UNITED STATES COURT OF FEDERAL CLAIMS

NAVAJO NATION, a federally recognized Indian Tribe; IDENTIFIABLE GROUP OF RELOCATION BENEFICIARIES, consisting of "Navajo families residing on Hopi-partitioned lands as of December 22, 1974[,]" per Public Law 93-531, § 11(h), 88 Stat. 1712, 1716 (1974), as amended and previously codified at 25 U.S.C. § 640d-10(h),	)	
Plaintiffs,	)	
v.	)	No. 21-1746-ZNS
UNITED STATES,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO UNITED STATES' MOTION TO PARTIALLY DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

Plaintiffs—the Navajo Nation ("Nation"), a federally recognized Indian Tribe, and the Identifiable Group of Relocation Beneficiaries ("Relocation Beneficiaries"), who are "Navajo families residing on Hopi-partitioned lands as of December 22, 1974[,]"[1]—together hereby respond to Defendant's Motion to Partially Dismiss Plaintiffs' Complaint, Doc. 7 ("Def.'s Mot."). That motion fails. First, the Relocation Beneficiaries have standing to and can assert claims as an "identifiable group" under the Indian Tucker Act because the Relocation Act defines them and requires that relevant trust land "shall be used solely for the[ir] benefit[.]" 25 U.S.C. § 640d-10(h). Second, Plaintiffs acknowledged in the Complaint that the Nation cannot assert claims which predate its 2014 settlement waiver and release, *see* Compl. ¶ 157, so that point is already resolved and no analysis is needed for the waiver and preclusion defenses except to recognize that those do not apply to the Relocation Beneficiaries. Third, the leasing and right-of-way claims are cognizable because the Relocation Act requires the Office of Navajo and Hopi Indian Relocation ("ONHIR") to "administer" the relevant lands and federal regulations prescribe that its operations "shall be governed by" ONHIR's Management Manual, which prescribes enforceable leasing requirements and incorporates enforceable right-of-way regulations. Fourth, Plaintiffs can seek grazing trespass damages and penalties since Defendant has committed grazing trespass under ONHIR's regulations, which also impose those liabilities. Finally, this Court has jurisdiction under the Tucker Act to remand to federal agencies with directions to properly maintain records for and administer the relevant trust lands and revenue therefrom related to Plaintiffs' monetary claims.

[1]Navajo-Hopi Settlement Act, Pub. L. 93-531, § 11(h), 88 Stat. 1712, 1716 (1974), as amended by 1980 and 1988 Navajo and Hopi Indian Relocation Amendments Acts (altogether, the "Relocation Act"), previously codified at 25 U.S.C. § 640d-10(h) ("Section 11(h)"). The Act was decodified without effecting its validity so the prior codification is cited. *See* Compl. at 1 n.1.

QUESTIONS PRESENTED

1. Do the Relocation Beneficiaries have standing and qualify to assert claims as an "identifiable group" under the Indian Tucker Act?

2. Does the Nation's 2014 settlement waive or preclude the Relocation Beneficiaries' claims?

3. Does the Court have jurisdiction over Plaintiffs' leasing and right-of-way claims?

4. Can Plaintiffs seek damages for grazing trespass committed by Defendant?

5. Does the Court have jurisdiction under the Tucker Act to remand to agencies to maintain records for and administer relevant trust lands and revenue related to plaintiffs' monetary claims?

BACKGROUND

Defendant's Motion provides some background but omits additional relevant background, so a recap is warranted. The Relocation Act mandated partition between the Nation and the Hopi Tribe of about 1.8 million acres of a former joint use area and established ONHIR and its predecessor agency to identify and relocate people from those lands and to administer trust lands acquired both for Navajos subject to partition and to compensate the Nation for lost partitioned lands. 25 U.S.C. §§ 640d(a), 640d-3, -7(b), -9 to -14; *Bedoni v. Navajo Hopi Indian Relocation Comm'n*, 878 F.2d 1119, 1124 (9th Cir. 1989); Compl. ¶¶ 22, 24-25; Def.'s Mot. at 4. Per Section 11 of the Relocation Act, Defendant so far has acquired in trust for the Nation about 376,000 acres of land in Arizona and New Mexico that are referred to as the "New Lands." Compl. ¶¶ 25-30; 25 U.S.C. § 640d-10(a); 25 C.F.R. § 700.701(b). Section 11 prescribes that those lands "shall be administered" by ONHIR and "shall be used solely for the benefit of Navajo families residing on Hopi-partitioned lands [("HPL")] as of December 22, 1974" (the Relocation Act's initial enactment date) and that "sole authority for final planning decisions regarding the development of [those] lands" "shall rest with" ONHIR. 25 U.S.C. § 640d-10(h); Compl. ¶¶ 6, 31. The Relocation

Act also transferred to ONHIR "powers and duties" to issue leases and rights of way for housing and broadly related facilities on those lands. *See* 25 U.S.C. § 640d-11(c)(2)(A) (referencing Pub. L. 99-190, 99 Stat. 1185, 1236 (1985)); Compl. ¶¶ 60-61.

The HPL were partitioned per the Relocation Act and are well-defined. *See* Compl. ¶ 9 (including map); 25 U.S.C. § 640d-3; *Sekaquaptewa v. MacDonald*, 626 F.32d 113 (9th Cir. 1980) (affirming partition). The defined Relocation Beneficiaries have been largely enumerated per the Relocation Act and consist of more than 4,000 families, including later-born children. Compl. ¶¶ 1, 11-17; Pub. L. 93-531, § 13(a)(1), 88 Stat. 1717 (requiring enumeration), superseded by Pub. L. 100-666, § 4(d), 102 Stat. 3929, 3931 (1988), previously codified at 25 U.S.C. § 640d-12(a) (requiring additional report). They all have a direct, distinct, and common interest under Section 11(h) that is not just based on their Navajo citizenship and is separate from interests of the Nation. Compl. ¶¶ 7-8. While most Relocation Beneficiaries relocated from HPL, about 120 families have not, so Defendant mistakenly identifies them all as "Relocatees." *Compare* Def.'s Mot. at 1, 7 *with* Compl. ¶¶ 10-12, 16. Defendant has acknowledged its fiduciary duties to the Relocation Beneficiaries and that they could litigate their rights under the Relocation Act. Compl. ¶¶ 37, 47.

Under the Relocation Act, ONHIR has promulgated detailed regulations which govern New Lands grazing. Compl. ¶¶ 39-45; 25 C.F.R. §§ 700.701-.731. The regulations only allow grazing by enrolled Navajo citizens who are New Lands residents and impose trespass liability including specific penalties for unauthorized grazing. *See* 25 C.F.R. §§ 700.709(a), .711(a)-(b), .725; Compl. ¶¶ 41, 43, 50-51. The regulations also provide that ONHIR's operations "shall be governed by" ONHIR's Management Manual ("OMM").[2]

[2]25 C.F.R. § 700.219(a). Per Federal Rules of Evidence 201(b) and (c)(2), Plaintiffs request judicial notice of the provisions of the OMM, which is available at https://www.onhir.gov/assets/documents/mangement-manual/ONHIR-Management-Manual.pdf (last visited March 11, 2022).

Per the Relocation Act and ONHIR's regulations, the OMM prescribes detailed requirements for ONHIR's exclusive administration of New Lands leasing that are "similar to those used by the Bureau of Indian Affairs [("BIA")] . . . on the remainder of the Navajo Indian Reservation." OMM § 1810 at 1; *see id.* §§ 1810.3, 1810.321-.325; Compl. ¶¶ 60-68. The OMM also requires that New Lands rights-of-way "conform to the requirements of 25 CFR [Part] 169[,]" OMM § 1810.11 at 1; Compl. ¶ 101. The OMM and incorporated BIA regulations prescribe that New Lands rights-of-way be: reviewed by the BIA and the Nation; approved by ONHIR; approved by the Nation via written consent; valued at fair market value absent written consent by the Nation; and in the best interests of the Indian land owners. 25 C.F.R. §§ 169.7(a), .12, .107(a), .110, .114, .124(a), .413; OMM §§ 1810.11-.14; Compl. ¶¶ 101-04.

ONHIR has not managed the New Lands in accordance with all these requirements for their administration and use. Compl. ¶¶ 69, 105; U.S. Gov't Accountability Office ("GAO"), ONHIR: Exec. Branch & Legis. Action Needed for Closure & Transfer of Activities, No. GAO-18-266 (April 2018) ("2018 GAO Report") at 42. For Plaintiffs' first claim, ONHIR has allowed grazing trespass by others and has grazed hundreds of livestock for many years on the New Lands in violation of its regulations. Compl. ¶¶ 49-55; 2018 GAO Report at 47. For the second claim, ONHIR has maladministered New Lands leasing by (1) not maintaining required records, (2) occupying and allowing others to occupy lands without leases, (3) improvidently allowing nonuse for long periods, (4) acting as lessor without authority, (5) allowing land uses without the Nation's approval, and (6) improvidently leasing below fair market rent and sometimes for no or nominal rent. Compl. ¶¶ 69-96; 2018 GAO Report at 43-46 & n.84, 104 n.26. For the third claim, ONHIR has maladministered New Lands rights of way by (1) failing to maintain records required to protect Plaintiffs' interests, and (2) allowing rights of way without the Nation's consent and without fair

market consideration or written waiver thereof. Compl. ¶¶ 105-10. For the fourth through sixth claims, which Defendant does not challenge here, Defendant has failed to promptly collect and deposit in trust and properly administer and account for New Lands revenue, allowed unauthorized expenditures, and failed to promptly invest, earn interest, and maximize returns. *Id.* ¶¶ 112-52; *see* 2018 GAO Report at 46-47. Finally, in addition to seeking $40 million, Plaintiffs seek relief under the Tucker Act for remands to federal agencies to properly maintain records for and administer the New Lands and revenue therefrom related to the above monetary claims. Compl. at 1, 41.

