

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ROGER BIRDBEAR, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 16-75L

Honorable Elaine D. Kaplan

**PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT**

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LIST OF ATTACHED EXHIBITS

Exhibit	Description
1	United States' Motion for Partial Dismissal and Memorandum of Points and Authorities in Support (ECF No. 10) ("Motion to Dismiss")
2	Transcript of Deposition of Gregory J. Chavarria taken October 9, 2020 ("Chavarria Trans.") (relevant portions)
3	Individual Indian Monies Statement of Performance for Roger Birdbear for September 1, 2015 through November 30, 2015 ("Sept. 1, 2015 SOP")
4	Individual Indian Monies Statement of Performance for Roger Birdbear for September 1, 2010 through November 30, 2010 ("Sept. 1, 2010 SOP")
5	Explanation of Payment Revenue from Oil and Gas Leases for Roger Birdbear dated October 28, 2015 ("Oct. 28, 2015 EOP")
6	Expert Report of Jane K. Kidd dated December 7, 2018 ("Kidd Report")
7	Expert Report of Gregory J. Chavarria dated April 26, 2019 ("Chavarria Report")
8	Individual Indian Monies Statement of Performance for Roger Birdbear for September 1, 2018 through November 30, 2018 ("Sept. 1, 2018 SOP")
9	Office of Inspector General Report No.: CR-EV-BIA-0001-2011, September 2012, "Oil and Gas Leasing in Indian Country: An Opportunity for Economic Development" ("OIG Sept. 2012 Report")
10	United States Government Accountability Office Report GAO-15-502, June 2015, "INDIAN ENERGY DEVELOPMENT, Poor Management by BIA Has Hindered Energy Development on Indian Lands" ("GAO June 2015 Report")

11	United States Government Accountability Office Report GAO-17-43, November 2016, “INDIAN ENERGY DEVELOPMENT, Additional Actions by Federal Agencies Are Needed to Overcome Factors Hindering Development” (“GAO Nov. 2016 Report”)
12	United States Government Accountability Office Report GAO-10-313, March 2010, “OIL AND GAS MANAGEMENT, Interior’s Oil and Gas Production Verification Efforts Do Not Provide Reasonable Assurance of Accurate Measurement of Production Volumes” (“GAO March 2010 Report”)
13	United States Government Accountability Office Testimony GAO-10-888T, July 22, 2010, “OIL AND GAS MANAGEMENT, Past Work Offers Insights to Consider in Restructuring Interior’s Oversight” (“GAO July 2010 Testimony”)
14	United States Government Accountability Office Report GAO-15-39, April 2015, “OIL AND GAS RESOURCES, Interior’s Production Verification Efforts and Royalty Data Have Improved, but Further Actions Needed” (“GAO April 2015 Report”)
15	Exhibit 6 to Expert Report of Gregory Chavarria (“ONRR Report”)
16	ONRR Form 2014

MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to United States Court of Federal Claims Rule 56, Plaintiffs Roger Birdbear, Thomas Birdbear, Nelson Birdbear, Jamie Lawrence, and Rae Ann Williams (collectively “Plaintiffs”), respectfully move the Court to grant summary judgment in their favor on Count IV of the Third Amended Complaint, ECF No. 147, because there are no material facts in dispute, and Plaintiffs are entitled to judgment as a matter of law. In support of this Motion, Plaintiffs rely on the accompanying memorandum and the attached exhibits.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs are enrolled tribal members of the Three Affiliated Tribes and collectively are the beneficial owners of allotted land that is held in trust by the United States. The United States retains control of Plaintiffs’ allotted lands “and thereby retained its fiduciary obligations to administer the trust lands and funds arising therefrom for the benefit of individual Indian beneficiaries.” *Cobell v. Norton (“Cobell VI”)*, 240 F.3d 1081, 1087 (D.C. Cir. 2001).

By this Motion, Plaintiffs seek summary judgment on Count IV of their Third Amended Complaint. Due process requires that when the United States disburses funds from an Individual Indian Money (“IIM”) account, which the United States holds in trust, it must provide notice and an opportunity for hearing to the account beneficiary. The United States failed to do so. In fact, the United States here failed to provide any notice of an opportunity for a hearing before it allowed third parties to disburse royalty payments from Plaintiffs’ IIM accounts. Oil and gas producers who leased Plaintiffs’ allotted land

made cash disbursements to themselves totaling over \$17 million from Plaintiffs' IIM accounts. By allowing these disbursements without providing any opportunity for hearing, the United States breached its trust duties and violated Plaintiffs' constitutional due process rights.

