settlement Act provides that "[t]he waivers under [Section 410(a)] shall take effect" on "the date [] the Secretary publishes in the Federal Register the statement of findings described in [S]ection 410(e)." Pub. L. No. 111-291, §§ 403(6), 410(b), 124 Stat. 3098, 3111. Regardless of their validity, the extension agreement and publication of the statement have already happened. Even assuming that the Court was to find the Secretary's publication of the statement arbitrary and capricious or contrary to law (it was not), it was the act of publication that set the enforceability date. *Id.* Plaintiffs concede that the publication "was a clear and mandatory directive under the [A]ct." Resp. at 19. Thus, the relief Plaintiffs seek is only achievable through amendment to the Settlement Act to change the enforceability date (or otherwise reverse the waivers and releases). Certainly, Plaintiffs could have challenged the Settlement Act itself as unconstitutional. As discussed below, however, Plaintiffs have not pled a constitutional challenge to the Act itself.[4] *See infra* pp. 17-21.

Plaintiffs claim that their injuries are redressable because the Court could issue declaratory relief voiding the Act. Resp. at 14–15. But redressability must be tethered to the claims actually pled. The possibility that the Court could issue declaratory relief invalidating the Settlement Act in response to a well-pled facial constitutional challenge does not provide Plaintiffs standing to bring entirely different claims challenging Interior's actions. *See Feloni v. Mayorkas*, No. 22-2094, 2023 WL 3180313, at *4 (D.D.C. May 1, 2023) (finding a plaintiff had

[4] Additionally, as mentioned in Federal Defendants' motion to dismiss, the Court arguably could not consider the remedy of finding the Settlement Act unconstitutional without joining the Crow Tribe and State of Montana. Fed. Defs.' Mot. to Dismiss & Mem. of Law in Support at 18, ECF No. 16 ("U.S. Mem.").

standing because she "[sought] a form of relief [the] court may grant"). Claims 1 and 2 challenge actions by Interior and are brought under the Administrative Procedure Act ("APA"). Resp. at 17-20. Claim 3 alleges a breach of trust, but it too is pled as an APA challenge to the 2016 publication by the Secretary. Am. Compl. ¶ 209. And a claim, like Claim 4, that challenges an agency action under the APA as having been unconstitutional is still governed by the APA standards of review and remedies. *See F.C.C. v. Fox Television, Inc.*, 556 U.S. 502, 516 (2009); Am. Compl. ¶ 213. "Except in rare circumstances," the remedy in APA cases is to remand the agency action for further consideration. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). The result of "a favorable decision on the merits" of Plaintiffs' claims would thus not be invalidation of the Settlement Act. Plaintiffs cannot circumvent the purpose of redressability analysis and the rule that they must prove standing "for each claim" brought, *Severino v. Biden*, 71 F.4th 1038, 1042 (D.C. Cir. 2023), by requesting relief—invalidation of an act of Congress—that their claims could not possibly entitle them to.

Plaintiffs' standing argument also relies on irrelevant provisions of the Settlement Act and Crow Tribe-Montana Water Rights Compact ("Compact"), which the Settlement Act ratified. Plaintiffs cite, for example, Section 410(g) of the Settlement Act, Resp. at 13, which provides that "[i]n the event that all appropriations authorized by this Act have not been made available to the secretary by June 30, 2030 . . . the waivers authorized in this section shall expire[.]" Pub. L. No. 111-291, § 410(g), 124 Stat. 3113. Plaintiffs have not made any allegations that would invoke this provision, which in any event is untethered to the Amended Complaint's four claims, all of which focus on Interior. The right of the Tribe to withdraw from the Compact under certain circumstances is likewise irrelevant to what relief the Court can grant Plaintiffs in this suit. *See* Resp. at 13 (citing Compact Art. VII.A.2).

The additional injuries Plaintiffs tie to their breach of trust claim (Claim 3) are also not redressable by the relief they seek. The Court cannot redress the lack of a Current Use List because the Current Use List already exists. The Court also cannot order Federal Defendants to fulfill the Tribe's responsibility to enact a Tribal Water Code. And in any event, Plaintiffs have failed to explain how a remedy related to the Current Use List or Tribal Water Code would remedy the injury on which they base their Amended Complaint, the supposed "expropriation" of their water rights. Am. Compl. ¶ 213.

