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' REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The United States moved for summary judgment on nine of Plaintiffs' claims, based on three grounds: Plaintiffs' failure to identify a money-mandating duty for six of their claims and the resulting lack of subject matter jurisdiction, the statute of limitations bar to one claim, and Plaintiffs' failure to make out a *prima facie* case for four claims. In opposition, Plaintiffs spend almost thirty pages asserting this Court has subject matter jurisdiction—without acknowledging the Supreme Court's two-part standard for subject matter jurisdiction or trying to demonstrate how they meet that standard. They fail to prove that their Count 1 claims are timely, and they fail to provide evidence supporting a *prima facie* case on four counts.

For these reasons, the United States' motion for summary judgment should be granted.

I. Plaintiffs Have Failed To Establish Subject Matter Jurisdiction (Counts 1, 3, 7-10)

The United States moved for summary judgment on Counts 1, 3, 7, 8, 9, and 10 because Plaintiffs have failed to identify a source of substantive law imposing a specific, money-mandating duty that the United States owes to Plaintiffs. Plaintiffs bear the burden of establishing subject-matter jurisdiction by a preponderance of the evidence. *Inter-Tribal Council of Ariz., Inc. v. United States*, 956 F.3d 1328, 1337-38 (Fed. Cir. 2020). They have failed to meet that burden. This Court therefore lacks jurisdiction over the claims.

In their response, Plaintiffs focus on the same argument of trust-based-on-control that the Supreme Court rejected in *Navajo II.* There the Court held that "control" is not sufficient where plaintiffs "cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated." 556 U.S. 287, 302 (2009). Yet Plaintiffs here argue that "[t]he statutory and regulatory *scheme* giving Defendant pervasive fiduciary *control* over Plaintiffs' trust property, particularly given their status as allottees/IIM beneficiaries and *Cobell* opt outs, demonstrates the indisputable existence of a comprehensive trust relationship and the perversity

of Defendant's subject matter jurisdiction argument." ECF No. 187 ("Pl. Opp.") at 1 (emphasis added). Plaintiffs' argument fails because a "statutory and regulatory scheme" is no substitute for the violation of a "specific, applicable, trust-creating statute or regulation." *Navajo II*, 556 U.S. at 302.

Plaintiffs then resort to a grab-bag of jurisdictional arguments ranging from the *Cobell* settlement to the procedural history of this case. As discussed below, none of those arguments establishes subject matter jurisdiction.

A. Plaintiffs Ignore the Legal Standard for Establishing Jurisdiction

Although Plaintiffs carry the burden of proof to establish jurisdiction, they fail to acknowledge the applicable two-part test. Instead, they suggest that jurisdiction exists because a regulatory "scheme" coupled with "control" imposes fiduciary duties. *See, e.g,.* Pl. Opp. at 14-15. The Supreme Court has rejected this very argument.

The Supreme Court in 2009 made plain two hurdles for Tucker Act jurisdiction: (1) an identification of a substantive source of law that establishes specific fiduciary or other duties and an allegation that the Government has failed faithfully to perform those duties; and (2) a determination that the substantive source of law can fairly be interpreted as mandating compensation for damages sustained due to the breach of the duties that law imposes. ECF No. 180 ("U.S. Br.") at 5 (citing *Navajo II*, 556 U.S. at 290-91). The threshold requirement that Plaintiffs identify specific statutes creating legal duties has been reiterated by courts at all levels. *See, e.g., Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. 250, 258 (2016) ("[A]ny specific obligations the Government may have . . . are governed by statute rather than the common law.") (internal quotations omitted); *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1039-40 (Fed. Cir. 2012) ("*Shoshone IV*") ("tribes must point to specific statutes and regulations that "establish [the] fiduciary relationship

and define the contours of the United States' fiduciary responsibilities.") (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011)). 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 (quoting *Navajo II*). "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id.*

Plaintiffs first mention *Navajo II* on page 19 of their brief, dismissing it as a case involving a tribe rather than allottees or IIM trust beneficiaries. *See* Pl. Opp, Section I.B.[1] The alleged distinction between case law involving tribes and that involving allottees is meritless, and Plaintiffs cite no authority for the proposition that *Navajo II* is limited to tribal claims.[2] The Indian Tucker Act standard applies in the same manner to tribes and allottees. *See* 28 U.S.C. § 1505 (this Court "shall have jurisdiction of any claim against the United States . . . . . in favor of any tribe, band, or other identifiable group of American Indians . . ."). Nor does the case law support any distinction. *See e.g., Jicarilla*, 564 U.S. at 178-83 (reviewing the standard for jurisdiction based on tribal and allottee cases without distinction).