ARGUMENT

None of Defendant's defenses succeed beyond what the Complaint already acknowledged. First, the Relocation Beneficiaries have standing and qualify as an "identifiable group of American Indians" to assert these claims under the Indian Tucker Act. They have standing based on their collective injuries from New Lands maladministration because Section 11(h) requires that those lands "shall be used solely for the[ir] benefit[.]" They qualify as an "identifiable group" because Section 11(h) also specifically identifies them, they have common injuries, and they are not within the definition of a tribe or band. Second, the Complaint acknowledged that the Nation cannot assert claims which predate its 2014 settlement waiver and release, so preclusion of those is moot. However, neither of those defenses apply to the Relocation Beneficiaries, who were not parties or privy to that settlement. Third, Plaintiffs properly assert leasing and right-of-way claims because the Relocation Act requires ONHIR to "administer" the New Lands, a defined fiduciary duty, including for leases and rights of way. Moreover, ONHIR's regulations prescribe that its operations shall be governed by the OMM, which prescribes enforceable leasing requirements and incorporates enforceable right-of-way regulations. Fourth, Plaintiffs properly assert grazing trespass claims and can seek damages including penalties therefor because Defendant has

committed and allowed grazing trespass in violation of its regulations, which also mandate damages and penalties. Finally, the Court has jurisdiction over Plaintiffs' request for an equitable remand to ONHIR and the U.S. Department of the Interior ("DOI") to properly maintain records for and administer the New Lands and resulting revenue ancillary to Plaintiffs' ongoing damage claims because the Tucker Act authorizes the Court to "remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."

I. THE RELOCATION BENEFICIARIES HAVE STANDING AND QUALIFY UNDER THE INDIAN TUCKER ACT TO ASSERT MALADMINISTRATION CLAIMS UNDER SECTION 11(h) OF THE RELOCATION ACT.

A. Relocation Beneficiaries Have Standing to Assert Claims for Injuries From Maladministration of the New Lands and Resulting Revenue Because Section 11(h) Mandates that the New Lands "Shall Be Used Solely For" Their Benefit.

Defendant argues that the Relocation Beneficiaries lack standing for maladministration claims because the New Lands are held in trust only for the Nation, so the Relocation Beneficiaries do not hold vested interests in those lands or their revenue, and the Relocation Act does not specify distribution to them of communal New Lands revenue. Def.'s Mot. at 10-14 (including misquote of Complaint ¶ 1). That defense fails because it ignores the mandate of Section 11(h) that the New Lands "shall be used solely for the benefit of" the Relocation Beneficiaries. 25 U.S.C. § 640d-10(h). Cases and trust law establish that that express statutory trust provides standing.

To have standing, Plaintiffs must allege (1) injury in fact, consisting of an actual or imminent, concrete, particularized invasion of a legally protected interest; (2) a causal connection between the injury and the alleged misconduct; and (3) that it is likely and not merely speculative that a favorable decision will redress the injury. *Fredericks v. United States*, 125 Fed. Cl. 404, 413 (2016) (citations omitted). Also, "[c]ontrary to the government's view of the law," vesting of rights is not relevant to standing and Indians have an "injury in fact" for standing even if they suffered

only injury to prospective interests. *Id.* at 413 & n.6. Therefore, alleging that federal conduct "'deprived'" Indians of interests that "'they otherwise would have'" received suffices for standing. *Id.* at 414 (quoting *Irving v. Hodel*, 481 U.S. 704, 711 (1987)). Moreover, "[i]n deciding a motion to dismiss for lack of subject matter jurisdiction, the court accepts as true all uncontroverted factual allegations in the complaint, construing them in the light most favorable to the plaintiff." *Fletcher v. United States* ("*Fletcher II*"), __ F.4th __, 2022 WL 552144, *4 (Fed. Cir. Feb. 24, 2022); *Confed. Tribes & Bands of Yakama Nation v. United States* ("*Yakama*"), 153 Fed. Cl. 676 (2021).

The Relocation Beneficiaries allege that Defendant's myriad maladministration deprived them of their proper "sole" beneficial use of and revenue from the New Lands. This includes prohibited grazing trespass, using land and allowing land uses without required leases, failure to collect grazing penalties or obtain proper returns for leasing or rights of way, and keeping and spending reduced New Lands revenue rather than collecting, depositing, and investing that in trust for the Relocation Beneficiaries. *See* Compl. ¶¶ 49-55, 69-96, 105-10, 112-52; 2018 GAO Report at 43-47 & n.84, 104 n.26. All that establishes injury in fact, while the second and third standing requirements are not and cannot be contested, since "[t]he alleged injuries are traceable to the United States, and they could be redressed by money damages." *Fredericks*, 125 Fed. Cl. at 414

Defendant tries to avoid the Relocation Beneficiaries' standing based on their lack of vested, severable title. Def.'s Mot. at 11. That fails because "the extent of trust property" concerns "the merits, not standing[,]" *Fredericks*, 125 Fed. Cl. at 414, and trust law confirms their standing. A trust and a fiduciary relationship exist where a settlor directs a trustee to administer property for a beneficiary, and a beneficiary's interests may be separate from trust assets. *N.C. Dep't of Rev. v. Kimberly Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2217-18, 2225 (2019); Restat. (Third) of Trusts §§ 2 & cmt. f, 3 (2003). In other words, "members of a definite class of persons" are

beneficiaries if they are owed duties based on the settlor's intent in a trust declaration, regardless of whether property is conveyed to another in trust. *See* Restat. (Third) of Trusts §§ 45 & cmt. g, 48. Moreover, beneficiaries have "a legally protected interest" in the trust corpus and "proper administration" thereof, with standing to sue for breach of trust simply if those interests "'are or may be adversely affected[.]'" *Scanlan v. Eisenberg*, 669 F.3d 838, 842, 846 (7th Cir. 2012) (quoting Restat. (Third) of Trusts § 94, cmt. b).

All that applies here because the Relocation Beneficiaries seek relief for injuries to them from violations of Section 11(h)'s mandates that the New Lands "shall be administered" and "shall be used solely for the[ir] benefit[,]" 25 U.S.C. § 640d-10(h), while the Nation asserts its own injuries from that maladministration. *See*, *e.g.*, Compl. ¶¶ 56-57, 96-97, 109-11. The Nation could but does not assert claims for deceased or incapacitated Relocation Beneficiaries based on their relationships to the Nation. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017); *Irving*, 481 U.S. at 706, 709 (Indian allotment escheat takings); *Wilkinson v. United States*, 440 F.3d 970, 977 (8th Cir. 2006) (Indian probate estate heirs); *Fredericks*, 125 Fed. Cl. at 414 (same). That does not preclude standing for any, much less all Relocation Beneficiaries. Defendant's standing defense fails to address any of this or ONHIR's undisputed prior concession that the Relocation Beneficiaries can assert claims under the Relocation Act regarding the New Lands. Compl. ¶ 37.

Next, no other cases on which Defendant relies undermine the Relocation Beneficiaries' standing. *Contra* Def.'s Mot. at 11-12. For example, *Chippewa Cree Tribe of Rocky Boy's Reservation v. United States* ("*Chippewa II*"), 73 Fed. Cl. 154 (2006), supports the Relocation Beneficiaries' standing here. That decision rejected Defendant's "individual, vested property rights" defense and reaffirmed that an identifiable group defined in law can assert "group claims[.]" *Id.* at 158-62. It also held that a "breach by government of its trust responsibilities

'would be experienced as an injury common to . . . all named tribal beneficiaries and the group'" of identifiable Indians. *Id.* at 163 (quoting *Chippewa Cree Tribe of Rocky Boy's Reserv. v. United States* ("*Chippewa I*"), 69 Fed. Cl. 639, 667 (2006), *reconsid. denied, Chippewa II*, 73 Fed. Cl. 154 (2006)) (emphasis added).

Next, Defendant misplaces reliance on *Fletcher v. United States* ("*Fletcher I*"), 151 Fed. Cl. 487 (2020), *rev'd*, *Fletcher II*, __ F.4th __, 2022 WL 552144 (Fed. Cir. 2022) and *Osage Tribe v. United States* ("*Osage II*"), 85 Fed. Cl. 162 (2008). Def.'s Mot. at 12. Those cases both concerned a law which provided that minerals were held in trust for the Osage Tribe with royalties deposited in trust for the Tribe and then distributed to individuals. *Fletcher I*, 151 Fed. Cl. at 491; *Osage II*, 85 Fed. Cl. at 169. *Fletcher II* recently reversed the standing ruling in *Fletcher I* on which Defendant relies here, agreeing with the Tenth Circuit that the law "plainly indicates" that the relevant individuals "have a trust relationship with the United States." *Fletcher II*, 2022 WL 552144, *5 (citing *Fletcher v. United States*, 730 F.3d 1206, 1209-10 (10th Cir. 2017) (Gorsuch, J.)). So too here, the Relocation Act establishes a trust relationship and standing for the Relocation Beneficiaries since it specifies that the New Lands "shall be used solely for the[ir] benefit" even though the New Lands are held in trust for the Nation. 25 U.S.C. §§ 640d-10(a), -10(h).

