**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

(Electronically filed on December 13, 2012)

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| GRACE M. GOODEAGLE, et al., | ) | |
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| Plaintiffs, | ) | No. 12-431L |
| | ) | |
| v. | ) | Hon. George W. Miller |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF [6] UNITED STATES' PARTIAL MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM AND FOR A MORE DEFINITE STATEMENT**

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## I. INTRODUCTION

Plaintiffs concede in their opposition to the United States' partial motion to dismiss that many of the claims advanced in their complaint are barred by the applicable statute of limitations, see Opp'n (ECF No. 11) at 26 (claims, or portions thereof, in plaintiffs' Fifth Cause of Action pre-dating June 28, 2006, are untimely), or are so broad or inarticulately plead as to encompass claims outside this Court's subject-matter jurisdiction, see id. at 11 (conceding that plaintiffs "intended to" limit claims in their Third Cause of Action to losses to or mismanagement of trust funds due under actual issued town lot leases). By plaintiffs' own admission, the United States' motion should be granted in part. Furthermore, plaintiffs' opposition fails to establish that any specific town lot leasing claims in their Third Cause of Action are timely or well-stated; that plaintiffs' Fifth Cause of Action is not preempted by CERLCA[1/]; that plaintiffs' un-plead "continuing trespass" claims (if any) in their Fifth Cause of Action fall within this Court's subject-matter jurisdiction; that plaintiffs' Sixth Cause of Action states a claim within this Court's subject-matter jurisdiction; or that a judicial or legislative takings claim based upon a Congressionally-authorized settlement that compensates plaintiffs for compromised claims is well stated. Thus, the United States' motion should be granted in full.

Moreover, plaintiffs' repeated charges of the United States' alleged "mischaracterizations of the Goodeagle complaint," Opp'n at 1, and plaintiffs' own repackaging of their overbroad allegations, id. at 11 ("as they intended to do"), highlight the appropriateness of a more definite statement. Plaintiffs should specify their claims upfront, so that the parties and the Court do not expend significant time and resources fleshing out claims that are outside this Court's subject-

[1/] The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, et seq.

matter jurisdiction.

## II. ARGUMENT

The Court of Federal Claims is a court of limited subject-matter jurisdiction. Massie v. United States, 226 F.3d 1318, 1321 (Fed. Cir. 2000). As such, plaintiffs have to plead and prove subject-matter jurisdiction. Rules of the United States Court of Federal Claims ("RCFC") 8(a)(1). Courts are presumed to lack subject-matter jurisdiction unless it is affirmatively indicated by the record; therefore, it is plaintiffs' responsibility to allege facts sufficient to establish the Court's subject-matter jurisdiction. Renne v. Geary, 501 U.S. 312, 316 (1991); DaimlerChrysler Corp. v. United States, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction." (citations omitted)). It is not the United States' obligation to demonstrate, at the pleading stage, that "none of these [alleged] acts violate its fiduciary duties," Opp'n at 30; instead, it is "petitioner['s obligation], in the event his claim is founded upon an act of Congress, to specify in his petition 'the act and the section thereof on which plaintiff relies,'" McMahon v. United States, 104 Ct. Cl. 366, 372 (1945). Here, plaintiffs have failed to plead facts bringing their third, fifth, sixth, and eighth causes of action within this Court's subject-matter jurisdiction because either affirmative allegations show those claims are untimely, preempted, or unsupported by law; or, a lack of alleged jurisdictional facts fail to push those claims across the jurisdictional threshold. Accordingly, plaintiffs' claims should be dismissed.

### A. Several of Plaintiffs' Claims in Their Third Cause of Action are Untimely and a More Definite Statement is Appropriate.

