**No. 2024-1108**

# IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**WINNEMUCCA INDIAN COLONY,**
*Plaintiff-Appellant*

v.

**UNITED STATES,**
*Defendant-Appellee*

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE NO. 1:20-CV-01618-KCD

## PLAINTIFF-APPELLANT'S REPLY BRIEF

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# PLAINTIFF-APPELLANT'S REPLY BRIEF

Pursuant to Rule 28 of the Rules of the United States Court of Appeals for the Federal Circuit, Plaintiff-Appellant, the Winnemucca Indian Colony, respectfully submits this Reply Brief.

## CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant certifies the following:

1. We represent Winnemucca Indian Colony.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented: The captioned parties are the real parties in interest.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented: None.

4. All law firms, partners, and associates that have appeared for the entities in the trial court or are expected to appear in this court for the entities, other than the captioned attorneys: None.

5. Related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a), other than the originating case: None.

6. Any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6): None/Not Applicable.

DATED this 21st day of May, 2024.

*/s/ Norberto J. Cisneros*

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## INTRODUCTION

BIA cites case law purporting to support each of the four grounds the Court of Federal Claims ("CFC") set forth for dismissal of this case. Upon closer scrutiny, the case law supports reversal.

First, BIA relies on *United States v. Tohono O'odham Nation*, 563 U.S. 307 (2011) to argue that jurisdiction under 28 U.S.C. § 1500 is precluded where two suits are based on "substantially the same operative facts." *See* BIA Br. at 19. But subsequently, courts have parsed the meaning of "the same operative facts," finding they are comprised of the "legally determinative" facts, "those that must be proven in order to recover on a given claim." *Petro-Hunt. LLC v. United States,* 105 Fed. Cl. 37, 43 (2012). BIA fails to explain how any "membership dispute" would need resolution before WIC can recover on its claims, which all involve allegations that BIA breached its duty to protect Colony land from corporate encroachment.

Second, BIA relies on *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995) for the notion that the statute of limitations under 28 U.S.C. § 2501 is not tolled by the continuous claims doctrine, where trespasses are ongoing. *See* BIA Br. at 38. BIA's dependence on *Fallini* is misplaced; the holding has never been extended outside the context of cases brought under the takings clause, and where continued takings (trespasses) occurred after enactment of legislation at a specific time. In other words, any contest of a piece of legislation purportedly allowing trespass must occur within six

years following enactment of the bill, statute or act being enacted. Here, BIA has not identified any legislation, or any single event that purportedly released BIA of its duty to stop trespasses from corporate entities.

Third, BIA relies on *Arizona v. Navajo Nation*, 599 U.S. 555, 563, 143 S.Ct. 1804 (2023) for an argument that WIC must cite a treaty, statute or regulation, not just judicially made federal common law like the *Winters* doctrine, *see Winters v. United States,* 207 U.S. 564, 28 S.Ct. 207 (1908), to fulfill the requirements for finding a money mandate. BIA Br. at 45. But WIC did exactly that, citing not just *Winters,* but also 25 C.F.R. § 152.22, which expressly requires Secretarial approval to convey individual-owned trust or restricted lands or land owned by a tribe. Because under 25 C.F.R. § 152.22, BIA has exclusive control over disposition of Indian land, the money mandate is triggered. *See United States v. White Mountain Apache Tribe,* 537 U.S. 465, 468, 123 S. Ct. 1126 (2003).

Fourth, BIA relies on *Confidential Informant 59-05071 v. United States*, 134 Fed. Cl. 698 (2017), to argue the CFC lacks jurisdiction to consider declaratory claims. *See* BIA Br. at 50. But the court's dismissal therein was dependent on dismissal of contract-based claims. *Confidential Informant 59-05071* at 712-13 and at 716-717. By the same logic, if money-based claims are returned to this action, it follows that the declaratory claims should also remain.

The authority cited by BIA mandates reversal of the CFC decision and judgment regarding WIC's following claims:

Claim 1 Violation of 25 U.S.C. § 323 et seq. – land use;

Claim 2 Violation of 25 U.S.C. § 323 et seq. – land use in relation to energy station;

Claim 3 Breach of trust – water;

Claim 5 Breach of trust and violation of law pursuant to the Indian Non-Intercourse Act;

Claim 6 Breach of Fiduciary Duty[1]; and

Claim 8 Demand for documents and accounting.

## ARGUMENT

### I. The Nevada action was not at all based on the same operative facts, and thus, 28 U.S.C. § 1500 was not a proper basis for dismissal.