Further afield, Defendant also misplaces reliance on *Hoopa Valley Tribe v. United States* ("*Hoopa*"), 597 F.3d 1278 (Fed. Cir. 2010). Def.'s Mot. at 11-12. There, Hoopa Valley Tribe members lacked standing to assert claims to a trust fund where the governing law only authorized distributions to those who elected not to have membership in that tribe. *Hoopa*, 597 F.3d at 1284. Plainly, expressly excluded tribal members had no standing. Unlike the law there, the Relocation Act mandates land use "solely for the benefit of" the Relocation Beneficiaries. 25 U.S.C. § 640-10(h). That recognizes a "legally protectable interest" for the Relocation Beneficiaries, which

gives them standing to assert claims for breach of duties owed directly to them. *Cf. Osage II*, 85 Fed. Cl. at 170 & n.6; *Osage Nation v. United States* ("*Osage I*"), 57 Fed. Cl. 392, 394-95 (2003).

Finally, the possibility that the Nation might have represented the Relocation Beneficiaries supports rather than undermines their own standing. *Osage II* confirms this regarding organizational standing for related claims. Under *Osage II*, an Indian tribe can represent the interests of its members regarding their distinct but related damage claims where they "share an interest in maximizing the damages awarded for the breach of trust duties alleged[.]" *Osage II*, 85 Fed. Cl. at 172-73, 175. However, an essential element of organizational standing is that the relevant individuals "have standing to sue in their own right[.]" *Military-Veterans Advocacy v. Sec. of Veterans Affairs*, 7 F.4th 1110, 1122 (Fed. Cir. 2021); *Osage Producers Ass'n v. Jewell*, 191 F. Supp. 3d 1243, (N.D. Okla. 2016). This entails that the relevant individuals satisfy standing requirements, including injury-in-fact. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494, 498-500 (2009); *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006). In sum, Defendant's unavailing effort to avoid the Relocation Beneficiaries' standing improperly ignores and confirms their standing under Section 11(h).

B. The Relocation Beneficiaries Can Assert Claims as an "Identifiable Group" Because They Satisfy the Indian Tucker Act's Requirements of Identifiability and Common Claims and Their Citizenship in and Possible Unasserted Representation by the Nation Are Irrelevant.

Defendant next argues that the Relocation Beneficiaries are not an identifiable group that can assert claims under the Indian Tucker Act because they are Navajo citizens who can be adequately represented by the Nation. Def.'s Mot. at 15. Defendant contends that only those who cannot sue as a tribe or with no existing tribe to represent their claims qualify as an identifiable group, and that the Nation adequately represents their interests. *See id.* at 16 & n.16. All that overlooks and misstates governing law and the Plaintiffs' actual allegations.

The Indian Tucker Act authorizes this Court's jurisdiction over claims against the United States arising under federal law by "any tribe, band, or other identifiable group of American Indians[.]" 28 U.S.C. § 1505. That allows claims by an "'unorganized or informal group'" of Indians "outside of their identity as members of a specific tribe or band[,]" so they "'do not have to be existing political groups'" to assert claims. *Chippewa I*, 69 Fed. Cl.at 672, 673 (quoting *Red Lake & Pembina Bands v. Turtle Mtn. Band of Chippewa Indians* ("*Red Lake*"), 355 F.2d 936, 940-41 (Ct. Cl. 1965), and *McGee v. Creek Nation*, 122 Ct. Cl. 380, 393 (1952) (citation and quotation omitted)). That does not mean that identifiable groups cannot include members of recognized tribes. Rather, identifiable groups may be represented by any of their members, including Indian tribes and eligible or "enrolled" members of Indian tribes. *Western Shoshone Identifiable Group v. United States* ("*Western Shoshone*"), 143 Fed. Cl. 545, 553, 593 (2019); *Chippewa II*, 73 Fed. Cl. at 171; *Chippewa I*, 69 Fed. Cl.at 669, 674. For these reasons, Defendant's "non-members"-only defense fails because it misstates *Chippewa I* and overlooks *Western Shoshone* and *Chippewa II*.

To qualify as an "identifiable group," the only "'controlling question is whether the claimant group can be identified and have a common claim.'" *Chippewa I*, 69 Fed. Cl. at 673 (quoting *McGhee*, 122 Ct. Cl. at 393) (additional citation and quotation omitted). To be identifiable, the group may be "defined in" statute or treaty, geographically, or otherwise. *Id.* at 671, 673-74 (discussing cases). To be common, claims concern trust assets with "undivided communal status . . . during the period when the injury was allegedly sustained" so that "'[a]ny breach by the government of its duties in regard to the management . . . would be experienced as an injury common to and indistinguishable in effect on all named tribal beneficiaries and the group[.]'" *Chippewa II*, 73 Fed. Cl. at 162-63, 167-69 (quoting *Chippewa I*, 69 Fed. Cl. at 667).

Such group-based claims are distinguished from individual claims, which depend on facts, circumstances, and proof for each individual. *Id.* at 165, 167-68 (discussing cases).

All this confirms that the Relocation Beneficiaries constitute a proper "identifiable group" under the Indian Tucker Act. They are expressly defined by the Relocation Act as "Navajo families residing on Hopi-partitioned lands as of December 22, 1974[,]" 25 U.S.C. § 640d-10(h), and they in fact have been largely identified per the Relocation Act, Compl. ¶¶ 11-17. In addition, their claims are common because they concern land that is held in trust for the Nation, 25 U.S.C. § 640d-10(a), which "shall be administered" and "shall be used solely for the[eir] benefit" collectively, *id.* § 640d-10(h). No more is required for the Relocation Beneficiaries to be an identifiable group.

Defendant also misplaces reliance on additional cases. *Osage II* does not support Defendant because the tribe there, unlike the Nation here, represented the proposed intervenors' purported identifiable group as its constituents. *Osage II*, 85 Fed. Cl. at 168. That also may no longer be viable because when sovereigns assert claims for their citizens as such, they are deemed to represent all their citizens. *S. Carolina v. N. Carolina*, 558 U.S. 256, 266 (2010). Besides that, *Osage II* was based on a prior ruling that only the tribe was the real party in interest and direct trust beneficiary. *Osage I*, 57 Fed. Cl. at 395. That is no longer good law because the Federal Circuit recently held that Osage and its members can separately assert their own interests under that statutory trust in which they both have interests. *Fletcher II*, 2022 WL 552144, *5.

Similarly, the Nation only asserts its own claims and does not represent the Relocation Beneficiaries, who assert their own claims for failure to use the New Lands solely for their benefit. *See* Compl. ¶¶ 4-6. That sole statutory use also distinguishes this case from *Round Valley Indian Tribes v. United States*, 102 Fed. Cl. 634 (2011). There, individuals could not intervene in part because they had no legally protectable or recognized interest. *Id.* at 636. In contrast, the

Relocation Beneficiaries are not intervenors and have an explicit legal interest under Section 11(h). Defendant cannot avoid the Relocation Beneficiaries' ability to assert their own group claims under the Indian Tucker Act based on unasserted representation by the Nation.

Contrary to Defendant's suggestion, neither *Wolfchild v. United States* ("*Wolfchild I*"), 62 Fed. Cl. 521 (2004), *reconsid. denied*, 68 Fed. Cl. 779 (2005), *rev'd*, 559 F.3d 1228 (Fed. Cir. 2009), nor *Snoqualmie Tribe v. United States* ("*Snoqualmie*"), 372 F.2d 951 (Ct. Cl. 1967), held that an existing tribal organization precludes identifiable group status. Def.'s Mot. at 15-16. *Snoqualmie* allowed identifiable group claims by persons "among the present-day Snoqualmie Tribe membership[.]" *Snoqualmiee*, 372 F.2d at 957. So too, Navajo citizens can assert identifiable group claims based on their group that is expressly defined in Section 11(h) of the Relocation Act. More recently, *Wolfchild I* recognized that "plaintiffs need not be an organized unit to claim jurisdiction under the Indian Tucker Act[,]" and that identifiable group claims must be brought "specifically and solely as members of a group" with a common right or interest, not as individual claims dependent on individual facts. *Wolfchild I*, 62 Fed. Cl. at 539-40. The Court later adhered to its ruling allowing an identifiable group "to vindicate a collective claim inhering in the group[,]" and also allowed intervention by both (i) "several thousand" additional group members without addressing whether they were members of recognized Indian tribes and (ii) a tribe with distinct interests from its members within the identifiable group. *Wolfchild v. United States* ("*Wolfchild II*"), 72 Fed. Cl. 511, 514, 517, 520, 528, 532 (2006). So here, the Relocation Beneficiaries can specifically and solely assert common, collective group claims and tribal citizenship is irrelevant, while the Nation indisputably can assert its own interests in this case. *See* Compl. ¶¶ 5, 6.