## II. Plaintiffs have failed to state a claim.

Even if the Court were to find that Plaintiffs have standing, all of Plaintiffs' claims should be dismissed under Rule 12(b)(6) for failure to state a claim. Plaintiffs' response effectively admits that their challenge to the validity of the extension agreement (Claim 1) is unreviewable under the APA. The interpretation of the Settlement Act offered in defense of their claim that the Secretary's publication of the 2016 statement was premature (Claim 2) fails as a matter of law. And finally, Plaintiffs' response in support of their breach of trust and constitutional claims (Claims 3 and 4) does not rebut Federal Defendants' arguments for dismissal and ignores controlling Supreme Court precedent.

### A. Plaintiffs' response concedes that the extension agreement is not reviewable under the APA (Claim 1).

Plaintiffs' response effectively concedes that their first claim, which challenges the validity of the extension agreement, should be dismissed. In their motion to dismiss, Federal Defendants argued that the extension agreement is unreviewable under the APA both because it was not a final agency action and because, even if it was, there are no judicially manageable standards under which to review the agreement. U.S. Mem. at 19-22. Plaintiffs' response concedes the first point and fails to respond to the second. Resp. at 17-19.

Plaintiffs agree that only final agency action is reviewable under the APA and that the extension agreement was not final agency action. Plaintiffs concede that "[t]he APA is the vehicle for advancing claims under the Settlement Act[,]" and review under Section 704 of the APA "does require 'final agency action.'" Resp. at 17 (quoting 5 U.S.C. § 704). Plaintiffs go on to admit, however, that "the negotiation with the Tribe regarding the extension of time . . . was an interlocutory act, aimed at granting Interior additional time to complete the obligatory steps required by Congress[.]" *Id.* at 18; *see also id.* ("Plaintiffs are not asserting that the [extension agreement] was [a] final agency action." (capitalization altered)). An action that is "merely tentative or interlocutory" is not a final action, *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), and the interlocutory nature of the extension agreement "is sufficient to deprive [Plaintiffs] 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).

While Plaintiffs' admission of the interlocutory nature of the extension agreement is reason enough to dismiss Claim 1, Plaintiffs also do not respond to Federal Defendants' argument that the agreement was "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Agency action is unreviewable under the APA when the governing 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). Beyond requiring that the extension be agreed to by the Tribe and Secretary with notice to the State of Montana, the Settlement Act provides no standards with which to evaluate the validity of the agreement. Pub. L. No. 111-291, § 415, 124 Stat. 3121. While Plaintiffs' response argues that there is a judicially manageable standard of review for the publication of the 2016 statement, they do not identify any standards in the Settlement Act that would guide evaluation of the extension agreement.

Resp. at 19. Plaintiffs argue that Federal Defendants' argument under APA Section 701(a)(2) fails "[b]ecause it focuses on the wrong agency action," Resp. at 19, but the extension agreement is the agency action Plaintiffs expressly challenge in their first claim. Am. Compl. ¶¶ 183-191. Plaintiffs' failure to respond to Federal Defendants' argument that Claim 1 should be dismissed because the extension agreement was "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), makes it "proper to treat that argument as conceded." *Wilkins v. Jackson*, 750 F. Supp. 2d 160, 162 (D.D.C. 2010). Because there are no standards against which to judge the extension agreement, in addition to all parties agreeing it was not a final agency action, Claim 1 should be dismissed.

**B. By the Amended Complaint's own allegations and Settlement Act's plain meaning, the Secretary's publication of the statement complied with the Settlement Act (Claim 2).**

Plaintiffs' second claim alleges the Secretary prematurely published the 2016 statement that set the enforceability date for the waivers and releases in the Settlement Act. Am. Compl. ¶¶ 192-196. Specifically, Plaintiffs' argument relates to Section 410(e)(1)(A) of the Act, which required the Secretary to report that either (i) "the Montana Water Court has issued a final judgment and decree approving the water 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. The Montana Water Court was never found to lack jurisdiction, and the Secretary reported that the requirement of Section 410(e)(1)(A) was satisfied through option (i) after the Montana Water Court entered a final judgment and decree approving the Compact and that decree was affirmed by the Montana Supreme Court. Statement of Findings: Crow Tribe Water Rights Settlement Act of 2010, 81 Fed. Reg. 40,720 (June 22, 2016).