Because it failed to provide Plaintiffs a hearing to contest the validity of the disbursements, the United States cannot now attempt to offer *post hoc* justifications. Accordingly, the United States as trustee must restore the funds that it allowed to be disbursed from Plaintiffs' IIM trust accounts. Plaintiffs also request that the Court order an accounting in aid of judgment to determine the full amount of unlawful cash disbursements from Plaintiffs' IIM accounts.

STATEMENT OF UNDISPUTED FACTS

Plaintiffs are enrolled tribal members of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota. Ex. 1, Motion to Dismiss, at 4. Plaintiffs are the beneficial owners of allotted land and resources held in trust by the United States, and mineral rights in at least 1,550 acres of Plaintiffs' allotted land are leased for oil and gas mining purposes. *Id.* at 5. The United States has leased Plaintiffs' allotted mineral rights in at least 38 separate leases to various oil companies/operators ("Lessees"). Ex. 2, Chavarria Trans., at 45:5-8.

The United States provides Statements of Performance ("SOP") to Plaintiffs on a quarterly basis, which report transaction activity for Plaintiffs' IIM accounts that are held in trust by the United States. *E.g.*, Ex. 3, Sept. 1, 2015 SOP; Ex. 4, Sept. 1, 2010 SOP; Ex. 8, Sept. 1, 2018 SOP. The United States also provides Explanation of Payment Revenue from Oil and Gas Leases to ("EOP") Plaintiffs. *E.g.*, Ex. 5, Oct. 28, 2015 EOP. As shown on the SOPs, beginning no later than November 17, 2010, the United States began

allowing Lessees to withdraw funds from Plaintiffs' IIM accounts. Ex. 4 at 5. These disbursements are labeled on the SOPs as "Cash Disbursement" paid to the "Great Plains Regional Office," which refers to the Great Plains Regional Office of the Bureau of Indian Affairs ("BIA"). *E.g.*, Ex. 3 at 1; Ex. 4 at 5; Ex. 8 at 1; Ex. 2 at 44:4-8. The experts for all parties agree that through November 30, 2017, there was \$17 million of "Cash Disbursements" to the Great Plains Regional Office from Plaintiffs' IIM accounts. Ex. 6, Kidd Report, at 8-9; Ex. 7, Chavarria Report, at 14 n. 22. Plaintiffs' expert Jane Kidd reports that, of the \$17,693,154 in total disbursements, \$13,584,393 was from Roger Birdbear's IIM account, \$1,051,108 from Jamie Lawrence's IIM account, \$955,439 from Nelson Birdbear's IIM account, \$1,051,108 from Rae Ann Williams's IIM account, and \$1,051,108 from Thomas Birdbear's IIM account. Ex. 6 at Table 6.

Disbursements from Plaintiffs' IIM accounts to the Great Plains Regional Office continued after November 30, 2017, but the total amount of such disbursements is unknown to Plaintiffs. *E.g.*, Ex. 8.

The United States never provided Plaintiffs with notice or an opportunity for a hearing to challenge the validity or amount of any withdrawals and deductions from their IIM accounts. Ex. 2 at 57:25-58:21.

STANDARD OF REVIEW

“A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.” RCFC 56(a). “Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.*; *Jicarilla Apache Nation v. United States (Jicarilla II)*, 100 Fed. Cl. 726, 729 (2011).

A genuine issue of material fact is one that could change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). “[S]ummary judgment is a salutary method of disposition designed to secure the just, speedy and inexpensive determination of every action.” *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (internal quotations and citations omitted).

“A party need not demonstrate the admissibility of ‘every piece of evidence supporting factual assertions’ in summary judgment proceedings.” *Coast Federal Bank v. United States*, 48 Fed. Cl. 402, 445 (2000), *aff’d en banc*, 323 F.3d 1035 (Fed. Cir. 2003) (quoting *Cedar Lumber, Inc. v. United States*, 857 F.2d 765, 769 (Fed. Cir. 1988)). On summary judgment, the court may consider evidence even if it is in a form that would not be admissible at trial. *Alpha I, L.P. v. United States*, 93 Fed. Cl. 280, 293 (2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

ARGUMENT

I. As Trustee, the United States Owes Fiduciary Duties and Due Process Protections.

A. The United States Owes the Highest Fiduciary Duty Under Law to Indian Allottees.

An elaborate statutory and regulatory framework grants the United States comprehensive control over the leasing, monitoring, and collection of royalties for all oil

and gas production on Native American allotted lands. *See, e.g.*, 30 U.S.C. §§ 1701-57; 25 U.S.C. §§ 162a, 396; 25 C.F.R. §§ 211, 212; 30 C.F.R. §§ 1200-1206; 43 C.F.R. § 3160; Fort Berthold Mineral Leasing Act, Pub. L. No. 105–188, 112 Stat. 620 (1998).