The parties agree on the statue of limitations analysis to be employed by the Court at the pleading stage. The Appropriations Act rider tolling the statute of limitations for claims by

Indians for losses to or mismanagement of trust funds[2/] does not apply to "claims involving trust assets." Shoshone Indian Tribe of the Wind River Reservation v. United States, 364 F.3d 1339, 1350 (Fed. Cir. 2004) ("Shoshone II"); accord Opp'n at 26. As such, "[a] claim premised upon the terms of a lease being suboptimal is a claim related to trust assets, and, therefore, outside of the scope" of the Appropriations Act. Shoshone Indian Tribe of the Wind River Reservation v. United States, 672 F.3d 1021, 1035 (Fed. Cir. 2012) ("Shoshone IV"). Similarly, "a claim premised upon the Government's failure to collect royalties in accordance with a hypothetical lease is a claim for mismanagement of trust assets." Id.; accord Opp'n at 13-14. Conversely, to the extent that plaintiffs can allege facts demonstrating the existence of actual town lot leases issued by the Bureau of Indian Affairs ("BIA") and "failure or delay in (1) collecting payments under the [leases]; (2) depositing the collected monies into [plaintiffs'] interest-bearing trust accounts; or (3) assessing penalties for late payment," those are claims for losses to or mismanagement of trust funds and may be timely. Shoshone II, 364 F.3d at 1350; accord Opp'n at 10-11. The parties disagree as to whether plaintiffs have alleged facts in their Third Cause of Action stating claims for losses to or mismanagement of trust funds and, if so, the extent and contours of those claims.

Regardless of what was plead by plaintiffs, in their opposition they seek to limit their Third Cause of Action to claims for losses to or mismanagement of trust funds due under actual town lot leases approved by BIA. Opp'n at 11. Thus, plaintiffs' claims that town lots were "unleasable" should be dismissed. Compl., ¶ 41 (ECF No. 1). Plaintiffs' claims that town lot leases could have been issued, but were not, are trust asset mismanagement claims and plaintiffs claimed damages based upon hypothetical leases that could have been issued are barred by the

[2/] Consolidated Appropriations Act, 2012, Pub. L. No. 112-74 (2011), Div. E, Tit. I, Office of the Special Trustee [125 Stat. 786, 1002].

statute of limitations. Shoshone IV, 672 F.3d at 1035.

Similarly, plaintiffs' claims that town lots were allegedly improperly "transfer[red] from one tenant to another" or "subleased," Compl., ¶ 42, are trust asset mismanagement claims. Plaintiffs do not claim that money due under the leases was not timely collected or deposited; plaintiffs, instead, challenge the manner in which BIA approved leases, subleases, or transfers. Such claims are indistinguishable from the tribes' claims in Shoshone that certain oil leases were allegedly unlawfully converted because BIA failed to follow statutory notice, advertisement, and competitive bid requirements—claims which the United States Court of Appeals for the Federal Circuit found to be trust asset mismanagement claims subject to the six year statute of limitations. Shoshone IV, 672 F.3d at 1032. Plaintiffs' approval, transfer, and sublease claims should be dismissed.

As for plaintiffs' claims (if any) for "failure or delay in (1) collecting payments under the [leases], (2) depositing the collected monies into [plaintiffs'] interest-bearing trust accounts, or (3) assessing penalties for late payment," Shoshone II, 364 F.3d at 1350, on actual issued town lot leases, a more definite statement is appropriate. The United States has insufficient knowledge of exactly what plaintiffs believe the United States did wrong. A more definite statement would make this litigation much more efficient by limiting the discovery process. As it stands now, the United States will likely have to do extensive discovery to uncover the leases at issue and what it is claimed that the United States has done wrong. Such an indefinite articulation of their claims is insufficient to give fair notice. Plaintiffs' broad town lot allegations are similar to trespass claims the Court of Claims found warranted a more definite statement:

> The petition itself is decidedly indefinite and loosely drawn. It would be impossible to answer its general allegations and bring the controversy to an issue as it now stands. No railroads [trespassers] are mentioned, no property is described, and nothing alleged except general statements that railroads have

> abandoned station sites along their right of ways without any way of disclosing instances or facts sufficient to notify the defendant so that a complete investigation of the claims might be made.

Choctaw and Chickasaw Nations v. United States, 75 Ct. Cl. 494, 501 (1932).