BIA fails to demonstrate that under *Tohono,* 563 U.S. at 310, this action is "based on substantially the same operative facts" as those in *Winnemucca Indian Colony v. United States*, No. 3:11-cv-622 (D. Nev. Aug. 29, 2011)) ("Nevada District Court action"). BIA Brief at 19, 23-26. To simply assert without evidence there is some "common factual basis," *see id.* at 24, is not enough to meet the *Tohono* standard. The "common factual basis" involves a myth BIA continues to embrace – that this case is about a "membership dispute" – as in the Nevada District Court action. Indeed, here "dispute" is used in such context seventeen times in the Answering Brief. The statement is false

[1] Contrary to BIA's incorrect statement, *see* BIA Br. at 20, fn. 2, WIC appeals the decision regarding this claim. *See* WIC Br. at 8, 11, 13, and 32.

distraction. But even if a real membership dispute existed, it would not have relieved BIA of its duties toward WIC.

"[D]etermining whether two claims are 'based on substantially the same operative facts' requires more than a side-by-side comparison of the two complaints to see how much verbiage is in common." *Petro-Hunt. LLC v. United States,* 105 Fed. Cl. 37, 43 (2012). This necessity occurs because "the court *must* first isolate the facts in the complaint that are 'operative,' *i.e.*, those that must be proven in order to recover on a given claim." *Petro-Hunt* at 43 (emphasis added). Such "operative" facts differ from "'background' facts." *Klamath Irrigation Dist. v. United States,* 113 Fed. Cl. 688, 699-700 (2013) (citing *Central Pines Land Co.,* 697 F.3d 1360, 1364-65 (Fed. Cir. 2012). Here, the CFC did not distinguish background facts from operative facts, as required.

A district court has jurisdiction to order the BIA to recognize, conditionally, either a new or old council "so as to permit the BIA to deal with a single tribal government," so long as the dispute remains unresolved by a tribal court. *Goodface v. Grassrope*, 708 F.2d 335, 337 (8th Cir. 1983). Such conditional recognition is "necessary to maintain basic services to the Tribe." *Id.* at 337. In other words, BIA owes duty to a tribe no matter whether dispute occurs.

Thus, there is no point to BIA's suggestion that, in order to "'save the Government from the burdens of redundant litigation,'" that this Court compare the facts from the Nevada action. BIA Brief at 5 (citing *Tohono* at 315), and 24, fn. Neither such facts nor resolution of the case before the Nevada District Court has any bearing

on the outcome of this action; res judicata does not apply. Indeed, now that the Nevada District Court action has resolved, nothing has changed. BIA still has, as it did before, the duty to defend the Colony's trust's interests – no more, and no less. The facts cited by BIA have always had nothing whatsoever to do with BIA's duty to protect Colony land from corporations. Even if BIA believed that William Bills, a Filipino with no Indian blood, could somehow be Chairman of Tribal Council, BIA still had the duty to prevent encroachments. BIA had the burden of explaining why a "membership dispute" suspended BIA duties to stop transgressions of (i) a road over Colony land; (ii) installation of overhead utility wires over Colony land; (iii) installation of a electrical substation on Colony land; and (iv) diversion of an actual stream in excess of 60 cfs running across the Colony lands, as here. Nor does BIA meet its burden of explaining how the background facts excused it from preventing the subdivision from placing several structures on Colony lands. In other words, neither Section 1500 nor res judicata has any application to this case. Even more significant, BIA can point to nothing in the decision by the CFC that identifies the relationship between a "membership dispute" and BIA's duties to the trust land.

BIA also references *Winnemucca Indian Colony v. United States*, No. 13-874, 2014 WL 3107445, at *1 (Ct. Fed. Cl. July 8, 2014). BIA Br. at 10. BIA suggests that where that case was dismissed under 28 U.S.C. § 1500, dismissal of this case should also be upheld. *Id.* BIA's suggestion is unavailing; as in the Nevada District Court action, allegations of alleged failure to protect the trust land against illegal easements and water

use by corporate interests were not alleged in that action. And as here, no causal relationship was alleged between any membership disputes and BIA failures to protect trust property.

BIA also quotes the comment from *Brown v. Haaland*, that a procedural background of disputes put even that case in "a constellation of litigation . . . ." BIA Br. at 1 (quoting *Brown v. Haaland*, No. 3:21-cv-00344, 2024 WL 1330119 (D. Nev. Mar. 28, 2024)). BIA implies this case arises from the same "constellation," which *Brown* identified as including the Nevada District Court case. *Id.* But the *Brown* court saw that, as opposed to the "leadership questions addressed in the district court," "[t]he case now before the Court, by contrast, deals with agency inaction, and questions regarding evictions and reassumption of the Contract—while certainly connected to questions regarding tribal leadership—are distinct and several steps removed from such leadership questions." *Brown* at 16, fn. 17.

BIA suggests WIC's inquiry did not "probe" whether the claims in the Nevada District Court action were "for or in respect to" the claims asserted in this action. BIA Br. at 22. But no amount of probing would indicate this case is related to any sort of membership dispute. A history of challenges to WIC's tribal authority by non-members comprises factual background, not the substance of any claims. It speaks to the general character of BIA in its relationship to WIC. Unlike operative facts, "background facts" provide "the context for the claims presented." *Baberman v. United States,* 129 Fed. Cl. 539, 546 (2016). Here, the context is that WIC has endured decades of ill treatment by

BIA; its refusal to protect Colony land from interference by third parties should be understood in that context.