Plaintiffs try to ignore the test set out in *Navajo II* in 2009 by asserting that the "pathmarking" authorities are *Mitchell II* (1983), *Cobell VI* (2001)*, White Mountain Apache*

[1] Plaintiffs also assert that the *Osage IV* court found that *Navajo II* only applies outside of "plenary authority" cases. There is nothing in *Navajo II* or *Osage IV* that would support such an interpretation, and courts have applied the *Navajo II* standards for Indian breach of trust cases to all types of plaintiffs and claims, including those presented here. *See, e.g., Two Shields v. United States*, 820 F.3d 1324, 1332 (Fed. Cir. 2016).

[2] The United States notes that Plaintiffs do not apply this distinction between tribal claims and individual Indian claims when they cite to authorities they believe support their position. See Pl. Opp. at 19 (discussing *Mitchell II*, *White Mountain Apache*, *Pawnee*, *Shoshone I* and *II*). Plaintiffs cannot have it both ways—arguing that adverse precedent is irrelevant because it involves tribal claims while simultaneously invoking their own extrapolations of precedent from tribal claims to oppose the United States' motion.

(2003), *Pawnee* (1987), *Shoshone I* and *II* (2003), and *Osage I* (2005), "among others." Pl. Opp. at 19. But Plaintiffs' interpretation of these older cases contradicts the actual holdings of more recent precedent—such as *Navajo II* (2009), *Jicarilla* (2011), *El Paso* (2014), and *Hopi Tribe* (2015). *Navajo I* itself identifies *Mitchell I* and *Mitchell II* as "pathmarking precedents," but that does not mean that they are the exclusive universe of precedent establishing the standard applicable here.

Plaintiffs choose not even to acknowledge *Mitchell I*, which found no subject matter jurisdiction. Their invocation of *Mitchell II* consists of quoting *Navajo I* and *Mitchell II* out of context. *See* Pl. Opp. at 12-13. But *Mitchell II* interpreted the relevant statutes and regulations to find a money-mandating duty, *Mitchell II,* 463 U.S. at 219-26, a task Plaintiffs fail to undertake. Indeed, *Jicarilla* underscored the importance of *Mitchell II's* analysis of the statutory and regulatory landscape in the particular situation presented:

> But the applicable statutes and regulations "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Mitchell II*, supra, at 224, 103 S.Ct. 2961. 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." *Navajo II*, *supra,* at 302, 129 S.Ct., at 1558. *The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute*.

564 U.S. at 177 (emphasis added).

Instead of accepting the principle that they must identify a violation of a specific, applicable, trust-creating statute or regulation that establishes money-mandating duties on the United States, Plaintiffs point to the statutory and regulatory scheme writ large. This is simply not sufficient to establish jurisdiction. *See Navajo II*, 556 U.S. at 301-02.

B. Plaintiffs' Reliance on the *Cobell* Settlement Is Misplaced

Plaintiffs' claims for alleged mismanagement of leasing cannot find safe harbor in *Cobell's* discussion of trust fund accounting. While Plaintiffs acknowledge that the *Cobell* claims dealt with allegations of trust fund mismanagement, not the leasing of Indian properties, Pl. Opp. at 12, they insist that, "[*Cobell's*] holding was directed to the duty to provide an accounting for the funds collected by Defendant on behalf of Indian allottees and IIM beneficiaries, but it clearly included the duty to manage and administer all trust assets as a fiduciary. . . ." *Id.* Not so.

Cobell does not alter the fundamental requirement that Plaintiffs "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) (quotation marks omitted); *see also El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 896 (D.C. Cir. 2014) (no actionable fiduciary relationship "merely by operation of federal common law"). Plaintiffs fail to establish the specific obligation here.

Plaintiffs assert that the *Cobell* settlement "likely would have included the Counts at issue in Defendant's XSMJ if Plaintiffs had not opted out." Pl. Opp. at 2. Plaintiffs rely throughout their brief on the argument that they should have the rights of the *Cobell* plaintiffs because they opted out of the settlement. By opting out, however, the only right Plaintiffs maintained is a right not to have their claims barred pursuant to the scope of the *settlement agreement*. *Cf. Two Shields v. United States,* 820 F.3d. 1324, 1330-31 (Fed. Cir. 2016) (claims of mismanagement of oil and gas leases barred by failure to opt out of *Cobell* settlement).