The United States has a duty to “ensure that Indian mineral owners desiring to have their resources developed . . . in a manner that maximizes their best economic interests.” 25 C.F.R. § 212.1(a). As the trustee to Indians’ allotment interests, mineral resources, and IIM accounts, the United States is held to the highest standard of trust for its management of allottees’ funds. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *see also, Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *adopted as majority opinion as modified en banc*, 782 F.2d 855 (10th Cir. 1986) (“[T]he Government, in both its executive and legislative branches, is held to a high standard of conduct, one consonant with its ‘moral obligations of the highest obligation and trust.’” (quoting *Seminole Nation*, 316 U.S. at 297)).

Because it is vested with these responsibilities, “[T]he United States has a general fiduciary obligation toward the Indians with respect to the management of those oil and gas leases.” *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987); *United States v. Mitchell (“Mitchell II”)*, 463 U.S. 206, 224 (1983) (“[T]he statutes and regulations now before us ... establish a fiduciary relationship and define the contours of the United States; fiduciary responsibilities.”). The Secretary of the Interior and the Bureau of Trust Fund Administration¹ (“BTFA”) are responsible for administering and carrying out the

¹ As of October 1, 2020, the BTFA assumed the fiduciary responsibilities previously managed by the Office of the Special Trustee for American Indians. https://www.doi.gov/ost/about_us (last accessed March 3, 2021).

government's trust responsibility to American Indians. *Jicarilla Apache Nation v. United States (Jicarilla III)*, 112 Fed. Cl. 274, 288 (2013). The Secretary of the Interior has a duty to "fulfill" and "aggressively carry out his trust responsibility in the administration of Indian oil and gas." 30 U.S.C. § 1701(b)(4), (a)(4).

By the United States' own admission, the Department of the Interior consistently has failed to fulfill its duties to Indians. For instance, after extensive evaluation, the Office of Inspector General ("OIG") "concluded that Indian oil and gas leasing is not achieving its full economic potential." Ex. 9, OIG Sept. 2012 Report, at 1 (Memo. from Mary L. Kendall). The OIG further found that "[i]nsufficient guidance and oversight of oil and gas leases by U.S. Department of Interior agencies have frustrated tribal officials and members, agency employees, and the energy industry in Indian Country" and that "[t]hese problems contribute to a general preference by industry to acquire oil and gas leases on non-Indian lands." *Id.* The result is "the loss of vital economic and other development opportunities for tribal governments and tribal members." *Id.* at 16. Stated simply, according to the OIG, "Overall, BIA has placed little emphasis on oil and gas operations in Indian Country." *Id.* at 7.

Likewise, the United States Government Accountability Office ("GAO") has recognized that "a number of factors have hindered development of [Indian energy] resources, including shortcomings in BIA's management of the resources and the development process." Ex. 10, GAO June 2015 Report, at 35. The shortcomings in BIA's management of Indian energy development that the GAO identified "place the agency at risk of not fulfilling its trust responsibility to Indian tribes and their members." *Id.* at 36; *see also* Ex. 11, GAO Nov. 2016 Report, at 29 ("BIA cannot provide reasonable assurance

it has the right people in place with the right skills to effectively meet its responsibilities” with respect to Indian energy development).

These findings by the OIG and GAO align with the GAO’s recent history of identifying Department of Interior deficiencies and problems related to federal oil and gas leases. For example, the GAO found that Interior did not have “sufficient assurance that it is properly measuring and accounting for oil and gas removed from federal lands.” Ex. 12, GAO March 2010 Report, at 79; *see also* Ex. 13, GAO July 2010 Testimony, at 1-2 (“Our work has included reviews of Interior’s oversight practices, operations, and rules, and our conclusions have been remarkably consistent: the agency has not done enough to meet the challenges it faces.”); Ex. 14, GAO April 2015 Report, at 1 (in “GAO Highlights”) (“Interior has not updated its regulations for onshore oil and gas measurement in over 25 years and, as a result, they do not reflect newer measurement technologies and standards adopted by industry, hampering Interior’s ability to have reasonable assurance that oil and gas are measured accurately.”).

