

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

CHEYENNE RIVER SIOUX TRIBE’S AMENDED PRE-TRIAL MEMORANDUM

This case involves a claim for money damages by the Cheyenne River Sioux Tribe (“Tribe”) against the United States (“U.S.”) for breach of contract, breach of trust, and the taking of tribal property without just compensation arising out of construction by the U.S. of a joint federal and tribal government administration building on tribal land in Eagle Butte, South Dakota, on the Cheyenne River Indian Reservation (“Reservation”) and the decision by the U.S. to cease all maintenance and repairs to the building following the discovery of mold in the building. As a result of the Government’s decision, the building, which is known as “Building 2001,” has fallen into a state of total disrepair. The U.S. has declared the building unsafe, closed it from any further use or occupation, and slated it for demolition.

In its Memorandum Opinion and Order of November 7, 2023, this Court granted in part and denied in part the U.S.’ motion for summary judgment. The Court found against the Tribe on its breach of contract claim, but found that the Tribe’s breach of trust and takings claims raise genuine issues of material fact and must be tried by the Court.

STATEMENT OF THE FACTS

The principal facts of this case are largely undisputed. They are as follows:

1. The Cheyenne River Sioux Tribe is a federally recognized Indian tribe.

2. The Tribe has a treaty-based, nation-to-nation relationship with the U.S.

3. As a constituent tribe of the Great Sioux Nation, the Tribe entered into several treaties with the U.S., including the Fort Laramie Treaty of April 29, 1868.

4. The Treaty of 1868 “set apart” certain territory, known as the Great Sioux Reservation, “for the absolute and undisturbed use and occupation” of the Indians of the Great Sioux Nation as “their permanent home.” Arts. II, XV. *See also* Art. VI.

5. The Great Sioux Reservation included all of present-day South Dakota west of the Missouri River and certain land west of the Missouri River in Nebraska. Art. II.

6. The Treaty of 1868 requires the U.S., “at its own proper expense, to construct” and maintain “agency building” on the Great Sioux Reservation. Art. IV.

7. The Treaty of 1868 provides that, “[t]he Indians herein named agree that when the agency house and other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere ...” Art. XV.

8. The Treaty of 1868 requires the U.S. to maintain an Indian agent to manage treaty affairs, including complaints by or against the Great Sioux Nation, complaints about depredations by bad men among the whites or Indians, distribution of annuities, farming, allotment of land to individual Indians, and related matters.

9. The Treaty of 1868 provides that:

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 presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose

decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

Treaty of 1868, Art. V. *See* Art. I (Indian agent to act on evidence of wrongs committed on the reservation by “bad men among the whites” against “the person or property of the Indians”).

10. The Treaty of 1868 provides that: “No treaty for the cession of any portion or part of the reservation herein described ... shall be of any validity or force as against the said Indians unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same” Art. XII.

11. In 1869, the U.S. established a Cheyenne River Agency at a location on the west bank of the Missouri River thirteen miles below the mouth of Cheyenne River in Dakota Territory.

12. The Act of March 2, 1889, divided the Great Sioux Reservation into seven smaller reservations, including the Cheyenne River Indian Reservation, and secured the relinquishment of Indian title to the remainder of the Great Sioux Reservation.

13. The 1889 Act provides, in relevant part, that the Cheyenne River Indian Reservation is “set apart for a permanent reservation for the Indians receiving rations and annuities at the Cheyenne River Agency.” § 4.

14. The 1889 Act contains a savings clause, which preserves all other rights of the tribes of the Great Sioux Nation under the Treaty of 1868. § 19.

15. By virtue of the savings clause in the 1889 Act, the requirements in the Treaty of 1868 concerning the maintenance of an Indian agent and an agency apply to the separate reservations and require the maintenance of an agency on the Cheyenne River Indian Reservation.

16. The 1889 Act provides that the Act shall take effect upon acceptance and consent thereto by the tribes of the Great Sioux Nation, pursuant to Article XII of the 1868 Treaty. § 28.

17. In 1890, President Benjamin Harrison issued Presidential Proclamation 295, which proclaimed “the acceptance of said act [of 1889] by the different bands of the Sioux Nation of Indians,” and declared the 1889 Act “to be in full force and effect.” The Presidential Proclamation further proclaimed a reservation of land on the Cheyenne River Indian Reservation for the “Cheyenne River Agency, school, and certain other buildings.”

18. Following passage of the 1889 Act, the Cheyenne River Agency was relocated fifty-six miles northward along the Missouri River.

19. The U.S. erected the agency building on tribal land held in agency reserve.

20. This agency building, referred to as the “Old Agency” or “Old Agency Building,” housed the administrative offices of federal agency personnel and the tribal government.

