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

UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN SUPPORT, AND OPPOSITION TO PLAINTIFFS' SUMMARY JUDGMENT MOTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

ADMINISTRATIVE REPORTS & DECISIONS

LEGISLATIVE MATERIALS

LIST OF EXHIBITS

Ex. No.	Description	To Be Filed Under Seal*
1	Declaration of Renita Howling Wolf plus Attachment A	X
2	Plaintiffs' Answers to the United States' First Revised Set of Interrogatories	
3	Nelson Birdbear Deposition Transcript pp. 1, 27, 39-40	
4	Sept. 28, 2009 R. Birdbear Email-BIRDBEAR0022953	X
5	Dec. 22, 2009 R. Birdbear Email-BIRDBEAR0014746	X
6	Declaration of Robert Winter and Attachment A	
7	ONRR Declaration (Shawna Schimke)	
8	Jane Kidd Deposition Transcript pp. 1, 192	
9	"Understanding Your OST Quarterly Statement"	
10	Aug. 6, 2013 Letter to R. Birdbear w enclosure	X
11	March 2013 Email Exchange between R. Birdbear and M. Burch with attachment	X
12	Greg Chavarria Deposition Transcript Excerpts pp. 1, 71-73	
13	Roger Birdbear Deposition Transcript pp. 1, 63-64	

* On April 21, 2021, the United States filed a motion seeking leave to file these five exhibits under seal. ECF No. 179. Pursuant to Paragraph 11 of Appendix E of the Rules of the United States Court of Federal Claims, the United States will wait for this Court to rule on that motion or otherwise indicate how the United States should proceed with those exhibits. The United States will serve the exhibits on Plaintiffs without awaiting further action from the Court.

CROSS-MOTION FOR SUMMARY JUDGMENT
ON PLAINTIFFS' COUNTS 1-4 AND 6-10

The United States moves for summary judgments on Counts 1-4 and 6-10[1] of Plaintiffs' Third Amended Complaint[2] ("Complaint") for the reasons stated in the brief below.

In short, Plaintiffs fail to identify a money-mandating statutory duty for six of their claims. This failure precludes jurisdiction in this Court. In addition, this Court's jurisdictional statute of limitations bars one of those six claims. Finally, Plaintiffs lack sufficient evidence to make their *prima facie* case for four claims, making summary judgment against Plaintiffs appropriate. The basis for summary judgment against each claim addressed in this brief is below:

	Basis for Summary Judgment		
Claim Number and Brief Description	**Jurisdictional: Lack of Duty**	**Jurisdictional: Statute of Limitations**	**Evidentiary: Failure of Proof to Sustain Claim**
1: Competitive advertising/reasonable royalties	X	X	
2: Properly value production/royalties			X
3: Drainage	X		
4: Collection/payment of appropriate royalties			X
6: Transportation deductions			X
7: Consent and acreage requirements	X		X
8: Drilling delays	X		
9: Failure to lease all lands (oil & gas)	X		
10: Failure to lease all lands (grazing)	X		

[1] Plaintiffs' Complaint uses Roman numerals for the counts. We use Arabic numerals here for simplicity.

[2] Plaintiffs filed the Third Amended Complaint in September 2018, adding Count 12. ECF No. 147.

This motion is supported by the accompanying memorandum of points and authorities and such further evidence and/or argument that is or might be proffered before the motion is submitted to the Court for disposition.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case is about whether the United States has met its trust obligations for five individual Native Americans. Plaintiffs have earned more than $15 million in just eight years from royalties on the lands managed by the United States. *See* ECF No. 177 ("Pl. Br.") Ex. 7 at 12. But Plaintiffs say they are owed far more. They are not. The evidence will show that Plaintiffs have been treated fairly, and the government has met its obligations.

This case began five years ago with a broad series of allegations. After the United States filed a motion to dismiss, Plaintiffs conceded that they lacked information regarding their claims, stating that was "precisely why this action was brought." ECF No. 18 at 10. In response, the United States agreed to table its motion to dismiss, and the Parties worked together with the Court to conduct discovery. Discovery has now concluded, and Plaintiffs' information "disadvantage" has been cured. *See id*.

Now that discovery is complete, it is appropriate to streamline this case. This Court should grant summary judgment against Plaintiffs on Counts 1, 3, 7, 8, 9, and 10 because Plaintiffs cannot identify a money-mandating statutory duty sufficient to provide jurisdiction. In addition, this Court's jurisdictional statute of limitations precludes Count 1, providing an independent basis for summary judgment. Finally, summary judgment is appropriate for Counts

2, 4,[3] 6, and 7 because Plaintiffs do not have evidence sufficient to establish their *prima facie* case.

PROCEDURAL POSTURE

Plaintiffs filed the original complaint on January 13, 2016. ECF No. 1. Plaintiffs soon amended their complaint, and the United States filed a motion to dismiss. ECF Nos. 7, 10. In response, Plaintiffs claimed they were at an information "disadvantage" and brought the lawsuit to rectify that disadvantage through discovery. ECF No. 18 at 10. During briefing of the motion to dismiss, the Parties reached an agreement to work together to ensure that Plaintiffs received the information relevant to their claims. They further agreed that Plaintiffs would then file a second amended complaint, and that the United States would not move to dismiss. *See* ECF No. 32. The United States reserved the right to make any arguments at a later point, including summary judgment. *Id*. at 3.

The Parties have now completed a thorough and vigorous discovery process. The United States has produced approximately 166,000 documents, while Plaintiffs have produced about 24,000 documents. The Parties have conducted 24 witness depositions, including fact witnesses, experts, and Rule 30(b)(6) depositions of the United States. Plaintiffs also sought discovery from 16 third parties and obtained approximately 56,000 documents from them. Since an early challenge to the pace of the United States' document production was denied by the Court, *see* ECF No. 127, Plaintiffs have not filed any motions challenging the adequacy of the discovery they received.

[3] The United States opposes Plaintiffs' motion for summary judgment on Count 4 and cross-moves on that basis as set forth below.

In short, Plaintiffs have had a full opportunity to develop their claims against the United States, and the case is ripe to narrow through summary judgment.

ARGUMENT

I. Standard For Summary Judgment

Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Moden v. United States,* 404 F.3d 1335, 1342 (Fed. Cir. 2005). Only genuine disputes of material facts that might affect the outcome of the suit will preclude entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986) ("Factual disputes that are irrelevant or unnecessary will not be counted."). Therefore, to avoid summary judgment, the non-moving party has to put forth evidence sufficient for a reasonable fact-finder to return a verdict for that party. *Id.* at 248-50.

Questions of law are particularly appropriate for summary judgment. *Dana Corp. v. United States,* 174 F.3d 1344, 1347 (Fed. Cir. 1999).

II. Certain Claims Fail For Lack Of A Government Duty

Counts 1, 3, 7, 8, 9, and 10 of Plaintiffs' Complaint should be dismissed because they fail to identify a source of substantive law imposing a duty that the United States owes to Plaintiffs, which is required to trigger the Court's jurisdiction under the Tucker Act. In an attempt to establish jurisdiction, Plaintiffs list numerous statutes and regulations in the Complaint. Plaintiffs also summarily assert that "[b]y reason of its comprehensive statutory and regulatory management of oil and gas leasing and production on Indian allotted land, the United States, as trustee, has a fiduciary obligation" and that the "statutes, regulations and corresponding fiduciary obligations mandate compensation by the federal government for damages sustained." Third Am.

Compl. ¶ 34. However, many of the cited sources of law have no applicability to Plaintiffs' claims, and those that do either fail to establish specific trust duties or do not require compensation if breached.

A. Plaintiffs Must Establish a Money-Mandating Duty to Support Tucker Act Jurisdiction for Their Claims

Plaintiffs assert that jurisdiction exists in this case under the Tucker Act, 28 U.S.C. § 1491. Third Am. Compl. ¶ 14. The Tucker Act does not create substantive rights enforceable against the United States for money damages. *United States v. Navajo Nation,* 556 U.S. 287, 290 (2009) ("*Navajo II*"). The Supreme Court has held that there are "two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act" for a non-contract claim.[4] *Id.* at 290. "First, the tribe '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.* (quoting *United States v. Navajo Nation,* 537 U.S. 488, 506 (2003) ("*Navajo I*")). Second, and only after a plaintiff identifies a substantive source of law, "the court must then determine whether the relevant source of 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].'" *Navajo II*, 556 U.S. at 290–91 (quoting *Navajo I*, 537 U.S. at 506).