B. The United States Is Responsible for Collecting and Depositing Lease Royalties in IIM Accounts.

Among other things, “[t]he Secretary shall establish a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed, and to collect and account for such amounts in a timely manner.” 30 U.S.C. § 1711(a).

Once oil and gas production has been established on Indian allottees’ trust lands, the lessee-operators are required to make royalty payments pursuant to the applicable lease to the Office of Natural Resources Revenue (“ONRR”) within the Department of

Interior. 30 U.S.C. § 1711(a); *see also* 25 C.F.R. § 212.40 (incorporating 25 C.F.R. § 211.40), 30 C.F.R. § 1201.100. The United States is obligated “to ensure the prompt and proper collection and disbursement of royalties.” *Shoshone Indian Tribe of Wind River Reservation v. United States*, 58 Fed. Cl. 77, 82 (2003) (citing to Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701–1757 (2000)).

As part of its duties as trustee, the United States collects royalty payments from the Lessees. 30 U.S.C. § 1711; 25 C.F.R. § 212.40 (incorporating § 211.40); 30 C.F.R. § 1201.100. Once the government receives the royalties, they are deposited into Plaintiffs’ IIM accounts. 30 U.S.C. § 1714; 25 C.F.R. § 115.002 (noting that an IIM account holder “may determine the timing and amount of disbursement from the account”).

IIM accounts are “interest bearing account[s] for trust funds held by the Secretary that belong to a person who has an interest in trust assets. These accounts are under the control and management of the Secretary [of the Interior].” 25 C.F.R. § 115.002; *see also Goodeagle v. United States*, 122 Fed. Cl. 292, 294 (2015); 25 U.S.C. §§ 162a (d), 4041. The funds deposited in an IIM account are property of the account beneficiary. 25 C.F.R. § 115.002 (defining “accounts” as “an interest bearing account for trust funds held by the Secretary [of the Interior] that belong to a person who has an interest in trust assets.”) (emphasis added). Adults have the right to withdraw funds from their IIMs. 25 C.F.R. § 115.101.

The United States and the Secretary of Interior must develop “enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States and Indian lessors and those inuring to the benefit of States.” 30 U.S.C. § 1701(b)(3). “[T]he Secretary of the Interior and the Secretary of the Treasury are the designated trustee-delegates for the IIM Trust.” *Cobell VI*, 240 F.3d, at

1088. As trustee to Indian allottees' mineral resources and IIM accounts, the United States has a duty to ensure collection of certain rents, royalties, and other payments pursuant to the terms of the applicable leases. 30 C.F.R. § 1201.100.

In their payment of royalties, if a lessee “determines that an adjustment or refund request is necessary to correct an underpayment or overpayment of an obligation, the lessee or its designee shall make such adjustment or request a refund within a reasonable period of time and only during the adjustment period.” 30 U.S.C. § 1721a(a)(1). A lessee must file “a royalty report which reflects the underpayment or overpayment of an obligation.” *Id.*

The United States is required to provide periodic SOPs to beneficiaries to account for all funds deposited into beneficiaries' accounts. 25 U.S.C. § 4011. SOPs are quarterly account statements issued by the United States that contain all transaction activity for that period for a given beneficiary's IIM Account, including the source, type, and status of funds, the beginning and ending balance, gains and losses, and receipts and disbursements.² 25 U.S.C. § 4011(b).

The United States also must provide IIM account beneficiaries with an Explanation of Payment (“EOP”) report. 30 U.S.C. § 1715(a). The EOP must include “a description of the type of payment being made, the period covered by such payment, the source of such payment, production amounts, the royalty rate, unit value and such other information as may be agreed upon by the Secretary and the recipient State, Indian tribe, or Indian allottee.”³ *Id.*

² Examples of SOPs are attached as Exhibits 3, 4, and 8.

³ An example of an EOP is attached as Exhibit 5.

1. The United States Must Provide a Hearing and Notice When Disbursing Funds from an IIM Account.

In addition to the fiduciary duties they are owed under the applicable regulations, beneficiaries' IIM accounts are also protected by principles of due process. Indeed, "there is no dispute that [a beneficiary's] interest in his IIM account funds is a property interest subject to due process protections." *Kennerly v. United States*, 721 F.2d 1252, 1257 (9th Cir. 1983).