In their response, Plaintiffs agree that "satisfaction of either (i) or (ii) [would] suffice" and that "[t]here is no dispute that (i) was satisfied." Resp. at 20. Those agreements mean that Claim 2 fails to state a viable claim for relief. But Plaintiffs nonetheless argue that the Secretary was required to wait for the conclusion of a separate case challenging the Compact in federal court. Resp. at 20. Their argument is based on a misreading of the definition of "final" in Section 403(7) of the Settlement Act. Section 403(7) defines "final" for the 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 . . . 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." Pub. L. 111-291, § 403(7), 124 Stat. 3098 (emphasis added). Plaintiffs read the phrase 'whichever occurs last' to cover both 403(7)(A) and (B), rather than just (B). Plaintiffs therefore "assert that (B)"—completion of plaintiffs' appeal to the Ninth Circuit in *Crow Allottees Ass'n v. U.S. Bureau of Indian Affairs*, 705 F. App'x 489 (9th Cir. 2017)—"occurred last." Resp. at 20. As a result, under Plaintiffs' reading, the Secretary's statement was premature because it pre-dated the conclusion of the Ninth Circuit appeal.[5]

Plaintiffs' reading of Section 403(7) finds no support in the plain meaning of the statutory text. The only sensible reading of "whichever occurs last" in Section 403(7)(B) is that it refers to the immediately preceding list of possible steps after a decision by "the appropriate United States

[5] The appeal in *Crow Allottees Ass'n* concluded in 2017. 705 F. App'x 489. The Ninth Circuit found that the plaintiffs' complaint challenging the Compact and Settlement Act had failed to state a claim. *Id.* at 491-92.

Court of Appeals"—filing of "a petition for certiorari . . . in the United States Supreme Court, denial of such petition, or issuance of a final judgment of the United States Supreme Court[.]" 124 Stat. 3098. "Whichever occurs last" is plainly referring to the various options of finality within 403(7)(B), rather than both 403(7)(A) and 403(7)(B). The definitions of 'final' in Section 403(7)(A) and (B) were clearly meant to match the division of Section 410(e)(1)(A)(i) and (ii). It would make no sense to require a decision from a U.S. Court of Appeals to finalize a decision made by a court, such as the Montana Water Court, whose decisions it has no jurisdiction to review. 28 U.S.C. §§ 1291, 1292, 1296. Plaintiffs' reading would also conflict with the disjunctive nature of Section 410(e)(1)(A) by requiring the Secretary to wait for the resolution of a case originating in federal district court even where the Montana Water Court had not been found to lack jurisdiction. Plaintiffs' reading is also contradicted by their own admission that 410(e)(1)(A)(i)—which requires a "*final* judgment and decree" from the Montana Water Court, Pub. L. No. 111-291, § 410(e)(1)(A), 124 Stat. 3112 (emphasis added)—was satisfied while the appeal to the Ninth Circuit in *Crow Allottees Ass'n* was still pending. *See* Resp. at 20.

In sum, and on the face of the complaint, the Secretary's publication of the statement was timely under the plain language of Sections 403(7) and 410(e)(1)(A). Plaintiffs' response fails to rebut that conclusion and Claim 2 should be dismissed.

**C. Plaintiffs fail to allege a cognizable breach of trust claim (Claim 3).**

Plaintiffs' third claim alleges various actions and inactions by Federal Defendants breached fiduciary duties owed to them as allottees. The Amended Complaint claims Federal Defendants breached common law fiduciary duties by allegedly failing to take certain actions "in the Crow water rights adjudication before the [Montana Water Court,]" Am. Compl. ¶¶ 200-201; by acting as their trustee in Compact negotiations "without adequate notice to the Plaintiffs[] and

other allottees, without their participation . . . and without their consent," *id.* ¶¶ 207-208; and by publishing the 2016 statement in the absence of a Current Use List and Tribal Water Code, *id.* ¶ 206. Federal Defendants moved to dismiss Claim 3 because, contrary to the requirements of a long line of Supreme Court precedent, Plaintiffs' Amended Complaint fails to identify a statute, regulation, or treaty provision imposing the specific fiduciary duties that Plaintiffs allege Federal Defendants to have violated. U.S. Mem. at 25-28. Plaintiffs' response cannot overcome this threshold deficiency.