As described below, Counts 8, 9, and 10 fail at the first hurdle, while Counts 1, 3, and 7 fail at the second.

B. Counts 8, 9, and 10 Fail Because Plaintiffs Cannot Identify a Government Duty that Has Been Breached

Counts 8, 9, and 10 fail to surmount the Supreme Court's first hurdle to jurisdiction: "a

[4] While the Supreme Court cases refer to tribes, the same analysis applies to individual Native American plaintiffs. *See Two Shields v. United States*, 820 F.3d 1324, 1332 (Fed. Cir. 2016).

substantive source of law that establishes specific fiduciary or other duties" that the government has failed to faithfully perform. *Navajo II*, 556 U.S. at 290.

"The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law . . . ." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). *Accord Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. 250, 258 (2016) ("We do not question the 'general trust relationship between the United States and the Indian tribes,' but any specific obligations the Government may have under that relationship are 'governed by statutes rather than the common law.'") (quoting *Jicarilla*, 56 U.S. at 165). "[A]n Indian tribe must identify statutes or regulations that both impose a specific obligation on the United States and bear[] the hallmarks of a conventional fiduciary relationship." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (citation and quotation marks omitted).

"[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." *Id*. Instead, the "threshold" showing must be based on "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that establish "*specific* fiduciary or other duties" that the government allegedly has failed to fulfill. *Navajo I*, 537 U.S. at 506 (emphasis added). "When the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . neither the Government's control over [Indian assets] nor common-law trust principles matter." *Jicarilla,* 564 U.S. at 177 (internal quotations and citations omitted).

1. Count 8 fails because the United States does not have a duty to dictate the timing of drilling operations

Plaintiffs invoke a combination of regulations and lease terms to assert in Count 8 that the United States failed to require timely oil and gas drilling occur on Plaintiffs' land, but none of the regulations or lease terms cited by Plaintiffs requires that the United States take any specific action with respect to the timing of drilling. *See* Third Am. Compl. ¶¶ 86-87. Plaintiffs have no basis to claim that the United States has breached a duty by allowing lessees to determine when to drill.

The first regulation Plaintiffs reference provides the objectives of the Bureau of Land Management's ("BLM") Onshore Oil and Gas Operations: "[t]he objective of these regulations is to promote the orderly and efficient exploration, development and production of oil and gas." 43 C.F.R. § 3160.0-4 (cited at Third Am. Compl. ¶ 82). A general objective statement for a set of regulations applicable to many parties does not create the specific, enforceable duty for the United States that the Plaintiffs contend. *See Jicarilla*, 564 U.S. at 177 (statute or regulation must be specific and clearly express fiduciary obligations to create an enforceable duty). A provision that merely serves to give regulations context, and does not contain any explanation of how it can be breached or the consequences of a breach, cannot provide the jurisdictional basis for Count 8.

The next cited regulation, 43 C.F.R. § 3161.2, describes the responsibilities of the authorized officer with jurisdiction over operations conducted on Federal or Indian oil and gas leases. *See* Third Am. Compl. ¶ 82. Plaintiffs allege that pursuant to Section 3161.2, the United States' authorized officer must "require compliance with lease terms," but there is no lease term that requires that drilling occur within a set time period. *See* Third Am. Compl. ¶ 85. Therefore, this regulation cannot provide the jurisdictional basis for the claim that the government failed to require drilling pursuant to the terms of the lease.

Plaintiffs also attempt to rely on 43 C.F.R. § 3162.2-2, which provides options to BLM if it determines that a well is draining mineral resources from another tract. *See* Third Am. Compl.

¶ 82. "We *may* offer for lease any qualifying unleased mineral resources under part 3120 of this chapter or enter into a communitization agreement." 43 C.F.R. §3162.2-2(c) (emphasis added). This regulation gives BLM authority to take certain actions, but it does not *require* action. Such discretionary language cannot form the basis of a specific and enforceable duty. *Wolfchild v. United States*, 731 F.3d 1280, 1289 (Fed. Cir. 2013) ("*Wolfchild IX*") ("The Secretary's authority to act [as provided in statute] does not support inference of the asserted duty to act (enforceable by a suit for money damages).").

Count 8 also alleges that the United States "allowed operators to deviate from the existing drilling schedules so that other allotments were drilled in advance of Plaintiffs." *See* Third Am. Compl. ¶ 86. Again, however, Plaintiffs misinterpret the regulation. 43 C.F.R. § 3162.3-1 provides that the United States approves individual applications to drill. There is no mention of drilling schedules, much less a mandate that the government require lessees to submit or adhere to drilling schedules.

In Paragraph 87 of the Complaint, Plaintiffs allege an example of an improper drilling delay, but the example itself further illustrates the flaws underlying Count 8 and shows the role the leases negotiated by Plaintiffs play in determining the timing of drilling. Indian owners on the Fort Berthold Reservation have the authority to negotiate the terms of their own mineral leases. The Plaintiffs here have opted to exercise that authority on many tracts, including with respect to the length of the initial lease term which, in turn, determines when an operator must initiate drilling or risk non-renewal of the lease. *See* Ex. 1 (Declaration of Renita Howling Wolf) ("Howling Wolf Decl.") ¶¶ 15-20. Plaintiffs' leases allow the lessee to initiate drilling any time during the lease period, or not at all. *See id.* ¶ 19 (under the terms of the lease agreements used, the lease agreement terminates automatically on expiration of the lease period unless the lease is held beyond that date by production); *see* also 25 C.F.R. §§ 212.27, 211.27.

In some cases, Plaintiffs chose to enter into longer primary-term leases in exchange for larger up-front bonus payments. *Howling Wolf Decl.* ¶ 17. This bargained-for exchange resulted in an increase in primary lease duration from a more common term of five years to a term of ten years. *See, e.g., id.* ¶ 18, Att. A (Lease Chart), Lease 7420A48849, Tract M711A-B (lease negotiated by Plaintiff Nelson Birdbear).

While Plaintiffs may be dissatisfied with the time it took for a lessee to commence drilling, what Plaintiffs seek here is for the government to force lessees to drill on a timeline inconsistent with the terms of the applicable leases. There is no authority (and certainly no mandate) for the government to have required the lessee to initiate drilling within a given time. The claims of damages against the United States resulting from delays in drilling in Count 8 are without merit, and summary judgment should be granted for the United States on this count.

2. Count 9 fails because the United States does not have a duty to lease all of Plaintiffs' lands for oil and gas drilling

Without citing any laws or regulations that the United States has failed to enforce, Plaintiffs contend in Count 9 that the United States "fail[ed] to lease all of the Plaintiffs' unleased allotted land for oil and gas mining purposes" Third Am. Compl. ¶ 89.[5] As discussed above, to succeed on a claim of breach of fiduciary duty against the United States, Plaintiffs must first identify substantive law creating that duty. In Count 9 Plaintiffs fail to identify any substantive source of law upon which they base their claim, and therefore summary judgment should be granted for the United States on this count.

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[5] In prior briefing, Plaintiffs have incorporated the support for Count 8 as support for Count 9. Those provisions of the Code of Federal Regulations, however, are insufficient when invoked for failure to lease all lands for the same reasons that those regulations are insufficient to invoke a government duty to compel drilling.

3. *Count 10 fails because the United States does not have a duty to lease all of Plaintiffs' lands for grazing*

Plaintiffs contend that they granted authority to the Bureau of Indian Affairs ("BIA") to permit leasing for grazing on certain acreage of their allotment land. Third Am. Compl. ¶ 97. That authorization, they allege, obligates the United States to permit and lease Plaintiffs' land. *Id.* at ¶ 98. But the regulations and statutes Plaintiffs cite in support of Count 10 do not identify a source of law that creates an affirmative duty to lease.