21. The Tribal Council Chambers and tribal governmental officers were located within the Old Agency Building.

22. The Old Agency Building served as the headquarters for the government of the Tribe for many decades.

23. The U.S. preserved, maintained, and repaired the Old Agency Building.

24. There is no evidence that the Tribe was required to lease any portion of the Old Agency Building from the U.S.

25. In 1934, Congress enacted the Indian Reorganization Act (“IRA”) to permit Indian tribes to organize for their common welfare by adopting constitutions and bylaws.

26. The IRA was also enacted, in part, to protect tribal lands. The IRA vested in Indian tribes the power “to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.” 25 U.S.C. § 5123(e).

27. The Tribe organized under Section 16 of the IRA in 1935 by adopting a Constitution and By-Laws, which were approved by the Secretary of the Interior.

28. The Tribe's Constitution and By-Laws became effective upon ratification by a majority of the members of the Tribe and approval of the Secretary of the Interior.

29. The Tribe's Constitution and By-Laws are binding on the U.S.

30. The Cheyenne River Sioux Tribe Constitution and By-Laws provide that the Cheyenne River Agency building is the seat of the tribal government. For example, Article III, Section 6, of the Constitution provides that upon election all councilmen shall report to the Agency to "take the oath of office," which shall be administered by the "reservation superintendent." Article IV, Section 1, of the By-Laws provides that: "Immediately after the election of members of the tribal council and said elected members are duly certified, as provided for in article III, section 6, the members shall assemble at the Cheyenne Agency and organize for business" Article IV, Section 2, of the By-Laws provides that all Council meetings shall be held at the "agency office or other building provided for such purpose." Article I, Section 3(a) of the By-Laws provides that the minutes of all Tribal Council minutes shall be filed at the "Cheyenne Agency Tribal Office." *See also* Art. VIII, § 13 (providing that "a complete record of assignments [of tribal land] shall be kept in the agency office and shall be open for inspection by members of the tribe").

31. In accordance with Section 16 of the IRA, the Tribal Constitution provides that the Tribal Council is vested with the power "[t]o approve or veto any sale, disposition, lease or encumbrance of tribal lands, interests in land or other tribal assets" Art. IV, § 1(c).

32. The Secretary of the Interior approved the Tribal Constitution and By-Laws on December 27, 1935. The Tribal Constitution and By-Laws were amended with the approval of the Secretary of the Interior in 1966, 1980, and 1992.

33. Congress enacted the Flood Control Act of 1944 to authorize the Pick-Sloan Missouri River Basin Project for the conservation, control, and use of water resources in the Missouri River Basin.

34. The Flood Control Act authorized the construction of dams along the Missouri River, including the Oahe Dam.

35. Construction of the Oahe Dam would result in flooding of a significant portion of the Cheyenne River Indian Reservation, including over 100,000 acres of tribal homelands that were among the Tribe's best and most productive lands and the land on which the Old Agency Building was located.

36. In 1950, Congress adopted the Act of September 30, 1950, to authorize the negotiation and ratification of a settlement contract with the Tribe for Indian lands and rights required by the U.S. for construction and maintenance of the Oahe Dam and reservoir.

37. The 1950 Act stated that the settlement contract shall provide for the payment of “[j]ust compensation for lands and improvements and interests therein, conveyed” by the Tribe to the U.S., and for “[c]osts of relocating and reestablishing the tribe and the members of [the] tribe who reside upon such lands so that their economic, social, religious, and community life can be reestablished and protected.” § 2(b)(1),(2).

38. The 1950 Act further stated that: “No such contract shall take effect until it shall have been ratified by Act of Congress and ratified in writing by three-quarters of the adult members of the two respective tribes ...” § 5(b).

39. The Tribe and the U.S. engaged in negotiations concerning just compensation for the taking of tribal lands and the relocation of the Cheyenne River Agency and other facilities that were located on the lands to be flooded.

40. The Tribe insisted that the costs of relocating and reconstructing the buildings and facilities within the taking area, including the Old Agency Building, be charged against the funds appropriated for the Oahe Dame project and not against any settlement paid to the Tribe, and the Tribe further insisted that the facilities be restored to a condition not less advantageous than the condition they are now in.

41. Congress enacted the Cheyenne River-Oahe Act of 1954 (“Oahe Act”) to set forth the “agreement between the United States of America and the Sioux Indians of the Cheyenne River Reservation in South Dakota” concerning “the acquisition of lands by the United States required for the reservoir created by the construction of Oahe Dam on the Missouri River and for rehabilitation of the Indians of the Cheyenne River Sioux Reservation” § 1.