As an initial matter, Plaintiffs' response creates confusion as to what specifically they are alleging to have been a breach of trust. Plaintiffs' response states they are "NOT seek[ing] remedies for" the Government's actions in the "[Compact] negotiations or the prior litigation in the Montana Water Court. Those allegations are merely part of the background of the case." Resp. at 32 (capitalization in original). Taking allegations from that timeframe off the table, the only action the Amended Complaint seems to challenge as a breach of trust is the Secretary's publication of the 2016 statement in the absence of a Current Use List and Tribal Water Code. Am. Compl. ¶¶ 197-209; Resp. at 32 ("The focus in this suit, as indicated throughout this document and the Amended Complaint, is on the untimely publication of the [statement] and steps Interior was required to complete prior to its publication."). Plaintiffs' response, however, also seems to suggest that the alleged lack of a Current Use List and Tribal Water Code are their own independent breaches of trust. Resp. at 33. Adding to this confusion, Plaintiffs' response references "ongoing duties" to provide an "accounting and quantification of the Indian allottees' water rights, protect[] those rights and priorities, ensur[e] fair and equitable distribution vis a vis non-Indian rights holders, [and] provid[e] a means of gaining access to water for living and agricultural use[.]" *Id.* Regardless of how they characterize their claim, though, Plaintiffs have

not identified any specific statutory or regulatory prescriptions that any of the Government's alleged actions or inactions violated.

Plaintiffs' response continues to assert that they can ground their breach of trust claim in common law, but also cites several statutory and regulatory provisions for the first time as additional bases for their claim. Resp. at 21-32. There are several problems with Plaintiffs' arguments. First, their argument that they can base their claim on common law disregards controlling Supreme Court precedent. Second, none of the new sources of law they cite create applicable trust duties that Federal Defendants violated. Finally, even if Plaintiffs had stated a proper breach of trust claim, the remedy would not be invalidation of the Settlement Act.

**1. To state a claim for breach of trust, Plaintiffs must identify a treaty, statute, or regulation that establishes a specific duty the Government failed to perform.**

The United States has an undisputed "general trust relationship" with Indian tribes. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). As the Supreme Court has repeatedly made clear as recently as this year, however, that general trust relationship does not itself impose enforceable fiduciary duties on the United States or its agencies. *See, e.g.*, *id.*; *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1814 (2023); *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"). The United States' trust obligations "are established and governed by treaty, statute, or regulation, rather than by the common law of trusts." *Navajo Nation*, 143 S. Ct. at 1813 n.1 (citing *Jicarilla*, 564 U.S. at 165, 177). "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities," and plaintiffs bringing a breach of trust claim must therefore "identify a specific, applicable, trust-creating" treaty, statute, or regulation "that the government violated[.]" *Jicarilla*, 564 U.S. at 177 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009) ("*Navajo II*")); *see also Navajo Nation*, 143 S. Ct. at 1813-14.

Plaintiffs' assertion that they are not subject to this well-established principle is directly contrary to Supreme Court precedent. Plaintiffs argue that the requirements of *Jicarilla* and related cases only apply to suits for money damages brought under the Indian Tucker Act in the Court of Federal Claims, not their claim for equitable relief in district court. Resp. at 24-25. Plaintiffs cite Justice Gorsuch's *dissent* in *Arizona v. Navajo Nation* to support this argument, Resp. at 25, but fail to acknowledge the Court's holding in that same case that "*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." 143 S. Ct. 1804, 1813 n.1 (2023) (emphasis added). *Arizona v. Navajo Nation* itself concerned a claim for equitable relief brought in federal district court. *See id.* at 1812. Despite all of Plaintiffs' assertions to the contrary, binding Supreme Court precedent requires them to "identify a specific, applicable, trust-creating" treaty, statute, or regulation "that the government violated[.]" *Jicarilla*, 564 U.S. at 177 (quoting *Navajo II*, 556 U.S. at 301); *see also Navajo Nation*, 143 S. Ct. at 1813. Plaintiffs have failed to do so.[6]