"A fundamental constitutional principle is that some form of hearing, with notice of its availability, must occur before a person is finally deprived of a property interest." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (quotation omitted). "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576 (1972). Private property held by Indians is "not excepted from the protection guaranteed by the Constitution." *Choate v. Trapp*, 224 U.S. 665, 677 (1912).

Accordingly, disbursements from a beneficiary's IIM trust account "without any hearing on the amount or validity of the [basis] *violate[s] his due process rights*, and, given the unique role of the federal government as trustee, that violation *indicates a breach of fiduciary responsibilities.*" *Kennerly*, 721 F.2d at 1254 (emphasis added).

The plaintiff in *Kennerly* owned interests in parcels of land that the BIA leased on his behalf. *Id.* The BIA administered the IIM in which the income from those leases was deposited. *Id.* The plaintiff owed money to the Blackfeet Tribe, which requested that the

BIA attach funds in plaintiff's IIM account pursuant to 25 C.F.R. § 104.9. *Id.* at 1254-55. That regulation (which has since been renumbered as 25 C.F.R. § 115.104) allowed for IIM funds to be applied by the Secretary against delinquent claims of indebtedness of the tribe of which the individual is a member. *Id.* Overturning a portion of the initial IBIA decision, the Court of Appeals held, "A fundamental constitutional principle is that some form of hearing, with notice of its availability, must occur before a person is finally deprived of a property interest." *Id.* at 1257. As to the type of "hearing," the court held that a judicial proceeding or "an administrative hearing with an impartial decision maker may suffice." *Id.* at 1256. As to the timing of a hearing, the court held "that in some cases due process may be satisfied by a prompt post-deprivation hearing if that opportunity is afforded prior to the final termination of a property interest and if the length or severity of the deprivation does not itself constitute a serious loss." *Id.* at 1258.

In that case, as here, the United States "never contemplated or held any hearing, either before or after drawing against Kennerly's IIM account, that aimed to determine even provisionally the validity of his debt to the tribe." *Id.* Ultimately, the court held that "[t]he federal defendants in this case failed to provide or even seek on behalf of Kennerly, the beneficiary of the trust, the protections required by procedural due process." *Id.* at 1258.

In a subsequent case, the IBIA applied *Kennerly* when the BIA placed a hold on a beneficiary's IIM account for the purpose of recovering funds erroneously paid to her. *Robinson v. Acting Billings Area Dir., BIA*, 20 IBIA 168, 168 (1991). There, the BIA inaccurately calculated appellant's interest in trust property and as a result erroneously deposited funds in her IIM account. *Id.* at 169. As authorized by 25 U.S.C. § 115.9, the BIA placed a hold on her IIM account in 1983 but did not provide her a *Kennerly* notice. *Id.*

In 1986, the BIA finally notified appellant that the erroneous amount would be withdrawn from her IIM and informed her that she could request a hearing, which she did. *Id.* After a hearing, the Superintendent held that the overpayment amount would be withdrawn from her IIM account. *Id.*

On appeal, the appellant argued that her due process rights, as described in *Kennerly*, had been violated. *Id.* The IBIA agreed. *Id.* at 171. It held that appellant should have been offered a hearing in 1983 “as soon as a hold was placed on her account.” *Id.* “Appellant’s right to due process was violated when she was not afforded a hearing at that time.” *Id.* Ultimately, the IBIA decided that “BIA may not recover the overpayment to appellant” based on “not only the trust responsibility, but also equitable considerations, including the initial and continued violation of appellant’s due process rights, the extensive length of time her account has been subject to the hold, and the financial hardships the hold has caused appellant and her family.” *Id.* at 174-75.

II. The United States Violated Plaintiffs’ Due Process Rights and Breached its Fiduciary Duties By Allowing Funds to Be Disbursed from Plaintiffs’ IIM Accounts Without an Opportunity for Hearing.

The United States allowed lessees to disburse \$17.69 million of funds from Plaintiffs’ IIM accounts. The United States provided Plaintiffs with no opportunity for a hearing to question or dispute the disbursements. Accordingly, the United States deprived Plaintiffs of their rights to due process and violated the fiduciary duties it owes to Plaintiffs.

A. The United States Has Allowed Over \$17 Million To Be Disbursed from Plaintiffs’ IIM Accounts.

The United States has allowed Lessees to withdraw funds from Plaintiffs’ IIM accounts since November 17, 2010. Ex. 4 at 5. Plaintiffs’ SOPs indicate “Cash Disbursements” to the “Great Plains Regional Office.” Ex. 3 at 1; Ex. 4 at 5; Ex. 8 at 1.

