IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Grace M. Goodeagle, et al.,	)	
Plaintiffs,	)	No. 12-431L
v.	)	Hon. Thomas C. Wheeler
United States,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT ON PRE-OCTOBER 25, 1994 IIM-ACCOUNT MISMANAGEMENT CLAIMS

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Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Other Authority

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Plaintiffs, holders of Quapaw Individual Indian Money accounts managed by the Bureau of Indian Affairs (collectively "Goodeagle"), oppose Defendant's, the United States, motion for partial summary judgment on Goodeagle's pre-1994 Individual Indian Money ("IIM") account investment mismanagement claims (Goodeagle's Seventh cause of action). First, the Government's argument that it had no duty to prudently invest Goodeagle's IIM trust funds until after Congress enacted the 1994 Indian Trust Fund Management Reform Act[1] is baseless: "The trust nature of the federal government's IIM responsibilities was recognized long before passage of the 1994 Act,"[2] and it "includes the obligation to maximize the trust income by prudent investment."[3]

[1] American Indian Trust Fund Management Reform Act of 1994, Pub. L. 103–412, 108 Stat 4239 (1994).
[2] *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001).
[3] *Cheyenne-Arapaho Tribes of Indians of Okla. v. United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975).

Second, this prudent investment duty has existed at least since Congress enacted 25 U.S.C. § 162a in 1918: "The 1918 Act constitutes a waiver of immunity insofar as it creates a substantive right enforceable against the United States for money damages."[4] Finally, even if the Government had not been statutorily required to prudently invest IIM funds, when it undertook management of IIM funds since at least 1938,[5] the United States was obligated to prudently invest the funds.

Goodeagle thus opposes the Government's motion for partial summary judgment and instead asks this Court to enter partial summary judgment holding that the Government has been obligated to prudently invest IIM funds since 1918.

Issues Presented

1. The Government argues that it had no duty to invest IIM trust funds until after Congress passed the Trust Fund Management Reform Act in 1994. But courts have repeatedly held that the Secretary's fiduciary obligations to IIM accounts did not commence in 1994 with the passage of the 1994 Act, and instead the Reform Act merely reaffirmed and codified preexisting federal trust responsibilities.[6] Should the Government's motion be denied?

2. In 1918 Congress enacted what is now 25 U.S.C. § 162a, identifying the types of investments the Interior Secretary is allowed to make with IIM and tribal trust funds. This in turn is part of a statutory and regulatory network requiring the Secretary to maximize income on IIM accounts through prudent investment. Is the Government liable if it breaches this statutory duty?

3. The Government has actively invested IIM account funds since at least 1938. In making investments with trust funds, the courts have held that the Secretary has a

[4] *White Mountain Apache Tribe of Ariz. v. United States*, 20 Cl. Ct. 371, 384 (1990)
[5] H.R. Report No. 103-778, at 11–12 (1994), available at http://www.justice.gov/sites/default/files/jmd/legacy/2014/02/13/houserept-103-778-1994.pdf.
[6] *See Cobell v. Norton*, 240 F.3d at 1100 (D.C. Cir. 2001); *see also Cobell v. Norton*, 392 F.3d 461, 471 (D.C. Cir. 2004).

> duty to do so prudently. If the Government did not invest prudently, is the Government liable?

Factual and statutory background

For a century the Government has held funds in trust on behalf of Indian tribes and individual Indians. These funds are mostly the proceeds from leasing Indian lands and natural resources.[7]

In 1918 Congress prescribed the types of accounts in which the Secretary was authorized to invest these IIM and tribal funds—interest-bearing bank accounts and Treasury bonds.[8] In 1938 Congress amended and codified this statute as 25 U.S.C. § 162a, adding some additional types of accounts into which the IIM and tribal funds could be invested. The statute now reads:

> (a) The Secretary of the Interior is hereby authorized in his discretion, and under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe . . . The said Secretary is also authorized, under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be selected by him the funds held in trust by the United States for the benefit of individual Indians . . . *Provided further,* That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States.[9]

Under the authority of 25 U.S.C. § 162a, the Interior Department has issued regulations creating parallel accounts for individual Indians and for tribes: "Congress has