Finally, Defendant misplaces arguments about adequate representation for a non-existent class action. This case is not brought as a class action, which is not "'superior . . . for the fair and

efficient adjudication of the controversy'" compared to "identifiable group" litigation under the Indian Tucker Act. *Chippewa I*, 69 Fed. Cl. at 669-70 & n.20 (quoting class action requirement under Rule of the Court of Federal Claims 23(b)(2)). Instead, proceeding with an identifiable group avoids "delay for notification to all class members" and allows any damages awarded to be shared by the group, which need only be fully identified if there is a judgment for them. *Id.* at 674. While an identifiable group may be represented by members thereof, *Western Shoshone*, 143 Fed. Cl. at 553; *Chippewa II*, 73 Fed. Cl. at 171-73, the Nation itself is not a member of the Relocation Beneficiaries. For all these reasons, the Relocation Beneficiaries are an "Identifiable Group" and the Nation does not represent them in that capacity.

II. THE NATION'S 2014 SETTLEMENT DOES NOT WAIVE, RELEASE, OR PRECLUDE CLAIMS FOR THE RELOCATION BENEFICIARIES BECAUSE THEY WERE NOT PARTIES TO IT AND IT DOES NOT APPLY TO THEM.

Defendant expends much effort asserting that the Nation's claims which accrued before its August 26, 2014 tribal trust settlement ("2014 Settlement") should be dismissed based on waiver and preclusion. Def.'s Mot. at 17-27. This was largely needless since the Complaint acknowledges that the Nation cannot assert claims which predate its 2014 Settlement. *See* Compl. ¶ 157. However, Defendant also asserts that the waiver applies to the types of claims "Plaintiffs" bring here and elsewhere asserts that the Nation represents the Relocation Beneficiaries and adequately represents their interests as its constituents. Def.'s Mot. at 15-16, 22-24. This warrants clarifying that the 2014 Settlement does not waive, release, or preclude the Relocation Beneficiaries' claims.

The 2014 Settlement precludes later assertion of waived and released claims only for the Nation as a party to that. *Compare* Def.' Mot. ex. 3 at 1, 3-6 *with Two Shields v. United States*, 820 F.3d 1324 (Fed. Cir. 2016) (regarding *Cobell* settlement). In contrast, a settlement does not apply to nonparties absent "authority to settle and waive . . . claims on their behalf[,]" *Fletcher II*,

2022 WL 552144, at *6, and evidence in the terms of the settlement of the parties' intent to apply the release to them, *Unova, Inc. v. Acer Inc.*, 363 F.3d 1278, 1281-82 (Fed. Cir. 2004) (under California law); *see GTE Wireless, Inc. v. Cellexis Intl., Inc.*, 341 F.3d 1, 6 (1st Cir. 2003) (under Arizona law). Absent such authority and documented intent, a plaintiff that was not a party to a prior settlement is not thereby barred from asserting a claim. *Fleischman v. Harwood*, 10 F.R.D. 139, 140 (S.D.N.Y. 1950). That includes individual Indians without legally protected interests in tribal trust assets who cannot object to a tribal settlement. *Round Valley Indian Tribes*, 102 Fed. Cl. at 636-37. In turn, there is a general rule against nonparty or nonprivity claim preclusion, *WesternGeco LLC v. Ion Geophysical Corp.*, 889 F.3d 1308, 1319 (Fed. Cir. 2018), and Defendant does not assert claim preclusion against the Relocation Beneficiaries, *see* Def.'s Mot. at 19-22. Therefore, because the Relocation Beneficiaries were not parties or privy to the 2014 Settlement and were not included as intended beneficiaries in the stated language of the 2014 Settlement, *see* Compl. ¶¶ 157, 160, the 2014 Settlement does not limit their claims.

III. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS REGARDING NEW LANDS LEASING AND RIGHTS OF WAY BECAUSE THE RELOCATION ACT AND THE OMM IMPOSE SPECIFIC MONEY-MANDATING FIDUCIARY DUTIES FOR THAT ADMINISTRATION.

Defendant next contends that Plaintiffs' leasing and rights-of-way claims should be dismissed for lack of jurisdiction because Plaintiffs fail to identify any money-mandating duty that Defendant owes to them. Def.'s Mot. at 27-36. This defense fails for three reasons. First, it misstates the law governing Indian breach of trust claims, omitting relevant points and asserting inapplicable requirements. Second, it misreads the Relocation Act's specific fiduciary duties to administer and solely use the New Lands for the Relocation Beneficiaries' benefit, which includes for leasing and rights of way. Third, it overlooks the legally operative, money-mandating effect of the OMM for leasing and incorporated rights-of-way regulations.

A. This Court has Jurisdiction Over Claims for Breach of Trust Duties to Indians Where Governing Sources of Law Impose Specific Fiduciary Duties on Defendant for Trust Assets That Are Legally Controlled by Defendant.

Under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505, this Court has jurisdiction for American Indian claims for breach of fiduciary duties grounded in sources of law that (1) impose specific fiduciary duties on the government and (2) can be fairly interpreted as mandating compensation for damages resulting from that breach. *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 290 (2009); *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 218-19 (1983); *United States v. Mitchell* ("*Mitchell I*"), 445 U.S. 535, 538-39 (1980); *Fredericks*, 125 Fed. Cl. at 410-11. *Fletcher II* recently reiterated this two-part test for "breach of duties to American Indians[.]" *Fletcher II*, 2022 WL 552144, at *6.

First, plaintiffs "'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 *Navajo II*, 556 U.S. at 291 (quoting *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 506 (2003)). When determining if Defendant owes specific fiduciary duties, "'the analysis must train on specific rights-creating or duty-imposing . . . prescriptions.'" *Two Shields*, 820 F.3d at 1332 (quoting *Navajo I*, 537 U.S. at 506). For this, plaintiffs must identify sources of law that "both impose a specific obligation on the United States and 'bear[] the hallmarks of a conventional fiduciary relationship.'" *Hopi Tribe v. United States* ("*Hopi*"), 782 F.3d 662, 667 (Fed. Cir. 2015) (quoting *Navajo II*, 556 U.S. at 301). The common-law trust hallmarks are a trustee, a beneficiary, and a trust corpus. *Mitchell II*, 463 U.S. at 225; Restatement (Third) of Trusts §§ 2, 3 (2003). Thus, "'where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said

expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.'" *Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (1980)).

Second, if the first "'threshold is passed, the court must then determine whether the relevant source of substantive law "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes."'" *Fletcher II*, 2022 WL 552144, at *7 (quoting *Navajo II*, 556 U.S. at 290-91 (quoting *Navajo I*, 537 U.S. at 506)). Under this "fair interpretation" rule, it suffices if the governing source of law is "reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mountain*, 537 U.S. at 472-73. Thus, an Indian claim under the Tucker Act does not require an explicit provision for money damage awards, the amount to be paid, or the basis for determining that. *Id.* at 477.

Defendant wrongly asserts an opposite second requirement based on distinguishable cases. Def.'s Mot. at 28-29. *United States v. Testan*, 424 U.S. 392 (1976), on which Defendant relies, is "not to the contrary" because it was "without any trust relationship in the mix . . . , but with affirmative reasons to believe that no damages remedy could have been intended, absent a specific provision." *White Mountain*, 537 U.S. at 477-78. Nor does *Navajo I* undermine the decision the same day in *White Mountain*. *See id.* at 479-81 (Ginsburg, J., conc.). As *White Mountain* noted, Defendant's theory "would leave *Mitchell II* a wrongly decided case[.]" *Id.* at 477.

Instead, in this second step, common-law trust principles are considered "'in drawing the inference that Congress intended damages to remedy a breach.'" *Fletcher II*, 2022 WL 552144, at *7 (quoting *Navajo II*, 556 U.S. at 291 (quoting *White Mountain*, 537 U.S. at 477)); *Intertribal Council of Arizona v. United States* ("*ITCA*"), 956 F.3d 1328, 1338 (Fed. Cir. 2020). Specifically, courts "look[] to common-law principles to inform . . . interpretation of statutes and to determine

the scope of liability that Congress has imposed." *United States v. Jicarilla Apache Nation* ("*Jicarilla I*"), 131 S. Ct. 2313, 2325 (2011) (citing *White Mountain*, 537 U.S. at 477)). Therefore, """"trust principles (including any such principles premised on 'control') could play a role in 'inferring that the trust obligation [is] enforceable by damages.'"""" *Hopi*, 782 F.3d at 668 (quoting *Navajo II*, 556 U.S. at 301 (quoting *White Mountain*, 537 U.S. at 473)) (alteration in original).

Under this entire test, if a statute "establishes a fiduciary relationship that imposes an obligation on the federal government" to plaintiffs, including a trust corpus "that is entirely controlled by the government[,]" "it naturally follows that a breach of those responsibilities should be remedied by money damages." *Fletcher II*, 2022 WL 552144, at *7; *see Hopi*, 782 F.3d at 668 (citing *Mitchell II*, 463 U.S. at 226). Also, laws or fundamental documents that give the federal government "full responsibility" over Indian trust assets and require them to be managed in the best interest of Indian beneficiaries impose fiduciary duties. *Hopi*, 782 F.3d at 667 (discussing *Mitchell II*, 463 U.S. at 220, 224-25). Moreover, laws or fundamental documents need not "expressly subject the Government to duties of management and conservation" if the relevant asset is occupied by the United States and expressly subject to a trust. *United States v. White Mountain Apache Tribe* ("*White Mountain*"), 537 U.S. 465, 475 (2003). In contrast, if the source of law does not assign "managerial control" to the United States, it does not impose enforceable fiduciary duties. *Navajo I*, 537 U.S. at 508.