A more definite statement by plaintiffs, setting forth the specific leases and lease provisions that the United States has allegedly violated, will allow the Court and the parties to test the jurisdictional basis for plaintiffs' claims at the pleading stage. "Developing a factual record is responsible for much of the cost of litigation. Discovery is a conspicuous example, and the preparation and examination of witnesses at trial is another." United States v. Tohono O'Odham Nation, 563 U.S. ___, 131 S. Ct. 1723, 1730 (2011). Delaying resolution of jurisdictional issues until after plaintiffs have specified their claims in discovery will not "secure the just, speedy, and inexpensive determination" of this action. RCFC 1. Because jurisdiction is a threshold issue, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998), and jurisdictional defects to plaintiffs' claims may be revealed by a more definite statement, a more definite statement is appropriate here to "narrow the issues and disclose the boundaries of the claim and defense," Williams v. United Credit Plan of Chalamette, Inc., 526 F.2d 713, 714 (5th Cir. 1976).

BIA used form leases to lease town lots on the Quapaw Reservation. A sample form lease was included in the Quapaw Analysis and is attached hereto as Exhibit 1.[3/] The form lease

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[3/] Plaintiffs repeatedly insist that the Quapaw Analysis should be considered part of their pleading. See, e.g., Opp'n at 11 (the government "has the actual Quapaw Analysis—which is the factual basis for the allegations"); 17 (government "has in its possession the Quapaw Analysis"); 18 (Quapaw Analysis "details Goodeagle's claims in far greater detail than could any typical complaint"). When deciding a motion to dismiss, the Court may review the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the Court will take judicial notice. Crusan v. United States, 86 Fed. Cl. 415, 417-18 (2009). The Court may therefore consider the attached Exhibit 1 in resolving the United States' motion.

calls for a lease term (in the example, one year) and a rent (in the example, $10 plus a $1 fee), one-half payable upon approval of the permit. Ex. 1. The form lease permits subleasing with the consent of the lessee and mandates that "consent cannot be withheld save only upon the grounds of non-payment of rents." Id. The form lease imposes no penalties or interest for late payment of rent. Instead, if the lessor fails to pay rent, the Superintendent of the BIA agency may cancel the lease without notice. If the lessor is a holdover tenant, the remedy in the lease is that "all . . . buildings or improvements, of whatsoever nature, shall be regarded as a fixture of said real estate and shall thereupon become the property of the owner of said land." Id. Thus, the putative obligation for BIA where a lessor does not pay rent is cancellation and eviction (a non-monetary remedy), and the penalty for a holdover tenancy is non-monetary (transfer of improvements as fixtures). Obligations that are not money-mandating in breach are outside this Court's subject-matter jurisdiction. United States v. Mitchell, 463 U.S. 206, 216-17 (1983) ("Mitchell II"). Plaintiffs should specify what terms of these leases they allege have been violated, the Tucker Act jurisdictional basis for claims premised on those alleged violations, and how the alleged violations breached a specific statutory or regulatory obligation of the United States, money-mandating in breach. A more definite statement is appropriate to flesh out these facts and test the jurisdictional underpinnings of plaintiffs' Third Cause of Action before the parties expend considerable time, effort, and resources, on discovery associated with these claims.

**B. Plaintiffs' Fifth Cause of Action is Preempted by CERCLA.**

Broadly speaking, there are two time periods relevant to plaintiffs' Fifth Cause of Action for "Failure to Protect Natural Resources and Failure to Protect the Environment." First, there is the period before 1983, when acts or omissions lead to the contamination of the environment on the Quapaw Reservation. As to those acts or omissions, plaintiffs concede that they constitute

trust asset mismanagement claims and are barred by the statute of limitations. Opp'n at 26-27. On September 8, 1983, the Tar Creek Superfund Site was placed on the National Priorities List. Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40,658, 40,667 (Sept. 8, 1983). After 1983, the Environmental Protection Agency ("EPA") began to investigate and remediate the environment on the Quapaw Reservation within the Tar Creek Superfund Site. Operable Unit 4 ("OU4") Record of Decision ("ROD") at 6-7.[4/] As to that post-1983 period—which encompasses the only period within the statute of limitations by plaintiffs' own admission—plaintiffs' Fifth Cause of Action is nothing more than an attack on EPA's investigation and remediation of the environment and this Court lacks jurisdiction over those claims by operation of Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

Aside from plaintiffs' challenge to "subsequent efforts to clean up the environmental devastation left behind," Compl., ¶ 54, plaintiffs' complaint is devoid of any alleged acts or omissions of the United States that occurred "since June 28, 2006," Opp'n at 27. The only possible claims within the statute of limitations that plaintiffs could assert would all pertain to EPA's investigation of the Tar Creek Superfund Site and its selected remedy. Plaintiffs' claim to the contrary, Opp'n at 21, is disingenuous.

