IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHEYENNE RIVER SIOUX TRIBE *Plaintiff*, v. UNITED STATES OF AMERICA, *Defendant*.	)	Case No. 20-126L Judge David A. Tapp

DEFENDANT UNITED STATES OF AMERICA'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case concerns a vacant government administration building in Eagle Butte, South Dakota. The building—labeled "Building 2001" in the Bureau of Indian Affairs' ("BIA") internal records—was constructed by the United States Army Corps of Engineers in the late 1950s to serve two purposes: it was the headquarters of the BIA Cheyenne River Agency, which served the Cheyenne River Sioux Tribe ("the Tribe") and its members; and it provided office and meeting space for the Cheyenne River Sioux Tribal government.[1] For decades, Building 2001 experienced roofing problems exacerbated by the harsh storms and winters of central South Dakota. After years of water intrusion, mold was discovered in Building 2001 in late 2013. In January 2014, BIA deemed Building 2001 unsafe for human occupancy and the building was closed.

The Tribe asserts three distinct claims relating to Building 2001's gradual deterioration. First, the Tribe alleges that the United States breached an unidentified contract that purportedly required the United States to maintain Building 2001 and transfer ownership to the Tribe when the United States no longer used it for Agency purposes. Second, the Tribe alleges that the deterioration of Building 2001 constitutes a breach of the United States' trust obligations to the Tribe. Third, the Tribe alleges that by failing to maintain Building 2001, the United States effected a Fifth Amendment taking of an unspecified property interest. Each of these claims is legally deficient.

[1] As discussed below, the Tribe constructed an addition to Building 2001 in 1977. In this brief, when the United States refers to Building 2001, it intends to refer only to Building 2001 as originally constructed by the Army Corps of Engineers. The United States will refer to the "Tribal Addition" specifically when it intends to reference or include that portion of the building.

First, there is no applicable contract, much less a contract that contains a provision requiring the United States to expend funds to maintain Building 2001 for the Tribe. The Tribe's claim that a contract exists appears to rely on discussions that took place between the United States and the Tribe in the 1950s. But contract formation in this Court is governed by four well-established factors, none of which are present here: (1) the United States had no intent to contract; (2) the terms of the putative contract are ambiguous; (3) the putative contract lacked consideration; and (4) the putative contract was not executed by an agent with actual authority to bind the United States. *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003) (internal citations omitted). Because no contract was formed, the Tribe's claim must fail.

Equally unsound is the Tribe's claim that the United States breached a trust duty to maintain and preserve Building 2001. First, the Tribe waived and released its claim pursuant to a 2013 settlement agreement with the United States because the Tribe had known of Building 2001's ongoing roof and maintenance problems for years, if not decades, when it entered the settlement. Similarly, the Tribe's claim accrued outside of this Court's six-year statute of limitations and the Court is therefore without jurisdiction to hear the Tribe's claim. *See* 28 U.S.C. § 2501. Even if the Tribe could clear those initial hurdles, their trust claim would still fail because Building 2001 is not a trust asset. Because it is not held in trust for the benefit of the Tribe, no trust duties have attached to Building 2001. Finally, the Tribe has identified no treaty, regulation, or statute that created applicable specific money-mandating fiduciary duties conferring jurisdiction on this Court. *United States v. Navajo Nation* (*Navajo I)*, 537 U.S. 488, 503, 506 (2003).

The Tribe's third claim also fails as a matter of law. The Tribe's takings claim is based on the United States' alleged failure to maintain Building 2001. However, "takings liability does not

arise from government inaction or failure to act." *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1361 (Fed. Cir. 2018). Further, the Tribe does not have a "cognizable property interest" in Building 2001 on which to base its Fifth Amendment claim. *See Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1329 (Fed. Cir. 2012). The United States cannot "take" its own property, so the Tribe's taking claim must fail. For these reasons, the United States respectfully requests that this Court grant the United States' motion for summary judgment and enter judgment for the United States.

BACKGROUND

A. The Cheyenne River Agency in Eagle Butte, South Dakota and the Treaty of Fort Laramie of 1868

The BIA is an agency within the United States Department of the Interior. Its mission is "to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives." *Bureau of Indian Affairs (BIA),* U.S. DEP'T OF THE INTERIOR INDIAN AFFAIRS, https://www.bia.gov/bia (last visited Apr. 3, 2023). To carry out that mission, BIA administers program services to tribes through "agencies." *Regional Offices*, U.S. DEP'T OF THE INTERIOR INDIAN AFFAIRS, https://www.bia.gov/regional-offices (last visited Apr. 3, 2023). One such agency is the Cheyenne River Agency (the "Agency"). The Agency currently sits in Eagle Butte, a town in north-central South Dakota on the Cheyenne River Sioux reservation, which consists of 1,450,644 trust acres of land. *Id.* (follow the "Map of Regions" hyperlink, zoom into "Great Plains region", near top of South Dakota you will see green area labeled "Cheyenne River Agency"); *Cheyenne River Agency*, U.S. DEP'T OF THE INTERIOR INDIAN AFFAIRS, https://www.bia.gov/regional-offices/great-plains/south-dakota/cheyenne-river-agency (last accessed Apr. 3, 2023). U.S. Department of the Interior Indian Affairs, Cheyenne River Agency,

https://www.bia.gov/regional-offices/great-plains/south-dakota/cheyenne-river-agency (last accessed March 30, 2023). Congress originally authorized and appropriated funds for the Agency in the Treaty of Fort Laramie of 1868. *See* EXHIBIT 1. As relevant to the Agency, Article III of the treaty states:

> The United States agrees, at its own proper expense, to construct . . . an agency building for the residence of the agent, to cost not exceeding three thousand dollars;

And, as relevant, Article V states,

> The 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 present for investigation upon the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law.

EXHIBIT 1 (emphasis added).

Today, the "agent" of the Agency is the BIA Agency Superintendent, who is to serve as "the liaison" with various state, county, and federal agencies, and with the tribal organizations, committees, and tribal officials." *Cheyenne River Agency*, U.S. DEP'T OF THE INTERIOR INDIAN AFFAIRS, https://www.bia.gov/regional-offices/great-plains/south-dakota/cheyenne-river-agency (last accessed Apr. 3, 2023).

B. The Oahe Dam Project, Public Law 83-776 and the Ensuing Negotiations

The Agency has not always been located in Eagle Butte, South Dakota; its headquarters was initially established on a portion of the reservation along the Missouri River. Pl.'s First. Am. Compl. ¶23, ECF No. 13. But, when Congress authorized the U.S. Army Corps of Engineers to construct the Oahe Dam and Reservoir (*see* Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887; 33 U.S.C. § 701-1 et seq), the project required the Agency to be flooded and ultimately relocated to Eagle Butte.

In 1954, Congress passed Public Law 83-776 (hereinafter "Cheyenne River-Oahe Act," or "the Act"), which provided for the federal acquisition of more than 100,000 acres of Cheyenne River Reservation lands for the Oahe Dam and reservoir. EXHIBIT 2. The law, which required approval by three-fourths of the adults enrolled in the Tribe, directed the United States to pay $5,384,014 in just compensation to the Tribe and its individual members for the lands it took for the Oahe Dam project.[2] *See* EXHIBIT 2 at Section II. Additionally, the law made appropriations for the "relocation and reconstruction of the Cheyenne River Agency," as well as the relocation and reconstruction of schools, hospitals, roads, and other incidental facilities or requirements. EXHIBIT 2 at Section IV. The requisite number of Tribal members approved the law, and the Secretary of the Interior issued a proclamation on April 6, 1955, marking the day the law went into effect. *See* EXHIBIT 4 at 2.