First, the statutory and regulatory framework Plaintiffs lay out at Paragraphs 15-35, which they rely on to form the basis for Count 10, is irrelevant to grazing leases. *Id.* at ¶ 92. The paragraphs that precede Count 10 only mention one statute relevant here, the General Allotment Act, which has been held only to establish a "bare trust." *United States v. Mitchell,* 463 U.S. 206, 224 (1983) ("*Mitchell II*"). Without more, the General Allotment Act cannot support a claim for breach of trust. All other statutes and regulations cited in the preceding paragraphs specifically govern oil and gas leasing. *See* 43 C.F.R. § 3160.0-1; 25 C.F.R. §§ 211.1, 212.1.

Within Count 10, Plaintiffs cite to 25 U.S.C. § 177, 25 U.S.C. § 3715, and 25 C.F.R. § 162.021. *See* Third Am. Compl. ¶ 94. None of these provisions gives rise to a duty to lease Plaintiffs' lands for grazing. Instead, they govern the government's duty with respect to approval of leases and enforcing a lessee's compliance.

25 U.S.C. § 177, the Indian Non-Intercourse Act, has nothing to do with agricultural leasing at all. Instead, that law prohibits the transfer of interests in Indian land other than by treaty or act of Congress. The Supreme Court has described the purpose of the Indian Non-Intercourse Act as "prevent[ing] unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties ...." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). This statute does not give rise to a fiduciary duty. *See White*

Mountain Apache Tribe v. United States, 249 F.3d 1364, 1373 (Fed. Cir. 2001) (identifying 25 U.S.C. § 177 as not "impos[ing] fiduciary obligations that would lead to a claim for money damages.").

Next, Plaintiffs cite 25 U.S.C. § 3715, part of the American Indian Agricultural Resource Management Act ("AIARMA"), as well as one of the Act's regulations, 25 C.F.R. § 162.021, to support their claim, apparently reasoning that where the Secretary has authority to lease for agricultural purposes, she has a duty to do so. Third Am. Compl. ¶ 94. Plaintiffs ignore the fact that Section 3715 was passed to further tribal self-determination and includes language binding the Secretary to tribal policies and regulations regarding grazing leases. 25 U.S.C. §§ 3702(1); 3715(b). *See also* S. Rep. No. 103-186, at 8 (1993). The Mandan Hidatsa Arikara Nation have adopted such policies and regulations, and they allocate range units pursuant to Tribal Grazing Resolution 16-205-LKH. The BIA's Fort Berthold Agency then approves and administers grazing permits. 25 C.F.R. § 166.208. The BIA does not have any role in the procurement of grazing leases for any particular range of land owned by Plaintiffs or anyone else on the Fort Berthold Reservation.

Finally, the existence of a general responsibility to assist Indian landowners broadly with respect to all leasing, for which Plaintiffs point to 25 CFR § 162.021, does not create an affirmative duty with regard to the grazing lease framework. *See* Third Am. Compl. ¶ 94. In fact, when promulgated in 2001, the grazing regulations were updated to provide greater self-determination, evincing the exact kind of policy described in *Jicarilla* that would supersede the common-law trust characteristics. "[T]he Government exercises its carefully delimited trust responsibilities in a sovereign capacity to implement national policy respecting the Indian tribes." *Jicarilla*, 564 U.S. at 178. Taken together, this regulatory scheme places the burden on the allottee and any prospective lessees to negotiate and submit a proposed lease for approval. Since Plaintiffs make no allegations that the government refused to approve grazing permits that were presented to it and Plaintiffs fail to identify substantive law creating an affirmative duty, summary judgment should be granted for the United States on this count.

C. Counts 1, 3, and 7 Fail Because Plaintiffs Cannot Identify a Government Duty that Mandates Compensation for Breach

Counts 1, 3, and 7 fail to meet the second hurdle of the Supreme Court's test: establishing a money-mandating legal duty imposed upon the United States by some other constitutional, statutory, or regulatory provision. *Navajo II*, 556 U.S. at 290-91. This second requirement reflects the understanding that jurisdiction cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages. *United States v. Testan*, 424 U.S. 392, 400–01 (1976); *see Navajo I*, 537 U.S. at 503, 506.

To be money-mandating in breach, "the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *See, e.g., National Veterans Legal Services Program v. United States*, 968 F.3d 1340, 1348 (Fed. Cir. 2020). Discretionary schemes are money-mandating only if (1) they provide "clear standards for paying" money to recipients; (2) they state the "precise amounts" that must be paid; or (3) as interpreted, they compel payment on satisfaction of certain conditions. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364-65 (Fed. Cir. 2005) (citation omitted).

In prior briefing, Plaintiffs have relied on a handful of cases to argue that this suite of case law can be bypassed here because the government's overall control over oil and gas leasing on trust lands is so complete. *See, e.g.*, Pl. Br at 5-6 (citing *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987) and *United States v. Mitchell*, 463 U.S. 206, 224 (1983)). The Supreme Court rejected that same argument in *Navajo II*: "The Government's liability cannot be premised on control alone." *Navajo II*, 556 U.S. at 301. The Court made clear that when the "Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." *Id.* at 302. As the *Pawnee* case Plaintiffs rely on explains, just because a "general fiduciary relationship" exists "does *not* mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trust." *Pawnee*, 830 F.2d at 191 (emphasis in original). The *Pawnee* court rejected the idea that the government had to "go contrary to and beyond the regulations and the leases in order to fulfill its alleged fiduciary obligation." *Id*. at 191-92.

Counts 1, 3, and 7 fail because Plaintiffs cannot identify a money-mandating duty to support jurisdiction. Plaintiffs are not arguing that the government failed to manage their leases in accord with the leases themselves and the regulations. Instead, Plaintiffs contend the government should have obtained *better* leases or otherwise should have gone beyond the management of leases to promote Plaintiffs' interest in every sphere. Such claims do not constitute money-mandating duties that confer jurisdiction on this Court. As the Supreme Court stated in *Navajo I*, when reviewing the Secretary's role in approving leases under the Indian Mineral Leasing Act ("IMLA"):

> neither the IMLA nor any of its regulations establishes anything more than a bare minimum royalty. Hence, there is no textual basis for concluding that the Secretary's approval function includes a duty, enforceable in an action for money damages, to ensure a higher rate of return for the Tribe concerned.

Navajo I, 537 U.S. at 511.

1. ***Count 1 fails because the United States does not have a money-mandating duty to hold a competitive auction for leases or maximize Plaintiffs' economic interests***

Count 1 alleges that the United States failed to provide a competitive bidding process for leases and, as a result, failed to maximize Plaintiffs' economic interests. Third Am. Compl. ¶¶ 37-38.[6]

The premise of the claim is legally wrong. Plaintiffs begin by alleging that, "The United States is under a fiduciary and statutory duty to subject leases for oil and gas development on Plaintiffs' land to a competitive bidding process." Third Am. Compl. ¶ 37. In fact, Congress has spoken on this precise point. The Fort Berthold Mineral Leasing Act ("FBMLA") states, "It shall not be a requirement [for lease approval that it] be offered for sale through a public auction or advertised sale." Public Law 105-188, § (a)(4), 112 Stat. 620, 621 (July 7, 1998).

Plaintiffs' allegation that the government has an obligation to reject any proposed lease that does not "maximize[] their best economic interests" fares little better. *See* Third Am. Compl. ¶ 38. This phrase comes from the regulatory provision stating the purpose of the leasing regulations, but Plaintiffs change its tenor by focusing only on the economic interest phrase. The full sentence is: "These regulations are intended to ensure that Indian mineral owners desiring to have their resources developed are assured that they will be developed in a manner that maximizes their best economic interests *and minimizes any adverse environmental impacts or cultural impacts resulting from such development*." 25 C.F.R. § 212.1(a) (emphasis added). Looked at in full, the provision is clear that the government is not charged with maximizing landowners' recovery at all costs, but must balance economic interests with potential adverse environmental and cultural impacts in its discretion. Notably, the purported requirement to

[6] In addition, the claim is barred by the statute of limitations, as explained in Section II.