42. The Oahe Act provides that the U.S. agreed to fund the “relocation and reconstruction of the Cheyenne River Agency, relocation and reconstruction of schools, hospitals, service buildings, agents and employees quarters, roads, bridges and incidental matters or facilities in connection therewith.” § 4.

43. The Oahe Act established a fund for the purpose of “complete rehabilitation” of the Tribe and its members “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 § 5.

44. The Oahe Act provided that the Tribe had “the right without charge to ... salvage any portion of the improvements within the said taking area ... and [such] salvage ... shall not be construed as ‘double compensation’ ...” Oahe Act, § 7.

45. The Tribe approved the agreement set forth in the Oahe Act by an affirmative vote of 92% of enrolled tribal member adults in December 1954.

46. The Secretary of the Interior proclaimed the ratification and approval of the agreement set forth in the Oahe Act on April 8, 1955.

47. Relocation of the buildings and facilities of the Cheyenne River Agency, pursuant to the Oahe Act, included relocation of the Tribal Council Chambers and tribal government offices in the Old Agency Building.

48. Tribal leaders insisted that new Agency Building be located on land held in trust by the U.S. for the benefit of the Tribe; that the new Agency Building house both federal (Bureau of Indian Affairs or “BIA”) offices and tribal government offices, including the Tribal Council Chambers; that the U.S. maintain responsibility for maintenance of the new Agency Building; and that ownership of the new Agency Building and all other buildings and facilities of any nature which would be constructed on, or moved to, tribal lands made available for relocation purposes would revert outright to the Tribe when the U.S. no longer had need for them for Agency purposes.

49. The relocation negotiations took place during the so-called “Termination Era” of federal Indian policy. In 1953, Congress adopted House Concurrent Resolution 108 to declare that, “it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States,” subject to “Federal supervision and control.”

50. The Tribe’s fear of potential termination of the Federal Government’s supervision of, responsibilities to, and services for the Tribe motivated the Tribe’s insistence that the new Agency Building be constructed on land owned by the Tribe and the Tribe’s insistence that ownership of the building and other facilities would revert outright to Tribal ownership when they were no longer needed for Agency purposes. In the event Federal jurisdiction was withdrawn in

the future, they would have on their land, and in their ownership, the facilities to move forward in transitioning to State control.

51. In a letter dated December 18, 1956, the Commissioner of Indian Affairs assured the Tribe that, “if and when the agency buildings became surplus to the needs of the Government, such property would be made available to the tribe. This procedure is a part of established Bureau policy.” The letter did not reference any particular Bureau policy or federal law.

52. The Tribe and the U.S. agreed to relocate and reestablish the Cheyenne River Agency in Eagle Butte.

53. The Tribal Council approved Tribal Council Resolution No. 23-57 (Feb. 9, 1957), which made tribal land available for the Agency “with the understanding that the agency would be relocated and reestablished in exactly the same manner as the present agency.” The Tribe indicated that it would make the land available to the U.S. under certain conditions, including:

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

2. That all buildings and facilities of any nature which are constructed on, or moved to, the said tract of land will revert to tribal ownership when the Government no longer has need for them for Agency purposes in accordance with the statement of the Commissioner of Indian Affairs in a letter dated December [18], 1956.

54. The Tribe adopted a second resolution that incorporated the same conditions in 1960. *See* Tribal Council Resolution No. 178-60-CR.

55. The Superintendent of the Cheyenne River Agency recommended approval of Tribal Council Resolution No. 178-60-CR, and the U.S., acting by and through the Commissioner of Indian Affairs, approved the resolution by letter dated December 19, 1960.

56. The Tribe understood that when the U.S. approved Tribal Council Resolution No. 178-60-CR, accepted the tribal land made available by the Tribe in that resolution, and constructed

the new Agency Building on that land, the U.S. accepted the Tribe's conditions, as set forth in the resolution.

57. The U.S. constructed the new Agency Building, referred to as "Building 2001," on the tribal land offered by the Tribe and accepted by the U.S. for that purpose.

58. The land on which Building 2001 is constructed is tribal trust land.

59. The land on which Building 2001 is constructed is a trust asset.

60. The Tribe has an ownership interest in the land on which Building 2001 is constructed.

61. The land on which Building 2001 is constructed was reserved for the "for the absolute and undisturbed use and occupation" of the Tribe as a "permanent home" in the Treaty of 1868. *See*, Treaty of 1868, Arts. II, VI, XV.

62. The U.S.' Title Status Report for the land on which Building 2001 is constructed states that the Tribe is the owner of "All" interest in the land, meaning "the equitable beneficial interest and the legal title interest merged together," that the Tribe's aggregate interest in the land is 1.00, meaning an undivided 100% interest, and that the "Title Status" is trust.