The fact that the court in *Cobell* found jurisdiction to approve the settlement is not meaningful here because the *Cobell* approval of the Trust Administration Claims was in the context of settlement and there was an explicit Congressional grant of jurisdiction over the

Trust Administration Claims. Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064, 3066-67 (Dec. 8, 2010). Plaintiffs cannot use the *Cobell* settlement as a sword that establishes any rights for them—jurisdictional or otherwise.[3] It is Plaintiffs' burden to prove that this Court has jurisdiction to hear the specific claims they have chosen to bring here, and they have not met that burden.

C. Plaintiffs Mischaracterize the Procedural History of this Case

Plaintiffs next try to make hay of the fact that the United States did not move to dismiss some of the claims at issue for lack of subject matter jurisdiction at the outset of the case. *See* Pl. Opp. at 2-3. The United States' decision to focus the subject matter jurisdiction arguments in its Motion for Partial Dismissal on only two counts does not bar it from raising jurisdictional failures of other counts at this time. *See* RCFC 56(a).

Plaintiffs also assert that it is "[e]ven more telling" that the United States withdrew its motion—a mischaracterization of the record. *See* Pl. Opp. at 2-3. When the United States filed its motion, Plaintiffs *asked the Court* for deferral of the issues in the United States' motion. ECF No. 18 at 2. Plaintiffs went so far as to file a separate motion to stay, requesting "that the Court defer ruling on the Government's jurisdictional arguments pending completion of factual discovery. . . . " ECF No. 24 at 1. As recited in the United States' opening brief, during briefing of the motion to dismiss, the Parties agreed to work together to ensure that Plaintiffs received additional information and agreed that (1) Plaintiffs would then file a second amended

[3] Plaintiffs' assertion that the United States in *Cobell* "repeatedly argued that the Court of Federal Claims had subject matter jurisdiction for all claims by allottees / IIM trust beneficiaries because claims for mismanagement of trust assets and breach of *any* fiduciary duty were *by definition* claims for money damages" is a mischaracterization of the United States' position. *See* Pl. Opp. at 10. Plaintiffs cite to a footnote in *Cobell I* that does not support their point. The claims at issue in *Cobell I* were trust fund mismanagement claims, not leasing claims, and the footnote specifically relates to those claims.

complaint and (2) the United States would not move to dismiss. ECF No. 32. Plaintiffs cannot now claim that their request to defer the issue established their victory on that same issue.

D. Plaintiffs Have Not Identified Case Law Supporting Jurisdiction under the Provisions at Issue

Plaintiffs also assert that that the Federal Circuit has found that subject matter jurisdiction exists under "several statutes and regulations upon which Plaintiffs have based their claims[.]" Pl. Opp. at 13 (citing *Pawnee* and *Poafpybitty*). None of the cases Plaintiffs cite support them here.

Poafpybitty dealt with a claim by an Indian lessor against the lessee. *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 376 (1968). It does not establish subject matter jurisdiction over a lease claim against the United States.

Meanwhile, *Pawnee* simply underscores the merit to the United States' motion. *Pawnee* held that a lessor can sue for the United States' failure to comply with a lease—but where it can allege no such failure, the claim that the United States should have done something beyond the lease cannot be sustained. *Pawnee v. United States,* 830 F.2d 187, 191 (Fed. Cir.1987). The Federal Circuit explained that the existence of a general fiduciary relationship "does *not* mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trust[.]" *Id.* (emphasis in original). *Pawnee* held that plaintiffs failed to state a proper claim for fiduciary breaches in collecting royalties on plaintiffs' leases because "[t]here is no allegation that Interior failed to comply with the regulations or the leases in valuing the oil for royalty purposes." *Id.* The court thus found that plaintiffs' allegation that "the Government did not pay them, as royalties, on the basis of the highest market value" was not in violation of a regulation or the applicable leases. *Id.* So too here. The failure to obtain a higher royalty amount is not a violation of any applicable requirement.

In Section I.A.5, Plaintiffs assert "this Court" has "repeatedly held" that subject matter jurisdiction exists under "many of the same statutes and regulations upon which Plaintiffs base their claims." Pl. Opp. at 15. They point to *Shoshone I* and *II.* The *Shoshone* cases, rather than supporting Plaintiffs' theory, in fact show how closely this Court and the Federal Circuit examine alleged violations to determine "the contours of the United States' fiduciary responsibilities." *Shoshone IV*, 672 F.3d at 1040 (quoting *Jicarilla*, 564 U.S. at 177). In *Shoshone I*, the court dismissed plaintiffs' maximization claims, finding them controlled—by plaintiffs' counsel's admission—by *Pawnee*. *Shoshone Indian Tribe of Wind River Reservation v. United States*, 56 Fed. Cl. 639, 648 (2003). The *Shoshone* court allowed plaintiffs to proceed on their claim that the United States failed to obtain proper value, however, because "this proper value can be determined by application of the regulations" cited. *Id.* at 648. In *Shoshone IV,* the Federal Circuit placed the burden on the tribes on remand to "establish that the Government had a duty to eject trespassers," demonstrating that even when jurisdiction exists for some elements of oil and gas leasing, it is not established for others. *Shoshone IV*, 672 F.3d at 1041. That is precisely what Plaintiffs fail to do here: establish the United States' duty to take specific actions, such as to hold a certain kind of auction or dictate the timing of drilling, for example.