Whether plaintiffs' complaint specifically mentions EPA by name is not the test under Section 113(h). The "obvious meaning" of Section 113(h) is that "when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy." Schalk v. Reilly, 900 F.2d 1091, 1095 (7th Cir. 1990). No matter how much plaintiffs contort their claims

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[4/] In fact, a task force was created in 1979 by the State of Oklahoma in response to suspected contamination, and EPA first proposed that Tar Creek be identified as a National Priorities List site in 1981. Id. at 6.

to try to escape Section 113(h), the Court should look to the substance of the claims to determine if they are "in all respects, a challenge to an EPA-ordered remediation." New Mexico v. Gen. Elec. Co., 467 F.3d 1223, 1249 (10th Cir. 2006). Here, the contamination occurred decades ago. See Compl., ¶ 41 (describing mountains of chat "since the early 1900s"), see also OU4 ROD at 6 (describing acid mine drainage in surface and groundwater in 1979). Thus, all that could be at issue in plaintiffs' Fifth Cause of Action that post-dates June 28, 2006, is the propriety of EPA's selected remedy for the Tar Creek Superfund Site and BIA's involvement in that selected remedy as a cooperating agency. Those claims fall squarely within the jurisdictional prohibition found in Section 113(h), and this Court lacks subject-matter jurisdiction over those claims.

To be clear, plaintiffs have not alleged in their Fifth Cause of Action a Fifth Amendment takings claim or a breach of contract claim. Thus, the cases summarized in U.S. Home Corp v. United States, 92 Fed. Cl. 401, 408-9 (2010), and relied upon by plaintiffs in their opposition, Opp'n at 22-23, are inapposite. Because any claims that plaintiffs could assert that fall within the statute of limitations would be challenges to removal or remedial actions selected by EPA, Section 113(h) divests this Court of subject-matter jurisdiction and plaintiffs' Fifth Cause of Action should be dismissed. Tarrant v. United States, 71 Fed. Cl. 554, 556-57 (2006).

**C. Alternatively, Plaintiffs' Fifth Cause of Action is Untimely.**

Plaintiffs do not dispute in their opposition that the acts or omissions that lead to the contamination of the environment on the Quapaw Reservation occurred decades ago and were actually known to plaintiffs, or reasonably knowable to plaintiffs, by no later than December 10, 2003, when the Quapaw Tribe and certain putative class members filed suit in the United States District Court for the Northern District of Oklahoma over environmental contamination on tribal and allotted land. Quapaw Tribe of Okla. v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1174-75

(N.D. Okla. 2009). To save some vestige of environmental claims, plaintiffs, in their opposition, depart from the four corners of the complaint and argue that an un-plead "continuing trespass" brings some claims within the statute of limitations. Opp'n at 26-27. Plaintiffs' argument should be rejected because neither the complaint nor plaintiffs' opposition identifies who or what is allegedly trespassing or identifies a specific statutory or regulatory obligation, money-mandating in breach, to remove or evict those alleged trespassers. Even if the Court were to entertain plaintiffs' novel theory, it still should be rejected.

In Shoshone IV, the Federal Circuit refused to address, in the first instance, whether the Court of Federal Claims has subject-matter jurisdiction over the tribes' "failure to eject trespassers" claims. Thus, the Federal Circuit remanded the case to the Court of Federal Claims "so that it can, in the first instance, hear argument on and determine whether the 1916 and 1938 Acts, or any other relevant statute or regulation create" a fiduciary duty, money-mandating in breach, to eject trespassers. 672 F.3d at 1041.