Plaintiffs’ expert Jane Kidd identified entries on Plaintiffs’ SOPs that indicated that funds were disbursed to the Great Plains Regional Office. Ex. 6 at 8-9. Likewise, Defendant’s expert Gregory Chavarria calculated “Plaintiffs’ account adjustments” that were “questioned as improper by Kidd.” Ex. 7 at 14 n. 22. Ms. Kidd and Mr. Chavarria calculated their respective amounts as follows:

Expert	Amount	Time Period
Kidd (Plaintiffs)	\$17,693,154	January 1, 2005 to November 30, 2017
Chavarria (Defendant)	\$17,290,359	October 1, 2009 to September 30, 2017

Ex. 6 at 8-9; Ex. 7 at 14 n. 22.

Mr. Chavarria explained the sources of the differences in his calculation and Ms. Kidd’s: (i) \$399,794 from time periods beyond what he considered “due to time restrictions” and (ii) \$3,005 that he claimed was the result of “keying errors” in Ms. Kidd’s data. Ex. 7 at 14 n. 22. Thus, Defendant does not dispute that \$17,690,149 (all but \$3,005 of Ms. Kidd’s calculated figure) was disbursed from Plaintiffs’ IIM accounts to the Great Plains Regional Office.

Since November, 2017, the United States has continued to allow cash disbursements from Plaintiffs’ IIM accounts. The amount of such disbursements since

November 2017 can be calculated upon an accounting in aid of judgment and the government supplementing its document production.

It is undisputed that the United States has never provided Plaintiffs with an opportunity for a hearing or notice that they had such a right to dispute the amount or validity of the Cash Disbursements. Ex. 2 at 57:25-58:21.

Permitting the disbursements from Plaintiffs' IIM accounts "without any hearing on the amount or validity of the underlying debts or assignments violated [Plaintiffs'] due process rights, and, given the unique role of the federal government as trustee, that violation indicated a breach of fiduciary responsibilities." *Kennerly*, 721 F.2d at 1254.

B. It Is Far Too Late for the United States to Argue the Validity of the IIM Disbursements.

As established above, the United States has violated Plaintiffs' due process rights and in so doing breached its fiduciary duties by allowing Lessees to withdraw money from Plaintiffs' IIM accounts without providing Plaintiffs an opportunity for a hearing. The United States cannot now attempt to repair its violation by offering the due process that it was required to provide years ago.

As in *Kennerly*, the United States here "never contemplated or held any hearing, either before or after drawing against [Plaintiffs'] IIM accounts, that aimed to determine even provisionally the validity" of the disbursements. 721 F.2d at 1258. Because the United States failed to provide any type of hearing before or after depriving Plaintiffs of their property rights, it forfeited its opportunity to present whatever justification it would have argued if it would have provided an opportunity for a hearing years ago. Accordingly, Plaintiffs are entitled to damages notwithstanding any claimed justification by the United States.

In *Kennerly*, the BIA allowed funds to be disbursed to satisfy a delinquent debt that the IIM account beneficiary owed to his tribe. *Id.* at 1254. The court noted that not only did the United States never hold any hearing to determine the validity of the underlying debt, but that there never was “any formal determination that the debt was, in fact, valid.” *Id.* at 1258. Instead, “the BIA officials accepted the Tribe’s unilateral decision on the issue of validity.” *Id.* Ultimately, “[b]ecause Kennerly had no opportunity for a hearing at which he could have his objections considered,” due process was not satisfied and the attachment was adjudged “void.” *Id.*

Similarly, in *Robinson*, the IBIA held that the IIM account beneficiary was entitled to notice and a hearing as soon as the Trustee took detrimental action against her account by placing an administrative hold. *Robinson*, 20 IBIA at 171. Robinson’s right to due process was violated when the government failed to provide a hearing at the time the hold was placed on her account. *Id.* Robinson did not dispute that the payment into her IIM account had been in error. Nevertheless, the IBIA held that the “BIA may not recover the overpayment to appellant.” *Id.* at 173.

As in *Kennerly* and *Robinson*, it is undisputed that Plaintiffs here were never given a hearing to contest the basis of the Cash Disbursements. Accordingly, the United States violated Plaintiffs’ due process rights. The decisions in those cases did not change based on the validity of the underlying debt in *Kennerly* or the undisputed overpayment in *Robinson*. This Court need not determine the validity of the disbursements made from Plaintiffs’ IIM accounts. That inquiry may have been appropriate at a due process hearing years ago, but, under both *Kennerly* and *Robinson*, it is too late to make it now.