E. Plaintiffs' Extrapolation of *White Mountain Apache* Is Contrary to Binding Precedent

Plaintiffs invoke *White Mountain Apache* in arguing that "administrative control over Indian trust assets inherently and necessarily requires a damages remedy for breaches of trust, trust management, and trust administration fiduciary duties." Pl. Opp. at 14. In fact, the case law explicitly rejects the argument that control alone establishes a money-mandating duty. *E.g.*, *Navajo II*, 556 U.S. at 302 (holding that "neither the Government's "control" over coal nor common-law trust principles matter" because the plaintiff Tribe "cannot identify a specific,

applicable, trust-creating statute or regulation that the Government violated"). The Federal Circuit has explicitly rejected Plaintiffs' reading of *White Mountain Apache*. *E.g., Hopi Tribe*, 782 F.3d at 668 (*White Mountain Apache* "does not stand for the proposition that in every case 'express trust plus actual government control equals enforceable trust duties' according to common law principles").

F. Plaintiffs' Argument that the United States Has Admitted Pervasive Control in Manuals Is Meritless

Unable to point to specific sources of law, Plaintiffs turn to the introduction and policy sections of manuals, handbooks, Secretarial orders, Solicitor's Opinions, standard operating procedures, memoranda, and interim guidance, asserting that the United States has "admitted" its "comprehensive fiduciary trust, trust management, and trust administration responsibilities." Pl. Opp. at 18. This is simply untrue.[4]

The internal documents Plaintiffs cite do not create a disputed issue of material fact as to jurisdiction. *See United States v. Navajo Nation,* 537 U.S. 488, 506 (2003) ("*Navajo I*") ("analysis must train on specific rights-creating or duty imposing *statutory* or *regulatory* prescriptions") (emphasis added). The materials Plaintiffs cite do not qualify as law. *See generally Hamlet v. United States*, 63 F.3d 1097, 1105 (Fed. Cir. 1995). *Hamlet* lays out four criteria for such documents to be treated as law, and none meet those criteria. They were not promulgated according the APA requirements, were not intended to be binding rules, and do not

[4] In addition to the 36 exhibits Plaintiffs submitted in opposition to the United States' motion, they submitted declarations by their trial counsel and one of their disclosed expert witnesses. *See* ECF 189, 190. These declarations go beyond authenticating the exhibits. The expert witness's declaration characterizes and quotes from exhibits, essentially serving as an appendix to Plaintiffs' brief, while trial counsel's provides extensive opinions on the United States' oversight of oil and gas leasing. Because they are not part of the brief or exhibits to it, the United States does not respond to the statements in the two declarations. The United States objects to the two declarations to the extent they are used to augment the page limit for Plaintiffs' brief or expand the scope of the expert's permissible trial testimony beyond his expert reports.

create any specific or concrete duties but rather consist of a variety of general policy statements and broad, departmental objectives. Moreover, in several instances the documents themselves expressly deny creating any new, legally enforceable trust duties. *See, e.g.,* Pl. App. Ex. 20 at APP1681-82 (stating that "[t]he trust responsibility is defined by treaties, statutes and Executive Orders" and that "[i]t would be beyond my authority, and this Order is not intended, to impose the legal standards by which a breach of trust claim would be reviewed in a court of law."); Pl. App. Ex. 21 at APP1689-90 (setting forth the guiding trust principles to be abided by "consistent with all applicable law" and disavowing that it "create[s] any right to administrative or judicial review or any legal right or benefit, substantive or procedural...."). These exhibits cannot establish Tucker Act jurisdiction.

G. Plaintiffs' Attempts to Establish Subject Matter Jurisdiction on a Claim-by-Claim Basis Fail

In Section I.C., Plaintiffs purport to present a claim-by-claim rebuttal to the United States' argument, but they fail to identify the specific statutory or regulatory cites required by *Mitchell II, Navajo II*, *Jicarilla,* and their progeny. The title of the Section—claiming that each Count is "based on the extensive money-mandating statutory and regulatory *scheme* by which Defendant exercises *plenary authority* over the IIM trust beneficiary assets that are the basis for the Plaintiffs' claims" (emphasis added)—makes clear that even in this section Plaintiffs continue to fail to meet their burden of pointing to specific obligations. Instead, each subsection just reiterates Plaintiffs' flawed interpretation of the case law.

