

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHEYENNE RIVER SIOUX TRIBE
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

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Case No.: 20-126L

FIRST AMENDED COMPLAINT

Plaintiff, CHEYENNE RIVER SIOUX TRIBE, for its Complaint against Defendant UNITED STATES, alleges as follows:

INTRODUCTION

1. This is an action by the Cheyenne River Sioux Tribe (“Tribe”) against the United States (“United States” or “Government”) for money damages for the Government’s breach of its constitutional, statutory, regulatory, contractual, and common law trust duties to the Tribe in the course of its comprehensive use, occupation, control, supervision, management, and administration of the government administration building in Eagle Butte South, Dakota, on the Cheyenne River Indian Reservation.

2. The government administration building (referred to hereafter as the “Government Building” or “Building”) is or was used by the United States for the Cheyenne River Agency of the Bureau of Indian Affairs and the Tribal Council Chambers and governmental offices of the Tribe.

3. The Tribe has an ownership interest in the Government Building, and at all times relevant to this action, the United States possessed and exercised comprehensive authority, control, and supervision over the Government Building.

4. The United States mismanaged the Government Building and failed to maintain, protect, repair, and preserve the Building, allowing it to deteriorate, fall into disrepair, and become unusable.

5. The Tribe seeks an award of monetary damages to repair and rehabilitate the Building and to make the Tribe whole for the deterioration to the Building (and the tribal land on which it sits) and the loss of use of the Building (and the tribal land on which it sits) suffered by the Tribe.

PARTIES

6. The Cheyenne River Sioux Tribe is a federally recognized Indian tribe organized under Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 987 (codified at 25 U.S.C. § 5123). Pursuant to the Act, the Tribe adopted a Constitution and By-Laws in 1935, which established its Tribal Council as its governing body. The Constitution and By-Laws were approved by the United States in 1935. The Tribe amended its Constitution and By-Laws, with the approval of the United States, in 1966, 1980, and 1992. The Tribe occupies the Cheyenne River Indian Reservation in north-central South Dakota.

7. The United States, acting by and through the Department of the Interior and other past and present federal agencies and their officers, as a matter of constitutional, treaty, statutory, regulatory, and common law, is trustee and a fiduciary to the Cheyenne River Sioux Tribe and is charged with carrying out trust duties and responsibilities with regard to the management and

administration of land, property, and other assets and resources held in trust for the use and benefit of the Tribe.

8. The Secretary of the Interior, as the principal agent of the trustee United States, has continuously reaffirmed that the trust responsibilities of the United States to the Tribe are well-established, originated with the formation of the United States Government, and are an ongoing obligation. Secretarial Order No. 3335 (Aug. 20, 2014) states (at § 3a) that “[t]he trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights.”

JURISDICTION

9. This Court has jurisdiction over the subject matter of this civil action under the Indian Tucker Act, 28 U.S.C. § 1505, and the Tucker Act, 28 U.S.C. § 1491(a)(1), because the action involves a claim against the United States for money damages brought by an Indian tribe residing within the territorial limits of the United States, and arises under the Constitution, laws, statutes, and regulations of the United States, agreements between the Tribe and the United States, Executive Orders of the President, and federal common law, all of which govern the administration and management of property held by the United States in trust for Indian tribes as described herein.

10. The Government has waived its sovereign immunity under 28 U.S.C. §§ 1491 and 1505.

FACTS COMMON TO ALL COUNTS

11. The Cheyenne River Sioux Tribe is a constituent tribe of the Great Sioux Nation and a signatory to the Treaty with the Teton of 1815, 7 Stat. 125 (Jul. 19, 1815), the Fort Laramie Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Fort Laramie Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868).

12. In the Treaty with the Teton of 1815, the United States pledged perpetual peace and friendship with the Teton (Lakota) Indians, including the four Teton (Lakota) bands that comprise the Cheyenne River Sioux Tribe, and the United States extended its protection to the Teton (Lakota) Indians.

13. In the Fort Laramie Treaty of 1851, the United States acknowledged the Great Sioux Nation's sovereign authority to make war and peace, recognized the Great Sioux Nation's territory and right to self-government and affirmed peace and friendship with the Great Sioux Nation.