The United States has deprived Plaintiffs of more than \$17.69 million dollars over the last ten years. By any measure, the length and severity of this deprivation is enough

to “constitute a serious loss”. *Kennerly* at 1258. As a matter of law, it is too late for the United States to provide a *post hoc* rationalization for its due process violation.

C. A Statute Authorizing Payment Adjustments Does Not Authorize Due Process Violations.

1. Plaintiffs Do Not Forfeit Their Due Process Rights.

The United States’ violations of due process and their fiduciary duties is not excused by the fact that Lessees are permitted to make adjustments to or seek refunds of royalty payments. *See* 30 U.S.C. § 1721a. Both *Kennerly* and *Robinson* considered actions by the United States that were authorized by statute, but the Ninth Circuit and the IBIA both made it clear that the *Kennerly* notice must still be provided.

In *Kennerly*, the BIA attached funds in the plaintiff’s IIM account pursuant to a regulation that allowed “[f]unds of individuals may be applied by the Secretary . . . against delinquent claims of indebtedness . . . to the tribe of which the individual is a member.” 721 F.2d at 1255 (quoting then-numbered 25 C.F.R. § 104.9). The regulation was based on 25 U.S.C. § 410, which allowed “money accruing from any lease . . . held in trust by the United States for any Indian” to “become liable for the payment of any debt of . . . such Indian contracted or arising during such trust period” only “with the approval and consent of the Secretary of the Interior.”

Likewise, in *Robinson*, the United States had the authority under the same statute, 25 U.S.C. § 410, to recover monies from the appellant to satisfy indebtedness to the United States on account of the overpayment of funds. 20 IBIA at 172. The IBIA ruled that even where the United States had the authority to recoup funds from the appellant’s IIM account, it could not do so without providing notice and a hearing. *Id.* at 174-75.

Accordingly, even when a statute authorizes the United States to attach or recoup funds in an IIM account or, in this case, adjust or refund royalty payments in an IIM account, due process requires that the United States must provide the IIM account owner with *Kennerly* notice before doing so. The United States' undisputed failure to do so here mandates summary judgment.

2. The United States Did Not Comply With 30 U.S.C. § 1721a.

Not only do the provisions of 30 U.S.C. § 1721a not allow the United States to violate Plaintiffs' due process rights, but the United States has failed to comply with the requirements of that statute.

If a lessee "determines that an adjustment or refund request is necessary to correct an underpayment or overpayment of an obligation," it must file "a royalty report which reflects the underpayment or overpayment." 30 U.S.C. § 1721a(a)(1). Additionally, the lessee "shall calculate and report the interest due attributable to such adjustment." 30 U.S.C. § 1721a(a)(2)(A). A lessee's request for refund must: be "made in writing to the Secretary and, for purposes of section 1724 of this title, is specifically identified as a demand," identify the person entitled to such refund, "provide[] the Secretary information that reasonably enables the Secretary to identify the overpayment for which such refund is sought," and "provide[] the reasons why the payment was an overpayment." 30 U.S.C. § 1721a(b)(1).

The United States' expert, Mr. Chavarria, identified an example of a report that lessees submit electronically to report adjustments. Ex. 2 at 85:11-86:1. That example of a report is attached as Exhibit 15 at 2. According to Mr. Chavarria, this report, which he

refers to as an “Oil and Gas Operations Report” is the same as ONRR Form 2014. Ex. 2 at 84:9-85:16. A copy of ONRR Form 2014 is attached as Exhibit 16.⁴

This report does not “reflect[] the underpayment or overpayment of an obligation” or “calculate and report the interest due.” Thus, it does not satisfy the requirements of 30 U.S.C. § 1721a(a). Nor does the report “specifically identified as a demand,” provide the Secretary with “information that reasonably enables the Secretary to identify the overpayment for which such refund is sought,” or provide “the reasons why the payment was an overpayment.” Thus, it does not satisfy the requirements of 30 U.S.C. § 1721a(b).

Additionally, the Secretary must “certify the amount of the refund to be paid . . . to the Secretary of the Treasury who shall make such refund.” 30 U.S.C. § 1721a(b)(2). There is no evidence that the Secretary of the Interior certified to the Secretary of the Treasury any refund to be paid to Lessees. Further, the Secretary of Treasury did not make any refund. To the contrary, according to Mr. Chavarria, “the operator [lessee] will reverse the entire amount of previously-reported revenues and then repost the corrected amounts.” Ex. 2 at 50:22-51:8.