In discussing Count 1, for example, Plaintiffs reiterate their arguments about the case law and handbooks. *See* Pl. Opp. at 23. Then they acknowledge that there is no regulatory obligation to hold a public auction—the basis for their claims—but say that such an obligation is nonetheless imposed by the "best interests" language of the statute. *Id*. at 24 ("while

Defendant may not be *required* to offer a lease through a public auction or sale . . . he may be required to do so" if such an auction is in the "best interests" of the owners and that there can be a breach of the "best interests" requirement "notwithstanding the FBMLA").

Plaintiffs' assertion that the United States is obligated to conduct a "best interests" analysis and a "maximizing best economic interests" analysis for their leases does not establish that the United States has a statutory money-mandating duty to do so that can support Tucker Act jurisdiction. In fact, this exercise of the Secretary's discretion in performing her general trust responsibilities has been found by the Supreme Court to be inadequate to establish a money mandating duty. *See Navajo I,* 537 U.S. at 509-11 (rejecting a claim of a money-mandating duty based on statutory "best interests" language).

The United States' responses to the arguments laid out in each count-by-count recitation of asserted statutory and regulatory support are encompassed within its original Motion.

II. Count 1 Is Time-Barred

In its opening brief, the United States laid out the facts surrounding the signing of leases in 2007 through 2009–leases that Plaintiffs first sought to challenge in this case in 2016. Plaintiffs bear the burden of proving that they brought their claims within the six-year-statute of limitations. Plaintiffs assert that Count 1 remains valid on three theories: the inclusion of trust administration claims in *Cobell*, belated discovery of the breach by Plaintiffs, and continuing trespass.[5] None of those theories make Count 1 timely, and Plaintiffs have failed to meet their burden.

[5] The United States moved to dismiss Count 1 as untimely in its 2016 motion to dismiss. At the time, Plaintiffs articulated only one theory to support the timeliness of their claim: that Plaintiffs did not discover the breach of trust until March 2010. ECF No. 18 at 31-33.

Plaintiffs first assert that their claims are timely because they "undoubtedly are encompassed by the *Cobell v. Salazar* Class Action Settlement Agreement and the *Cobell* Amended Complaint which was filed with Defendant's stipulated agreement." Pl. Opp. at 36. Plaintiffs provide no support for their assertion that *Cobell* tolled their claims or for how long. Since it is Plaintiffs' burden to establish how long their claim was allegedly tolled by *Cobell,* and they have not done so, their argument must fail. *See Inter-Tribal Council of Ariz.*, 956 F.3d at 1337-39.

If one were to guess, perhaps Plaintiffs are asserting that their claims were tolled for the entirety of the *Cobell* litigation—an unfathomable assertion since the leases at issue in Count 1 were not even approved until over a decade after *Cobell* was filed in 1996. But their admission that trust administration claims were first included in *Cobell* through the Amended Complaint, which was filed in December 2010, dooms their timeliness argument. The *Cobell* litigation, as originally filed in 1996, concerned historical accounting claims. When the parties sought to settle the case in 2010, they included trust administration claims in the settlement, which required an amendment of the complaint. As Plaintiffs admit, their Count 1 allegations fit within the trust administration class in the *Cobell* settlement. *See* Pl. Opp. at 36. Those claims were not asserted until after the enactment of the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (Dec. 8, 2010). Specifically, the claims were first asserted when the *Cobell* plaintiffs filed the amended complaint on December 21, 2010, in conjunction with the proposed and, later, final settlement. Am. Compl., *Cobell v. Salazar,* No. 1:96-cv-1285-TFH (D.D.C. Dec. 21, 2010) (ECF No. 3671).

The law Plaintiffs cite on tolling establishes that "the filing of a class action complaint . . . toll[s] the limitation period of 28 U.S.C. § 2501." *Bright v. United States*, 603 F.3d 1273 (Fed.