14. The Fort Laramie Treaty of 1851 acknowledges, "the territory of the Sioux or Dahcotah Nation, commencing on the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Butte or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of the Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning."

15. In making the Fort Laramie Treaty of 1851, the Great Sioux Nation did "not abandon or prejudice any rights, or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described."

16. In the Fort Laramie Treaty of 1868, the United States acknowledged the Great Sioux Nation's sovereign authority, including its power to make war and peace, and its permanent home bounded by the east bank of the Missouri and the 104th meridian, including the Black Hills of South Dakota.

17. The Fort Laramie Treaty of 1868, in Article 2, acknowledges the Great Sioux Reservation proper as follows:

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto all existing reservations on the east bank of said river shall be, and the same is set apart for the absolute and undisturbed use and occupation of the Indians herein named ... and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized ... shall ever be permitted to pass over, settle upon, or reside in the territory described in this article.

The Fort Laramie Treaty of 1868, in Articles 11 and 16, respectively, also acknowledges the reserved hunting lands and unceded Indian territory of the Great Sioux Nation.

18. In the Fort Laramie Treaty of 1868, in Article 4, “[t]he United States agrees, at its own proper expense, to construct at some place on the Missouri River, near the center of said reservation ... the following buildings, to wit: an agency building for the residence of the agent....”

19. In the Fort Laramie Treaty of 1868, in Article 5, “[t]he United States agrees that the agent for said Indians shall in the future make his home at the agency-building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law.”

20. In the Act of March 2, 1889, the United States stipulated that the Cheyenne River Indian Reservation is reserved as the “permanent reservation” of the Cheyenne River Sioux Tribe, as follows:

That the following tract of land, being a part of the said Great Reservation of the Sioux Nation, in the Territory of Dakota, is hereby set apart for a permanent reservation for the Indians receiving rations and annuities at the Cheyenne River Agency, in the said Territory of Dakota, namely: Beginning at a point in the center of the main channel of the Missouri River, ten miles north of the mouth of the Moreau River, said point being the southeastern corner of the Standing Rock Reservation; thence down said center of the main channel of the Missouri River, including also entirely within said reservation all islands, if any, in said river, to a point opposite the mouth of the Cheyenne River; thence west to said Cheyenne River, and up the same to its intersection with the one hundred and second meridian of longitude; thence north along said meridian to its intersection with a line due west from a point in the Missouri River ten miles north of the mouth of the Moreau River; thence due east to the place of beginning.

21. The Act of March 2, 1889, acknowledges the Cheyenne River Agency and preserves the Cheyenne River Sioux Tribe’s original rights under the Fort Laramie Treaty of 1868 as follows: “That all the provisions of the said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, and the agreement with the same approved February twenty-eighth, eighteen hundred and seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding.”

22. In its treaties with the Great Sioux Nation and in the Act of March 2, 1889, the United States agreed to protect the Tribe and its members, and guaranteed the Tribe’s right to the absolute and undisturbed use of its Indian lands, including the lands at issue in this case.

23. The original Cheyenne River Agency was located along the Missouri River on the Cheyenne River Indian Reservation.

24. The Tribal Council Chambers and tribal governmental officers were located within the Cheyenne River Agency.

25. In the 1950s, the Cheyenne River Agency was required to be moved from its location along the Missouri River to facilitate the creation of Lake Oahe pursuant to the Cheyenne River—Oahe Act, Public Law 83-776, § 4, (Sept. 3, 1954), to wit:

The United States further agrees to appropriate, and the Secretary of the Army is authorized and directed to make available sums so appropriated to be charged against the cost of the construction of the Oahe project, further additional appropriations to be expended for the relocation and reconstruction of the Cheyenne River Agency, relocation and reconstruction of schools, hospitals, service buildings, agents and employees quarters, roads, bridges and incidental matters or facilities in connection therewith.

26. The Department of the Army made arrangements for the relocation of the Cheyenne River Agency, Tribal Council Chambers and governmental offices, schools and other related buildings.

27. On or about February 1, 1957, at a conference between the Department of the Army, Corps of Engineers, Bureau of Indian Affairs, and the Cheyenne River Sioux Tribal Council, the Corps of Engineers requested that it be authorized to relocate and reconstruct the Cheyenne River Agency buildings and facilities at a site selected for that purpose.