"maximize" Plaintiffs' economic interest is nearly identical to what the Supreme Court explicitly rejected in *Navajo I.* 537 U.S. at 509-11 (finding no enforceable money-mandating duty where statute, among other things, required government to act in Tribe's "best interests"). No case supports jurisdiction for such a maximization claim with respect to leasing.

Moreover, nothing in the provisions cited by Plaintiffs, nor any other part of the regulations, provides any standards that would allow a court to determine when this discretionary balance entrusted to the government is breached. Nor is there any basis to determine the amount to be paid. Thus Count 1 fails for lack of a money-mandating duty and summary judgment should be granted for the United States on this count. *See, e.g.*, *Samish*, 419 F.3d at 1364.

2. Count 3 fails because the United States does not have a money-mandating duty to prevent drainage of oil and gas from Plaintiffs' tracts

Count 3 alleges the government violated duties by allowing "drainage" of oil and gas from Plaintiffs' tracts. *See* Third Am. Compl. ¶ 48.

The only regulatory provisions Plaintiffs cite in Count 3 come from the general regulations applicable to both public lands and those held in trust for individual Indians. The regulations at 43 C.F.R. § 3160 *et. seq.* were promulgated in 2002. Because they apply beyond trust land, the rules cannot provide a basis for finding a specific trust duty. The source of any duty would need to be found elsewhere. *See Wolfchild v. United States*, 559 F.3d 1228, 1238 (Fed. Cir. 2009) ("*Wolfchild VI*") (failure to use term trust "gives rise to doubt that a trust relationship was intended.").

In any event, the cited regulations fail to establish a trust duty. The Complaint cites three different provisions, but none sets forth the "duty" to ensure that drainage "does not occur on Plaintiffs' property" that the Complaint asserts. *See* Third Am. Compl. ¶ 47. The first, 43 C.F.R. § 3160.0-5, merely defines drainage. Then 43 C.F.R. § 3161.2 directs the government to take a laundry list of steps such as inspecting and regulating operations, requiring compliance with lease terms, and requiring that operations result in maximum recovery while minimizing waste, protecting the environment and other natural resources, and protecting life and property, among many other tasks. Finally, 43 C.F.R. § 3162.3-1 states that wells shall be drilled in conformity with an acceptable well-spacing program. Well-spacing programs ensure that the wells are drilled far enough from property borders to avoid drainage. And the very provision Plaintiffs cite states that an acceptable well-spacing program includes one issued by a state commission and accepted by the government. *See* 43 C.F.R. § 3162.3-1(a). Here, the United States has adopted the North Dakota well-spacing rules, satisfying this requirement. Overall, the cited provisions are too attenuated to create a specific trust duty to prevent drainage, and provide no basis for assessing compensation.

Another portion of the Complaint cites 25 C.F.R. §§ 211.47 and 212.47, alleging that those provisions require the government to compel offset wells to prevent drainage. *See* Third Am. Compl. ¶ 35.j. But the applicable provision requires that the *lessee* "[p]rotect the lease from drainage" and does not put any obligation on the government. *See* 25 C.F.R. §§ 211.47(b).[7] The government simply "reserves the right to impose reasonable and equitable terms and conditions . . . such as payment of compensatory royalty for the drainage." *Id*. A provision placing an obligation on the lessee and merely noting the government's ability, in its discretion, to require royalty payments cannot be read as an obligation to obtain such payments. *See Wolfchild IX*, 731 F.3d at 1289.

[7] 25 C.F.R. § 211.47 applies to tribal-owned lands, while 25 C.F.R. § 212.47 applies to lands owned by individual Indians. 25 C.F.R. § 212.47 incorporates the language of 25 C.F.R. § 211.47.

None of the regulations set requirements for when the government must act nor a basis for determining damages if that duty was breached. Therefore Count 3 fails for lack of a money-mandating duty and summary judgment should be granted for the United States on this count. *See, e.g.*, *Samish*, 419 F.3d at 1364.

3. Count 7 fails because the United States does not have a money-mandating duty to obtain consent for and limit size of communitization agreements

Count 7 alleges that the United States failed to abide by acreage and consent requirements in the regulations. As described in Section IV below, this claim is based on a misreading of the regulations. But even if Plaintiffs were correct about the rules, the claim fails at the jurisdictional stage because there is no compensation mandate in the applicable law.

The only standard Plaintiffs cite in the Complaint is the government's obligation to act in their "best interests." *See* Third Am. Compl. ¶ 79. While Plaintiffs do not provide a citation for this purported obligation, it presumably derives from language in 25 C.F.R. § 212.20(b)(6)[8] and/or Section (a)(2)(A)(ii) of the FBMLA. But these provisions are discretionary and do not contain the necessary language to constitute a money-mandating duty.

The regulatory provision states that BIA *may* choose not to accept a bid after an auction process if it finds the bid not to be in the landowner's "best interest." The regulations state that in considering best interest, BIA "shall consider any relevant factor, including, but not limited to: economic considerations, such as date of lease expiration; probable financial effect on the Indian mineral owner; leasability of land concerned; need for change in the terms of the existing lease; marketability; and potential environmental, social, and cultural effects." 25 C.F.R. § 212.3. Such a standard invests "broad discretion" in the BIA official. *See Kenai Oil & Gas, Inc. v. Dep't of*

[8] As noted above, this provision does not directly apply to Plaintiffs because the Fort Berthold Mineral Leasing Act explicitly allows leases be reached without an auction.

Interior of U.S., 671 F.2d 383, 387 (10th Cir. 1982) ("Superintendent of Bureau of Indian Affairs must take the Indians' best interests into account when making any decision involving leases on tribal lands and *has broad discretion to consider all factors affecting their interests*.") (emphasis added). The breadth of discretion afforded the government means there can be no money-mandating duty. *See Wolfchild IX*, 731 F.3d at1289.

The FBMLA uses "best interest" in a slightly different way, but the result is the same. There, the statute says that the Secretary *may* approve a lease if a majority of the ownership interest consents and the Secretary finds the lease is in the best interest of the owners. Public Law 105-188 Section (a)(2)(A)(ii). Thus the decision is within the government's discretion: it *may* approve the lease, but is not obligated to do so, and must consider the best interest of the owners. *See id*. Nothing in the cited provisions offers a standard for what terms the Secretary should obtain, so there can be no money-mandating duty. *See Navajo I*, 537 U.S. at 511.

Neither usage of best interest has anything to do with the size or consent requirements for leases. Thus neither provides any basis for assessing damages if those requirements are breached. Therefore Count 7 fails for lack of a money-mandating duty and summary judgment should be granted for the United States on this count. *See, e.g.*, *Samish*, 419 F.3d at 1364.

III. Plaintiffs' First Claim Is Barred By The Statute Of Limitations For Leases Approved More Than Six Years Before The Complaint Was Filed

In Count 1, Plaintiffs allege that the United States breached its duties in how it advertised leases and the terms it obtained. *See* Third. Am. Comp. ¶¶ 37-41. For the reasons stated in Section II, this claim fails for lack of a money-mandating duty. In addition, summary judgment is appropriate because the leases at issue were approved—with Plaintiffs' knowledge—more than six years before Plaintiffs filed their original complaint.

A. Legal Standard for Statute of Limitations

A six-year statute of limitations applies to claims in this Court, including claims brought by individual Indians for breach of trust. 28 U.S.C. § 2501; *see Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1576-78 (Fed. Cir. 1988).[9] The statute of limitations begins to run when the "claim first accrues." 28 U.S.C. § 2501. A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the government and entitle the claimant to institute the action. *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988). For Indian breach of trust claims, a claim "traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Shoshone II*, 364 F.3d at 1348 (citations omitted).

