2021-1366

In The

United States Court Of Appeals

For The Federal Circuit

CHEMEHUEVI INDIAN TRIBE,

***Plaintiff - Appellant*,**

v.

UNITED STATES,

***Defendant - Appellee*.**

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
ORIGINATING CASE NO.: 1: 16-CV-00492-MHS

CORRECTED REPLY BRIEF OF APPELLANT

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I. Section §164 Claim Adequately Alleged.

A. Government Waived Limitations Argument.

Statutes of limitation do not run against beneficiaries of Government-administered trust funds until after an application for restoration has been denied. *U.S. v. Taylor*, 104 U.S. 216 (1881) (AB18-19); *U.S. v. Wardell*, 172 U.S. 48 (1898). While briefly arguing 28 U.S.C. §2501 bars Tribe's 25 U.S.C. §164 restoration application (RB28), Defendant cites no supporting authority. An issue "merely alluded to and not developed as an argument in a party's brief is deemed waived." *Rodriguez v. VA*, 8 F.4th 1290, 1305 (Fed.Cir.2021).

B. *Twombly*/*Iqbal* Plausibility Standard Relaxed Where Facts Peculiarly Within Defendant's Possession And Control.

Defendant cites Claims Court's "determinative findings" Tribe is "unsure" whether unclaimed *per capita* funds "actually exist" (RB24-25, citing Appx6, Appx45-46), arguing Tribe's 25 U.S.C. §164 restoration claim does not survive *Twombly*/*Iqbal* analysis (RB26).[1] This overly strict reading of *Twombly/Iqbal*'s plausibility standard fails to recognize some evidentiary facts "may be distinctively in the defendant's possession." *ABB Turbo Systems v. Turbousa*, 774 F.3d 979, 988 (Fed.Cir.2014).

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[1] *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Tribe's application for "all unclaimed *per capita* payments" (Appx138, Appx151, Appx214) necessarily implies an allegation, on information and belief, such payments exist, although Tribe is "unsure" they exist.[2] While this Court has not addressed the issue, other circuits have largely agreed "factual allegations pled on information and belief should not be summarily rejected under *Twombly* where 'the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information [making] the inference of culpability plausible.'" *Ahern Rentals v. EquipmentShare.com*, 59 F.4th 948, 954 (8thCir.2023) (quoting *Arista Records v. Doe 3*, 604 F.3d 110, 120 (2d Cir.2010)); *accord*, *In re Rockefeller Center Properties Sec. Litig.*, 311 F.3d 198, 216 (3dCir.2002); *Inova Hospital v. Blue Cross & Blue Shield*, 892 F.3d 719, 730 (5thCir.2018) (quoting *Arista Records*); *Soo Park v. Thompson*, 851 F.3d 910, 928 (9thCir.2017) (same); *Kareem v. Haspel*, 986 F.3d 859, 866 (D.C.Cir.2021). *Exergen Corp. v. Wal-Mart Stores*, 575 F.3d 1312, 1330 (Fed.Cir.2009) similarly held a plaintiff may plead on information and belief under heightened pleading standards, e.g., for fraud under Fed.R.Civ.P. 9(b), "when essential information lies uniquely within another party's control," at least "if the pleading sets forth the specific facts upon which the belief in reasonably based." The Claims Court

[2] If necessary, Tribe can on remand amend its Complaint expressly to allege, on information and belief, unclaimed *per capita* payments exist.

adopted the *Arista Records* standard. *Vanquish Worldwide v. U.S.*, 147 Fed.Cl. 390, 401 (2020). Tribe urges this Court to do so as well.

Necessary facts supporting Tribe's §164 claim are peculiarly within Defendant's possession and control. Defendant argues Tribe should have acquired these facts after "conduct[ing] . . . *jurisdictional* discovery" (RB25 (emphasis added)), but jurisdictional discovery is *not* fact discovery needed to uncover whether Defendant holds undistributed *per capita* payments.

Tribe's allegations support a plausible inference undistributed payments exist. They indicate no tribal government existed from 1939 until 1970, and most, if not all, of Tribe's members were displaced by the Parker Dam's construction, flooding and taking of Chemehuevi tribal lands in the late 1930's and early 1940's, causing members' dispersal to the Colorado River Indian Reservation and nearby cities (Appx134-135, Appx150). As can be inferred from these allegations, at least some *per capita* payments, distributed in 1970, did not reach displaced tribal members, some of whom may not have moved back to the reservation after the mid-20th century tribal diaspora.

Tribe's alleging, on information and belief, undistributed *per capita* payments exist, the facts being in the Government's exclusive possession and control, and sufficient factual material making the inference of undistributed payments plausible, is permissible under *Twombly/Iqbal*.

C. Tribe May Apply To Court For Payments' Restoration.

Defendant argues Tribe cannot apply to court for *per capita* payments because that remedy "can be provided only by Interior through an administrative process" (RB26). The statute merely provides payments "shall be restored to tribal ownership," 25 U.S.C. §164, while 25 C.F.R. §115.820 (RB28) states "a tribe may *apply* under 25 U.S.C. §164" (emphasis added) to have unclaimed per capita funds transferred to Tribe, without specifying where to file the application. No administrative procedure exists for processing applications.