28. The Tribal Council recommended that the Cheyenne River Agency building and facilities be relocated at Eagle Butte, South Dakota, on tribal land made available to the United States by the Tribe for that purpose.

29. On or about February 6, 1957, the Commissioner of Indian Affairs accepted the recommendation of the Tribal Council.

30. The Bureau of Indian Affairs accepted the offer of tribal land by the Tribe for Agency relocation purposes subject to the following agreement and conditions:

1. That the land will be held in Agency Reserve status as the present agency site is now held.

2. That all buildings and facilities of any nature which are constructed on, or moved to, the said tract of land will revert to tribal ownership when the Government no longer has need for them for Agency purposes in accordance with the statement of the Commissioner of Indian Affairs in a letter dated December 19, 1956.

3. That the jurisdiction of the Cheyenne River Sioux Tribe with respect to all matters set out in the Constitution and By-Laws and the Law and Order Code of the Cheyenne River Sioux Tribe will in no way be impaired by the removal of the Agency from its present site to the site described herein.

C.R.S.T. Resolution No. 23-57 (Feb. 11, 1957).

31. Pursuant to its agreement with the Tribe, the United States undertook to locate the aforesaid buildings, including the Government Building, on tribal land at Eagle Butte, South Dakota, and to maintain the Cheyenne River Agency, Tribal Council Chambers and governmental offices, schools and other related buildings with the promise that ownership of the buildings would revert to the Cheyenne River Sioux Tribe when the buildings were no longer needed for federal government purposes.

32. On information and belief, the tribal land on which the Government Building is located is held in trust by the United States for the benefit of the Cheyenne River Sioux Tribe and the Tribe owns the beneficial interest in the land.

33. By agreement with the Tribe, the United States held and used the land and Government Building and the Tribe used the Government Building for its Tribal Council Chambers and governmental offices.

34. At all times relevant to this action, the Tribe had an ownership interest in the Government Building, including but not limited to a reversionary interest in the Building as initially constructed by the United States and an ownership interest in one or more additions to the Building made by the Tribe.

35. By agreement, the United States pledged that the Tribe had (and would have) an ownership interest in the Government Building and the right to use the Government Building, or part of it, for its Tribal Council Chambers and government offices, and further that the Tribe had (and has) a reversionary interest in the entire Building when the United States no longer has need for the Building.

36. At all times relative to this action, the United States possessed and exercised comprehensive authority, control, and supervision over the land and Government Building.

37. At all times relevant to this action, the United States had (and continues to have) an on-going duty to maintain, protect, repair, and preserve the land and Government Building and to prevent the same from deteriorating, falling into disrepair, and becoming unusable.

38. The United States mismanaged, wasted, and failed to properly maintain, protect, repair, and preserve the Government Building, allowing the Government Building, including the additions made by the Tribe, to deteriorate, fall into disrepair, and become unusable. Among other things, leaks in the roof and inadequate repairs by United States caused physical damage, deterioration, decay, and environmental hazards, including toxic levels of mold and other contaminants, rendering the Building (and the tribal land on which it sits) unfit, unsafe, and unusable.

39. The United States abandoned the Government Building, including the Tribal Council Chambers and government offices, and refuses to repair and rehabilitate the Government Building or any part thereof.

40. The failure by the United States to maintain, protect, repair, and preserve the Government Building has rendered the tribal land on which the Building sits unusable. That land was pledged by the Tribe to the United States in return for the United States' pledge that it would

build and maintain the Government Building, in whole or in part, for the Tribal Council Chambers and tribal governmental offices.

41. The Government Building (and the land on which it sits) is abandoned, dilapidated, and unmaintained. The Building (and the land in which it sits) is an on-going blight on, and hazard to, the community.

COUNT I: BREACH OF TRUST

1-41. The Tribe realleges and incorporates by reference the allegations contained in paragraphs 1-41 above.

42. In the Northwest Ordinance (Jul. 23, 1787), one of the United States' organic acts, the United States pledged that:

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

This law was periodically updated and applied to new territories.