Finally, where a statute evokes a common-law trust by combining trust language and authorizing federal use of land in the same provision, it should be inferred that Congress intended to apply "the common-law trust duty to preserve trust property that the trustee actually administers." *Hopi*, 782 F.3d at 668, 670 (discussing *White Mountain*); *Western Shoshone*, 143 Fed. Cl. at 600. That inference applies because when Congress uses express fiduciary language,

courts "'must infer that Congress intended to impose . . . traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary.'" *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981)). If there is any doubt, a "governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Id.* at 1101 (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)); *Shoshone Indian Tribe of Wind River Reserv. v. United States* ("*Shoshone II*"), 364 F.3d 1339, 1352 (Fed. Cir. 2004) (quoting same and additional cases). All the above applies here.

B. The Relocation Act Imposes Enforceable Fiduciary Duties on Defendant to "Administer" the New Lands and "Use" Them "Solely for the Benefit" of the Relocation Beneficiaries, Including Regarding Leases and Rights of Way.

Under the proper jurisdictional test explained above, the Relocation Act readily imposes enforceable fiduciary duties for administration and use of the New Lands, including for leasing and rights of way. Section 11(h) of the Relocation Act mandates in full the following:

> The lands transferred or acquired pursuant to this section[, *i.e.*, the New Lands,] shall be administered by the Commissioner [of ONHIR] until relocation under the [Relocation Act] . . . is complete and such lands shall be used solely for the benefit of Navajo families residing on Hopi-partitioned lands as of December 22, 1974[, *i.e.*, the Relocation Beneficiaries]: Provided, [t]hat the sole authority for final planning decisions regarding the development of lands acquired pursuant to this subchapter shall rest with the Commissioner until such time as the Commissioner has discharged his statutory responsibility under this subchapter.

25 U.S.C. § 640d-10(h) (emphases added). Three times in this provision, "use of the word 'shall' means what follows is mandatory, not discretionary." *Norman v. United States*, 942 F.3d 1111, 1117 (Fed. Cir. 2019).

While this provision only references the ONHIR Commissioner, it applies to ONHIR since the Commissioner directs ONHIR. *Id.* § 640d-11(a). That matters because the Commissioner in 1994 delegated to ONHIR's Executive Director full operational authority with full authority in all

program operations and ONHIR has not had a Commissioner since 1994. Compl. ¶ 22; OMM at 1; 2018 GAO Report at 9-10. In turn, the proviso was enacted to ensure that development of the New Lands not be slowed down and "should be done in conformity with, and in accordance with, section 13(c)(4) [of the Relocation Act,] which directs the Commissioner to assure that the acquisition of housing shall be provided to the relocatees simultaneously with related community facilities and services such as water, sewers, roads, schools and health facilities." H.R. Rep. 100-1032, at 9 (1988). All those facilities require leases or rights of way, and this sole administrative authority for ONHIR is "especially important" for the New Lands, "where the creation of a whole new community of relocatees is contemplated . . . ." *Id.*

In addition, Section 12(c)(2)(A) of the Relocation Act transferred to ONHIR "all powers and duties of the Bureau of Indian Affairs [("BIA")] from Public Law 99-190 (99 Stat. at 1236) that relate to the relocation of" Navajos from HPL. 25 U.S.C. § 640d-11(c)(2)(A) ("Section 12(c)(2)(A)"). Under that incorporation, ONHIR "may issue leases and rights of way for housing and related facilities to be constructed on the lands which are subject to Section 11(h)" of the Relocation Act. Department of Defense Appropriations Act, Pub. L. 99-190, 99 Stat. 1185, 1236 (1985). As above, this includes various services to be provided on the New Lands, including but not limited to water, sewers, roads, schools, and health facilities. *Id.* § 321, 99 Stat. 1266-67; *see* Compl. ¶ 32; 2018 GAO Report at 8 & n.9; OMM § 1810 at 1.

These Section 12(c)(2)(A) "powers and duties" over leasing and rights of way are not separate from Section 11(h)'s mandate for administration of the New Lands with sole planning and development authority and use solely for Relocation Beneficiaries. Rather, "'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Cucic v. Wilkie*, 921 F.3d 1095, 1098 (Fed. Cir. 2019) (citations omitted). Read together, these

Relocation Act provisions prescribe and define ONHIR's "full responsibility" to "administer" the New Lands, including enforceable fiduciary duties for leasing and rights of way. 25 U.S.C. §§ 640d-10(h), 640d-11(c)(2)(A). That is reinforced by the Act's further mandate that the New Lands "shall be used solely for the benefit of" the Relocation Beneficiaries, which precludes use for ONHIR's own or others' benefit. *See id.* § 640d-10(h).

At the same time, the New Lands are held in trust for the Nation, so the hallmarks of a conventional fiduciary relationship exist as required and the Nation is a co-beneficiary for New Lands administration. *See id.* § 640d-10(a); *Fletcher II*, 2022 WL 552144, at *7; *Osage II*, 85 Fed. Cl. 162, 170 n.6; *Osage I*, 57 Fed. Cl. at 394-95. Next, the proviso for ONHIR's "sole authority" for New Lands planning and development reinforces legally exclusive federal control, while continuation of that until ONHIR has "discharged" its "statutory responsibility" under the Relocation Act confirms that ONHIR has legal duties thereunder, contrary to Defendant's assertions. *See* 25 U.S.C. § 640d-10(h). Finally, all this specific statutorily mandated administration, sole use, and exclusive authority for the New Lands implicitly encompass "leases and rights of way," *see* 25 U.S.C. § 640d-11(c)(2)(A) (incorporating Pub. L. 99-190, 99 Stat. 1236), just as it also impliedly includes grazing administration, for which Defendant has not denied this Court's jurisdiction. All that satisfies the first step of analysis for enforceable fiduciary duties within this Court's jurisdiction under the actual governing case law outlined above.

For the second step, because Section 11(h) provides focus, specific fiduciary duties, and exclusive control for the trust relationship expressly invoked in Section 11(a), common-law principles of general trust law may be considered to inform interpretation of the Relocation Act and to determine the scope of enforceable liability that Congress imposed. *See Jicarilla I*, 131 S. Ct. at 2325; *Navajo II*, 556 U.S. at 301; *White Mountain*, 537 U.S. at 473, 477; *ITCA*, 956 F.3d at

1338; *Hopi*, 782 F.3d at 668. Also, "'[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *O'Neill v. Dep't of Housing & Urban Devt.*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (quoting *Nat'l Labor Relations Bd. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). Specifically, use of express fiduciary language is inferred to impose "'traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary.'" *Cobell*, 240 F.3d at 1100 (quoting *Amax Coal Co.*, 453 U.S. at 330).

Under all that authority, Section 11(h)'s express mandate to "administer" incorporates all the specific fiduciary duties of "administration." *See O'Neill*, 220 F.3d at 1360; *Hopi*, 782 F.3d at 668, 670; *Cobell*, 240 F.3d at 1100; *Western Shoshone*, 143 Fed. Cl. at 600. In the Restatement of Trusts, that first "specific" and fundamental duty of trusteeship is defined as follows:

> (1) The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law.
> (2) In administering the trust, the trustee's responsibilities include performance of the following functions:
> (a) ascertaining the duties and powers of the trusteeship, and the beneficiaries and purposes of the trust;
> (b) collecting and protecting trust property;
> (c) managing the trust estate to provide returns or other benefits from trust property; and
> (d) applying or distributing trust income and principal during the administration of the trust and upon its termination.

Restatement (Third) of Trusts § 76 (2007); *cf. Jicarilla Apache Nation v. United States* ("*Jicarilla III*"), 112 Fed. Cl. 274, 290 n.21 (2013) (referencing earlier Restatement for earlier claims).

This duty to administer is "an affirmative duty. Thus, a trustee may commit a breach of trust by improperly failing to act, as well by improperly exercising the powers of the trusteeship" Restatement (Third) of Trusts § 76, cmt. b. In addition, a trustee must comply with both the terms of the trust and default general trust law mandates except as permissibly modified by the trust

terms. *Id.* at cmt. b(1). Therefore, because Section 11(h) expressly establishes this primary specific fiduciary duty, it also satisfies the second, "fair interpretation" rule that the government should be liable for breach of relevant fiduciary duties. *See Mitchell II*, 463 U.S. at 226; *Hopi*, 782 F.3d at 667-68. That especially applies where the governing statute also provides that the subject trust asset shall "be 'used' exclusively 'for the benefit'" of Navajo beneficiaries. *ITCA*, 956 F.3d at 1341. Accordingly, Section 11(h) "establishes a fiduciary relationship that imposes an obligation on the federal government" to Plaintiffs, including a trust corpus "that is entirely controlled by the government[,]" so "it naturally follows that a breach of those responsibilities should be remedied by money damages." *Fletcher II*, 2022 WL 552144, at *7. In sum, Plaintiffs' claims here for New Lands maladministration under Section 11(h), including for grazing, leasing, and rights of way, are all within this Court's jurisdiction.