"Apply" means "*[t]o make a formal* request or *petition*, usually in writing, *to a court . . . for the granting of some . . . order, which is within [its] power or discretion*." *Black's Law Dictionary* 128 (4thed.1968) (emphasis added); *accord*, *Regions Bank v. Legal Outsource*, 936 F.3d 1184, 1191 (11thCir.2019) (quoting *Black's* definition). "Application" "refer[s] to a more informal . . . procedure" than other civil actions. *Julius Restaurant v. Lombardi*, 282 N.Y. 126, 25 N.E.2d 874, 876 (1940); *accord*, *North Street Ass'n v. Olympia*, 96 Wash.2d 359, 635 P.2d 721, 724 (1981);[3] *see also Fayette County Agric. Cultural Society v. Scott*, 96 Ohio App. 6, 121 N.E.2d 118, 122 (1953) (application "describe[s] a legal document which, when filed, will start the wheels of justice turning."). "Apply" in §115.820 has this well-settled meaning, allowing an application to the court for restoration relief, as in *Quapaw Tribe v. U.S.*, 120 Fed.Cl. 612 (2015).

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[3] *Disapproved on other grounds by Sidis v. Brodie/Dohrmann*, 117 Wash.2d 325, 815 P.2d 781 (1991) (en banc).

II. Tribe Timely Brought Trust Funds Mismanagement Claims.

A. Claims Don't Accrue Until After Meaningful Accounting.

"Statutes of limitations do not "*accrue*, i.e., 'shall not commence to run,' until the [tribal] claimant is provided with a meaningful accounting." *Shoshone Indian Tribe v. U.S.* ["*Shoshone I*"], 364 F.3d 1339, 1347 (Fed.Cir.2004) (quoting Interior Appropriations Act, P.L. No. 108-7 (2003)) (emphasis added). Defendant argues Tribe's accrual "theory" derives from Appropriations Act riders (RB18). But *Shoshone I* strongly indicated, even absent appropriation riders, basic trust principles prevent the statute of limitations from running on claims for loss/mismanagement of tribal trust funds until an appropriate accounting is provided to the tribal beneficiary: "statute of limitations do not commence to run against the [trust] beneficiaries until a final accounting has occurred[.]" 364 F.3d at 1348. Defendant "is the trustee for the Tribes, having assumed the relationship of trustee-beneficiary pursuant to treaties and statutes," and, "[b]ecause of its treaty and statutory obligations to tribal nations, the [Government] must be held to the 'most exacting fiduciary standards' . . .." *Id.* (citation omitted). These "most exacting fiduciary standards" prevent statutes of limitations from running against tribal beneficiaries regarding trust fund loss/mismanagement claims until the Government-trustee provides a meaningful accounting.

Furthermore, Defendant's argument notwithstanding (RB18-19), "the plain language of the [Appropriations] Act [riders] *does not limit claim filings to the year in which the Act was enacted* [.]" *White Mountain Apache Tribe v. U.S.*, 2018 WL 11365074, *8 (Fed.Cl. 01/05/2018) (No. 17-359L) (emphasis added). This Court recognized "[t]he Appropriation Riders extend the statute of limitations to pursue accounting breach of trust claims under the Reform Act *until after* 'the affected Indian tribe ... has been furnished with an accounting of such funds.'" *Wyandot Nation v. U.S.*, 858 F.3d 1392, 1397 (Fed.Cir.2017) (quoting Consolidated Appropriations Act, 2014, Pub.L. No. 113-76, 128 Stat. 5, 305–06) (emphasis added).

Appropriations riders "operate in only the applicable fiscal year, *unless [their] language clearly indicates [they are] intended to be permanent.*" *B&C Trades Dep't v. Martin*, 961 F.2d 269, 273-74 (D.C.Cir.1992) (emphasis added). "Congress may create permanent, substantive law through an appropriations bill . . . if it is clear about its intentions." *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 224 (1st Cir.2003). "[T]he presumption against permanence in appropriation bills can be overcome if Congress clearly expresses its intention to create permanent law[.]" *Id.* The language of the riders at issue clearly states tribal trust fund loss/mismanagement claims do not accrue, i.e, statutes of limitations "shall not commence to run," until a tribe receives an accounting, regardless when the claim is filed. Congress clearly expressed its intention.

Even assuming the riders were ambiguous, any ambiguity must be construed in Tribe's favor to allow claim filings in subsequent years where Tribe has yet to receive a meaningful accounting. "'[S]tatutes are to be construed liberally in favor of the Indians, *with ambiguous provisions interpreted to their benefit.*'" *Yakima County v. Confederated Tribes*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)) (emphasis added). This liberal construction rule applies to appropriation riders directly affecting tribal rights.

Nor does *Wyandot Nation v. U.S.*, 124 Fed.Cl. 601 (2016), *aff'd* 858 F.3d 1392 (Fed.Cir.2017) (RB19), support Defendant. *Wyandot Nation* rejected an accrual argument based on "Interior Appropriations Act riders issued each year from 1990 through 2014," 124 Fed.Cl. at 605-606, only because Wyandot Nation, a non-federally-recognized tribe, was not entitled to an accounting under the Reform Act, *see* 25 U.S.C. §4044, mandating accounting for "each tribal trust fund *for which the Secretary is responsible*." (Emphasis added).[4] Because "Wyandot Nation [was] not entitled to an accounting" at all, it could not "rely on the Appropriations Act riders to delay the accrual of its . . . trust fund claim." *Id.* at 606.

[4] On appeal, this Court clarified Wyandot Nation's right to an accounting required establishing "it is a federally recognized 'Indian tribe[.]" *Wyandot Nation*, 858 F.3d at 1397-98.