### A. WIC did not waive or forfeit its argument regarding 28 U.S.C. § 1500.

BIA argues WIC forfeited its argument regarding Section 1500. BIA Br. at 20-22. BIA is incorrect. In Opposition to BIA's Motion to Dismiss Second Amended Complaint, WIC stated: "Defendant likewise argues incorrectly that this Court lacks jurisdiction because of a '"pending' action' . . . . an action to which the United States is not a party *and an action that had no similar claims*." Appx181 (emphasis added). WIC further argued "there was no bona fide membership dispute that should stop this action from proceeding." *Id.*

Contrary to BIA's argument to this Court, WIC's citation to the oral argument transcript is evidence of non-forfeiture. Therein, WIC's counsel stated:

> [W]hether a third-party can make some frivolous claim and all of a sudden bring the Winnemucca Indian Colony into some piece of litigation over it doesn't mean it's the same set of facts. We actually agree on that issue. There's no argument. So it's not the same set of facts. We're saying based upon the properly seated – the tribal council, these are the wrongs that were done to them that require monetary damages.

Appx404[2] at 54. BIA. Contrary to BIA's argument, *See* BIA Br. at 22, these are not the words of BIA's counsel. The problem with the decision by the CFC is that it mischaracterized the instant action as one involving "factual questions of who, if anyone, constituted the legitimate Colony leadership; whether the individuals in

[2] BIA's correction to Appx404 is accurate.

question had authorization from that leadership to enter Colony lands; and when and under what circumstances the BIA took (or did not take) action to recognize a government"). Appx9. The CFC conducted no analysis as to whether such facts were operative, or were background facts (as, indeed, they were). The CFC never stated that determination of membership required resolution before it could determine whether BIA illegally allowed third-party interference by corporate interests.

### B. This Court may consider the argument regarding 28 U.S.C. § 1500.

Even if WIC had forfeited its arguments – it did not – this Court may still consider the question of whether a prior case about non-members arguing they somehow had a right to serve as Council members has anything to do with this case, involving BIA failure to protect trust interests.

The cases cited by BIA involved waiver, not forfeiture. *See* BIA Br. at 20 (quoting *Gant v. United States*, 417 F.3d 1328, 1332 (Fed. Cir. 2005); *Ladd v. United States*, 713 F.3d 648, 655 (Fed. Cir. 2013); and *Caterpillar Inc. v. Sturman Indus., Inc.*, 387 F.3d 1358, 1368 (Fed. Cir. 2004)). But a distinction exists between waived and forfeited issues. *Day v. McDonough*, 547 U.S. 198, 199, 126 S.Ct. 1675, 1678 (2006) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." *Kontrick v. Ryan,* 540 U.S. 443, 458 n.13, 124 S. Ct. 906 917 n.13 (2004) (citing *United States* v. *Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770) (1993). Federal courts do not have

"*carte blanche* to depart from the principle of party presentation basic to our adversary system," and thus, it is an abuse of discretion for a court "to override a [party's] deliberate waiver." *Wood* v. *Milyard,* 566 U.S. 463, 472-73, 132 S. Ct. 1826, 1833-34 (2012) (quotations omitted). In contrast, courts have the ability to "resurrect" forfeited issues *sua sponte. Id.* at 471 n.5, 132 S. Ct. at 1833 n.5. Courts may do so because "the refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary." *Davis v. United States*, 512 U.S. 452, 464, 114 S. Ct. 2350, 2358, 129 (1994) (Scalia, J., concurring) (citing *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-448, 113 S. Ct. 2173 (1993)).

*Caterpillar,* as cited by BIA, looked to the 7th Circuit for its analysis regarding waiver. *Caterpillar* at 1368 (citing *Datamatic Servs. v. United States,* 909 F.2d 1029, 1034 (7th Cir. 1990)). But the 7th Circuit made clear the distinction between waiver and forfeiture, stating, "[W]e may affirm on any ground supported by the record as long as the appellee did not waive – as opposed to forfeit – the issue." *LaSalle Nat'l Bank v. Gen. Mills Rest. Corp.*, 854 F.2d 1050, 1052 (7th Cir. 1988) (citing *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154 (1937) (Brandeis, J.).

The Federal Circuit has identified five situations in which discretion to consider a forfeited issue may be exercised:

> (i) the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (ii) the proper resolution is beyond any doubt; (iii) the appellant had no opportunity to raise the objection at

> the district court level; (iv) the issue presents significant questions of general impact or of great public concern; or (v) the interest of substantial justice is at stake.

*Amgen Inc. v. Sandoz Inc.,* 877 F.3d 1315, 1324 (Fed. Cir. 2017).