In the years following the Cheyenne River-Oahe Act passage, the Tribe and the United States negotiated certain details of the reconstruction and relocation not addressed by Congress in the Act, including the location of the new agency, whether the agency would be constructed on land owned by the United States or land owned by the Tribe, and which party would pay the construction costs for the Tribal offices in the Agency building. The parties ultimately agreed that the Agency would be relocated to Eagle Butte, South Dakota. When the Agency was located along the Missouri River, the Tribal offices had been located in the basement of the Agency headquarters building. *See* EXHIBIT 5. Although the parties discussed alternative arrangements

[2] In 2000, Congress recognized that the United States did not fairly compensate the Tribe when the Government acquired the 104,492 acres of land for the Oahe Dam and Reservoir project and passed the Cheyenne River Sioux Equitable Compensation Act. Pub. L. 106-511, 114 Stat. 2365 (2000) (Exhibit 3). To make amends, the Act established a trust fund, managed by the Secretary of the Treasury, to pay the Tribe an additional $290,722,958 plus interest. *See also LeBeau v. United States*, Civ. No. 12-4178-KES, 2013 WL 4780079, at *1 (D.S.D. Sept. 5, 2013).

such as constructing two separate buildings for the BIA and the Tribe that would connect via tunnel, by September 1957, the parties ultimately agreed that the Agency headquarters and the Tribal council building would once again share one building. *See* EXHIBIT 6 at 1 (see highlighted text). BIA also agreed to pay for construction costs of the Tribal office space in the relocated Agency headquarters building. *See* EXHIBIT 7.

As to ownership of the land where the Agency was to be reconstructed, the United States intended to acquire land in fee simple to use for the agency relocation, while the Tribe called for all Agency facilities to be located on tribal land held in trust by the United States for their benefit. The parties' relative positions on ownership are expressed in a December 18, 1956 letter ("December 18th Letter") from the Commissioner of the BIA to the Chairman of the Tribe. *See* EXHIBIT 8. In the letter, the BIA Commissioner acknowledged the Tribe's protest of the United States' plan to relocate the Agency to Federal land instead of tribal land, but stated that "throughout our discussions on this matter, this office has had no other intention but to locate the agency on Government-owned land." EXHIBIT 8.

In February 1957, the Tribe memorialized its position that the Agency should be located on trust land in Tribal Resolution 23-57, which "formally offered" Tribal trust land on which to construct the Agency to the United States, subject to three conditions:

> (1) That the land will be held in Agency Reserve[3] 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 1[8], 1956;[4] and

[3] In historical documents, the United States appears to use the terms "agency reserve" and "administrative reserve" interchangeably.

[4] The Parties have agreed that Resolution 23-57 incorrectly references a *December 19*, 1956, letter when it intended to reference the *December 18*, 1956 letter. The parties have agreed that

> (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.

EXHIBIT 9.

The United States ultimately decided to reconstruct the Agency on Tribal land held in trust by the United States for the benefit of the Tribe. In a May 8, 1957 letter, the Commissioner of BIA advised the Chairman of the Tribe that he had "decided that the site for relation shall be tribally owned land," [5] (EXHIBIT 10) and sent a telegram to the BIA area director on June 7, 1957, alerting him that the land should be taken in trust for Tribe and put in an administrative reserve status in accordance with Tribal Resolution 23-57. EXHIBIT 11. Most of the land on which the new Agency would sit was already held in trust by the United States, but the selected location also required the United States to acquire an additional 6.31 acres of land in fee pursuant to Public Law 776, which was placed in trust as well. *See* EXHIBIT 13. In response, the Tribe passed an additional resolution—Resolution 178-60—setting aside the additional 6.31 acres, along with the original plot already held in trust, as an Agency reserve. *See* EXHIBIT 14. Resolution 178-60 included the same three conditions that were set forth in Resolution 23-57. On

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this was a clerical mistake. The Tribe corrected the clerical error in its related Resolution, 178-60, passed in 1960.

[5] The BIA commissioner explained his decision by noting that "one of the principal objections to the relocation of the Agency on tribal land [had] been removed," which was referring to BIA's prior concerns that locating the Agency on tribal land would create jurisdictional issues related to public services like water, sewage, waste disposal, and law enforcement. *See* EXHIBIT 12. However, after inquiry from BIA, the Attorney General of South Dakota issued an opinion stating that the city of Eagle Butte had authority to complete sewage and water disposal for the new Agency, even if it was located on trust land. *See* EXHIBIT 10. Further, a new law, approved on March 18, 1957, provided a procedure by which the state of South Dakota could assume jurisdiction of law and order whenever the Tribe, the interested counties, and the Bureau agreed that law and order services should be assumed by the State. EXHIBIT 10. With these jurisdictional concerns resolved, the BIA commissioner decided to locate the Agency on trust land.

December 19, 1960, the BIA Commissioner wrote a letter to the BIA Area Director explaining that Tribal Resolution 178-60 was approved and the land described therein was designated as an administrative reserve. *See* EXHIBIT 15.

C. United States and Tribal Occupation of Building 2001

The United States constructed Building 2001 in 1959 at a cost of $351,149.88. *See* EXHIBIT 16 at 51. As initially constructed, Building 2001 was divided into two main areas: the northern portion of the building ("BIA North) provided office space for BIA's Agency personnel, while the southern portion of the building ("Tribal South") provided space for the Tribal government to work and hold council meetings. EXHIBIT 17. In 1977, the Tribe, using funding from the United States Economic Development Administration, constructed an addition to Building 2001 to provide the Tribe more office space. EXHIBIT 18. The addition (the "Tribal Addition," but occasionally referred to as the "Tribal Annex" or "Annex" in the record) was attached along the western side of Building 2001. EXHIBIT 17. It had its own entrance but was also accessible via a hallway in BIA North. The Tribal Addition only housed Tribal offices; no BIA offices, programs, or personnel were located in the Tribal Addition.

The Tribe initially occupied office space in Building 2001 through a one-year "Use Permit" by which BIA granted the Tribe permission to use the Tribal South area subject to five conditions. EXHIBIT 19. The use permit established that the BIA was responsible for "maintenance and repair" of the whole building, but that the Tribe was responsible for paying its own utilities. EXHIBIT 19. In 1971, the parties executed a five-year "Revocable Permit" to govern the Tribe's use of Tribal South. EXHIBIT 20. The permit allowed the Tribe to use Tribal South to conduct its business while noting that the permit was "not a lease" and, therefore, did not grant "any leasehold interest or right in or to the land or building herein described."

EXHIBIT 20. The revocable permit held the Tribe responsible for "minor repairs to prevent undue deterioration," for "maintenance of the building and the grounds," and for payment of utilities. EXHIBIT 20. Although BIA periodically prepared additional permits to be implemented and signed by the Tribe, there is no evidence whether the parties executed additional permits after the 1971 permit expired in 1976.

D. Building Maintenance, Repairs, and Discovery of Mold

By the mid-1970s, when the Tribe sought additional office space, it was already referring to Building 2001 as an "antiquated structure" that was "poorly designed for the severe winters prevalent in South Dakota." EXHIBIT 21. A 1979 facilities evaluation prepared by a private contractor recommended $48,100 worth of upgrades to bring the building up to code. EXHIBIT 16 at 47. The survey identified roof leaks among the issues needing maintenance and recommended roof replacement, cautioning that "[f]urther leaks will result if not corrected." *Id.* The survey also estimated that building had a twenty-year useful life beyond that point. *Id.*

Over the years, BIA undertook countless maintenance and repair projects in Building 2001.[6] Work orders for Building 2001 reveal a variety of routine maintenance requests prepared by a BIA safety inspector, which flagged smaller repair needs like replacing old carpeting and non-operational exit signs, as well as larger-scale issues like cracks in the wall and leaks from the ceiling. *See, e.g.*, EXHIBIT 22. Between 1986 and 1988, BIA replaced the roof over Building 2001. *See* EXHIBIT 23; EXHIBIT 24. In 2002, an inspection of Building 2001's roof again

[6] Because the Tribe owned the Tribal Addition, it had responsibility for all maintenance and repairs in the Tribal Addition. There are very few documents in the factual record related to the Tribe's maintenance of the Tribal Addition, including whether and to what extent the Tribe maintained or repaired the building. However, in September July 2013, the Tribe hired a contractor to replace the roof of the Tribal Addition. *See* EXHIBIT 33.

found leaks in at least two places. EXHIBIT 25. BIA noted that repairing, rather than replacing the roof, was a "short term solution" and that instead, the roof should be replaced. EXHIBIT 26. Although the BIA regional office secured funding from the Department of the Interior to cover the cost of roof replacement (EXHIBIT 27) for reasons that are not presently clear, BIA never proceeded with the project. BIA also compiled a cost estimate to replace the roof in 2011, but, due to lack of funding, did not move forward with the project. *See* EXHIBIT 28; EXHIBIT 29.