B. 1996 Andersen Report Not A Meaningful Accounting.

Regarding Defendant's alternative argument "Tribe received an accounting" (RB19), the 1996 "Andersen Report 'was not an audit,'" *Cherokee Nation v. Dep't of Interior*, 531 F.Supp.3d 87, 97 (D.D.C.2021) (quoting *Cobell v. Kempthorne*, 532 F.Supp.2d 37, 52 (D.D.C.2008) *(Cobell XX), vacated and remanded on other grounds*, 573 F.3d 808 (D.C.Cir.2009)), and did not constitute the "full and complete accounting" required by 25 U.S.C. §4044(2)(A). *Id.*

Glaringly incomplete, the report itself concluded "'14[%] of transactions – amounting to $2.4 billion – were deemed . . . to be "unreconciled," [as] the Office of Trust Funds Management . . . was unable to locate source documents . . . support[ing] the accuracy of the general ledger entry for the transactions.'" *Cherokee Nation*, 531 F.Supp.3d at 93 (citation omitted)). *Cherokee Nation* court found "[t]his lapse . . . astonishing":

> A student with an 86% score receives a B+ in school, *but a trustee who can only account for 86% of a trust receives an F grade.*

Id. at 93 n. 1 (emphasis added). This deficiency "alone is a basis to reject the report." *Id.* at 97.

"Of greater concern . . . according to the Government's Index [of the administrative record produced for the Andersen Report], . . . *only 1.56% of the Government's proposed record is made up of documents that pre-date the [Andersen Report's] starting period [, i.e., 1972]*." *Id.* (emphasis added). "[B]lack-

letter trust law" requires accounting for all items of property constituting the corpus of the trust from the trust's "inception," which, for the Parker Dam compensation funds, was 1940 (Appx134-135, Appx150-151, Appx207, Appx210-211, Appx226, Appx228-229), 32 years before the start of the 20-year period covered by the Report (1972-1992), and in the case of the ICC Judgment funds, was 1965 (Appx137-138, Appx152-153, Appx213-214, Appx231), 7 years before 1972. *Cobell v. Norton*, 240 F.3d 1081, 1103 (D.C.Cir.2001). "It is difficult to imagine how Arthur Andersen could have possibly created a fulsome accounting with only this tiny fraction of historical data." *Cherokee Nation*, 531 F.Supp.3d at 97.

"[T]he [Andersen Report's] reconciliation did not 'address the completeness of records,' nor calculate 'receipts and disbursements that should have been recorded.'" *Cobell XX*, 532 F.Supp.2d at 52. "The Andersen Report, limited by defendant as trustee for 'reasons of time and cost' is not complete." *Osage Tribe of Indians of Okla. v. U.S.*, 96 Fed.Cl. 390, 450 (Fed.Cl.2010). "[A]lthough Congress required an accounting [in the Reform Act], *that task proved impossible as records were lost and destroyed according to the [General Accounting Office]*." *White Mountain Apache Tribe*, 2018 WL 11365074, *8 n. 4 (emphasis added).

"Like a zombie, the Andersen Report will not die," despite judicial attempts to "euthanize it." *Cherokee Nation*, 531 F.Supp.3d at 98. "[I]t continues to haunt its victims," including Tribe. *Id.* "To allow this horror story to continue would

ignore the Government's 'distinctive obligation' to protect a frequently 'exploited people.'" *Id.* (quoting *Seminole Nation v. U.S.*, 316 U.S. 286, 296 (1942)). "[T]he Andersen Report must be buried [as] an incomplete audit that does not provide an adequate accounting of the trust," *id.*, and its 1996 receipt by Tribe did not trigger running of the statute of limitations.

C. Government Did Not Repudiate The Trust.

Even assuming Tribe received a meaningful accounting, this did not cause the statute of limitations to run: the trust's repudiation was also required. A breach-of-trust claim "traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Shoshone I*, 364 F.3d at 1348. Notwithstanding Defendant's arguments (RB18, 21-22), the repudiation requirement derives from basic trust law principles, not the appropriation riders.

Defendant nowhere specifies any express statements or acts constituting a repudiation. *See Shoshone I*, 364 F.3d at 1348 (trustee repudiates the trust "by express words or by taking actions inconsistent" with trustee's responsibilities). Neither the Reform Act's language nor its legislative history provides a tribe's mere receipt of a reconciliation report triggers running of the statute of limitations on tribal trust fund mismanagement claims against the Government. *Sisseton Wahpeton Oyate v. Jewell ["Jewell"]*, 130 F.Supp.3d 391, 396 (D.D.C.2015).

Rather, "the proper inquiry" for accrual is the trustee's repudiation of the trust. *Id.*, citing *Cobell v. Norton*, 260 F.Supp.2d 98, 104 (D.D.C. 2003).

As Defendant "ha[s] not argued that the trust has been repudiated," the court below should have reserved decision on the statute of limitations question until factual discovery was completed. *Jewell*, 130 F.Supp.3d at 397. "The parties have not yet had the opportunity to develop a record through [factual] discovery on when [Tribe's] claims accrued, and the factual issues related to accrual preclude deciding the issue of the statute of limitations at the motion to dismiss stage." *Id.* *Accord*, *Cherokee Nation v. Department of Interior*, 2020 WL 224486, *3 (D.D.C. 01/15/2020) (No. 1:19-cv-02154 (TNM)) (rejecting statute of limitations arguments at motion-to-dismiss stage absent any suggestion trust was repudiated).

D. Claims Are Ripe For Adjudication.

Defendant briefly argues Tribe's tribal trust fund recovery/mismanagement claims are not ripe for adjudication because they have not yet accrued for statute of limitations purposes, citing no supporting authority (RB19-20, 22). This undeveloped argument must be deemed waived, *Rodriguez*, 8 F.4th at 1305, and, moreover, should be rejected as specious. Defendant essentially contends, by never providing an accounting or repudiating a trust, it can prevent any tribe from ever suing for loss/mismanagement of trust funds. Tribe, moreover, as Defendant

acknowledges (RB22 n. 5) sued for an accounting in aid of its breach-of-trust claims, rendering those claims sufficiently ripe for adjudication.