Contrary to BIA's suggestion, *see* BIA Br. at 23, fn. 5; 25, WIC is not seeking reversal on the basis of "unfairness." The point is that where Section 1500 has been called an "'anachronism'" and a "'trap for the unwary,'" *Klamath Irrigation Dist. v. United States,* 113 Fed. Cl. 688, 691, fn. 2 (2013) (citation omitted), the CFC erred in relying on BIA's unsubstantiated statements about a 'membership dispute" to reach its decision. No analysis was done as to how the history of BIA's refusal to acknowledge properly seated Council was the cause of BIA's refusal to observe its own trust duties. Here, the evidence is that the Nevada District Court case did not involve BIA duties to protect trust interests. Appx47-63. BIA has offered no evidence whatsoever to refute that in the Nevada District Court action, WIC only sought a declaration that, "The Winnemucca Indian Colony is adversely affected by the failure to act by the BIA and by the BIA issuing an arbitrary decision regarding the recognition of William Bills as part of the Winnemucca Indian Colony Council," Appx55, and that the United States must recognize the members of the Tribal Council Appx61-62 at ¶ 72. The proper resolution of the non-applicability of Section 1500 is "beyond any doubt," such that this Court should reverse the decision and judgment of the CFC. *See Amgen* at 1324.

## II. BIA's own conduct tolled the statute of limitations.

BIA argues that the CFC correctly dismissed under 28 U.S.C. § 2501 on the basis that: 1) no formal repudiation is required; 2) no accounting was required; 3) the statute wasn't tolled under Council was recognized; and 4) the continuing claims doctrine didn't not apply. BIA Br. at 27-43. BIA is wrong on all counts. Where this Court "review[s] the legal aspects of the determination by the CFC that the appellants claim was barred by the statute of limitations without deference," *Caldwell v. United States,* 391 F.3d 1226, 1233 (Fed. Cir. 2004), reversal is now appropriate.

### A. Not before 2015 did BIA give notice of repudiation.

WIC argued that BIA's 2015 letter stating Colony land was held in fee, not trust, was repudiation of trust tolling the statute of limitations. WIC's Corrected Principal Brief (WIC Br.) at 5, 23. BIA counters the error was later corrected, and the letter related only to the 20-acre parcel. BIA Br. at 32. BIA provides no authority for the notion that once a false repudiation is taken back, tolling under a statute of limitations is effectively annulled. Furthermore, the repudiation of trust tolled the statute of limitations with respect to claims over the 320 acres because BIA repudiated its duty to WIC generally.

### B. Without an accounting, WIC did not have notice of all corporate trespasses.

BIA argues that even without an accounting, WIC was aware of corporate trespass. But notice of all corporate trespass would have been impossible, where

Council members were threatened with prosecution in 2011 for setting foot on their own land.

### C. BIA itself suggested the action couldn't be brought until BIA recognized Council.

To support the argument that the statute of limitations was tolled until BIA recognized the Council led by Chairman Wasson, WIC cited BIA's own cited argument for dismissal: "'A court lacks subject matter jurisdiction over a suit purportedly brought on behalf of a tribe by a tribal faction that does not constitute a BIA-recognized tribal government.'" WIC Br. at 20 (citing App. 138-39 (BIA quoting *Nooksack Indian Tribe v. Zinke*, No. C17-0219-JCC, 2017 WL 1957076, at *6 (W.D. Wash. May 11, 2017)). BIA ignores its own previous argument because it demonstrates that the statute of limitations did not begin to accrue until recognition on December 13, 2014.

BIA's accounting of historic events suggests bad faith. BIA admits that in November 2009, the IBIA determined Chairman Wasson and Tribal Council had identified sufficient basis to require a decision on WIC's leadership. BIA Br. at 6. BIA then admits, "Following that ruling, the Regional Director issued a short decision declining to recognize the purportedly elected council as the duly elected leadership." BIA Br. at 7. BIA's admission begs the question: why not? And why, instead, would BIA recognize a Filipino with no Indian blood as Chairman?

BIA's citation to *Nooksack* offers a clue to the answer. The strategy is revealed: refuse to recognize Council for fifteen years (2000 to 2014), then move for dismissal

on grounds that too much time has passed. The strategy also includes moving for dismissal on grounds the dispute continues and has not been decided, and therefore, not enough time has passed under Section 1500. The contention that any action WIC brings will always be brought both too soon and too late should end with BIA's reference to *Winnemucca Indian Colony v. United States*, No. 13-874, 2014 WL 3107445 (Ct. Fed. Cl. July 8, 2014). *See* BIA Br. at 10. Where the court dismissed that case under Section 1500 because the "operative facts" regarding a "membership dispute" were unresolved, this action differs because BIA has now finally acknowledged WIC's duly elected Council.

Affirmation of CFC's decision would act as an endorsement of BIA's bad faith strategy – one that could be used against other tribes. This Court should not countenance such a result.