Cir. 2010). To qualify for tolling, claims in an amended complaint must relate back to the original Complaint. *See, e.g., Fauvergue v. United States*, 85 Fed. Cl. 50, 54 (2008) (the Federal Circuit uses a "general inquiry to determine whether a claim should relate back by focusing on the notice given to the defendant by the general fact situation set forth in the original pleading.") (internal quotation omitted). The trust administration claims do not relate back to the historical accounting claims; they are based on different underlying facts and asserted violations. The trust administration claims first alleged in the 2010 *Cobell* amendment go far beyond the request for a historical accounting and concern numerous types of alleged violations. To the extent Plaintiffs' claims are tolled by the *Cobell* claims in the 2010 Amended Complaint, they are tolled from the date of the filing of those claims—December 21, 2010—to the opt-out date of April 20, 2011. Thus, the period excluded by the *Bright* tolling doctrine is at most 120 days. The January 13, 2016 complaint filing date means all claims that accrued before September 15, 2009 are barred even under this theory. As noted in the United States' opening brief, Plaintiffs have limited Count 1 to leases entered into between 2007 and 2009. U.S. Br. at 20. Only one of those leases was entered into after September 15, 2009. *See* U.S. Br. Ex. 1 at Att. A. Thus, summary judgment is appropriate based on the statute of limitations for all but one lease even under Plaintiffs' assertion of tolling by *Cobell.*

Plaintiffs also assert that Count 1 is timely because they allegedly did not discover the breach of trust until they submitted inquiries to the BIA around March 2010. That assertion is contradicted by the facts and the law. The violations that Plaintiffs allege in Count 1—the alleged absence of a "competitive bidding process" and the alleged failure to "maximize[] their best economic interests"—were known when the leases were approved. *See Two Shields*, 820 F.3d at 1329 (holding that "the government's purported liability was fixed at the time it

allegedly repudiated its trust duties [. . .]–when it approved the [subject] leases at below-market rates."). Here, Plaintiffs were aware of the process that was used to bid the leases, the lease terms, and the auction. Further, Plaintiffs identified their perceived shortcomings in the leasing process to the government in 2009. *See* U.S. Br. at 21 (uncontroverted in Plaintiffs' brief). As the Federal Circuit made clear in *Shoshone IV*, where the Government's "alleged omissions and misstatements did not prevent the [Plaintiffs] from being aware of the material facts that gave rise to their claim[,]" the claim is barred. *See Shoshone IV*, 672 F.3d at 1031.

Finally, Plaintiffs' continuing trespass theory lacks merit. For that theory to succeed, Plaintiffs would need to prove the leases are void under the applicable regulatory regime, so the continued presence of the lessee on the property would constitute a trespass. *See Shoshone IV*, 672 F.3d at 1035-40 (explaining that there must be a "substantive source of law that establishes fiduciary or other duties" to eject trespassers). As laid out in the United States' opening papers, the United States complied with the requirements for bidding and approval of these leases, and Plaintiffs fail in their maximization claim because neither the regulation Plaintiffs cite nor any case law supports jurisdiction for a maximization claim with respect to leasing. *See* U.S. Br. at 14-15. Thus, because the leases are not void, there is no trespass and Plaintiffs cannot rely upon the continuing trespass theory to preserve the timeliness of their asserted claims.

III. Plaintiffs Cannot Show 'A Genuine Issue For Trial' (Counts 2, 4, 6, 7)

At this stage, Plaintiffs have the burden to show there "is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). They have failed to do so for Counts 2, 4, 6, and 7, and summary judgment should be granted for the United States.

A. Count 2: Plaintiffs Have Produced No Evidence that the United States Failed to Properly Value Oil and Gas Production in Determining Royalties

Plaintiffs contend that the United States "misconstrues . . . Count 2 because the claims in Count 2 are directly related to the allegations and relief sought in Count 1." Pl. Opp. at 40. On their face, however, Counts 1 and 2 are distinct. Count 1 addresses Plaintiffs' complaints with the process and results of the lease auction; Count 2 states that the United States failed to properly value the produced resources to calculate royalty payments. *Compare* Third Am. Compl. ¶ 41 *with* ¶ 44. The relevant headings of the Complaint and Plaintiffs' brief both confirm that Count 2 is about "properly value[ing] oil and gas production in determining royalties." *Id*.; Pl. Opp. at 40. Plaintiffs have failed to produce any evidence that the United States improperly valued the resources or miscalculated royalties.

Instead, Plaintiffs point to several exhibits analyzing what balance of lease bonus and royalty terms would be most lucrative for allottees. Pl. Opp. at 40-41. Plaintiffs' Exhibits 15 and 16 are reports from one of Plaintiffs' testifying experts who opined that the United States should have obtained better lease terms—but did not allege that the government failed to require compliance with the leases. Plaintiffs' Exhibit 32 is a BLM analysis regarding how royalty rates and bonus payments affect each other. (Exhibit 31 is an example lease.) Plaintiffs argue Exhibit 32 means the government failed to obtain optimal lease terms. *Id*. But none of the exhibits address whether the United States ensured payment of the appropriate royalties under the approved leases. The exhibits are relevant, if at all, only to Count 1.

