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

REPLY IN SUPPORT OF DEFENDANT UNITED STATES' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Summary judgment should be granted in favor of the United States because the Tribe has failed to present evidence demonstrating a genuine issue of material fact regarding any of its three claims. Throughout its Response, the Tribe makes conclusory, unsupported assertions, citing neither facts nor law. However, "arguments of counsel cannot take the place of evidence lacking in the record." *Estee Lauder Inc. v. L'Oreal, S.A.*, 129 F.3d 588, 595 (Fed. Cir. 1997) (internal citation omitted).

"The purpose of summary judgment is not to deprive the litigant of a trial, but to avoid an unnecessary trial when only one outcome can ensue," that is, "when no material facts remain in dispute, or when the nonmovant can not prevail on its view of the facts." *Vivid Technologies, Inc. v. American Sci. & Eng'g, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999). The Supreme Court has held that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Because the United States has moved for summary judgment in a motion "made and supported" in accordance with RCFC 56(e), the Tribe must now present evidence to refute the United States' arguments. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *see also* RCFC 56(c)(1)(A) (identifying the kinds of evidence that must be offered by a non-movant to create a genuine issue of fact). The Tribe has failed to do so.

First, the Tribe has failed to establish the existence of a contract with the United States. As an initial matter, the Tribe identifies no government representative with actual authority to bind the United States who purportedly entered into a contract with the Tribe. That alone entitles the United States to summary judgment. In addition, the Tribe also offers no evidence showing

the United States objectively expressed an intent to contract, as required to form mutual assent. The preliminary report from the Tribe's intended historian only offers opinions regarding *the Tribe's intent* and its supposed understanding as it relates to the alleged contract; it provides no evidence about the United States' understanding. As to the alleged "offer" and "acceptance" of *a contract*, the Tribe again simply ignores key parts of the factual record that do not support its argument, including (1) the Tribal Resolutions' ambiguous statement that the building would revert to Tribal ownership *in accordance with the statement of the Commissioner of Indian Affairs*, and (2) the ambiguity in the December 18, 1956 letter, when the Commissioner references established bureau policy. Moreover, and fatally for the Tribe's claim, the Tribe concedes that no provision in the Tribal Resolutions require the United States to maintain or repair Building 2001, much less replace the facility for the Tribe's use. Thus, the Tribe's breach of contract claim would fail even if the Tribal Resolution could be deemed a contract.

Second, the Tribe fails to identify a substantive source of law giving rise to trust duties to maintain and repair Building 2001 for the benefit of the Tribe. Instead, the Tribe admits that its breach of trust claim is based on an alleged implicit trust duty that the United States purportedly assumed when the United States constructed the Agency on tribal trust land. Such a claim suffers from a fatal legal flaw. Decades of Supreme Court precedent establish that the Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute or regulation. *See, e.g. United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011). Because the Tribe has not identified a statute imposing a fiduciary duty to maintain or repair Building 2001 for the Tribe's benefit, its proffered facts are irrelevant. The Tribe's trust claim fails as a matter of law.

The Tribe also did not bring a timely claim to challenge shortcomings in the maintenance and repair of Building 2001. In its First Amended Complaint and Responses to the United States' interrogatories, the Tribe alleged and asserted that the United States failed to maintain Building 2001 by inadequately replacing the roof and failing to address ongoing water intrusion. To avoid the statute of limitations, the Tribe now contends that its claim did not accrue until the United States determined that Building 2001 was not fit for continued use and was better suited for demolition. The Tribe likewise claims that it did not waive its claim in its 2013 settlement because the United States did not forgo all repairs until 2014. But the Tribe cannot escape its admission that it knew of the roof leaks and potential for mold for *years* and that any trust obligation (if one existed) was present long before BIA entered into the settlement in 2013 and ceased use of Building 2001 in 2014.

Third, the Tribe's Response cites *zero* evidence and *zero* legal authority to support its taking claim. In other parts of its brief, the Tribe cites inapplicable common law property principles and cherry-picked statements from the Restatement that, even taken together, do not demonstrate a cognizable property interest taken by the United States. Moreover, as explained in the United States' opening brief, a taking claim cannot be premised on inaction. The Tribe attempts to transform its claim by adding the words "made the decision to" to the beginning of each claim. For instance, instead of arguing that the United States "ceased all repairs," which describes inaction, the Tribe now argues that the United States *made the decision to* cease all repairs. A "decision" to do nothing is still inaction. The Court should look past the Tribe's semantics to the true nature of the Tribe's takings claim, which is fatally flawed because it is rooted in allegations of inaction.