The “adjustments” are invalid, because the United States failed to follow the requirements of 30 U.S.C. § 1721a(a) and (b). Thus, even if the government had provided a *Kennerly* hearing, Plaintiffs would have prevailed.

⁴ Form 2014 is available at <https://www.onrr.gov/reportpay/PDFDocs/2014.pdf> (last accessed March 3, 2021).

III. The United States Is Liable for Damages Stemming from its Breach of Trust Duties.

A. The United States Must Pay Damages in the Amount of the Improper Disbursements.

As trustee to Plaintiffs' mineral resources and IIM Accounts, the United States has a fiduciary duty to not deprive Plaintiffs of their property without a *Kennerly* hearing. By allowing the Lessees to withdraw funds from Plaintiffs' IIM accounts, the United States breached its fiduciary duty to Plaintiffs. *Kennerly*, 721 F.2d at 1254 (“given the unique role of the federal government as trustee, that [due process] violation indicates a breach of fiduciary responsibilities.”).

“It is well established that a trustee is accountable in damages for breaches of trust.” *Mitchell II*, 463 U.S. at 226. (“Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.”). “Courts determine the amount of damages for such a breach by attempting to put the beneficiary in the position in which it would have been absent the breach.” *Jicarilla III*, 112 Fed. Cl. at 304 (citing *Conf. Tribes of Warm Springs Reservation of Or. v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001)). Moreover, “[t]he Federal Circuit has instructed, regarding this calculation, that ‘[i]t is a principle of long standing in trust law that once the beneficiary has shown a breach of the trustee’s duty and a resulting loss, the risk of uncertainty as to the amount of the loss falls on the trustee.’” *Jicarilla III*, 112 Fed. Cl. at 304 (quoting *Conf. Tribes of Warm Springs*, 248 F.3d at 1371).

In *Kennerly*, the attachment of funds to satisfy a debt deprived the plaintiff of funds in his IIM account and triggered the obligation to provide a hearing. Here, the disbursements to the Great Plains Regional Office deprived Plaintiffs of funds in their IIM

accounts and triggered the obligation to provide a hearing. The *Kennerly* court held that “the attachment violated due process and is void.” *Kennerly*, 721 F.2d at 1258. Similarly, here the disbursements to the Great Plains Regional Office violated due process and are void.

In order to put the Plaintiffs “in the position in which [they] would have been absent the breach,” *Jicarilla III*, 112 Fed. Cl. at 304, the disbursements must be reversed, which has the effect of voiding them. In other words, the improper withdrawals must be restored to Plaintiffs’ IIM accounts in order to restore them to the position that they would have been in had the United States not violated their constitutional rights.

Specifically, the United States should pay \$17,690,149, the undisputed amount that was disbursed from Plaintiffs’ IIM accounts to the Great Plains Regional Office.

B. Plaintiffs Are Entitled to an Accounting in Aid of Judgment to Determine Damages Suffered Since November 30, 2017.

Plaintiffs’ calculated their damages for Count IV through November 30, 2017. The experts on both sides agree that \$17,690,149 was disbursed from Plaintiffs’ IIM accounts to the Great Plains Regional Office through that date. The unlawful disbursements, however, have continued since then. Plaintiffs therefore request an accounting in aid of judgment to ascertain the amount of disbursements to the Great Plains Regional Office since November 30, 2017.

In a suit for money damages, upon a judgment determining “that defendant has violated its statutory fiduciary obligations,” it is within the court's jurisdiction to order an accounting in aid of the judgment “for the purpose of enabling the court to determine the amount which plaintiffs are entitled to recover.” *Klamath & Modoc Tribes & Yahooskin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 491 (1966). An

accounting in aid of judgment is a means to facilitate the exercise of the court's proper jurisdiction and to facilitate an award of the relief the parties actually seek. *Id.* at 491. Here, Plaintiffs are entitled to summary judgment on the United States' liability for Count IV, and their evidence establishes damages through November 30, 2017. Analysis of Plaintiffs' subsequent SOPs for additional entries that identify "Cash Disbursements" to the Great Plains Regional Office will lead to an efficient accounting for the damages suffered through the date of judgment.

CONCLUSION

For the foregoing reasons, Plaintiffs requests that summary judgment be entered in their favor on Count IV for no less than \$17,690,149 for damages through November 30, 2017, with additional amounts disbursed after November 30, 2017 to be calculated through an accounting in aid of judgment.

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