Plaintiffs are likewise misplaced in their reliance on *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"), to argue that "general common law breach of trust doctrine continues to have meaning, defining the contours of the specific fiduciary responsibilities owed by the

[6] While not directly relevant to this case, Plaintiffs' assertion that the "articulation of the government's trust obligation" in *Jicarilla* and *Navajo II* "does not exist in the context of claims brought by Indian plaintiffs under the 'ordinary Tucker Act'" is also incorrect. Resp. at 24. The Tucker Act and Indian Tucker Act provide essentially the same access to relief. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). Just like tribes suing under the Indian Tucker Act, individual Indian plaintiffs bringing breach of trust claims under the Tucker Act must also identify a specific trust-creating statute, regulation, or treaty the Government violated. *See, e.g.*, *Ramona Two Shields v. United States*, 820 F.3d 1324, 1332 (Fed. Cir. 2016).

[United States] as trustee[.]" Resp. at 26. The plaintiffs in *Mitchell II* identified detailed statutory and regulatory provisions that required sales of timber to "be based upon a consideration of the needs and best interests of the Indian owner and his heirs," *Mitchell II*, 463 U.S. at 209 (internal quotations omitted), and "enumerated specific factors to guide that decisionmaking," *Navajo II*, 556 U.S. at 294. Looking to the statutory language, the Court found that the provisions "directly support[ed] the existence of a fiduciary relationship" in the Secretary's performance of those functions. *Mitchell II*, 463 U.S. at 224. It was thus "the statutes and regulations [] before [the Court]" that "define[d] the contours of the United States' fiduciary responsibilities." *Mitchell II*, 463 U.S. at 224. Plaintiffs point to no such law here that would support an enforceable fiduciary duty.

**2. Plaintiffs have not stated a claim for breach of trust.**

The Secretary's publication of the 2016 statement when all conditions in Section 410(e)(1) were met, as required by the Settlement Act, was not a breach of trust. Because the United States' trust obligations are defined by statutes and regulations, an agency action required by statute cannot be a breach of trust. As Plaintiffs admit, the Settlement Act did not require that either the Current Use List or Tribal Water Code be completed before publication of the statement. *See* Pub. L. No. 111-291, § 410(e)(1), 124 Stat. 3112; Resp. at 42. The absence of those items at the time of publication therefore cannot be the basis for a breach of trust claim.

To the extent Plaintiffs are now arguing that the alleged lack of a Current Use List and Tribal Water Code are their own breaches of trust, those claims fail. First, as discussed above, any claim of agency inaction based on the lack of a Current Use List is unavailable because the List exists. *See supra* p. 3. Second, the Settlement Act places responsibility for preparing the Tribal Water Code on the Crow Tribe, not Federal Defendants. Pub. L. No. 111-291, § 407(f)(1), 124 Stat. 3105. The Secretary's only responsibility in that process is to "approve or

disapprove the [code] within a reasonable period of time after the date on which the Tribe submits it to the Secretary." *Id.* § 407(f)(3)(C), 124 Stat. 3106. Additionally, even if Plaintiffs had identified a breach of trust stemming from a failure to meet the requirements of the Settlement Act, the remedy for that breach would be either (1) remand of the allegedly violative action, or (2) an order compelling the agency action withheld in violation of the alleged trust duty. A breach of trust by Interior cannot lead to the invalidation of a Congressional act.

Plaintiffs have also not identified a basis for any broader breach of trust claim concerning "ongoing duties" to quantify and protect their water rights, ensure fair and equitable distribution, or provide a means for them to acquire water. Resp. at 33. Many of the new statutory and regulatory provisions Plaintiffs identify in their response—none of which are referenced in Claim 3—are simply irrelevant to this case. Plaintiffs' response makes no attempt to explain how they apply or impose enforceable duties on Federal Defendants. Some concern irrigation projects and the reimbursability of the costs of such projects, while others concern allotments and allottees generally, but none touch on the specific issues of this case. *See* Resp. at 28-29 & nn.5-6 (citing 25 C.F.R. §§ 171.105, 171.110, 2530.0-8; 25 U.S.C. §§ 349, 382, 385, 386, 386a, 404; Act of May 8, 1906, Ch. 2348, 34 Stat. 182, 183).