III. Government's Prohibiting Tribe From Leasing Its Water Rights So Junior Users Could Use Tribe's Surplus Water Rights Free Of Charge Amounted To A Taking.

A. Tribe Possesses Compensable Property Interest In Surplus *Winters* Water Rights.

Defendant argues Tribe, despite owning senior, decreed, quantified, reserved *Winters* water rights, "has no right to water it does not use [on the reservation in any one year], and [all surplus[5]] water [rights are] then available to junior users" free of charge (RB33). Defendant, citing no authority, asserts *Winters* water rights quantified by the *Arizona v. California Decree* did not "bestow any property right in the maximum amount regardless of use." (*Id.*) Thus, Defendant contends, "to the extent a portion of Chemehuevi's allocation of water goes unused, that amount of water becomes available to junior users [free of charge] consistent with the [*Arizona v. California*] *Decree*." (*Id.*)

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[5] Although Defendant prefers the term "excess water" (RB28, n. 8), Tribe accurately labels the rights in question "surplus water rights." "'Excess' waters are those stream waters . . . which are over and above those used to satisfy *Winters* rights." *Holly v. Confederated Tribes*, 655 F.Supp. 557, 558 (E.D.Wash.1985), *aff'd sub nom. Holly v. Totus*, 812 F.2d 714 (9thCir.1987). The rights in question, although surplus to the need for water for beneficial use in irrigation, agriculture, or for domestic/municipal purposes, are not "excess waters," as the lease of surplus water rights is needed to raise revenue for the reservation's current needs, including investing in irrigation and other farming equipment necessary to raise cash crops on the reservation.

Defendant's position ignores three key qualities of Tribe's *Winters* water rights: their (1) *quantification*; (2) *senior priority*; and (3) *transferability*.

Quantification. Simon Rifkind, the Special Master appointed by the Supreme Court in the *Arizona v. California* water rights litigation, described the water rights created by the *Arizona v. California Decree*:

> [E]stablish[ing] a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation . . . *will preserve the full extent of the water rights created by the United States* . . ..
>
> . . . [T]he United States asks only for enough water to satisfy future agricultural and related uses. *This does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses.* . . .
>
> The water rights established for the benefit of the five Indian Reservations . . . *are of fixed magnitude and priority* . . .. The measurement used in defining the magnitude of the water rights is the amount of water necessary for agricultural and related purposes because this was the initial purpose of the reservations, *but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.* . . .

Report from Simon H. Rifkind, Special Master, to the Supreme Court 265–66 (December 5, 1960) (emphasis added).

The Supreme Court later emphasized the Master's and the Supreme Court's adoption of the practicably irrigable acreage standard constituted "a *fixed* present determination of [each affected tribe's] future needs for water." *Arizona v. California*, 460 U.S. 605, 623 (1983) (emphasis in original). This implies

quantified water rights established by the *Arizona v. California Decree* are of fixed magnitude, may be used by Tribe at any time in the future to their "full extent," and are not subject to variation depending on Tribe's level of actual water use.

Notwithstanding Defendant's "use it or lose it" argument, Tribe possesses a vested property right to use *the full amount* of its *decreed, quantified* water rights *for any lawful purpose*[6] (including leasing water to more junior users to raise revenue to be used for lawful reservation purposes) regardless of Tribe's actual water usage since entry of the *Arizona v. California Decree*. *Cf. U.S. v. Orr Water Ditch Co.*, 309 F.Supp.2d 1245, 1254 (D.Nev.2004), *aff'd sub nom. U.S. v. Truckee-Carson Irrigation Dist.*, 429 F.3d 902 (9thCir.2005), where the Pyramid Lake Paiute Tribe was decreed water rights to a maximum of 14,742 acre feet of water per year. The district court ruled, given the tribe's "*right* to use water in the . . . amount described . . . was judicially recognized and established," the tribe could "begin to use *its full water rights as decreed* without injuring other person's water rights" rather than being confined to "the Tribe's actual usage" currently or at the time of the decree. *Id.* (emphasis added.)

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[6] Defendant acknowledges the Supreme Court later clarified "*Winters* rights may be used *for any lawful purpose for the reservation*" (RB31 n. 9 (emphasis added)), citing *Arizona v. California*, 439 U.S. 419, 422 (1979) (quantification "shall not constitute a restriction of the usage … to irrigation or other agricultural application"). Defendant concedes, given that clarification, "the lower court incorrectly stated that the Tribe possesses only the right to use a certain amount of water 'for irrigation.'" (RB31 n. 9 (quoting Appx49).)

Tribe's quantified reserved *Winters* water rights do not depend on putting water to beneficial use. "Unlike a state water right, the priority of a federal reserved water right is not established by appropriation for beneficial use; rather, such a right is determined by the withdrawal and reservation of the applicable land for a federal purpose." *State of N.M. ex rel. State Engineer v. Public Lands Comm'r*, 145 N.M. 433, 200 P.3d 86, 94 (Ct.App. 2008); *see also U.S. v. Jesse*, 744 P.2d 491, 494 (Colo.1987) (per curiam) (federal reserved water right "may be created without diversion or beneficial use"). Likewise, "the quantity of a federal reserved water right is not determined by the amount of water put to beneficial use; rather, it is determined by the amount of water necessary to carry out the primary purpose of the reservation." *N.M. State Engineer*, 200 P.3d at 94; *accord*, *In re General Adjudication of Rights to Use Gila River Water*, 231 Ariz. 8, 289 P.3d 936, 942 (2012) (en banc).