Due to the chronic problems with leaks from the roof, Building 2001 and the Tribal Addition sustained repeated water damage. During rainstorms or periods of thaw in the Spring, the ceiling and walls of Building 2001 and the Tribal Addition often leaked. *See* EXHIBIT 30 at 31:9-32:3. In 2010, a large storm passed through Eagle Butte, which allowed water to infiltrate and caused substantial damage to Building 2001 and the Tribal Addition. *See* EXHIBIT 31 at 11. BIA and the Tribe used buckets to catch the leaking water, and BIA made patch repairs to the roof to stop the leaking. However, the leaks persisted in the years following the storm, just as they had in the years before the storm. *See* EXHIBIT 32 at 115: 7-19.

Mold was identified inside Building 2001 in late 2013. *See* EXHIBIT 34. BIA contracted with a company called Badlands Environmental Consultants, Inc. to complete airborne microbial/fungi assessments. The results indicated that both Building 2001 and the Tribal Addition "appear[ed] to have a microbial/fungi problem" due to elevated concentrations of certain species of mold/fungi that can lead to health problems in humans. *See* EXHIBIT 35 at CHYDIS0000313; EXHIBIT 36 at 000298.

E. Relocation and Current Operations

In January 2014 BIA coordinated an emergency move out of Building 2001 pursuant to its Continuity of Operations Plan based on the results of the Badlands reports. *See* EXHIBIT 37.

On January 31, 2014, BIA sent a letter informing the Tribal chairman that Federal operations had been shut down in Building 2001 as of January 21, 2014, expressing its understanding that the Tribe was also planning to vacate Building 2001 based on the results of the fungal sampling, and requesting the Tribe notify the BIA if the process of relocating individuals would extend beyond February 3, 2014. [7] *See* EXHIBIT 37. Initially, BIA relocated its agency offices to a Bureau of Indian Education's boy's dormitory, while most of the Tribe's personnel relocated to Tribally-owned buildings in Eagle Butte, including the "Wellness Center" and the "Old Dental Building". *See* EXHIBIT 39. Even though BIA had closed Building 2001 in January 2014, the Tribal secretary and Tribal chairman remained in Tribal South until November 2014, when they relocated operations to converted office space inside a former a Bureau of Indian Education girl's dormitory. *See* EXHIBIT 40. By March 2015, BIA had secured a lease to a building in Eagle Butte known as the Western Sky Building and moved in shortly thereafter. *See* EXHIBIT 41. Today, the Agency headquarters offices remain in the Western Sky building, and the Tribal offices remain in Tribally-owned buildings and the converted dormitory. The Tribal Council meets in a hotel conference room in Eagle Butte. EXHIBIT 32 at 94:24-95:9.

Since relocating, BIA has taken no subsequent steps to remediate the mold in Building 2001 or undertake structural repairs. Instead, based on an April 20, 2016 inspection, a BIA Safety and Health Inspection Report recommended that Building 2001 be "condemned and demolished" due to the roof leaks and overall condition. EXHIBIT 42. Similarly, the Tribe has not remediated the mold or made repairs to the Tribal Addition. *See* EXHIBIT 32 at 103: 4-7.

[7] The BIA maintains that it hand-delivered this letter to the Tribal Chairman's office on January 31, 2014. During his deposition, the Tribe's Chairman indicated that he remembers the letter being hand delivered by the BIA Superintendent. EXHIBIT 30 at 35:11-36:13. However, the letter was not marked "received" by the Tribal Chairman's office until October 14, 2014. *See* EXHIBIT 37.

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). The moving party has the burden of showing "the absence of any genuine issue of material fact and entitlement to judgment as a matter of law." *Crater Corp. v. Lucent Techs., Inc.*, 255 F.3d 1361, 1366 (Fed. Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986)). The nonmoving party then bears the burden of establishing, by a showing of specific facts, that there are genuine issues of material fact for trial. *See Celotex*, 477 U.S. at 324–25. "A fact is material if it will make a difference in the result of a case under the governing law." *Kingman Reef Atoll Dev., LLC v. United States*, 116 Fed. Cl. 708, 742 (2014).

ARGUMENT

I. THE UNITED STATES AND THE TRIBE DID NOT FORM A CONTRACT RELATED TO MAINTENANCE, REPAIR, OR OWNERSHIP OF BUILDING 2001

The Tribe's breach of contract claim fails because the Tribe and the United States never entered a contract with respect to ownership, maintenance, or repair of Building 2001. Neither the Tribal Resolutions nor BIA letters discussing the Tribal Resolutions created a contract because they do not demonstrate a mutual intent to contract, there was no unambiguous offer or acceptance, and the Tribe provided no consideration. *See Anderson*, 344 F.3d at 1353. Nor was any putative agreement executed by a government representative with actual authority to bind the United States. *See id.* Additionally, the Tribal Resolutions contain no provision addressing building maintenance or repair, and therefore impose no corresponding contractual duty on the United States.

To recover against the government for an alleged breach of contract, a plaintiff has the burden to demonstrate that there was a binding agreement. *Id.* Not all agreements form

enforceable contracts within the meaning of the Tucker Act. *See Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997). To form an agreement binding upon the government, four basic requirements must be met: "(1) mutuality of intent to contract; (2) lack of ambiguity in offer and acceptance; (3) consideration; and (4) a government representative having actual authority to bind the United States in contract." *Anderson,* 344 F.3d at 1353 (footnote omitted).[8]

Here, the Tribe alleges:

> 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.

Pl.'s First. Am. Compl. ¶ 61.

The Tribe has failed to identify the document(s) that constitutes the "agreement, or contract" it refers to in the complaint. Likewise, the Tribe has not identified the terms of its alleged offer to contract, the United States' alleged acceptance of those terms, any consideration for the alleged agreement, or a government agent with the authority to bind the United States to those terms.[9] Because not one of this Court's requirements for contract formation have been met, no contract was formed, and the United States is entitled to judgment as a matter of law.

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[8] While the Tribe has not specified whether the alleged contract was express or implied in fact, an implied-in-fact contract has the same requirements as an express contract except that an implied-in-fact contract is founded upon the meeting of the minds and the mutual understanding of the parties. *Hanlin v. United States,* 316 F.3d 1325, 1328 (Fed. Cir. 2003) (citing *Balt. & Ohio R.R. Co. v. United States,* 261 U.S. 592, 597(1923)).

[9] The United States does not concede that this alleged contract was signed by a government agent with the authority to bind the United States, and it remains the Tribe's burden to identify the individual and the source of his or her authority. *See Yifrach v. United States*, 145 Fed. Cl. 691,

A. A Contract Between The United States And Tribe Was Never Formed Because The United States Never Expressed An Objective Intent To Contract

The United States and Tribe never had a mutual intent to enter a binding contract related to the maintenance of Building 2001. This is "a threshold condition for contract formation." *Anderson*, 344 F.3d at 1353 (citing Restatement (Second) of Contracts § 18 (18 (Am. L. Inst. 1981). "To satisfy its burden to prove such a mutuality of intent, a plaintiff must show, by objective evidence, the existence of an offer and a reciprocal acceptance." *Id*. (citing *Estate of Bogley v. United States*, 514 F.2d 1027, 1032 (Ct. Cl. 1975)). A plaintiff must provide "something more than a cloud of evidence that could be consistent with a contract to prove a contract and enforceable contract rights." *D & N Bank v. United States*, 331 F.3d 1374, 1377 (Fed. Cir. 2003).

The Tribe has never clearly identified what document constitutes the contract with the United States for maintenance of Building 2001. However, based on the Tribe's allegations in the Amended Complaint, responses to its interrogatories, and deposition testimony, it appears that the Tribe considers Tribal Resolutions No. 23-57 and/or No. 178-60 [hereinafter "The Tribal Resolutions." EXHIBITS 9 and 14;] to be its "offer" to the United States, and a subsequent letter from the BIA Commissioner to the BIA area director as the United States' "acceptance" of the offer. EXHIBIT 15. Even taken together, those documents do not demonstrate a mutual intent to contract.