For these reasons, and other reasons set forth below, the Court should enter summary judgment in favor of the United States.

ARGUMENT

I. THE UNITED STATES HAS NO CONTRACTUAL OBLIGATION TO MAINTAIN OR REPAIR BUILDING 2001 TO ALLOW THE TRIBE TO CONTINUE USING IT FOR TRIBAL PURPOSES

The Tribe bears the burden of proving the existence of a contract. The United States has explained that the record contains no evidence that a valid contract was ever formed between the United States and the Tribe related to the ownership, maintenance, or repair of Building 2001. The Tribe offers no record evidence establishing otherwise. Summary judgment is therefore appropriate. *Celotex*, 477 U.S. at 324. The Tribe also concedes that no express provision in the Tribal Resolutions requires the United States to maintain or repair Building 2001. Because the Tribe cannot recover for breach of a term absent from an express contract, no material fact precludes summary judgment in favor of the United States.

A. The Tribe's Response Offers No Evidence of Mutual Assent, Ignores Ambiguity in the Offer and Acceptance, and Fails to Identify a Government Representative with Actual Authority to Bind the United States

As the party alleging the existence and breach of a contract with the United States, the Tribe carries the burden to demonstrate four elements: (1) a mutual intent to contract; (2) consideration; (3) lack of ambiguity in the offer and acceptance; and (4) evidence that the government representative who entered or ratified the agreement had actual authority to bind the United States. *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). And because the Tribe ultimately bears the burden of proof to demonstrate the existence and breach of a contract, the Tribe "may not rest upon mere allegation or denials of [its'] pleading, but must set forth

specific facts showing that there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 256 (citing Fed. R. Civ. Pro. 56(e)). The Tribe has not met that burden.

First, the United States is entitled to summary judgment on the contract claim because the Tribe has presented no evidence that the alleged contract was entered into by a United States Government representative with actual authority to bind the United States, as the Tribe failed to identify any individual in its Response brief or pleadings. *Celotex*, 477 U.S. at 324. Indeed, the Tribe must not only identify the Government representative who allegedly bound the United States to a contract, but must also demonstrate that the representative had "actual authority to enter the alleged contract." *Yifrach v. United States*, 145 Fed. Cl. 691, 698 (2019); *see also Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998) ("The burden was on [plaintiffs] to prove that the [contracting officer] had the authority to enter into the . . . contract."). This requirement is not a mere formality; it ensures that the United States has affirmatively accepted responsibility for contractual obligations and has both legal and institutional mechanisms in place to meet its commitments and appropriate funds as needed.

Here, the Tribe is arguing that over seventy years ago, some unnamed individual made a binding commitment that the United States would expend unlimited funds over an unlimited period of time to maintain, preserve, repair, and ultimately reconstruct an administrative building for the use of the Tribe, even after the United State itself is no longer able to use the building. What's more, the Tribe simultaneously argues that the putative contract stripped the United States of both present and future ownership of the building that the United States paid to construct and maintain, and that the terms of the putative contract supersed pre-existing statutes and regulations governing the transfer of federal buildings to Indian Tribes. Such assertions are baseless. The Tribe has presented no declarations, stipulations, documents, admissions,

interrogatory answers, or other evidence, *see* RCFC 56(c)(1)(A), that a government representative with actual authority agreed to any contract, much less one with such costly and far-reaching terms. The Tribe has thus failed to establish a required element of its breach of contract claim and, therefore, the alleged contract "cannot be enforced under the Tucker Act, even if [it] could show the remaining elements of contract formation." *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1327 (Fed. Cir. 1997).

Lack of actual authority to contract is not the only fatal flaw. The Tribe also offers no evidence to establish that the United States objectively manifested intent to enter a binding contract with the Tribe. To attempt to show mutual assent, the Tribe's brief contains only one conclusory, unsupported statement: "[t]he United States manifested its assent to the terms of the Tribe's offer in a manner invited by the Tribe, namely approval of the Tribal Council Resolutions, placement of the tribal land in agency reserve status, and construction o[f] Building 2001 on the tribal land." *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. ('Pl.'s Resp.") at 24, ECF No. 95. While the Tribe attempts to rely on the United States' historian's answer to the Tribe's leading question to argue that "it is a 'reasonable inference' that the Tribe would have understood that the United States accepted its conditions by approving the Tribal Council Resolution and building on trust land,'" (Pl.'s Resp. at 24) this statement does not address how *the United States* understood its approval of the Tribal Resolution. Equally unhelpful are the statements by the Tribe's intended historian that "[t]he Tribe would have understood the approval of the resolution, and the actual construction on Tribal land an acceptance and agreement of the Tribe's conditions."). Pl.'s Resp., Ex. A at 10, ECF No. 96-1. By failing to put forth relevant evidence to establish that the United States understood and intended to enter into a

contract, the Tribe has failed to show a *mutual* intent to contract. Consequently, the Tribe has not demonstrated a genuine issue of fact.