"Unlike appropriative rights created under state law, which are defined by actual diversion and continued beneficial use of waters from natural channels, Indian *Winters* rights reserve a paramount right to the use of as much water . . . as is needed to fulfill the primary purposes for which the land was reserved." *Holly*, 655 F.Supp. at 558.

Defendant's reliance (RB31-32 n. 10, 32) on *Casitas Mun. Water Dist. v. U.S.*, 708 F.3d 1340, 1353-54 (Fed.Cir.2013) is misplaced, as the water right at

issue in *Casitas* was *a California prior appropriative right* dependent on continued beneficial use for both its existence and quantity. 708 F.3d at 1354 ("Although appropriative rights are viewed as property under California law, those rights are limited to the 'beneficial use' of the water involved.") (citation omitted). Federal reserved water rights, including *Winters* rights, are not limited to beneficial use. Far from having "no right to water that it does not use" (RB33), Tribe, as owner of senior federal reserved water rights, can lease its surplus *Winters* water rights to junior users to raise revenue for the Reservation's current needs without making any current beneficial use of these surplus rights.

Similarly, Defendant's reliance on *FPC v. Niagara Mohawk Power*, 347 U.S. 239 (1954) (RB31-32 n. 10, 32-33) is unavailing. Water rights in *Niagara Mohawk* had been "separated from [riparian] lands and . . . transferred or leased to [the power company]": under New York law, they were real estate "known as corporated hereditaments." *Id.* at 247. The Supreme Court expressly stated "*[w]e are not required to determine the nature of the rights claimed by [Niagara Mohawk*][.]" *Id.* at 246 (emphasis added). The actual issue before the Court was whether, in computing a federal licensee's amortization reserve, the FPC was justified in disallowing "expenses paid or incurred by the licensee . . . for the use of [water] rights." *Id.* at 241. The Court held it was not. *Niagara Power* provides no

guidance regarding the nature of either Tribe's *Winters* water rights or federal reserved water rights in general.

As for *Crow Creek Sioux Tribe v. U.S.*, 900 F.3d 1350 (Fed.Cir.2018) (RB31-32 & n. 10), aside from reasons previously given why *Crow Creek* is distinguishable from the instant case (AB32-33), the reserved *Winters* water rights in *Crow Creek*, unlike Chemehuevi Tribe's *Winters* rights, had not yet been quantified by court decree. Absent quantification of *Winters* water rights for the future needs of the tribe, Crow Creek Sioux Tribe was left with having to show the Government's diversions from the Missouri River affected that tribe's current beneficial use of reserved *Winters* rights.

Senior Priority. The *Arizona v. California Decree* assigned a priority date of February 2, 1907 to Tribe's *Winters* water rights, the date the Chemehuevi reservation was established (Appx134, Appx200), *Arizona v. California*, 376 U.S. 340, 344 (1964), giving Tribe's *Winters* water rights a very senior priority compared to all other Colorado water rights users.

"The value of a water right is its priority and the [economic and social] expectations which that right provides," *Santa Fe Ranchers Property Owners Ass'n v. Simpson*, 990 P.2d 46, 54 (Colo.1999) (en banc) (quoting *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1380 (Colo.1982) (en banc)). An owner of "a water right created under federal law [including reserved *Winters* water rights]" may seek

"to realize the value and expectations that enforcement . . . of that right's priority secures." *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1148-49 & n. 12 (Colo.2001) (en banc) (citing *Winters* in footnote 12).

Defendant argues this "most important stick in the water rights bundle," *Application for Dill's Water Rights*, 435 P.3d 1067, 1075 (Colo.2019) (quoting *Empire Lodge*, 39 P.3d at 1148), does not exist, only an annual right to divert the water for use on Tribe's reservation, with no ability to realize the economic value of the water rights' senior priority relative to other water rights by transferring or leasing these senior rights to junior users.

Transferability. Defendant also fails to recognize water rights are real property rights, *see Walker v. U.S.*, 69 Fed.Cl. 222, 230 (2005); *Wiechens v. U.S.*, 228 F.Supp.2d 1080, 1082 (D.Ariz.2002); *In re Nunes*, 1997 WL 1038143, *4 (Bnkr.E.D.Cal. 07/29/1997) (No. 96–9067); *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments*, 165 Idaho 467, 447 P.3d 915, 924 (2019); and cases cited initially (AB31-32, 45 & n. 8), that can be transferred or leased, e.g., by a senior user to more junior users. *See, e.g., Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 42 (Colo.1997) (en banc), and cases cited initially (AB31-32).

Water rights can "be conveyed with the land on which they are put to beneficial use, *or separate from it*." *Eagle Creek*, 447 P.3d at 924 (emphasis added); *accord*, *West Maricopa Combine v. Arizona Dep't. of Water Resources*, 200

Ariz. 400, 26 P.3d 1171, 1178 (Ct.App.2001); *Nielson v. Newmyer*, 123 Colo.189, 228 P.2d 456, 458 (1951); *Adaven Management v. Mountain Falls Acquisition Corp.*, 124 Nev. 770, 191 P.3d 1189, 1192-94 (2008).