First, the Tribal Resolutions mischaracterize the BIA's previous statements regarding the Tribe's alleged reversionary interest in Building 2001. While the Tribe may have attempted to

698-99 (2019), *aff'd,* 825 F. App'x 899 (Fed. Cir. 2020). Similarly, it remains the Tribe's burden to identify the alleged contract's consideration.

bind the United States to specific contractual terms, the United States merely expressed a desire to follow pre-existing BIA policies and statutory mandates. The second condition of the Tribal Resolutions references the December 18, 1956 letter ("December 18 Letter") from the Commissioner of Indian Affairs. *See* EXHIBITS 9 and 14; EXHIBIT 8. The Tribal Resolutions suggest that the December 18 Letter contains a statement promising the Tribe 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." EXHIBITS 9 and 14. Significantly, no such statement exists in the December 18 Letter. Instead of indicating an intent to take on contractual duties above and beyond its pre-existing policies, the letter states that the BIA "had no intention *but* to locate the agency on Government-owned land" and explained that "established bureau policy" dictates that "if and when the agency buildings, etc., became surplus to the needs of the government, such property would be made available to the tribe." EXHIBIT 8 (emphasis added). The "established bureau policy" was a reference to Public Law 991,[10] which gave the Secretary of the Interior discretion to convey title to any federally owned buildings that are no longer required for the Government's administration "as he may deem appropriate." EXHIBIT 44. This process remains part of BIA's regulations today, as 25 C.F.R. § 900.95–900.101[11] give the Secretary of the Interior the discretion to donate excess or surplus BIA property to Indian tribes, provided certain conditions are met. BIA's regulations define "excess property" as "property under the jurisdiction of the BIA or [Indian Health Services] that is excess to the agency's needs and the discharge of its responsibilities." C.F.R. § 900.95; *see also* 25 C.F.R. § 900.102(b) (defining "surplus

[10] Public Law 991 was originally codified at 25 U.S.C. § 443(a) but has since been "editorially reclassified as a note under section 1457 of Title 43, Public Lands".

[11] All references to the C.F.R. are to the 2023 version.

government property" as "excess real or personal property that is not required for the needs of and the discharge of the responsibilities of all Federal agencies that has been declared surplus by the General Services Administration.").

Therefore, even if the Tribe had an intent to contract with the United States to dictate the terms of any eventual transfer of title to Building 2001, the United States intended only to follow its own policies, if and when they became applicable, *i.e.*, if and when the building met the regulatory definition of "surplus" and the Secretary of the Interior, in his or her discretion, determined that transfer was appropriate. Accordingly, neither the Tribal Resolutions nor the December 18 Letter demonstrate the requisite objective manifestation of voluntary, mutual assent. *See D & N Bank*, 331 F.3d at 1378-79 ("An agency's performance of its regulatory or sovereign functions" is not evidence of an intent to contract and does not create contractual obligations).

Likewise, the December 19, 1960 letter ("December 19 Letter") does not demonstrate that the United States intended to form a binding contract with the Tribe related to Building 2001. First, although the letter states that "Resolution No. 178-60 is hereby approved," approval of a tribal resolution is not equivalent to acceptance of a contractual offer. The Tribal Resolutions requested approval by the Secretary of the Interior in accordance with the Tribe's constitutional provisions on Self Government (EXHIBIT 43, Article IV, Section 2), and BIA approved the Resolution in accordance with its policies guiding Tribal Relations. *See Division of Tribal Government Services*, *U.S. DEP'T OF THE INTERIOR INDIAN AFFAIRS,* https://www.bia.gov/bia/ois/tgs (last accessed Apr. 3, 2023) ("When required, Tribal Relations staff . . . review and approves Tribal ordinances, Tribal resolutions, attorney contracts, attorney fees and expense vouchers when the Tribal constitution requires Secretarial approval."). The

Tribe's constitutional requirement that the Secretary of the Interior approve certain resolutions does not somehow covert an exercise of the inherent power of the Tribe's sovereignty into a binding contract with the United States. *See, e.g., D & N Bank*, 331 F.3d at 1378-79 (finding that a bank board's approval of a merger did not amount to intent to contract where the bank board was required to approve all mergers in its regulatory and sovereign capacity). Second, the letter makes no mention of a reversionary interest in Agency buildings or of the Tribe's jurisdiction, as expressed in conditions two and three of the Tribal Resolutions. EXHIBITS 9 and 14. It speaks only of the status of the land. Therefore, the letter cannot demonstrate mutuality of intent to contract because it does not "absolutely and unqualifiedly" indicate that the United States accepted an offer from the Tribe "as to all its terms." *Estate of Bogley*, 514 F.2d at 1032. This deficiency, standing alone, defeats the Tribe's breach of contract claim.

B. The Terms Of The Alleged Contract Were Ambiguous, Which Prevented Contract Formation

The terms of the putative contract between the United States and the Tribe are unclear and ambiguous, which prevents formation of an enforceable contract. A contract with the United States cannot be formed unless there is a "lack of ambiguity in offer and acceptance." *Anderson*, 344 F.3d at 1353. Here, based on the inconsistent language in the Tribal Resolutions, it is impossible to ascertain the exact terms that made up the Tribe's offer. Without an unambiguous offer, there can be no contract.

The Tribe's purported offer is ambiguous because the second "condition" of the Tribal Resolutions does not match the language in the December 18 Letter it references. While the Tribal Resolutions state that "all buildings and facilities . . . *will revert to tribal ownership* when the *Government no longer has need for them for Agency purposes* in accordance with [the December 18 Letter]" (EXHIBITS 9 & 14 (emphasis added)), the December 18 Letter reflects a

very different understanding. In the December 18 Letter, the BIA commissioner noted that "*if and when* the agency buildings, etc., *became surplus* to the needs of the Government, such property *would be made available to the tribe*" as "part of established Bureau policy." EXHIBIT 8. These differences matter. The terms the Tribe uses in the Tribal Resolutions carry vastly different meanings and legal significance than the terms of the letter it purports to be "in accordance with," yet it is impossible to know which terms govern.

Put simply, there was no meeting of the minds between the Tribe and BIA. If the language from the referenced letter was intended to govern, any transfer of title to Building 2001 would be governed by policies established pursuant to a Federal statute. *See* supra Section I(A). At a minimum, BIA would first need to make a formal finding that Building 2001 is excess to the needs of the Government before making the property available to the Tribe. *See* 25 C.F.R. § 900.95. In contrast, if the contract is meant to include only the language in the Tribal Resolutions, it is unclear at what point the Government would be found to no longer have "need" for the building for Agency purposes under the terms of the alleged agreement, or who would have the authority to make that determination. These contradictions imbue any purported offer or acceptance based on the Tribal Resolutions with ambiguity, which precludes creation of a contract. *See Modern Sys. Tech. Corp. v. United States*, 979 F.2d 200, 202 (Fed. Cir. 1992) ("In the absence of contractual intent or sufficiently definite terms, no contractual obligations arise."). Because no contract was formed, the Tribe's breach of contract claim must fail as a matter of law.

C. The United States Had No Contractual Duty To Maintain, Protect, Repair, Or Preserve The Building

Where a contract exists, to recover for a breach of contract against the United States, a plaintiff has the burden to show: "(1) a valid contract between the parties, (2) an obligation or

duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." *San Carlos Irrigation & Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). "Contract interpretation begins with the language of the written agreement." *Coast Fed. Bank, FSB v. United States,* 323 F.3d 1035, 1038 (Fed. Cir. 2003). Determining the obligations or duties that arise out of a contract "is a legal question of contract interpretation" that is "generally amenable to summary judgment." *Mata v. United States*, 114 Fed. Cl. 736, 745 (2014) (citing *San Carlos Irrigation*, 877 F.2d at 959 and *Varilease Tech. Grp., Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002)).

