No. ________

IN THE

Supreme Court of the United States

WINNEMUCCA INDIAN COLONY,
Petitioner,
v.
UNITED STATES,
Respondents.

On Petition for A Writ of Certiorari
to the United States Court of Appeals
For the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

TREVA HEARNE
RENO LAW GROUP, LLC
433 W. Plumb Lane
Reno, Nevada 89509

NORBERTO J. CISNEROS
Counsel of Record
BARBARA M. MCDONALD
MADDOX & CISNEROS, PLLC
1210 S. Valley View Blvd.
Suite 202
Las Vegas, NV 89102
(702) 366-1900
NCisneros@mc-thefirm.com

Attorneys for Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

(1) Is the United States' promise to provide the Winnemucca Indian Colony, a federally recognized Tribe with lands held in trust established by an Executive Order and a separate legislative act, coupled with the government's nearly exclusive statutory and regulatory control over the water on Indian lands, sufficient to entitle an Indian tribe to money damages when the United States breaches its fiduciary duty to protect the natural resources on those Indian lands?

(2) Did the Federal Court of Appeals, Federal Circuit, err when it affirmed dismissal of the Winnemucca Indian Colony's third claim for relief – Breach of Trust – Water?

(3) Can the Winnemucca Indian Colony state a cognizable claim for breach of trust against the United States in relation to BIA failure to prevent trespass and theft of natural resources by third parties, under the *Winters* doctrine and 25 C.F.R. § 152.22?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner is a governmental entity and thus has no corporate interests to disclose.

RELATED PROCEEDINGS

1. *Winnemucca Indian Colony v. United States of America*, No. 2024-1108, United States Court of Appeals for the Federal Circuit. Final Judgment entered January 8, 2026.

2. *Winnemucca Indian Colony v. United States of America*, No. 2024-1108, United States Court of Appeals for the Federal Circuit. Judgment entered October 16, 2026.

3. *Winnemucca Indian Colony v. United States of America*, No. 20-1618, United States Court of Federal Claims, Judgment entered August 25, 2023.

PARTIES TO PROCEEDING

Petitioner, Winnemucca Indian Colony, was plaintiff and appellant below.

Respondent, the United States, was the defendant and appellee below.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

RELATED PROCEEDINGS ii

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY
PROVISIONS INVOLVED 1

BACKGROUND 1

I. The land 1
II. The water appurtenant to the land 3
III. The people 5

STATEMENT OF THE CASE 6

LEGAL ARGUMENT 15

I. *Arizona v. Navajo Nation* did not involve third-party interference of existing tribal water. 15
II. The court in *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States* dismissed claims involving

new water, but allowed claims related to existing water to continue. 19

CONCLUSION 25

Appendix A - Order of the United States Court of Appeals for the Federal Circuit Denying Petition for Panel Rehearing and Rehearing En Banc (January 8, 2026) 1a

Appendix B - Opinion of the United States Court of Appeals for the Federal Circuit (October 16, 2025) 3a

Appendix C - Opinion and Order of the United States Court of Federal Claims (August 25, 2023) 29a

Appendix D - First Amended Complaint, United States Court of Federal Claims (February 1, 2022) 92a

TABLE OF AUTHORITIES

Cases:

Arizona v. California,
460 U.S. 605, 103 S. Ct. 1382 (1983) 24

Arizona v. Navajo,
599 U.S. 555 (2023) 9, 13-17, 19

Cappaert v. United States,
426 U.S. 128, 96 S. Ct. 2063 (1976) 24

Hopi Tribe v. United States,
782 F.3d 662 (Fed. Cir. 2015) 17

United States v. Mitchell,
463 U.S. 206, 103 S. Ct.
(1983) *("Mitchell II")* 8, 9, 12, 22

United States v. Navajo Nation (*Navajo I*),
537 U.S. 488 (2003) 7, 8, 10, 22, 23

United States v. White Mountain Apache Tribe,
537 U.S. 465 (2003) 12, 22-24

Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States, 99 F.4th 353
(Fed. Cir. 2024) 13-15, 19, 23, 24

Winters v. United States,
207 U.S. 564 (1908) 7-14, 17-19, 23, 24

Statutes:

28 U.S.C. § 1254(1) 1

25 C.F.R. § 152.22 .... 9, 12, 22-24

Treaties:

Treaty of Guadalupe Hildago, Feb. 2, 1848,
9 Stat. 922, Article XI. 2, 3

United States Treaty with the Western
Shoshone, October 1, 1863,
18 Stat. 689, Article 6... 2,

Executive Orders:

Executive Order No. 2639,
June 18, 1917 1

Executive Order,
February 8, 1918 2

Other Authorities

Steven J. Crum, *The Road on Which We Came,*
(Univ. of Utah Press, 1994) 5

Restatement (Second) of Trusts § 176 (1957)..... 22

Restatement (Third) of Trusts § 76 (2007) 22

OPINIONS BELOW

The initial decision of the Federal Circuit is reported at 156 F.4th 1339 (Fed Cir. 2025) and is reproduced at Appendix 3a to 28a. The Order denying Petition for Rehearing and Rehearing *en Banc* (Fed. Cir January 8, 2026) [Doc 53] is reproduced at Appendix 1a to 1b.

JURISDICTION

The Federal Circuit issued its initial decision on October 16, 2025. ECF No. 47. On January 8, 2026, the Federal Circuit issued its order denying the combined petition for panel rehearing and rehearing *en banc.* ECF No. 53. Federal Circuit has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted in an appendix to this petition.

BACKGROUND

I. The land

The Winnemucca Indian Colony was established in the last century when President Woodrow Wilson signed two Executive Orders setting aside land for the use of "homeless Shoshone." Executive Order No. 2639, June 18, 1917, described 160 acres of land to be set aside as the NE ¼ of Section

32, Township 36N., Range 38E., M.D.M. (Mount Diablo Meridian). Executive Order dated February 8, 1918 described an additional 160 acres to be set aside as the SE 1/4 of Section 32, Township 36N., Range 38E., M.D.M. (Mount Diablo Meridian). These two contiguous parcels are commonly referred to by the Tribe as the "320 acres."

In 1928, because the BIA records reflected that the homeless Shoshone were still living on 20 acres near the railroad where they worked, a separate 20 acres was conveyed by Congressional Act, described as N1/2 NE1/4 SW1/4, Section 29, Township 36, Range 38 East, Mount Diablo Meridian, Nevada, containing 20 acres more or less. This parcel is commonly referred to by the Tribe as the "20 acres."

The 320 acres and the 20 acres have since been held in trust by the United States. The United States set aside small Colonies and reservations in Nevada under the Ruby Valley Treaty of 1863: "The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein." United States Treaty with the Western Shoshone, October 1, 1863, 18 Stat. 689, Article 6. Further the reservation of Indian lands was provided for in the Treaty of Guadalupe Hidalgo wherein the United States

promised to allow the native Indians to remain on their homelands, ". . . but, on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain." Treaty of Guadalupe Hildago, Feb. 2, 1848, 9 Stat. 922, Article XI.

II. The water appurtenant to the land

The Winnemucca Indian Colony's land is located within the Humboldt River Basin, an extensive river drainage system located in north-central Nevada and extending in a generally east-to-west direction from its headwaters in the Jarbidge, Independence and Ruby Mountains in Elko County, to its terminus in the Humboldt Sink, approximately 225 miles away in the desert of northwest Churchill County. The basin encompasses an area of approximately 16,840 square miles and is the only major river system wholly contained within the State of Nevada. [1] The State of Nevada is wholly contained within the geological formation known as the Great Basin which is bordered by the Rocky Mountains and the Sierra Nevada Mountains. Because of the arid nature of the lands, the water systems or drainage systems have been categorized and mapped extensively.

In the 1800s the only use of the waters was by emigrants passing through to California and Oregon,

---

[1] Chronology of the Humboldt River, Nevada Dept. of Water Resources, Nevada Water Basin and Technology Series at P.I-1.

and by miners and trappers, but mostly by the Shoshone Indians who camped, trapped and migrated along the Humboldt River. The flows of the lower Humboldt River that flow through Humboldt County, Nevada and the Winnemucca Indian Colony are derived from snow melt from the Toiyabe Mountains and Shoshone Mountains.[2]

Specifically, White's Creek, which flows through Water Canyon and then into the Humboldt River, has been the sole water source available on the Winnemucca Indian Colony since it was designated as a Colony and a federally recognized Tribe by Executive Order of 1916. In 1916 the water from White's Creek, which was an all-weather stream, flowed through the Colony and was used to irrigate grassland and feed livestock belonging to members of the Colony. Today, as a result of third-party trespass, the water no longer flows through the Colony.

Since Winnemucca is located in an arid desert type environment, sources of water are critical to the use and habitability of the land. The climate in the Winnemucca area is an arid, "high-desert" type that is characterized by dry, hot summers and cold, moderately dry winters. For the period 1877 through 2011, the annual average high temperature was 66°F., the annual average low temperature was 33°F., and the average annual precipitation (rain and snow) was 8.28 inches. This amount of precipitation is not sufficient to support dryland agriculture, which generally requires a minimum of 20 inches of rain per year. Summer days tend to be hot with sharp

[2] *Id.* at (p I-8).

temperature drops at night, typical of any high-desert environment; freezing temperatures have occurred in every month of the year.

III. The people

The Winnemucca Indian Colony's members have lived continuously on the land. During the years 1933 to 1941, New Deal funds were distributed to the Nevada Shoshone for purchase of livestock and for improving grazing lands. Remnants of the corrals and pens were still visible on the Winnemucca Indian Colony in 2000. Although Winnemucca was rarely mentioned, it was referred to in conjunction with the Battle Mountain Shoshone reservation. *See* Steven J. Crum, *The Road on Which We Came,* (Univ. of Utah Press, 1994) at 85-117.

However, beginning with the First World War, there was a diaspora of members of the Colony due to enlistment in the fighting for the two world wars and because families with children were escaping from the Colony to save their children from conscription into the Stewart Indian residential school. The Colony members lived on the Colony sporadically, but returned to bury their relatives on the lands and returned for family gatherings.

Throughout the 20th century, the Winnemucca Indian Colony's population varied. However, the land was developed for personal and business use, such as for the Winnemucca Indian Colony's smoke shop. During such time, the United States has always exerted its power of trust over the Winnemucca

Indian Colony. For example, when a membership dispute arose in 1985/1986, the Western Nevada Agency of BIA took control and acted as a trustee of the Colony's smoke shop and other assets until a proper government could be organized. All the funds were collected and turned over to the new government when it was established.

The Western Nevada Agency of the BIA took over the entirety of the governance of the Colony in 1986 and undertook a thorough determination of the qualified membership. However, when the Tribal Chairman was murdered on the Administration doorsteps in February 2000, the BIA refused to recognize the true membership, even though these members were the same as those determined to be qualified in 1986. With this refusal, outsiders – including a Filipino – argued they were the true members, when they obviously were not. Thus, the true and proven membership suffered without a permanently recognized government from 2000 to 2022. BIA has never made an inventory of the assets of the Colony in breach of its trust duty. As a result, BIA has never provided an assessment of the water flow into the Winnemucca Indian Colony from White's Creek. Instead, BIA allowed the only existing water to be stolen by corporate third parties.

STATEMENT OF THE CASE

The United States government has long been the trustee for the natural resources of the tribes as

compensation for peace with the Indians,[3] but this case, if allowed to stand, will breach that critical promise. The government trustee has rendered the reservations a useless piece of sand without water. To wit, this case arises from the Winnemucca Indian Colony's claims against the United States in the Court of Federal Claims. In its First Amended Complaint, the Winnemucca Indian Colony sued for money damages, *inter alia,* in relation to failure by the United States to stop trespasses to water on tribal trust land. Specifically, in Count Three, titled "Breach of Trust – Water," the Winnemucca Indian Colony alleged that the government allowed a third-party development company "to divert a stream and remove water from wells from which water was able to reach the Colony's lands" and hold that water in upstream wells and holding tanks, such that "there is no available water or water rights located on the 320 acres" of the Winnemucca Indian Colony's land. App. 131a.

The United States brought a Motion to Dismiss First Amended Complaint, arguing, in relevant part, that the Winnemucca Indian Colony had not identified a source of law imposing a money-mandating duty on the United States to manage Plaintiff's alleged *Winters* Doctrine water rights under *Winters v. United States,* 207 U.S. 564 (1908).

The Winnemucca Indian Colony understood that, in order to bring a water-based, breach of trust claim in the Court of Federal Claims, the Indian

---

[3] See, Article 6, Ruby Valley Treaty and Article VI, Treaty of Guadalupe Hidalgo, 1843.

Tucker Act requires a plaintiff to "identify a substantive source of law that establishes specific fiduciary or other duties." *United States v. Navajo Nation,* 537 U.S. 488, 506, 123 S. Ct. 1079 (2003) *("Navajo I")* (internal quotation omitted). "[T]he analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* If the Tribe identifies such a statute at step one of the *Navajo I* analysis, at the second step "the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Id.* (alteration in original) (quoting *United States v. Mitchell,* 463 U.S. 206, 219, 103 S. Ct. 2961(1983) *("Mitchell II")).*

The Winnemucca Indian Colony argued that *Winters,* in combination with 25 C.F.R. § 152.22 – a regulation – fulfills the requirements for finding a money mandate. Both steps are fulfilled by 25 C.F.R. § 152.22, which 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.

25 C.F.R. § 152.22 (b).

In Reply to the Motion to Dismiss Amended Complaint, the Winnemucca Indian Colony 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)).

The Winnemucca Indian Colony further argued that though 25 C.F.R. § 152.22 does not mention water, a reservation of water is implied through the *Winters* doctrine. *Arizona v. Navajo*, 599 U.S. 555, 561 (2023) (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 the Winnemucca Indian Colony 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).

The Court of Federal Claims dismissed the case in the entirety, finding, as to the water claim, that:

> Importantly, after the parties completed briefing on the Government's Motion, the Supreme Court decided *Navajo Nation*, holding that an 1868 treaty with the Navajos did not impose upon the federal government a duty to take affirmative steps to secure water for the tribe, even if under the *Winters* doctrine the treaty reserved the tribe's water rights. 143 S. Ct. at 1811, 1814. In that case, the Navajos were not alleging that the Government had interfered with water access but that it should assess, plan, and provide for the tribe's water needs. *Id.* at 1810. The Court held that, although the treaty creating the Navajo reservation imposed several specific duties on the United States, "the treaty said nothing about any affirmative duty for the United States to secure water." *Id.* at 1813. Specifically, the Court found no language in the Navajo treaty that would establish a "conventional trust relationship with respect to water." *Id.* at 1814 (explaining that the Court would not "'apply common-law trust principles' to infer duties not found in the text of a

treaty, statute, or regulation"). As "it is not the Judiciary's role to update the law," the Court concluded it must leave "to Congress and the President the responsibility to enact appropriations laws and to otherwise update federal law as they see fit in light of the competing contemporary needs for water." *Id.* at 1814–15.

App. 53a.

The Court of Federal Claims further found:

> Just as the Supreme Court found the Navajo treaty did not impose a duty to take "affirmative steps" to secure water for the Navajo Tribe, the Court also concludes the Executive Order does not impose a duty on the Government to take "affirmative steps" to prevent diversion of water onto the Winnemucca reservation. *Navajo Nation*, 143 S. Ct. at 1814. That *Winters* nonetheless recognizes the Colony's reserved water rights does not in itself create a duty for the Government to enforce those rights against third-party interference. *Winters* only recognized the federal government's power to assert such rights on behalf of a tribe, not that it has a specific fiduciary duty to do so. *Navajo Nation* instructs that neither the Government's general trust relationship

> with the Colony nor the Executive Order fill in the gap to create an affirmative duty to ensure the Colony's access to water. Indeed, *Navajo Nation* rejected the argument that the Government's purported control over reserved water rights created trust duties to the Navajos and indicated that the Navajos could assert their own interests in water rights litigation.4 *Navajo Nation*, 143 S. Ct. at 1815–16.

App. 54a.

The Court of Federal Claims further found that the Winnemucca Indian Colony had not identified an otherwise money-mandating source of law underlying the third claim. App. 47a. However, the Court did not explain how 25 C.F.R. § 152.22 was not money mandating.

On appeal, the Winnemucca Indian Colony argued that dismissal of Count Three was improper because the *Winters* doctrine and 25 C.F.R. § 152.22 established: 1) BIA's fiduciary duty, and 2) a money mandate, as required under *United States v. White Mountain Apache Tribe,* 537 U.S. 465 (2003) and *United States v. Mitchell,* 463 U.S. 206, 225, 103 S.Ct. 2961, 2962 (1983) (*Mitchell II).* The mandate required BIA to observe its fiduciary duty to stop diversion of water from the Winnemucca Indian Colony lands.

The Federal Circuit affirmed. App.12a. The Federal Circuit's analysis began with what the *Winters* doctrine stands for – that the "Federal Government's reservation of land for an Indian tribe . . . implicitly reserves the right to use needed water from various sources." App. 13a (quoting *Arizona v. Navajo Nation*, 599 U.S. 555, 561 (2023) (citing *Winters v. United States*, 207 U.S. 564, 576–77 (1908)). Next, however, the Court found that the *Winters* doctrine "is a common law doctrine that does not, on its own, create a trust obligation." *Id.* The Court did not cite any case wherein an Indian tribe sought money damages in relation to a failure to protect *existing* water. Instead, the Court noted that in *Arizona,* the Supreme Court "held that the 1868 treaty establishing the Navajo Reservation reserved necessary water to accomplish the purpose of the Reservation but did not require the government to take affirmative steps to secure water for the tribe." *Id.* (citing *Arizona* at 566.) Federal Circuit further cited its decision in *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, 99 F.4th 353 (Fed. Cir. 2024), stating that the case involved a "similar situation," specifically, that the Ute had "alleged that the government had 'duties in trust to secure new water for the tribe . . . ." *Id.*

The Federal Circuit found that 25 C.F.R. § 152.22 "does not mention water rights or establish any governmental duty relevant to the diversion of tribal water" and therefore did not establish a money-mandating duty relevant to Count Three. *Id.* at 10-11. The Federal Circuit, thus, ignored that the value of

the land is its natural resources, and, in this case, the natural resource was water.

The Winnemucca Indian Colony sought reconsideration or *en banc* review regarding Federal Circuit's finding that case dismissal is warranted under *Arizona* as well as *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States,* 99 F.4th 353 (Fed. Cir. 2024). App. 1a to 2a. In particular, and as noted by Federal Circuit, the Ute tribe "alleged that the government had 'duties in trust to secure new water for the Tribe, including by constructing new water storage infrastructure." App. 14-15a (citing *Ute* at 1364-65). This case does not involve "new water," and thus, *Ute* does not support dismissal.

The Winnemucca Indian Colony argued that because *Ute* is distinguishable: here, the issue is not about "new water," but instead, about existing water. Furthermore, *Ute* did not involve third party interference. The Winnemucca Indian Colony sought ruling in reconsideration or *en banc* review that *Winters* and 25 C.F.R. § 152.22 support claims for money damages against the United States when it fails to stop third party interference with existing water rights, and thus, fails to reserve sufficient water rights to accomplish the purposes of the reservation. The Federal Circuit Court of Appeals finally sounded the death knell for the Colony's right to useable land for their homes. The Federal Court of Appeals rendered the Winnemucca Indian Colony a useless patch of sand.

The Federal Circuit denied the Winnemucca Indian Colony Petition.

LEGAL ARGUMENT

In affirming dismissal of the Winnemucca Indian Colony's Third Claim, the Federal Circuit compared the facts in this case to those in *Arizona v. Navajo Nation*, 599 U.S. 555 (2023), and in *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, 99 F.4th 1353 (Fed. Cir. 2024). First, the Court noted that in *Arizona,* "the Navajo Nation filed suit seeking to compel the United States government to take affirmative steps to secure needed water for the tribe." App. 14a (citing *Arizona* at 558-59). Second, the Court noted that in *Ute,* "the Tribe alleged that the government had "duties in trust to secure new water for the Tribe, including by construction of new water storage infrastructure." App. 14-15a (citing *Ute* at 1365-66).

But both *Arizona* and *Ute* were about affirmative steps to find *new* water, not existing water – a crucial distinction from this case. Without this Court's intervention, the Federal Circuit's ruling results in the Winnemucca Indian Colony's tribal homelands being reduced to useless sand without water.

I. *Arizona v. Navajo* did not involve third-party interference of existing tribal water.

From the outset of the opinion, the court in *Arizona v. Navajo Nation* noted the difference between protecting existing water (as here), and securing new water (as in *Arizona):*

> The Navajos' claim is not that the United States has *interfered* with their water access. Instead, the Navajos contend that the treaty requires the United States to *take affirmative steps* to secure water for the Navajos—for example, by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure—either to facilitate better access to water on the reservation or to transport off-reservation water onto the reservation.

Arizona at 558-59, 143 Sup. Ct. at 1809 (emphasis in original).

The *Arizona* Court repeated this important distinction several times, for example, stating:

> According to the Navajos, the United States must do more than simply not *interfere* with the reserved water rights. The Tribe argues that the United States

> also must *take affirmative steps* to secure water for the Tribe— including by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure. See Tr. of Oral Arg. 102 (counsel for Navajo Nation: "I can't say that" the United States's obligation "to ensure access" to water "would never require any infrastructure whatsoever").

Id. at 547-48, 14 Sup. Ct. at 1812. And:

> As relevant here, the Navajos do not contend that the United States has interfered with their access to water. Rather, the Navajos argue that the United States must take affirmative steps to secure water for the Tribe—for example, by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure.

Id. at 563, 143 Sup. Ct. at 1812-13.

The Court's repeated acts of distinguishing between new water and existing water evokes the very same distinction made in *Hopi Tribe v. United States,* 782 F.3d 662, 665 (Fed. Cir. 2015) – a case cited by the Winnemucca Indian Colony. *See Hopi* at 669 ("In some circumstances, *[Winters]* may also give

the United States the power to enjoin others from practices that reduce the quality of water feeding the reservation.").

As in *Arizona,* the facts in *Hopi* involved a tribal request to assist with the procurement of *new* water. The public water systems on the Hopi reservations were found to contain arsenic, and thus, the Hopi sued the United States, seeking damages to cover the cost of providing alternative sources of drinking water in all five communities. *Id.* at 665. The court affirmed dismissal, finding that *Winters* "does not . . . give the United States responsibility for the quality of water within the reservation, independent of any third-party diversion or contamination" *Id.* at 669. Further, the *Hopi* court found that even if Congress intended the term "land" in an Act of 1958 to include reserved water rights under the Winters doctrine, the Act still had not imposed a fiduciary duty to manage water quality on the Hopi Reservation, "absent third-party interference." *Id.* At most, by holding reserved water rights in trust, **"Congress accepted a fiduciary duty to exercise those rights and exclude others from diverting or contaminating water that feeds the reservation."** *Id.* (emphasis added).

Similarly, here the Winnemucca Indian Colony sued for BIA failure to protect tribal water from third party interference. No demand has been made that BIA help the Winnemucca Indian Colony find new water from an outside source, or to build pipelines, pumps, wells, or other water infrastructure, or to remove poison from wells on the Winnemucca Indian

Colony's land. Instead, the Winnemucca Indian Colony seeks money damages for diversion of water from its own land. The only way to replace lost water in the arid desert of Nevada is with money damages to buy replacement water rights.

Arizona therefore does not support dismissal. At the very least, the Court's emphatic distinction between new water and existing water means that the holding of *Arizona* was narrow, confined to cases involving a request by a tribe to secure new sources of water. Broadening the holdings therein to cases involving diversion of tribal water would result in a devastating precedent.

II. The court in *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States* dismissed claims involving new water, but allowed claims related to existing water to continue.

Neither did *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, 99 F.4th 1353 (Fed. Cir. 2024), cited by the Federal Circuit, support dismissal. The court noted that in *Ute,* the Tribe alleged that the government had "duties in trust to secure ***new*** water for the Tribe, including by constructing new water storage infrastructure." App. 14-15a (emphasis added) citing *Ute* at 1364–65. The Ute Tribe pointed to the *Winters* doctrine and federal statutes as imposing those duties. *Id.* at 1365–66. The *Ute* Court held that the statutes did not impose trust duties to secure water for the tribe because the

general instruction of one of the statutes to "otherwise protect the rights and interests of the Indians" was not specific enough to create trust duties. *Id.* at 1366, 1371 (cited at App. 15a). On such basis, Federal Circuit saw "no obligation for the government to take action with respect to the alleged diversion of tribal water." App. 15a.

The Federal Circuit's comparison of this case to *Ute* was only to rejection of a money mandate supporting damages related to *new* water. The Federal Circuit held that the subject statutes did not impose trust duties to secure water for the tribe because the general instruction of one of the statutes – to "otherwise protect the rights and interests of the Indians" – was not specific enough to create trust duties. App. 15a (citing *Ute* at 1366, 1371). However, the court's citation was to Discussion, Part IA of *Ute*. *See Ute* at 1364-66.