[7] *See Cobell v. Norton*, 240 F.3d at 1100.
[8] Act of May 25, 1918, ch. 86 § 28, 40 Stat. 591.
[9] 25 U.S.C. § 162a.

passed a number of laws that require the Secretary to establish and administer trust fund accounts for Indian tribes and certain individual Indians who have an interest(s) in trust lands, trust resources, or trust assets."[10] For individual Indians like Goodeagle, the Government deposits income from trust lands and resources into an IIM account, which the Government defines as "an interest bearing account for trust funds held by the Secretary that belong to a person who has an interest in trust assets."[11] The Government also deposits income from tribal trust lands and resources into a Tribal Trust Account, which Interior defines as "a trust fund account for a federally recognized tribe that is maintained and held in trust by the Secretary,"[12] and the Government's investment choices determine the rate of return on these accounts because "[t]he rate of interest on a trust account changes based on how the money is invested and how those investments perform."[13]

Congress has traced the Interior Department's parallel investment policies for both individual and tribal trust funds to at least 1938:

> Beginning in 1938, the BIA initiated a policy in which all IIM funds would be invested and managed by the BIA Agency level offices. This policy was consistent with the Secretary of Interior's statutory responsibilities regarding tribal Indian trust funds.[14]

In 1994 Congress enacted the Indian Trust Fund Management Reform Act, codifying and reaffirming the Government's existing fiduciary duties concerning IIM

[10] 25 C.F.R. § 115.700.
[11] 25 C.F.R. § 115.002.
[12] 25 C.F.R. § 115.002.
[13] 25 C.F.R. § 115.712.
[14] H.R. Report No. 103-778, at 11–12 (1994).

trust funds. Relevant here, Congress added a new provision, 25 U.S.C. § 161a(b), which reads:

> All funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of individual Indians shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities with maturities suitable to the needs of the fund involved, as determined by the Secretary of the Interior, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable securities.[15]

Summary of Argument

A. The D.C. Circuit has repeatedly rejected the Government's argument, which it again tries to make here, that it was the 1994 Reform Act that first created the Government's fiduciary duty to prudently invest and account for IIM funds: The "[e]nactment of the Indian Trust Fund Management Reform Act in 1994 did not alter the nature or scope of the fiduciary duties owed by the government to IIM trust beneficiaries."[16] Because "[t]he trust nature of the federal government's IIM responsibilities was recognized long before passage of the 1994 Act,"[17] this Court[18] and the Court of Claims have repeatedly held the Government liable for its failure to prudently invest Indian funds:

> The fiduciary duty which the United States undertook with respect to these funds includes the "obligation to maximize the trust income by prudent

[15] 25 U.S.C. § 161a(b).
[16] *Cobell v. Norton*, 283 F. Supp. 2d. 66, 145 (D.D.C. 2003), *vacated in part on other grounds*, 392 F.3d 461.
[17] *Cobell*, 240 F.3d at 1100.
[18] *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 288–89 (2013).

> investment," and the trustee has the burden of proof to justify less than a maximum return . . . .[19]

B. These cases rely primarily on what is now 25 U.S.C. § 162a, originally enacted in 1918, which defines the types of investments the Secretary may make with IIM or tribal trust funds (interest-bearing trust accounts, Treasury bonds and, after 1938, certain bond mutual funds). This Court has repeatedly held that 25 U.S.C. § 162a waives sovereign immunity for damages when the Government fails to prudently invest Indian funds:

> The 1918 Act establishes and circumscribes the Secretary of the Interior's authority to invest funds. Exercise of that authority within the parameters established by the Act calls for the production of money. The 1918 Act constitutes a waiver of immunity insofar as it creates a substantive right enforceable against the United States for money damages.[20]

Though cases like *Cheyenne-Arapaho*,[21] *Jicarilla*,[22] and *White Mountain Apache*,[23] involved tribal funds rather than IIM funds, this makes no difference since both are governed by the same provision of 25 U.S.C. § 162a:

> The Secretary of the Interior is hereby authorized in his discretion to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe . . . and] The said Secretary is also authorized to withdraw from the United States Treasury and to deposit in banks to be selected by him the funds held in trust by the United States for the benefit of individual Indians.[24]

C. Since at least 1938 the BIA has consistently invested IIM funds:

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[19] *Cheyenne-Arapaho Tribes of Indians of Okla.*, 512 F.2d at 1394.
[20] *White Mountain Apache Tribe of Ariz.*, 20 Cl. Ct. at 384.
[21] *Cheyenne-Arapaho Tribes of Indians of Okla.*, 512 F.2d at 1390.
[22] *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013).
[23] *White Mountain Apache Tribe of Ariz. v. United States*, 20 Cl. Ct. 371 (1990).
[24] 25 U.S.C. § 162a.