In the same way, the Tribe fails to offer evidence concerning the United States' argument that the alleged offer and acceptance were fatally ambiguous. Here again, the Tribe presents only counsel's unsupported, conclusory statements that "the terms of the offer were clear and unambiguous" and "[t]he United States' acceptance was without any reservations, restrictions, or qualifications."[1] Pl.'s Resp. 24. The Tribe ignores the differences between the language in the Tribal Resolutions and the December 18, 1956 letter it references, omits the portion of the letter where the Commissioner referred to existing Bureau policy governing transfer of surplus government policy, and mischaracterizes the contents of the December 18 letter, claiming the letter "pledges to the Tribe that the United States would make the properties available to the Tribe when it no longer needed them." *Id.* at 25; *see* Def.'s MSJ at 17-18. The alleged offer and acceptance are ambiguous and contradictory. The Tribe thus fails to establish the "meeting of the minds" necessary to contract.

The Tribe also incorrectly invokes canons of construction of Indian law to claim that "any perceived ambiguity" in the alleged contract "would be resolved in favor of the Tribe and

[1] Alternatively, the Tribe asserts that the United States accepted the Tribe's offer by performance, namely construction of Building 2001. Pl.'s Resp. 24. However, acceptance by performance is inapplicable to the facts of this case. First, § 50 of the Restatement (Second) of Contracts (which the Tribe cites) establishes that an offeree may only accept an offer by performance if it is "invited or required by the offer." Here, the Tribal Resolutions request that the Secretary of the Interior "approve this resolution thereby setting aside the above-described tribal lands for administrative use of the Bureau of Indian Affairs . . .". *See* Def.'s Mot. for Summ. .J., ("Def.'s MSJ") Ex. 9 (ECF No. 83-9) Ex. 14 (ECF No. 83-14). Thus, the language of the purported offer neither invites nor requires acceptance by performance. In any event, the remaining elements of contracting with the United States would still need to be met, including lack of ambiguity in the offer and acceptance. *Anderson v. United States*, 344 F.3d at 1353. Federal Circuit precedent thus refutes the Tribe's claim that "acceptance by performance is not vitiated by subsequent allegations of ambiguity in the terms of the offer." *See* Pl.'s Resp. at 24.

the agreement would be understood as the Indians themselves would have understood [it]." Pl.'s Resp. 26. But Section 2.02 of Cohen's Handbook of Federal of Federal Indian Law offers guidance on canons of construction for *statutory* interpretation of *federal* law, not common law contract interpretation. *See* Pl.'s Resp., Ex. AA, ECF No. 96-27. ("[T]reaties, agreements, statutes, and executive orders" must "be liberally construe[d] in favor of the Indians and that all ambiguities are to be resolved in their favor."). In the context of Indian treaties, this canon of construction makes sense because "treaties were imposed upon [the Indians] and they had no choice but to consent." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). In contrast, the Tribe's breach of contract claim is not based on language from a treaty or statute originally drafted by the United States and imposed on the Tribe; it is based on an alleged bargained-for exchange containing an alleged offer *drafted by the Tribe* and an alleged acceptance by the United States to the *Tribe*'s terms. Such circumstances do not warrant interpretation of contract terms in favor of the Tribe.

More fundamentally, though, canons of contract interpretation are immaterial where no written contract was formed. The issue is not how the Court should interpret ambiguous terms in an already-formed contract; the question is whether ambiguity in the offer and acceptance prevented contract formation in the first instance. Here, both the alleged offer and alleged acceptance are facially ambiguous, thus no contract was formed.