63. Building 2001 is a trust asset.

64. The Tribe has an ownership interest in Building 2001.

65. The Tribe has the right to use and occupy Building 2001.

66. The Tribe's ownership interest in Building 2001 is based, in part, on the fact that the building is an improvement affixed to land owned by the Tribe and ownership of the improvement follows ownership of the land.

67. The Tribe's ownership interest in Building 2001 is also based, in part, on the fact that the Tribe has a future interest in Building 2001. The Tribe's ownership interest in Building

2001 and its right to use and occupy Building 2001 are also based on the Treaty of 1868, the 1889 Act, the IRA and the Constitution and By-Laws of the Tribe (which were adopted pursuant to the IRA and which are binding on the U.S.), the Oahe Act (which directed the U.S. to relocate all buildings and facilities of the Cheyenne River Agency, including the government administration building used jointly by the Tribe and the U.S., and to restore the Tribe and its members to “a condition not less advantageous” than their present condition), and the agreements and arrangements made by the Tribe and the U.S. in furtherance of the Oahe Act, among other things.

68. Building 2001 was constructed by the U.S., in whole or in part, for the Tribe, as required by the Treaty of 1868 and the statutes, laws, and agreements set forth herein.

69. Building 2001 was constructed as a joint BIA-Tribal facility.

70. In the construction plans for the Cheyenne River Agency Administration Building, dated June 1958, the south portion of the joint BIA-Tribal building is dedicated for the Tribe, including: “COUNCIL ROOM”; three rooms designated “COMMITTEE RM”; offices for the “CHAIRMAN” and “TREASURER”; “SECRETARY’S OFFICE”; and offices for “ACCOUNTING” and other tribal functions.

71. Building 2001 was constructed in or around 1959.

72. The BIA Agency and the Tribe maintained their government headquarters in Building 2001.

73. Building 2001 consists of two distinct areas: the northern portion of the building, which was occupied primarily by the BIA and that is referred to in this litigation as “BIA North,” and the southern portion of the building, which was occupied exclusively by the Tribe and that is referred to as “Tribal South.”

74. The Tribe occupied all of the space within Tribal South, and it also occupied one or more offices or spaces in BIA North, including one or more offices or spaces for the Tribal Enrollment Office.

75. Building 2001 served as the headquarters for the government of the Tribe for many decades, beginning shortly after construction of the building was complete in 1959 and continuing until the Tribe vacated the building in November 2014.

76. The U.S. had, and continues to have, the responsibility to maintain and repair all portions of Building 2001, as originally constructed, including the roof of Building 2001, as originally constructed.

77. The Tribe and the U.S. entered into one or more revocable permits for Building 2001.

78. These permits assigned responsibility for major maintenance and repairs of all portions of Building 2001, as originally constructed, to the U.S. and responsibility for minor maintenance and repairs, such as cleaning and changing light bulbs, to the Tribe.

79. Beginning in the mid- to late-1970s and continuing for several decades thereafter, the Tribe used and occupied Building 2001 without a lease or permit.

80. The U.S. is not aware of any documentation to counter the understanding between the U.S. and the Tribe that the Tribe would use and occupy BIA South and some portion of BIA North for enrollment with or without an MOU, lease, permit, et cetera. The U.S. did not ask the Tribe to vacate the building or seek to evict the Tribe from the building.

81. The Tribe had the right to use and occupy building 2001 without a lease or permit.

82. The Tribe constructed an addition to Building 2001 in the late 1970s. The addition is referred to as the “Tribal Addition” or “Tribal Annex.” It is connected to Building 2001 and together with BIA North and Tribal South, the building functions as one interconnected facility.

83. The Tribe owns the Tribal Addition.

84. The Tribe undertook repairs to the roof over the Tribal Addition in 2013, including replacement of the roof membrane.

85. The U.S. assumed exclusive responsibility for all major repairs to Building 2001, including BIA North and Tribal South. The Tribe was responsible for minor maintenance to Tribal South. The Tribe was not responsible for replacing the roof over Tribal South.

86. The U.S. replaced the roof over BIA North and Tribal South between 1986 and 1988.

87. In subsequent years, the U.S. identified the need for additional major repairs to the roof over BIA North and Tribal South, including replacement of the roof.

88. The U.S. obtained numerous construction proposals and cost estimates for the roof repairs for Building, including replacement of the roof.

89. The cost estimates obtained by the U.S. for the proposed major repairs to the roof over BIA North and Tribal South, including replacement of the roof, ranged from \$164,500, more or less, in 2001 to \$336,416, more or less, in 2009. These cost estimates were based on documented construction proposals in the materials provided.

90. A subsequent estimate of \$1 million for roof replacement was set forth in an internal email between BIA officials in 2015, long after the Bureau abandoned Building 2001, but this estimate was not substantiated by a formal proposal or any other documentation and it appears to have been a “back of the napkin” estimate.