> Beginning in 1938, the BIA initiated a policy in which all IIM funds would be invested and managed by the BIA Agency level offices. This policy was consistent with the Secretary of Interior's statutory responsibilities regarding tribal Indian trust funds.[25]

Having chosen to make those investments of IIM funds the Government is now liable for any breach of fiduciary duty resulting from its imprudent investment of those trust funds: "[C]onsistent with these statutory mandates, 'the United States [is] responsible for investing Indian trust funds in the highest yielding investment vehicles available to the funds in question.'"[26]

The Government cites no case holding that it is not liable for pre-1994 imprudent investment of IIM trust funds. *Gila River*[27] and *Ak Chin*,[28] the primary cases on which the Government relies, both held that IIM account-holders could not receive 4% interest on their breach-of-trust damages because Congress had not waived sovereign immunity to allow it. Goodeagle's Seventh Cause of Action does not seek interest, so these cases are inapposite.

ARGUMENT

I. The 1994 Reform Act merely reaffirmed BIA's existing duty to prudently invest IIM funds

The Government's motion is based on a false premise—its claim that until Congress enacted the Indian Trust Fund Reform Act of 1994 the BIA had no duty to

[25] H.R. Report No. 103-778, at 11–12 (1994).
[26] *Jicarilla Apache Nation*, 112 Fed. Cl. at 295 (*quoting Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629, 668 (2006)).
[27] *United States v. Gila River Pima-Maricopa Indian Cmty.*, 586 F.2d 209 (Ct. Cl. 1978).
[28] *American Indians Residing on Maricopa-Ak Chin Reservation v. United States*, 229 Ct. Cl. 167 (1981).

prudently invest Goodeagle's IIM trust funds. But the 1994 Reform Act did not create a new Government fiduciary duty for IIM funds; it merely reaffirmed the Government's existing fiduciary duties:

> [The] [e]nactment of the Indian Trust Fund Management Reform Act in 1994 did not alter the nature or scope of the fiduciary duties owed by the government to IIM trust beneficiaries. Rather, by its very terms, the 1994 Act identified a portion of the government's specific obligations and created additional means to ensure that the obligations would be carried out.[29]

As the D.C. Circuit stated in the *Cobell* IIM case, "[t]he trust nature of the federal government's IIM responsibilities was recognized long before passage of the 1994 Act,"[30] and the Reform Act "appears in large part to codify Interior's prior practice, which involved the exercise of complete control over the IIM funds."[31] These trust duties are money-mandating, creating a Tucker Act claim: "[T]he trust duties that in *Cobell VI* we said the 1994 Act reaffirmed are the fully enforceable variety found in *Mitchell II* and *White Mountain Apache Tribe.*"[32]

The House Report for H.R. 4833, which became the 1994 Reform Act, confirms Congress' intent that the Act clarify the Government's existing IIM fiduciary duty—not create a new one:

> Section 103 of the Amendment to H.R. 4833 is intended to codify current investment practices of the BIA. Beginning in 1938, the BIA initiated a policy in which all IIM funds would be invested and managed by the BIA

[29] *Cobell v. Norton*, 283 F. Supp. 2d at 145, *vacated in part on other grounds*, 392 F.3d 461.
[30] *Cobell v. Norton*, 240 F.3d at 1100.
[31] *Cobell v. Norton*, 392 F.3d at 471.
[32] *Id*. (citations omitted).