25 U.S.C. § 381, which is discussed as background information in the Amended Complaint, is at least relevant to administration of allottee water rights, granting the Secretary authority to "prescribe such rules and regulations as [she] may deem necessary to secure a just and equal distribution" of water for irrigation among allottees. But the Secretary's *authority* to prescribe regulations as she deems necessary does not create a compellable *duty* to promulgate regulations. *See Wolfchild v. United States*, 731 F.3d 1280, 1289 (Fed. Cir. 2013). Further, any duty in Section 381 it is not one the Secretary has failed to perform—as discussed above, the

regulations at 25 C.F.R. Part 171 have governed management of the Crow Irrigation Project in the absence of a Tribal Water Code, and Plaintiffs do not allege that they have been denied a "just and equal distribution" of water for irrigation.

To the extent Plaintiffs cite this plethora of statutes and regulations to argue that the United States' general involvement in the administration of allotments and Indian water rights creates trust duties analogous to those in *Mitchell II*, that argument is unavailing. Plaintiffs have not identified any law like those in *Mitchell II* that created a fiduciary relationship going beyond a bare trust, and "the 'Federal Government's liability' on a breach-of-trust claim 'cannot be premised on control alone.'" *Navajo Nation*, 143 S. Ct. at 1815 (quoting *Navajo II*, 556 U.S. at 301). Plaintiffs point to language in the Settlement Act stating that the United States holds the Tribal Water Right in trust. *See* Resp. at 22-23 (citing Pub. L. No. 111-291, § 407(c), 3014). But this is exactly the kind of limited trust relationship the Supreme Court in *Mitchell I* found insufficient to establish enforceable trust obligations. *United States v. Mitchell*, 445 U.S. 535, 542 (1980). Further, another court has already found that 25 C.F.R. Part 171 does not create the same kind of "comprehensive scheme" for apportionment and delivery of water that the statutes and regulations in *Mitchell II* created for the sale of timber. *Grey v. United States*, 21 Cl. Ct. 285, 300 (1990), *aff'd*, 935 F.2d 281 (Fed. Cir. 1991).

Because Plaintiffs have not identified any trust duty Federal Defendants failed to perform and, even if Plaintiffs had, they would not be entitled to the relief they seek, Claim 3 should be dismissed.

**D. Plaintiffs have failed to plead a viable Fifth Amendment claim (Claim 4).**

Plaintiffs' fourth claim alleges that the publication of the 2016 statement violated their Fifth Amendment rights. Am. Compl. ¶¶ 210-214. Plaintiffs' response admits they have no

grounds for a Fifth Amendment takings claim.[7] Resp. at 33, 35-36. Plaintiffs also offer no response to Federal Defendants' argument, supported by the Ninth Circuit's holding in the prior federal case challenging the Compact, that a "procedural due process argument fails because the legislative process was the only process to which plaintiffs were entitled." U.S. Mem. at 30 (quoting *Crow Allottees Ass'n*, 705 F. App'x at 492). Even if Count 4 could be read as challenging the Settlement Act directly (rather than the Secretary's 2016 statement), Plaintiffs' procedural due process allegations "do not provide a basis for rendering the Settlement Act invalid." *Crow Allottees Ass'n*, 705 F. App'x at 492.

Plaintiffs have likewise failed to state a substantive due process or equal protection claim. For one, the Amended Complaint challenges the publication of the 2016 statement, not enactment of the statute. Am. Compl. ¶ 213. But, as explained above, the Settlement Act (not the Secretary's statement) is the source of the alleged "expropriation" of Plaintiffs' water rights. *See supra* pp. 2-3. The constitutional harm Plaintiffs allege to have occurred is detached from the action the Amended Complaint challenges.

Even if the Amended Complaint had pled a facial challenge the Settlement Act, the claim could not proceed. "[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." 28 U.S.C. § 2401. The Settlement Act was signed into law in 2010, and any facial challenge to the Act is therefore time barred. *See Alaska Legis. Council v. Babbitt*, 15 F. Supp. 2d 19, 24 (D.D.C.