B. The Tribe Admits That No Express Terms in the Putative Written Contract Require the United States to Maintain or Repair Building 2001 and the Tribe Has Not Met the Requirements for an Implied Contract

As the United States has explained, and as the Tribe concedes by failing to offer evidence to the contrary, there is no express provision in the alleged contract that required or requires the United States to preserve and maintain Building 2001 for the use of the Tribe. And, while the

Tribe neither pleads nor argues in its brief that an implied in fact contract was created, the Tribe nonetheless insinuates that the Court must imply terms into the contract that are not there, namely "an obligation on the part of the United States to preserve and maintain Building 2001" to allow the Tribe to use the building. Pls.' Resp. 26. The Tribe arrives at this conclusion by arguing that an *express* contract was formed, which allowed the United States to construct the Agency building on Tribal land, and an *implied* contract was *simultaneously* formed, which gave the Tribe property interests in the Agency building. This cannot be. The Federal Circuit has held that a contract implied-in-fact cannot exist if an express contract already covers the same subject matter. *Trauma Serv. Grp.*, 104 F. 3d at 1326. Here, the Tribe posits that the Tribal Resolutions created an express offer, and the United States' approval of the resolution served as an express acceptance to the "clear and unambiguous" terms of the offer. Pl.'s Resp. 24; *see also id*. at 1 (describing the conditions articulated in the Tribal Resolutions as "express"). The Court cannot therefore find a simultaneously-created, implied-in-fact contract.[2] As such, the Tribe has no legal footing to argue that the United States breached terms that appear nowhere in the putative written contract itself.

II. THE TRIBE FAILS TO ESTABLISH JURISDICTION FOR ITS TRUST CLAIM AND WAIVED ITS TRUST CLAIM IN A PRIOR SETTLEMENT[3]

As the party seeking relief, the Tribe carries the burden of showing that it is properly in court. *McNutt v. Gen. Motors Acceptance Corp. of Ind.,* 298 U.S. 178, 188 (1936). Here, the

[2] As to any argument that the Court could find a contract implied-in-law, it is well settled that this Court lacks jurisdiction over contracts implied-in-law. *Trauma Serv. Group.*, 104 F.3d at 1324-25 (citing *Hercules Inc. v. United States*, 516 U.S. 417, 423 (1996)).

[3] The Tribe waived any claims regarding other alleged trust duties by failing to include them in its response brief.. *See Novosteel SA v. United States, Bethlehem Steel Corp.*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) ([A] party does not waive an argument based on what appears in its pleading; a party waives arguments based on what appears in its brief.").

Tribe fails to clear two jurisdictional hurdles that bar its claim challenging the United States' maintenance and repair of Building 2001: (1) the Tribe has invoked no rights-creating or duty-imposing source of substantive law that can fairly be interpreted as mandating compensation for alleged damages, and (2) this Court's jurisdictional statute of limitations bars the claim because it accrued more than six years before the Tribe filed suit.

A. Common Law Trust Principles Are Irrelevant Because the Tribe Has Still Failed to Identify a Substantive Source of Law Imposing a Duty to Maintain or Repair

The Tribe's claim must be dismissed because it fails to "identify a substantive source of law that establishes specific fiduciary or other duties" to hold Building 2001 in trust for the Tribe. *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). In its Response, the Tribe addresses this foundational, prerequisite requirement for all trust claims only in passing, claiming that Building 2001 is a trust asset because "it is an improvement to, and fixture on, the land," which is held in trust. Pl.'s Resp. 28. Thus, the Tribe appears to contend that Building 2001 became a trust asset, with corresponding trust duties because "ownership of the improvements follows title to the land." *Id.* at 25 (quoting *Banner v. United States*, 238 F.3d 1348, 1356 (Fed. Cir. 2001). The Tribe also claims that the Government's use of Building 2001 requires it to "act in accordance with the duties of a common law trustee." Pl.'s Resp. 28. Both assertions are meritless and highlight the absence of an applicable trust duty. The Supreme Court has firmly and repeatedly held that the trust relationship between the Government and Indians "is defined and governed by statutes rather than the common law." *Jicarilla*, 564 U.S. at 173-74. The Tribe has failed to identify any *statute or regulation* whereby the United States took Building 2001 into trust—a necessary element of any breach of trust claim. As such, the United States should prevail on its claim for summary judgment.