> Agency level offices. This policy was consistent with the Secretary of Interior's statutory responsibilities regarding tribal Indian trust funds. As early as 1929 the United States recognized its fiduciary responsibilities for Indian trust funds, and enacted 25 U.S.C. 161a requiring the Secretary to invest funds held in trust by the Secretary of on behalf of Indian tribes. BIA investment policies developed such that since 1966, the BIA pooled all IIM accounts for investment purposes, and since 1984 the Secretary has been required to invest tribal Indian trust funds in public-debt securities. Section 103 mirrors the language of 25 U.S.C. 161a to also require the Secretary of the Interior to invest individual Indian trust funds in public-debt securities.
>
> . . .
>
> The Committee believes this will further clarify the Secretary's trust responsibilities to require the Secretary to invest individual Indian trust funds . . . . [I]n order to broaden the types of investments in which the Secretary could invest individual Indian trust funds, and for purposes of consistency, [the provision] requires the Secretary to invest individual trust funds in public-debt securities.[33]

The Committee report further states that the Government has been investing Indian funds since 1820, and has been held liable for mismanagement of those funds:

> Funds have been held in trust for American Indians by the Federal Government since 1820. The Bureau of Indian Affairs (BIA) has had the authority to invest Indian Trust Funds since 1918, however, it was not until 1966 that the BIA exercised its full range of investment authority. The Office of Trust Funds Management (OTFM) within the BIA is responsible for implementing the fiduciary responsibility of ensuring that all proper controls are maintained with regard to the Indian trust funds.
>
> . . .
>
> The BIA is currently managing some 1,880 tribal accounts and nearly 337,000 separate IIM accounts.

[33] H.R. Report No. 103-778, at 11–12 (1994), available at http://www.justice.gov/sites/default/files/jmd/legacy/2014/02/13/houserept-103-778-1994.pdf.

> In order to protect these funds, investments must be unconditionally secured through Federal Government deposit insurance. Funds must be deposited in interest bearing accounts within 30 days of receipt. The Federal Government is responsible for lost interest if funds are not invested within that time. The responsibility for management of Indian Trust Funds by the BIA has been determined through a series of court decisions, treaties, and statutes.
>
> Volumes have been written about improper management of funds within the Bureau of Indian Affairs since its inception.[34]

Because the Government had the fiduciary duty to prudently invest Goodeagle's IIM trust funds both before and after the 1994 Reform Act, its motion for partial summary judgment fails.

II. Under 25 U.S.C. § 162a the United States has since 1918 had a statutory duty to maximize the trust income in Goodeagle's IIM accounts by prudent investment

In 1918 Congress enacted a statute that was later codified as 25 U.S.C. § 162a to define the investments the Interior Secretary was allowed to make with Indian trust funds—both tribal and individual.[35] The 1918 statute provided

> [t]hat the Secretary of the Interior be, and he is hereby authorized, under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and segregate the common, or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States, and which are susceptible of segregation, so as to credit an equal share to each and every recognized member of the tribe except those whose pro rata shares have already been withdrawn under existing law, and to deposit the funds so segregated in banks to be selected by him, in the State or States in which the tribe is located, subject to withdrawal for payment to the individual owners or expenditure for their benefit under the regulations governing the use of other individual Indian moneys. The said Secretary is also authorized, under such rules and regulations as he may prescribe, to

[34] *Id.* at 9.
[35] Act of May 25, 1918, ch. 86 § 28, 40 Stat. 591.

> withdraw from the Treasury and deposit in banks in the State or States in which the tribe is located to the credit of the respective tribes, such common, or community, trust funds as are not susceptible of segregation as aforesaid, and on which the United States is not obligated by law to pay interest at higher rates than can be procured from the banks.[36]

In 1938 Congress amended the statute, codifying it in its current form as 25 U.S.C. § 162a, to add Treasury bond mutual funds as another allowable investment for both tribal and individual trust funds:

> The Secretary of the Interior is hereby authorized in his discretion to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe . . . and] The said Secretary is also authorized to withdraw from the United States Treasury and to deposit in banks to be selected by him the funds held in trust by the United States for the benefit of individual Indians . . . .
>
> . . .
>
> Notwithstanding subsection (a) of this section, the Secretary of the Interior, at the request of any Indian tribe, in the case of trust funds of such tribe, or any individual Indian, in the case of trust funds of such individual, is authorized to invest such funds, or any part thereof, in guaranteed or public debt obligations of the United States or in a mutual fund, otherwise known as an open-ended diversified investment management company if—
> (A) the portfolio of such mutual fund consists entirely of public-debt obligations of the United States, or bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States, or a combination thereof;
> (B) the trust funds to be invested exceed $50,000;
> (C) the mutual fund is registered by the Securities and Exchange Commission; and
> (D) the Secretary is satisfied with respect to the security and protection provided by the mutual fund against loss of the principal of such trust funds.[37]

[36] *Id.*
[37] 25 U.S.C. § 162a.