First, even if a contract could be established, there is no language in the Tribal Resolutions that creates 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." Pl.'s First. Am. Compl. ¶ 62. The terms and obligations the Tribe posits as the basis for its breach claim are entirely different than those laid out in the Tribal Resolutions and appear nowhere in the factual record. Neither the Tribal Resolutions nor BIA's subsequent letter approving the resolution speak an obligation to maintain, protect, repair, or preserve the Agency building. Instead, the Tribal Resolutions assert only that the building will "revert" to tribal ownership when the Government no longer has need for them for agency purposes. [12] To show a breach of contract, the Tribe would need to point to obligations or duties "arising *out of* the contract." *San Carlos Irrigation*, 877 F.2d at 959

[12] Ironically, if, as the Tribe argues, the United States is no longer using Building 2001 for agency purposes and the building must revert to Tribal ownership, the Tribe would take on the cost of remediation or demolition of Building 2001. The Tribal Resolutions do not speak to the condition of the buildings when it reverts, do not require the United States to remediate the damage to the building before it reverts to Tribal ownership, and do not require the United States to construct a new building on the site. Thus, the building would revert as-is.

(emphasis added). The contractual duties the Tribe alleges were breached do not arise out of the contract, so the Tribe cannot recover for their breach.

In sum, the United States never formed a binding, enforceable contract with the Tribe because the United States never objectively manifested an intent to contract, the Tribe's offer was ambiguous, and the United States did not accept an offer. But even if the Tribe could establish a contract, there is no possible interpretation of the Tribal Resolutions that would create a duty on the United States to maintain, repair, or preserve Building 2001 or to remediate the damage before allowing it to "revert" to Tribal ownership.[13] The factual record reveals no genuine dispute as to any material facts. Thus, this Court should find that the United States is entitled to judgment as a matter of law on the breach of contract claim.

II. THE UNITED STATES IS NOT LIABLE FOR BREACH OF TRUST

A. The Tribe's Claim Is Time-Barred

Before this Court can consider the merits of the Tribe's trust claims, it must consider two preliminary issues: whether the Tribe's trust claim is barred by its 2013 settlement with the United States, and whether this Court has jurisdiction pursuant its 6-year statute of limitations. Here, the Tribe's claim is time-barred on both accounts. The Tribe's trust claim centers on allegations that the United States failed to preserve and maintain Building 2001, which led to its eventual deterioration. But the Tribe knew that Building 2001's roof had been leaking for decades before it filed suit and knew that black mold had developed in Building more than six years before it filed suit. That is enough to bar the Tribe's trust claims under both the terms of the prior settlement and the jurisdictional statute of limitation.

[13] Even if the United States somehow had a contractual duty to maintain, repair, or preserve Building 2001, the Court would lack jurisdiction over the Tribe's breach of contract claim because the claim accrued outside of the Court's six-year statute of limitations. *See infra*, II(A)(2) (discussing claim accrual in the context of trust duties).

1. The Tribe Released Its Breach of Trust Claim Because the Claim Is Based on Alleged Harms That Occurred Prior to a February 20, 2013 Settlement

First, the Tribe released and waived its breach of trust claim against the United States pursuant to a prior settlement agreement with the United States because its instant claim is based on alleged harms that occurred before February 20, 2013. When faced with a release as part of a settlement contract, the court must "first ascertain whether its language clearly bars the asserted claim." *Dureiko v. United States*, 209 F.3d 1345, 1356 (Fed. Cir. 2000). If the language of the release is "unambiguous and susceptible only to one reasonable meaning, the court's review is limited to the plain meaning without considering extrinsic evidence." *Info. Sys. & Networks Corp. v. United States*, 148 Fed. Cl. 356, 364 (2020) (quoting *MW Builders, Inc. v. United States*, 134 Fed. Cl. 469, 512 (2017)).

On January 28, 2013, the United States and Federal Defendants (including the then-current Secretary of the Interior, then-Acting Principal Deputy Special Trustee for American Indians, and then-Secretary of the Treasury) and the Cheyenne River Sioux Tribe stipulated to a global settlement to address the trust accounting claims and the trust mismanagement claims that the Tribe brought against the United States and its agents in two related cases: *Cheyenne River Sioux Tribe v. Kempthorne*, No. 06-cv-01897-TFH (D.D.C. dismissed Apr. 26, 2013) and *Cheyenne River Sioux Tribe v. United States*, No. 06-cv-00915-NBF (Fed. Cl. dismissed Oct. 7, 2011). Pursuant to the stipulated settlement, the United States paid the Cheyenne River Sioux Tribe $38,500,000.00. In consideration of the payment, Paragraph 4 of the stipulated settlement stated that the Tribe:

> "[H]ereby waives, releases, and covenants not to sue in any administrative or judicial forum on any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, known or unknown, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or

> violations occurring before the date of this Court's entry of this Joint Stipulation of Settlement as an Order and that relate to Defendants' management or accounting of Plaintiff's trust funds or Plaintiff's non-monetary trust assets or resources."[14]

Def.'s Mot. for Leave to Amend Answer Ex. A ¶ 4, ECF No. 69-1. The settlement became effective on February 20, 2013 when the Court issued an order approving the Joint Stipulation of Settlement.

Here, the Tribe's trust claim is barred by the terms of the settlement because it is "based on" harms that occurred before the date of the settlement. The Tribe alleges that "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." Pl.'s First. Am. Compl. ¶ 55. But BIA replaced the roof over Building 2001 between 1986 and 1988, over thirty years before the Tribe filed this suit. *See* EXHIBITS 23, EXHIBIT 24. By 2003, BIA noted that roof was leaking again, which the Tribe either knew or should have known given that they occupied half Building 2001. *See* EXHIBIT 46 at 2 ("The roof leaks causing water to leak on ceiling pane and electrical lighting which causes panels to fall from the ceiling. Panel has been known to fall on desks and nearly injure occupants." Even the large storm in June 2010 that allowed a great amount of water to infiltrate Building 2001 took place nearly ten years before the Tribe filed suit. *See* EXHIBIT 32 at 115: 7-19. And, while the record is clear that Building 2001's roof was allowing water to leak into the building for decades before 2013 (*see, e.g.*, EXHIBIT 26, EXHIBIT 23), the terms of the settlement apply *even if the Tribe was*

[14] The Tribe has argued that the settlement agreement is inapplicable here because it included "an exception for claims arising out of the 1868 Treaty of Fort Laramie." Mem. in Opp'n to Mot. for Leave to Amend Answer 2,ECF No. 71. However, as explained below, the Tribe has identified nine separate sources of law allegedly establishing the United States' trust duties. Unless the Tribe intends to argue that the Treaty of Fort Laramie of 1868 is the *only* source of law creating money-mandating trust duties, the stipulated settlement's release is still applicable.

unaware of such harms because the settlement applies equally to "known or unknown" harms or violations.

What's more, the Tribe had problems of its own in the Tribal Addition, which also had a documented history of roof failures and leaks prior to February 2013. For instance, on April 16, 2012, a tribal employee working in the Tribal Addition emailed Tribal facility and maintenance coordinators reporting "several leaks near the Central Records Office," which is located in the Tribal Addition. EXHIBIT 48. She continued by asking, "Since I am on the subject of the leak near Central Records: when is this building going to be repaired so that this leak and other major repairs are finally addressed. When we get any type of moisture there are severe leaks in the hallways. This has led to damage of equipment as well as the potential for mold. The mold then becomes a health issue for those of us working down here." EXHIBIT 48. For these reasons, the Tribe's breach of trust claim is improperly "based on" harms, known or unknown, occurring before the date of its 2013 settlement with the United States. Accordingly, the Tribe released and waived its instant claims, and this Court should grant summary judgment in favor of the United States.

2. This Court Lacks Jurisdiction Over the Tribe's Breach of Trust Claim Because It Was Filed After the Statute of Limitations Had Run

Similarly, this Court lacks jurisdiction over the Tribe's breach of trust claim because the Tribe's claims accrued more than six years before the Tribe filed its complaint on February 4, 2020. The six-year statute of limitations for breach of trust claims in this Court is a jurisdictional bar and must be strictly construed. 28 U.S.C. § 2501; *see also Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576–77 (Fed. Cir. 1988) ("The 6-year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a

condition of the government's waiver of sovereign immunity and, as such, must be strictly construed.").