The Tribe likewise fails to identify any "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that impose a duty on the United States to repair and maintain Building 2001. *Jicarilla*, 564 U.S. at 174 (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)). From the eleven substantive sources of law that the Tribe initially identified in its First Amended Complaint, the Tribe now offers specific language from only one statute that allegedly creates the relevant fiduciary duties: the Cheyenne River-Oahe Act, Pub L. No. 83-776, 68 Stat. 1191 (Sept. 3, 1954) ("the Act").[4] Pl.'s Resp. 27. But the Tribe takes language from the Act—allegedly requiring the United States to "place the Indians in 'no[] less advantageous' a position than they were in at the Old Agency"—out of context. Pl.'s Resp. 27-28 (citing Cheyenne River-Oahe Act, § V). Like Section II of the Cheyenne River-Oahe Act, which established that the United States would pay $5,384,014 in just compensation for the lands and improvements taken in connection with the Oahe Dam project, and Section IV, which appropriated funds specifically to reconstruct and relocate buildings, including the Cheyenne River Agency, Section V of the Act also makes a specific amount of funds available for a specific purpose: it limits the United States' financial commitment to appropriating $5,160,000...

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[4] The Tribe also states that the United States' "duty to construct, maintain, and repair Building 2001 for the benefit of the Tribe" is "rooted in the Treaty of 1868 [and] the 1889 Act," and alleges that "[t]he government's duty to repair is also rooted in the Trade and Intercourse Act, 25 U.S.C. §177, and federal laws and regulations governing the management of Indian trust land." Pl.'s Resp. 27-28. But such general allegations and citations to entire laws or treaties, without identifying any "specific rights-creating or duty-imposing" provisions within those sources of law falls well below the Tribe' burden to demonstrate jurisdiction and should thus be disregarded. *See Jicarilla*, 564 U.S. at 174 (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)). Moreover, the Trade and Intercourse Act (the Nonintercourse Act) only applies to transactions between Tribes and non-federal parties, and is inapplicable to transactions between Tribes and the Federal government. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 521 (1986) (J. Blackmun with J. Marshall and J. O'Connor, dissenting).

> [F]or the purpose of complete rehabilitation for all members of said tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this act, whether or not residing within the taking area of the Oahe Project, and for relocating and reestablishing members of said Tribe who reside upon such lands conveyed to the United States to the extent that the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in.

Def.'s MSJ, Ex. 2 at § V, ECF No. 83-2.

Thus, the full context of the statute reveals that Section V created no fiduciary duties related to maintenance or repair of Building 2001. There is no specific language in Section V that would allow this Court to infer money-mandating fiduciary duties by which the United States "implicitly" agreed "not to permit the relocated buildings to fall into disrepair." Pl.'s Resp. 28. To the contrary, Congress appropriated a one-time payment (with interest) for a specific purpose and empowered *the Tribe* to expend the funds as it saw fit to rehabilitate individual tribal members. This one-time payment did not create fiduciary duties. *See, e.g., Flute v. United States*, 808 F.3d 1234. 1246 (10th Cir. 2015) (finding that a "one-time expenditure of money in a particular manner" did not create ongoing fiduciary obligation). In addition to the explicit funding limitation, Congress put an explicit time-cap on the expenditure, noting that authorization for the funds would only remain effective for ten years. *See* Def.'s MSJ., Ex. 2 at § V. Regardless, "the Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177.[5]

Rather than identify a statute that expressly accepts any relevant trust duty, the Tribe concedes that its trust claim is unsupported by any such statute. The Tribe instead contends that Interior "implicitly included an agreement not to permit the relocated [federal agency] buildings

[5] The Tribe's reliance on *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), Pl.'s Resp. 27, is similarly unavailing because Congress only accepts trust duties expressly via statute.

to fall into disrepair." Pl.'s Resp. 27-28. Such an alleged "implicit" agreement is legally insufficient. *Jicarilla*, 564 U.S. at 177. The Tribe's trust claim must thus be dismissed.

While the Court's analysis need not proceed further, the Tribe's assertion of an implicit trust duty is further undercut by the Cheyenne River-Oahe Act's purpose to provide just compensation for the acquisition of lands and appropriate funds-certain for the rehabilitation of the Tribe. Def.'s MSJ, Ex. 2. In its Response, the Tribe urges that that "by the government's logic, [the government] would have discharged its duty if the relocated agency buildings stood for any amount of time, no matter how short, even a year or two." Pl.'s Resp. 28. While the Tribe's hypothetical is an extreme example that did not come to pass, the United States does not disagree with the conclusion the Tribe reaches when it applies the United States' "logic." The Cheyenne River-Oahe Act was a one-time authorization of funds for the purpose of reconstruction and rehabilitation made necessary by the construction of the Oahe Dam. If, for example, a tornado or other natural disaster had leveled the relocated agency buildings one year after it was constructed, Congress would have needed to appropriate additional funds, via statute, to allow for a second reconstruction.