Here, Defendant prevented Tribe from long-term leasing surplus *Winters* water rights to junior water users under 25 U.S.C. §415(a),[7] depriving Tribe of the economic advantage afforded by its *Winters* water rights' senior priority and instead giving more junior water users Tribe's surplus water rights free of charge. "[T]o deprive a person of his priority is to deprive him of a most valuable property right." *High Country Citizens' Alliance v. Norton*, 448 F.Supp.2d 1235, 1253 (D.Colo.2006) (quoting *Colorado Water Conservation Bd. v. Central*, 125 P.3d 424, 434 (Colo.2005) (en banc)); *accord*, *General Agriculture Corp. v. Moore*, 166 Mont. 510, 534 P.2d 859, 863 (1975).

Tribe possesses a compensable property interest protected by the Fifth Amendment in surplus *Winters* water *rights, real property rights,* it may lease to junior water users to raise revenue for on-reservation purposes, not in "the water itself" (RB46), "excess water" (RB36), or "in the molecules of water" (RB41) as Defendant misleadingly argues.

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[7] On appeal, Defendant has abandoned the argument Tribe is barred by the Nonintercourse Act, 25 U.S.C. §177, from selling, transferring or leasing *Winters* water rights. Nor has it responded to Tribe's contention 25 U.S.C. §415(a) authorizes long-term leases of water rights (AB44-45).

B. Water Rights Takings Require No Physical Interference.

Defendant argues no taking occurred because Tribe "makes no claim" Government "interfered in any way with the Tribe's *Winters* right to divert water" (RB34). Water rights takings need not involve direct physical interference with an owner's right to divert water. In *International Paper Co. v. U.S.*, 282 U.S. 399 (1931), the Government, during World War I, requisitioned all of Niagara Power's hydroelectric power to increase power production for the war effort. Niagara Power had leased some of its water to International Paper Company, which diverted the water to its mill. Responding to the Government's direction to "cut off the water being taken" by International Paper, Niagara Power terminated the water diversion to International Paper. *Id.* at 405-406. The termination resulted in International Paper being unable to operate its mill for nearly nine months. The Government did not physically direct the flow of the water. Instead, the Government caused Niagara Power to stop International Paper from diverting water to its mill so the water would be available for "private companies for [war effort] work deemed more useful [by the Government] than the manufacture of paper." *Id.* at 404. The Supreme Court found the Government directly appropriated water International Paper had a right to use.

This case involves a similar direct appropriation of Tribe's surplus, *Winters* water rights. As in *International Paper*, the Government did not physically divert

the flow of the water. Rather, the Government refused to allow Tribe to enter into long-term leases of its surplus water rights, to allow those water rights to be used by junior water users, including MWD, free of charge. The Government's action served a public purpose of subsidizing the cost of water to junior water users, their customers and ratepayers, in Southern California. The Government directly appropriated, for an alternate public purpose, surplus water rights Tribe had a right to lease to provide revenue for lawful reservation purposes.

C. Tribe's Takings Claim Not Time-Barred.

Arguing the continuing claims doctrine does not apply, Defendant asserts Tribe's reserved *Winters* water rights consist of a "*single* 'right' to use water to support the purposes of its Reservation" (RB45-46 (emphasis in original)). This contention fails to recognize Tribe's *Winters* water rights consist of a series of "annual diversion rights," *Arizona v. California*, 547 U.S. 150, 169-70, 174 (2006), not annual allocations of physical water (RB46). In any one calendar year, Tribe possesses an annual *right to divert* 11,340 acre-feet of water from the mainstream of the Colorado River. *Id.* at 174. It must use that right during that one year: it cannot exercise the right afterwards, e.g., during the subsequent year. Nor can it exercise next year's right to divert prematurely: future rights to divert have yet to come into being. Annual application of the Government's "use it or lose it" policy, requiring each annual diversion right to be used on the reservation only and

prohibiting its transfer or lease, resulted in a series of appropriations/takings of Tribe's surplus annual diversion rights for the benefit of junior users, including MWD. Tribe has been dispossessed of its surplus annual diversion rights on a yearly basis in a "series of independent and distinct events" (RB46, citing *Brown Park Estates-Fairfield Def. Co. v. U.S.*, 127 F.3d 1449, 1456 (Fed.Cir.1997)), not of a single water right by one event in a single year.

The Government's alternate waiver argument (RB43-44) ignores Tribe raised the continuing claims doctrine below in its Sur-Reply Brief (Appx666-667). Furthermore, "[o]nce a federal claim is properly presented, [i.e., Defendant effected a taking of Tribe's surplus water rights], a party can make any argument in support of that claim; *parties are not limited to the precise arguments they made below*." *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (emphasis added); *accord*, *Hemphill v. New York*, 142 S.Ct. 681, 689 (2022); *Pfizer, Inc. v. Lee*, 811 F.3d 466, 471 (Fed.Cir.2016). Claims are deemed waived or forfeited, "not arguments." *U.S. v. Palares-Galan*, 359 F.3d 1088, 1095 (9thCir.2004).

IV. Tribe Adequately Alleged And Argued Below A Mismanagement Of *Winters* Water Rights Claim.

A. Breach-Of-Trust Claim Not Forfeited.

Defendant asserts (RB37) Tribe did not raise a breach-of-trust claim below regarding Defendant's mismanagement of Tribe's surplus *Winters* water rights, based on §6 of the Boulder Canyon Project Act, 43 U.S.C. §617e, when in fact

Count III of the Complaint clearly raised and adequately set forth such a claim (Appx154-159, Appx233-245). Tribe made detailed breach-of-trust arguments concerning Defendant's mismanagement of Tribe's surplus *Winters* water rights before the Claims Court, both in opposition to Defendant's motion to dismiss the Complaint (Appx459-467) and in Tribe's Sur-Reply Brief (Appx668-672).