43. In the Trade and Intercourse Act, the United States protected Indian lands from acquisition by third parties, and pledged to acquire Indian lands through treaties or conventions:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C.A. § 177, *codifying* Act of June 30, 1834, c. 161, § 12, 4 Stat. 730. *See also* 25 U.S.C.A. § 85, *codifying* Act of June 30, 1913, c. 4, § 18, 38 Stat. 97 (“No contract made with any Indian, where such contract relates to the tribal funds or property in the hands of the United States, shall

be valid, nor shall any payment for services rendered in relation thereto be made unless the consent of the United States has previously been given.”)

44. These acts are integral to the Government’s trust responsibility to Indian nations.

45. In the Treaty with the Teton of 1815, the United States undertook an express duty to protect the Lakota people and their tribes, including the Cheyenne River Sioux Tribe. This is essential to the genesis of the trust responsibility of the United States to the Cheyenne River Sioux Tribe.

46. In the Fort Laramie Treaty of 1851, the United States acknowledged the boundaries of the Sioux Nation in South Dakota.

47. In the 1854 Kansas Nebraska Act and the 1860 Dakota Territory Act, the United States reserved the rights of people and property pertaining to the Sioux Nation.

48. In the Fort Laramie Treaty of 1868, the United states pledged that the Great Sioux Reservation—which consisted of all of South Dakota west of the Missouri River, more or less—would be the “permanent home” of the Sioux Nation, held for its absolute and undisturbed use and occupation. The United States agreed that no white person should be allowed to enter or occupy this permanent homeland, and that the Army would stay south of the North Platte River. The United States pledged that the Great Sioux Reservation would be protected as an absolute and undisturbed livable homeland.

49. In the Acts of 1877 and 1889, the United States wrongfully diminished the Great Sioux Reservation without the requisite consent of the Sioux Nation, in violation of the 1 Fort Laramie Treaty of 1868.

50. In the 1889 Act, the United States declared that the Cheyenne River Indian Reservation would be held for the benefit of the Cheyenne River Sioux Tribe, and through the Fort

Laramie Treaty of 1868, the United States agreed that when our Sioux Nation citizens became dual United States citizens, we would retain all of the benefits of the Treaty.

51. In 1944, the United States enacted the Flood Control Act to protect the lower Mississippi River Basin from annual floods that devastated cities further south.

52. In the Cheyenne River—Oahe Act, the United States called upon the Cheyenne River Sioux Tribe to sacrifice 103,000 acres, more or less, of the best land on its reservation homeland. The United States and the Cheyenne River Sioux Tribe agreed that the Tribe would retain important rights and benefits in the taking area and would move its headquarters to Eagle Butte, South Dakota. That move, included the replacement of the old Agency, which was flooded, with the new Agency, which was to be constructed at the new Agency Reserve.

53. The United States acting through the Bureau of Indian Affairs (“BIA”) and the Army Corps of Engineers, sought to benefit the country as a whole, while asking for an extreme sacrifice from the Cheyenne River Sioux Tribe. When, as here, the Trustee acquires trust property from the beneficiary for its own use and benefit, the Trustee is and should be held strictly accountable for the transaction.

54. The new Agency was placed on trust land, and the Tribal Council Chambers and Tribal Offices were made an integral part of the new Agency building—the Government Building. The BIA undertook to provide maintenance and repairs for the Government Building, including roof replacement.

55. The BIA replaced the roof, which subsequently failed in heavy rains and allowed the infiltration of black mold and other harms, causing the Government Building to deteriorate, fall into disrepair, and become unusable.

56. The BIA fled the Government Building, but made no plan for the relocation of the Tribal Council Chambers or Tribal Offices.

57. By treaties, statutes, regulations, Executive Orders, and other laws, the Government has recognized and reaffirmed its trust responsibility to manage and protect the lands, property, assets, and resources of Indian nations, including the Cheyenne River Sioux Tribe. In addition to the authorities cited above, *see, e.g.*, 25 U.S.C. § 3101, *et seq.* (National Indian Forest Resource Management); 25 U.S.C. § 3665a; 25 U.S.C. § 3701, *et seq.* (American Indian Agricultural Resource Management); 25 U.S.C. § 4001, *et seq.* (American Indian Trust Fund Management Reform), 25 U.S.C. § 4101, *et seq.* (Native American Housing Assistance and Self-Determination); 25 U.S.C. § 4301 (Native American Business Development), *et seq.*; 25 U.S.C. § 5301, *et seq.* (Indian Self-Determination and Education Assistance); 25 U.S.C. § 5601, *et seq.* (Indian Trust Asset Reform); 25 U.S.C. ch. 45 (Protection of Indians and Conservation of Resources); Executive Order No. 13175 (Nov. 6, 2000).