With regard to the Tribe's assertion that "the government's use of Building 2001 requires the government to act in accordance with the duties of a common law trustee," (Pl.'s Resp. at 28), the Supreme Court has squarely held "[t]he Federal Government's liability cannot be premised on control alone." *United States. v. Navajo Nation*, 556 U.S. 287, 301 (2009) (*"Navajo II"*); *see also Jicarilla*, 564 U.S. at 177 (quoting *Navajo II*, 556 U.S. 287, 302 (When "the Tribe cannot identify a specific, applicable trust-creating statute or regulation that the Government violated, . . . *neither the Government's 'control' over [Indian assets] nor common-law trust principles matter*.") (emphasis added). The Tribe ignores this more recent precedent and instead

misapplies *United States v. Mitchell,* 436 U.S. 206 (1983) to falsely claim that "control alone is sufficient" to impose a fiduciary trust duty. Pl.'s Resp. 28. Mitchell held the opposite, holding that "there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages." *United States v. Mitchell*, 463 U.S. 206, 218 (1983). Instead, common law trust principles, including those premised on control, *only* come into play once a Tribe has identified a specific fiduciary duty created by statute or regulation. *See Hopi Tribe*, 782 F.3d at 668. Here, no statute or regulation establishes Building 2001 as a trust asset subject to fiduciary duties, and no statute or regulation creates a specific duty that the United States maintain and repair Building 2001 for the use and benefit of the Tribe. Thus the United States' use or control over portions of the building are irrelevant to this Court's jurisdictional analysis.

To the extent that the Tribe seeks to rely on a single paragraph in its introduction claiming that this case is "similar to White Mountain Apache Tribe v. United States, 537 U.S. 465 (2003)" because it involves a claim regarding building maintenance, that argument is similarly unavailing. As the United States explained, the statute at issue in *White Mountain Apache Tribe* made the buildings and improvements trust assets. *See* Def.'s MSJ 27-28, ECF No. 83. The statute here does not. The Tribe's failure to address this distinction is fatal to its claim[6].

[6] In the Introduction, the Tribe also implies that the Cheyenne River Sioux Constitution and Bylaws require the United States to provide the Tribe space in the Agency building. First, the Tribe's Constitution is not binding on the United States and cannot create fiduciary duties. *Jicarilla*, 564 U.S. at 173. The Tribe's Constitution acknowledges this by noting that its powers of self-government are "subject to any limitations imposed by the statutes or the Constitution of the United States." Def.'s MSJ, Ex. 43 at 3-4, Article IV, § 1, ECF No. 85-3. Second, the Tribe's Bylaws explicitly envision a non-BIA agency building as a possible meeting place by establishing that "[t]he council shall meet regularly on the first Tuesday of each month. The meetings shall be held at the agency office *or other building provided for such purpose*." Def.'s Ex. 43 at 14, Article IV § 2) (emphasis added). It does not require the Department of the Interior to provide the "other building." The building could be provided by anyone, including the Tribe.

Because the Tribe has not established that the United States has fiduciary duties with respect to maintenance and repair of Building 2001 to benefit the Tribe, the Tribe's proffered expert evidence regarding mold testing or repair efforts—including Plaintiff's Exhibits W, X, Y, and Z— are irrelevant for summary judgment. *See Liberty Lobby*, 477 U.S. at 248 ("[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). The Tribe's proffered reports, at most, presuppose the existence of a trust duty and address the secondary question of whether the government breached that alleged duty. But the Court lacks jurisdiction over the Tribe's trust claim because: 1) Congress imposed no relevant duty; 2) the statute of limitations bars those claims; and 3) the 2013 settlement agreement bars those claims.

B. The Tribe Cannot Convert an Untimely Claim Into a Timely Claim by Focusing Only on the "Most Painful" Aspect of the Alleged Breach

To avoid the statute of limitations, the Tribe's Response attempts to recast its Complaint by focusing only on the United States' 2014 decision that Building 2001 was not fit for continued use and was better suited for demolition, instead of the years of roof leaks proceeding that decision. In doing so, the Tribe's improperly bases its claim on the instance when the "consequences" of the roof leaks "became most painful" to the Tribe. *Fallini v. United States*, 56 F.3d 1378, 1383 (Fed. Cir. 1995) (quoting *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980).