91. The U.S. did not undertake or complete the proposed repairs to the roof over BIA North and Tribal South. The reason cited was lack of funding. However, on at least one occasion, funding was appropriated and authorized for roof repairs, but the U.S. did not proceed to make the repairs.

92. In 2014, the U.S. informed the Tribe that it had discovered the presence of mold in Building 2001.

93. Mold testing by Badlands Environmental Consultants confirmed the presence of mold in Building 2001, including BIA North and Tribal South, and in the Tribal Addition.

94. Badlands Environmental Consultants made recommendations for repair of the building and remediation of the mold.

95. Badlands Environmental Consultants did not recommend vacating the building.

96. The level of mold found in Building 2001 in 2014 did not warrant closure of the building.

97. The U.S. developed no plan and undertook no significant action to remediate the mold in Building 2001.

98. The U.S. eventually made the decision to forego any further maintenance and repairs of Building 2001 and to demolish Building 2001.

99. The decision to forego further maintenance and repairs was made sometime after April 29, 2014.

100. By 2016, BIA inspection recommended that the Building be condemned and demolished instead of repaired, but the U.S. never finalized demolition.

101. According to the U.S., the final decision to demolish the building was made in 2020.

102. The BIA did not perform a formal cost assessment prior to the decision to forego further maintenance and repairs of Building 2001 and to demolish Building 2001.

103. In 2014, Building 2001 could have been repaired and maintained.

104. The value of Building 2001 exceeded the cost of repair in 2014.

105. The BIA has performed no repairs or maintenance to Building 2001 since it made the decision to forego further maintenance and repairs.

106. Building 2001 is in a state of total disrepair at this time.

107. Sometime in or around 2020, the U.S. made a determination that Building 2001 was worth less than the cost of remediation. The U.S. made that determination and submitted documentation for the demolition of the building, and that occurred in 2020.

108. The U.S.' decision to forego repair of Building 2001 and to demolish the building has deprived the Tribe of its interest in Building 2001.

109. The U.S.' decision to forego repair of Building 2001 and to demolish the building has deprived the Tribe of its ability meaningfully to use the Tribal Addition.

110. The U.S.' decision to forego repair of Building 2001 and to demolish the building has deprived the Tribe of the use of the tribal land on which Building 2001 is located.

111. The Tribe continued to occupy Tribal South until November 2014.

112. In November 2014, the U.S. relocated some, but not all, of the tribal government offices to a boarding school dormitory in Eagle Butte.

113. The boarding school dormitory is inadequate to house all of the tribal government offices and it does not have sufficient space for the Tribal Council Chambers.

114. The Tribe now conducts its Tribal Council meetings in the conference room of the Cheyenne River Motel, a tribally-owned motel located on Highway 212 in Eagle Butte.

115. The tribal government is located in various buildings throughout Eagle Butte.

116. The U.S. has not made the “agency office” available for the purpose of holding Tribal Council meetings, nor has it provided an “other building” for such purpose, as required by Article IV, § 2, of the Tribe’s By-Laws.

117. Sometime in or around October 2022, the U.S. posted signs on the entrances to BIA North, Tribal South, and the Tribal Addition that state: “No soliciting loitering trespassing.”

118. Sometime in or around October 2022, the U.S. posted signs on the entrances to BIA North, Tribal South, and the Tribal Addition that state, in part: “Danger-Keep out. This structure is unsafe, and its use or occupancy is prohibited by the U.S. Department of the Interior. No trespassing. This sign must not be removed.”

119. At all times relevant to this action, the U.S. possessed and exercised, and continues to possess and exercise, comprehensive authority, supervision, and control over Building 2001 and the tribal land on which it sits.

120. The BIA continues to unilaterally control the Building conditions.

121. At all times relevant to this action, the U.S. had (and continues to have) an on-going trust duty to maintain, protect, repair, and preserve Building 2001 and the land on which it sits and to prevent the same from deteriorating, falling into disrepair, and becoming unusable.

122. The U.S. breached its trust duties by mismanaging, wasting, and failing to properly maintain, protect, repair, and preserve Building 2001 after mold was discovered in the building, and by deciding, sometime after April 29, 2014, to forego any further maintenance and repairs of Building 2001, and by allowing Building 2001 to deteriorate, fall into disrepair and become unusable, and by deciding, sometime in 2020, to demolish Building 2001 and by preventing the

Tribe from using Building 2001 or any part of it, including the Tribal Addition, and the land on which the building sits.

123. The failure by the U.S. to maintain, protect, repair, and preserve the Building 2001 has rendered Building 2001, including the Tribal Addition, and the land on which it sits unusable.