But *Ute* also involved allegations over the United States failure to protect existing water, discussed in the decision at Discussion Part IB. *Ute* at 1366-71. There, the Court upheld the claim. *See Ute* at 1366 ("We reach a different conclusion as to the second category of the Tribe's breach of trust claims, at least as to water infrastructure. In the second category, the Tribe alleges that the United States has mismanaged particular infrastructure and specific water rights previously appropriated to the Tribe and held in trust for the Tribe's benefit."). The Ute Tribe had alleged "'that the United States violated this duty by affecting "transfers of the Tribe's water rights . . . from Indian lands to non-Indian lands under the UIIP

[Uintah Indian Irrigation Project] and from Indian lands on the Reservation not non-Indian lands outside the UIIP.'" *Id.* at 1370 (citing Complaint). The court deemed that even where the issue had not been briefed, the breach of trust claims related to diversion would go forward, as otherwise, "'injustice might otherwise result . . . .'" *Id.* at 1370 (citation omitted).

Injustice certainly would have resulted for the Ute, who were noted to be living on "exceptionally arid" land. *Id.* at 1358. The description fits the Winnemucca Indian Colony land as well, one State over in the dry Nevada desert. Compounding the injustice of the Winnemucca Indian Colony living without water is the story of how and why existing water was taken away. The Winnemucca Indian Colony was unable to protect itself from the loss of the water from its lands because BIA intentionally refused to recognize a government for twenty-two years. App. 29a. Moreover, during this time, the Colony members could not enter their lands since they had been arrested for trespass once and threatened with it again by BIA police. App. 33a. The Winnemucca Indian Colony members were excluded from their lands and arrested for trespass and then threated with arrest again even after the IBIA stated that BIA must recognize a Council, but BIA refused. *Id.* Now, the members are denied the full use of their property rights – the land *and* the water. BIA had the power to disable the tribe by not recognizing tribal government and then breached its own trust duties. The Winnemucca Indian Colony is now left in the absurd position of having to buy its own water from a utility, due to BIA's failure to stop third party

interference. Because the Winnemucca Indian Colony now has no more water, the only way to recompense for the loss is funds to purchase water rights.

The Ute arrived at a happier outcome. The *Ute* court allowed diversion-related claims to proceed because a 1906 Act was deemed to be a substantive source of law that established specific fiduciary or other duties under *Navajo I*, and the Act could be fairly interpreted as a money mandate under *Mitchell II*. *Id.* at 1368-69. The Act satisfied *Navajo I* in part because the United States held the irrigation systems "in trust for the Indians." *Id.* at 1368 (citing 34 Stat. 375). The Act next satisfied *Mitchell II* because, as in *United States v. White Mountain Apache Tribe,* 537 U.S. 465 (2003), the fact that the *Ute* property "occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee' because 'a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *Id.* (quoting *White Mountain Apache* at 475 (citing, *inter alia*, Restatement (Second) of Trusts § 176 (1957)); *see also* Restatement (Third) of Trusts § 76 (2007). The *Ute* court thus held: "Here, as in *White Mountain Apache*, 'it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.'" *Ute* at 1369 (quoting *White Mountain Apache* at 476 (quoting *Mitchell II,* 463 U.S. at 226)." The *Ute* court thus found that the duties prescribed by the 1906 Act could be fairly interpreted as money-mandating, and, therefore, that the second element of

the *Navajo I* jurisdictional analysis was satisfied as to the water infrastructure claims.

The Winnemucca Indian Colony made similar arguments about 25 C.F.R. § 152.22 – that it placed land and water into trust, over which it had control. Certainly, to conclude otherwise – that the United States does not control the water flowing through the Winnemucca Indian Colony – would contravene *Winters.* But the Federal Circuit did not fully analyze the significance of section 152.22 because it stopped at the first step of the Tucker Act analysis, finding no duty under *Navajo I.* The Winnemucca Indian Colony now requests that the Court reconsider, find a trust duty, and interpret section 152.22 as money mandating.

The law requires only a "fair inference" of a money mandate. *Ute* at 1369 (quoting *White Mountain Apache* at 473). In *White Mountain Apache,* "the Supreme Court noted that the statutory language expressly defined a fiduciary relationship and that the United States enjoyed occupation of the trust property, which was sufficient for Indian Tucker Act jurisdiction even though the statute did not 'expressly subject the Government to duties of management and conservation.'" *Id.* at 1368 (quoting *White Mountain Apache* at 474-75). Similarly, here the word "water" may be implied through *Winters;* when 25 C.F.R. § 152.22 says, "[l]ands held in trust by the United States for an Indian tribe," it also means water. Otherwise, the Winnemucca Indian Colony would find itself back in the situation described in *Winters* – a tribe with rights to land but not to the

water. Presumably, too, the United States would prefer an interpretation that all Indian water, including the Winnemucca Indian Colony's, is water held in trust by the United States. A money mandate is further inferred through control. In *White Mountain Apache*, the statute provided that the "former Fort Apache Military Reservation" would be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes." *White Mountain Apache* at 469 (quoting Pub. L. 86-392, 74 Stat. 8). *See also Ute* at 1368 (quoting same). Here, 25 C.F.R. § 152.22 makes clear that only the United States has the control to sell land (and water). Control is complete, indicating a money mandate.

The Winnemucca Indian Colony identified 25 C.F.R. § 152.22 as the requisite source of law. Under the Regulation, the Secretary *must* approve land sales. The Winnemucca Indian Colony argued that the *Winters* doctrine extends such a prohibition to the Winnemucca Indian Colony's implied water rights. The doctrine simply stands for the precept that, "when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation." *Cappaert v. United States,* 426 U.S. 128, 138, 96 S. Ct. 2063, 2070 (1976) (citing *Winters v. United States,* 207 U.S. 564 (1908)). Under *Winters,* the United States holds reserved water rights "[a]s a *fiduciary*" for the Tribes" *Arizona v. California,* 460 U.S. 605, 626-627, 103 S. Ct. 1382 (1983) *("California")* (emphasis added).

Otherwise, the United States has created a reservation, a homeland for these homeless Shoshone that, by the Federal Court's ruling has been rendered a useless patch of sand.

CONCLUSION

The petition should be granted.

Respectfully submitted,

NORBERTO J. CISNEROS
Counsel of Record
BARBARA M. MCDONALD
MADDOX & CISNEROS, PLLC
1210 S. Valley View Blvd.
Suite 202
Las Vegas, NV 89102
(702) 366-1900
NCisneros@mc-thefirm.com

TREVA HEARNE
RENO LAW GROUP, LLC
433 W. Plumb Lane
Reno, Nevada 89509

Attorneys for Petitioner

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

Appendix A - Order of the United States Court of Appeals for the Federal Circuit Denying Petition for Panel Rehearing and Rehearing En Banc (January 8, 2026) 1a

Appendix B - Opinion of the United States Court of Appeals for the Federal Circuit (October 16, 2025) 3a

Appendix C - Opinion and Order of the United States Court of Federal Claims (August 25, 2023) 29a

Appendix D - First Amended Complaint, United States Court of Federal Claims (February 1, 2022)..............................92a

APPENDIX A

NOTE: This order is non precedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WINNEMUCCA INDIAN COLONY,
Plaintiff-Appellant
v.
UNITED STATES,
Defendant-Appellee

2024-1108

Appeal from the United States Court of Federal Claims in No. 1:20-cv-01618-KCD, Judge Kathryn C. Davis

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge,* LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges.*[1]

PER CURIAM.

[1] Circuit Judge Newman did not participate.

ORDER

Winnemucca Indian Colony filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

January 8, 2026	For the Court
Date	*/s/ Jarrett B. Perlow*
	Clerk of Court

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

WINNEMUCCA INDIAN COLONY,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2024-1108

Appeal from the United States Court of Federal Claims in No. 1:20-cv-01618-KCD, Judge Kathryn C. Davis.

Decided: October 16, 2025

NORBERTO J. CISNEROS, Maddox & Cisneros, LLP, Las Vegas, NV, argued for plaintiff-appellant. Also represented by BARBARA MCDONALD; TREVA J. HEARNE, Reno Law Group, Reno, NV.

BENJAMIN W. RICHMOND, Environment and Natural Resources Division, United States Department of Justice, Boston, MA, argued for defendant-appellee. Also represented by AMBER BETH BLAHA, TODD KIM.

Before LOURIE, DYK, and CUNNINGHAM, *Circuit Judges*.

DYK, *Circuit Judge*.

The Winnemucca Indian Colony ("Colony") brought suit against the United States in the Court of Federal Claims ("Claims Court") asserting claims based on alleged statutory violations and breaches of trust duties relating to tribal land and water rights. The Claims Court dismissed for lack of jurisdiction. *Winnemucca Indian Colony v. United States*, 167 Fed. Cl. 396, 401 (2023) ("*Decision*"). The Claims Court determined that some claims were barred because they failed to identify a money-mandating source of law, some were time-barred by the statute of limitations, some were barred by 28 U.S.C. § 1500 due to an earlier filed action in district court, and some otherwise re- quested equitable relief outside of the Claims Court's juris- diction. We affirm.

BACKGROUND

I. Factual Background

The Colony is a federally recognized Indian Tribe located in northern Nevada. In 1917, President Woodrow Wilson set aside 320 acres near Winnemucca, Nevada for certain Shoshone Indians living in the area, and in 1928, Congress set aside another 20 acres. Those lands are held in trust for the Colony. The Bureau of Indian Affairs ("BIA") has authority to act on behalf of the United States with respect to certain trust responsibilities to the Colony. Members of the Colony elect a Council to represent the Colony's interests in its interactions with the BIA. Colony membership is limited to persons who are at least one- quarter Paiute or

Shoshone by blood quantum, are de- scended from a person listed in a 1916 tribal census, and have not taken money or land as a result of membership in another tribe.

On February 22, 2000, then-Chairman of the Council Glenn Wasson was stabbed to death. The surviving Council members split into two factions: the "Wasson group" and the "Bills/Ayer group." Both factions claimed they were the proper tribal government and entitled to control of the Colony's assets. The Wasson group claimed the leader of the Bills/Ayer group, William Bills, did not qualify for tribal membership because of his lineage and could not serve on the Council. The factions litigated the leadership dispute in tribal courts. In 2002, a specially appointed panel of appellate tribal court judges ruled in favor of the Wasson group.

For the following decade, the BIA refused to recognize either faction as the Colony's government, despite repeated requests to do so. At one point, the Interior Board of Indian Appeals, which hears appeals of BIA decisions, ordered the BIA to recognize a government. The BIA still refused to recognize a government.

II. The Nevada Action

Subsequently, in August 2011, the Wasson group filed suit in the U.S. District Court for the District of Nevada, *Winnemucca Indian Colony v. United States*, No. 3:11-cv- 622 ("the Nevada action"), seeking injunctive and declaratory relief recognizing

the Wasson group as the rightful representatives of the Colony.

In the Nevada action, the Wasson group alleged that the BIA irreparably harmed the Colony by failing to recognize the Wasson group's leader as the rightful leader of the Council and by arbitrarily recognizing William Bills as part of the Council. The Colony requested a "preliminary and permanent injunction against the BIA from appointing as the government of the Colony any person who does not meet" the council membership requirements, App'x 62,[1] and sought a declaratory judgment that a decision failing to recognize the Wasson group as the government of the Colony was error.

The allegations in the Nevada action were not limited to the tribal leadership dispute. The Colony also alleged unauthorized occupation of its land, including: that the Colony, including its rightful members, "ha[d] been effectively excluded from its own lands by the BIA"; that the BIA failed to require other persons to leave the 20-acre parcel "even though none of those persons ha[d] authority to be on the [Colony's] lands"; and that "[t]he lands of the . . . Colony continue[d] to be occupied by non[-]members of [the Colony], all allowed and supported by the BIA." App'x 54 ¶¶ 25–27. The Colony sought a declaratory judgment that:

> The failure of the BIA . . . [in] allowing any non[-]members to occupy a possessory

[1] Citations to "App'x" refer to the appendix filed by the Colony at Dkt. No. 13.

> interest in the lands of the Winnemucca Indian Colony to the exclusion of the Winnemucca Indian Colony members and government without proper federal approval and consent, violates the Non Intercourse Act, [25 U.S.C. § 177,] is an abuse of discretion, and is a breach of the trust responsibility owed by the United States of America to a federally recognized Tribe[.]

App'x 63.

The Bills/Ayers group intervened in the Nevada action, arguing that they should be recognized as the legitimate Council of the Colony and that they had a right to live and conduct business on Colony lands. Ayer Grp.'s Mot. to Intervene at 2–3, *Winnemucca Indian Colony v. United States*, No. 3:11-cv-622, Dkt. No. 18 (D. Nev. Sept. 15, 2011). Following various rulings against the BIA, in 2012, the district court ordered the BIA to "recognize Thomas Wasson[, then the leader of the Wasson group,] as the representative of the Council until the conclusion of [the Nevada] action" and ordered that Mr. Wasson institute a process for determining membership. S. App'x 431–32.[2] In October 2014, the Colony elected Council members. The district court ordered the BIA to recognize the election results, which favored the Wasson group. S. App'x 440. The BIA did so on December 13, 2014. The Bills/Ayer group challenged the election results in tribal courts, which dismissed the action for lack of jurisdiction.

---

[2] Citations to "S. App'x" refer to the supplemental appendix filed by the government with its response brief at Dkt. No. 18.

On October 1, 2018, the district court "extend[ed] comity" to the tribal court rulings. *Winnemucca Indian Colony v. United States*, No. 3:11-cv-622, 2018 WL 4714755, at *1 (D. Nev. Oct. 1, 2018). The Bills/Ayer group then appealed to the Ninth Circuit. The United States did not participate in the appeal.

On June 15, 2020, the Ninth Circuit held that the Nevada district court lacked subject matter jurisdiction, vacated the district court's orders, and remanded with instructions to dismiss. *Winnemucca Indian Colony v. United States ex rel. Dep't of the Interior*, 819 F. App'x 480, 483 (9th Cir. 2020). The Ninth Circuit issued the mandate on December 23, 2020. Following the vacatur of the district court's orders, the BIA later "continue[d] to recognize the results of [the Colony's elections]"—which have favored the Wasson group—"unless and until a tribal remedy require[d] [it] to change course." App'x 234 (letter of the Acting Regional Director of the BIA executed Jan. 11, 2022). The Nevada suit did not resolve any of the trespass claims.

III. The Claims Court Action

On November 18, 2020, before the Ninth Circuit issued the mandate in the Nevada action, the Colony filed suit in the present case ("the Claims Court action"). The case comes to us on facts that have been alleged but not adjudicated. "At this stage in the proceedings, we accept the [Colony's] well pleaded factual allegations as true." *Bd. Of Supervisors of Issaquena Cnty. v. United States*, 84 F.4th 1359, 1362 (Fed. Cir. 2023) (quoting *A & D*

Auto Sales, Inc. v. United States, 748 F.3d 1142, 1147 (Fed. Cir. 2014)). In the operative complaint, the Colony included a history of the leadership dispute, including the various tribal court actions and the Nevada action. The Colony enumerated eleven claims for relief, six of which (Counts One, Two, Five, Six, and Eight) are at issue in this appeal.[3]

Counts One and Two alleged breaches of duties relating to various unauthorized encroachments on tribal land relating to at least one road ("Highland Road"), an electrical substation, and power lines. Count Three alleged a "[b]reach of [t]rust," App'x 96, relating to the Colony's water rights due to a nearby development's diversion of a stream and its removal of water "from wells from which water was able to reach the Colony's lands," App'x 97 ¶ 168. Count Five alleged breaches of trust and violations of the Indian Non-Intercourse Act, 25 U.S.C. § 177. With respect to these Counts, the Colony alleged that the government failed to police the 320-acre parcel of land to prevent unauthorized entries and improperly conveyed interests in the land to others. Count Six alleged other breaches of fiduciary duties. The Colony alleged that the government failed to survey or protect from encroachments the 20-acre portion of the Colony's lands. The Colony alleged that "more than one structure" was placed on the land by a nearby subdivision, including "a garage, shed, part of a trailer park, road, and driveway." App'x 100 ¶ 196. In Count Eight, the Colony sought equitable relief, demanding documents and an

[3] The Colony has not appealed the dismissals of Counts Four, Seven, Nine, Ten, and Eleven.

accounting.

The government moved to dismiss. The Claims Court dismissed all of the claims, relying on various overlapping theories. First, the Claims Court determined that Count Three and part of Count Six[4] failed to state a claim upon which relief can be granted because those claims did not identify violations of a money-mandating source of law as required to bring a suit against the United States for damages under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505. Second, the Claims Court found that Counts One, Two,[5] Three, Five, and Six were time-barred by the statute of limitations, 28 U.S.C. § 2501. Third, the Claims Court determined it lacked jurisdiction over all of the Counts at issue on appeal under 28 U.S.C. § 1500, because the claims were substantially the same as the claims in the then-pending Nevada action. *See United States v. Tohono O'Odham Nation*, 563 U.S. 307, 311 (2011) (explaining that section 1500 bars the Claims Court from having jurisdiction over a claim "if the plaintiff has another

---

[4] The Claims Court "conclude[d] that Count Six should be dismissed in part for failure to state a claim upon which relief can be granted to the extent the claim rests on allegations other than those related to physical encroachments onto Colony lands." *Decision* at 414.

[5] Count Two asserts a claim based on "a road along-side the lands of the Winnemucca Indian Colony," but does not explicitly name the road. App'x 95 ¶ 158. The Claims Court's statute-of-limitations determination as to Count Two applies to "Highland Road," a road named elsewhere in the operative complaint. *Decision* at 415 n.10; see App'x 94–95 ¶ 152. There is no contention on appeal that the road identified in Count Two is not Highland Road.

suit for or in respect to that claim pending against the United States or its agents"). Fourth, the Claims Court determined that Count Eight's request for equitable relief was outside of the court's jurisdiction, because it depended on jurisdiction over the other Counts.

The Claims Court entered judgment on August 28, 2023. The Colony appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review de novo the Claims Court's dismissal of a complaint for lack of jurisdiction. *Fletcher v. United States*, 26 F.4th 1314, 1321 (Fed. Cir. 2022). The plaintiff bears the burden of establishing jurisdiction. *Id.* In deciding a motion to dismiss for lack of subject matter jurisdiction, the court accepts as true all uncontroverted factual allegations in the complaint, construing them in the light most favorable to the plaintiff. *Id.*

The Colony challenges each of the Claims Court's reasons for dismissing the Counts at issue on appeal. We start with the Claims Court's dismissal for lack of a money-mandating fiduciary duty, then turn to the time bar, then the dismissal pursuant to section 1500, and finally the issue of equitable relief.

I. Money Mandate

The Claims Court dismissed Count Three and part of Count Six for failing to identify violations of

money-mandating fiduciary duties. We do not disturb the Claims Court's dismissal of part of Count Six because the Colony did not challenge that portion of the Claims Court's decision in its opening brief.[6] We affirm the Claims Court's dismissal of Count Three.

While the United States has a "'general trust relationship [with] the Indian people,'" for the Claims Court to have jurisdiction over a claim for breach of trust or breach of fiduciary duty, a plaintiff "must identify a substantive source of law that establishes specific fiduciary or other duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*") (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983)). The "substantive source of law" must be one that "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of [specific fiduciary or other] duties,'" and, to establish jurisdiction, the plaintiff must allege that the "[g]overnment has failed faithfully to perform those duties." *Id.* (quoting *Mitchell*, 463 U.S. at 219).

---

[6] The Claims Court dismissed portions of Count Six, including the Colony's contentions "regarding surveying, recognition of a tribal government, and the smoke-shop operation," for failure to fit within the scope of a money-mandating source of law. *Decision* at 414. In its opening brief, the Colony only challenged the Claims Court's "finding that a money mandate did not support Plaintiff-Appellant's *third* claim," Appellant's Br. 8 (emphasis added), and did not challenge the dismissal of this portion of Count Six for failure to identify a money-mandating source of law. Arguments not raised by an appellant in its opening brief on appeal are forfeited. *McIntosh v. Dep't of Def.*, 53 F.4th 630, 641 (Fed. Cir. 2022).

In Count Three, titled "Breach of Trust – Water," the Colony alleged that the government allowed a third-party development company "to divert a stream and remove water from wells from which water was able to reach the Colony's lands" and hold that water in upstream wells and holding tanks, such that "there is no available water or water rights located on the 320 acres" of the Colony's land. App'x 96–97. On appeal, the Colony argues dismissal of Count Three was improper because the *Winters* doctrine and 25 C.F.R. § 152.22 establish the required fiduciary duty and money mandate. We disagree.

Under the *Winters* doctrine, the "Federal Government's reservation of land for an Indian tribe . . . implicitly reserves the right to use needed water from various sources." *Arizona v. Navajo Nation*, 599 U.S. 555, 561 (2023) (citing *Winters v. United States*, 207 U.S. 564, 576–77 (1908)). The Colony appears to argue that the government must take affirmative actions on the Colony's behalf to protect its *Winters* water rights from third-party actions taking place outside of the Colony's land. But the *Winters* doctrine is a common law doctrine that does not, on its own, create a trust obligation. The Supreme Court addressed this issue in *Arizona v. Navajo Nation*, 599 U.S. 555 (2023). There, the Navajo Nation filed suit seeking to compel the United States government to take affirmative steps to secure needed water for the tribe. 599 U.S. at 558–59. The Court held that the 1868 treaty establishing the Navajo Reservation reserved necessary water to

accomplish the purpose of the Reservation but did not require the government to take affirmative steps to secure water for the tribe. *Id.* at 566. The Court held it would not "'apply common-law trust principles' to infer duties not found in the text of a treaty, statute, or regulation." *Id.* (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 178 (2011)); *see also id.* at 564 n.1. Thus, "[t]o maintain [a breach-of-trust] claim here, the [Colony] must establish, among other things, that the text of a treaty, statute, or regulation imposed certain duties on the United States." *Id.* at 563–64.

The Colony primarily points to 25 C.F.R. § 152.22 as providing the rights-creating duty found necessary in *Navajo I*, but that regulation does not mention water rights or establish any governmental duty relevant to the diversion of tribal water. The regulation states that "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 Congress provides otherwise. 25 C.F.R. § 152.22(b). Such language does not establish a money-mandating duty relevant to Count Three. The Colony has not identified any other "treaty, statute, or regulation," *Arizona*, 599 U.S. at 563–64, that establishes an obligation for the United States to stop third-party actions relating to water rights.

We addressed a similar situation in *Ute Indian Tribe of the Uintah & Ouray Indian Reservation v. United States*, 99 F.4th 1353 (Fed. Cir. 2024). There, the Tribe alleged that the government had "duties in

trust to secure new water for the Tribe, including by constructing new water storage infrastructure." *Id.* at 1364–65. The Tribe pointed to the *Winters* doctrine and federal statutes as imposing those duties. *Id.* at 1365–66. We held that the statutes did not impose trust duties to secure water for the tribe because the general instruction of one of the statutes to "otherwise protect the rights and interests of the Indians" was not specific enough to create trust duties. *Id.* at 1366, 1371. Here, too, we see no obligation for the government to take action with respect to the alleged diversion of tribal water.

Because the Colony fails to identify the source of an affirmative duty for the government to intercede, we affirm the Claims Court's dismissal of Count Three for lack of jurisdiction.

II. Statute of Limitations

We next turn to the Claims Court's dismissal of Counts One, Two, Five, and the remaining portion of Six as time-barred under 28 U.S.C. § 2501. The statute of limitations in section 2501 is jurisdictional and requires that a claim be filed "within six years after such claim first accrues." 28 U.S.C. § 2501; *Chemehuevi Indian Tribe v. United States*, 104 F.4th 1314, 1321 (Fed. Cir. 2024). The Colony filed suit on November 18, 2020, so for its claims to be timely, they must have accrued on or after November 18, 2014 (the "critical date"). For the purposes of section 2501, a cause of action against the government accrues "when all the events which fix the government's alleged liability have occurred

and the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988).