In *White Mountain Apache Tribe of Arizona v. United States*,[38] this Court held that the 1918 statute waived sovereign immunity, subjecting the Government to damages for imprudent investment of Indian funds:

> The 1918 Act establishes and circumscribes the Secretary of the Interior's authority to invest funds. Exercise of that authority within the parameters established by the Act calls for the production of money. The 1918 Act constitutes a waiver of immunity insofar as it creates a substantive right enforceable against the United States for money damages.[39]

Though *White Mountain* involved tribal trust funds, it equally applies to IIM funds because 25 U.S.C. § 162a governs both.

A. A number of cases have held the Government liable for pre-1918 imprudent investment under 25 U.S.C. § 162a

The Government makes much of the word "may" in 25 U.S.C. § 162a, arguing that this makes the Secretary's duty of prudent investment discretionary. But the Court of Claims long ago rejected this argument, holding that the Secretary's duty to maximize returns by prudent investment of trust funds is mandatory, and the United States is liable for failure to do so:

> The fiduciary duty which the United States undertook with respect to these funds includes the "obligation to maximize the trust income by prudent investment," and the trustee has the burden of proof to justify less than a maximum return . . . .[40]

Rejecting the Government's argument that under 25 U.S.C. § 162a the Secretary had discretion whether to invest Indian monies but no duty to maximize income, the Claims Court in *White Mountain Apache* stated:

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[38] *White Mountain Apache Tribe of Ariz. v. United States*, 20 Cl. Ct. 371 (1990).
[39] *Id.* at 384.
[40] *Cheyenne-Arapaho Tribes of Indians of Okla.*, 512 F.2d at 1394.

> The *Mitchell* Court itself supplies a fiduciary's obligation to maximize the trustee's own income as the quintessential example of the explicit duty: "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."[41]

In *Jicarilla Apache Nation v. United States*,[42] this Court relied on 25 U.S.C. § 162a (and other statutes) to hold the government liable for investment mismanagement of tribal trust funds because the relevant statutes "vest the United States with management control over the trust funds, discretion with respect to their investment, and detailed responsibilities to account to the tribal beneficiaries."[43] The same is true of individual Indian beneficiaries and their IIM funds.

The *Jicarilla* court went on to state: "[T]he United States is responsible for investing Indian trust funds in the highest yielding investment vehicles available to the funds in question."[44] In its analysis, the *Jicarilla* court held the United States trustee to the highest standards, stating: "[M]any cases involving the alleged misappropriation or mismanagement of tribal trusts have held 'the duty of care owed by the United States is

[41] *White Mountain Apache Tribe of Ariz.*, 20 Cl. Ct. at 383 (*citing Mitchell*, 463 U.S. at 225).
[42] *Jicarilla Apache Nation*, 112 Fed. Cl. at 288.
[43] *Id.* (quoting *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 731–32 (2011)).
[44] *Id.* at 295 (quoting *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. at 668).

not mere reasonableness, but the highest fiduciary standards.'"[45] Further, "because of its treaty and statutory obligations to tribal nations, the United States must be held to the most exacting fiduciary standards in its relationship with the Indian beneficiaries."[46]

Rejecting the Government's argument that it could leave the Tribe's funds dormant, the *Jicarilla* court stated: "Several courts have found that 'the fiduciary requirement to make prudent investments requires that any amount maintained as a cash balance that is in excess of the immediate disbursement needs for the period should be invested in a vehicle offering a higher return.'"[47] The court further reasoned that the BIA did not take into account the Jicarilla Nation's budgetary needs, but only engaged in limited investment practices for other reasons, such as bureaucratic simplicity and inertia.[48] Finally, the court also rejected the argument that the Nation dictated the funds to be invested in such a way, stating "it remained for the agency, and the agency alone, to determine how the trust funds would be invested."[49]