**D. WIC's claims are continuing claims.**

WIC argued that, as in *Shoshone Indian Tribe of Wind River Reservation v. United States,* 672 F.3d 1021, 1027 (Fed. Cir. 2012) *(Shoshone II)*, each trespass by corporate interests constituted separate events invoking the continuing claims doctrine tolling the statute of limitations. In *Shoshone II,* plaintiff Indians alleged certain oil and gas leases were unlawfully converted from a 1916 Act to a 1938 Act, resulting in worse royalty and renewal terms for plaintiffs. *Shoshone II* at 1025. Plaintiffs filed the action in 1979, so the federal government sought dismissal based the statute of limitations. *Id.* BIA acknowledges that in *Shoshone II,* new entries upon Indian land by third parties – a

"yearly extraction of trust resources" – were deemed to be distinct injuries allowing the continuing claims doctrine. BIA Br. at 39-40.

But BIA argues that here, the construction of a road and other structures constituted a "single event," and suggests the trespasses were non-actionable cumulative effects. Not so under *Shoshone II:* "Assuming the Government had a duty to eject the trespassers, every time the Government failed to remove the trespassers a new cause of action arose." *Shoshone II* at 1036, fn. 9. In other words, the *Shoshone II* court did not find that the 1938 Act was a single event triggering accrual of the statute of limitations whereby subsequent trespasses would be deemed merely cumulative.[3]

BIA's idea of trespass as a "cumulative effect" derives from *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995). Therein, the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-1340 was deemed to be a "single event" occurring in 1971 barring application of the continuing claims doctrine – but specifically and only in the context of a federal taking. *See Fallini* at 1379-80. More than twenty years later in 1992, plaintiff Fallinis, who were cattle ranchers, filed suit contending the government had taken their property by requiring them to provide water to wild horses. *Id.* at 1380. Thus, the Fallinis brought a claim under the takings clause of the Fifth Amendment. *Id.*

[3] Contrary to BIA's argument, *see* BIA Br. at 40, fn. 10 (citing Appx101 ¶ 199), WIC's Amended Complaint did not allege that the corporate trespasses all occurred only "between 2000 through 2014." Instead, WIC's allegation was of BIA "failure to act from 2000 through 2014 in failing to properly recognize a Tribal Council of the Colony . . . ." In other words, "between 2000 through 2014" was not a modifier to the rest of the allegations in ¶ 199.

at 1379. The court found that, for purposes of claim accrual, the taking had occurred on the date of the enactment of the legislation. *Id.* at 1382-83. Wild horses entering the property every day did not give rise to application of the continuing claims doctrine.

This action is not brought under the takings clause. No legislative enactment date triggered conduct related to WIC's first and second claims. 25 U.S.C. § 323, which supported the claims, refers to an ongoing duty by BIA not to give easements to third parties, allow corporate encroachments, and allow diversion of water. The statute is not a trigger for accrual of BIA conduct. And breach of trust, under which WIC brought its third claim, did not accrue upon the passing of any legislative act. The Indian Non-Intercourse Act, 25 U.S.C. § 415, under which WIC brought its fifth claim, requires the BIA uphold a duty. And no legislative enactment date triggered accrual of conduct related to WIC's sixth claim for fiduciary duty, or for its eighth claim for an accounting. No wonder *Fallini* has not been used to eliminate the continuing claims doctrine in cases having nothing whatsoever to do with the takings clause. *Fallini* has no application here.

Further, if, as BIA suggests, *see* BIA Br. at 40, "protecting the government from defending suits" were the primary purpose of determining application of the continuing claims doctrine, the doctrine would never apply. Thus, in *Wells v. United States,* 420 F.3d 1343 (Fed. Cir. 2005), as cited by BIA, *see* BIA Br. at 39, the outcome was the doctrine *did* apply. Where the government wrongly withheld payments to a veteran, "each time the money was withheld from Well's retirement pay the statute limiting that amount

was violated, thereby giving rise to a distinct claim." Here, each time 25 U.S.C. § 323, 25 U.S.C. § 415,[4] and 25 C.F.R. § 152.22 were violated, the doctrine applied.

**1. The Indian Long-Term Leasing Act – which is money mandating – does not give BIA discretion to protect or not protect Indian trust land.**

BIA argues that even if trespass supports application of the continuing claims doctrine, BIA had no duty to stop such trespass. *See* BIA Br. at 41-43. But WIC argued the CFC found, *sua sponte,* that the Indian Long-Term Leasing Act was money mandating and might grant the court jurisdiction over WIC's claim of breach of trust. Appx28-29[5]. An Act is money mandating when, in part, an underlying duty is present. *White Mountain Apache Tribe* at 465, 475, 123 S.Ct. at 1134. As a result of the CFC raising the issue of its own accord, waiver (or more properly, forfeiture), does not bar appeal of the issue. *Milyard,* 566 U.S. at 471 n.5, 132 S. Ct. at 1833 n.5.