[9] Through prior appropriations acts for DOI, Congress has provided that "the statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." *See, e.g.*, Pub. L. No. 111-88, 123 Stat. 2904, 2922 (Oct. 30, 2009). The tolling provisions in these appropriations acts ended in 2014. The acts are not relevant here because they cover losses to trust funds rather than to trust assets. *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1350 (Fed. Cir. 2004) ("*Shoshone II*"). The Federal Circuit held that a claim that a given lease should have included more favorable terms is one for mismanagement of a trust asset and thus not affected by the appropriations acts. *Id.*

The "knowledge of that repudiation" is further defined as "placing the beneficiary on notice that a breach of trust has occurred." *Id*. This "on notice" standard is no different than the objective standard commonly applied to the "accrual suspension rule," which states that the accrual of a claim against the United States is suspended until the claimant "knew or should have known" that the claim existed. *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (citation omitted); *see also San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011) ("This objective standard applies to the accrual of a claim for breach of fiduciary duty."); *Two Shields v. United States*, 820 F.3d 1324, 1329 (Fed. Cir. 2016). In a prior case brought by Indians at Fort Berthold, the Federal Circuit found that for limitations purposes, "the government's purported liability was fixed at the time it allegedly repudiated its trust duties as set forth in § 396—when it approved the [subject] leases at below-market rates." *Two Shields*, 820 F.3d at 1329.

B. Statement of Material Facts

Plaintiffs filed their initial complaint on January 13, 2016. ECF No. 1.

Most of the leases at issue in this case were finalized following an auction held by BIA in November 2007, though the FBMLA and applicable rules do not require an auction or public advertising. Howling Wolf Decl. ¶ 6. Plaintiffs have limited Count 1 to "all leases . . . that were entered into from 2007 through 2009." *See* Ex. 2 (Plaintiffs' Answers to the United States' First Revised Set of Interrogatories) at 3.

Leases become effective when approved by BIA. 25 C.F.R. § 211.27 (applicable here through incorporation at Section 212.27). To obtain BIA approval, the operator must submit several items, including consent pages representing more than 50% of the ownership interest in the tract.[10] Howling Wolf Decl. ¶ 12. For 18 of the 36 oil and gas leases finalized between 2007 and 2009, at least one of the Plaintiffs signed an acceptance of lessor form before the lease became effective through BIA approval. *See* Howling Wolf Decl. ¶¶ 22-24 and Attach. A. Because the leases were generally similar, Plaintiffs were aware of the terms of all of the leases at the time of approval. *Id.* ¶ 16.

Plaintiffs were aware of the auction when it happened and soon came to question it. Plaintiff Nelson Birdbear attended the lease auction. Ex. 3 (N. Birdbear Dep.) 39:25-40:3. At least by September 2009, Plaintiff Roger Birdbear believed BIA had mishandled the 2007 auction, and he wrote an email describing several perceived failings in the BIA approach. Ex. 4 (Sept. 28, 2009 R. Birdbear Email (BIRDBEAR0022953)) (noting BIA auction and comparing results to contemporaneous BLM auction); *see also* Ex. 5 (Dec. 22, 2009 R. Birdbear Email (BIRDBEAR0014746)).

Of the leases identified by Plaintiffs as relevant to this case, 36 were approved by BIA between 2007 and 2009. *See* Howling Wolf Decl. Attach. A. All of the leases that Plaintiffs identified in their interrogatory response as addressed in Count 1 were approved more than six years before Plaintiffs filed their original complaint.

C. Argument

Count 1 challenges the process by which leases were obtained and the terms of those leases, alleging that the government failed to act in Plaintiffs' "best interests." *See* Third. Am. Comp. ¶¶ 37-41. The Federal Circuit has already ruled on the issue, finding that a claim challenging lease approval accrues when the lease is approved. *Two Shields*, 830 F.3d at 1329.

[10] Ownership of many of the relevant tracts is divided among many individuals holding shares of different sizes.

The court found the government's "purported liability was fixed . . . when it approved" the leases. *Two Shields*, 830 F.3d at 1329. The *Two Shields* court found lease approval was when the government "allegedly repudiated its trust duties." *Id*. The court rejected the argument that a later sale of the leases was the necessary final event fixing liability.[11] *Id*.

Here, Plaintiffs knew of the nature of the auction as it happened and the terms of the leases before they were approved in 2007 through 2009. Yet they waited nearly a decade to file suit. Because Plaintiffs themselves have identified the relevant leases for Count 1 as those reached between 2007 and 2009, and because all of those leases are beyond the statute of limitations, summary judgment should be awarded for the United States on Count 1.

[11] In *Two Shields*, the question was whether plaintiffs' claim was released by their failure to opt out of the *Cobell* settlement. 830 F.3d at 1329. But the analysis of when a claim challenging lease approval accrues is precisely analogous to Plaintiffs' Count 1, as explained in the text.

IV. Summary Judgment Is Appropriate For Counts 2, 4, 6, And 7 Because Plaintiffs Have Not Developed Any Evidence To Support Their Claims

A. Standard of Review

"The Supreme Court made clear in *Celotex* that, at summary judgment, a party is entitled to judgment as a matter of law when 'the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.'" *XY, LLC v. Trans Ova Genetics,* 890 F.3d 1282, 1292 (Fed. Cir. 2018) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)).

Where Plaintiffs have the ultimate burden of proof, the United States "bears the initial responsibility of informing the district court of the basis for its motion." *Celotex,* 477 U.S. at 323. The United States meets that responsibility by "pointing out to the district court . . . that there is an absence of evidence to support" the claim. *Id.* at 325. Once that basis is established, Plaintiffs must designate "specific facts showing there is a genuine issue for trial." *Id.* at 324. Notably "some metaphysical doubt as to the material facts" does not suffice to prevent summary judgment. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586–87 (1986).

B. Statement of Undisputed Facts[12]

1. DOI has a robust, highly-regulated system for assessing and paying royalties and auditing payments

DOI's responsibilities with regard to oil and gas produced from trust leases are governed by statute, regulations, and well-documented policies and procedures. Ex. 6 (Declaration of Robert Winter) ("Winter Decl.") ¶ 4. With respect to payment of royalties, duties are divided between the Office of Natural Resources Revenue ("ONRR"), BIA, and the Bureau of Trust

[12] The undisputed facts in this section are not material because Plaintiffs have not presented evidence in support of Counts 2, 4, 6, and 7. Nonetheless, the government provides an overview here of its royalty assessment system and of its extensive compliance program.

Funds Administration ("BTFA"). *Id.* ¶ 5. ONRR collects sales and production reports from oil and gas companies, collects and deposits payments from oil and gas companies, provides distribution reports to BIA, and performs audit and compliance reviews. *Id.* ¶ 6. As part of its monitoring function, ONRR, through its Revenue, Reporting, and Compliance Management Program, is responsible for reviewing and disseminating production information, including to BLM, BIA, States, Tribes, and the public. *Id.* ¶ 6. BTFA distributes royalty payments and manages Individual Indian Monies accounts. *Id.* ¶ 7.

The determination of royalties is governed by the ONRR regulations at 30 C.F.R chapter II, subchapters A and C, and by the lease terms. *See* 25 C.F.R. § 212.6. For both oil and gas leasing, deductions from gross proceeds are permitted for applicable allowances, including deductions of transportation costs for both oil and gas. *See* 30 C.F.R. §§ 1206.56-1206.58 (2015); 30 C.F.R. §§ 206.54-206.55 (1996); 30 C.F.R. §§ 1206.171, 1206.177, and 1206.179-1206.180.

BTFA informs owners about distributions and payments through Individual Indian Monies Statements of Performance ("SOPs") and Explanations of Payments ("EOPs"). Winter Decl. ¶¶ 9-10. SOPs are account statements that reflect all account activity, including collections and distributions, with general transaction descriptions based on transaction type codes maintained within the data and references to supporting documentation. *Id.* ¶ 11. EOPs provide the total collections for all leases by owner, reflecting total payments for a particular lease and calculations of individual owners' respective portion of royalties paid, including information regarding any adjustment. *Id.* ¶ 12.

ONRR has a robust compliance program to monitor and verify compliance by oil and gas operators with relevant lease terms and federal regulations, including making sure that royalties are correctly paid. *See* Ex. 7 (Declaration of Shawna Schimke) ("Schimke Decl.") ¶ 2. Data mining analysis, compliance reviews, and audits each occur regularly to ensure the correctness of royalty payments. *Id.* ¶ 5.