This Court also noted in *Osage Tribe of Indians of Oklahoma v. United States*,[50] that the Court of Claims has uniformly held the Government responsible for investing Indian trust funds: "[T]he Court of Claims has addressed the statutory obligations under

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[45] *Jicarilla Apache Nation*, 112 Fed. Cl. at 287 (quoting *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 20 (2009) and *Am. Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 990 (Ct. Cl. 1981).
[46] *Id.* (quoting *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F. 3d 1339, 1348 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 973 (2005)).
[47] *Id.* at 295 (quoting *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. at 666–67).
[48] *Id.* at 298.
[49] *Id.*
[50] *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629 (2006).

25 U.S.C. §§ 161a, 161b, and 162a on a number of occasions and has uniformly held the United States responsible for investing Indian trust funds in the highest yielding investment vehicles available to the funds in question.[51] Further, "[t]he requirement to invest Indian trust funds in the highest yielding investments available is a legal requirement mandated by applicable statutes—here, 25 U.S.C. §§ 161a and 162a—and not solely a prudential one."[52]

B. None of the Government's cases supports its argument that Goodeagle's claim for investment mismanagement of these IIM accounts prior to 1994 must be dismissed

United States v. Gila River Maricopa-Pima Indian Community,[53] was a suit to recover irrigation maintenance costs that the Government had improperly withdrawn from the Tribe's trust account. This case did not involve any claim for investment mismanagement of any funds, nor did the court discuss any aspect of investment mismanagement. Rather, the court there denied the plaintiff's claim for interest on the amounts withdrawn from the Tribe's IIM account because "no statute exists requiring interest to be paid on 'Individual Indian Money' (IIM) accounts."[54]

American Indians Residing on Maricopa-Ak Chin Reservation v. United States,[55] involved a claim for general accounting—and no claim for investment mismanagement

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[51] *Osage Tribe of Indians of Okla.*, 72 Fed. Cl. at 671.
[52] *Id.*
[53] *United States v. Gila River Pima-Maricopa Indian Cmty.*, 586 F.2d 209 (Ct. Cl. 1978).
[54] *Id.* at 216–17; *Gila River* is also inapplicable because the tribe had control over the IIM accounts, not the Government, so there was no trust responsibility as there is over the Goodeagle IIM accounts. *See Gila River Pima-Maricopa Indian Community v. United States*, 38 Ind. Cl. Comm. 1, 38 (Ind. Cl. Comm. 1976) (Yarborough, dissenting) *modified*, 586 F. 2d 209 (Ct. Cl. 1978).
[55] 667 F.2d 980.

of IIM accounts (as in this case). In setting out the requirements for a proper accounting, the court there stated: "No statute requires interest to be paid on IIM accounts or on tribal bank accounts, but when IIM accounts that contain tribal money are deposited where they earn interest, either in the Treasury or in commercial banks, such interest earnings must be accounted for."[56]

The *Ak Chin* court did not discuss, and the case did not involve, any claim for investment mismanagement of IIM funds. And in *White Mountain Apache Tribe of Arizona v. United States*,[57] the Government "sought dismissal of all of plaintiff's claims seeking interest as damages,"[58] which the court granted, stating: "The statute does not expressly mandate that payment of interest as damages, and interest is the measure of damages that plaintiff seeks for breach of the duty established by the 1918 Act."[59] The case did not involve a claim for pre-1994 investment mismanagement of IIM funds, but the court there did reject the Government's argument that "breach of the fiduciary duty to invest Indian money is not actionable in this court," quoting from the Court of Claims:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.[60]

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[56] *Am. Indians Residing On Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 1002 (Ct. Cl. 1981).
[57] *White Mountain Apache Tribe of Ariz. v. United States*, 20 Cl. Ct. 371 (1990).
[58] *Id.* at 374.
[59] *Id.* at 384.
[60] *Id.* at 383 (*quoting Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183 (1980)).