To start, "determination of jurisdiction starts with the complaint." *Harvey v. United States*, 149 Fed. Cl. 751, 764 (2020) (internal citations omitted). "A cause of action accrues when all of the events necessary to fix the alleged liability of the Government have occurred and the claimant legally is entitled to bring suit." *Carr v. United States*, 61 Fed. Cl. 326, 330 (2004). And even a continuing claim "ar[ises] only once." *Mitchell v. United States*, 10 Cl. Ct. 63, 77

(1986). Here, the First Amended Complaint alleged that "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." Pl.'s First. Am. Compl. ¶ 55. Tus, the Tribe's own words reveal that its claim that BIA failed to maintain and repair Building 2001 stems from BIA's allegedly flawed replacement of the roof in 1986-88 and failure to repair or replace the roof after the 2010 storm. *See also* Def.'s MSJ, Ex. 45, at 9, ECF No. 85-5 ("failed to meet reasonable standards of building maintenance" by undertaking repairs to the roof that were "negligent, faulty, defective and deficient, improperly supervised, and failed in execution.")

There is no evidence that the United States concealed the leaking roof from the Tribe (*see*, e.g. *Spevack v. United States*, 182 Ct. Cl. 884, 890 (1968)), nor is there evidence that the roof leaks were "inherently unknowable," (*see e.g. Japanese War Notes Claimants Ass'n of Philippines, Inc. v. United States*, 178 Ct. Cl. 630, 634 (1967) each of which may allow the statute of limitations to be tolled. *See Menominee Tribe of Indians v. United States*, 726 F.2d 718, 720-21 (Fed. Cir. 1984) (finding that Tribe's claim was violated the statute of limitations where the Tribe was "capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim"). In fact, the opposite is true. Long before February 2014, the Tribe knew the roof was leaking (Def.'s MSJ, Ex. 32, at 115: 7-19, ECF No. 84-2) and that water intrusion could lead to dangerous mold growth. *See* Def.'s MSJ, Ex. 48, ECF No. 85-8 ("When we get any time of moisture there are severe leaks in the hallways. This

has led to damage of equipment as well as the potential for mold."). The statute of limitations bars the Tribe's claim because the Tribe knew of the alleged breach decades before filing suit.[7]

C. The Tribe Waived Its Trust Claim in Its 2013 Settlement

In the same way, the Tribe has failed to meet its burden to demonstrate that it did not waive its breach of trust claim in the comprehensive 2013 settlement. *See United Launch Services, LLC v. United States*, 139 Fed. Cl. 664, 681 (2018) (quoting *McDonald v. United States*, 13 Cl. Ct. 255, 259 (1987) ("[P]laintiff bears the burden of persuading the court that . . . [the government's] evidence is insufficient to establish at least one essential element of [its] affirmative defense"). But the Tribe did not offer a response to the United States' argument, (Def.'s MSJ at 21-23) that the Tribe's claim is "based on harms or violations," "known or unknown" that arose prior to February 20, 2013, which precludes the trust claim.[8] Instead, as with its statute of limitations argument, the Tribe now focuses its assertion of harm only on the United States' determination that it was not feasible to rehabilitate Building 2001 and that Building 2001 was best suited for demolition. Pl.'s Resp. at 29. But, the United States' decision to condemn Building 2001 was not a standalone decision that developed in a vacuum—it was

[7] This Court likewise lacks jurisdiction over the Tribe's breach of contract claim, as the Tribe correspondingly asserts "[t]he United States breached the contract when it made the final decision – after April 29, 2014 – to forgo all maintenance and repairs to the building and when it made the decision – in 2020 – to demolish the building. Pl.'s Resp. 26.

[8] The full language of the waiver provision of the prior settlement is: "In consideration of the payment required by Paragraph 2 above, Plaintiff hereby *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." *See* Def.'s Mot. for Leave to Amend Answer Ex. A ¶ 4, ECF No. 69-1 (emphasis added).

based on years of water infiltration into Building 2001 and problems with the roof. Accordingly, the Tribe's claim is necessarily *based on* harms that occurred long before the United States made the "decision to forego all maintenance and repairs of Building 2001" (Pl's Resp. at 29), including the documented need for a new roof beginning in the early 2000s (*See, e.g.*, Def.'s MSJ, Exs. 25, 26, ECF Nos. 83-25, 83-26). Because the Tribe's claim is based on harms, known or unknown, occurring before February 20, 2013, the Tribe has waived its instant trust claim.

III. THE TRIBE PROVIDES NO EVIDENCE THAT AN AFFIRMATIVE GOVERNMENT ACTION EFFECTUATED A TAKING

The Tribe cites no factual evidence or legal authority in the takings section of its response brief. *See* Pl's Resp. at 30-31. That alone entitles the United States to summary judgment on this claim. *See Liberty Lobby*, 477 U.S. at 248 (1986) ("[A] party opposing a properly supported motion for summary judgment "'may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.'") (internal citations omitted).