B. Act Imposed Trust Duty On Interior.

Defendant disingenuously argues Tribe "does not . . . identify language in the Boulder Canyon Project Act . . . imposing any fiduciary duty on the Government" (RB38). when in fact, as argued initially (AB41), the statute, 43 U.S.C. §617e, mandates Boulder Canyon (now Hoover) dam and reservoir "*shall* be used" for "satisfaction of present perfected rights." (Emphasis added.) "Use of . . . 'shall' in a statute generally denotes the imperative," and "imposes a duty." *Merck & Co. v. Hi-Tech Pharmacal*, 482 F.3d 1317, 1322 (Fed.Cir.2007), citing *Blacklight Power v. Rogan*, 295 F.3d 1269, 1273 (Fed.Cir.2002); *Grav v. U.S.*, 886 F.2d 1305, 1307-08 (Fed.Cir.1989). Nothing in §617e "states or suggests . . . 'shall' does not mean exactly what it says," *Merck*, 482 F.2d at 1322, and the Supreme Court held "the Secretary is *required* to satisfy present perfected rights," including Tribe's *Winters* reserved water rights. *Arizona v. California*, 373 U.S. 546, 584, 600 (1963) (emphasis added). Section 617e, a specific, "duty-imposing statute", gave rise to a trust duty to give priority to Tribe's quantified *Winters* water rights.

See U.S. v. Navajo Nation ["Navajo I"], 537 U.S. 488, 506 (2003) (analysis "must train on specific rights-creating or duty-imposing statutory . . . prescriptions.") (emphasis added); *accord, U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2009).

Nor must §617e expressly impose trust obligations. A Tribe need only identify a statute "establish[ing] *specific* fiduciary or *other duties*," and allege the Government "failed faithfully to perform those duties." *Navajo I*, 537 U.S. at 506 (emphasis added). A "specific, applicable trust-creating statute," *U.S. v. Navajo Nation ["Navajo II"]*, 556 U.S. 287, 302 (2009), can be one where the fiduciary duty is implied. "Explicit use of the word 'trust,' or any other particular language, is not necessary." *Moose v. U.S.*, 674 F.2d 1277, 1281 (9thCir.1982); *accord, Angle v. U.S.*, 709 F.2d 570, 574 (9thCir.1983). "[S]tatutes can also be inferred to be money mandating because they are 'duty-imposing'[.]" *Shoshone Indian Tribe v. U.S.*, 58 Fed.Cl. 77, 82 (2003), citing *Navajo I*, 537 U.S. at 506 ("[A]vailability of such damages may be inferred.").

That a fiduciary duty may be implied from §617e's language is further strengthened by Defendant's maintaining and exercising undisputed control over Tribe's use and disposition of its *Winters* water rights. Where the Government "takes on or has control or supervision over tribal . . . properties, the fiduciary relationship normally exists with respect to such . . . properties . . . even though

nothing is said expressly in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection." *Navajo Tribe v. U.S.*, 224 Ct.Cl. 171, 624 F.2d 981, 987 (1980). Tribe provided a "basis on which . . . a fiduciary duty could be found" (RB39).

Nor is Tribe challenging Defendant's "failure to approve a particular water lease" (RB39). Rather, Tribe complains of a continuing, ongoing, repeated, yearly breach by the Government of a specific rights-creating statutory provision, 43 U.S.C. §617e, by allowing Tribe's surplus water rights to be used free of charge by junior water users.

In sum, Tribe did not forfeit, properly pled, and consistently advocated, here and below, a breach-of-trust claim for damages for Defendant's failure to give priority to Tribe's present perfected rights as required by 43 U.S.C. §617e.

C. Tribe's Breach-of-Trust Claim Not Time-Barred.

Regarding whether Tribe's breach-of-trust claim for *Winters* water rights' mismanagement is time-barred (RB40-42, 44), a breach-of-trust claim "traditionally accrues when the trustee 'repudiates' the trust" and the beneficiary knows about the repudiation. *Shoshone I*, 364 F.3d at 1348. The statute of limitations does not run against a tribe-beneficiary and in favor of the Government-trustee until the "trust is repudiated and the fiduciary relationship is terminated." *Hopland Band of Pomo Indians v. U.S.*, 855 F.2d 1573, 1578 (Fed.Cir.1988).

Defendant nowhere claims it repudiated the trust, nor points to any statements or acts amounting to such a repudiation. *See Shoshone I*, 364 F.3d at 1348 (trustee repudiates "by express words or by taking actions inconsistent" with trustee's responsibilities).

Moreover, this Court recognized the Government-trustee "can breach [its] fiduciary responsibilities . . . *without placing the beneficiary on notice that a breach has occurred*." *Id.* (emphasis added). Whether or when Tribe was on notice of Defendant's alleged breaches of trust amounting to a trust repudiation raises questions of fact that cannot be determined on a motion to dismiss. "The parties have not yet had the opportunity to develop a record through discovery on when [Tribe's] claims accrued, and the factual issues related to accrual preclude deciding the issue of the statute of limitations at the motion to dismiss stage." *Jewell*, 130 F.Supp.3d at 397.

Finally, Tribe's breach-of-trust allegations demonstrate repeated, ongoing breaches of a continuing trust duty to give Tribe's "present perfected [*Winters* water] rights" priority over junior users, "creating a series of individual actionable wrongs" each year the breach continued, allowing Plaintiff to sue for damages from breaches occurring within six years immediately preceding filing of suit. *See Mitchell v. U.S.*, 10 Cl.Ct. 787, 788 (1986).