A cause of action for breach of trust traditionally accrues when the trustee "repudiates" the trust "by express words or by taking actions inconsistent with [its] responsibilit[y] as trustee." *Shoshone Indian Tribe of Wind River Rsrv. v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004). The Federal Circuit has "'soundly rejected' the notion 'that the filing of a lawsuit can be postponed until the full extent of the damage is known.'" *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1354 (Fed. Cir. 2011) (citations omitted). Even in tribal trust claims, "for purposes of determining when the statute of limitations begins to run, the 'proper focus' must be 'upon the time of the [defendant's] acts, not upon the time at which the *consequences* of the acts [become] most painful.'" *Id.* (alternations and emphasis in original) (citing *Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011). Furthermore, this Court must employ an objective standard to determine whether the pertinent events have occurred for purposes of claim accrual. *See id.* at 1350 (citing *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995) ("[A] plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue."); *see also Jones v. United States*, 801 F.2d 1334, 1335 (Fed. Cir. 1986) ("[A]n action for breach of fiduciary duty accrues when the trust beneficiary knew or should have known of the breach.").

Here, there is no genuine factual dispute that the Tribe knew or objectively should have known of Building 2001's maintenance deficiencies, which ultimately led to its permanent closure, prior to February 4, 2014. In addition to the Tribe's knowledge of the ongoing roof problems and infiltration of water described above, the Tribe was also aware that surface and airborne mold was discovered in the building prior to February 4, 2014. On January 21, 2014,

the BIA Agency Superintendent emailed the Tribal Chairman the results from the microbial/fungi testing in Tribal South and the Tribal Addition, noting the presence of Stachybotrys, which the report described as "typically appear[ing] as a sooty black fungus" that can produce "extremely toxic" mycotoxins. EXHIBIT 36 at 000297. The next day, on January 22, 2014, the Tribe received a copy of BIA's Public Service Announcement explaining that BIA had coordinated an emergency move from Building 2001 as a result of air tests revealing airborne microbial/fungi that causes serious health problems. *See* EXHIBIT 38. The Tribe released its own Public Service Announcement on January 31, 2014, explaining that the Tribal offices in Building 2001 and the Tribal Addition needed to "be closed and services moved to another location" due to the results from mold testing. EXHIBIT 39. That same day, the United States sent the Tribe a letter notifying the Tribe that BIA had coordinated an emergency move from Building 2001 because of concerns about serious health problems stemming from the mold. See EXHIBIT 37. The letter also established that as of January 31, 2014, the United States' position was that the Tribe had no legal right to occupy Tribal South. EXHIBIT 37. ("Although the Tribe had previously leased space in Building 2001, no lease or permit exists at the present time which would provide the Tribe with any legal right of occupancy.").

In sum, before February 4, 2014, the Tribe knew or should have known that (1) the roof of Building 2001 had been leaking for years and had not been replaced since the late 1980s; (2) mold had been discovered inside Building 2001 and the Tribal Addition, which posed a health and safety risk to those working inside Building 2001; (3) BIA was shutting down operations in Building 2001 and relocating its offices to a new location; and (4) BIA understood the Tribe to have no legal right of occupancy in Tribal South. If this Court finds the United States breached a duty to maintain, protect, repair, or preserve Building 2001 and to prevent it from deteriorating,

falling into disrepair, and becoming unusable, there is no material dispute of fact that the Tribe was objectively aware of the facts giving rise to its claim before February 4, 2014. Accordingly, the Tribe's breach of trust claim accrued outside of the statute of limitations and must be dismissed for lack of Jurisdiction.

B. The United States Does Not Have Trust Duties With Respect To Building 2001 Because Building 2001 Is Not A Trust Asset

The United States does not have trust duties with respect to Building 2001 because Building 2001 is not a trust asset. In general, the United States "incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian lands or resources." *Inter Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (citing *United States v. Mitchell*, 463 U.S. 206, 226 (1983)). And "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011).

But there are three antecedent elements necessary before the Court even reaches the question of specific fiduciary duties. The presence of any trust duties necessarily requires: (1) a trustee (the United States); (2) a beneficiary (the Tribe); and (3) a trust corpus (for example, property, lands, or funds). *Inter Tribal Council*, 51 F.3d at 203. It necessarily follows that a court must identify the "trust corpus," or property subject to the trust, before it can find the existence of fiduciary duties. For example, in *United States v. Mitchell*, the trust corpus was the Indian trust lands and the marketable timber thereon. 463 U.S. 206, 224 (1983). And—though the specific fiduciary duties ultimately arose from other statutes (*id.* at 224)—the resources were trust resources by nature of the General Allotment Act. *Id.* at 217. That Act "provided that the United States would hold land 'in trust' for the Indian allotees." *Id.* (citing 25 U.S.C. § 348).

The same is true for the building that was at issue in *White Mountain Apache*. In that case, the Supreme Court considered whether the United States was subject to trust duties related to a former military post called Fort Apache, which was originally established by the United States within territory that later became the White Mountain Apache Tribe's reservation in 1877. *United States v. White Mountain Apache Tribe*, 537 U.S. 465*,* 468 (2003). In 1922, Congress transferred control of the Fort to the Secretary of the Interior, and in 1960, Congress passed a statute directing the "lands, *together with the improvements thereon*, included in the former Fort Apache Military Reservation" (Act of March 18, 1960, Pub. L. 86-392, 74 Stat. 8 (emphasis added)) to be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for the purpose." *White Mountain Apache*, 537 U.S. at 468-69 (quoting Act of March 18, 1960, 74 Stat. 8). Although the Department of the Interior occupied parts of the Fort at various times over the years, the Fort ultimately fell into disrepair, leading the Tribe to sue the United States for allegedly breaching its "fiduciary duty to 'maintain, protect, repair, and preserve' the trust property." *Id.* at 469 (internal citation omitted). But—setting aside the source of that specific duty—the 1960 statute defined the trust corpus as "Fort Apache," including both the land *and buildings,* or "improvements," on the land. The buildings at Fort Apache were expressly part of the trust asset that Congress established.

Here, the Tribe alleges breach of the same trust duties identified by the Court in *White Mountain Apache*: the duty to maintain, protect, repair, and preserve Building 2001. And indeed, the case at bar shares certain factual similarities with *White Mountain Apache*: both cases involve the United States using buildings located on tribal trust land for administrative purposes,

and in both cases, the building or buildings ultimately fell into disrepair. But the instant case is distinguishable from *White Mountain Apache* in one material way. Unlike the building at issue in *White Mountain Apache*, Building 2001 itself is not held in trust for the Tribe's benefit. Congress has never directed Building 2001 (or any prior Agency headquarters building) to be held in trust for the benefit of the Tribe. And although the land on which the building sits is held in trust for the benefit of the Tribe (*see* EXHIBIT 49), Building 2001 itself is not held in trust. This distinction is critical because trust duties can only attach to trust assets. *See, e.g. White Mountain Apache,* 537 U.S. at 475 ("[A] fiduciary actually administering trust *property* may not allow it to fall into ruin on his watch.") (emphasis added). Because the "essential element of a trust corpus is missing" from the Tribe's claim (*Wyandotte Nation v. Salazar*, 939 F. Supp. 2d 1137, 1155 (D. Kan. 2013)) (footnote omitted), the Tribe's claim that the United States breached trust obligations by failing to maintain or preserve Building 2001 must fail as a matter of law.

C. The Court Would Lack Jurisdiction Over The Tribe's Breach of Trust Claim Even if Building 2001 Were A Trust Asset, Because The Tribe Has Identified No Substantive Source Of Law Giving Rise To A Money-Mandating Trust Duty

The Tribe asserts jurisdiction under both the Tucker Act and the Indian Tucker Act. Pl.'s First. Am. Compl. ¶ 9. But neither statute creates a "substantive right enforceable against the United States for money damages." *Mitchell*, 445 U.S. at 538. To establish jurisdiction under these statutes, a plaintiff must identify a substantive source of law, distinct from the Tucker Act or Indian Tucker Act, that satisfies the two-part test outlined by the Supreme Court and adopted by the Federal Circuit.