Data mining analysts perform reviews of reported royalty information, capturing possible anomalies. *Id.* They look for under-reported or missing royalties by comparing what was reported on the royalty report to the reported sales or transferred data from the Oil and Gas Operations Report (OGOR). *Id.* Data mining also reviews companies that recoup more than they reported. *Id.* They also review the reporting on new communitization agreements. *Id.*

Compliance reviews check that the royalty equation is reported and paid correctly and there are no variances. *Id.* Compliance reviews are designed to determine "reasonableness" of company reported royalty and production data in compliance with lease terms, statutes, and regulations. *Id.*

ONRR conducts audits to verify compliance with lease terms, statutes, and regulations, applying Generally Accepted Government Auditing Standards to verify the accuracy of royalty reporting and payments. *Id.* As distinguished from the other compliance activities, audits are a longer, more formal process. *Id.* ONRR performs various types of audits including company audits, property audits, special term audits, and issue audits, such as transportation audits. *Id.*

When issues of non-compliance are detected, ONRR uses multiple techniques to address the issues and collect additional royalties, as applicable. *Id.* ¶ 6.

Beginning in 1983, and continuing through this year, ONRR has conducted a number of audits and compliance reviews that covered at least one of the leases where at least one Plaintiff has an interest, covering several different topics, or "issues." *Id.* ¶ 9. ONRR has used, and continues to use, its panoply of tools to ensure the reporting and payment on the Plaintiffs' properties are in accordance with the terms of their leases and ONRR's regulations. *Id.* ¶ 17.

2. Plaintiffs did not present any factual or expert evidence of accounting issues

Despite their challenges in Counts 2, 4, and 6 to the appropriateness of royalty payments, none of Plaintiffs' three experts offers an opinion that payments under the existing lease terms were inaccurate. Plaintiffs' expert economist decided that an examination of the amounts paid or owed to Plaintiffs "would be inefficient." Pl. Br. Ex. 6 (Kidd Expert Report) ¶ 32.

3. The United States' expert confirmed the appropriateness of DOI's accounting policies and procedures and the payments at issue

Despite Plaintiffs' failure to make any specific allegations or present evidence of improper calculations, the United States retained a certified public accountant, Gregory Chavarria, as an expert to analyze DOI's procedures and to determine whether amounts paid were properly supported based on relevant documentation. Pl. Br. Ex. 7 (Chavarria Expert Report) ¶ 18. Mr. Chavarria found the "accounting and monitoring procedures and the accounting records available from the Office of the Special Trustee and Office of Natural Resources Revenue to be extensive and sufficient to verify a significant portion of the relevant oil and gas revenue collected." *Id.* ¶ 7. Based on his review, Mr. Chavarria found there was

> *no accounting evidence to support the claim that the government did not collect amounts due under the leases or that the government failed to pay to Plaintiffs revenue that it collected*. Furthermore, considering the results of my research and analysis under significant time constraints, the work I have been able to perform refutes the claim made by Kidd that "an examination would be inefficient". In fact, such examinations appear to be performed on a regular basis by the ONRR.

Id. ¶ 24 (emphasis added).

C. Argument

1. Count 2: The claim that the United States failed to properly value oil and gas production in determining royalties is unsupported

In Count 2, Plaintiffs assert that "the regulations" "impose a duty on the part of the United States to properly calculate the value of oil, gas and natural gas produced and saved in calculating the royalty payments due Plaintiffs" and contend that the government breached its duty by "failing to properly calculate the value of those resources produced and saved from Plaintiffs' land." Third Am. Compl. ¶¶ 43-44 (citing no specific regulations but incorporating prior paragraphs). Count 2 fails to set forth any specific factual allegations regarding the timing, manner, or impact of the government's alleged failure to properly value oil and gas production.

To the extent Plaintiffs' claims are predicated on the mistaken assumption that 100 percent of gross proceeds are due to them, those claims are inconsistent with the applicable regulations, as noted above. To the extent Plaintiffs challenge royalty calculations, they have failed to specify such challenges either in the Complaint or during discovery. As described above, the United States' expert has found no accounting evidence to support Plaintiffs' claims of improper accounting, and ONRR has used its robust compliance program – including compliance reviews and audits related to Plaintiffs' leases – to ensure royalties are reported and paid appropriately to the Plaintiffs. The United States' expert's accounting testimony regarding his comparison of actual receipts against actual lease terms is unrefuted. Consequently, summary judgment should be granted to the United States on Count 2 because Plaintiffs proffer no competent evidence of irregularities and the United States proffers unrefuted accounting testimony establishing that the payments were proper.

2. *Count 4: The claim that the United States failed to collect and pay royalties is unsupported*

While Plaintiffs *alleged* in their Complaint that the government "has not collected all amounts to which Plaintiffs are entitled under their leases" and "has not paid to Plaintiffs all amounts which have been collected and to which they are entitled[,]" Third Am. Compl. ¶ 60, their evidence does not match those allegations.[13]

Plaintiffs have not presented any fact or expert evidence in support of their Count 4 assertion of underpayment of royalties based on existing lease terms. In fact, Plaintiffs' summary judgment motion makes clear that they have limited Count 4 to asserted improper withdrawals rather than undercollection or underpayment of royalties.[14] To the extent any claim of undercollection or underpayments remains, as described above, the United States has presented expert evidence of DOI's robust accounting procedures and conformity with them here, and ONRR has used its multi-faceted compliance program to ensure royalties are reported and paid appropriately to the Plaintiffs. That opinion testimony is unrefuted. The United States is therefore entitled to summary judgment on Count 4 for the reasons discussed here and below in the opposition to Plaintiffs' motion.

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[13] In a separate allegation in Count 4, Plaintiffs assert that "[i]n addition, amounts are deducted from Plaintiffs' account statements which are not appropriate and Plaintiffs are provided no legitimate explanation therefor." Third Am. Compl ¶ 61. Plaintiffs' Paragraph 61 allegation about improper withdrawals, as spelled out by Plaintiffs' motion for summary judgment, is that the United States is required, when it disburses funds from an Individual Indian Money ("IIM") account, to provide notice and an opportunity for hearing to the account beneficiary. The claim is thus distinct from any claim of underpaying royalties and is addressed below in the response to Plaintiffs' motion.

[14] In their motion for summary judgment, Plaintiffs assert that lessees made cash disbursements to themselves totaling over $17 million without providing any opportunity for hearing and ask that "summary judgment be entered in their favor on Count IV for no less than $17,690,149 for damages. . . ." Pl. Br. at 21. Thus, Plaintiffs have limited their damage claim in Count 4 to alleged improper disbursements.

3. *Count 6: The claim that the United States illegally deducted transportation costs is unsupported*

In Count 6, Plaintiffs contend that the United States breached its trust duties "by allowing the lessees on the Plaintiffs' oil and gas leases to illegally deduct transportation costs." Third Am. Compl. ¶ 70. They assert that transportation costs were deducted without the lessees submitting an Oil Transportation Allowance Report as required "before any deduction can be taken." *See id.* ¶ 71. Plaintiffs acknowledge that, under 30 C.F.R. § 1206.56, ONRR audits royalty payments and is responsible for determining when companies "improperly determine[] a transportation allowance." *Id.* ¶ 72. Plaintiffs state that upon information and belief Defendant breached that duty by "improperly deducting transportation charges." *Id.* ¶ 73. Plaintiffs include no support of improper deductions in their Complaint or in any factual or expert evidence.

Although the Complaint asserts oil and gas leases are subject to pre-filing requirements, the pre-filing requirement for Transportation Allowance Reports applies only to (a) oil; (b) transported under an arm's length contract; and (c) prior to July 1, 2015. *See* 30 C.F.R. §§ 1206.56 and 1206.57; 80 Fed. Reg. 24800 (May 1, 2015);. No such requirement ever existed for gas. *See* 30 C.F.R. §§ 1206.177 and 1206.178. Plaintiffs have failed to identify any specific instances of failures to file required pre-filing Reports, and summary judgment should therefore be granted on Count 6.