The Tucker Act explicitly divests this Court of subject-matter jurisdiction over claims "sounding in tort." 28 U.S.C. § 1491(a)(1). Tort actions are expressly outside the Court of Federal Claims' jurisdiction. Brown v. United States, 105 F.3d 621, 623 (Fed. Cir. 1997). The Indian Tucker Act does not expand Tucker Act jurisdiction in Indian cases, and "[c]laims that would 'otherwise be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group' [under the Indian Tucker Act] include those founded upon the Tucker Act . . . which waives immunity for claims '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, or for liquidated or unliquidated damages in cases not sounding in tort.'" Wolfchild v. United States, 96 Fed. Cl. 302, 324-25 (2010).

"[T]respass is a tort." United States v. Atl. Richfield Co., 612 F.2d 1132, 1137 (9th Cir. 1980). Because "trespass is a tort . . . the court does not have jurisdiction over tort claims." Schrader v. United States, 103 Fed. Cl. 92, 98 n.6 (2012). Framing plaintiffs' claims as failure to "eject trespassers," instead of as direct trespass claims against the United States, does not alter the analysis. The tort of trespass includes one who "causes a thing or third person" to trespass and one who "fails to remove from the land a thing which he is under a duty to remove." RESTATEMENT (SECOND) TORTS, § 158 (1965). Thus, any "continuing trespass" claim that plaintiffs may have is outside this Court's subject-matter jurisdiction. No Court of Appeals has held that the United States has a duty to eject trespassers. Shoshone IV, 672 F.3d at 1040 (explaining that Cherokee Nation of Okla. v. United States, 21 Cl. Ct. 565 (1990) ("Cherokee II"), "merely leaves open the possibility that the Tribes could establish that the Government had a duty to eject trespassers pursuant to the 1938 Act."). Because plaintiffs' complaint does not allege trespass, and because plaintiffs have failed to identify a specific statutory or regulatory proscription, money-mandating in breach, to evict alleged trespassers, plaintiffs' Fifth Cause of Action should be dismissed in its entirety.

Plaintiffs' claims for environmental contamination are admittedly untimely. Plaintiffs have not plead a continuing trespass claim and, even if they were to do so, such a claim would be outside this Court's subject-matter jurisdiction. Thus, plaintiffs' Fifth Cause of Action should be dismissed.

**D. Plaintiffs Fail to State a Claim in Their Sixth Cause of Action.**

Plaintiffs' response to the United States well stated challenge to plaintiffs' Sixth Cause of Action, a "catch all" claim for breach of the general trust obligation owed to Indians, turns the jurisdictional inquiry under RCFC 12(b)(1) on its head. Plaintiffs argue that they have no

obligation to identify specific statutory or regulatory obligations, money-mandating in breach, that the United States has allegedly violated and argue, instead, that it is the government's obligation to "deny that it has such statutory and regulatory obligations." Opp'n at 27-28. It is plaintiffs' obligation to establish subject-matter jurisdiction, DaimlerChrysler Corp., 442 F.3d at 1318, not the United States' obligation to disprove subject-matter jurisdiction.

Plaintiffs do not dispute in their opposition that claims for breaches of the general trust relationship between the United States and Indians are outside this Court's subject-matter jurisdiction. See United States v. Navajo Nation, 537 U.S. 488, 506 (2003) ("Navajo I") ("Although the undisputed existence of a general trust relationship between the United States and the Indian people can reinforc[e] the conclusion that the relevant statute or regulation imposes fiduciary duties, that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act." (internal quotation marks and citations omitted)). Plaintiffs have to do more than plead facts that may constitute a breach of some unspecified statutory or regulatory proscription. See Opp'n at 29-30. Plaintiffs also concede that they did not attempt to "expressly cite [statutory and regulatory obligations] in this particular cause of action." Id. at 28. Thus, because plaintiffs have failed to "identify a substantive source of law that establishes specific fiduciary or other duties[,] allege that the Government has failed faithfully to perform those duties," and failed to show that "the relevant substantive source of law 'can fairly be interpreted as mandating compensation for the damages sustained as a result of a breach . . .'," United States v. Navajo Nation, 556 U.S. 287, 290-91 (2009) ("Navajo II"), plaintiffs' Sixth Cause of Action should be dismissed for lack of subject-matter jurisdiction.