First, a claimant "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation (Navajo II)*, 556 U.S. 287, 290 (2009) (citation omitted);

see also Jicarilla Apache Nation, 564 U.S. at 165 (emphasizing that the government's duties to Indian tribes are defined by specific trust-creating statutes or regulations, not common law trust principles.) A statute or regulation "that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (citing *Mitchell*, 445 U.S. at 542-44 (1980)). Accordingly, the United States is subject to those fiduciary duties "only to the extent it expressly accepts those responsibilities by statute" or regulation. *Jicarilla Apache* Nation, 564 U.S. at 177; *Navajo I,* 537 U.S. at 506 ("[A]nalysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions . . ."); *See also El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 895 (D.D.C. 2014) ("[T]he real question is whether the particular statute or regulation establishes rights and duties that characterize a conventional fiduciary relationship.").

Second, "[i]f that threshold is passed, the court must then determine whether the relevant source substantive of law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *Navajo II*, 556 U.S. at 290-91 (internal alterations and quotations omitted) (quoting *Navajo I*, 537 U.S. at 506). A determination that a statute can "fairly be interpreted" as providing the requisite substantive right for money damages "depends on the facts, and underlying substantive law, in each particular case." *Anderson v. United States*, 5 Cl. Ct. 573, 577 (1984), *aff'd*, 764 F.2d 849 (Fed. Cir. 1985).

Here, the Tribe's claim does not survive the first step of the Supreme Court's test because the Tribe has failed to identify a specific, money-mandating statute that requires the United States to maintain or preserve Building 2001. The Tribe has identified eleven sources of the United States' alleged trust responsibilities: the Northwest Ordinance, the Trade and Intercourse Act, the Treaty with the Teton of 1815, the Fort Laramie Treaty of 1851, 1854 Kansas Nebraska

Act, 1860 Dakota Territory Act, the Fort Laramie Treaty of 1868, the Act of March 2, 1889, the Flood Control Act, the Cheyenne River-Oahe Act (Public Law 83-776), Pl.'s First Am. Comp. ¶¶ 42-43, 45-48, 50-52, and the "agreement of the United States related to Tribal Resolution No. 23-57."[15] EXHIBIT 45 at 7. But not one of these purported sources of law creates the necessary specific fiduciary duties to maintain, protect, repair, or preserve the building. Further, the Tribe's claims also fail the Court's second step, as none of the alleged sources of trust duties can be fairly interpreted to provide the requisite substantive right for money damages. Thus, this Court lacks jurisdiction over the Tribe's breach of trust claim.

1. The United States Has Not Specifically Accepted Money-Mandating Fiduciary Duties Regarding Maintenance, Repair, or Preservation of Building 2001 In Any Statutes, Regulations, or Treaties

Here, none of the substantive sources of law identified by the Tribe contain specific, rights-creating or duty-imposing statutory or regulatory prescriptions requiring the United States to locate and keep Building 2001 at its relocated site, or to maintain, protect, repair, and preserve the building. First, the Tribe appears to root its claim for breach of trust largely in Articles III and V of Treaty of Fort Laramie of 1868. But nothing in the text of the Treaty of Fort Laramie of 1868 creates a fiduciary duty to maintain, protect, repair, and preserve Building 2001 or to prevent it from deteriorating, falling into disrepair, and becoming unusable. If anything, the Treaty of Fort Laramie of 1868 establishes a duty to locate an agency building (see EXHIBIT 1, Article III) on the reservation, where an agent will provide services to the Tribe (*see* EXHIBIT 1,

[15] The Tribe also alleges, generally, that "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" and cites generally to a list of statutes as examples. Pl.'s First. Am. Compl. ¶ 57. But these statutes relate only to the United States general trust relationship with Indian nations and fall well short of this Court's standard requiring the Tribe to identify "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U.S. at 506.

Article V). But the Tribe does not allege that the United States breached those particular duties, likely because there is no dispute that the BIA has always kept an office open in a building on the reservation, where the Superintendent of the Agency, acting as the United States' agent, has remained to serve the Tribe. *See* EXHIBIT 32 at 161:13-162:1. For instance, even when the BIA had to close Building 2001 and relocate—first to its temporary location in the Girls' dormitory, then to its more-permanent home in the Western Sky Building—the Agency Superintendent has continuously fulfilled his role as the agent of the United States and has always "ma[d]e his home" on the reservation. EXHIBIT 1, Article V. Thus, the United States continues to fulfill the specific obligations it has under Articles III and V of the Treaty of Fort Laramie of 1868 and cannot be found to have breached duties *not created* by the Treaty, including duties to maintain, repair, or preserve Building 2001.

The Tribe also points to the Cheyenne River-Oahe Act as a source of specific fiduciary duties. But the plain terms of the Act show that it imposed no relevant trust duty. The Act states that it was enacted to rehabilitate and compensate the Tribe for the United States' acquisitions of lands required for construction of the Oahe Dam and reservoir. *See* EXHIBIT 2, Statement of purpose. Specifically, Section II of the Act authorized the United States to pay the Tribe $5,384,024, which was agreed to be "a final and complete settlement of all claims, rights, and demands of said Tribe or allottees or heirs thereof arising out of the construction of the Oahe project." EXHIBIT 2, Section II, And, as relevant here, Section IV of the Act established that the United States would appropriate funds specifically for the "relocation and reconstruction of the Cheyenne River Agency." EXHIBIT 2. But agreeing to pay the Tribe a sum-certain in just compensation and agreeing to appropriate funds to relocate the Agency is not equivalent to agreeing to accept specific, fiduciary duties related to the relocated agency, especially not duties

that purportedly mandate *additional* and *ongoing* financial appropriations. The Act makes no mention of a duty to maintain, repair and preserve the reconstructed agency building, and certainly does not adopt a duty to construct a brand-new agency building if and when the reconstructed building eventually becomes unusable. It suggests the opposite – a one-time relocation and reconstruction of the building originally provided for by the Treaty of Fort Laramie of 1868 for BIA's use. Because Congress did not include any duty to maintain that building at that location in perpetuity, this Court's jurisdiction over the Tribe's breach of trust claim finds no basis in this statute.

Additionally, in its response to the United States' interrogatories, the Tribe cited to "the agreement of the United States related to Tribal Resolution No. 23-57 (Feb. 11, 1957) as additional source of alleged trust duties." EXHIBIT 45 at 7. This "agreement" cannot create trust duties because an agreement, or contract, is not a substantive source of law. *See Hopi Tribe*, 782 F.3d at 667 (citing *Mitchell*, 445 U.S. at 542-44) ("[T]he United States is only subject to those fiduciary duties that it specifically accepts by statute or regulation."). A duty must come from Congress because Congress is the settlor of any trust with Indian Tribes, which also means they alone have the right to alter the terms of the trust by statute. *Jicarilla Apache Nation*, 564 U.S. at 184 n.9. Accordingly, a contract—even a purported contract with an agent of United States—cannot create a tribal trust duty.

Finally, the remaining sources of law identified by the Tribe fare no better. In addition to the treaties, statutes, and contracts discussed above, the Tribe also identifies a list of additional sources of law purportedly creating fiduciary duties related to Building 2001. First, the Tribe identifies the Northwest Ordinance (Jul. 23, 1787) and the Trade and Intercourse, which it describes as "integral to the Government's trust responsibility to Indian nations" (Pl.'s First. Am.

Compl. ¶ 44), and the Treaty with the Teton, which it describes as "essential to the genesis of the trust responsibility of the United States to the [Tribe]." *Id.* ¶ 45. That may well be true, and the United States does not deny the general trust relationship it holds with the Tribe, or with Indian Tribes in general. But the Supreme Court has squarely held that a general trust relationship is not enough to create money-mandating trust duties. *See Jicarilla Apache Nation*, 564 U.S. at 165; *Navajo I*, 537 U.S. at 490; *Mitchell*, 445 U.S. at 542-44. The Tribe also identifies the Fort Laramie Treaty of 1851 as "acknowledg[ing] the boundaries of the Sioux Nation in South Dakota", the Kansas Nebraska Act and the 1860 Dakota Territory Act as "reserve[ing] the rights of people and property pertaining to the Sioux Nation," the Act of March 2, 1889 as the United States "agree[ing] to protect the Tribe" and "guarantee[ing] the Tribe's right to absolute and undisturbed use of its Indian lands," and the Flood Control Act as "protect[ing] the lower Mississippi River Basin from annual floods." Pl.'s First. Am. Compl. ¶¶ 22, 46, 47, 51. But again, the Tribe has not identified specific, duty-imposing prescriptions in any of these treaties or statutes requiring the United States to maintain, protect, repair, and preserve Building 2001. In short, because the Tribe has failed to demonstrate that this Court has subject matter jurisdiction under either the Tucker Act or the Indian Tucker Act, this Court should grant summary judgment for the United States.