Defendant's various contrary contentions are all meritless. First, Defendant asserts that the Relocation Act duty to administer is vague and does not impose any specific fiduciary or other duty regarding leasing or rights or way. Def.'s Mot. at 29-30. That misreads the Relocation Act and governing law. Section 11(h)'s mandate that Defendant "shall administer" the New Lands imposes a specific, multifaceted fiduciary duty with an incorporated, established meaning. *See* 25 U.S.C. § 640d-10(h); *O'Neill*, 220 F.3d at 1360; Restatement (Third) of Trusts § 76. The breadth of Section 11(h) does not make the fiduciary duty to administer thereunder vague because "'[b]road general language is not necessarily ambiguous when congressional objectives require broad terms.'" *Classen Immunotherapies, Inc. v. Biogen Idec*, 659 F.3d 1057, 1064 (Fed. Cir. 2011) (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980)). Section 11(h) is purposely broad, not vague, since it covers up to 400,000 acres within ONHIR's exclusive authority. *See* 25 U.S.C. § 640d-10(a), -10(h). At the same time, Section 12(c)(2)(A) makes clear that New Lands

administration includes leasing and rights of way "duties," 25 U.S.C. § 640d-11(c)(2)(A). Read together, Defendant's explicit duties to administer, plan, and develop the New Lands requires administration of leases and rights of way. *See* Restatement (Third) of Trusts § 76(2)(c). All this makes this case like *Mitchell II* and its progeny, and unlike *Navajo I* or *Mitchell I*, contrary to Defendant's unfounded comparison, Def.'s Mot. at 30-31.

Second, Defendant contends that the Relocation Act is not money-mandating except for certain specific relocation benefits per prior cases. Def.'s Mot. at 31, 32-33. *Begay v. United States*, 16 Cl. Ct. 107 (1987), *aff'd*, 865 F.2d 230 (Fed. Cir. 1988), addressed other Relocation Act provisions, not Section 11. Claims there concerned consequential psychological harms from relocation, where nothing could be reasonably be viewed as a trust corpus and there was no congressional intent to create a trust. *Begay v. United States*, 865 F.2d 230, 321-32 (Fed. Cir. 1988). That cannot preclude unaddressed claims under Section 11, which mandates that the New Lands be held in trust and enumerates multiple broad and specific fiduciary duties. *See* 25 U.S.C. § 640d-10(a), (h). That distinction also precludes Defendant's comparison to discretionary language for reimbursement of legal fees under another Relocation Act provision, which was found to be not money-mandating in *Hopi Tribe v. United States*, 55 Fed. Cl. 81 (2002).

Third, Defendant cannot avoid its specific duty to administer under Section 11(h) based on the fact that Section 12(c)(2)(A) incorporates a provision that the agency "may" issue leases and rights of way. *See* Def.'s Mot. at 31-32 (concerning 25 U.S.C. § 640d-11(c)(2)(A) and Pub. L. 99-190, 99 Stat. 1236). Section 12(c)(2)(A) provides that this incorporation entails powers "and duties[.]" 25 U.S.C. § 640d-11(c)(2)(A). Those terms must be read in the context and scheme of Section 11(h)'s broad mandate to "administer" the New Lands. *See Cucic*, 921 F.3d at 1098.

Fourth, Defendant cannot avoid its specific fiduciary duties under Section 11(h) based on

the Complaint's references to the Non-Intercourse Act and the Federal Records Act. *See* Def.'s Mot. at 33-34 (concerning Compl. ¶¶ 74, 79, 107). Those references are aptly made in enumerating specific aspects of Defendant's multifarious leasing and rights-of-way maladministration under Section 11(h)'s statutory mandate to administer the New Lands. *See* Compl. ¶¶ 67-68, 70, 100. The Non-Intercourse Act, 25 U.S.C. § 177, requires a federal treaty or statute to authorize conveyances of tribal lands, so "failure to strictly comply with the requirements of such a statute renders any resulting conveyance void." *Shoshone Indian Tribe of Wind River Reserv. v. United States* ("*Shoshone III*"), 672 F.3d 1021, 1037-38 (Fed. Cir. 2012).

In turn, Defendant's references to cases involving laws of general applicability and not involving Indian trust asset maladministration, Def.'s Mot. at 33-34, cannot avoid that "[v]arious statutes and regulations independently obligate defendant to make and preserve various records to document its management of Indian trust assets." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 135 n.2 (2004) (citing authorities). Rather, "'[i]t is well settled that a trustee such as defendant is under a duty to keep and render clear and accurate accounts with respect to administration of the trust.'" *Id.* (quoting *Pueblo of San Ildefonso v. United States*, 35 Fed. Cl. 777, 788 (1996)). It therefore is "indisputable" "beyond any measure of doubt" that Defendant can be subject to enforceable fiduciary duties for "specific duties relating to the maintenance of records for all land held in trust by the United States[.]" *Oglala Sioux Tribe v. United States*, 21 Cl. Ct. 176, 192-93 (1990). So too here, Defendant cannot credibly contest ONHIR's legal duty for the New Lands to "'make and preserve records'" "'to protect the rights of . . . persons directly affected by the agency's activities.'" Compl. ¶ 70 (quoting 44 U.S.C. § 3101 and 36 C.F.R. § 1220.30(a)). Consistent with that, when Defendant fails to keep proper records, as in this case, *e.g., id.* ¶¶ 71-72, all doubts will be resolved against it. *Confed. Tribes of Warm Springs Res. v. United States*

("*Warm Springs*"), 248 F.3d 1365, 1373 (Fed. Cir. 2001); *Jicarilla III*, 112 Fed. Cl. at 302.

Finally, Plaintiffs do not imply that Defendant's "alleged authority and control over these lands, standing alone, creates money-mandating fiduciary obligations." Def.'s Mot. at 35-36. Plaintiffs have identified specific money-mandating duties under Section 11(h) to support their leasing and rights-of-way claims, as explained above. That, combined with Defendant's complete and exclusive legal control over the New Lands under Section 11(h), establishes a fiduciary relationship with federal responsibilities for which breach should be remedied by money damages. *See Mitchell II*, 463 U.S. at 226 *Fletcher II*, 2022 WL 552144, at *7; *Hopi*, 782 F.3d at 668.

C. The OMM Implements and Reinforces Section 11(h)'s Specific Fiduciary Duties by Elaborating Enforceable Duties for New Lands Leasing and Incorporating Enforceable Right-of-Way Regulations.

In a final effort to avoid Plaintiffs' leasing and rights-of-way claims, Defendant contends that the OMM is not a substantive source of law that can confer jurisdiction in this Court. Def.'s Mot. at 34-35. That misstates Plaintiffs' claims, which rely on the Relocation Act for this Court's jurisdiction, as explained in the preceding section here. *See also* Compl. ¶¶ 31-37, 59-60, 99-100. The OMM merely "implement[s] those statutory directives" "[p]ursuant to the Relocation Act[.]" *Id.* ¶¶ 62, 101. Thus, while the Relocation Act alone provides jurisdiction for the leasing and rights-of-way claims, the OMM reinforces and elaborates the Relocation Act's enforceable fiduciary duties. *See id.* ¶¶ 67-68. If any more analysis is warranted to support jurisdiction, the OMM supports enforceable leasing and rights-of-way duties.

Under governing case law, Defendant's enforceable fiduciary duties need not be specifically enumerated by a statute or regulation. *See White Mountain*, 537 U.S. at 476-77; *Mitchell II*, 463 U.S. at 210, 228; *Navajo Tribe*, 624 F.2d at 988; *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981); *Jicarilla Apache Nation v. United States* ("*Jicarilla II*"), 110 Fed.

Cl. 726, 735-37 (2011) (discussing prior cases). Therefore, "while a Tribe needs to point, at the outset, to a specific, trust-creating statute, the language of such a statute ultimately does not cabin defendant's fiduciary obligations." *Jicarilla II*, 100 Fed. Cl. at 738 (citing *Jicarilla I*, 131 S. Ct. at 2325). That supports consideration and application of the OMM to define the scope of allowable claims within this Court's jurisdiction.

For this, an agency is required to follow its own manual when that affects the rights of individuals. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (concerning BIA); *see Hamlet v. United States*, 63 F.3d 1097, 1105 n.6 (Fed. Cir. 1995) (citing same). In particular, an agency manual that is not promulgated as a formal regulation has the binding force and effect of law if: (1) the promulgating agency was vested with authority to create the manual; (2) the agency conformed to all procedural requirements in promulgating the manual; (3) the promulgating agency intended the provision to establish a binding rule; and (4) the provision does not contravene a statute. *Tidewater Contrs., Inc. v. United States*, 131 Fed. Cl. 372, 393-94 (2017) (quoting *Hamlet*, 63 F.3d at 1105). For the third requirement, the primary consideration for determining agency intent is whether the text of the manual "'indicates that it was designed to be binding on the agency.'" *Id.* at 397 (quoting *Ferrell v. Dep't of the Interior*, 314 F.3d 584, 591 (Fed. Cir. 2002)). Defendant overlooks all this in citing other cases to assert that the mere lack of publication in the Federal Register precludes the OMM from being an additional money-mandating source of law. *See* Def.'s Mot. at 34-35.

Under the above governing requirements, the OMM has the binding force of law. First, Defendant does not dispute that ONHIR was vested with authority to create the OMM. ONHIR has "all the powers and" is "responsible for all the duties" that its predecessor had, as well as to provide for its administrative services and to administer the New Lands, including leasing and rights-of-way powers and duties transferred from the BIA. 25 U.S.C. §§ 640d-10(h), 640d-

11(c)(1)(A), 640d-11(c)(2), 25 U.S.C. § 640d-11(e)(1). Those laws authorized ONHIR to adopt the OMM as acknowledged on the OMM's first page: "The procedures contained in" the OMM "have been developed pursuant to explicit or implicit authority vested in . . . [ONHIR] by PL. 93-531, as amended . . . ; and various appropriations bills which contained instructions regarding program authority and operations." OMM at 1. The OMM further elaborates that authority specific for all land use approvals, including leases and rights-of-way. OMM § 1810.