In their opposition, plaintiffs cite to, without explaining how the United States allegedly violated, 25 U.S.C. § 162a(d)(8). Opp'n at 28. The American Indian Trust Reform Management

Act of 1994, Pub L. No. 103-412 ("1994 Act"), added subdivision (d) to Section 162a, which states, in relevant part, that the proper discharge of the Secretary of the Interior's trust responsibilities to Indians includes "[a]ppropriately managing the natural resources located within the boundaries of Indian reservations and trust lands." 25 U.S.C. § 162a(d)(8). This provision of the 1994 Act is not money-mandating in breach, and should not form the basis for subject-matter jurisdiction over plaintiffs' Sixth Cause of Action.

"Appropriately managing" non-monetary Indian trust resources and acting "in the best interest of the Indians," while laudable goals of federal Indian policy, do not rise to the level of specific, enforceable, trust obligations that compel—or be inferred to compel—compensation by the United States if the Court finds that they have been breached. "The Federal Government's liability cannot be premised on control alone." Navajo II, 556 U.S. at 301. The specific statute upon which plaintiffs invoke Tucker Act jurisdiction has to be "fairly . . . interpreted as mandating compensation by the Federal Government for the damage sustained," Mitchell II, 463 U.S. at 217, and be "reasonably amenable to the reading that it mandates a right of recovery in damages," United States v. White Mountain Apache Tribe, 537 U.S. 465, 473 (2003). Here, Section 162a(d)(8) is similar to the government's general obligations under the Dawes Act to hold land "in trust for the sole use and benefit" of Indian allottees, which the Supreme Court deemed to be an insufficient basis for conferring subject-matter jurisdiction in United States v. Mitchell ("Mitchell I"). 445 U.S. 535, 542-43 (1980). Thus, 25 U.S.C. § 162a(d)(8) does not form a basis for subject-matter jurisdiction over plaintiffs' Sixth Cause of Action.

Plaintiffs, in their opposition, also cite to the general leasing provisions of the Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97-459 (1983), 96 Stat. 2515, amended by Pub. L. No. 106-462 (2000), 114 Stat. 1991. Opp'n at 28. It is unclear why plaintiffs believe 25

U.S.C. § 2218 applies to their claims. ILCA was adopted to allow the Secretary of the Interior to facilitate acquisition of fractionated land interest by Indian tribes for consolidation. H.R. Rep. No. 97-908 at 9 (Sept. 30, 1982) (Act's "[g]oal is to allow Indian tribes: (1) to consolidate their tribal landholdings; (2) to eliminate certain undivided fractionated interests in Indian trust or restricted lands; and (3) to keep trust or restricted lands in Indian ownership by allowing tribes to adopt certain laws restricting inheritance of Indian lands to Indians."). Nowhere in plaintiffs' complaint do they put land consolidation at issue. 25 U.S.C. § 2218 is not a basis for subject-matter jurisdiction over plaintiffs' Sixth Cause of Action.

Plaintiffs likely meant to refer to the Secretary of the Interior's general supervisory role over Indian leasing. In general, Indian allottees may lease their land to third-parties subject to the Secretary's approval. 25 U.S.C. § 393. Nonetheless, "only the power to approve . . . leases" does not "create, expressly or otherwise, a trust duty." Navajo I, 537 U.S. at 507-8. The mere fact that the Secretary of the Interior has to approve Indian leases is insufficient to invoke Tucker Act jurisdiction because "neither the Government's 'control' . . . nor common law trust principles matter." Navajo II, 556 U.S. at 302.

Plaintiffs' citation to the Quapaw lead and zinc mining regulations, 25 C.F.R. Part 215, Opp'n at 28, is also not a basis for subject-matter jurisdiction over plaintiffs' Sixth Cause of Action. Part 215 applies exclusively to lead and zinc mining leases on the Quapaw Reservation, not any other form of mineral leasing or other leasing. 25 C.F.R. § 215.25. Plaintiffs' First Cause of Action pertains to lead and zinc mining. Compl., ¶¶ 28-35. Also, plaintiffs explicitly rely upon Part 215 as a basis for their claims in their First Cause of Action. Id., ¶ 32. Thus, to the extent plaintiffs are asserting lead or zinc mining claims in their Sixth Cause of Action, those claims are duplicative of plaintiffs' claims in their First Cause of Action and the Sixth Cause of

Action should be dismissed. To the extent plaintiffs are asserting claims other than lead or zinc mining claims in their Sixth Cause of Action, Part 215 has no application to those claims and is not a basis for Tucker Act jurisdiction. Plaintiffs' Sixth Cause of Action should be dismissed in its entirety.