III. THE UNITED STATES DID NOT TAKE THE TRIBE'S PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT

The Tribe's Fifth Amendment taking claim suffers two fatal flaws. First, the Tribe's claim is based on alleged government inaction, which is not legally cognizable under the Fifth

Amendment.[16] Second, the Tribe lacks a cognizable property interest in Building 2001. Accordingly, the Tribe's Fifth Amendment taking claim fails as a matter of law.

A. Government Inaction Cannot Effect A Taking

The Federal Circuit has squarely held that the United States "cannot be liable on a takings theory for inaction." *St. Bernard Parish,* 887 F.3d at 1357; *see also Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1341 (Fed. Cir. 2018) (affirming the "principle that government inaction cannot be a basis for takings liability"). Here, the Tribe's takings claim is rooted in allegations of government inaction: the failure to perform maintenance work on Building 2001. The Tribe does not challenge what the United States has *done*; it challenges what the United States has *not done,* or what the United States has *not done well enough*, neither of which amount to a Taking under the Fifth Amendment. Without a government action on which to base its takings claim, the Tribe's claim fails as a matter of law.

The Tribe concedes this fatal flaw in its interrogatory answers, which actually use the word "inaction" to describe the takings claim. Pl.'s First. Am. Compl. ¶ 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.") (emphasis added); *see also* EXHIBIT 45 at 8, 10. Because the Tribe's claim is "fatally flawed" and "destined to fail," the Tribe's taking must be dismissed. *Terry v. United States*, 103 Fed. Cl. 645, 651 (2012) (citation omitted).

[16] The Tribe attempted to plead both a taking and a regulatory taking. Notwithstanding the fact that the Tribe has not identified the regulation or regulatory action that allegedly amounted to a regulatory taking, the Federal Circuit has held that government liability must be based on affirmative acts by the government (as opposed to inaction) in both physical and regulatory takings. *St. Bernard Parish*, 887 F.3d at 1361.

The Tribe's assertions that "failures" of the United States amount to a taking fare no better. A failure to act is inherently inaction. And the Tribe's Complaint and interrogatory responses reveal that its takings claim is based on the United States' failure to act. For instance, the Tribe argued that:

> The **failures** of the United States include, but are not limited to, **failure** to maintain, repair and upkeep the Building over a period of years, **failure** to plan for the operations, maintenance, repair and upkeep of the Building and when the United States undertook maintenance or repairs, including repairs to the roof, they were negligent, faulty, defective and deficient, improperly supervised, and **failed** in execution and **failed** to meet reasonable standard of building maintenance, thereby allowing the building to become susceptible to rainwater and other water and moisture from precipitation, leak, suffer an accumulation of water and moisture, and develop mold in the walls and structure of the building. Further, the United States **failed** to remediate mold and restore the Building when the mold was discovered.

EXHIBIT 45 at 9 (emphasis added); *see also* EXHIBIT 45 at 8, 10, 12, 13, 14, 15, 16, 17 (alleging various failures); Pl.'s First. Am. Compl. ¶¶4, 38, 40; 63, 65 (same).

The Federal Circuit confirmed in *St. Bernard Parish* that allegations about the government's "failure" to take action is merely another way of alleging inaction. 887 F.3d at 1360-61. In *St. Bernard Parish*, the plaintiff landowners contended that the "the failure of the Army Corps to maintain" a navigation channel into New Orleans allegedly caused the channel to funnel Hurricane Katrina's storm surge toward the city's levees with greater force, resulting in flooding and a taking of their property. *Id*. at 1358 (citation omitted). The Federal Circuit reversed the lower courts' liability finding because the claim was "based in large part on the failure of the government to take action." *Id.* at 1360. The court held that "[o]n a takings theory, the government cannot be liable for failure to act, but only for affirmative acts by the government." *Id.*

Here, the Tribe alleges that because the government failed to maintain, protect, repair, and preserve, or prevent Building 2001 from deteriorating, it took the Tribe's property. However, under *St. Bernard Parish*, neither the Tribe's direct allegation of "inactions," nor the Tribe's allegations of the United States' "failures," can support a taking claim.

Similarly, the Tribe alleges that the United States "allow[ed]" Building 2001 to deteriorate, fall into disrepair, and become unusable. *See* Pl.'s First. Am. Compl. ¶¶ 4, 38, 55 (discussing what BIA "allow[ed]" to happen); *see also* EXHIBIT 45 at 9, 12, 14 (same). The Federal Circuit has similarly rejected attempts to save a claim by characterizing inaction as an affirmative act. *Bench Creek Ranch, LLC v. United States*, 855 F. App'x 726, 728 (Fed. Cir. 2021). In *Bench Creek Ranch, LLC*, Plaintiff-owner of a Nevada ranch brought a Fifth Amendment takings claim against the United States alleging that hundreds of wild horses on federal lands drank water belonging to the Plaintiff. *Id*. at 726. In addition to its direct allegations of government "inaction" and "failure", the Bench Creek plaintiff also alleged that the government "affirmatively resist[ed] years of requests to remedy the nuisance that they had created." *Id.* at 728 (alternation in original). The Federal Circuit, however, found that this attempt to identify an action nevertheless "refer[ed] to inaction" and dismissed the claim. *Id.* The same is true here. The Tribe's assertions that the government "allow[ed]" the building to deteriorate, fall into disrepair, and become unusable all amount to inaction disguised as action, and cannot create takings liability.

B. The Tribe Has No Cognizable Property Interest in Building 2001 and Cannot Therefore Base a Claim on "Condemnation" of the Building

At oral argument, when asked to identify the action giving rise to the Tribe's takings claim, counsel for the Tribe identified the United States' "condemnation" of Building 2001. EXHIBIT 47 at 39: 1-14. But the United States did not use its a power of eminent domain to

condemn a structure belonging to a third party; it determined that *its own building* was no longer fit for use. This "condemnation" does not constitute a taking because the Tribe has no cognizable property interest in Building 2001.

The Federal Circuit has established a two-part test to determine whether a taking has occurred. "First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment." *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). "Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest." *Id.*

The Tribe fails to clear the first hurdle because it does not have a cognizable property interest in Building 2001, which is owned by the United States. While the Tribe may argue that it has a "reversionary property interest" stemming from the Tribal Resolutions (EXHIBITS 9 & 14), those resolutions create no cognizable property right to occupy or use Building 2001. The Tribe's claim of "reversion" stems from its own statement in the Tribal Resolutions that Building 2001 would "revert" to Tribal ownership "when the Government no longer has need for [it] for Agency purposes" in accordance with the December 18, 1956 letter. EXHIBITS 9 & 14. However, as explained above, the Tribal Resolutions referenced pre-existing BIA policies (which are still in effect today) governing the circumstances of any possible future transfer to the Tribe, which in turn give the Secretary of the Interior *discretion* to decide whether to make transfer. *See* 25 C.F.R. § 900.95–900.101. The Tribe's "unilateral expectation" of a hypothetical, potential transfer of property is "not a property interest entitled to protection." *Broughton Lumber Co. v. United States*, 30 Fed. Cl. 239, 243 (1994) (citing *Webb's Fabulous Pharmacies,*

Inc. v. Beckwith, 449 U.S. 155, 161 (1980). Because the United States cannot "take" its own building by condemnation,[17] the Tribe's Fifth Amendment taking claim must fail.

CONCLUSION

For the foregoing reasons, the United States respectfully requests this Court grant summary judgment for the United States on each of the Tribe's three claims.

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[17] The United States has also taken no action to appropriate the Tribe's property interest in the Tribal Addition. The United States' so-called "condemnation" of Building 2001 did not interfere with the Tribe's use of the Tribal Addition. The Tribe admits that the United States has not prevented the Tribe's from accessing the Tribal Addition or prevented the Tribe from entering the Tribal Addition at its discretion. EXHIBIT 32 at 103:8-16.