As further detailed below, Counts One, Two, Five, and the portion of Six at issue on appeal alleged various physical encroachments on the Colony's land, trespasses and continued use of those encroachments, and that the government breached its trust duties to the Colony by failing to act to prevent those encroachments and trespasses. Count One alleged that the BIA allowed the construction of Highland Road across Colony land "without the approval of the Colony and without compensation to the Colony" and "without obtaining proper approvals or consent for the right-of-way from the Tribe," and that the government has continued to "allow[] the City of Winnemucca to continue to use and maintain" the road. App'x 94–95 ¶¶ 152–54. The Colony also alleged that "the City of Winnemucca ap- proved a subdivision for ingress and egress from a back parking lot over Colony lands without any approvals, con- sent or compensation to the Colony." App'x 95 ¶ 154. Count Two alleged that the government allowed an energy company to "construct an electrical substation and place overhead power lines upon Colony land" and "grade a road alongside the lands of the . . . Colony without authorization or notice to the Colony which road . . . caused erosion and disruption to the lands of the Colony," and that the government allowed the energy company to "continue to use the power lines . . . without authorization . . . ." App'x 95–96 ¶¶

158–59. Count Five alleged breaches of trust and violations of the Indian Non-Intercourse Act related to the encroachments—namely, that the Colony "ha[d] not consented to the conveyance of any property interest in the Colony lands"; that the government failed to "protect[] . . . the lands from encroachment" and failed to "properly police[] the lands"; and that, as a result, the Colony was entitled to damages for the "failure to receive funds for the rights of way being utilized" for the encroachments detailed in Counts One and Two (in addition to other damages). App'x 99–100 ¶¶ 188–91. The portion of Count Six at issue on appeal alleged breaches of fiduciary duties—namely, that the government failed to protect the 20-acre parcel from encroachments including "a garage, shed, part of a trailer park, road, and driveway"; that the Colony was entitled to damages for "loss of energy and use" resulting from those encroachments; and that the government "fail[ed] to police and protect the lands from encroachment and trespass." App'x 100–101 ¶¶ 196–99.

The Colony argues its claims were timely because (1) the claims did not accrue until the United States repudiated its trust relationship with the Colony, which occurred in 2015 at earliest; (2) the claims did not accrue until the United States provides an accounting; (3) the claims did not accrue until the tribe was recognized by the BIA on December 13, 2014; and (4) the continuing claims doctrine applies.

The Colony's first three arguments are

unpersuasive. First, the government was not required to provide a formal statement repudiating the trust for the Colony's claims to accrue in this case. As we explained in *San Carlos Apache Tribe v. United States*, an explicit repudiation is not required for a claim of breach of fiduciary duty to accrue where the circumstances are "objectively sufficient to notify the Tribe of the alleged breach." 639 F.3d 1346, 1355 (Fed. Cir. 2011). That is the case here. The Colony fails to explain why the physical presence of the encroachments would not be "objectively sufficient to notify" the Colony of the alleged breaches. Second, the Colony has not identified a common law requirement that a party be provided with an accounting before its claim accrues in situations involving physical encroachments, such as those alleged by the Colony. The Colony points to *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339 (Fed. Cir. 2004) ("*Shoshone I*"), for the principle that "the statute of limitations [does] not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust." Appellant's Br. 16 (quoting *Shoshone I*, 364 F.3d at 1348). But *Shoshone I* involved claims of mismanagement of tribal trust funds, where a beneficiary would not be aware that a breach of fiduciary duty had occurred until an accounting had been provided. *See Shoshone I*, 364 F.3d at 1342, 1344. As we explained in *San Carlos Apache Tribe*, that principle does not apply where, as here, a final accounting is unnecessary to put the Colony on notice of the accrual of its claim. 639 F.3d at 1355.

Third, the timing of the recognition of certain tribal leadership does not change the limitations period here. The Colony primarily points to *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005) to support its position. There, we held that the Samish's claims did not accrue until they received a ruling recognizing the existence of the tribe. *Id.* at 1369. But here, the parties do not dispute that the Colony has been recognized for the entirety of the limitations period—it is only the Colony's leadership that has been in dispute. In this case, there is no question about the official recognition of the Colony as an existing tribe, and the Colony's leadership dispute does not affect the accrual of its claims.[7] We now turn to the Colony's fourth argument, regarding the continuing claims doctrine. The continuing claims doctrine allows "later arising claims even if the statute of limitations has lapsed for earlier events." *Tamerlane, Ltd. v. United States*, 550 F.3d 1135, 1145 (Fed. Cir. 2008) (citation omitted). It applies where a plaintiff's claim is "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages."

[7] The Claims Court acknowledged that the Colony's argument could, at best, "be construed as a claim that the lack of a BIA-recognized council created a 'legal disability' for the Colony that prevented it from filing an action, in which case § 2501 would entitle it to additional time to bring suit." *Decision* at 417; *see* 28 U.S.C. § 2501 ("A petition on the claim of a person under legal disability . . . at the time the claim accrues may be filed within three years after the disability ceases."). The Colony does not raise that argument on appeal. Oral Arg. at 11:02–11:07 ("Our theories have not gone under legal disability [in the appeal].")

Brown Park Ests.-Fairfield Dev. Co. v. United States, 127 F.3d 1449, 1456 (Fed. Cir. 1997). "The continuing claims doctrine has been applied when the government owes a continuing duty to the plaintiffs. In such cases, each time the government breaches that duty, a new cause of action arises." *Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000). The doctrine does not apply to single events that have continuing negative effects. *Brown Park*, 127 F.3d at 1456.

In order to avoid the statute of limitations, the Colony must establish that its claims accrued on or after November 18, 2014, i.e., within six years of the filing of the complaint on November 18, 2020. As described earlier, Counts One, Two, Five, and the remaining portion of Six allege various physical encroachments on the tribe's land and the government's failure to act to prevent those encroachments. The physical encroachments include:

- "a two-lane, partially paved road called High-land Road," App'x 94–95 ¶ 152;
- ingress and egress easements granted to a neighboring subdivision;
- an electrical substation;
- overhead power lines; and
- several structures, including "a garage, shed, part of a trailer park, road, and driveway," allegedly "placed on the Colony's land by a subdivision located adjacent to the [20-acre plot of the Colony's land]," App'x 100 ¶ 196.

The Claims Court found that the first four of these encroachments—the Highland Road, the ingress/egress for the neighboring subdivision, the electrical substation and the overhead power lines—were already constructed as of 2013, i.e., before the critical date. The Colony does not challenge that factual finding on appeal. The Claims Court also determined that the Colony had not met its burden to demonstrate that the allegations regarding the structures on the 20-acre plot occurred within the limitations period. The court's conclusion was based in part on satellite images from 2013, "which reveal[ed] the existence of a trailer park, road, driveway, sheds, and other structures" on the plot. *Decision* at 420. On appeal, the Colony does not dispute that the structures identified in the 2013 satellite photos were the same structures it referenced in Count Six of its complaint, *see* App'x 100 ¶ 196, nor does it dispute that the structures existed as of 2013. Accordingly, to the extent that the Colony's claims are based on the original encroachment of the structures on the Colony's land, we see no error in the Claims Court's conclusion that those claims are barred by the statute of limitations.

The Colony's allegations also, however, raise more difficult questions as to the continued use and maintenance of the physical encroachments.[8] The

[8] In this connection, the Colony asserts that the government has a trust duty to eject trespassers or prevent trespass on tribal land. The Claims Court did not answer this question. The court explained that "[t]he Indian Long-Term Leasing Act[, 25 U.S.C. § 415,] requires the Government to approve leases of Indian

Colony argues that its claims are not limited to physical encroachments and that "individual instances of trespass have occurred . . . within . . . the limitations period." Appellant's Br. 23. In its complaint, the Colony alleged that the government "fail[ed] to police and protect [the Colony's] lands from encroachment and trespass." App'x 101 ¶ 199; *see also* App'x 84 ¶ 81 (referring to the BIA's "continuing failure to secure the lands and resources of the Colony"); App'x 99– 100 ¶ 190 (alleging that the government failed to remove trespassers and "affirmatively conveyed the possessory interest of the land be held by [sic] trespassers"). The Colony specifically alleged that the government "allowed the City of Winnemucca to continue to use and maintain" Highland Road, App'x 95 ¶ 153, and "allowed [an energy company] to continue to use the power lines." App'x 95–96 ¶ 159.

The Colony argues that the Claims Court erred in treating all of the trespass allegations as "continued ill effects" of the physical encroachment

land," that the Act and its implementing regulations "impose on the Government money-mandating fiduciary duties in the tribal leasing context," and that the Act thus "supplie[d] a money-mandating source of law" to the extent the Colony alleged that the government "mismanaged the leasing of residential properties on the Colony's land." *Decision* at 413 (citing *Brown v. United States*, 86 F.3d 1554, 1562–63 (Fed. Cir. 1996)). It did not address whether the government has a continuing duty to otherwise stop trespasses to tribal land. On appeal, the Colony argues that the Indian Long-Term Leasing Act and its implementing regulations establish such a duty, relying primarily on *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18 (1st Cir. 2007) to support its theory. Appellant's Reply Br. 16–17. The government disagrees.

allegations. *Decision* at 418 (citation omitted). The Colony's trespass allegations appear to rely on a continuing trespass theory like the one we addressed in *Shoshone Indian Tribe of Wind River Reservation v. United States*, 672 F.3d 1021 (Fed. Cir. 2012) ("*Shoshone II*"). Under that theory, "each trespass is its own cause of action with its own six-year statute of limitations." *Id.* at 1035. Accordingly, the Colony argues that "[a]ssuming the Government had a duty to eject the trespassers, every time the Government failed to remove the trespassers, a new cause of action arose." Appellant's Br. 24 (quoting *Shoshone II*, 672 F.3d at 1035 n.9). The Colony's theory thus seems to be that it could still timely bring suit for any such injuries incurred on or after November 18, 2014 (i.e., within six years of filing suit in the Claims Court).

While this case raises important and difficult questions as to the scope of the continuing claims doctrine, we think it inadvisable to resolve those questions now, given the sparse record and limited briefing on the issues. We need not decide whether the Colony's theories as to the continuing claims doctrine are correct, because, as discussed in the following section, we affirm the dismissal of these claims on other grounds.

III. Section 1500

Section 1500 provides that the Claims Court "shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United

States." 28 U.S.C. § 1500. The statute's aim is to "save the Government from burdens of redundant litigation." *Tohono O'Odham*, 563 U.S. at 315. "[T]o determine whether § 1500 applies, a court must make two inquiries: (1) whether there is an earlier-filed 'suit or process' pending in another court, and, if so, (2) whether the claims asserted in the earlier-filed case are 'for or in respect to' the same claim(s) asserted in the later-filed Court of Federal Claims action." *Res. Invs., Inc. v. United States*, 785 F.3d 660, 664 (Fed. Cir. 2015) (quoting *Brandt v. United States*, 710 F.3d 1369, 1374 (Fed. Cir. 2013)).

Since the Nevada action was filed first and remained pending when this suit was filed, only the second inquiry is in dispute in this appeal. "Two suits are for or in respect to the same claim if they are based on substantially the same operative facts, regardless of the relief sought in each suit." *Tohono O'Odham*, 563 U.S. at 317. If the section 1500 bar applies, it attached "when plaintiffs filed their Claims Court action," and we must therefore "compare the operative facts asserted at the time the two com- plaints were filed." *Cent. Pines Land Co. v. United States*, 697 F.3d 1360, 1364 (Fed. Cir. 2012); *see also Keene Corp. v. United States*, 508 U.S. 200, 207–09 (1993). The Colony argues that the Nevada action did not involve substantially the same set of facts as the Claims Court action and so the Claims Court erred in determining it lacked jurisdiction over Counts One, Two, Three, Five, Six, and Eight pursuant to 28 U.S.C. § 1500.[9]

---

[9] The government argues that the Colony forfeited this argument by failing to raise it to the Claims Court. To the extent the

We need not reach the Colony's section 1500 arguments as to many of the appealed claims because, as explained above, we affirm the dismissal of those claims on other grounds. As to the surviving claims concerning continuing trespass—the portions of Counts One, Two, Five, and Six that are alleged to have accrued on or after November 18, 2014—we affirm the Claims Court's dismissal under section 1500.[10]

The Supreme Court examined section 1500 in *Tohono O'Odham*. There, the tribal nation filed two complaints, one in district court and one in the Claims Court, that "alleged almost identical violations of fiduciary duty, for which it requested money damages." 563 U.S. at 310. The Court determined that "the substantial overlap in operative facts" triggered section 1500's jurisdictional bar. *Id.* at 318.

Colony failed to properly preserve its argument for appeal, we exercise our discretion to consider it in the first instance. *Medtronic, Inc. v. Teleflex Innovations S.À.R.L.*, 68 F.4th 1298, 1305 (Fed. Cir. 2023) ("[E]ven if an issue was not presented below, there is no absolute bar to considering and deciding the issue on appeal, as forfeiture is a matter of discretion."); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.").

[10] The government acknowledges that section 1500 is applied on a claim-by-claim basis. Oral Arg. at 15:57–16:04 (admitting that "[i]f there are counts [in the Claims Court complaint] that don't involve overlap [with the Nevada complaint], then the section 1500 bar wouldn't apply").

Here, much of the subject matter of the Nevada com- plaint, such as the BIA's failure to resolve the tribal leadership dispute, may be ultimately irrelevant to the disposition of the surviving claims, which involve third-party encroachments and related trespasses. The problem for the Colony is that the Nevada action included significant and broad allegations of trespass and occupation. Those allegations are sufficient to trigger section 1500 and bar the surviving claims.

In the Nevada complaint, the Colony alleged that the BIA "allowed and supported" "[t]he lands of the Colony [to] continue to be occupied by non[]members of [the Colony]," App'x 54 ¶ 27, and that "[t]here ha[d] been no federal consent to convey any interest in the . . . Colony lands including any possessory interest," App'x 56 ¶ 36. These allegations are operative facts in the Claims Court complaint. As described earlier, the complaint here alleges claims that the government allowed continuing trespasses on tribal land. These overlapping facts "are not mere background facts; they are critical to [the Colony's] claims in both actions." *Cent. Pines*, 697 F.3d at 1365. We thus conclude that the appealed portions of Counts One, Two, Five, and Six that are alleged to have accrued on or after November 18, 2014, are barred by section 1500, and affirm the Claims Court's dismissals under that section.

This ruling does not, of course, bar the Colony from initiating a new lawsuit covering the subject matter of the continuing trespass allegations and, in that suit, attempting to overcome any statute of

limitations bar. *Res. Invs.*, 785 F.3d at 670 (holding that plaintiff's claims were barred by section 1500 but noting that plaintiff could have earlier "dismissed and refiled its Claims Court action" following the conclusion of the barring district court action).

IV. Equitable Relief

In Count Eight, the Colony demands equitable relief in the form of "[d]ocuments and [an a]ccounting." App'x 102. The Claims Court determined that such a request was outside its jurisdiction. The Claims Court generally does not have jurisdiction to grant equitable relief, subject to a few exceptions, such as when the equitable relief is "ancillary to claims for monetary relief over which [the Claims Court] has jurisdiction." *Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998). The Colony appears to acknowledge that Count Eight rises and falls with the determination of jurisdiction over its substantive claims. *See* Appellant's Reply Br. 24–25. Because none of the Colony's claims for monetary relief remain pending, we affirm the Claims Court's dismissal of Count Eight.

CONCLUSION

For the foregoing reasons, we affirm the Claims Court's dismissal of the Colony's complaint.

AFFIRMED

COSTS

No costs.

APPENDIX C

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 20-1618

WINNEMUCCA INDIAN COLONY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Filed: August 25, 2023

OPINION AND ORDER

Plaintiff Winnemucca Indian Colony ("Plaintiff" or "Colony") filed this breach of trust action against the United States, alleging the Bureau of Indian Affairs ("BIA") failed to fulfill various trust responsibilities it owed to the Colony. The events underpinning Plaintiff's claims relate to a long-running internal tribal dispute about the Colony's proper membership and leadership. Plaintiff contends the BIA's refusal to recognize the rightful leadership faction of the Colony for nearly two decades resulted in nonmembers unlawfully

occupying the Colony's land, diverting its natural resources, and stifling economic development. It seeks more than $208 million in monetary damages, as well as declaratory judgment and an accounting of the Colony's trust assets.

Before the Court is the Government's Motion to Dismiss the Amended Complaint. The Government contends Plaintiff's claims should be dismissed primarily for lack of subject-matter jurisdiction on several grounds, including standing, 28 U.S.C. § 1500's statutory bar on jurisdiction, the statute of limitations, and Plaintiff's failure to identify a money-mandating source of substantive law. For any claims that survive, the Government seeks dismissal for failure to state a claim upon which relief may be granted. Also before the Court is Plaintiff's Motion to File a Surreply and Plaintiff's Motion to Strike the Government's recent Notice of Additional Authority. Because the Court concludes that it lacks jurisdiction over Plaintiff's claims, it must **GRANT** the Government's Motion and **DISMISS** the Amended Complaint. The Court further concludes that Plaintiff's proposed surreply does not address new arguments and is not necessary for the Court's disposition of the Government's Motion and, as such, **DENIES** its request to file a surreply. The Court likewise **DENIES** Plaintiff's Motion to Strike the Government's Notice of Additional Authority and instead **GRANTS** Plaintiff's alternative request to consider its response.

BACKGROUND

I. Factual History

A. Leadership Dispute

The Colony is a federally recognized Indian Tribe located in northern Nevada. *See* Pl.'s Am. Compl. ¶¶ 2, 6, ECF No. 22. In 1916, President Woodrow Wilson set aside by executive order 320 acres of land for homeless Shoshone Indians that is now held in trust for the Colony. *Id.* ¶ 6. In 1928, Congress set aside and additional 20 acres. *Id.* ¶ 7. Membership in the Colony is limited to individuals who are one-quarter Paiute or Shoshone by blood quantum, are descended from a person listed in the 1916 tribal census, and who have not taken money or land as a result of membership in another tribe. *Id.* ¶ 11. Qualifying members elect a council to represent the Colony's interests in government-to-government relations with the BIA, which manages the trust responsibility to the Colony on behalf of the United States. *Id.* ¶ 5.

The leadership dispute underlying Plaintiff's claims dates back more than 20 years. From 1990 to 2000, the BIA recognized a tribal council led by Winnemucca Council Chair Glen Wasson as the government of the Colony. *Id.* ¶¶ 32, 37. On February 22, 2000, Wasson was stabbed to death on the doorstep of the Colony's Administrative Building. *Id.* ¶ 39. His murder initiated a power struggle among the remaining members of the council to decide who would assume control of the

Colony's government. *Id.* ¶¶ 40–50. Two factions each claimed to be the legitimate tribal council and asserted control over the Colony's assets. *Id.* One faction—the Wasson group (led by council member Sharon Wasson)—believed the leader of the competing group, council member William Bills, did not qualify for tribal membership because of his lineage. *Id.* ¶¶ 38, 50. Later that year, the BIA withdrew its recognition of the tribal government while the Colony resolved the leadership dispute. *Id.* ¶¶ 44, 46. Things came to a head in 2002 after several years of litigation before the Tribal Court when a specially appointed appellate panel, the "Minnesota Panel," ruled in favor of the Wasson group. *Id.* ¶ 63.[1]

Following the Minnesota Panel decision, the Wasson group requested the BIA to recognize it as the rightful government of the Colony. *Id.* ¶ 64. Despite repeated requests, the BIA refused to recognize the group, citing the outstanding leadership dispute and remaining tribal remedies. *Id.* As of May 17, 2007, all tribal remedies had been exhausted, and the Inter-Tribal Court of Appeals of Nevada issued a decision dismissing all further appeals in recognition of the Minnesota Panel's decision as final. *Id.* ¶ 65. On March 6, 2008, in connection with an interpleader action filed by the bank holding the Colony's account of funds, the

[1] The Colony funded the Minnesota Panel because, at the time, the BIA had not funded the Inter-Tribal Court of Appeals of Nevada; thus, no government-provided appellate process was available. ECF No. 22 ¶¶ 59, 62.

United States District Court for the District of Nevada issued an opinion agreeing that all tribal remedies had been exhausted and granting the Minnesota Panel decision comity. *Id.* ¶ 67. Still, the BIA refused to recognize a Colony government. *Id.* ¶¶ 68, 73 recognize a leadership group of the Colony when a reason existed. *Id.* In light of allegations of trespass by nonmembers on the Colony's land, it ordered the BIA to recognize a Colony government. *Id.* When the BIA did not do so, and instead barred Colony members from entering the land in May 2011 to rehabilitate an abandoned smoke shop, the Wasson group sought injunctive and declaratory relief in the District of Nevada to prohibit the Government from interfering with the Colony's activities on their land and to establish themselves as the Colony's duly elected government ("Nevada Case"). *Id.* ¶ 83; *see* Compl., *Winnemucca Indian Colony v. United States ex rel. Dep't of the Interior*, No. 11-622 (D. Nev. Aug. 29, 2011), ECF No. 1. After several more years of litigation and various rulings against the BIA, the BIA (acting pursuant to the district court's order) recognized the Wasson group by letter dated December 13, 2014. ECF No. 22 ¶¶ 83–84, 86–87, 89, 96. Another competing Colony faction, the Ayer group, who had intervened as a defendant in the Nevada Case, appealed to the Ninth Circuit Court of Appeals. The Circuit ultimately vacated all of the district court's orders from 2011 to 2018 for lack of subject- matter jurisdiction. *See Winnemucca Indian Colony v. United States ex. rel. Dep't of Interior* (*Winnemucca*), 819 F. App'x 480, 483 (9th Cir. 2020). The Government did not participate in the appeal.

In April 2021, due to the BIA's need to administer contracts with the Colony under P.L. 93-638, the BIA issued an interim tribal government recognition to the Wasson group. Ex. 1 to Def.'s Mot. for Enlargement of Time at 9–12, ECF No. 16-1. On January 11, 2022, the Acting Regional Director of the Western Regional Office of the BIA issued a final decision letter on how the Western Regional Office would continue necessary government-to-government relations with the Colony, including continued recognition of the Wasson group for government-to-government contracting purposes until "an adjudication of the underlying membership and election disputes by a tribal forum" requires otherwise. Ex. 1 to Def.'s Notice of Additional Authority at 15–16, ECF No. 20-1.

B. Resulting Losses to the Colony

Plaintiff alleges that because of the ongoing leadership dispute and the BIA's failure to permanently recognize a government of the Colony during the dispute, the BIA failed to fulfill its trust responsibilities to the Colony and prevented the Colony from managing and preserving its resources, leading to disrepair and decay of Colony lands and buildings. *See, e.g.*, ECF No. 22 ¶¶ 85, 140–46, 177–78. Plaintiff alleges that during the pendency of the leadership dispute, the BIA and individuals residing on Colony land — who Plaintiff claims are unlawfully trespassing — threatened Colony members, preventing them from entering and managing the Colony's property. *Id.* ¶¶ 40–41, 76,

78–79, 108, 141, 177, 221. As a result, Plaintiff alleges the Colony's lands suffered numerous encroachments and harms, which the BIA failed to prevent or remedy. *Id.* ¶¶ 85, 177–78.

In particular, the BIA continued to maintain leases for HUD housing on Colony land to individuals who Plaintiff contends are not members of the Colony. *Id.* ¶¶ 29, 41, 79–81, 108, 111, 220. Plaintiff alleges the BIA never required the residents to pay rent and never collected any payments. *Id.* ¶ 174. It also asserts the BIA never transitioned possession of Colony homes to members, and Colony members have been forced to reside outside of the reservation at the Colony's expense. *Id.* ¶¶ 41, 108, 177–78, 221. According to Plaintiff, the BIA and the nonmember residents also have failed to properly maintain the premises, resulting in open contamination of hazardous waste on the land. *Id.* ¶¶ 113, 175.

In addition, the BIA allegedly allowed several physical encroachments on Colony lands without the Colony's consent and without compensation to the Colony. *Id.* ¶¶ 132–39. These encroachments include a road, overhead powerlines, an electrical substation, and easements granted to a neighboring subdivision. *Id.* Plaintiff alleges that the subdivision also has placed several structures on Colony lands, including a garage, shed, road, driveway, and part of a trailer park. *Id.* ¶ 196. Plaintiff further contends that the BIA allowed the Offenhauser Development Company, which designed the subdivision, to divert a stream off Colony lands without permission and

without any compensation to the Colony. *Id.* ¶¶ 124–26. And the BIA has allegedly permitted the neighboring subdivision to discharge storm sewer runoff directly onto Colony lands. *Id.* ¶¶ 127–28. Plaintiff contends that the BIA has failed to recapture the water that once naturally flowed through Colony lands or collect compensation for the Colony's water loss. *Id.* ¶¶ 129-31. Before the leadership dispute, the Colony operated a successful smoke shop and maintained an administrative building, both on Colony land. *Id.* ¶¶ 140, 144. Plaintiff alleges that because trespassers and the Government excluded Colony members from the land, the smoke shop ceased operations and the administrative building fell into disrepair. *Id.* ¶¶ 141–42, 146. Plaintiff claims the BIA made no effort to preserve these structures, nor has it compensated the Colony for the resulting losses. *Id.* ¶¶ 143, 149.

II. Procedural History

On November 18, 2020, the Colony filed a complaint in this Court ("Original Complaint"). *See* Pl.'s Compl., ECF No. 1. The Original Complaint raised ten claims for relief: (1) Violation of 25 U.S.C. § 323 *et seq.*—land use; (2) Violation of 25 U.S.C. § 323 *et seq.*—land use in relation to energy station; (3) Breach of Trust—Water; (4) Agency action unlawfully withheld or unreasonably delayed; (5) Breach of Trust pursuant to the Indian Non-Intercourse Act; (6) Breach of Fiduciary Duty; (7) Demand for Documents and Accounting; (8) Declaratory Judgment—Right to royalties for use of land; (9) Loss of use of lands and rights as Tribal

members by the individual members of the Colony; and (10) Declaratory Judgment—Right to lands granted to the other western tribes of BLM and other government lands pursuant to the repatriation of Tribal Lands process. *Id.* at 23–31.