124. Building 2001 and the land on which it sits are abandoned, dilapidated, and unmaintained. They are an on-going blight on, and hazard to, the community.

125. The U.S. has taken no action since 2014 to demolish Building 2001.

126. In respect to its breach of trust claim, the Tribe seeks an award of monetary damages to repair, rehabilitate, or replace Building 2001, including the Tribal Addition. The Tribe calculates these damages based on cost of repair, rehabilitation, or replacement per square foot of floor area.

127. Documents initially produced by the BIA indicated that the total floor area of BIA North and Tribal South is approximately 15,407 square feet, more or less, and the total floor area of the Tribal Addition is 8,305 square feet, more or less, resulting in a total floor area of 23,712 square feet, more or less.

128. However, the U.S. subsequently offered expert testimony that Building 2001, including the Tribal Addition, has an approximate floor area of 32,000 square feet, more or less. The Government's expert estimated the total floor area of BIA North and Tribal South to be not less than 17,586 square feet, more or less, and the total floor area of the Tribal Addition to be not less than 14,000, more or less.

129. The Tribe has produced (and will offer at trial) expert testimony that the cost for repair or rehabilitation of Building 2001, including the Tribal Addition, is not less than \$585 per square foot of floor area. This is based on 65% of replacement cost, which accounts for 35% salvageable superstructure and shell.

130. Assuming a total floor area of 32,000 square feet, the cost for repair or rehabilitation of Building 2001, including the Tribal Addition, is not less than \$18,720,000.

131. The Government's expert puts the cost for repair and rehabilitation of Building 2001, including the Tribal Addition, at \$4,427,696, based on a cost of \$138.37 per square foot for 32,000 feet of building space.

132. The Government's expert stated that the cost of repair and rehabilitation of Building 2001, without including the Tribal Addition, should be based on a floor area of "20,000-square-feet as the cost basis to allow for some increased costs associated with the unknown building party wall construction and the unknown interconnectivity."

133. According to the Tribe's expert, the cost of repair and rehabilitation of Building 2001, without including the Tribal Addition, using a cost basis of 20,000 square feet, would be \$11,700,000 at \$585 per square foot.

134. According to the Government's expert, the cost of repair and rehabilitation of Building 2001, without including the Tribal Addition, using a cost basis of 20,000 square feet, would be \$2,741,130, more or less, at \$155.87 per square foot.

135. It is not known if repair and rehabilitation of Building 2001 is possible at this time due to the deteriorating condition of the building, including the superstructure and shell.

136. The Tribe has produced (and will offer at trial) expert testimony that the cost for replacement of Building 2001, including the Tribal Addition, is not less than \$900 per square foot of floor area. Assuming a total floor area of 32,000 square feet, the cost for replacement of Building 2001, including the Tribal Addition, is not less than \$28,800,000. The cost of replacement of Building 2001, without including the Tribal Addition, using a cost bases of 20,000 square feet would be \$18,000,000 at \$900 per square foot.

137. The Government's expert puts the cost of replacement of Building 2001, including the Tribal Addition, at \$6,811,819, more or less, at \$212.87 per square foot for 32,000 square feet. The same expert puts the cost of replacement of Building 2001, without including the Tribal Addition, at \$4,795,912, more or less, at \$239.80 per square foot for 20,000 square feet.

138. The cost of demolition would be additional.

139. The Government's expert testified that his estimates may have to be adjusted upward 15-25% or more based on classification of the building as a government building, construction cost index for location, procurement issues, and other factors.

140. The cost of new construction for comparable government buildings in Indian country is high, as demonstrated by construction costs of \$770 per square foot for a tribal community center on the Standing Rock Indian Reservation; \$1,000 per square foot for a detention center on the Lake Traverse Reservation, and up to \$1,000 per square foot for a school on the Cheyenne River Indian Reservation.

141. In respect to its breach of trust claim, the Tribe also seeks an award of monetary damages for the Tribe's lost use of Building 2001, including the Tribal Addition, and the land on which the building sits.

142. The Tribe has produced (and will offer at trial) expert testimony that the cost to rent office space comparable to the space used and occupied by the Tribe in Building 2001 is not less than \$16 per square foot per year.

143. Assuming the Tribe used and occupied a total of 23,000 square feet in Building 2001, the cost to rent comparable office space would be not less than \$368,000 per year.

144. By the time of trial, the Tribe will have lost the use of Building 2001 for approximately nine-and-a-half years, resulting in estimated damages for lost use of not less than \$3,496,000.