Second, while Defendant denigrates the OMM's status, Def.'s Mot. at 34, Defendant does not dispute that the OMM conformed to all procedural requirements for its promulgation. The OMM explains that and how its "formal procedures" were developed and approved consistent with ONHIR's authority and regulations. *See* 25 U.S.C. § 640d-11(c)(1)(A); 25 C.F.R. § 700.219(a); OMM at 2. This makes the OMM presumptively procedurally valid.

Third, the text of the OMM and ONHIR's regulations indicate that ONHIR intended the OMM, including its leasing and rights-of-way provisions, to establish binding rules, contrary to Defendant's assertion, Def.'s Mot. at 34. The regulations provide that ONHIR's operation "shall be governed by" the OMM, which "is the prescribed medium for publication of policies, procedures and instructions which are necessary to facilitate the day-to-day operations and administration" of the agency. 25 C.F.R. § 700.219(a). This establishes that the OMM governs ONHIR's operations necessary for its administration as a "fundamental document" and substantive source of law for enforceable fiduciary duties. *See Mitchell II*, 463 U.S. at 215; *Oglala Sioux*, 21 Cl. Ct. at 192. Likewise, ONHIR regulations "implement" "General Policies and Instructions" and "procedures[,]" *see* 25 C.F.R. Part 700, subpart A title & § 700.1(b), so Defendant cannot credibly contend that the use of those same words in the OMM somehow makes it unenforceable.

Defendant also contends that the OMM is not intended to be binding because the OMM

allows for deviations "where appropriate." Def.'s Mot. at 34 (quoting OMM at 1). The structured allowance for deviations of the OMM does not make it any less binding than the allowance for waivers and exceptions of the regulations makes them nonbinding. The OMM recognizes that no "Manual can anticipate every possible situation or set of facts that an agency may encounter" and provides for deviations "since circumstances change" and ONHIR "is committed to using 'best practices[.]'" OMM at 1. Those provisions would be superfluous if the OMM were merely advisory, discretionary, nonbinding guidance rather than prescribed, necessary, and governing per 25 C.F.R. § 700.219(a). Likewise, ONHIR's regulations allow for ONHIR to waive or provide exceptions to any requirement or time limit there and even to allow requests for waiver on a case-by-case basis. *Id.* § 700.13. The allowance for exceptions proves rather than refutes binding rules.

Additional text reinforces ONHIR's intent to make the OMM's rights-of-way provisions binding. The OMM states that "[a]pplications for rights-of-way (ROW) on the New Lands shall conform to the requirements of 25 CFR [Part] 169. Applicants should refer to these regulations for comprehensive instructions regarding various types of right-of-way applications." OMM § 1810.11; Compl. ¶ 101. The OMM elaborates on application of those "requirements" that must be "conform[ed]" with, including BIA review and final ONHIR approval, without any indication that those are not intended to establish binding rules. *See* OMM §§ 1810.11-.15; Compl. ¶ 101.

Defendant correctly concedes that ONHIR "possesses the powers and duties related to issuing rights-of-way on the New Lands" but erroneously asserts that the incorporated regulations cannot be a substantive source of law here because those apply to BIA and ONHIR has not promulgated its own rights-of-way regulations. Def.'s Mot. at 35 (emphasis added). ONHIR did not need to promulgate such regulations because ONHIR was authorized to and properly published the OMM to govern its operations, including incorporating regulations with BIA review subject to

ONHIR approval. Nothing precludes or invalidates that incorporation, as in the Relocation Act itself for leasing and rights-of-way powers and duties. *See* 25 U.S.C. § 640d-11(c)(2)(A) (incorporating Pub. L. 99-190, 99 Stat. 1236). The expressly and validly incorporated right-of-way regulations impose enforceable fiduciary duties even with a requirement for consent by Indian landowners. *Mitchell II*, 463 U.S. at 223 & nn.25-28; *Coast Indian Cmty. v. United States*, 550 F.2d 639, 652-53 (Ct. Cl. 1977). All this confirms ONHIR's intent for the OMM to impose binding fiduciary duties for New Lands rights-of-way administration under the Relocation Act.

Similarly, the OMM New Lands leasing provisions establish ONHIR's intent to make those binding. Those provisions consistently use the mandatory verbs "will" and "shall" regarding lease applications and detailed requirements for ONHIR's processing and acting on nonprofit, business, commercial, industrial, and mineral leases. *See* OMM §§ 1810.3, 1810.321-1810.325; *Norman*, 942 F.3d at 1117. This encompasses use agreements for New Lands that are only surface interests as authorized by Section 11. *See* 25 U.S.C. § 640d-10(f); Compl. ¶¶ 83-84, 90; *cf.* 25 C.F.R. §§ 162.003, -.004(a) (applying BIA leasing regulations to surface estates). At the same time, among other things for nonprofit leases, ONHIR's own "New Lands Manager will negotiate the specific terms of the lease with the applicant." *Id.* § 1810.322.1.

Finally, consistent with *Hamlet*'s last requirement, none of the OMM leasing and rights-of-way provisions contravene the Relocation Act. Rather, they appropriately implement and reinforce the broad, mandatory statutory duty to administer the New Lands, including for leases and rights of way. *See* 25 U.S.C. §§ 640d-10(h), -11(c)(2)(A). With that, the OMM has the binding force and effect of law and supports this Court's jurisdiction over Plaintiffs' leasing and right-of-way claims, per *Ferrell*, *Hamlet*, and *Tidewater.*

IV. PLAINTIFFS CAN SEEK CLAIMS AND DAMAGES INCLUDING PENALTIES BASED ON DEFENDANT'S VIOLATION OF ITS OWN GRAZING TRESPASS REGULATIONS UNDER THE RELOCATION ACT.

Defendant next contends that ONHIR's grazing regulations do not support Plaintiffs' claims for grazing trespass damages and liability against Defendant both for where ONHIR "failed to issue *itself*" a grazing permit "along with any additional requests for trespass damages." Def.'s Mot. at 36-37. In support, Defendant contends that (1) the grazing regulations make trespassers liable only to Defendant and require payment of trespass damages and penalties to ONHIR rather than Plaintiffs, and (2) case law precludes trespass damages and penalties against the United States. *Id.* These defenses all fail because they misread Plaintiffs' claims, the grazing regulations, Defendant's fiduciary duties, and the one case relied on, and overlook other governing cases.

First, Defendant materially misstates the grazing claims. Plaintiffs do not simply claim that Defendant committed grazing trespass by failing to issue itself a permit, so that that could be cured by ONHIR issuing itself a permit. *See* Def.'s Mot. at 36. Rather, Plaintiffs allege that ONHIR committed grazing trespass because it has grazed hundreds of livestock on about 60,000 acres of the New Lands for years in violation of its own regulations, which categorically bar it from grazing livestock there, as the GAO has found. Compl. ¶¶ 29, 50-51; 2018 GAO Report at 47. ONHIR also has wrongfully allowed banned New Lands grazing by ineligible non-Indians. Compl. ¶¶ 53-55.

Second, ONHIR's grazing regulations impose, rather than preclude, both liability and damages for allowing all that grazing trespass on the New Lands. The regulations mandate that "[a]ll livestock grazed on the New Lands must be covered by a grazing permit authorized and issued by" ONHIR and that "Permit holders must" "Be enrolled Navajo Tribal Members" and "Maintain a permanent residency on the New Lands . . . ." 25 C.F.R. § 700.711(a)-(b). In contrast, ONHIR is a federal agency, not a Navajo citizen or a New Lands resident. 25 U.S.C. § 640d-11(a).

Non-Indians also are not Navajo citizens, obviously. ONHIR even keeps a list of "individuals eligible for New Lands grazing permits" and those on the list must apply for permits and have "determinations on eligibility" by ONHIR. *Id.* § 700.709(a), (d)-(e). Therefore, ONHIR's and non-Indians' ineligibility precludes not just grazing permits, but grazing itself, as ONHIR should have known. In turn, ONHIR's "Livestock trespass" regulation specifically prohibits "[t]he grazing of livestock upon, or driving of livestock across, any of the New Lands without a current approved grazing or crossing permit." 25 C.F.R. § 700.725(a). All that allows for liability here.

ONHIR's regulation also provides for grazing trespass damages as follows:

> The owner of any livestock grazing in trespass on the New Lands is liable to a civil penalty of $1 per head per day for each cow, bull, horse, mule or donkey and 25¢ per head per day for each sheep or goat in trespass and a reasonable value for damages to property injured or destroyed. The Commissioner may take appropriate action to collect all such penalties and damages and seek injunctive relief when appropriate. All payments for such penalties and damages shall be paid to the Commissioner for use as a range improvement fund.

Id. § 700.725. Even more, unauthorized livestock within the New Lands which are not removed therefrom within 10 or 15 days "will be impounded and disposed of by the Commissioner" with proceeds used to pay the penalties, for New Lands range improvement. *Id.* § 700.727, .727(a)-(b), (h). Altogether, these regulations prohibit the grazing trespass that ONHIR has allowed for itself and non-Indians and impose liability on both for quantified penalties and quantifiable damages. They also authorize and require ONHIR to collect for all grazing trespass liability.