After the Government filed a Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the Colony moved to amend the Original Complaint. *See* Mot. to File First Am. Compl., ECF No. 15; Proposed First Am. Compl., ECF No. 15-1. The Proposed Amended Complaint eliminated the claim for agency action unlawfully withheld, added a claim for violation of 25 U.S.C. § 4101, added a claim alleging Plaintiff lacks an available remedy at law, corrected facts about land use, clarified facts about encroachment, and provided jurisdictional facts in an attempt to overcome the Government's first Motion to Dismiss. *See* ECF No. 15 at 4. The Court granted the amendment over the Government's opposition, and the Colony filed its Amended Complaint on February 1, 2022 ("Amended Complaint"). *See* Order Granting Mot. to Amend Pleadings, ECF No. 21; ECF No. 22. On March 18, 2022, the Government filed a second Motion to Dismiss. *See* Def.'s Mot. to Dismiss ("MTD"), ECF No. 23. The Motion is now fully briefed. *See* Pl.'s Resp. to MTD, ECF No. 25; Def.'s Reply to MTD, ECF No. 28. On August 17, 2022, Plaintiff filed a Motion for Leave to File Surreply, which is also fully briefed. *See* Pl.'s Mot. to File Surreply, ECF No. 29; Def.'s Resp. to Pl.'s Mot. to File Surreply, ECF No. 30; Pl.'s Reply to Mot. to File Surreply, ECF No. 31.

On January 19, 2023, the Court held oral argument.

On July 6, 2023, Plaintiff filed a Notice of Additional Authority, informing the Court of the Supreme Court's decision in *Arizona v. Navajo Nation*, 143 S. Ct. 1804 (2023), which it argues is relevant to the pending Motion to Dismiss. *See* Notice of Additional Authority, ECF No. 35. On July 12, 2023, Plaintiff filed a Motion to Strike Notice of Additional Authority, or, in the Alternative, Response Thereto. *See* Mot. to Strike, ECF No. 36. Plaintiff argues that the Court's rules do not allow for such a notice to be filed and, in any event, that *Navajo Nation* does not impact its breach of trust claims. *Id.* at 1–2.

The Court notes that this is the second lawsuit filed by the Colony in the Court of Federal Claims. In 2014, another judge of the court dismissed an action brought by the Colony seeking monetary damages from the United States for nearly identical harms. *See Winnemucca Indian Colony v. United States*, No. 13-874, 2014 WL 3107445, at *3 (Fed. Cl. July 8, 2014). The court granted dismissal for lack of jurisdiction under 28 U.S.C. § 1500 because of the concurrent Nevada Case pending at the time. The court held that the district court case involved substantially the same operative facts related to the BIA's refusal to recognize the Wasson group as the Colony's government. *Id.* at *4 (holding that both cases involved "factual questions of who, if anyone, constituted the legitimate Colony leadership; whether the individuals in 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").

At the time the instant action was filed, the Ninth Circuit had issued its decision vacating the district court's prior orders in the Nevada Case for lack of subject-matter jurisdiction. *Winnemucca*, 819 F. App'x 480 at 483 (opinion issued June 15, 2020). But the Ninth Circuit did not issue the mandate effectuating its June 2020 judgment until December 23, 2020, over a month after Plaintiff filed the Original Complaint in this case. *See* Mandate, *Winnemucca*, No. 18-17121 (9th Cir. Dec. 23, 2020), ECF No. 65.

LEGAL STANDARDS

I. Motions to Dismiss Pursuant to RCFC 12(b)(1)

Before reaching the merits of a plaintiff's action, the Court must as a threshold matter assure itself that subject-matter jurisdiction exists. RCFC 12(b)(1), (h)(3); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (affirming that subject-matter jurisdiction "'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception'" (quoting *Mansfield v. Swan*, 111 U.S. 379, 382 (1884))). The plaintiff bears the burden of establishing by the preponderance of evidence the Court's jurisdiction over its claim. *See Estes Express Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir.

2014).

When deciding whether to dismiss a complaint pursuant to RCFC 12(b)(1) for lack of subject-matter jurisdiction, the Court must accept all factual allegations as true and draw all reasonable inferences in the claimant's favor. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). However, if a complaint contains challenged factual allegations, for purposes of ruling on a motion to dismiss, the court may inquire into facts necessary to support jurisdiction and may resolve disputed facts. *See Al Johnson Constr. Co. v. United States*, 19 Cl. Ct. 732, 733 (1990); *see also Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985) (affirming that a court may consider "evidentiary matters outside the pleadings" when assessing a Rule 12(b)(1) dismissal).

II. Motions to Dismiss Pursuant to RCFC 12(b)(6)

The Court must also dismiss an action if it fails to state a claim for which relief may be granted. RCFC 12(b)(6). To avoid dismissal under RCFC 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although a complaint need not contain detailed factual allegations to raise a plausible claim, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of

action will not do." *Twombly*, 550 U.S. at 555; *see Papasan v. Allain*, 478 U.S. 265, 286 (1986) (holding that a court is "not bound to accept as true a legal conclusion couched as a factual allegation"). In deciding a motion under RCFC 12(b)(6), the Court may consider the complaint itself, "the written instruments attached to it as exhibits, 'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Todd Constr., L.P. v. United States*, 94 Fed. Cl. 100, 114 (2010) (quoting *Tellabs, Inc. v. Makor Issues & Rts. Ltd.*, 551 U.S. 308, 322 (2007)), *aff'd*, 656 F.3d 1306 (Fed. Cir. 2011).

DISCUSSION

The Court lacks jurisdiction over each of Plaintiff's claims because they are barred pursuant to 28 U.S.C. § 1500, fail to identify money-mandating sources of substantive law, are outside the statute of limitations, and/or seek equitable relief that is beyond the Court's statutorily prescribed jurisdiction.[2]

---

[2] Because the Court has determined that each of Plaintiff's claims should be dismissed on jurisdictional grounds, and because the Government's standing argument addresses what amounts to a pleading issue, it is unnecessary to determine whether Plaintiff has sufficiently pleaded facts showing that this suit is brought by and through the Colony's duly elected council. It is likewise unnecessary to determine whether Count Two should be dismissed under RCFC 12(b)(6) for failure to state a claim.

I. The Court Lacks Jurisdiction Over All Claims Except Count Nine Because Plaintiff Had Another Suit or Process Pending Against the United States When It Filed Its Original Complaint.

The Government contends the Court lacks jurisdiction pursuant to 28 U.S.C. § 1500 over Counts One through Eight, Ten, and Eleven because they are substantially the same as the claims in the Nevada Case, which was pending on appeal before the Ninth Circuit ("Ninth Circuit Appeal") at the time the Colony filed its Original Complaint. ECF No. 23 at 32. Winnemucca argues that the Court has jurisdiction because the Government was not a party to the Ninth Circuit Appeal. ECF No. 25 at 23. The Court concludes that, although the Government did not actively participate in the appeal, Plaintiff nevertheless had a pending suit or process against the United States at the time it filed its Original Complaint, and the Court accordingly lacks jurisdiction over all but one of Plaintiff's claims.

Section 1500 bars jurisdiction over a claim in the Court of Federal Claims "if the plaintiff has another suit for or in respect to that claim pending against the United States or its agent." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 311 (2011). To determine whether § 1500 applies, the Court must analyze: (1) whether the plaintiff has an earlier-filed suit "pending" in another court; (2) whether that suit is pending "against the United States;" and (3) whether the claims asserted in the earlier-filed suit share the same operative facts as

the claims asserted in the later-filed suit in the Court of Federal Claims. 28 U.S.C. § 1500; *see HEALTHeSTATE, LLC v. United States*, 146 Fed. Cl. 681, 686 (2020); *see also Brandt v. United States*, 710 F.3d 1369, 1374 (Fed. Cir. 2013). Each question must be evaluated based on the state of things at the time the action in the Court of Federal Claims was filed, and the jurisdictional bar continues even if the earlier-filed action is subsequently resolved. *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993); *Prophet v. United States*, 106 Fed. Cl. 456, 465 (2012). If the Court answers all questions in the affirmative, the case must be dismissed. *Winnemucca Indian Colony*, 2014 WL 3107445, at *2.

Plaintiff does not dispute that the Ninth Circuit Appeal was pending at the time it filed its Original Complaint because the Ninth Circuit's mandate had not yet issued, nor does it dispute that the claims asserted in that case are substantially the same as the claims in this case. Indeed, the Colony's prior, similar suit brought in this court was dismissed under § 1500 due to the same concurrent litigation. *See id.* at *4. Rather, Plaintiff argues that the Ninth Circuit Appeal was not pending "against the United States" because the Government was not participating in the appeal. ECF No. 25 at 23 (quoting 28 U.S.C. § 1500). The Court must thus decide whether the United States' decision not to join a pending appeal in an earlier-filed case that otherwise meets § 1500 removes the statute's jurisdictional bar. The Court holds that it does not.

Although the parties do not cite any cases addressing this exact scenario, the ample body of caselaw interpreting and applying § 1500 undercuts Plaintiff's argument. Plaintiff's argument focuses narrowly on who was litigating the Ninth Circuit Appeal rather than the claim subject to the appeal. A "suit or process," however, includes both an action filed in the lower court and any ensuing appeal, which is "pending" once a notice of appeal is docketed and remains "pending" at least until the appeals court issues a mandate effectuating judgment. *Hood v. United States*, 659 F. App'x 655, 661 (Fed. Cir. 2016) (citing *Brandt*, 710 F.3d at 1380); *Nycal Offshore Dev. Corp. v. United States*, 148 Fed. Cl. 1, 14–15 (2020) (holding that the term "process," as used in § 1500, encompasses "the entire course of legal proceedings" following the filing of a "suit"); *Beberman v. United States*, 135 Fed. Cl. 336, 340 (2017), *rev'd on other grounds*, 755 F. App'x. 973 (Fed. Cir. 2018). And if an appeals court through its mandate remands a case for further proceedings, the ongoing "suit or process" remains "pending" until the lower court resolves the matter. *Burman v. United States*, 75 Fed. Cl. 727, 729 (2007). Viewed collectively, these cases instruct that the finality of the claim in the earlier-filed suit should be the focus for determining whether the same claim in the later-filed suit is barred. Here, the claim against the Government in the Nevada Case was not extinguished by the district court's final judgment because once the Ayer group filed its notice of appeal the "suit or process" continued in the Ninth Circuit Appeal.

Just as in the Nevada Case, the claims at issue in the Ninth Circuit Appeal were *against the United States*. The substance of the Ninth Circuit's decision reveals as much. Specifically, the Circuit reviewed whether the district court had subject-matter jurisdiction over Plaintiff's claims against the BIA pursuant to the Administrative Procedure Act, answering the question in the negative due to a lack of final agency action. *Winnemucca*, 819 F. App'x at 482 (holding that "at the time the complaint was filed the [BIA] had not reached a final decision on whether it would recognize any group as the Colony's tribal council, or whether any such recognition was warranted"). Although the Government was not directly engaged in the appeal, it was still subject to the judgment of the Ninth Circuit and faced the potential of continued proceedings in the district court if the Circuit had remanded for further proceedings. In short, whether the Government was directly litigating the Ninth Circuit Appeal is irrelevant. Because the claims asserted in the Nevada Case were against the Government and the same claims were being challenged in the Ninth Circuit Appeal, the appeal constituted a "suit or process" pending "against the United States" under the meaning of § 1500. *See Scott Aviation v. United States*, 23 Cl. Ct. 573, 576 (1991) (dismissing complaint under § 1500 where same claim previously brought in this court was then-pending on appeal before the Federal Circuit).

This conclusion is reinforced by the purpose of § 1500. The jurisdictional bar now found in § 1500 dates to the Reconstruction Era and was enacted to

address suits brought against the United States by former residents of the Confederacy to recover for property seized during the Civil War. *Keene*, 508 U.S. at 206. Many claimants who struggled to bring suit in the Court of Claims, which barred the claims of plaintiffs who aided the rebellion, brought duplicative suits in other courts. *Id.* (citing Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 574–80 (1967)). Thus, Congress passed the progenitor of § 1500 "to prohibit the filing and prosecution of the same claims against the United States in two courts at the same time." *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1562 (Fed. Cir. 1988). The purpose of the jurisdictional bar was to avoid not only the "unfair burden to the defendant" but also "[t]he possibility of inconsistent judicial resolution of similar legal issues[,] . . . unnecessary crowding of this court's docket[,] and general administrative chaos." *Id.* at 1563 (quoting *City of Santa Clara v. United States*, 215 Ct. Cl. 890, 893 (1977)). Accordingly, barring Plaintiff's claims here properly upholds the purpose of § 1500.

For these reasons, the Court finds that it lacks jurisdiction over Counts One through Eight, Ten, and Eleven pursuant to § 1500.

II. Plaintiff Has Failed to Identify Violations of Money-Mandating Fiduciary Duties in Counts Three, Four, Seven, and Part of Count Six.

In addition to its § 1500 argument, the Government alleges that Counts Three through Seven should be dismissed because each of the counts fails to allege that the Government violated a money-mandating fiduciary duty. ECF No. 23 at 42. Accordingly, the Government argues the Court lacks jurisdiction over those claims. *Id.* The Court concludes Plaintiff has sufficiently identified money-mandating statutes granting the Court jurisdiction over Count Five and part of Count Six. Plaintiff has not identified, however, money-mandating statutes supporting Counts Three, Four, Seven, and part of Count Six.

Plaintiff alleges the Court has subject-matter jurisdiction over its claims pursuant to the Tucker Act, 28 U.S.C. § 1491, and Indian Tucker Act, 28 U.S.C. § 1505. These acts provide for a limited waiver of the Government's sovereign immunity, granting the Court jurisdiction over (1) any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States," *id.* § 1491(a)(1); and (2) any claim against the United States in favor of a tribe "arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or [that] is one which otherwise would be cognizable in the Court of

Federal Claims if the claimant were not an Indian tribe, band or group," *id.* § 1505.[3] The acts, however, are purely jurisdictional and do not create "a substantive right enforceable against the Government by a claim for money damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). To establish jurisdiction, the plaintiff must identify a substantive source of law, distinct from the Tucker Act or Indian Tucker Act, that satisfies a two-part test outlined by the Supreme Court. *United States v. Navajo Nation* (*Navajo II*), 556 U.S. 287, 290–91 (2009).

Under that test, the tribe first "'must identify a substantive source of law that establishes specific fiduciary or other duties and allege that the Government has failed faithfully to perform those duties.'" *Id.* at 290 (quoting *United States v. Navajo Nation* (*Navajo I*), 537 U.S. 488, 506 (2003)). "[A] statute or regulation that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). Rather, "the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U.S. at 506. Next, the tribe must demonstrate that "the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as

---

[3] The last clause of the Indian Tucker Act is meant to incorporate the "ordinary" Tucker Act. *United States v. Navajo Nation* (*Navajo II*), 556 U.S. 287, 290 (2009).

a result of a breach of the duties [the governing law] impose[s].” *Navajo II*, 566 U.S. at 291 (alteration in original) (internal quotation marks omitted) (quoting *Navajo I*, 537 U.S. at 506). A statute is money-mandating in two circumstances: when (1) “it can fairly be interpreted as mandating compensation by the Federal Government for . . . damages sustained,” or (2) “it grants the claimant a right to recover damages either expressly or by implication.” *Lummi Tribe of the Lummi Rsrv. v. United States*, 870 F.3d 1313, 1317 (Fed. Cir. 2017) (internal quotation marks and numbering omitted) (quoting *Blueport Co., LLC v. United States*, 533 F.3d 1374, 1383 (Fed. Cir. 2008)).

A statute need not explicitly mandate money damages, and “general trust law [may be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation.” *White Mountain Apache Tribe*, 537 U.S. at 477. However, should the statutes or regulations relied upon to satisfy the question of jurisdiction grant officials “substantial discretion” in carrying out the statutory scheme, they generally cannot be interpreted as mandating compensation. *Wolfchild v. United States*, 731 F.3d 1280, 1292 (Fed. Cir. 2013) (internal quotation marks and citation omitted); *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006) (“A statute is not money-mandating when it gives the government complete discretion over the decision whether or not to pay an individual or group.” (citation omitted)).

A. Plaintiff Has Not Identified a Money-Mandating Source of Law Underlying Count Three.

Plaintiff argues that the executive order that created the Winnemucca reservation ("Executive Order") in conjunction with the *Winters* doctrine provides the money-mandating source of law underlying Count Three. ECF No. 25 at 35–36. In that claim, Plaintiff alleges the Government wrongfully allowed the Offenhauser Development Company to divert water from Colony lands in breach of its fiduciary duty to prevent third-party interference with the Colony's reserved waters rights. ECF No. 22 ¶¶ 164, 168–70; *see* ECF No. 25 at 37.

In *Winters v. United States*, the federal government filed an action to enjoin defendant-corporations from constructing or maintaining dams or reservoirs on the Milk River in Montana, which constituted the northern boundary of the Fort Belknap Indian Reservation, or from otherwise preventing water of the river from flowing to the reservation. 207 U.S. 564, 565 (1908). The Supreme Court held that when the Government set aside the Fort Belknap Indian Reservation by treaty, it reserved for the Indians enough water from the Milk River to support an agrarian lifestyle. *Id.* at 577. Accordingly, the Court upheld the lower court's order enjoining any diversions of the Milk River upstream of the reservation that would render the reservation inarable. *Id.* at 578 ("The power of the government to reserve the waters and exempt them

from appropriation under the state laws is not denied, and could not be."). *Winters* thus stands for the principle that "a reservation of water rights sufficient to accomplish the purpose of the reservation is made when the Government reserves land for a reservation or other federal enclave." *White Mountain Apache Tribe of Ariz. v. United States*, 11 Cl. Ct. 614, 626 (1987), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993).

Plaintiff argues that in *Hopi Tribe* the Federal Circuit recognized that the *Winters* doctrine imposes fiduciary duties on the Government. ECF No. 25 at 36 (citing *Hopi Tribe*, 782 F.3d at 669). In that case, the Hopi Tribe sued the Government for failing to protect the reservation's water supply from contamination by toxic chemicals. *Hopi Tribe*, 782 F.3d at 665–66. The tribe argued that the Government breached its fiduciary duty under the *Winters* doctrine to preserve the reservation's water quality. *Id.* at 669. The Court held that the *Winters* doctrine "gives the United States the power to exclude others from subsequently diverting waters that feed the reservation" and that in some circumstances "it may also give the United States the power to enjoin others from practices that reduce the quality of water feeding the reservation." *Id.* The Court held the doctrine did not "give the United States responsibility for the quality of water within the reservation, independent of any third-party diversion or contamination." *Id.* According to the Court, "[a]t most, . . . Congress accepted a fiduciary duty to exercise [reserve water] rights and exclude

others from diverting or contaminating water that feeds the reservation." *Id.*

While the United States' duties regarding third-party water diversions are central to this case, they were not in *Hopi Tribe* and the quoted statement generally refers to the existence of a duty in a best-case scenario. Because it was not necessary for the resolution of the issue in *Hopi Tribe*, it constitutes dicta. Lower courts have not interpreted *Hopi Tribe* to decide definitively that the Government owes tribes any specific fiduciary duties with respect to third-party water diversion, instead analyzing the text of specific sources of law to determine the existence of duties related to reserved water rights. *See Ute Indian Tribe of Unitah v. United States*, No. 18-359 L, 2021 WL 1602876, at *4–6 (Fed. Cl. Feb. 12, 2021), *appeal docketed*, No. 21-1880 (Fed. Cir. Apr. 23, 2021); *Crow Creek Sioux Tribe v. United States*, 132 Fed. Cl. 408, 411 (2017), *aff'd*, 900 F.3d 1350 (Fed. Cir. 2018).

Importantly, after the parties completed briefing on the Government's Motion, the Supreme Court decided *Navajo Nation*, holding that an 1868 treaty with the Navajos did not impose upon the federal government a duty to take affirmative steps to secure water for the tribe, even if under the *Winters* doctrine the treaty reserved the tribe's water rights. 143 S. Ct. at 1811, 1814. In that case, the Navajos were not alleging that the Government had interfered with water access but that it should assess, plan, and provide for the tribe's water needs. *Id.* at 1810. The Court held that, although the treaty

creating the Navajo reservation imposed several specific duties on the United States, "the treaty said nothing about any affirmative duty for the United States to secure water." *Id.* at 1813. Specifically, the Court found no language in the Navajo treaty that would establish a "conventional trust relationship with respect to water." *Id.* at 1814 (explaining that the Court would not "'apply common-law trust principles' to infer duties not found in the text of a treaty, statute, or regulation"). As "it is not the Judiciary's role to update the law," the Court concluded its must leave "to Congress and the President the responsibility to enact appropriations laws and to otherwise update federal law as they see fit in light of the competing contemporary needs for water." *Id.* at 1814–15.

Here, the source of law setting aside the Colony's land is contained in a single paragraph of an executive order. The Executive Order states:

> It is hereby ordered that the following lands in Nevada be, and they are hereby reserved from entry, sale or other disposal and set aside for the use of two certain bands of homeless Shoshone Indians now residing near the towns of Winnemucca and Battle Mountain, Nevada.

President Woodrow Wilson, Executive Order of June 18, 1917.

Like the Navajo treaty, there is no language in the Executive Order through which a trust

relationship regarding water could be inferred. Indeed, the order is completely silent with respect to water. Just as the Supreme Court found the Navajo treaty did not impose a duty to take "affirmative steps" to secure water for the Navajo Tribe, the Court also concludes the Executive Order does not impose a duty on the Government to take "affirmative steps" to prevent diversion of water onto the Winnemucca reservation. *Navajo Nation*, 143 S. Ct. at 1814. That *Winters* nonetheless recognizes the Colony's reserved water rights does not in itself create a duty for the Government to enforce those rights against third-party interference. *Winters* only recognized the federal government's power to assert such rights on behalf of a tribe, not that it has a specific fiduciary duty to do so. *Navajo Nation* instructs that neither the Government's general trust relationship with the Colony nor the Executive Order fill in the gap to create an affirmative duty to ensure the Colony's access to water. Indeed, *Navajo Nation* rejected the argument that the Government's purported control over reserved water rights created trust duties to the Navajos and indicated that the Navajos could assert their own interests in water rights litigation.[4] *Navajo Nation*, 143 S. Ct. at 1815–16.

---

[4] As noted above, reserved water rights cases in this court have employed a similar analytical framework. In *Ute Indian Tribe*, a tribe brought a breach of trust claim premised on, among other things, the Government's failure to prevent trespass theft and conversion of the tribe's reserved water rights. 2021 WL 1602876, at *3 n.3. In *Crow Creek Sioux*, a tribe brought a similar claim based on the Government's diversion of water from the Missouri River through the construction of several dams. 132 Fed. Cl. at 409. In each case, the courts looked to the

Plaintiff argues that *Navajo Nation* is inapposite because Plaintiff's claims are not premised on the treaty with the Navajos analyzed in that case. ECF No. 26 at 2. Nevertheless, since both the Navajo treaty and the Executive Order make no mention of any affirmative duty respecting water, the analytical framework laid out by the Supreme Court compels the same conclusion in both cases. Plaintiff also argues that *Navajo Nation* is inapplicable since it did not overrule *Winters*. But while the Supreme Court did not overrule the earlier precedent, the Court here must nevertheless follow the Supreme Court's guidance in analyzing cases involving the *Winters* doctrine, and that guidance leads the Court to conclude that neither the *Winters* doctrine nor the Executive Order impose the trust responsibilities Plaintiff asserts here.

Because the Executive Order does not impose a duty upon the Government to prevent third- party diversion of water onto Colony lands or otherwise take affirmative steps to secure water for Colony lands, it is not a money-mandating source of law that can support jurisdiction in this case. And because Plaintiff has not identified an otherwise

---

language of the sources of law at issue to determine whether they imposed specific trust obligations with respect to water, and they found none. *Ute Indian Tribe*, 2021 WL 1602876, at *4–6; *Crow Creek Sioux*, 132 Fed. Cl. at 409, 411 (noting treaties establishing reservations did not address water rights; holding general trust language in statute to manage natural resources, alongside *Winters*, did not create specific trust obligations sufficient to invoke jurisdiction under the Indian Tucker Act).

money-mandating source of law underlying Count Three, the Court does not have jurisdiction to hear such claim under the Tucker Act or Indian Tucker Act.