145. In respect to its breach of trust claim, the Tribe also seeks damages in an amount to be determined at trial for the costs of displacement and relocation of the tribal government and its offices, departments, and programs, including all personnel and property associated therewith, to alternate locations, and for increased difficulty for the tribal government to function in make-shift, scattered office spaces throughout the community and increased difficulty for tribal members and others to interact with the tribal government.

146. In respect to its takings claim, the Tribe seeks an award of just compensation for the fair market value of the Building and land at the time of the taking, plus interest, and the Tribe submits that the fair market value is comparable to the replacement cost of the building.

STATEMENT OF ISSUES TO BE RESOLVED

1. Whether the U.S. has a trust duty to construct, maintain, and repair or replace Building 2001 for the Tribe.

2. Whether the U.S. breached that duty by failing to repair, rehabilitate, or replace Building 2001 following the discovery of mold in the building.

3. Whether the U.S.' construction of Building 2001 on tribal land and its subsequent failure to repair the building has resulted in a taking of the Tribe's property in violation of the Fifth Amendment.

DISCUSSION OF LEGAL PRINCIPLES

I. THE UNITED STATES HAS A TRUST DUTY TO CONSTRUCT, MAINTAIN, AND REPAIR OR REPLACE BUILDING 2001 FOR THE TRIBE.

The Court ruled that the U.S. has a trust duty to construct the Agency building on the Reservation for the benefit of the Tribe. The Court ruled that this “trust duty can be traced to the ... text” of the Treaty of 1868. Mem. Op. 12. *See also id.* at 14. The Court further ruled that the obligation to construct the Agency building on the Reservation is reaffirmed and repeated in every instance where Congress, the President, or the Secretary of the Interior revisited the obligations laid out in the Treaty of 1868. *Id.* at 12 (referencing Presidential Proclamation 295 issued in 1890 pursuant to the 1889 Act; the Secretary of the Interior’s approval of the Tribe’s Constitution and By-Laws pursuant to the 1934 IRA; and the Oahe Act, which required “reconstruction of the Cheyenne River Agency” and restoration of the Tribe “to a condition not less advantageous” than the one existing at the time of relocation).

The Treaty-based duty to construct the Agency building is continued in full force under the 1889 Act. The Act preserves the Tribe’s rights the Treaty of 1868, and requires the construction and maintenance of the Agency building on the Cheyenne River Indian Reservation. This is reaffirmed in Presidential Proclamation 295.

The Constitution and By-Laws of the Tribe provide that the Agency building is the seat of the tribal government. For decades, the Old Agency Building along the Missouri River served as the tribal government headquarters. The Tribal Council Chambers and tribal government offices were located in the building. It was a joint federal and tribal government administration building.

When the U.S. proposed to flood the Cheyenne River Agency, it pledged in the Oahe Act to reconstruct the Cheyenne River Agency, including the Old Agency Building, and to rehabilitate and restore the Tribe and its members “to a condition not less advantageous” than the one existing

at the time of relocation. Oahe Act, §§ 4, 5. That meant reconstructing a joint federal and tribal government administration building for the Tribe. These statutory duties implicitly included an agreement not to permit the new Agency building to fall into disrepair. This Court rejected the Government's "one-and-done" theory that its obligations under the Oahe Act were extinguished upon construction of the new building. Mem. Op. 12. The U.S. had a "continuity of obligation" to maintain the Agency building for the Tribe. *Id.*

The Oahe Act was passed for the benefit of the Tribe and its members and, as such, it is to be liberally construed in their favor. *See* 1 Cohen's Handbook of Federal Indian Law § 2.02 (collecting cases). The intent of Congress in the Act was to provide the Tribe with the same resources it had at the Old Agency, including a joint federal and tribal government administration building. This duty was and is enduring and ongoing.

The U.S. has a trust duty to maintain, protect, repair, and preserve the Building. The duty arises from several sources. The Treaty of 1868 requires the U.S. to keep the Agency building "office open at all times." Treaty of 1868, Art. V. This duty was carried forward in the 1889 Act. The Tribe's Constitution and By-Laws, which were approved by the U.S. and which are binding on the U.S., provide that the Agency building is the seat of tribal government and the meeting place of the Tribal Council. The duty to provide an Agency building for the Tribe continues as long as the Tribe is in existence and exercising powers of self-governance. By requiring the U.S. to restore the Tribe to a condition "not less advantageous" than its condition at the Old Agency Building, the Oahe Act required the U.S. to furnish and maintain an Agency building to be used, in part, as the seat of government of the Tribe. The U.S. undertook a duty and responsibility to maintain the Old Agency Building, and it has the same duty and responsibility to maintain Building 2001.