V. Tribe Adequately Alleged Government Breached Its Fiduciary Duties In Managing Tribe's Shoreline Lands.

Defendant argues Tribe "alleges no set of facts establishing . . . 1941 taking [of Tribe's 21-mile shoreline lands] was not lawful" (RB51). Defendant ignores Secretary Morton's November 1974 Order "*correct[ing]* the designation by Secretary Ickes of November 25, 1941," and "*confirming*" "*[t]he Chemehuevi Tribe has full equitable title to all those [shoreline] lands within the Chemehuevi Indian Reservation designated to be taken by Secretary Ickes in 1941*[.]" (Appx313) (emphasis added). Nor does Defendant respond to Tribe's argument (AB47), "[w]hen there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive is unlawful[.]" *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C.Cir.1984), *vacated on other grounds*, 471 U.S. 1113 (1985). The Parker Dam Act did not authorize taking Tribe's shoreline lands as they were unnecessary for either the dam's construction or creation of the reservoir behind it (Lake Havasu). While during the 33-year period from 1941 until 1974, "the *United States* held title to the [shoreline] lands, not the Tribe" (RB51-52 (emphasis in original), Secretary Morton's Order makes clear the title so held was a *bare legal title*, "full equitable title" remaining in Tribe.

Defendant argues, "even if Chemehuevi did have equitable title during that period, the Tribe identifies no statute, regulation, or treaty under which [Defendant] assumed [a] specific land-administration, money-making duty" (RB52). Defendant makes no response to Tribe's contention (AB50), given the "fundamental documents," i.e., statutes, establishing the Chemehuevi Reservation (Appx134, Appx200), a fiduciary relationship "necessarily ar[ose] when the Government assume[d] such elaborate control over" riparian lands and shoreline within the boundaries of the Reservation belonging to Tribe. *U.S. v. Mitchell [Mitchell II]*, 463 U.S. 206, 225 (1983). The Government, by making no responsive argument, waived this point. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *SmithKline Beecham v. Apotex*, 439 F.3d 1312, 1320 (Fed.Cir.2006).

VI. Suspense Accounts' Mismanagement Claim Adequately Stated.

Defendant alleges "deficiencies in Chemehuevi's claim [for suspense accounts' mismanagement], including . . . failure to allege . . . suspense accounts actually exist, [or] that [Defendant] failed to collect interest or to disburse the funds to the rightful owners" (RB53). Tribe alleges payments of Tribe's income were "made to the BIA *for deposit to the Tribe's BIA 'suspense accounts*'" (Appx248 (emphasis added)), confirming suspense accounts "actually exist."

Furthermore, the allegation "Tribe is entitled to an accounting of and to recover compensation and damages *for any and all mismanagement of the Tribe's BIA suspense . . . accounts* . . . maintained from time to time for the Tribe by the BIA" (Appx249) necessarily implies Tribe, on information and belief, alleges such mismanagement existed, even if Tribe is unsure it did.[8] As argued regarding Tribe's §164 claim, "factual allegations pled on information and belief should not be summarily rejected under *Twombly* where 'the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information [making] the inference of culpability plausible.'" *Ahern Rentals*, 59 F.4th at 954 (quoting *Arista Records*, 604 F.3d at 120).

Unquestionably, necessary facts supporting Tribe's suspense funds mismanagement claim are peculiarly within Defendant's possession and control. While Defendant argues Tribe "engaged in jurisdictional discovery" (RB53), jurisdictional discovery is not the *fact* discovery needed to determine whether and to what extent Tribe's suspense accounts have been mismanaged.

An inference mismanagement occurred arises from the allegation, despite suspense accounts being used by BIA since 1946 for temporary deposits of payments owed to Tribe, a 75-year period, none of Tribe's suspense accounts "has

[8] Again, if necessary, Tribe can on remand amend its Complaint expressly to allege, on information and belief, mismanagement of its suspense accounts existed.

ever been audited" (Appx249). An inference is particularly justified given Interior's "deplorable record" in carrying out its fiduciary duties. *Cobell v. Kempthorne*, 455 F.3d 317, 333 (D.C.Cir.2006).

Defendant suggests, because "no *specific* tribe is associated" with any one suspense account (RB55 (emphasis added), Defendant owes no fiduciary duty until money is deposited into a tribe's trust account. The Court should reject this absurd, unreasonable, and unjust interpretation of 25 C.F.R. §115.900. *Maceren v. District Director*, 509 F.2d 934, 941 (9thCir.1974) (rejecting interpretations "produc[ing] an unjust, unreasonable, or absurd result"); *Kantor v. U.S.*, 205 Ct.Cl. 1, 6-7 (1974) (absurd interpretations must be avoided).

VII. Tribe's Request For Accounting Is Proper.

Tribe's request for an accounting is not to "search[] for claims" (RB56) or an "attempt to uncover claims." (RB57). Rather, Tribe adequately alleges breach-of-trust claims for damages. "Assuming [Tribe's] allegations bear out, . . . [and Tribe] meet [its] 'burden of proving specifically how the defendant . . . failed in [its] duty to [Tribe],' a[n] accounting may be required of the government '[to] enabl[e] the court to determine the amount which [Tribe is] entitled to recover.'" *Fletcher v. U.S.*, 26 F.4th 1314, 1326-27 (Fed.Cir.2022).

CONCLUSION

Tribe respectfully urges this Court to reverse the Claims Court's September 29, 2020 decision dismissing Tribe's Complaint and to remand this matter for further proceedings.

Dated: March 16, 2023

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on March 16, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2) because:

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