B. Plaintiff Has Not Identified a Money-Mandating Source of Law Underlying Count Four.

Plaintiff alleges that the Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C. §§ 4101–4243, provides the money-mandating source of law underlying Count Four. ECF No. 25 at 39. In that count, Plaintiff claims that the Government wrongly conveyed leaseholds for residential housing on Colony land to nonmembers without collecting rents, excluded Colony members from Colony lands, and prevented the Colony from applying for housing grants. ECF No. 22 ¶¶ 174–79. As a result, Plaintiff alleges it suffered over $20,000,000 in damages. *Id.* ¶ 179.

NAHASDA directs the Government to provide grants to Indian tribes to carry out affordable housing activities. 25 U.S.C. § 4111(a). Plaintiff does not allege that it made an application for grants, and accordingly does not allege the Government failed to provide grants owed under a NAHASDA contract. ECF No. 22 ¶ 179. Rather, it alleges that, without a recognized tribal government, it lacked the ability to enter into contracts or receive grants under NAHASDA and thus is seeking to recover the amount of funding it should have received. *Id.* ¶ 176; ECF No. 25 at 40.

The Federal Circuit has held that the obligation imposed by NAHASDA to supply tribes with housing grants is not money-mandating. *Lummi Tribe*, 870 F.3d at 1319. As the Court explained, "[u]nder NAHASDA, the Tribes are not entitled to an actual payment of money damages, in the strictest terms." *Id.* at 1318. Rather, the Court held that the appropriate remedy for a failure to allocate or disburse funds under NAHASDA is the award of "strings-attached NAHASDA grants—including subsequent supervision and adjustment," which is a form of equitable relief. *Id.*

Plaintiff responds that it "is not seeking equitable relief in the form of strings-attached NAHASDA grants It is seeking money damages because it never received the funding it was due." ECF No. 25 at 40. But the Federal Circuit has specifically rejected such a distinction. *Lummi Tribe* held that any claim for relief under NAHASDA for a failure to provide housing grants "would necessarily be styled in the same [equitable] fashion; the statute does not authorize a free and clear transfer of money." 870 F.3d at 1319. Thus, NAHASDA cannot serve as the money- mandating source of law underlying Count Four, and the Court therefore lacks jurisdiction to hear such claim under the Tucker Act or Indian Tucker Act.

C. Plaintiff Has Identified a Money-Mandating Source of Law Underlying Count Five.

Plaintiff's Amended Complaint asserts that the Indian Non-Intercourse Act, 25 U.S.C. § 177, provides the money-mandating source of law underlying Count Five. ECF No. 22 ¶¶ 181–82. In its Opposition, Plaintiff alleges that the Indian Long-Term Leasing Act, 25 U.S.C. § 415, and its implementing regulations, 25 C.F.R. §§ 162.005 and 162.023, provides a further basis for jurisdiction. ECF No. 25 at 41, 45–46. Count Five alleges the Government wrongfully conveyed a possessory interest in Colony lands to nonmembers, allowed various encroachments on Colony lands without the Colony's consent, and allowed the diversion of a stream which prevented water from entering Colony lands. ECF No. 22 ¶¶ 190–91. The Court concludes that the Indian Long- Term Leasing Act, but not the Indian Non-Intercourse Act, is a money-mandating source of law that may form a jurisdictional basis of Count Five.

1. Plaintiff Has Not Established That the Indian Non-Intercourse Act Is a Money-Mandating Source of Law.

The only substantive source of law that Plaintiff identifies in Count Five of the Amended Complaint is the Indian Non-Intercourse Act. *Id.* ¶ 181. The Non-Intercourse Act states:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 177.

Plaintiff relies on two decisions by the Court of Claims that found the Non-Intercourse Act imposes fiduciary duties on the Government.[5] In *Seneca Nation of Indians v. United States*, the Court of

---

[5] The Court of Claims is a predecessor to the Federal Circuit, and its decisions remain binding on this Court unless overturned by a higher court or by statute. *S. Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

Claims held that "[i]n the light of [the Non-Intercourse Act's] language, contemporaneous construction, and history, . . . the United States assumed a special responsibility to protect and guard against unfair treatment in [transactions for the disposition of tribal land]." 173 Ct. Cl. 917, 925 (1965). And in *United States v. Oneida Nation of New York*, the Court "re-affirm[ed] previous decisions that held that the Trade and Intercourse Act establishes a fiduciary relationship between the Indians and the United States Government." 477 F.2d 939, 943 (Ct. Cl. 1973). Other cases that are not binding on this Court have likewise recognized a fiduciary relationship created by the Non-Intercourse Act. *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (holding Non-Intercourse Act created trust relationship between Government and tribes); *Alabama-Coushatta Tribe of Tex. v. United States*, Cong. Reference No. 3-83, 2000 WL 1013532, at *63 (Fed. Cl. June 19, 2000) (same); *but see Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 380 (2013) (holding Non-Intercourse Act did not "give rise to any specific fiduciary duties that are applicable to the judiciary"), *aff'd in part, vacated in part, remanded*, 782 F.3d 1345 (Fed. Cir. 2015).

Seneca and *Oneida*, however, were decided before the Supreme Court established the two- part test of *Navajo I* and *II* for determining jurisdiction over an Indian Tucker Act claim. And both cases addressed a question of liability under the Non-Intercourse Act in conjunction with the Indian Claims Commission Act ("ICCA"). *Seneca*, 173 Ct. Cl. at 926

(holding the Non- Intercourse Act could support recovery of money damages under the ICCA when a tribe received “unconscionably low consideration” for the disposition of its land); *Oneida*, 477 F.2d at 941 (holding the Government “might be liable” for money damages under the ICCA if the Non-Intercourse Act created a fiduciary duty upon the Government regarding tribal land transactions).

Plaintiff has not invoked the ICCA here, nor could it, as the act only granted jurisdiction over claims accruing before August 14, 1946. 25 U.S.C. § 70a. The standard applied in *Seneca* and *Oneida* to determine if the courts had jurisdiction over the tribes’ claims differs significantly from the standard this Court must apply. In those cases, the courts’ jurisdiction was premised on subsection 2, clause 5 of the ICCA.[6] *Seneca*, 173 Ct. Cl. at 926; *Oneida*, 477 F.2d at 941. Clause 5 applied to “claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.” 25 U.S.C. § 70a(2)(5). The courts in both cases held that a “‘special relationship’ [was] established between the government and the claimant Indians affecting the controverted subject matter” based on the Non-Intercourse Act. *Oneida*, 477 F.2d at 942 (quoting *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 502 (1967)); *see Seneca*, 173 Ct. Cl. at 925–26.

[6] In *Seneca*, the court held it also had jurisdiction over the plaintiff’s claims under clause 3 of subsection 2, 173 Ct. Cl. at 925–26, which applies to certain claims arising from “treaties, contracts, and agreements between the claimant and the United States,” 25 U.S.C. § 70a(2)(3). Here, Plaintiff’s claims are not premised on any agreement between it and the United States.

However, that conclusion was not driven by any particular text of the statute found to create specific fiduciary or other duties of the Government that are money-mandating. Rather, the courts cited to a speech by President George Washington to the Seneca tribe expounding on the Act. *Oneida*, 477 F.2d at 941–42 (emphasis omitted) ("The General Government will never consent to your being defrauded, but it will protect you in all your just rights [Y]ou will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians."); *see Seneca*, 173 Ct. Cl. at 923–24.

Under the standards applicable to this Court, the recitation of a "general trust relationship" is insufficient to establish jurisdiction over a breach of trust claim. *Hopi Tribe*, 782 F.3d at 667. Furthermore, the Colony "must establish, among other things, that *the text* of a treaty, statute, or regulation imposed certain duties on the United States." *Navajo Nation*, 143 S. Ct. at 1813 (emphasis added). The jurisdictional analyses of *Oneida* and *Seneca* are simply inapplicable to the Court's current standards. Plaintiff has pointed to no other authority that has held the Non- Intercourse Act imposes specific fiduciary duties on the Government that are money-mandating and only asserts without any argument that *Seneca* and *Oneida* "would survive analysis under *White Mountain Apache II*." ECF No. 25 at 44.

With no binding precedent applicable to the jurisdictional question at hand, the Court concludes that under the standard laid out in *Navajo I*, the text of the Non-Intercourse Act does not impose any "specific fiduciary or other duties" on the United States. *Navajo I*, 537 U.S. at 506. The statute lays out three requirements that: (1) any conveyance of tribal land must be made through treaty pursuant to the Constitution; (2) any private party who attempts to enter such a treaty is liable for $1,000; and (3) a state may, with the approval of the United States, adjust the terms of treaties that convey tribal land held within its jurisdiction. 25 U.S.C. § 177. The Act thus grants the Government certain *powers* in the facilitation of tribal land conveyances—to enter treaties, to penalize private individuals who attempt to acquire tribal land, and to allow participation by the states—but nothing in the text places upon the Government a *duty* to carry out any specific function. Because the Indian Non-Intercourse Act fails the first prong of the *Navajo I* analysis, the Court concludes it is not a money-mandating source of law and cannot support jurisdiction in this case.

2. The Indian Long-Term Leasing Act Is a Money-Mandating Statute Granting the Court Jurisdiction Over Count Five.

The Federal Circuit in *Brown v. United States* held that the Indian Long-Term Leasing Act and its implementing regulations impose on the Government money-mandating fiduciary duties in the tribal leasing context. 86 F.3d 1554, 1563 (Fed.

Cir. 1996). The Government admits as much but argues that because Plaintiff did not identify the Act in its Amended Complaint, it cannot raise the statute for the first time in its opposition brief.[7] ECF No. 28 at 26–27 (citing *Jarvis v. United States*, 154 Fed. Cl. 712, 718–19 (2021)).

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." *Gay v. United States*, 93 Fed. Cl. 681, 685 & n. 4, 5 (2010) (quoting 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed. 2022)) (allowing claim to move forward despite failure to identify money-mandating statute creating jurisdiction in complaint when relevant statute was readily identifiable); *see, e.g., Ward v. United States*, 89 Fed. Cl. 463, 475 (2009) (same); *Morganroth v. Quigg*, 885 F.2d 843, 846 (Fed. Cir. 1989) (holding plaintiff need not refer in complaint to statute granting court jurisdiction over claims grounded in patent law when claims were clearly based on patent law violations).

The Indian Long-Term Leasing Act requires the Government to approve leases of Indian land, *Brown*, 86 F.3d at 1562, and "ensure that the parties

[7] In its Reply, the Government associates Plaintiff's reference to the Indian Long-Term Leasing Act with the claims under Count Six, *see* ECF No. 28 at 26, but Plaintiff discussed the act under its Count Five argument, *see* ECF No. 25 at 45.

to a lease of Indian land have given adequate consideration to the impacts of the lease on, *inter alia*, neighboring lands and the environment," *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 29 (1st Cir. 2007). The Act's protections are meant to encompass both Indian tribes and their members. *Id.* It can thus be inferred from the facts alleged throughout the Amended Complaint—*i.e.*, that the Government gravely mismanaged the leasing of residential properties on the Colony's land, including failing to collect any rent—that the Indian Long-Term Leasing Act supplies a money-mandating source of law underlying Count Five to that extent. Indeed, the Federal Circuit has drawn a connection between the Act and the Non-Intercourse Act, cited in Count Five, explaining that the former "must, of course, be understood against the backdrop created by [the latter], the most general prohibition on conveyances of interests in Indian land." *Brown*, 86 F.3d at 1562.

Because there is a money-mandating source of law underlying Count Five, the Court concludes it does not lack jurisdiction over such claim solely based on the failure to identify that specific money-mandating source of law.[8]

---

[8] As explained in other sections of this opinion, the Court nonetheless lacks jurisdiction over Count Five for other reasons.

D. Plaintiff Has Identified a Money-Mandating Source of Law Supporting Only Part of Count Six.

Plaintiff identifies 25 U.S.C. § 323, NAHASDA, and the Indian Non-Intercourse Act as the money-mandating sources of law underlying its breach of fiduciary duty claim in Count Six. ECF No. 22 ¶ 199; *see* ECF No. 25 at 47. In support of its claim, Plaintiff alleges that the Government failed to survey Colony lands as requested by the Colony; failed to prevent encroachments on Colony lands, including a garage, shed, trailer park, road, and driveway; interfered with the Colony's efforts to reopen the smoke shop; and failed to recognize a tribal council for the Colony. ECF No. 22 ¶¶ 195–96, 199.

As explained above, Plaintiff has not demonstrated that NAHASDA and the Non-Intercourse Act are money-mandating statutes. The Government concedes that Plaintiff's remaining source of law, 25 U.S.C. § 323, "may create money-mandating fiduciary duties." ECF No. 28 at 26 n.9; *see Mitchell II*, 463 U.S. at 223 (recognizing § 323 and related statutes as money- mandating). It argues, however, that "Plaintiffs' passing reference to 25 U.S.C. [§] 323 in Count Six does not create a plausible claim for relief." ECF No. 28 at 26 n.9. It also argues Plaintiff has not identified a source of law creating a money-mandating duty to recognize a tribal government and that no such duty exists. ECF No. 23 at 47 (quoting *Cayuga Indian Nation of N.Y. v. E. Reg'l Dir.*, 58 IBIA 171, 179, 2014 WL 264822, at *6 (Jan. 16, 2014)). Plaintiff does not dispute the

Government's contention that no statute or regulation requires the BIA to recognize a tribal council. Rather, Plaintiff rejects the Government's characterization of its allegations, arguing that its "claim is not about failure to recognize a legitimate tribal government." ECF No. 25 at 48.

The Court has jurisdiction over a claim under the Tucker Act or Indian Tucker Act so long as the plaintiff has identified a money-mandating source of law underlying the claim and demonstrated that it is "within the class of plaintiffs entitled to recover under the money-mandating source." *Jan's Helicopter Serv., Inc. v. F.A.A.*, 525 F.3d 1299, 1307 (Fed. Cir. 2008). Section 323 provides the Secretary of the Interior the power to grant rights-of-way over Indian lands, and tribes such as Plaintiff fall under the class of plaintiffs entitled to relief under the provision. Therefore, the Court concludes that it is not deprived of jurisdiction over Count Six based on a lack of an identified money-mandating source of law.

Nevertheless, if a "plaintiff's case does not fit within the scope of the [money-mandating source of law,] . . . plaintiff loses on the merits for failing to state a claim on which relief can be granted." *Id.* (quoting *Fisher v. United States*, 402 F.3d 1167, 1175–76 (Fed. Cir. 2005)). Plaintiff's contentions in Count Six regarding surveying, recognition of a tribal government, and the smoke-shop operation are patently unrelated to the Secretary of the Interior's power to grant rights-of-way. That the Government failed to compensate the Colony for

rights-of-way resulting in the physical encroachments alleged in Count Six, however, could plausibly entitle Plaintiff to relief. *See Mitchell II*, 463 U.S. at 223. The Court thus concludes that Count Six should be dismissed in part for failure to state a claim upon which relief can be granted to the extent the claim rests on allegations other than those related to physical encroachments onto Colony lands. [9]

E. Plaintiff Has Not Identified a Money-Mandating Source of Law Underlying Count Seven.

As the Government correctly argues, Plaintiff has not identified any money-mandating source of law underlying Count Seven. ECF No. 23 at 47. In that count, Plaintiff simply alleges that it has "no other remedy at law or administrative appeal to recover the value of the loss of their lands and sovereignty" resulting from the Government's numerous alleged breaches of trust and violations of law. ECF No. 22 ¶ 204. Plaintiff makes no argument in defense of jurisdiction, which the Court construes as a concession of the issue. *See Winnemucca Indian Colony*, 2014 WL 3107445, at *1 n.3. Since Plaintiff has admittedly failed to identify a money-mandating source of law underlying Count Seven, the Court concludes it lacks jurisdiction to hear such claim.

---

[9] As explained in other sections of this opinion, the Court nonetheless lacks jurisdiction over Count Six for other reasons.

III. Count One, Part of Count Two, and Counts Three through Six Are Barred by the Statute of Limitations.

The Government contends Count One, part of Count Two,[10] and Counts Three through Six should be dismissed as untimely under the court's statute of limitations, as each of these claims accrued more than six years before Plaintiff filed the Original Complaint. ECF No. 23 at 36. The Government attached a series of maps, deeds, satellite photos, and other documents to its Motion in support of its contention. ECF No. 23, Exs. 15–25. Through these exhibits, as well as the Colony's complaint in the 2013 Court of Federal Claims case ("2013 Complaint"), the Government aims to show that various encroachments and other events on the Colony's lands, which serve as the basis for claims in the Amended Complaint, existed over six years before Plaintiff filed suit and that Plaintiff was aware or should have been aware of them at that time. ECF No. 23 at 38–41.

Plaintiff does not contest the validity of any evidence introduced by the Government but argues that the statute of limitations nevertheless does not bar its claims for several reasons—*i.e.*, because (1) the Government has not repudiated its trust relationship with the Colony, (2) the Government

[10] As part of Count Two, Plaintiff alleges that a road was constructed alongside Colony lands in 2018. ECF No. 22 ¶ 158. The Government concedes that if Plaintiff is referring to a road different from Highland Road, then this allegation falls within the limitations period. ECF No. 23 at 49.

has not provided the Colony with an accounting, (3) the Wasson group was not recognized as the Colony's leadership until 2014, and (4) the continuing claims doctrine saves its claims. ECF No. 25 at 24. None of Plaintiff's arguments are availing.

The Court's six-year statute of limitations on actions against the United States "is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576–77 (Fed. Cir. 1988). The limitations period begins to run when a "claim first accrues." 28 U.S.C. § 2501. The Federal Circuit has found that a claim ordinarily accrues "when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011) (quoting *Hopland Band*, 855 F.2d at 1577). In the tribal breach-of-trust context, a claim accrues "when the trustee 'repudiates' the trust" and the Colony knows or should have known of that repudiation. *Shoshone Indian Tribe of Wind River Rsrv. v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) (citations omitted) (citing *Hopland Band*, 855 F.2d at 1573); *see San Carlos Apache Tribe*, 639 F.3d at 1350. "A trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as trustee." *Shoshone Indian Tribe*, 364 F.3d at 1348. Courts employ an objective standard to determine whether a tribe knew or should have known that the United States

repudiated its trust responsibilities. *San Carlos Apache Tribe*, 639 F.3d at 1350.

A. The Amended Complaint Alleges the United States Has Repudiated Its Trust Relationship.

Plaintiff argues that the statute of limitations has not begun to run on its claims for breach of trust because the United States has not formally repudiated its trust relationship with the Colony, an essential step for claim accrual. ECF No. 25 at 24–25. A formal repudiation of the Government's role as trustee is unnecessary, however.

For the purposes of claim accrual, a repudiation simply means that "the trustee has failed to fulfill his responsibilities," which can occur "by express words or by taking actions inconsistent with his responsibilities as trustee." *Shoshone Indian Tribe*, 364 F.3d at 1348. Plaintiff alleged throughout its Amended Complaint that the United States breached its trust obligations to the Colony by failing to fulfill its responsibilities in myriad ways. *See, e.g.*, ECF No. 22 ¶¶ 158 (allowing construction of electrical substation, power lines, and road on Colony land without Colony approval), 168 (failing to prevent diversion of water onto Colony land), 174 (conveying housing to nonmembers without the collection of any payment), 199 (failing to recognize tribal council). Indeed, if Plaintiff did not make such allegations, then it would not have stated a claim for breach of trust in the first place, as a trustee's failure to fulfill his trust obligations is a required element

of a *prima facie* claim for breach of trust. 121 AM. JUR. TRIALS 129 *Fiduciary Fraud* (2011); *Navajo I*, 537 U.S. at 506 (holding that the Government's failure "faithfully to perform [its fiduciary] duties" is an essential element of an Indian breach of trust claim).

Therefore, while the United States may not have formally repudiated its role as trustee to the Colony, Plaintiff has alleged through the Amended Complaint that the United States made limited, specific repudiations of its trust responsibilities. As further discussed below, these alleged repudiations determine when the statute of limitations period for each claim begins.

B. The United States Need Not Provide the Colony with an Accounting for the Limitations Period to Commence.

Plaintiff also contends that the limitations period has not commenced on its claims, and will not commence, until the United States provides the Colony with an accounting of BIA funds to determine the extent of the Colony's losses. ECF No. 25 at 25–26. Plaintiff bases its argument on two sources of law: (1) the common law of trusts, and (2) the Interior Department Appropriations Act of 2014. *Id.* at 25–27 (citing *Shoshone Indian Tribe*, 364 F.3d at 1348; Consolidated Appropriations Act, Pub. L. No. 113-76, 128 Stat. 5, 305–06 (Jan. 17, 2014)). The Federal Circuit has held that in tribal breach of trust cases it is "common for the statute of limitations to not commence to run against the beneficiaries until

a final accounting has occurred that establishes the deficit of the trust." *Shoshone Indian Tribe*, 364 F.3d at 1348 (citing 76 AM. JUR. 2D *Trusts* § 440 (2000); *McDonald v. First Nat'l Bank of Bos.*, 968 F. Supp. 9, 14 (D. Mass. 1997)). Congress codified this common-law principle through various Interior Department Appropriations Acts, most recently in 2014, which states: "the statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected Indian tribe . . . has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." 128 Stat. at 305–06.

Importantly, however, the 2014 Act tolled the statute of limitations applicable only to claims premised on "losses to or mismanagement of trust funds" for which an accounting would be necessary to determine "*whether* there has been a loss." *Id.* (emphasis added). It did not toll the limitations period for all breach of trust claims, and especially not those where the claimant alleged that "an open repudiation of an alleged trust duty" had already occurred. *Wolfchild*, 731 F.3d at 1291 (holding tolling provision did not apply to case not involving trust funds and where accounting would not be necessary to put the tribe on notice of its claim). In the latter scenario, as in this case, an accounting is not necessary to learn of the *existence* of a loss giving rise to a claim, although it could help show the *extent* of a loss. Indeed, another judge of this court recently held that "if the Tribe is on notice of a breach of the government's trust obligations sufficient to state a

claim—and simply is uncertain of the quantum of damages—the claim already has accrued and the statute of limitations has begun to run." *Chemehuevi Indian Colony v. United States*, 150 Fed. Cl. 181, 202 (2020). This holding finds support in longstanding binding precedent, as the Federal Circuit "has 'soundly rejected' the contention 'that the filing of a lawsuit can be postponed until the full extent of the damage is known.'" *Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (quoting *Boling v. United States*, 220 F.3d 1365, 1371 (Fed. Cir. 2000)).

Here, Plaintiff argues that "the true extent of the damage is unknown at this time" and "an accounting is necessary to calculate the extent of loss." ECF No. 25 at 26, 28. Plaintiff does not, however, argue that an accounting is necessary to determine *whether* there has been a loss, nor would such argument be plausible. Plaintiff's claims involve alleged trust obligations pertaining to the Colony's lands and resources—not trust funds—and the Amended Complaint alleges that the Government committed "an open repudiation" of those alleged trust duties. *Wolfchild*, 731 F.3d at 1291. Therefore, an accounting is not necessary for accrual of Plaintiff's claims.

C. The Wasson Group Need Not Have Been Recognized for the Limitations Period to Commence.

Even assuming its claims had technically accrued, Plaintiff argues that the limitations period

could not have commenced until December 13, 2014, when the BIA recognized the Wasson group as the Colony's duly elected council, as that is the earliest time the Wasson group could have been on inquiry notice of the Government's trust repudiations.[11] ECF No. 25 at 27. As Plaintiff's Opposition expressly recognizes, however, "[t]here is only one Plaintiff—the Tribe." *Id.* at 21. It is the plaintiff's awareness of the facts fixing the Government's liability that determines when a claim accrues. *See San Carlos Apache Tribe*, 639 F.3d at 1350 (a claim accrues when "*the plaintiff* was or should have been aware of the[] existence" of "the events which fix the government's alleged liability" (emphasis added)). Whether Plaintiff—the Colony—was aware of the Government's alleged breaches of trust is not dependent on changes in or recognition of tribal leadership. *Cf. Wyandot Nation of Kan. v. United States*, 124 Fed. Cl. 601, 606 (2016) (holding limitations period on tribal breach of trust claim began when tribe became aware of breach in 1880s and thus successor-in-interest's claims were time-barred), *aff'd*, 858 F.3d 1392 (Fed. Cir. 2017).

[11] Plaintiff's Opposition is confusing on this point. It argues that Plaintiff's claims did not accrue until December 13, 2020, which would be six years from the BIA's recognition of the Wasson group pursuant to an order in the Nevada Case. ECF No. 25 at 27; *see* ECF No. 22 ¶ 96 ("On December 13, 2014, the BIA in response to Court Order finally recognized the government of the Winnemucca Indian Colony."). Plaintiff likely meant that the statute of limitations did not *expire* until that date. The brief also erroneously refers to December 9, 2014, as the date of BIA's recognition.