*Nulankeyutmonen Nkihtaqmikon v. Impson,* 503 F.3d 18, 29 (1st Cir. 2007), cited by the CFC, *see* Appx28, proves wrong BIA's assertion that the Indian Long-Term Leasing Act establishes no specific duty to stop trespassers. *See* BIA Br. at 42. *Impson* arose from BIA approval of lease of tribal land to a developer who wanted to construct a natural gas terminal. *Impson* at 23. Obviously, such a developer entering land would be a

[4] Contrary to BIA's argument, *see* BIA Br. at 42, The Indian Long-Term Leasing Act wasn't violated as a result of BIA improperly approving leases; it was violated when BIA allowed encroachment in the absence of any properly approved leases. This failure has been ongoing, including within the prior six years.

[5] BIA incorrectly states that WIC is not appealing the decision regarding the money mandate with respect to the sixth claim. *See* BIA Br. at 13.

trespasser. Indeed, plaintiffs in *Impson* sought to stop the developer's "right to enter upon and restrict access to the Premises." *Id.* at 24. But plaintiffs could only do so by suing BIA, who had, by granting the lease, violated the Indian Long-Term Leasing Act. *See Impson* at 29-30. The *Impson* court further allowed a breach of trust claim to proceed to the extent it relied on the Long-Term Leasing Act. *Id.* at 31. The reasoning was:

> *Brown* found a fiduciary relationship between the government and Indian land owners who could lease their lands only subject to the Secretary's approval under the Long-Term Leasing Act precisely because the Secretary was acting in part to protect the land owners' financial interests, a traditional fiduciary capacity.

*Impson* at 31 (citing *Brown v. United States,* 86 F. 3d 1554, 1563 (Fed. Cir. 1996). Thus, the fiduciary duty to protect WIC's interests under the Long-Term Leasing Act against trespasses and/or encroachments by third parties is well established under *Impson.*

BIA cites *Two Shields v. United States*, 820 F.3d 1324, 1332–33 (Fed. Cir. 2016) for the notion that WIC must identify specific statutory obligations related to its claims. BIA Br. at 42. *Two Shields* was simply referring to the Tucker Act framework. *See Two Shields* at 1332. Here, BIA cites no authority refuting that under *Gay v. United States*, 93 Fed. Cl. 681, 685 & n. 4, 5 (2010) and 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 2022) as cited by the CFC, *see* Appx27, "[a] plaintiff need not identify explicitly in its Complaint a money-mandating source of law underlying its claims so long as 'there are facts pleaded in the complaint from which the court's jurisdiction may be inferred.'" *Id.* Here, the facts alleged are "that [BIA] gravely mismanaged the leasing of residential properties on the Colony's land, including

failing to collect any rent."*See* Appx28. As in *Shoshone II,* each time third parties encroach and trespass upon Colony land, a continuing claim arises.

BIA further cites *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995) and 25 C.F.R. § 162.371 for the notion that the Leasing Act imposes no ongoing mandatory duties to prevent trespass or eject trespassers. BIA Br. at 42. But "ejectment of a trespasser is a statutory function not at odds with the traditional trustee-beneficiary relationship. Rather, ejectment is a traditional exercise of a trustee's duty to protect the trust property on behalf of the trustees . . . ." *Grondal v. United States,* 21 F.4th 1140, 1168 (9th Cir. 2021). And BIA's argument was rejected in *Shoshone Indian Tribe of the Wind River Reservation v. United States,* 52 Fed. Cl. 614 (2002) *(Shoshone III).*[6] As here, the federal government in *Shoshone III* argued it breached no trust duties by failing to prosecute known trespassers. *Shoshone III at* 628, fn. 16. Like BIA here, the federal government relied on the "discretionary-authority" argument from *Shoshone-Bannock* for the proposition that the United States has no general trust responsibility to prosecute on behalf of the Tribes. *Id; see also* BIA Br. at 43. The *Shoshone III* court found the federal government's argument:

> confuses the issue of the government's alleged failure as a trustee with its exercise of prosecutorial discretion. The fact that the government has discretion about prosecution has no bearing on whether or not it has acted

[6] *Shoshone III* was decided before *Shoshone Indian Tribe of Wind River Reservation v. United States,* 364 F.3d 1339, 1348 (Fed. Cir. 2004) *(Shoshone I)* and *Shoshone Indian Tribe of Wind River Reservation v. United States,* 672 F.3d 1021, 1027 (Fed. Cir. 2012) *(Shoshone II);* the ordinals reflect the order of their appearance in the brief, not their historic sequence.

> properly as a trustee. A trustee has no discretion to ignore its trust responsibilities.

*Shoshone III at* 628, fn. 16. Similarly, instances of "may" in 25 C.F.R. § 162.371 comprise a further example of reservation of prosecutorial discretion by BIA, not at odds with the broader duty to take some action to prevent trespass by third parties. Here, WIC is not seeking an injunction forcing BIA to eject trespassers; it is seeking money damages for the many millions of dollars of lost revenue as the result of such inaction.

Contrary to BIA's arguments, the doctrine of continuing claims applies here. The CFC incorrectly dismissed WIC's first, second, third, fifth and six claims, such that this Court should now reverse.