In any event, the Tribe's taking claim fails for two independent reasons. First, the Tribe still identifies no government *affirmative action* that purportedly effectuated a taking. The Tribe cannot transform inaction into action merely by alleging a "decision" to take no action. *See Johnson v. United States*, No. 22-584L, 2023 U.S. Claims, LEXIS 33 at *17 (Fed. Cl. Jan. 31, 2023) ("Simply labeling inaction as an affirmative act does not save an otherwise deficient takins claim."). Here, the Tribe's attempts to do just that. Instead of describing the United States' violation as "ceasing all repairs" – which describes inaction – the Tribe states that the United States "*made the decision to* cease all repairs." Pl.'s Resp. 31 (emphasis added). In the same way, the Tribe claims that the United States made the "decision to allow the building to fall into total disrepair." *Id.* at 31. Even a conscious decision to do nothing is not, itself, action.

Accordingly, the Tribe's attempt to characterize government inaction as government action falls short, and the Tribe's taking claim must be dismissed. *See Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004).

Second, the Tribe has not established a cognizable property interest in Building 2001.[9] Although the United States permitted the Tribe to use space in the federal building for Tribal government purposes, the Federal Circuit has explained that "use itself does not equate to a cognizable property interest for purposes of a takings analysis." *American Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1377 (Fed. Cir. 2004). The Tribe also has no property interest based on the common law principle that improvements follow title to the land because Congress, not the state common law, dictates the ultimate disposition of "federally owned buildings, improvements, or facilities" on tribal lands or on lands reserved for Indian administration. *See* Pub. Law No. 84-991, Def.'s MSJ, Ex. 44, ECF No. 85-4. Thus, because Building 2001 is a federally owned building, improvement, or facility located on lands reserved for the administration of the Cheyenne River Agency, the Secretary of the Interior has discretion to determine whether it is appropriate for transfer to the Tribe. While the Tribe may have hoped to eventually obtain ownership of Building 2001, the Federal Circuit has explained that "hopes

[9] Despite this Court's requirement to identify the "precise nature of the taking claim" that the Tribe alleges. *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002), the Tribe fails to clarify the exact nature of its property interest. In its Response, the Tribe identifies its property interest as both a "present" and "future" interest. Pl.'s Resp. 25-26. The Tribe also cites to Restatements applicable only to life estates (Pl.'s Resp. at 26, citing Restatement (First) of Property §§ 139, 140 (2023)), but fails to show that a life estate was created here. *See* Restatement (First) of Property § 107 ("An estate for life is created in an existent person by an otherwise effective conveyance which determines the duration of the created estate in specific words, and solely, by the life or lives of one or more identified and existent human beings. . ."). Finally, the Tribe points to case law interpreting the general law of improvements on leased land (*see* Pl.'s Resp. at 25, citing *Banner v. United States*, 238 F.3d 1348, 1356 (Fed. Cir. 2001)) even though there was no lease in place.

and expectations of future property use are not in and of themselves a cognizable property interest." *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1332 (Fed. Cir. 2012). Because the Tribe fails to demonstrate a legally cognizable property interest, the Tribe's takings claim is unsound. *Petro-Hunt, L.L.C. v. United States*, 862 F.3d 1370, 1385 (Fed. Cir. 2017).

Finally, the Tribe argues that the United States' demolition of Building 2001 would effectuate a taking of the adjacent Tribal Addition. However, any claim based on speculative, future action is unripe. The Supreme Court has repeatedly held that "'the act of taking' is the 'event which gives rise to the claim for compensation.'" *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2170 (2019) (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)). Thus, whether "the Tribal Addition can be maintained if Building 2001 is demolished" (Pl.'s Resp. at 31) is inapposite to this case because the demolition has not occurred. As this Court has explained, a taking claim does not become ripe "the moment when the property owner subjectively feels affected by a potential taking." *Doyle v. United States*, 165 Fed. Cl. 161, 167 (2023) *appeal docketed,* No. 2023-1735 (Fed. Cir. Apr. 3, 2023). Without a cognizable property interest, an identifiable government action, or a claim ripe for adjudication, the Tribe has no claim or relief under the Fifth Amendment and the United States is entitled to summary judgment.

CONCLUSION

For the foregoing reasons, the Court should grant the United States' motion for summary judgment.

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