58. The Government had (and continues to have) on-going fiduciary duties as trustee, arising under the Constitution, federal treaties, statutes, regulations, Executive Orders, and laws, and the Government's contracts and agreements with the Tribe, including those cited herein and all others, to locate and keep the Government Building on the relocated site of the Cheyenne River Agency and to maintain, protect, repair, and preserve the Government Building (and the land on which it sits) for the Tribe.

59. The Government breached its fiduciary duties to maintain, protect, repair, and preserve the Government Building, causing the Building to deteriorate, fall into disrepair, and become unusable and causing the land on which the Government Build sits to become unusable.

60. As a result of the Government's breaches of its fiduciary duties, the Tribe has been damaged and has suffered economic loss in an amount to be determined at trial. Among other things, the Tribe seeks an award of monetary damages to repair and rehabilitate the Building and to make the Tribe whole for the deterioration to the Building (and the land on which it sits) and the loss of use of the Building (and the land on which it sits) suffered by the Tribe.

COUNT II: BREACH OF CONTRACT

1-60. The Tribe realleges and incorporates by reference the allegations contained in paragraphs 1-60 above.

61. The United States entered an agreement, or contract, with the Tribe in which it accepted from the Tribe certain tribal land in Eagle Butte, South Dakota, for the relocation of the Cheyenne River Agency and, in return, the United States pledged that the Tribe would have an ownership interest in the Government Building built on the land and the right to use the Government Building, or a part of it, for its Tribal Council Chambers and government offices and a reversionary interest in the entire Building when it ceased to be used by the United States.

62. The United States had (and has) a contractual obligation to locate and keep the Government Building on the relocated site of the Cheyenne River Agency and to maintain, protect, repair, and preserve the Building and the land on which it sits.

63. The United States breached its contract with the Tribe by failing to keep, maintain, protect, repair, and preserve the Government Building on the relocated site of the Cheyenne River Agency, causing the Building (and the land on which it sits) to deteriorate, fall into disrepair, and become unusable.

64. As a result of the Government's breaches of its contractual duties, the Tribe has been damaged and has suffered economic loss in an amount to be determined at trial. Among other

things, the Tribe seeks an award of monetary damages to repair and rehabilitate the Building and to make the Tribe whole for the deterioration to the Building (and the land on which it sets) and the loss of use of the Building (and the land on which it sets) suffered by the Tribe.

COUNT III: TAKING

1-64. The Tribe realleges and incorporates by reference the allegations contained in paragraphs 1-64 above.

65. The United States, by its actions, inactions, and failures, as set forth herein, caused the Government Building to fall into such a state of disrepair that the United States has condemned the Building and prevented the Tribe from using it or any part of it, including the additions to the Building made by the Tribe.

66. The actions of the United States amount to taking and/or regulatory taking of the Government Building, including the additions to the Building made by the Tribe, and the land on which the building sits.

67. The taking and/or regulatory taking of the Government Building was without just compensation, in violation of the Fifth Amendment to the United States Constitution.

68. The Tribe seeks an award of just compensation, plus interest, for the unlawful taking and/or regulatory taking of its property.

PRAYER FOR RELIEF

WHEREFORE, the Tribe respectfully requests that the Court:

1. Award the Tribe monetary damages in an amount to be determined by the Court at trial which will compensate the Tribe for the injuries and losses and deprivation of property caused through violations of the United States' constitutional, contractual, fiduciary, statutory, and other responsibilities, as set out above, including interest as required by law;

2. Award the Tribe its costs and attorney's fees incurred herein under 28 U.S.C. § 2412 and any other applicable law; and
3. Award such other relief as the Court deems just and equitable.

Dated: October 5, 2020

/s/ Steven J. Gunn

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CERTIFICATE OF SERVICE

I certify that on October 5, 2020, I caused a true and correct copy of the foregoing to be served by operation of the Court's Case Management/Electronic Case Filing System on all parties and counsel of record.

/s/ Steven J. Gunn

STEVEN J. GUNN