The only other evidence Plaintiffs point to in support of Count 2 is the expert opinion of the United States' accounting expert, Gregory Chavarria. Mr. Chavarria reviewed extensive records and verified roughly two-thirds of the payments. This does not mean that the remaining one-third were flawed. *Contra* Pl. Opp. at 40. Indeed, Plaintiffs ignore Mr. Chavarria's statement

in the very next sentence of his report: stating that he used additional documents to reconcile another 31% of the total payments. He concluded: "As a result of my analysis, I found 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." Pl. Mot. Ex. 7 (ECF No. 178-5) ("Chavarria Rep.") ¶ 24. Mr. Chavarria's report is the only evidence Plaintiffs cite that relates to Count 2, and it states that the claim has no basis. Tellingly, Plaintiffs' own experts opted not to even review the payments made to Plaintiffs. *See* U.S. Br. at 26.

Plaintiffs simply ignore the undisputed evidence of the rigorous process the government uses to ensure proper payments. *See id*. at 23-26. Through that process, the United States has "ensure[d] the reporting and payment on the Plaintiffs' properties are in accordance with the terms of their leases and [applicable] regulations." *Id*. at 25-26 (citing U.S. Ex. 7). The undisputed evidence thus shows Plaintiffs have been properly compensated under the leases.

Finally, Plaintiffs argue that summary judgment should be denied because they assert the United States has relevant information it failed to produce. *See* Pl. Opp. at 41. This claim is completely unsupported. Indeed, the Parties and the Court worked extensively to ensure complete production, and, in May 2018, the Parties jointly reported that they "have each completed their respective document productions." ECF No. 136 at 2. Fact discovery closed in July 2018, more than three years ago. ECF No. 139. Plaintiffs raised no issue with the government's production in the May 2018 status report or at any time since—until the United States' opening brief showed Plaintiffs' lack of evidence. A party cannot avoid summary judgment by pointing to evidence that it wishes it could have obtained. *See Serdarevic v.*

Advanced Med. Optics, Inc., 532 F.3d 1352, 1364 (Fed. Cir. 2008) (party "cannot defeat a motion for summary judgment . . . with speculation about what discovery might uncover").

B. Count 4: The Evidence Shows No Funds Were Removed from Plaintiffs' Account, So There Is No Due Process Violation

As the United States explained in its cross-motion, no funds were removed from Plaintiffs' accounts. U.S. Br. at 36-38. Plaintiffs half-heartedly argue that funds were in fact removed, but only cite the same materials they previously relied on, which the United States has already addressed with undisputed testimony from experts in the subject. *See* Pl. Opp. at 46; U.S. Br. at 36-38 (citing Ex. 6, 12).

Plaintiffs then pivot to arguing that it does not matter whether the funds were withdrawn from their accounts or not. This new theory is beyond the scope of Plaintiffs' motion, but it fares no better. As explained in the prior briefing, any adjustments to royalties are made by lease operators against subsequent payments before those subsequent payments are deposited, based on the lease terms agreed to by Plaintiffs. *See* U.S. Br. at 36-37, Ex. 6 ¶¶ 16-18 and Att. A at 7-9. Adjustments may be necessary as additional information becomes available. Contrary to Plaintiffs' argument that they have a property interest in prospective royalties, they have an interest only in the amount that is due to them. There is no property interest in an overpayment that needs to be adjusted according to the terms of the lease and the regulations—particularly when the adjustment is made outside the party's account. Moreover, for due process protections to be implicated, there must be "overt official involvement" in the deprivation. *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 157 (1978). Here there is no deprivation at all. But even if there were, there is no due process violation because the adjustments are made by the private operator, not the United States. *See id*.

Nothing in the three cases Plaintiffs cite contradicts this conclusion. *Kennerly v. United States* is inapposite because it involved removing money from the plaintiff's account. *See* 721 F.2d 1252, 1256 (9th Cir. 1983). And the Supreme Court has described the two other cases Plaintiffs rely on as involving "a finding of state action as an implicit predicate of the application of due process standards." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 927 (1982) (describing cases including *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969)). Here, where no money was removed from Plaintiffs' accounts and any adjustments were made by private entities according to terms of leases signed by Plaintiffs, due process requirements are not implicated.[6]

Finally, Plaintiffs insist that the parties agree Plaintiffs were deprived of money they are owed. Pl. Opp. at 45. Not so. The United States has consistently disputed this allegation and made clear in its initial brief that Plaintiffs have been paid what they are owed—anything more would be a windfall. U.S. Br. at 38.