## III. *Winters* and 25 C.F.R. § 152.22 together establish a money mandate.

WIC argued the *Winters* doctrine and 25 C.F.R. § 152.22 were sources of substantive law establishing: 1) BIA's fiduciary duty, and 2) a money mandate, as required under *White Mountain Apache Tribe* at 465, and *United States v. Mitchell,* 463 U.S. 206, 225, 103 S.Ct. 2961, 2962 (1983) (*Mitchell II).* Appx203-206. The mandate required BIA to observe its fiduciary duty to stop diversion of water from Colony lands.

Citing *Arizona* at 563, BIA suggests *Winters* is insufficient because it is common law, not a treaty, statute or regulation. But WIC's point all along has been that *Winters,* in combination with 25 C.F.R. § 152.22 – a regulation – fulfills the requirements for finding a money mandate. WIC explained that 25 C.F.R. § 152.22 states that Secretarial approval

is necessary to convey individual-owned trust or restricted lands or land owned by a tribe. This is control sufficient to establish a fiduciary responsibility:

> '[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.'

*Mitchell II* at 225, 103 S.Ct. at 2972 (quoting *Navajo Tribe of Indians v. United States,* 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980)).

Though BIA argues 25 C.F.R. § 152.22 does not mention water, a reservation of water is implied through the *Winters* doctrine. *Arizona*, 599 U.S. at 561 (citing *Winters*, 207 U.S. at 576-77). Thus, the *Winters* doctrine and 25 C.F.R. § 152.22 constitute "a substantive source of law that establishes specific fiduciary or other duties," and WIC has "allege[d] that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation* (*Navajo I*), 537 U.S. 488, 506 (2003).

BIA next argues that even if *Winters* is a doctrine of reserved rights by the United States, the doctrine does not set forth affirmative duties. BIA Br. at 46. But the *Winters* decisions recognize that the United States holds reserved water rights "[a]s a *fiduciary*" for the Tribes and therefore has authority to bring *Winters* rights claims *"for* the Indians . . . ." *Arizona v. California*, 460 U.S. 605, 627-28, 103 S. Ct. 1382, 1395 (1983) *("California")* (emphasis added). *See also Winters* at 576 ("The Government is asserting the rights of the Indians."). The United States has long understood that it not only has

the power to protect Indian rights; it also has the duty. *California* at 628, fn. 21 (analyzing whether U.S. error in calculation of irrigable acreage for a tribe was a breach of its duty to the Tribe). Shockingly now – and wrongly – BIA suggests it has no such duty.

BIA next argues that existence of implied reserved water rights gives rise only to a "limited" or "bare" trust. BIA fails to properly attribute the reference; BIA is actually citing the dissent in *Arizona.* BIA Br. at 46 (quoting *Arizona*, 599 U.S. at 565-66 (Gorsuch, N., dissenting)). The context of the dissent is found in the assessment that the majority erred by "misreading the Navajo's request and applying the wrong analytical framework," *i.e.,* the Tucker Acts framework, which did not apply. Even if the Tucker Act had applied, Justice Gorsuch found that the distinction "between regulatory schemes that create 'bare trusts' (that cannot sustain actions for damages) and a 'conventional' trust (that can make the government 'liable in damages for breach' under the Tucker Acts)," were distinctions that did not support the majority opinion. *Arizona,* 599 U.S. at 568 (Gorsuch, N., dissenting) (quoting *White Mountain Apache Tribe* at 473-474). *See also id.* at 1832 ("the Court . . . reaches the wrong result even under the Court's Tucker Act framework.").

In any event, the reserved water rights in this case constitute a conventional trust under the framework set forth in decades of Supreme Court cases and as summarized by Justice Gorsuch. *Id.* at 568-69 (citing *United States v. Mitchell,* 463 U.S. 206, 219-224, 103 S.Ct. 2961 (1983) and *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 468, 123 S. Ct. 1126 (2003)). In short, what makes a trust a conventional one is the degree

of federal control. *Id. Mitchell II* and *White Mountain Apache* are the same cases WIC cited to argue that, by its express terms, 25 C.F.R. § 152.22 gave BIA exclusive control over disposition of Indian land, which raised the trust to the level in which the money mandate was triggered. WIC Br. at 31 (citing Appx205).

Furthermore, where plaintiffs in *Arizona* sought an accounting for implied water rights, *Arizona* at 549, what WIC seeks are damages for diversion of actual wet water. *See Gould v. Deschutes Cty.,* 322 Ore. App. 571, 576 (2022) (differentiating wet water from "simply paper water rights."). In the desert, land is useless without water. WIC's loss is tangible.

In *White Mountain Apache Tribe* at 466, 123 S. Ct. 1126 at 1128-29, the Court analyzed whether Pub.L. 86-392, 74 Stat. 8 (1960 Act) was money mandating by first analyzing the degree of federal control pursuant to that statute. The 1960 Act provided that a reservation be held by the United States in trust, subject to the federal right to use the land for administrative or school purposes. *Id.* at 468-69, 123 S.Ct. at 1130. The Court determined that the trust duties were not those of a bare trust because, in part, the 1960 Act gave the United States "discretionary authority to make direct use of portions of the trust corpus." *Id.* at 466, 123 S.Ct. at 1128-29.