4. *Count 7: The claim that the government inappropriately approved leasing agreements is unsupported*

In Count 7, Plaintiffs assert that the United States has approved communitization and unitization agreements affecting Plaintiffs' properties without obtaining consent from owners representing a majority interest and that such agreements violate lease acreage limitations. Third Am. Compl. ¶ 78. To support their allegations, Plaintiffs reference provisions related to lease acreage limitations, tract-owner consent, and approval found in 25 C.F.R. § 211.25 and FBMLA

§ (a)(2)(A). *See* Third Am. Compl. ¶¶ 76-77. As described above in Section II.C.3, Count 7 should fail because Plaintiffs cannot identify a money-mandating duty. In the alternative, summary judgment should be granted on this claim because the cited provisions do not apply to the agreements at issue, and Plaintiffs have made no factually specific allegations or disclosed any factual support for or expert opinions regarding these alleged violations.

25 C.F.R. § 211.25 provides that individual leases for oil and gas shall not exceed 640 acres. None of the leases on Plaintiffs' land exceeds the 640-acre limitation. 25 C.F.R. § 211.25 governs only the acreage size of leases, not communitization agreements. Plaintiffs incorrectly assume that a communitization agreement changes the terms or amount of acres included in an individual lease, but an oil and gas lease and a communitization agreement are separate instruments.

Plaintiffs also assert that in approving communitization agreements without their consent, the United States breached an explicit legal and fiduciary obligation under the FBMLA, Section (a)(2)(A)(i). The Act provides that "[t]he Secretary may approve any mineral lease or agreement that affects individually owned Indian land, if… the owners of a majority of the undivided interest in the Indian land that is the subject of the mineral lease or agreement… consent to the lease or agreement." *Id.* However, communitization agreements do not constitute a "lease or agreement" under FBMLA § 2(A)(i). As interpreted by Plaintiffs, the statute could require majority consent for *any* decision affecting the land—including hiring a security guard to monitor the land, for example.

Unlike leases, communitization agreements do not have the legally operative effect of disposing of the interest holder's property right. Rather, communitization agreements are carried out after the individual Indian owners have consented to the underlying lease or agreement. The communitization agreement is then made between the lessee and BIA or BLM to increase the efficiency of the mineral disposition agreed to in the original lease. Communization agreements are controlled by 25 C.F.R. § 212.28, which provides that "[t]he consent of the Indian mineral owner to such a [communitization agreement] shall not be required unless such consent is specifically required in the [underlying] lease." 25 C.F.R. § 212.28(b). Plaintiffs' leases did not specify this requirement, so majority consent was not required for their inclusion in communization agreements. Howling Wolf Decl. ¶ 25.

Plaintiffs Roger and Nelson Birdbear have in the past challenged lease assignments[15] on a similar theory that the United States failed to obtain consent. In one case, the IBIA found that the lease language, which provided that the lessee agreed not to assign the lease, or any interest therein, "except with the approval of the Secretary of the Interior," governed. *See Roger Birdbear v. Acting Great Plains Reg'l Dir.,* 56 I.B.I.A. 87, 88 (2012). In the other, the IBIA similarly found that "neither the lease nor the regulations required" Nelson Birdbear's consent. *Nelson Birdbear v. Acting Great Plains Reg'l Dir.*, 62 I.B.I.A. 056, 59 (2015). Neither decision considered whether the FBMLA *required* consent for such an agreement. Thus, Plaintiffs should be aware that the terms of the lease and the regulations govern whether consent is required, and there is no basis for finding a consent requirement in either for communitization agreements.

Thus, Count 7 rests on a misunderstanding of the regulations. In addition, Plaintiffs have no evidence of harm resulting from the alleged failures. None of Plaintiffs' experts have addressed the issue, and none of the Plaintiffs could identify any harm from the alleged violation. Indeed, communitization agreements have no impact on Plaintiffs' land: the same party has drilling rights as agreed to under the lease, and the landowners receive the same amount agreed to in the lease.

[15] A lease assignment occurs when the original lessee transfers the lease to another operator.

Therefore, because Plaintiffs have adduced no evidence that the United States needed consent from owners for the communitization or unitization agreements or that the agreements violate size limitations, summary judgment should be granted to the United States on Count 7.

V. The United States Requests The Opportunity To Brief Exhaustion Principles On Claims Remaining After The Court's Summary Judgment Decisions

In addition to the summary judgment arguments made above, the United States notes that some of Plaintiffs' claims could be dismissed or deferred under the doctrines of prudential exhaustion or primary jurisdiction. After the Court rules on summary judgment, the United States requests an opportunity to brief the Court on whether any of the remaining claims should be dismissed or deferred.

Together, the doctrines of exhaustion and primary jurisdiction are "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Wyandot Nation of Kansas v. United States,* 858. F.3d. 1392, 1399 (Fed. Cir. 2017) (citing *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956)). Under exhaustion, courts consider the "twin purposes of protecting administrative agency authority and promoting judicial efficiency." *White & Case LLP v. United States*, 67 Fed. Cl. 164, 170 (2005) (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). In cases where exhaustion is found not to apply, the primary jurisdiction doctrine counsels delay where "agency adjudication . . . will be a material aid . . . in either making the problem disappear entirely or making for a more intelligent and sensitive eventual judicial judgment." *Wyandot*, 858 F.3d at 1399-1400 (internal citations and quotations omitted).

Here, the regulatory structure governing leasing of individually allotted lands makes BIA decisions subject to the DOI appeals process. 25 C.F.R. § 212.58 (incorporating the 25 C.F.R. Part 2 appeal instruction from 25 CFR § 211.58). Courts have found dismissal warranted under exhaustion principles in similar situations for Fort Berthold plaintiffs. *See Fredericks v. United States,* 125 Fed. Cl. 404, 411-12 (2016) (determining *sua sponte* that certain of the Ft. Berthold plaintiffs' un-exhausted claims required a final determination within the Department's appeal structure under theory of prudential exhaustion); *Hall v. Tesoro High Plains Pipeline Co., LLC*, 478 F. Supp. 3d 834, 837-841 (D.N.D. 2020) (requiring exhaustion on claims involving trespass and rights of way); *Chase*[16] *v. Andeavor Logistics*, No. 1:19-cv-00143, 2020 WL 6231891, slip op. at 2-5 (D.N.D. Apr. 6, 2020) (same).

Because whether dismissal or deferral is warranted on a particular count requires an updated assessment of what steps Plaintiffs have taken to seek administrative remedies, the United States suggests that it would be most efficient to address this potential issue for the remaining claims after the Court rules on the Parties' summary judgment motions.

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[16] Plaintiffs in this case (with the exception of Nelson Birdbear) are also named plaintiffs in *Chase v. Andeavor Logistics*.

OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT 4

Plaintiffs' motion rests on a mistake of fact. They allege that the United States has allowed operators to withdraw money from Plaintiffs' Individual Indian Money ("IIM") accounts without notice or opportunity for a hearing. Pl. Br. at 2-3. This fact is the cornerstone of Plaintiffs' motion—but it is not true. Plaintiffs' motion should be denied, and the United States' cross-motion for summary judgment on Count 4 should be granted.

Plaintiffs point to one source of evidence for their motion: the statements of performance, known as SOPs, that the United States provides to IIM account holders on a quarterly basis.[17] *See* Pl. Br. at 2-3. Plaintiffs note that the SOPs on their face indicate "cash disbursements" to the Great Plains Regional Office of the Bureau of Indian Affairs.[18] Plaintiffs then rely on the Ninth Circuit decision *Kennerly v. United States*, which found that removing money from an individual's IIM account to pay a third party debt required a hearing to satisfy due process. 721 F.2d 1252, 1258 (9th Cir. 1983). Plaintiffs' argument is simply that the SOPs say funds were disbursed from the account and to do so without a hearing violates *Kennerly*.[19] As Plaintiffs'

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[17] Plaintiffs' brief also states that "experts for all parties agree that . . . there was $17 million of 'Cash Disbursements' to the Great Plains Regional Office from Plaintiffs' IIM accounts." Pl. Br. at 3. This is misleading at best. The Parties' experts agree on the (rough) *amount* that the EOPs label as cash disbursements. *See* Pl. Br. at 13 (describing differences in experts' calculations). But, as explained in the text, Mr. Chavarria made clear in his expert report and deposition that no funds were actually removed from Plaintiffs' IIM accounts. And Plaintiffs' expert stated that she only looked at what the SOPs stated on their face. Ex. 8, Kidd Dep., at 192:4-17.