[7] With Plaintiffs' admission that that the Settlement Act did not constitute a taking of property, their argument that a takings claim may seek equitable relief becomes irrelevant. Resp. at 33-34. Further, while Plaintiffs point broadly to *Hodel v. Irving*, 481 U.S. 704 (1987), and *Babbitt v. Youpee*, 519 U.S. 234 (1997), they "have made no showing that a suit for compensation under the Tucker Act, 28 U.S.C. § 1491(a)(1), or the Little Tucker Act, 28 U.S.C. § 1346(a)(2), [would be] inadequate to satisfy the demands of the Fifth Amendment" in their case. *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 137 (D.D.C. 2019).

1998), *aff'd*, 181 F.3d 1333 (D.C. Cir. 1999). Further, to bring a facial challenge, Plaintiffs would need to show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). But the Amended Complaint makes no such allegations.

Perhaps recognizing the statute of limitations and pleading problems—and again incorrectly assuming Claim 4 had challenged the Act rather than the Secretary's statement—Plaintiffs' response argues that they are bringing an as-applied challenge to the Settlement Act. But the fact that the Settlement Act applies to Plaintiffs would not make their claim an as-applied challenge. "[T]he distinction between facial and as-applied challenges . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Doe v. Rogers*, 139 F. Supp. 3d 120, 154 (D.D.C. 2015) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010)). Plaintiffs seek (inappropriately) complete invalidation of the Settlement Act and, if they had challenged the Act, it would therefore be a facial challenge. *See* Prayer for Relief, Am. Compl. at 56; *Doe v. Reed*, 561 U.S. 186, 194 (2010).

Regardless of the distinction between facial and as-applied challenges, though, "[t]he substantive rule of law is the same[.]" *Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014). The Amended Complaint does not allege facts sufficient to plausibly allege a substantive due process or equal protection violation. *See* U.S. Mem. at 31-32.

Plaintiffs' discussion of whether rational basis review or strict scrutiny applies (and whether the Act surpasses it) is irrelevant to the present Rule 12(b) motion. *See* Resp. at 41–44. We note, however, that Plaintiffs are incorrect in assuming strict scrutiny would apply. Statutory distinctions between Indians and non-Indians designed to fulfill "Congress' unique obligation toward the Indians" are political classifications subject to rational basis review, not racial

classifications subject to strict scrutiny. *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *see also Am. Fed. of Gov't Emps., AFL-CIO v. United States*, 330 F.3d 513, 520 (D.C. Cir. 2003). "[C]lassifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians." *United States v. Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted). Such classifications are accordingly permissible if they are "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. If laws drawing classifications between Indians and non-Indians "were deemed invidious racial discrimination, an entire title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552. Such a situation would be "untenable." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979). "[F]ederal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *Antelope*, 430 U.S. at 645.

The Settlement Act explicitly states the United States was acting in its capacity as trustee for the Tribe and allottees. Pub. L. No. 111-291, § 410(a), 124 Stat. 3109. And the Act classifies allottees like Plaintiffs "not as a discrete racial group, but, rather, as members of [a] quasi-sovereign tribal entit[y]" with unique water rights. *Mancari*, 417 U.S. at 554. The distinction between the Tribal Water Right and water rights recognized under state law was necessary to settle claims between holders of those rights, and thus rationally related to fulfilling Congress' "unique obligation" to the Crow Tribe and tribal members. *Id.* at 555.

But, regardless, the standard of review that would apply to judicial review of an equal protection claim against the Settlement Act is irrelevant because the Claim 4 is pled as challenge

to the Secretary's 2016 statement, not the Settlement Act. Indeed, any facial challenge to the constitutionality of the Act would be time-barred and, in any event, Plaintiffs have failed to adequately plead such a claim. Their fourth claim should therefore be dismissed.

## CONCLUSION

Plaintiffs lack standing to bring their claims and fail to plead a violation of the Settlement Act, fiduciary duties, or the Fifth Amendment. For those reasons, their Amended Complaint should be dismissed in its entirety.

Respectfully submitted this 18th day of September, 2023.

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## CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2023, I electronically filed the foregoing and attached exhibit using the CM/ECF system, which will automatically send email notification to the attorneys of record.

*s/ Amanda K. Rudat*
AMANDA K. RUDAT