BIA attempts to turn the issues of discretion and control on their head, arguing that statutes granting government officials "'substantial discretion" are not money-mandating. BIA Br. at 47 (quoting *Wolfchild v. United States*, 731 F.3d 1280, 1292 (Fed. Cir. 2013) *(Wolfchild II)* (quoting *Price v. Panetta*, 674 F.3d 1335, 1339 (Fed. Cir. 2012)).

In *Wolfchild II,* the statutes at issue were two 1863 Acts that "authorized" the Secretary of Interior to set aside certain public lands for the benefit of certain individual Indians who had assisted in rescuing whites from a massacre. *Wolfchild II* at 1292. The court referred to its earlier ruling in the same case to explain its analysis. *Id.* (citing *Wolfchild v. United States*, 101 Fed. Cl. 54, 70-73 (2011) *("Wolfchild I")).* In *Wolfchild I,* the court found "a distinction lies between those statutes which employ mandatory language such as 'shall' and those that use permissive language such as 'may' or similar terms." *Wolfchild I* at 70. The first Act of 1863 provided the Secretary was "'authorized'" to set apart eighty acres of land to any friendly Sioux. *Id.* (quoting Act of Feb. 16, 1863, § 9, 12 Stat. at 654). Similarly, the second Act of 1863 stated, "[i]t shall be lawful for the Secretary" to assign to the individual friendly Sioux eighty acres of land. *Id.* (quoting Act of March 3, 1963 § 4, 12 Stat. at 819). In this context, the *Wolfchild I* court held, "The plain language of the Acts reveals that the legislation only permits – not mandates – the Secretary to provide the lands to individual qualified Sioux." *Id.* Merely "authorizing" or "making it lawful" were "discretionary terms." *Id.*

*Wolfchild* supports WIC, as 25 C.F.R. § 152.22 (b) expressly requires:

> Lands held in trust by the United States for an Indian tribe, lands owned by a tribe with Federal restrictions against alienation and any other land owned by an Indian tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the Act of Congress authorizing sale provides that approval is unnecessary.

In other words, the Secretary *must* approve land sales. *Winters* extends such a prohibition to WIC's implied water rights. *See Arizona*, 599 U.S. at 561 (citing *Winters*, 207 U.S. at 576-77). Any violation of such rights is trespass. *Winters* at 575 (describing defendants as "trespassers.").

Under the regulation, not even WIC has power to alienate Colony land or water. WIC could not give rights to third-party Offenhauser to divert a stream. Only BIA has that right, which amounts to total control – which "fairly infers" a money mandate. *See White Mountain Apache Tribe* at 472. The inference here is fair: "where the federal government has "full responsibility" to manage a resource or "elaborate control" over that resource, the requisite "fiduciary relationship *necessarily* arises." *Arizona* at 569 (quoting *Mitchell II,* 463 U. S. at 224-225, 103 S. Ct. 2961 (emphasis added in *Arizona).*

The error by the CFC is clear.

## IV. Jurisdiction over the accounting claim derives from jurisdiction over money-related claims.

The reason the CFC dismissed WIC's eighth claim for documents and an accounting was that jurisdiction was found to be lacking for all other claims. WIC Br. at 31-32. Thus, should this Court reverse the CFC with respect to any of the claims, it should further reverse dismissal of the eighth claim. *Id.*

BIA counters with citation to *Confidential Informant 59-05071 v. United States*, 134 Fed. Cl. 698 (2017), arguing the CFC lacks jurisdiction to order an accounting except as an aid in determining the quantum of damages resulting from a successful claim over

which that court possesses jurisdiction. In that action, contract claims were affirmed. *Confidential Informant 59-05071* at 712-13 and at 716-717. Thus, had the reviewing court reversed the lower court's dismissal of such claims, it likely would have also reversed dismissal of the accounting claim.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision and judgment of the CFC.

DATED this 21st day of May, 2024.

*/s/ Norberto J. Cisneros*

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## CERTIFICATE OF SERVICE

I hereby certify that on this May 21, 2024, I served a true and correct copy of the above document, entitled **PLAINTIFF-APPELLANT'S REPLY BRIEF**, via the Court's electronic filing/service system (CM/ECF) to all parties on the current service list.

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**CERTIFICATE OF COMPLIANCE**
**UNDER FEDERAL RULES OF APPELLATE PROCEDURE**
**32(a)(7) AND FEDERAL CIRCUIT RULE 32**

Counsel for Plaintiff-Appellant certifies that:

1. This document complies with Fed. R. App. P. 32(a)(7)(B) and Fed. Cir. R. 32(b)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the brief herein contains 6,984 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using 14-point Garamond font in Microsoft Word 2019.

DATED this 21st day of May, 2024

*/s/ Norberto J. Cisneros*

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