[18] Plaintiffs quantified disbursements from November 2010 to November 2017. They claim that disbursements continued after November 30, 2017, but that "the total amount . . . is unknown to Plaintiffs." *See, e.g.*, Pl. Br. at 3. This is risible given that Plaintiffs' evidence consists solely of SOPs sent to Plaintiffs.

[19] Plaintiffs also allege that the United States violated 30 U.S.C. § 1721a. Pl. Br. at 17-18. The United States disputes this allegation, but it is immaterial to the motion. This allegation is not part of Plaintiffs' complaint and is made simply to argue that Section 1721a does not provide authority for the adjustment system used.

expert on this topic clarified at her deposition, she only "investigated *whether the SOPs stated* that disbursements were related to the Great Plains Regional Office." Ex. 8 (Kidd Dep.) at 192:4-17 (emphasis added). Plaintiffs' only evidence is the face of the SOPs themselves. But they ignore the copious evidence explaining what the SOPs mean.

The fact that the cash disbursement entry does *not* refer to funds being removed from the IIM account has been made clear repeatedly. For instance, the ONRR website includes a handout devoted to helping owners understand their SOPs. *See* Ex. 9 (Understanding Your OST Quarterly Statement and How It Relates to your EOP – Oil & Gas Transactions) *available at* *https://www.onrr.gov/IndianServices/pdfdocs/Understanding_Your_OST_Quarterly_Statement.pdf*. That handout describes the disbursements Plaintiffs flag here and notes in red text, "These do not result in cash removed from your IIM Account." *Id.* ONRR also had meetings on the Fort Berthold Reservation to explain the process and handed out an FAQ that explained it, including that no money was taken from IIM accounts. Winter Decl. ¶ 20 and Attach. A at 7-9, 11.

As ONRR has explained, operators are required to make royalty payments within the month following the sale of the oil or gas. Winter Decl. ¶ 17. In some cases, the operators make estimated payments and adjust the payments in a subsequent month. *Id*. This process ensures that payments are timely made and can be adjusted through deductions from subsequent payments. *Id*. The adjustments do not come from the IIM accounts, however, but by making an offset against a future payment. *Id.* ¶ 18. As Robert Winter, a supervisory accountant at ONRR, explains, the cash disbursements "do not represent the removal or transfer of any funds from Plaintiffs' IIM accounts." *Id.* ¶ 15.

The government has even reached out to Roger Birdbear specifically to explain how the disbursements work. In 2013, Mr. Birdbear contacted the government to challenge certain deductions from his royalty payment, much as Plaintiffs now do in their motion. The DOI Office of Trust Review and Audit ("OTRA") performed a special review of Mr. Birdbear's royalties and found that the adjustments were appropriate. *See* Ex. 10 (Aug. 6, 2013 Letter to R. Birdbear with enclosure). OTRA explained that, "The royalty reporting procedure is to report the royalty in the month after the sales month and make adjustments to the initial royalty amount in the subsequent month(s) reporting offsetting credit and debit adjustments." *Id*. at BIRDBEAR0017137. OTRA provided the review to Mr. Birdbear in August 2013. *Id*. As part of the exchange, the government also provided Mr. Birdbear the FAQ document mentioned above. *See* Ex. 11 (March 2013 Email Exchange between R. Birdbear and M. Burch with attachment).

The United States' expert accountant explained how the adjustment process works in deposition testimony elicited by Plaintiffs but ignored in their motion. He testified that no funds were removed from Plaintiffs' IIM accounts. Ex. 12 (Chavarria Dep.) at 71:8-73:10. Instead, any deductions were made against payments that the lessees would otherwise make in the current month. *Id*. His expert report explained that such adjustments were taken into account in designing the EOP forms and explained in the glossary of the form. Pl. Ex. 7 at 14-15. Mr. Chavarria also states plainly in his expert report that the adjustments are "not withdrawals." *Id*. at 14. Despite citing Mr. Chavarria's deposition and expert report,[20] Plaintiffs ignore this unrebutted testimony on the factual issue at the heart of their motion. In the end, Plaintiffs have no evidence to rebut ONRR's website or the sworn testimony by outside expert Mr. Chavarria and ONRR witness Mr. Winter.

In addition, Plaintiffs' own testimony shows why their theory of disbursements cannot

[20] Plaintiffs cite Mr. Chavarria's deposition solely for the fact that the Great Plains Regional Office is an office of the Bureau of Indian Affairs. *See* Pl. Br. at 3 (citing Pl. Ex. 2).

work. IIM account holders are not required to keep their receipts in their IIM accounts. They can move them to other accounts as desired. Both Nelson and Roger Birdbear testified that they moved their funds out within a few days; Nelson Birdbear testified that it was done automatically. *See* Ex. 13 (R. Birdbear Dep.) at 63:15-64:19, Ex. 3 (N. Birdbear Dep.) at 27:8-24. Plainly, if Plaintiffs regularly move their funds out of the IIM accounts, these funds could not be reached for disbursements. This would be a problem if Plaintiffs' theory of how the system worked was correct; it is not.

While unfounded, Plaintiffs' motion would have major consequences in two ways. First, it would confer a windfall on Plaintiffs by essentially paying them double royalties. As Mr. Chavarria explained in his expert report, many of the entries follow a pattern of payment, reversal, and reposting. Pl. Ex. 7 at 16. The first two cancel each other out, leaving the correct payment amount. If Plaintiffs also recover the disbursement amount, it is akin to an extra payment for each sale of oil and gas. As Mr. Chavarria calculated, Plaintiffs have already been paid $15 million in royalties for the period in question. *See* Pl. Br. Ex. 7 at 12. The motion would add more than $17 million more. Plaintiffs never say that they are owed these royalties, only that due process compels the payment. That argument is incorrect, as explained above, and inequitable.

But the consequences of Plaintiffs' motion go beyond their requested windfall. If granted, the motion would upend the carefully orchestrated program by which royalties are paid to thousands of Indian allottees. Plaintiffs would have the government hold a hearing before every royalty adjustment. Such a scheme is plainly unworkable, and would force the government to change the rules, giving operators more time to pay royalties to avoid the need for adjustments. Revamping the program would be a major burden to the government, and slower royalty payments would hurt all allottees.

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The undisputed facts—testimony from the United States' accounting expert, an internal expert in the process, and the government's own website—show that no funds were removed from Plaintiffs' IIM accounts. Plaintiffs' motion must therefore fail. Those same undisputed facts mean that Plaintiffs' disbursement argument cannot succeed at trial, so summary judgment is appropriate for the United States on Plaintiffs' Count 4.[21]

CONCLUSION

For the reasons stated, the United States respectfully requests that the Court:

- Grant summary judgment to the United States on Plaintiffs' Counts 1-4 and 6-10; and
- Deny Plaintiffs' motion for summary judgment regarding Count 4.

Respectfully submitted,

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[21] Plaintiffs may argue that Count 4 is broader than their disbursement argument. However, they moved for summary judgment on Count 4 solely based on that theory. *See, e.g.*, Pl. Br. at 20-21 (stating amount due based on disbursements and seeking that precise amount). Win or lose, Plaintiffs have reduced Count 4 to the theory in their motion.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 23, 2021, I electronically transmitted the foregoing Cross-Motion for Summary Judgment, Memorandum in Support and Opposition to Plaintiffs' Summary Judgment Motion using the ECF system for filing and transmission of a Notice of Electronic Filing to the ECF registrants in this case.

_*s/Thomas A. Benson*____
THOMAS A. BENSON