Plaintiff has provided no caselaw supporting the proposition that the limitations period for a tribe does not commence until the tribal council that brings suit has been recognized by the BIA.[12] At best, Plaintiff's argument could be construed as a claim that the lack of a BIA-recognized council created a "legal disability" for the Colony that prevented it from filing an action, in which case § 2501 would entitle it to additional time to bring suit. 28 U.S.C. § 2501 ("A petition on the claim of a person under legal disability . . . at the time the claim accrues may be filed within three years after the disability ceases."). But even assuming the lack of a recognized tribal council states a cognizable legal disability, the limited tolling provided under § 2501 would only extend the Colony's time to file an action until December 13, 2017 (three years after BIA's recognition of the Wasson group).

Accordingly, that the BIA did not recognize the Wasson group until December 13, 2014, does not save Plaintiff's claims from being time barred.

[12] By contrast, the Federal Circuit has held that a tribe's claim did not accrue until the tribe itself gained government recognition through judicial proceedings in another forum, as federal recognition or acknowledgement was a prerequisite to the tribe's right to statutory benefits, and thus a necessary element of the claim. *Samish Indian Nation v. United States, 419 F.3d 1355, 1369 (Fed. Cir. 2005). Despite the leadership disputes, Plaintiff does not allege that the Colony's status as a federally recognized tribe was ever in question. See ECF No. 22 ¶ 2.*

D. The Continuing Claims Doctrine Does Not Apply to Plaintiff's Claims.

In the same vein, Plaintiff asserts that the continuing claims doctrine preserves each of its claims despite the statute of limitations. ECF No. 25 at 28. When a plaintiff pleads "a series of distinct events—each of which gives rise to a separate cause of action—as a single continuing event," the continuing claims doctrine operates to save the later-arising claims even if the limitations period lapsed for the earlier-arising claims. *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998) (citing *Brown Park Estates–Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997)); *Friedman v. United States*, 310 F.2d 381, 384–85 (Ct. Cl. 1962)); *Rosales v. United States*, 89 Fed. Cl. 565 (2009) (holding continuing claims doctrine applies where "the last in a series of related, on-going actions falls within the six-year statute of limitations"). "In order for the continuing claim doctrine to apply, the plaintiff's claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." *Wells v. United States*, 420 F.3d 1343, 1345 (Fed. Cir. 2005) (quoting *Brown Park*, 127 F.3d at 1456). "On the other hand, if there was only a single alleged wrong, even though the wrong caused later adverse effects, . . . the continuing claim doctrine is not applicable." *Id.* at 1345–46 (citing *Hart v. United States*, 910 F.2d 815 (Fed. Cir. 1990)).

1. Plaintiff's Pleaded Claims Are Not Continuing Claims.

There are two categories of Plaintiff's claims that the Government argues are barred by the statute of limitations: (1) physical encroachments onto Colony land that the Government failed to address, ECF No. 22 ¶¶ 153–55, 158–61, 168–170, 191, 196–98; and (2) trespasses by nonmembers living on Colony land that the Government either wrongfully authorized and/or has failed to remedy through removal or eviction, *id.* ¶¶ 112, 174–78.

The Government's failures to prevent or prosecute physical encroachments onto Colony land, however, constitute "single distinct event[s]" that have only had "continued ill effects later on." *Simmons v. United States*, 71 Fed. Cl. 188, 192–93 (2006) (quoting *Brown Park*, 127 F.3d at 1456) (holding failure to prevent road construction on plaintiff's trust land did not constitute continuing claim). Likewise, the Government's allowing nonmembers to occupy Colony housing and failing to set proper rent rates, or its failure to remove trespassers living in unauthorized housing, also constitute singular alleged wrongs even if the Colony continues to suffer from the consequences of the Government's original decisions. *See Brown Park*, 127 F.3d at 1459 (holding failure to adjust rental payments was not continuing claim even when unsuitably low payments continued into limitations period); *Oenga v. United States*, 83 Fed. Cl. 594, 616 (2008) (same); *Simmons*, 71 Fed. Cl. at

192–93 (holding failure to prevent trespassers from entering trust land did not constitute continuing claim).

Take for example Plaintiff's claim that the Government wrongfully allowed a road to be constructed on Colony land. ECF No. 22 ¶ 154. According to the satellite imagery submitted by the Government, the road was constructed in 2013 at the latest. *See* ECF No. 23-15. Each day since then the road continues to exist, traffic may frequent upon it, and all the while Plaintiff lacks payment for the intrusion; however, these harms are the direct and natural result of the road's initial construction. Or take Plaintiff's allegation that the Government unlawfully conveyed housing on the Colony's land to nonmembers and has refused the Colony's requests to remove trespassing individuals. *See, e.g.*, ECF No. ¶¶ 33, 41, 64, 79, 82, 97–99, 174–78. Again, while for decades the alleged trespassers have been ever present and the Colony has continuously lacked access to or benefits from Colony housing, such harm is the continued effect of the BIA's original decision to convey the housing to the alleged trespassers in 1997 and, with respect to any other individuals, to the Government's initial refusal to remove alleged trespassers dating back to at least 2011. As aptly described in *Brown Park*, each of these claims arises from one alleged wrong by the Government, which accrued all at once, and the continuing harm alleged by Plaintiff results from the single earlier alleged wrong. 127 F.3d at 1457. Accordingly, none of Plaintiff's claims in its Amended Complaint are part of "a series of independent and distinct events or

wrongs," each with its own associated damages, and thus do not constitute continuing claims. *Id.* at 1456.

2. Plaintiff's Newly Raised Claims Are Not Continuing Claims.

In its Opposition, Plaintiff raises six allegations that it argues show a continuation of the Government's alleged wrongs. ECF No. 25 at 29. Specifically, Plaintiff alleges the Government: (1) removed Plaintiff from the budget formulation process; (2) failed to allocate all budget funds to the Colony; (3) failed to institute a tribal court for the Colony; (4) declined the Colony's application for law enforcement; (5) cut off communications with any Colony member except the Colony's chairwoman; and (6) denied the trust status of a parcel of Colony lands. *Id.* at 30–34. All but one of these allegations do not appear in Plaintiff's Amended Complaint; and in any event, they do not save Plaintiff's untimely claims.

First, these allegations do not constitute continuing claims as they are not a continuation of the wrongs alleged in the Amended Complaint. As a threshold matter, the continuing claims doctrine applies to save later arising claims in a series of *related* events or actions. *Rosales*, 89 Fed. Cl. at 579; *see Friedman*, 310 F.2d at 384–85 (finding continuing claims doctrine applied to save later arising periodic pay claims); *Burich v. United States*, 366 F.2d 984, 986–87 (Ct. Cl. 1966) (same); *Mitchell v. United States*, 10 Cl. Ct. 787, 789 (1986) (holding continuing claims doctrine applied to save later-

arising instances in a pattern of repeated failures to replant a harvested forest). Except for the last allegation regarding the trust status of the Colony's land, Plaintiff's newly raised claims share no relation to the land and natural resource-based claims pled in the Amended Complaint, but rather constitute entirely unique alleged wrongs.

Second, the more recent April 2015 denial of the trust status of the Colony's land, which in any event appears to have been formally reversed in August 2020 (ECF No. 22 ¶¶ 99, 102), is not a continuing claim. BIA issued the denial in response to a tribal court order directing the eviction of the alleged trespassers to whom the Government, as described above, conveyed residential housing in 1997 and/or whom the Government has refused to remove since at least 2011. ECF No. 22 ¶¶ 33, 82, 97–99. As of those earlier dates, all events necessary to fix the Government's alleged liability had occurred, and Plaintiff's claim accrued all at once. *Brown Park*, 127 F.3d at 1459.

Finally, even if the Court found that Plaintiff's newly raised claims constitute a continuation of Plaintiff's claims as pled in the Amended Complaint, such that the continuing claims doctrine applied, the doctrine would act only to save the newly raised claims, not the claims in the Amended Complaint. This is because the continuing claims doctrine serves to preserve those claims in a series of related events that occurred within the six-year statute of limitations period; it does not resurrect the related claims for which the limitations period has expired.

Friedman, 310 F.2d at 6–8; *Brown Park*, 127 F.3d at 1455–56; *Mitchell*, 10 Cl. Ct. at 789.

Because each of the claims in Counts One, part of Two, and Three through Six accrued outside of the limitations period, the continuing claims doctrine cannot save them regardless of the occurrence of later-arising claims.

3. Plaintiff Should Not Be Permitted to Further Amend Its Complaint to Include the Newly Raised Claims.

Although Plaintiff's newly raised claims allegedly took place within the limitations period, it is axiomatic that Plaintiff cannot raise new allegations in its opposition brief to survive a motion to dismiss. *Jarvis*, 154 Fed. Cl. at 718. While Plaintiff incorrectly argues it did not need to include these allegations in its Amended Complaint, it alternatively requests leave to again amend its pleading. ECF No. 25 at 29. Under RCFC 15(a), the Court has discretion to allow a party to amend its complaint, and amendments should be liberally granted. *Mitsui Foods, Inc. v. United States*, 867 F.2d 1401, 1403 (Fed. Cir. 1989). Nevertheless, "'repeated failure to cure deficiencies by amendments previously allowed . . . [or] futility of amendment' may justify the denial of a motion for leave to amend." *Id.* at 1403–04 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Allowing Plaintiff to amend its Amended Complaint to include the newly raised claims would

be futile, as this action is barred nearly in its entirety under § 1500. Moreover, Plaintiff's one-line cursory request for leave to amend does not attempt to state a plausible breach of trust claim, which must both identify a money-mandating source of law that establishes specific fiduciary duties and allege that the Government breached those duties.[13] *Navajo II*, 556 U.S. at 291. Plaintiff fails to identify any substantive source of law underlying its newly raised claims, which largely relate to decisions refusing or denying the Colony's Indian Self-Determination and Education Assistance Act ("ISDA") contract applications. *See* ECF No. 25 at 30–34; *see also Samish Indian Nation v. United States*, 419 F.3d 1355, 1365 (Fed. Cir. 2005) (holding that, absent a self-determination contract, "ISDA does not confer a private damage remedy" for non-payment of underlying benefits based on wrongful refusal to accord tribe federal recognition). Moreover, Plaintiff already had an opportunity to amend its Original Complaint once in response to the Government's first motion to dismiss, which raised similar statute of limitations arguments and, specifically, the continuing claims doctrine. *See* ECF No. 8 at 34–36.

---

[13] The Federal Circuit has found such bare requests for amendment to be insufficient. *See Refaei v. United States*, 725 F. App'x 945, 951 (Fed. Cir. 2018) (holding court was not required to address request to amend complaint "because it was merely incorporated into a response to a motion to dismiss"); *see also Albers v. Bd. of Cnty. Comm'rs of Jefferson Cnty., Colo.*, 771 F.3d 697, 706 (10th Cir. 2014).

E. The Government Has Demonstrated That the Encroachments Alleged by Plaintiff Occurred Outside the Limitations Period.

Since Plaintiff has not demonstrated that the statute of limitations was tolled or has not begun to run, the Court must determine the accrual dates of its claims. Plaintiff bears the burden of showing by a preponderance of the evidence that its encroachment and trespass claims accrued within the statute of limitations. *See Fid. & Guar. Ins. Underwriters*, 805 F.3d at 1087. The alleged encroachments on tribal land include: (1) a street referred to as "Highland Road," ECF No. 22 ¶¶ 152–56, 191 (Counts One, Five); (2) an easement granted to a neighboring subdivision, *id.* ¶ 154 (Count One); (3) an electrical substation, *id.* ¶¶ 158, 160–62, 191 (Counts Two, Five); (4) overhead powerlines, *id.* ¶¶ 158–62, 191 (Counts Two, Five); (5) structures or wells that divert water from a stream bed or "remove water from wells from which water was able to reach the Colony's lands," *id.* ¶ 168; *see id.* ¶¶ 169–72, 191 (Counts Three, Five); and (6) structures placed by a neighboring subdivision, which include "a garage, shed, part of a trailer park, road, and driveway," *id.* ¶ 196 (Count Six). The trespass claims relate to nonmembers residing in HUD housing on the Colony's land. *Id.* ¶¶ 174–78 (Count Four).

The Government submitted satellite images revealing that—as of 2013—Highland Road, the overhead powerlines, the ingress/egress for the neighboring subdivision, and the electrical

substation were already constructed. *See* Exs. 15–19 to MTD, ECF Nos. 23-15, 23-16, 23-17, 23- 18, 23-19. The Government also submitted a 1989 map for development of a subdivision that reveals the existence of Highland Road at that time, Ex. 20 to MTD, ECF No. 23-20; a 1989 quitclaim deed for the overhead powerlines, Ex. 21 to MTD, ECF No. 23-21; a 1997 right-of-way application for the overhead powerlines, Ex. 22 to MTD, ECF No. 23-22; and a 1974 land survey that includes the electrical substation, Ex. 23 to MTD, ECF No. 23-23—all of which show that these structures were in place well before Plaintiff filed even its 2013 Complaint.

The Government also submitted satellite images of the Colony's residential 20-acre plot from 2013, which reveals the existence of a trailer park, road, driveway, sheds, and other structures. Ex. 24 to MTD, ECF No. 23-24. While it cannot be certain, the Government believes that these are the structures Plaintiff refers to in Count Six of its Amended Complaint at paragraph 196. ECF No. 23 at 40. Plaintiff also admitted in its Amended Complaint that alleged trespassers have occupied the 20 acres for decades, including at some point persons "living in makeshift, unhealthy and unauthorized housing." ECF No. 22 ¶ 112; *see id.* ¶¶ 110, 113. And Plaintiff acknowledged that the Government has refused to remove trespassers since as early as 2011, an allegation it also raised in the 2013 Complaint. *Id.* ¶¶ 79–82; Ex. 9 to MTD ¶¶ 71–73, ECF No. 23-9.

Finally, the Government contends Plaintiff's description of the structures that divert water from Colony lands is too vague to determine the structures to which Plaintiff refers. ECF No. 23 at 40. Nevertheless, Plaintiff referred to an upstream subdivision's diversion of water in its 2013 Complaint. ECF No. 23-9 ¶ 15. As for the alleged trespassers in HUD housing on Colony land, the Amended Complaint alleges that the conveyances to those individuals occurred in 1997, which counsel confirmed at oral argument. ECF No. 22 ¶¶ 33, 109–11; Tr. of Oral Arg. at 86:16–88:6, ECF No. 34.

Plaintiff does not dispute the veracity of any of this evidence, nor has Plaintiff presented any evidence to counter the Government's assertions. Accordingly, the Court concludes Plaintiff has not met its burden to demonstrate that the allegations underlying Count One, part of Count Two, and Counts Three through Six occurred within six years prior to the filing of the Original Complaint. To the contrary, the evidence presented by the Government and the allegations in the Amended Complaint and 2013 Complaint show they occurred outside the limitations period and that Plaintiff knew or should have known of the occurrences. Therefore, each of these claims is time barred, and the Court accordingly lacks jurisdiction to entertain them.

IV. Counts Eight Through Eleven Request Equitable Relief That Is Outside of the Court's Jurisdiction.

The Court likewise lacks jurisdiction over Counts Eight through Eleven because they seek equitable relief that is outside the Court's jurisdiction. ECF No. 23 at 50. Plaintiff argues that those claims should survive, as the Court has the authority under 28 U.S.C. § 1491(a)(2) to order equitable relief that will aid in a judgment of liability against the Government. ECF No. 25 at 49.

Generally speaking, the Court lacks equity jurisdiction except in a few narrow circumstances. *Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998). One of those circumstances, which Plaintiff alleges is applicable here, is when equitable relief is "ancillary to claims for monetary relief over which [the Court] has jurisdiction." *Id.* (citing 28 U.S.C. §§ 1491(a)(2), (b)(2)). For example, once liability for money damages has been established, the Court may order an accounting to determine the extent of damages owed. *N. Colo. Water Conservancy Dist. v. United States*, 88 Fed. Cl. 636, 665 (2009) (citing *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 490–91 (1966)); *Am. Indians Residing on Maricopa–Ak Chin Rsrv. v. United States*, 229 Ct. Cl. 167, 667 F.2d 980 (1981)).

Plaintiff's claims, however, do not invoke the Court's limited equitable powers. Count Nine seeks a declaration that "the Colony is entitled to fair and

reasonable compensation for past, present and future use of the Colony's water, land and other property rights." ECF No. 22 ¶ 217. In Count Ten, Plaintiff requests a declaration that "[Colony] members each suffered the loss of the use of the lands for twenty years and the benefits of tribal membership for fifteen years." *Id.* ¶222. And Count Eleven seeks a declaration that "[the Colony] is entitled to the opportunity to petition for the conveyance of the acreage in its purview." *Id.* ¶ 228. Each of these claims are standalone claims for declaratory judgment that are unnecessary and unrelated to any potential award of monetary relief. *Nat'l Air Traffic Controllers*, 160 F.3d at 716 (holding the Court of Federal Claims has no "jurisdiction to grant equitable relief when it is unrelated to a claim for monetary relief pending before the court."). They are thus outside the Court's jurisdiction.

Count Eight, on the other hand, is a demand for documents and an accounting to determine the amount of damages owed in relation to the claims pending before the Court. ECF No. ¶ 212. While the Court is permitted to require an accounting to aid in the assessment of damages, *see N. Colo. Water Conservancy*, 88 Fed. Cl. at 665, for the reasons stated above, each of Plaintiff's substantive counts must be dismissed. Because the Court lacks jurisdiction to entertain Plaintiff's claims, there are no damages to be assessed and therefore no accounting that would be "'an incident of and collateral to' a money judgment." *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998) (quoting 28 U.S.C.

§ 1491(a)(2)) ("[T]he Court of Federal Claims has no power to grant affirmative non-monetary relief unless it is tied and subordinate to a money judgment." (citation and quotation marks omitted)). Count Eight is thus outside the Court's jurisdiction.

V. The Government Did Not Raise New Arguments in Its Reply That Warrant a Surreply.

In response to the Government's Reply, Plaintiff filed a Motion for Leave to File a Surreply. *See* ECF No. 29. Plaintiff states that a surreply is necessary to respond to two contentions the Government made for the first time in its reply in support of its jurisdictional arguments: (1) that the BIA's recognition of a Winnemucca tribal council has been appealed to the IBIA, and (2) that the alleged trespassers on Colony lands have sued the Government. *Id.* at 2. The Government responds that neither of those contentions were used to support its claims for dismissal but rather were raised simply to update the Court on recent factual developments pertinent to the case. ECF No. 30 at 2. Thus, the Government argues, there were no "new" arguments raised in its reply that warrant a surreply. *Id.* The Court agrees.

A surreply is appropriate when a party raises new arguments for the first time in a reply brief, thus depriving the opposing party the opportunity to respond. *Hardy v. United States*, 153 Fed. Cl. 624, 628 (2021). Here, the Government never used the two contentions Plaintiff addresses to support its

dismissal arguments. Rather, it included them in its reply merely as a factual update for the Court. *See* ECF No. 28 at 8–9. The Court has not relied on either contention in deciding the question of dismissal, and thus a surreply would not assist the Court.

VI. The Government's Notice of Additional Authority Properly Provides the Court with New and Pertinent Binding Case Law.

While the Court's rules do not address the filing of notices of supplemental authority, the Government's notice appropriately advises the Court of a new development in relevant case law that post-dates the completion of both the briefing and oral argument in this matter. Not only is the Government's notice helpful to the Court, as *Navajo Nation* is both highly relevant to the issues in this matter and binding authority, the notice does not prejudice Plaintiff since it merely directs the Court to the new decision without including any legal argument. Accordingly, the Court will not strike the Government's notice but will, per the alternative request, consider Plaintiff's response to the Government's notice set forth in its Motion to Strike.

CONCLUSION

For the above stated reasons, the Government's Motion to Dismiss (ECF No. 23) is **GRANTED**. Plaintiff's Motion for Leave to File a Surreply (ECF No. 29) is **DENIED**. Plaintiff's Motion to Strike (ECF No. 36) is **DENIED IN PART** and

GRANTED IN PART. The Clerk is directed to enter judgment accordingly.

SO ORDERED.

Dated: August 25, 2023

/s/ Kathryn C. Davis
KATHRYN C. DAVIS
Judge

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Case No.: 20-1618 L

WINNEMUCCA INDIAN COLONY,
a Federally-recognized Indian Colony;

Plaintiff,

v.

UNITED STATES OF AMERICA ex rel.
SECRETARY OF THE DEPARTMENT OF THE
INTERIOR, BUREAU OF INDIAN AFFAIRS,

Defendants,

FIRST AMENDED COMPLAINT

Filed: February 1, 2022

COMES NOW, the Winnemucca Indian Colony, by and through its duly appointed Council and their attorneys of record, and Plaintiff complains as follows:

STATEMENT OF THE CASE

This action is initiated to recover actual damages, just compensation, an accounting, declaratory judgment, and injunctive relief, arising from Defendants' breach which resulted in takings of property, property rights and monetary assets of the Winnemucca Indian Colony and its individual members during the past decades while the Bureau of Indian Affairs arbitrarily, capriciously and unreasonably breached its trust responsibility to this federally recognized tribe to protect its lands and resources.

These actions and inactions resulted in a group of non-Indians and non-members unlawfully occupying the Colony's lands; other non-members and non-Indians were allowed to strip all income from the Colony through the loss of economic development; easements were allowed or even granted over Colony land without obtaining corresponding income and without obtaining the consent of the Colony Council or membership; encroachments by adjacent development occurred on the Colony's lands and the trustee did nothing to stop these encroachments, water rights were never acquired and wet water flowing across the lands were diverted and no longer available for use on the lands of the Colony; the Bureau of Land Management restored certain lands of Western tribes, but omitted the Colony because the Trustee

failed and refused to recognize a government or appear on behalf of the Colony which cost the Colony the loss of in excess of a potential restoration of over 1,000 acres. For all these reasons and others, the Colony and its members, individually, have been deprived of their lands and resources. The natural resources of the Colony have not been protected and the Colony has lost income and grant and contract funds, due and owing to it as a result of the acts of the United States of America through its agency the Bureau of Indian Affairs. The acts and failure to act of the government were not just a bad investment or negligence, the acts were intentional deprivation of the use of the lands of the Winnemucca Indian Colony to its members.

The loss of the quality of life and standards of living for all members and residents because of the lack of recognition of the government is unfathomable. Whereas BIA doesn't provide anything close to a Shangri-La for reservations, it does provide welfare, shelter, food and protective services according to its legal obligation and as delegated by Congress. As trustee of the lands of the Colony, the BIA failed to protect the lands of the Colony and the use of those lands for the Colony members.

The members were not able to claim and contract for P.L. 93-638 funds and the members individually suffered the loss of health care and educational support payments, among other payments and were deprived of the standing to seek federal resources to aid families and individuals seeking affordable homes in a safe and healthy

environment. For two decades, Defendants refused support, took away the federal safety net, and deprived the members of the Winnemucca Indian Colony of family, community, and the ability to preserve traditions. Two decades of the BIA claiming that it could not recognize a government because there were two factions, when BIA held in its files the family trees and proof of who the members were for over three decades, divided this community irretrievably and robbed it of a substantial opportunity cost of not becoming a unified community with a viable economy.

The Council members were denied their civil right to serve in their elected offices. By failing to verify the status of the members from its own files, the government deprived the members of their government and the Council from serving as a government and building this reservation into homes and a community.

JURISDICTION

1. This Court has subject matter jurisdiction over the subject matter of this action under 28 § 1491 (The Tucker Act), as this action involves claims against the United States for unliquidated money damages, which does not sound in tort and is brought by an Indian Tribe, arising under the Constitution, laws, treaties or regulations of the United States, and Executive Orders of the President of the United States. The damages are due to the Colony by virtue of breach of the trust obligtions of the United States to tribes and because the failures of the government violate the statutes and laws that mandate money damages to the

Colony. (25 U.S.C.§ 5301 et. seq., 25 U.S.C.§ 4101 et seq., etc.) The Court further has jurisdiction under the Indian Tucker Act, 28 U.S.C. § 1505, because this action is in favor of a tribe.

PARTIES

2. Plaintiff Winnemucca Indian Colony (the "Colony" or "Tribe") is a federally recognized Tribe.

3. The Winnemucca Indian Colony represents its enrolled members who are individuals with the right of membership.

4. Defendant United States of America is vested with numerous trust, fiduciary and statutorily imposed responsibilities owed to the Colony and employs various federal departments and agencies to fulfill those obligations. Congress has statutorily designated the Department of the Interior ("DOI") as being primarily responsible for the management of Indian affairs.

5. Defendant Secretary of the Interior ("SOI") has delegated authority over Indian affairs to several agencies within the Department of the Interior, most notably the Bureau of Indian Affairs ("BIA").

a. The Western Regional Office of the BIA is located in Phoenix, Arizona ("Western Regional Office"), and has authority to manage the trust responsibility to the Winnemucca

Indian Colony on behalf of the United States of America.

b. The Superintendent of the Western Nevada Agency of the BIA is located in Carson City, Nevada ("Western Nevada Agency"), and has authority to manage the trust responsibility to the Winnemucca Indian Colony on behalf of the United States. The employees, contractors and agents of the Superintendent include the police officers of the BIA that have as their patrol the Winnemucca Indian Colony.