The Treaty and laws recognize the Tribe's ownership interest in the Agency building. The Treaty of 1868 provides that the Reservation is set apart for the absolute and undisturbed use and occupation of the Indians as a permanent home. Art. II, VI, XV. By requiring construction of the Agency building on the Tribe's land, the Treaty guaranteed a tribal ownership interest in the building. *See Banner v. United States*, 238 F.3d 1348, 1356 (Fed. Cir. 2001) ("improvements to realty are considered part of the real property; ownership of the improvements follows title to the land"); *Mann v. United States*, 984 F.3d 317, 325 (4th Cir. 2021) (same) (citations omitted).

This Court has ruled that the Tribe's "future interest in the Building" is recognized and affirmed in the Oahe Act. Mem. Op. and Order at 13-14 (discussing § 7 of the Oahe Act). The Tribe's future interest in Building 2001 was confirmed by the agreements and arrangements made by the Tribe and the U.S. in furtherance of the Oahe Act, including the Government's agreement to locate the building on tribal land and its pledge that ownership of the building would revert to the Tribe when the Government no longer needs the building for Agency purposes.

The existence of an ownership interest on the part of the Tribe in Building 2001 carries with it an obligation on the part of the U.S. to preserve and maintain Building 2001. So, too, does the U.S.'s assumption of comprehensive supervision and control of the building, including control over the repair and maintenance of the building, access to the building, and ultimate disposition of the building. *See White Mountain Apache Tribe v. U.S.*, 249 F.3d 1364 (Fed. Cir. 2001), *aff'd* 537 U.S. 564 (2003); Restatement (First) of Property §§ 139, 140 (2023).

In *United States v. Mitchell*, 436 U.S. 206 (1983), the Supreme Court made clear that control alone is sufficient to create a fiduciary relationship:

[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing

is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

463 U.S. at 225 (citation omitted). The U.S.’ occupation, use, supervision, and control of Building 2001 require the U.S. to act in accordance with the duties of a common law trustee, including the duty to preserve the trust property. *See, e.g.*, Restatement (Second) of Trusts § 176 cmt. b (1959) (“duty of the trustee to use reasonable care to protect the trust property from loss or damage.”).

In furtherance of the Oahe Act, and in accordance with the Treaty of 1868 and other federal laws, the U.S. constructed Building 2001 on tribal trust land. Building 2001 is a permanent fixture on the Tribe’s trust land, and the U.S. has a duty to maintain and preserve the building to fulfill its obligations under the Oahe Act and its obligation to prevent damage to the Tribe’s trust land.

The U.S. built Building 2001, in whole or in part, for the Tribe. The U.S. occupied a portion of the building for Agency purposes; the U.S. undertook a duty to perform major repairs to Building 2001; and the U.S. exercised comprehensive supervision and control over the building. Under the circumstances, the U.S. had, and continues to have, a duty to repair or replace the building.

II. THE UNITED STATES BREACHED ITS TRUST DUTY BY FAILING TO REPAIR, REHABILITATE, OR REPLACE BUILDING 2001 FOLLOWING THE DISCOVERY OF MOLD IN THE BUILDING.

The U.S. breached its duty by deciding to forego all maintenance and repair of Building 2001 months after the discovery of mold in the building and thereafter deciding—in 2020—to demolish the building. The evidence will show that the building could have been repaired and rehabilitated after the discovery of mold.

The U.S. may claim that the cost of repair and remediation of Building 2001 exceeded its value, but that claim is not supported by the facts, and even if it were, it would not provide a justification for refusing to repair or replace the Agency building. As noted above, the duty to

provide a joint federal and tribal government building, just like the Old Agency Building along the Missouri River, is enduring and on-going.

III. THE UNITED STATES' CONSTRUCTION OF BUILDING 2001 ON TRIBAL LAND AND ITS SUBSEQUENT FAILURE TO REPAIR THE BUILDING HAS RESULTED IN A TAKING OF THE TRIBE'S PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT.

The U.S. constructed Building 2001 on tribal land. The U.S. made the decision to cease all repairs and maintenance of Building 2001 after the discovery of mold. The building is now unoccupied, and the Tribe is prohibited from entering Building 2001. The U.S. has made the decision to demolish Building 2001. The U.S. has not offered to compensate the Tribe for its ownership interest in the building or its reversionary interest in the building. The government's action constitutes a taking of the Tribe's property interests in the building without just compensation, in violation of the Fifth Amendment.

Further, the Tribal Addition is connected to Building 2001 and the evidence will show that the Tribal Addition cannot be maintained, used, or occupied maintained if Building 2001 is not repaired and rehabilitated or if Building 2001 is demolished.

The U.S. continues to allow Building 2001 to sit vacant and wasting away on the Tribe's land. The U.S. has effectively ignored and abandoned the building for over nine years. The ongoing physical occupation of the Tribe's land by this abandoned building constitutes a taking of the Tribe's property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

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