**E. Plaintiffs Have Failed to State a Legislative or Judicial Takings Claim.**

Plaintiffs completely ignore in their opposition the fact that they will be compensated for their Historical Accounting Claims released and waived in the Cobell v. Salazar, D.D.C. No. 96-cv-1285, settlement agreement, ratified by Congress in the Claims Resolution Act of 2010, Pub. L. No. 111-291 (2010), 124 Stat. 3064. Plaintiffs appear to concede that, as established in the United States' opening brief (ECF No. 6-1) at 20-24, any challenge in this Court to the United States District Court for the District of Columbia's approval of the Cobell settlement agreement and release would be an impermissible collateral attack on the actions of another tribunal. Vereda Ltd. v. United States, 271 F.3d 1367, 1375 (Fed. Cir. 2001). Realizing this impediment to their takings claim, plaintiffs concede that they "do not assert that either the Cobell court or this court (in dismissing their previous complaint under Section 1500) acted wrongfully." Opp'n at 36. Thus, plaintiffs have to accept that "the information produced from an historical accounting is not likely to be worth significantly more to some class members than to others" and that "Congress's judgment that uniform payments would adequately compensate class members for an accounting right that it created carries significant weight." Cobell v. Salazar, 679 F.3d 909, 918 (D.C. Cir. 2012) ("Cobell XXIII"). Plaintiffs also have to accept that the Historical Accounting Class settlement is "fair, reasonable and adequate." Order Granting Final Approval to Settlement (ECF No. 3850) at 4 in Cobell v. Salazar, D.D.C. No. 96-cv-1285.

It is axiomatic that the Fifth Amendment does not preclude the government from taking

property for public use, it only compels payment of just compensation for any such takings. Williamson Cnty. Reg'l Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985). The United States denies that the Cobell settlement or the Claims Resolution Act of 2010 have effectuated any taking. Nonetheless, even assuming some form of taking, plaintiffs have been provided just compensation for the alleged property taken: their Historical Accounting Claims. Plaintiffs will be paid $1,000 in exchange for the dismissal with prejudice of their Historical Accounting Claims and a release of such claims up to the settlement agreement Record Date. The District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia have made specific findings that the $1,000 payment is fair, reasonable, and adequate. Congress has ratified the settlement, indicating that Congress views the compensation as just. There is no taking, and if there were, Congress and the courts have already determined plaintiffs have obtained just compensation.

To be clear, the named plaintiffs have opted out of the Trust Administration Class in Cobell. As opt-outs, plaintiffs "expressly preserve and do not release, waive or discharge any Funds Administration Claims (including without limitation accounting error claims) and/or Land Administration Claims, whether such claims arise in equity or at law." Cobell Settlement Agreement, ¶ I.7 (ECF No. 3660-2) in Cobell v. Salazar, D.D.C. No. 96-cv-1285. Plaintiffs' "property" (i.e., claims) that have been "taken" by the Cobell settlement are claims that the United States has failed to adequately account for trust assets, including alleged failures to maintain trust records. Plaintiffs explicitly disavow any such claims in this case. Compl. at 3. Thus, at a minimum, plaintiffs' Eighth Cause of Action fails to state a claim because no "property" at issue in this case has allegedly been "taken," and plaintiffs have been provided just compensation for any "property" allegedly "taken" by the Cobell settlement and the Claims

Resolution Act of 2010. Plaintiffs Eighth Cause of Action should be dismissed for failure to state a claim.

## III. CONCLUSION

For the reasons set forth herein, and for the reasons set forth in the United States' opening brief, the United States respectfully requests that its partial motion to dismiss or for a more definite statement be granted in full.

Dated: December 13, 2012

Respectfully submitted,

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