STATEMENT OF FACTS

Winnemucca Indian Colony History

6. In 1916, Woodrow Wilson signed two Executive Orders setting aside 320 acres in Humboldt County, Nevada.

7. In 1928 Congress set aside an additional twenty acres purchased from the railroad for the same homeless Shoshone Indians that received the 320 acres.

8. In 1916 a census was taken by the government to determine who was living on the 20 acre parcel.

9. In 1972 the Colony pursuant to the Reorganization Act of 1934 received a Constitution and Bylaws from the government that set out the

requirements to qualify for membership in what was now a federally arecognized Tribe, the Winnemucca Indian Colony.

10. The 340 acres set aside for the Winnemucca Indian Colony were titled in the United States of America intended for the benefit of the Winnemucca Indian Colony.

11. In 1972 pursuant to the Indian Reorganization Act, the Colony adopted a Constitution that stated the requirements for enrollment in the Colony were to be 1/4 Paiute and/or Shoshone by blood quantum and to be a descendent of a person listed on the 1916 census of residents on the Colony and to not have taken money or land as a result of membership in another Tribe. These qualifications for membership were recommended by the BIA and voted on by persons who resided at the Colony and have not changed since the date of adoption.

12. The Indian Self-Determination and Education Assistance Act of 1975 was slow to be implemented. Prior to 1996, Self-Governance was only directly applied to BIA programs, but thereafter, all non-BIA Department of the Interior programs have participated in Self-Governance and the establishment of programmatic targets to transfer programs to federally recognized Indian Tribes.

13. A tribe must submit an initial contract proposal under Public Law 93-638 to obtain a

contract from the BIA to perform its own Tribal functions including police functions, schools, etc. The BIA is obligated under statute and regulation to provide technical assistance to the contracting Tribe.

14. All Indians who are members of a federally recognized tribe are entitled to annuity monies and, after the age of eighteen years, are entitled to a receipt for their annuity pursuant to 28 U.S.C. § 116.

15. Prior to 1986 there had been a diaspora of members of the Colony due to enlistment in the fighting for the two world wars and because families with children were escaping from the Colony to save their children from conscription into the Stewart Indian residential school.

16. The Colony members lived on the Colony sporadically, but returned to bury their relatives on the lands and returned for family gatherings.

17. In 1986 the BIA reviewed the list of persons who alleged qualification for distribution of the Northern Paiute Judgment Fund and who resided at the Winnemucca Indian Colony and noted that those applicants were members of the Ft. McDermitt Paiute Tribe and the Lovelock Paiute Tribe and were using those Ft. McDermitt and Lovelock Paiute memberships as the underlying right to collect funds under the Northern Paiute Judgment Fund. Some of these persons were also claiming to serve as the Council of the Winnemucca Indian Colony in

violation of the membership qualifications of Ft. McDermitt and Lovelock which disallowed membership in two tribes coincidentally and who didn't qualify for membership in the Winnemucca Indian Colony pursuant to its Constitution and Bylaws. Merely residing on an Indian Colony is not a qualification for membership.

18. The Western Nevada Agency held in its records the ancestry research on the residents and persons attempting to claim membership to the Winnemucca Indian Colony which either proved or disproved their right to membership. These records were placed in the BIA files circa 1986.

19. The Winnemucca Indian Colony Constitution excludes persons who took distribution as a result of membership in another Tribe from being members of the Colony which is a standard clause in BIA generated Consitutions adopted throughout Indian country in the IRA timeframe. Non-members of the Colony could not serve as Council members.

20. On February 5, 1987, a memo written by the Superintendent of the Western Nevada Agency affirmatively stated: "At the present time, there are no eligible members residing on the Winnemucca Colony." The Superintendent added: "We further advised the Area Office that it is not the Bureau's wish to have the land withdrawn from trust protection or declared as surplus property, as the lands were set aside for the use of homeless Shoshone Indians. . ."

21. The same memo stated the BIA had presumed that the persons living on the Colony qualified for membership but as a result of the Northern Paiute Judgment Fund distribution, the Council members serving in Winnemucca were not members and could not qualify as members of the Colony.

22. The Western Nevada Agency allowed the persons who resided on the Winnemucca Indian Colony to choose which Tribe they intended to be a member of, and when all the members chose to join or had always been a member of a Tribe other than the Winnemucca Indian Colony in order to qualify for the Northern Paiute Judgment Fund, the BIA took control of the assets of the Colony and withdrew recognition of the government of the Colony in 1986.

23. The BIA stated that the persons serving as Colony Council were not qualified to be members of the Colony according to the adopted Constitution and By-laws, and, therefore, the government had to be reorganized with qualified members.

24. The Western Nevada Agency took control and acted as a trustee of the Colony's smoke shop and other assets until a proper government could be organized. All the funds were collected and turned over to the new government when it was established. The new government comprised of persons who were qualified to be members of the Colony.

25. The BIA took over a year to search for persons who qualified to be members of the Winnemucca Indian Colony and, in the meantime, did ancestry

research on all members that applied to verify their qualification as members, including, as discovered in 2016, ancestry research on many residents of the Colony demonstrating that they did not qualify for membership in the Winnemucca Indian Colony.

26. Seventeen persons qualified as members and became the official membership list, including Glenn Wasson, Sharon Wasson, Thomas Wasson, Thomas Magiera, Elverine Castro, Andrea Davidson, Alma Gregory, Trudi Hodson, Renee Johnson, Paulette Kelley, Lucy Lowrey, Carlene Likins, Merlene Magiera, Richard Tom, Ida Whiterock and Alyce Williams.

27. After solicitation of members and an election, by 1990 a government had been recognized for the government-to-government relationship with the United States and the lands and assets returned to the management of the Colony Council.

28. The newly certified members and recognized Council of the Winnemucca Indian Colony repeatedly requested information and documentation from the BIA about the history and origins of the Winnemucca Indian Colony and the records of membership.

29. In 1997, when the Lovelock Housing Authority empowered by the BIA to manage the housing on the Colony's lands was found to have diverted the funds from the intended purpose, the BIA directed the Lovelock Housing Authority, already in breach of its agreement and without consent from the Colony Council, to convey a

leasehold interest to the each non-member resident of the HUD home, thus conveying all but one home to non-members without requiring rental or any payment at all, effectively excluding the members from all residential housing on the Colony.

30. The BIA failed and refused to furnish any of this documentation from 1990 until 2013, and the ancestry information was not furnished until 2016. This fact is significant in that during the entirety of the time, 2000 – 2014, the BIA claimed that there was an intra-tribal dispute and thus it would not recognize a government. Yet the BIA knew and had documentation in its files that proved certain persons requesting recognition, referred to as the Ayer group and the Bills group,did not qualify for membership, nor did any person residing on the Winnemucca Indian Colony without right or authority (referred to herein as "the trespassers").

Winnemucca Indian Colony Tribal Government History

31. In 1934 the Indian Agency of Nevada stated that the lands of the Winnemucca Indian Colony were reserved for bands of Western Shoshone Indians living in the area.

32. The BIA in 1990 recognized the government of the Colony as Glenn Wasson, Chairman; Lucy Lowry; Sharon Wasson; Elverine Castro; and Richard Tom.

33. In 1997, when there was a recognized Council on the Colony, the BIA approved a conveyance of the

HUD homes on the lands of the Colony to the lessees without Council approval and the leases were conveyed to non-members and the BIA failed to require rents to be paid to the Colony for the use of the homes causing inestimal damages from loss of residential housing for members and, at a minimum, $300 - $500 a month in rental income to the Colony for each of the five homes for more than 24 years in excess of $432,000.

34. In 1999 Richard Tom resigned as a member of the Council and passed away soon thereafter, and William Bills, who had recently presented himself as the son of Ermon Bills, a putative member of the Winnemucca Indian Colony, was appointed to the Council.

35. On August 5, 1999, William Bills, on his own, without authority from the Council, applied for a grant from the EPA for up to $75,000. The rest of and majority of the Council, led by Chairman Glenn Wasson, adamantly disapproved of this. Bills had no approval by a majority of the Council for his act as required by the Constitution and By-laws. The Council also voted down a request made by William Bills for an allotment of ten (10) acres of Colony land on which to build a casino.

36. The EPA did not check with the BIA to determine the proper government and membership of the Winnemucca Indian Colony and paid the $75,000 grant to William Bills who pocketed the grant for his individual use.

37. The BIA recognized the Colony's government until the year 2000 as Glenn Wasson, Chairman; Elverine Castro; Lucy Lowery; and Thomas Wasson, and, in the Fifth Council position, alternatively from 1990 to 2000, as Thomas Magiera or Sharon Wasson, or William Bills or Richard Tom.

38. In the regularly scheduled February 2000 meeting of the Winnemucca Indian Colony, the Chairman, Glenn Wasson, reported to the Council that William Bills might not qualify as an Indian since he may have been adopted and had provided a fraudulent birth certificate with his application for membership and, further, that he was diverting mail belonging to the Colony. The Chairman stated that action would have to be taken on this matter at the March 2000 meeting.

39. On February 22, 2000, Glenn Wasson was murdered by multiple stab wounds in his back on the doorsteps of the Colony's Administration Building. The federal government has failed to arrest anyone for this murder and failed to make any credible investigation.

40. On March 1, 2000, William Bills had soil removed from the Colony lands in and around the Administration Building, including but not limited to the area where the murder occurred. Bills acted without majority Council approval as required by the Constitution and Bylaws of the Colony as adopted in 1972 and excluded the other Council members from their lands

41. The BIA was the sole policing agency on the lands of the Colony and refused to remove the trespassers and refused to remove the non-Indian acting as Chairman. Once again, the members of the Colony were forced to leave their lands out of fear for their lives after the murder of Glenn Wasson and the failure of the police officers to protect them from further violence.

42. Although the Colony Council submitted evidence of William Bills' lack of blood quantum in the form of his birth certificate, the BIA did nothing to remove him from the lands of the Colony.

43. Further, the BIA knew that the persons claiming to support William Bills as the Chairman were not qualified to be members of the Winnemucca Indian Colony based upon the ancestry research done in 1986-1987.

44. During the year 2000, the BIA first recognized William Bills, then Sharon Wasson, then William Bills, and then withdrew recognition of the government.

45. From the year 2000 the BIA did nothing to secure the trust assets and resources of the Colony for its members.

46. When this dispute arose, the Western Nevada Agency of the BIA declared the Tribe's government dysfunctional and did not recognize any government as of July 2000.

47. In December 2000, the Regional Office overruled the Western Nevada Agency and made an affirmative finding that the Western Nevada Agency could not find the government to be dysfunctional. Still, the BIA continued its refusal to recognize a government for this federally recognized Tribe.

48. Despite repeated requests, the BIA failed to recognize a government of the Winnemucca Indian Colony from July 2000 until ordered to do so by the United States District Court, District of Nevada, in December 2014.

49. In October 2000 when the government of the Winnemucca Indian Colony had an election on the Colony lands, the BIA arrested Thomas Wasson and Sharon Wasson and the members of the election committee and qualified members of the Winnemucca Indian Colony.

50. The election was eventually held and Sharon Wasson, Thomas Wasson, Elverine Castro, Thomas Magiera and Merlene Magiera were elected as Council members.

51. On March 31, 2005, the United States District Court entered an Order finding that the Wassons and the election committee had been wrongfully arrested in violation of their Constitutional rights when the arrests were made by the BIA.

52. In July 2000, Bank of America, which held the account of funds of the Winnemucca Indian Colony in the approximate sum of $500,000.00, froze the

accounts in order to determine who was the proper party to access the account, and filed the account in interpleader due to the allegations by both William Bills and Sharon Wasson claiming to be Chairman of the Winnemucca Indian Colony. The case was entitled *Bank of America v. William Bills and Sharon Wasson,* Case No. CV-N-00-450-HDM (VPC), filed in the United States District Court, District of Nevada.

53. On May 19, 2000, the Tribal Court, Judge Kyle Swanson, at the request of William Bills, issued an order excluding all council members from the Colony but for William Bills. The Order was in violation of the Constitution and Bylaws of the Colony, but the BIA police officers enforced the Order and did not allow the members to re-enter their lands.

54. That Order was appealed to the Inter Tribal Court of Appeals of Nevada, a body that was funded by the BIA.

55. On March 21, 2001, the parties were ordered to have another trial over the matters before a Tribal Court agreed to by William Bills and Sharon Wasson because of the failure of the Tribal Judge Kyle Swanson to hold a hearing, take evidence or create any record whatsoever.

56. A Tribal Court hearing was scheduled, and Steven Haberfeld of Sacramento, California, recommended by Larry Echohawk, then affiliated with the Native American Rights Fund, was agreed

to by the parties as the Tribal Judge to officiate and render an opinion.

57. During 2000 and 2001, a Tribal Court proceeding was held for more than five weeks of testimony, with hundreds of exhibits entered into evidence, costing the Colony over $70,000 in Tribal funds to pay for the proceedings because the BIA refused to provide 638 funding to the Colony.

58. In May of 2002, the acting Tribal Court determined that no members existed and that the acting Court would decide the membership and conduct the election and be paid for by the Winnemucca Indian Colony in excess of another $50,000.00.

59. All parties agreed that an appeal of this decision was necessary; however, the BIA had failed to fund the Inter Tribal Court of Appeals in Nevada and, thus, no appellate process was available to Indians in Northern Nevada.

60. Pursuant to a Ninth Circuit mediation that was convened to settle some matters on appeal in this litigation, counsel for William Bills et al. and counsel representing the members of the Colony agreed that a panel of judges would be chosen to hear the appeal of the Winnemucca Indian Colony Tribal Court decision.

61. The United States District Court, District of Nevada, provided a courtroom and the Appellate Panel, which was the Specially Appointed Appellate Panel of the Winnemucca Indian Colony also known

as the "Minnesota Panel," because the Judges were judges from the Sioux Tribes in Minnesota.

62. The Minnesota Panel was paid for by the bank account belonging to the Winnemucca Indian Colony, in an amount more than $50,000.00.

63. On August 16, 2002, the "Minnesota Panel" issued an opinion recognizing Sharon Wasson as the Chairman of the Winnemucca Indian Colony and the other members of the Council as Elverine Castro, Thomas Wasson, William Bills and Thomas Magiera. Mr. Mageira was required to be replaced because of his decease prior to the hearing. This decision recognized a Council with a clear majority of members that are Plaintiffs herein.

64. The Winnemucca Indian Colony requested that the BIA recognize the government as recognized by the Minnesota Panel, but the BIA refused in 2002 to recognize a government of this federally recognized Tribe, did not remove the trespassers from the Colony's lands, and did not protect the resources and assets of the Colony.

65. On May 17, 2007, all Tribal remedies were again exhausted regarding the matters of government recognition and Tribal membership by virtue of a decision of the reconstituted Inter-tribal Court of Appeals of Nevada dismissing all further appeals in recognition of the prior Minnesota Panel decision as final.

66. In 2007, the Winnemucca Indian Colony again requested that the BIA recognize the government as affirmed by the Inter Tribal Court, but the BIA refused.

67. On March 6, 2008, United States District Court Judge Brian Sandoval issued an opinion that all Tribal remedies had been exhausted and the decision of the "Minnesota Panel" was granted comity.

68. In 2008, the Winnemucca Indian Colony again requested that the BIA recognize the government as recognized in comity by the United States District Court, District of Nevada, but the BIA refused.

69. On June 29, 2009, William Bills, holding himself out as "Tribal Chairman" for the Colony, executed a certified resolution for the "Winnemucca Indian Colony" certifying and authorizing the Glacier International Depository Bank as its "Central Bank and Depository."

70. The alleged GID bank defrauded foreign investors and was eventually criminally investigated, resulting in the conviction of a known associate of William Bills. Upon information and belief, William Bills testified in exchange for leniency in his role, as the GID Bank was falsely authorized by him as the Chairman of the Winnemucca Indian Colony.

71. Since the GID Bank was chartered by William Bills acting as the Winnemucca Indian Colony, the name of the Colony will always be associated with defrauding foreign investors of hundreds of thousands of dollars.

72. On October 14, 2010, the Ninth Circuit Court of Appeals affirmed the decision of the U.S. District Court that recognized the Minnesota Panel decision. *Certiorari* was denied by the United States Supreme Court on April 18, 2011.

73. The Winnemucca Indian Colony again requested that the BIA recognize the government as recognized by the Ninth Circuit and the United States Supreme Court, but the BIA refused.

74. The Interior Board of Indian Appeals ("IBIA") determined that the BIA was required to recognize the government of a federally recognized Tribe when a reason existed and ordered the BIA to recognize a government of the Winnemucca Indian Colony because of allegations of trespass on the lands of the Colony.

75. The Winnemucca Indian Colony again requested that the BIA recognize the government of the Colony as ordered by the IBIA, but the BIA refused.

76. On or about the middle of May 2011, the Winnemucca Indian Colony entered their lands and began work to rehabilitate the smoke shop located on the 320 acre parcel of the Winnemucca Indian

Colony that was abandoned when Glenn Wasson was murdered in February 2000 and the other members threatened with violence.

77. The contractors that were retained to work on the rehabilitation of the smoke shop were approached by police officers from the BIA on or about July 31, 2011.

78. BIA agent Hermes stated that he had been directed by his employer that no one had any authority to be on site and that the workers were to depart by the next morning or, by implication, they would be arrested.

79. None of the trespassers inhabiting the 20 acres of the Winnemucca Indian Colony lands was required to leave by the BIA officers.

80. The members of the Winnemucca Indian Colony were, thereby, again, effectively excluded from their own lands by the BIA.

81. The lands of the Winnemucca Indian Colony continued to be occupied by non-members of this federally recognized Tribe, all allowed by the BIA by its continuing failure to secure the lands and resources of the Colony.

82. On August 10, 2011, an urgent request letter was sent to the Superintendent of the Western Nevada Agency of the BIA asking that the Winnemucca Indian Colony be allowed to return to

their lands, but the Superintendent failed and refused to respond to this urgent request.

83. On August 31, 2011, the United States District Court, District of Nevada, granted the Colony's motion for a temporary restraining order against the BIA to stop it from interfering with the Winnemucca Indian Colony re-entering its lands.

84. On September 1, 2011, a corresponding preliminary injunction against the BIA was granted, ordering the BIA to recognize a government of this federally recognized tribe.

85. For each and every day that the Winnemucca Indian Colony was excluded from its lands, there was a loss in cultural rights, habitation, economic development and income to the Colony and its members, and as a result, the Colony and its members suffered irreparable harm and monetary damages.

86. On January 31, 2012, the United States District Court, District of Nevada, entered an Order stating that the BIA's "continued refusal. . .to grant the Colony adequate interim recognition without restrictions. . .amounts to a de facto termination of the sovereign recognition granted by Congress, which is likely to lead to the irreparable political dissolution of the Colony's sovereign existence.. ."

87. On July 9, 2012, after hearing, the United States District Court, District of Nevada, gave the BIA seven days to recognize either Thomas Wasson

or William Bills - but not both - and that the BIA should review the record in the case to make a reasonable decision.

88. Within seven days, the BIA, having met exclusively with William Bills and his attorney and no other party, recognized William Bills as the government of this federally recognized tribe. William Bills is 100% Filipino by blood quantum and evidence of that fact had been submitted to the BIA in 2000.

89. On September 25, 2012, the United States District Court, District of Nevada, entered an Order stating that:

> …the Court rules that the decision by the BIA to recognize Bills on July 17, 2012 was an abuse of discretion and not in accordance with law, see 5 U.S.C. § 706(2)(A), because the BIA based its decision purely on its interpretation of tribal law, which is territory into which neither the BIA nor this Court is to tread. (The government did not appeal this decision.)

90. Thomas Wasson, Judy Rojo, Misty Morning Dawn Rojo Alverez, Katherine Hasbrouck, and Eric Magiera were recognized as the government of the Winnemucca Indian Colony by letter from the BIA on December 14, 2014, but the BIA which continues to be the only police force on the Colony refuses to remove the trespassers who hold possession of the

twenty acres where the only residential housing is located.

91. The Colony members funded an election, from their own personal funds, because the BIA refused to enter into a aid to tribal government contract with the Colony.

92. An election monitored by the Inter Tribal Council of Nevada on June 29, 2013. The report of the election was submitted to the United States District Court, District of Nevada and to the Western Nevada Agency asking for recognition of the Colony Council as Judy Rojo, Misty Morning Dawn Rojo, Katherine Hasbrouck, Willis Evans and Thomas Magiera, II.

93. The Winnemucca Indian Colony had no funds because of the failure of the BIA since 2000 to enter into aid to tribal government contracts and protect the lands and resources for the Colony members, which resulted in a loss of funds that were allocated to the Winnemucca Indian Colony by the federal government in excess of $2,984,781.00.

94. Further, the Colony had no funds because the BIA has allowed a group of trespassers to occupy the lands of the Winnemucca Indian Colony and operate the smoke shop on those lands and keep the funds for their own personal use and further use and reside on the lands without collecting rents, which loss to the Colony exceeds $2,760,000.00

95. Further, the Colony had no funds because the BIA has failed and refused to protect the members of the Colony from the threats of violence made by the occupation group and William Bills, thus the members fear to enter their lands and risk personal injury or death.

96. On December 13, 2014, the BIA in response to Court Order finally recognized the government of the Winnemucca Indian Colony.

97. In April 2015, the Tribal Court of the Winnemucca Indian Colony issued a five-day eviction order directed to the trespassing occupants of the Colony in order for the United States Environmental Protection Agency, which had already agreed to fund a clean up, to enter the lands unmolested and assess the hazardous and solid waste contamination of the lands.

98. The Order of the Tribal Court was delivered to the BIA police for enforcement.

99. The BIA police refused to enforce the Order, and the Western Nevada Agency delivered a letter to the Winnemucca Indian Colony on April 15, 2015, refusing to enforce the Tribal Court Order and the Acting Superintendent of the Western Nevada Agency, Marilyn Bitsilie, declared that the 20 acres were not held in trust status for the benefit of the Winnemucca Indian Colony thus depriving the Colony of all use and protection of the twenty acres.

100. On August 24 and 28, 2015, the Winnemucca Indian Colony made demands for the removal of the unlawful trespassers from the lands of the Colony, removal or compensation for the easements granted without authorization, restoration of the water rights to the 320 acres, a demand that the 20 acres which was declared held in trust by the United States for the Winnemucca Indian Colony in an opinion by the Solicitor General in 1993 be declared trust lands and other demands, so that the members could once again re-enter their lands and use the lands of the Winnemucca Indian Colony for the benefit of the membership.

101. Sometime in the spring of 2016, the Superintendent of the BIA, Western Nevada Agency, declared verbally to the Chairman of the Winnemucca Indian Colony in person that the 20 acres of the Winnemucca Indian Colony was held in trust for the Colony and had been since at least 1928, essentially reversing the statement of the interim Superintendent, but still refusing to evict the trespassers and allow the EPA to conduct its assessment.

102. In August 2020, the BIA provided a Certified Title Status Report that revealed that the lands of the Winnemucca Indian Colony were held in trust for the benefit of the Colony and its members with no lawful liens or encroachments.

103. The Superintendent stated that the documents held by the BIA that regarded the

Western Nevada Agency would be turned over to the Colony.

104. The Superintendent stated that a $50,000.00 grant would be authorized for the Winnemucca Indian Colony but that the Colony would have to account for every cent of the grant before any further monies would be authorized under the 638 powers of the BIA.

105. The Superintendent further stated that BIA would resolve the unauthorized CFR Court issue and hold a meeting in April 2016 in Phoenix to that end.

106. No determination or decision has been made by the BIA, and the CFR Court has announced that it will hold court and has assumed jurisdiction. Its Orders have resulted in the loss of grant funds, and the increased cost of activities authorized by the grant funds are in excess of $50,000.00.

107. The CFR Court appointed by BIA has held court without jurisdiction, which required the Colony to retain counsel to represent its interests. The CFR Court has scheduled multiple hearings even after it was informed that it no longer had jurisdiction since a Tribal Court had been appointed in 2015. The CFR Court did not transfer to the Tribal Court the cases over which CFR court had no jurisdiction until June 2021 The Colony incurred attorneys' fees and costs in excess of $71,000.00 because of this CFR court action.

108. The Superintendent further stated that it was too dangerous for the membership to return to its lands and that it should set up an office in Reno, Nevada, until the lands are cleared of non-members, requiring the Colony to expend over $60,000.00 in rental costs for being in Reno and being excluded from its lands.

109. No attempt has been made to clear the lands of trespassers for the five years since the government has been recognized.

110. The Superintendent provided copies of the leases for the HUD housing located on the lands of the Winnemucca Indian Colony, which leases clearly expired at the latest in 1997.