III. When the United States did invest Goodeagle's IIM funds, it had the legal duty to invest those funds prudently—both before and after 1994

The Government admits that it invested Goodeagle's IIM funds since 1966 to 1994.[61] In making investments with Goodeagle's trust funds, the Government's duty was to invest them prudently, and the Government is liable for making imprudent investments. First, the Court of Claims has expressly held that "IIM funds are . . . trust funds,"[62] and "[w]here the Government takes on or has control and supervision over tribal money or property, the normal relationship is fiduciary unless Congress expressly has provided otherwise."[63] So, "[n]o statute requires interest to be paid on IIM accounts or on tribal bank accounts, but when IIM accounts that contain tribal money are deposited where they earn interest, either in the Treasury or in commercial banks, such interest earnings must be accounted for."[64]

Because the United States holds Goodeagle's IIM funds as a trustee, it owes the fiduciary duty (as with other Indian trust funds) to prudently invest them so as to maximize the return:

> The fiduciary duty which the United States undertook with respect to these funds includes the 'obligation to maximize the trust income by prudent investment,' and the trustee has the burden of proof to justify less than a maximum return. *See* Blankenship v. Boyle, 329 F. Supp. 1089, 1096 (D.D.C.1971). *See* also Restatement of Trusts 2d § 181 (1959). A corollary duty is the responsibility to keep informed so that when a previously proper investment becomes improper, perhaps because of the opportunity for

[61] Def.'s Br. at 4.
[62] *Am. Indians Residing On Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 1002 (Ct. Cl. 1981).
[63] *Id.* at 1003.
[64] *Id.*

better (and equally safe) investment elsewhere, funds can be reinvested.[65]

Holding the Government liable for failure to maximize investment returns on the Tribe's proceeds of labor accounts, this Court in *Jicarilla* relied on the

> "striking similarities" between *Cheyenne–Arapaho Tribes* and the Supreme Court's subsequent decisions in *Mitchell*, 463 U.S. 206, 103 S.Ct. 2961 (1983) and *White Mountain Apache*, 537 U.S. 465, 123 S.Ct. 1126 (2003), which "thoroughly repudiated defendant's cramped view of its fiduciary obligations."[66]

The Government admits that the Department of the Interior has had statutory authority to invest IIM funds since at least 1908:

> It has long been allowed to invest IIM accounts in its discretion. *See, e.g.*, Department of the Interior Appropriations Act for 1909, Pub. L. No. 16-104, 35 Stat. 70, 73 (1908). (Secretary of the Interior "may deposit Indian moneys, individual or tribal, . . . in such national bank or banks as he may select. . . .;") *see also* 25 U.S.C. § 162a.[67]

The Government also admits that the Secretary has been investing these funds from 1966 to 1994: "Beginning in 1966, the Department of the Interior invested IIM funds centrally from the BIA's Division of Finance in Albuquerque, New Mexico."[68] The Government described its investment process for the Goodeagle IIM accounts for this time period:

> IIM funds were invested in "group securities." *See* App. Ex. 3 (describing group securities); App. Ex. 4 (IIM fund invested "on a Bureau-wide pool basis"). Until March 1989, BIA computed IIM interest semi-annually and

[65] *Cheyenne-Arapaho Tribes of Indians of Okla.*, 512 F.2d at 1394.
[66] *Jicarilla Apache Nation*, 112 Fed. Cl. at 288–89 (quoting *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 731–32)).
[67] Def.'s Mem. in Support of Mot. for Partial Summ. J. Re- Pre-October 25, 1994 Individual Indian Money Investment Mismanagement Claims at 4 n.3 (April 13, 2015) (Doc. 90-1) ("Def.'s Br.").
[68] Def.'s Br. at 4.

> distributed interest semi-annually. App. Ex. 5. Beginning in June 1989, BIA converted to a monthly distribution of interest on the basis of the average daily balance of each account. *Id.* This system remained in place through 1994.[69]

In this case, once the Government took Goodeagle's IIM funds into trust and began investing them—as we know it did by its own admission from at least 1966—it took on the responsibility to invest those funds prudently to maximize the investment return. By its own admission thus this Court should deny the Government's motion for partial summary judgment and grant Goodeagle's motion, holding as a matter of law that the Government was required as a matter of law to invest prudently to maximize return on investments for all Goodeagle IIM accounts.

Conclusion

This Court should deny the Government's motion for partial summary judgment and grant Goodeagle's motion.

Respectfully submitted,

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[69] Def.'s Br. at 4–5.

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