C. Count 6: Plaintiffs' Claim Cannot Succeed Because Deductions Are Allowed under the Regulations

The regulations at issue specifically allow for deduction of reasonable transportation costs for oil and gas. *See* 30 C.F.R. §§1206.52(h), 1206.177(a), 1206.179(c). The lease itself states that it shall "abide by and conform to any and all regulations . . . in force relative to such leases." Pl. App. Ex. 31 ¶ 3(g). The lease even specifies that "[i]t is understood" for royalty purposes "that a reasonable allowance for the cost of manufacture shall be made" for products like natural gas. *Id*. ¶ 3(c). While this provision does not specifically state "transportation costs,"

[6] Even if there was a due process violation, that "does not mean [plaintiff] is entitled, as a matter of law, to retain the overpayment," as the very cases cited by Plaintiffs explain. *See Robinson v. Acting Billings Area Dir., BIA*, 20 IBIA 168, 171 (1991). If the Court finds a due process violation, further proceedings will be necessary to determine how to redress it. *See Kennerly*, 721 F.2d at 1258 (court "must remand for consideration of the appropriate remedy").

it belies Plaintiffs' contention that the full gross proceeds are due. And while Plaintiffs' brief quotes a portion of lease language, nothing in the excerpt or the lease overall states that royalties must be paid on gross proceeds in full. *See* Pl. Opp. at 42.

Plaintiffs' only other support is a North Dakota Supreme Court case cited for the proposition that "Plaintiffs' leases are commonly referred to . . . as 'gross proceeds' leases." *See Id*. at 42-43. But the case says no such thing. It interprets a lease between the State of North Dakota and a private operator—a lease that explicitly uses the term "gross proceeds," unlike the leases at issue here. *See Newfield Expl. Co. v. State ex rel. N.D. Bd. of Univ. & Sch. Lands*, 931 N.W.2d 478 (N.D. 2019). The case is simply irrelevant to the question here, which is controlled by the regulations explicitly adopted into the lease. *See* Pl. App. Ex. 31 ¶ 3(g).

Finally, Plaintiffs' brief goes well beyond the allegations in the Complaint, which were limited to transportation deductions and alleged that the United States had allowed such deductions without submission of a required form. *See* Third Am. Compl. ¶ 71. That allegation tacitly conceded that transportation deductions *are* allowed under the law. Now Plaintiffs appear to be arguing that no deductions are allowed, and expand this argument to include deductions for "processing, compliance, non-refundable rent, and interest." Pl. Opp. at 43. Because this argument is beyond the Complaint, it cannot be heard now. *See RQ Squared, LLC v. United States*, 119 Fed. Cl. 751, 759 (2015). Nor have Plaintiffs presented evidence that these deductions are outside those allowed by the law. Once again, Plaintiffs' only evidence comes from Mr. Chavarria's expert report, and he concludes that the deductions at issue are "transportation or other related fees allowed by policy, regulations and lease terms." Chavarria Rep. ¶ 29.

D. Count 7: Plaintiffs' Claim Cannot Succeed Because Owner Approval Is Not Required for Communitization Agreements

As the United States explained in its cross-motion, landowner approval is not required for communitization agreements. *See* U.S. Br. at 30-32. Plaintiffs' only response is that the term "mineral lease or agreement" in the Fort Berthold Mineral Leasing Act includes communitization agreements. *See* Pl. Opp. at 43-44. This argument fails for the reasons set forth in the United States' initial brief.

Moreover, Plaintiffs have not provided any evidence—not even a theory—for how they have been harmed by communitization agreements. In their response, they simply imply that the United States has failed to produce documents. Pl. Opp. at 44. But, as discussed above, discovery in this case is closed, and Plaintiffs cannot forestall judgment based on the hypothetical documents they wish they had. *Supra* Part III.A. And it is not clear what Plaintiffs mean by "records or notices produced to land interest owners," since the United States has produced hundreds of documents fitting that description. Nor would such documents (if any relevant, unproduced documents exist) support a damages claim. Communitization agreements simply make it more likely that operators will drill on tracts too small to support a well on their own (because they do not meet spacing requirements to prevent drainage), while fairly allocating the resulting royalties to all owners. In other words, without communitization agreements, Plaintiffs would have received less in royalties than they actually did.

CONCLUSION

The United States respectfully requests that the Court grant its motion for summary judgment, thus resolving Counts 1-4 and 6-10 of Plaintiffs' Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 3, 2021, I electronically transmitted the foregoing reply brief using the ECF system for filing and transmission of a Notice of Electronic Filing to the ECF registrants in this case.

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