111. The BIA has failed and refused to remove the persons living in the HUD homes with expired leases.

112. The BIA has failed and refused to remove persons who are trespassers, non-members and non-Indians, living in makeshift, unhealthy and unauthorized housing on the lands of the Colony.

113. The BIA has failed and refused to allow the United States Environmental Protection Agency to enter the lands of the Colony and assess the hazardous and solid waste contamination on the site which is open and obvious.

114. The cost of removal of the waste deposited on the lands by the trespassers non-members and occupiers will exceed $350,000.00.

The Tribal Lands

115. President Woodrow Wilson set aside 160 acres for the benefit of the homeless Shoshone by Executive Order dated June 18, 1917, described as the NE ¼ of Section 32, Township 36N., Range 38E., M.D.M. (Mount Diablo Meridian).

116. President Wilson set aside an additional 160 acres for the benefit of the homeless Shoshone by Executive Order dated February 8, 1918, described as the SE 1/4 of Section 32, Township 36N., Range 38E., M.D.M. (Mount Diablo Meridian).

117. These two contiguous parcels are commonly referred to by the Tribe as the "320 acres."

118. In 1928, because the BIA records reflected that the homeless Shoshone were still living on 20 acres near the railroad where they worked, a separate 20 acres was conveyed by Congressional Act, described as N1/2 NE1/4 SW1/4, Section 29, Township 36, Range 38 East, Mount Diablo Meridian, Nevada, containing 20 acres more or less.

119. This parcel is commonly referred to by the Tribe as the "20 acres" and is the only parcel which has ever been occupied until 2019.

120. These three parcels have at all times since 1928 been referred to and recognized as the lands of the Winnemucca Indian Colony.

121. These lands are potential irrigable acreage and have a right to water rights incumbent thereto as agricultural lands.

BIA'S TRUST RESPONSIBILITY TO THE TRIBE

122. The United States of America has a trust responsibility to protect the value of Indian land and its use for the benefit of Indians. As explained in *United States v. Mitchell*, 463 US 206, 223 (1983):

> The Secretary is empowered to grant rights-of-way for all purposes across trust land, 25 U. S. C. § 323, provided that he obtains the consent of the tribal or individual Indian landowner, § 324, and that the Indian owners are paid appropriate compensation, § 325. Regulations detail the scope of federal supervision. 25 CFR pt. 169 (1983). For example, an applicant for a right-of-way must deposit with the Secretary an amount not less than the fair market value of the rights granted, plus an amount to cover potential damages associated with activity on the right-of-way. The Secretary must determine the adequacy of the compensation, and the amounts deposited must be held in a special account for distribution to Indian landowners. See 25 CFR §§ 169.12, 169.14 (1983).

Water Issues

123. The United States of America has a trust responsibility to protect the value of the land and its use for the benefit of the Indians, including obtaining water rights for the 320 acres for agricultural purposes or any purpose for the beneficial use of the lands since the lands are located in Nevada, a desert, and not usable without water.

124. At the time it was conveyed to the Tribe, the 320 acres had a stream with free flowing water in an amount in excess of 60 cfs which ran across the 320 acres.

125. Upon information and belief, Offenhauser Development Company diverted the water without obtaining permission from the SOI or the United States Congress.

126. No monetary benefit was or is paid to the Winnemucca Indian Colony for this water diversion.

127. Additionally, Offenhauser Development Company designed its subdivision so that storm sewer runoff from the subdivision discharges directly onto the 320 acres.

128. Such storm sewer runoff is untreated and contains contaminants harmful to the Tribal lands and continues to run onto the lands of the Colony.

129. The BIA failed and refused, and continues to fail and refuse, to protect the lands of the

Winnemucca Indian Colony from the loss of the water flowing across its lands from the stream originating in the Humboldt Mountains.

130. The BIA failed and refused, and continues to fail and refuse, to protect the lands of the Winnemucca Indian Colony from the discharge of storm sewer water or the use of such easement by the City of Winnemucca.

131. The BIA failed and refused, and continues to fail and refuse, to reserve water rights for the best and appropriate use of the 320 acres as agricultural lands.

Encroachment by Substation, Power Lines, Buildings and Roads

132. The 320 acres that belong to the Winnemucca Indian Colony were set aside by President Wilson as a rectangle of land.

133. Within the four years since recognition, the Colony Council has repeatedly requested that BIA survey the Colony lands to determine the encroachments by subdevelopers – now the City of Winnemucca and NV Energy, by an electrical substation, a substandard road and overhead power lines which are, upon information and belief, encroaching upon the property and easements to the property.

134. Upon information and belief, NV Energy placed the electrical substation and overhead power

lines upon Colony land without obtaining a right of way or, if a right of way was obtained, it has now expired by its terms.

135. Upon information and belief, NV Energy and the BIA had a right of way agreement that paid nothing to the Colony and was not approved by the Colony's government, and that expired sometime after 2010.

136. No monetary benefit was or is paid to the Winnemucca Indian Colony for these power lines or electrical substation, nor are they maintained by the Winnemucca Indian Colony.

137. The Winnemucca Indian Colony surveyed the twenty acre parcel in 2019 and found encroachments from buildings by a neighboring subdivision; easements from a neighboring subdivision and the City of Winnemucca, and other encroachments upon the lands.

138. The City of Winnemucca has built and used a road across the lands of the Winnemucca Indian Colony without the consent of the Colony and without the Colony receiving any compensation for the encroachment of Highland St. upon the lands of the Colony, all with BIA's knowledge and consent.

139. The BIA had not surveyed the lands nor protected the Colony's lands from these encroachments.

Loss of Economic Development Income

140. The approximately $500,000.00 interpled by Bank of America and $500,000 taken from the person of Glenn Wasson when he was murdered was all money generated by the Smoke Shop managed by the Colony membership between 1993 and 1999. The Smoke Shop thus generated profits in excess of $100,000 per annum in 1990 valued dollars.

141. Due to actions taken by the BIA, the Tribe was stopped from reopening the Smoke Shop from 2000 to 2011 by the occupation of the lands by non-members and the threat of arrest from the BIA police.

142. Due to the long vacancy at the Smoke Shop, the Tribe was informed by a licensed contractor that the building was no longer useable, and it has now been removed from the lands of the Winnemucca Indian Colony.

143. Upon information and belief, the Colony and its membership have lost in excess of $100,000 per year because of the loss of the economic use of the smokeshop and have been required to replace the smokeshop building for in excess of $300,000.00.

Loss of use of Administration Building

144. The 20 acres of the Winnemucca Indian Colony contained an administration building built for the purpose and use of administrative duties of the Colony membership.

145. The Administration Building was occupied by the persons who were trespassers from 2000 to 2014.

146. The Administration Building was left by the trespassers with defective and hazardous electrical wiring, black mold, and other structural defects, making the building too hazardous for human use.

147. The Administration Building is trust property.

148. The estimate to rehabilitate the Administration Building for reuse is in excess of $300,000.00.

149. The Administration Building as trust property was the responsibility of the BIA and its loss is directly attributable to the breach of trust by BIA.

First Claim for Relief
Violation of 25 USC § 323 *et seq. – land use*

150. Plaintiff incorporates all paragraphs of this complaint by reference as if fully set out herein.

151. 25 USC § 324 and the regulations promulgated under 25 USC § 323, codified at 25 CFR pt. 161.1 et seq. (1967), restrict Defendants' power to convey Indian land by requiring that consent of Tribal officials be obtained before making a conveyance pursuant to 25 USC § 323.

152. Upon information and belief, the BIA allowed the waste of natural resources and use of the lands

within the Winnemucca Indian Colony within the past ten years, and constructed a two-lane, partially paved road called Highland Road which crosses Colony land without the approval of the Colony and without compensation to the Colony.

153. Upon information and belief, Defendants have allowed the City of Winnemucca to continue to use and maintain the twolaned, partially black-topped road.

154. Upon information and belief, Defendants allowed the City of Winnemucca to place the road upon Colony land without obtaining proper approvals or consent for the right-of-way from the Tribe and the SOI. Additionally, upon information and belief, the City of Winnemucca approved a subdivision for ingress and egress from a back parking lot over Colony lands without any approvals, consent or compensation to the Colony.

155. No monetary benefit was or is paid to the Tribe for the right of way for this road.

156. Plaintiffs have suffered actual harm by the loss of its lands.

Second Claim for Relief
Violation of 25 USC § 323 *et seq.* – land use in relation to energy station

157. Plaintiff incorporates all paragraphs of this complaint by reference as if fully set out herein.

158. Upon information and belief, Defendants allowed Sierra Pacific Power Company d/b/a NV Energy, Inc. ("NV Energy") within the past thirty (30) years, to construct an electrical substation and place overhead power lines upon Colony land, and, in 2018, allowed NV Energy to grade a road alongside the lands of the Winnemucca Indian Colony without authorization or notice to the Colony which road impeded water running onto the lands of the Colony and has caused erosion and disruption to the lands of the Colony.

159. Upon information and belief, Defendants have allowed NV Energy, Inc., to continue to use the power lines that are now on the lands of the Winnemucca Indian Colony, without authorization or right or payment demanded from the BIA on behalf of the Colony.

160. Upon information and belief, Defendants allowed NV Energy, Inc., to construct the electrical substation and place overhead power lines on Colony land without obtaining proper approvals or a right-of-way from the Tribe and the SOI.

161. No monetary benefit was or is paid to the Winnemucca Indian Colony for the right-of-way for the electrical substation, the road, or overhead power lines.

162. Plaintiffs have suffered actual harm in the loss of use of these easements or the loss of negotiated trade for services for these easements

and has further suffered damages to the lands by erosion and loss of water flow.

Third Claim for Relief
Breach of Trust - Water

163. Plaintiff incorporates all paragraphs of this complaint by reference as if fully set out herein.

164. Under the Winters doctrine, established in Winters v. United States, 207 U.S. 564, 577–78, 28 S.Ct. 207 (1908) and also known as the reserved-water-rights doctrine, when the United States reserves land for an Indian tribe, it also by implication "reserves [the] amount of water necessary to fulfill the purpose of the reservation . . . ." Cappaert v. United States, 426 U.S. 128, 141, 96 S.Ct. 2062 (1976).

165. Defendants reserved Colony land for the Tribe by Executive Order for the purpose of the lands being the home of the Winnemucca Indian Colony and, therefore, its trust duties extend to Tribal water.

166. The United States has a responsibility for the quality of water within the reservation when there is "third-party diversion or contamination." Hopi Tribe v. United States, 782 F.3d 662, 669(2015).

167. The standard of duty for the United States as trustee for Indians is not mere "reasonableness," but the highest of fiduciary standards. *See, e.g., United States v. Mason,* 412 U.S. 391, 398, 93 S.Ct. 2202, 2207 (1973); *Cheyenne-Arapaho Tribes v. United*

States, 206 Ct.Cl. 340, 345, 512 F.2d 1390, 1392 (1975).

168. Upon information and belief, Defendants allowed Offenhauser Development Company to divert a stream and remove water from wells from which water was able to reach the Colony's lands for its highest and best use and as a result there is no available water or water rights located on the 320 acres which renders no water available and which is needed and is now located in upstream wells and holding tanks and not available to the 320 acres in an amount in excess of 60 cfs for use in an upstream diversion and impoundment.

169. Upon information and belief, Defendants allowed Offenhauser Development Company to divert the water without obtaining permission from the SOI and without paying any costs for loss of water to the Colony.

170. No monetary benefit was or is paid to the Winnemucca Indian Colony for this water diversion.

171. No substitute water source has been made available to the Winnemucca Indian Colony in order to make use of their lands for any purpose.

172. Plaintiffs have suffered actual harm in an amount in excess of $6,100,000.00

Fourth Claim for Relief
Violation of 25 U.S.C.§ 4101

173. Plaintiff incorporates all paragraphs of this complaint by reference as if fully set out herein.

174. The BIA caused the Lovelock Housing Authority to convey to non-members the residential housing on the Colony without collection of any rents nor requiring that any rents be paid.

175. The residents of the HUD housing believe, based upon assurances from BIA and subsequent actions denying the Colony Council the right to evict these residents, that they have rights to occupy all the residential housing on the Colony without government approval, without paying any rentals to the Colony and ignoring all compliance orders from the Colony regarding use of sanitation facilities and accumulation of solid and hazardous waste upon the lands of the Colony.

176. Without residential housing or the ability to enter into a contract or grant with HUD because the Colony did not have a recognized government for fourteen years, the Colony's members were effectively excluded from the Colony's lands.

177. Further the Colony members and government could not re-enter their lands because of the threat of arrest for trespass from the only police force on the Colony, the BIA, thus losing the ability to develop a healthy marketplace and engage in economic development.

178. Further the Colony members and government could no re-enter their lands and begin the clean up of the hazardous, solid and infectious waste deposited on the Colony's lands by the trespassers.
179. The Colony lost the right to apply for grants and contracts and suffered damages in the amount in excess of $20,000,000.00.

Fifth Claim for Relief
Breach of Trust and Violation of Law pursuant to the Indian Non-Intercourse Act

180. Plaintiff incorporates all paragraphs of this complaint by reference as if fully set out herein.

181. The Tribe is an Indian "tribe" within the meaning of the Indian Non-intercourse Act ("Act"), 25 U.S.C. § 177.

182. The Act provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

183. The parcels of land at issue herein are covered by the Act as Tribal land.

184. Defendants have never consented to the alienation of the Tribal land.

185. The trust relationship between Defendants and the Tribe has never been terminated or abandoned.

186. BIA's inherent and statutory fiduciary duties under the Act include, among others, the duty to properly manage the trust property, both real and personal, of Plaintiffs.

187. The Act prohibits the conveyance of any interest in Indian lands (real property) without proper federal consent.

188. The Tribe has not consented to the conveyance of any property interest in the Colony lands, including any possessory interest.

189. Congress has not authorized the conveyance of any interest in the Colony's lands.

190. The BIA, by its arbitrary, capricious and unreasonable failure for fourteen years to recognize a Council of the Winnemucca Indian Colony, and/or to have surveyed the lands, protected from the lands from encroachment, or properly policed the lands, nor protected the natural resources, nor obtained water for the highest and best use of the lands has affirmatively conveyed the possessory interest of the land be held by trespassers which has required the Colony to expend in excess of $250,000 to attempt to remove the trespassers from its lands which still has not been accomplished to date by the acts and failure to act by the government.

191. As a result of Defendants' actions, the Colony and its members have suffered and continue to suffer considerable damage and harm, including the failure to receive funds for the rights of way being utitlized for (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; loss of funding; loss of economic development; loss of use of buildings; encroachment upon the lands; and further damages for loss of use of lands and loss of right to conduct governmental functions.

192. Plaintiffs have suffered actual harm in an amount in excess of $100,000,000.

Sixth Claim for Relief
Breach of Fiduciary Duty

193. Plaintiffs incorporate all paragraphs of this complaint by reference as if fully set out herein.

194. Pursuant to 25 CFR § 2.8, the Winnemucca Indian Colony has repeatedly requested that the twenty acres of the Colony's lands be surveyed by BIA.

195. The BIA has failed and refused since 2014 to survey the twenty acre parcel of the Colony's land as an obligation under the trust responsibility to preserve the lands of a federally recognized tribe.

196. Upon information and belief, more than one structure has been placed on the Colony's lands by a

subdivision located adjacent to the twenty acres, including but not limited to a garage, shed, part of a trailer park, road, and driveway. The Colony's losses exceed $72,000 per year in loss of energy and use by the subdivisions.

197. No monetary benefit was or is paid to the Winnemucca Indian Colony for this encroachment.

198. Plaintiff has suffered actual harm in an amount of more than $110,000 annually because of Defendants' failure to act on this encroachment. Plaintiff incurred the costs of the survey to the twenty acre parcel of Colony land and specifically identified the encroachments in 2019, but the three hundred and twenty acre parcel still has not been surveyed nor can the Colony afford the cost of the survey.

199. Defendants, by their failure to act from 2000 through 2014 in failing to properly recognize a Tribal Council of the Colony, failing to police and protect the lands from encroachment and trespass and interfering with the efforts of the Tribe to re-open the Smoke Shop, violated Defendants' fiduciary responsibilities under federal law, including but not limited to 25 USC 323, 25 USC 4101 and the Non-Intercourse Act.

200. As a result of Defendants' actions, the Colony and its members have suffered and continue to suffer considerable economic damage and harm including, without limitation, the loss of at least

$100,000 per annum in lost profits from operation of the Smoke Shop.

201. Defendants also violated their fiduciary responsibilities to the Colony under federal law.
202. Plaintiffs have suffered actual harm in an amount in excess of $2,000,000.00.

Seventh Claim for Relief
The Winnemucca Indian Colony has no other means of recovering the loss of the value and income from its property wherein it was denied management, access and use of its property other than to seek damages from the United States.

203. Plaintiffs incorporate all paragraphs of this complaint by reference as if fully set out herein.

204. The Plainitiffs have no other remedy at law or administrative appeal to recover the value of the loss of their lands and sovereignty taken from them by the BIA's breach of trust responsibility, violation of the law, failure of the BIA to follow its own policies in protecting and contracting with the federally recognized Tribes and the BIA's failure to follow the laws adopted by Congress to preserve the lands, enter into contracts for services or provide those services to the Colony, and the its failure to protect the natural resources on the lands of the Colony and conveyed leaseholds on Colony property without compensation and without the consent of the Colony.

205. The Plainitffs have suffered irreparable harm from these acts and failures to act by the BIA.

206. The Plaintiffs have suffered actual damages from the loss of use of their lands, loss of contracts, loss of grants, and the failure of the BIA to protect the lands and resources of the Colony.

Eighth Claim for Relief
Demand for Documents and Accounting

207. Plaintiffs incorporate all paragraphs of this complaint by reference as if fully set out herein.

208. As trustees, Defendants manage and control all ownership documents and information concerning Colony land, and Defendants' management of such lands.

209. As fiduciaries, Defendants have been and are obliged to account fully to Plaintiff, as trust beneficiaries, for the ownership, management, and disposition of Colony land.

210. BIA breached its fiduciary duties and duty of trust by arbitrarily, capriciously and unreasonably failing to properly recognize the Colony tribal government within a reasonable time, despite numerous court orders spanning twelve years and failing to contract with the Colony for the funds allocated specifically by Executive and Legislative Branches of government to the Winnemucca Indian Colony and failing to use those allocations for serices at the Colony but instead diverted those funds for

use by the BIA to support its own staff salaries and expenses.

211. BIA has a duty to render an accounting to plaintiff to determine damages resulting from any misallocation of funds.

212. Plaintiffs hereby demand, on behalf of the Colony and its individual members, an accounting of all Tribal annuities, distributions, allotments, grants wrongfully withheld or diverted and any other payments, including interest thereon, for the period during which Defendants failed to properly pay Plaintiffs in excess of $35,000,000.00.

Ninth Claim for Relief
Declaratory Judgment - Right to Royalties for Use of Land

213. Plaintiff incorporates all paragraphs of this complaint by reference as if fully set out herein.

214. The BIA failed to seek any compensation for the use of the Colony's water, land and other property rights from the third parties using those lands, water, and resources.

215. The BIA did not simply undervalue or make bad investments on behalf of the Colony, the BIA did nothing to protect and preserve the lands and resources of the Colony for its members.

216. The Colony is entitled to fair compensation for use of the Colony's water, land and other property rights pursuant to federal law. Fair

compensation requires, among others, an appraisal of the value of the assets and an accounting by the BIA.

217. Pursuant to 28 U.S.C. §2201, Plaintiffs seek a declaration that the Colony is entitled to fair and reasonable compensation for past, present and future use of the Colony's water, land and other property rights in excess of $91,000,000.00.

Tenth Claim for Relief
Loss of use of lands and rights as Tribal members
by the individual members of the Colony

218. Plaintiffs incorporate all paragraphs of this complaint by reference as if fully set out herein.

219. The Winnemucca Indian Colony has had members over the age of eighteen years for the most recent twenty years.

220. These members have been excluded from the use and enjoyment of their tribal lands because of the occupation of the lands by trespassers allowed and protected by the BIA.

221. These members could not engage in economic development of their lands, use their lands, enjoy the benefits of tribal membership because of the lack of recognition of the government of the Winnemucca Indian Colony.

222. The Colony seeks a judicial declaration that these members each suffered the loss of the use of

the lands for twenty years and the benefits of tribal membership for fifteen years in an amount in excess of $1,000,000 per tribal member.

Eleventh Claim for Relief
Declaratory Judgment – Right to lands granted to the other western tribes of BLM and other government lands pursuant to the repatriation of Tribal Lands process

223. Plaintiffs incorporate all paragraphs of this complaint by reference as if fully set out herein.

224. The Bureau of Land Management ("BLM") manages approximately 1200 acres near or adjacent to the Winnemucca Indian Colony which is considered surplus property by the BLM.

225. In 2012, many Tribes in the western United States made a proposal to have lands that were considered surplus by the BLM returned to the Tribes and conveyed as trust lands for the Tribes' management and control.

226. Since the Winnemucca Indian Colony did not have a government recognized by the BIA and the BIA did not protect the interests of the Colony itself by intervening to protect the Colony's interests, the Winnemucca Indian Colony missed the opportunity to petition for the conveyance of the acreage in its purview.

227. The Colony suffered damages by this omission in excess of $879,000.00.

228. The Colony seeks a judicial declaration that it is entitled to the opportunity to petition for the conveyance of the acreage in its purview.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against all Defendants, as follows:

1. A judgment of money due to the Colony and its members of more than $208 million according to proof;

2. A declaratory judgment that the Colony is entitled to fair and reasonable compensation for past, present and future use of the Colony's water, land and other property rights;

3. A declaratory judgment that Plaintiff is entitled to the opportunity to petition for the conveyance of acreage in its purview, pursuant to the BLM tribal lands repatriation process;

4. A declaratory judgment that Colony members each suffered the loss of the use of the lands for twenty years and the benefits of tribal membership for fifteen years in an amount in excess of $1,000,000 per tribal member;

5. An accounting for all distributions, annuities, grants and allotments and

other monies, including interest thereon, which are due to Plaintiffs;

6. A judgment in favor of Plaintiffs for their costs of trial and their attorneys' fees in this matter; and,

7. Such other and proper orders as the Court deems appropriate.

DATED this 31st day of January, 2022.

<u>/s/Norberto J. Cisneros</u>
Norberto J. Cisneros. Esq.
Maddox & Cisneros, LLP
3230 S. Buffalo Dr., Suite 108
Las Vegas, Nevada 89117
Telephone: (702)366-1900
Facsimile: (702)366-1999

Treva J. Hearne, Esq.
Reno Law Group, LLC
595 Humboldt Street
Reno, Nevada 89509
Telephone: (775)329-5800
Facsimile: (775)329-5919
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2026, I served a true and correct copy of the above document, entitled **FIRST AMENDED COMPLAINT**, via the Court's electronic filing/service system (CM/ECF) to all parties on the current service list.

/s/Rhonda Cory
An Employee of Maddox & Cisneros, LLP

LEGAL PRINTERS LLC

202-747-2400
202-449-9565 Fax
LegalPrinters.com

5614 Connecticut Avenue, NW #307
Washington, DC 20015

April 8, 2026

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20002

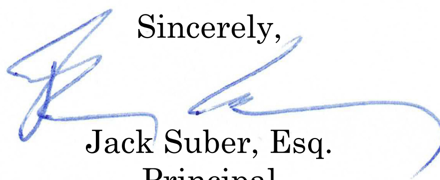
RE: WINNEMUCCA INDIAN COLONY V. UNITED STATES

Dear Sir or Madam:

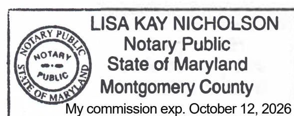
As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari referenced above contains **5,572** words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Sincerely,



Jack Suber, Esq.
Principal



Sworn and subscribed before me this 8th day of April 2026.

LEGAL PRINTERS LLC

202-747-2400
202-449-9565 Fax
LegalPrinters.com

5614 Connecticut Avenue, NW #307
Washington, DC 20015

April 8, 2026

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20002

RE: WINNEMUCCA INDIAN COLONY v. UNITED STATES

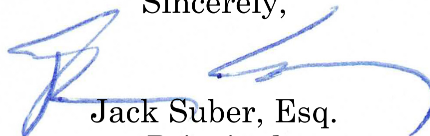
Dear Sir or Madam:

I certify that at the request of the Petitioner, on April 8, 2026, I caused service to be made pursuant to Rule 29 on the following counsel for the Respondent:

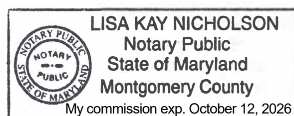
RESPONDENT:
D. John Sauer
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
supremectbriefs@usdoj.gov
202-514-2217

This service was effected by depositing three copies of a Petition for Writ of Certiorari in an official "first class mail" receptacle of the United States Post Office as well as by transmitting a digital copy via electronic mail.

Sincerely,



Jack Suber, Esq.
Principal



Sworn and subscribed before me this 8th day of April 2026.