Third, the Section 11(h) enforceable fiduciary duty to properly administer the New Lands requires Defendant to "manag[e] the trust estate to provide returns or other benefits from trust property" and to "apply[] or distribut[e] trust income and principal during the administration of the trust[,]" Restatement (Third) of Trusts § 76(2)(c)-(d). That makes Defendant liable for its failure to collect the specified grazing penalties and damages both from itself and others for the

specified use "solely for the benefit of" Relocation Beneficiaries. *See* 25 U.S.C. § 640-10(h).

Fourth, the one case that Defendant relies on to avoid this liability does no such thing. That case, *Shoshone Indian Tribe of the Wind River Reservation v. United States* ("*Shoshone I*"), 52 Fed. Cl. 614 (2002) does not hold that Indians categorically cannot collect trespass damages and penalties from Defendant. *Contra* Def.'s Mot. at 36-37. Instead, *Shoshone I* held that certain federal lands "trespass regulations cited by the Tribes" did not entitle the Tribes to receive "the penalties provided for[.]" *Shoshone I*, 52 Fed. Cl. at 628 (concerning 43 C.F.R. Parts 3590 and 9230). *Shoshone I* "does not consider" other "Acts or the duties arising thereunder." *Shoshone III*, 672 F.3d at 1040-41 (contrasting a case where a different regulation imposed trespass duties).

Here, Plaintiffs properly fault Defendant both for failing to prevent grazing trespass, including by itself, and for failing to collect trespass penalties and damages "for use as a range improvement fund" intended "solely for the benefit of the Relocation Beneficiaries" under the Relocation Act. 25 U.S.C. § 640-10(h); 25 C.F.R. § 700.725. For these claims, *Shoshone I* holds that "[a]ny failure of the United States to prevent . . . trespass, if proven at trial, would be compensable as damages for breach of trust under *Mitchell II*." *Shoshone I*, 52 Fed. Cl. at 628 (emphasis added). The New Lands grazing regulation penalties and damage quantifications thus simply provide measures for calculating damages, which *Shoshone I* authorizes.

Finally, additional authority overlooked by Defendant supports liability and damages for grazing trespass here. *White Mountain* and *Mitchell II* establish that for trespass, "'it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.'" *White Mountain*, 537 U.S. at 476 (quoting *Mitchell II*, 463 U.S. at 226). The self-dealing grazing trespass claim, in addition to violating express regulatory proscriptions, also is like *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966), where Defendant took over a trust land lease for

itself instead of for the benefit of the Tribe. *Id.* at 323. Both cases involve "a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself. Under such circumstances, the beneficiary . . . is entitled to recover." *Id.* at 324. In such cases, "the only practical way to assure proper operation is to foreclose any possibility of the trusted representative's making a personal profit out of transactions that are linked directly or indirectly to such a relationship." *Ottawa Tribe v. United States*, 166 Ct. Cl. 373, 380 (1964).

Once past liability, nothing precludes damages for the extensive, ongoing grazing maladministration committed here. As for liability, trust law guides damages determinations for trust land trespass to place beneficiaries in the position they would have been in absent the breach. *Oenga v. United States*, 91 Fed. Cl. 629, 641, 644 (2010); *see Warm Springs*, 248 F.3d at 1371. Consequently, claims for Indian trust land grazing maladministration are cognizable and compensable, including for reduced range value, *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 666 (1987), and for failure to obtain adequate grazing permit fees, *White Mountain Apache Tribe v. United States*, 25 Cl. Ct. 333, 334 (1992). For all these reasons, Plaintiffs assuredly can seek damages including required penalties based on Defendant's grazing trespass.

V. THE TUCKER ACT AUTHORIZES EQUITABLE RELIEF ANCILLARY TO PLAINTIFFS' DAMAGE CLAIMS FOR AGENCY REMANDS WITH SUCH DIRECTION AS THE COURT MAY DEEM PROPER AND JUST.

Defendant's last line of defense is that the Court lacks jurisdiction to grant equitable relief requiring Defendant "to take specific actions regarding the administration and use of the New Lands and income from the New Lands." Def.'s Mot. at 37. Defendant notes that the Court lacks general jurisdiction to provide declaratory and injunctive relief, *id.*, which Plaintiffs do not dispute. Defendant continues, however, that the Court may only "'issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable

records'" "'incident of and collateral to' a money judgment[,]" which does not encompass Plaintiffs' equitable relief claims. *Id.* 37-38 (quoting 28 U.S.C. § 1491(a)(2)).

Tellingly, Defendant's brief discussion omits the next, key statutory sentence. "In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." 28 U.S.C. § 1491(a)(2). That language, which the Complaint cites and paraphrases, Compl. at 41, is far broader than the narrow "orders" in the prior sentence, on which Defendant relies, but which are largely irrelevant here. To be sure, equitable relief must be "'an incident of and collateral to'" a money judgment. *Porter v. United States*, 131 Fed. Cl. 552, 560 (2017) (quoting 28 U.S.C. § 1491(a)(2) and citing *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998)). Yet through both these provisions, the Court may "grant equitable relief ancillary to claims for monetary relief over which it has jurisdiction" that are "pending before the court." *National Air Traffic Controllers Ass'n v. United States* ("*NATCA*"), 160 F.3d 714, 716 (Fed. Cir. 1998).

Equitable relief requests under the second sentence of Section 1491(a)(2) may arise when there is a question if a party "is obligated to perform at all" or "a special need for early resolution of a legal issue." *Alliant Techsystems, Inc. v. United States* ("*Alliant*"), 178 F.3d 1260, 1271 (Fed. Cir. 1999). This applies even when there is a potential for future damage claims or a concern about interference with continuing administration. *Emery Worldwide Airlines, Inc. v. United States*, 47 Fed. Cl. 461, 472 (2000). Moreover,

> [i]n responding to such a request, the court . . . is free to consider the appropriateness of declaratory relief, including whether the claim involves a live dispute between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect the parties' interests.

Alliant, 178 F.3d at 1271. Therefore, because Plaintiffs state claims for damages within the CFC's jurisdiction, they also may seek related ancillary equitable relief for agency remands where

Defendant disputes its obligation to perform and damages inadequately protect their interests.

All that authorizes the equitable relief sought by Plaintiffs. First, all requested equitable relief is ancillary to Plaintiffs' claims for damages. All equitable relief sought in the Complaint is based on and relates to Defendant's ongoing breaches of its fiduciary duties to administer and use the New Lands, which are confirmed above, and Defendant's related failures to administer New Lands revenue, which Defendant does not dispute are cognizable. *See* Compl. at 41. ONHIR still has not addressed its illegal grazing trespass years after it was identified by the GAO. *Id.* ¶ 51. ONHIR's leasing and rights-of-way maladministration is also ongoing, *id.* ¶¶ 74-78, 93, 106, perhaps because Defendant disputes that it "is obligated to perform at all" in its Motion to Dismiss.

Second, Plaintiffs can seek a remand for proper record maintenance since Defendant must but does not do that. *Compare Pueblo of Laguna*, 60 Fed. Cl. at 135 n.2; *Pueblo of San Ildefonso*, 35 Fed. Cl. at 788 *with* Compl. ¶¶ 52 (grazing), 74-78 (leasing), 107 (rights of way), 123 (revenues). In particular, DOI has reported to Congress that ONHIR does not have auditable records and cannot compile the records it has to meet relevant standards. Compl. ¶ 125. Looking forward, ONHIR is "'in the process of procuring a financial and business management system' but that is not expected to be operational until late summer 2022' and 'would not address any issues associated with the existing underlying financial records.'" *Id.* ¶ 126. Damages are inadequate to address these ongoing breaches. As Defendant knows, related equitable and monetary relief is complimentary, not exclusive, since "prospective injunctive relief" is not the "sole relief" allowable "as a remedy for failures of maintenance[.]" *White Mountain*, 537 U.S. at 478-79.

Finally, "[r]emedies for trespass on Indian land under federal common law include: ejectment and damages, *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232, 12 L. Ed. 1056 (1850); [and] accounting, *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 359 . . . (1941)[.]" *United States*

v. Torlaw Realty, Inc., 483 F. Supp. 2d 967, 973 (C.D. Cal. 2007), *aff'd*, 348 Fed. Appx. 213 (9th Cir. 2009). Within its equitable jurisdiction, this Court like others may permanently enjoin continuing trespass on Indian lands under well-developed federal law on equitable remedies. *See Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 973 (10th Cir. 2019).

Neither case Defendant relies on to oppose equitable relief either addresses the second sentence in Section 1491(a)(2) or undermines that for equitable relief in this case. *See* Def.'s Mot. at 38. *Massie v. United States*, 226 F.3d 1318 (Fed. Cir. 2000), only cited that subsection generally without discussion and not surprisingly but irrelevantly held that this Court did not have equitable jurisdiction for "resurrecting the terms of a contract, which had been materially breached and was no longer in force, allowing it to govern the amount of and the manner by which the monetary award was to be paid, and . . . compelling Massie to accept performance under those terms[.]" *Id.* at 1321. That proves nothing here. In *Smalls v. United States*, 87 Fed. Cl. 300 (2009), the Tucker Act authorizations for equitable relief were "inapplicable" for a stand-alone requested injunction "requiring a 'merit review by the Director of the Medical Center . . . so he can compare the new evidence with the old and the complete medical file in order to provide a well reasoned decision.'" *Id.* at 307. Neither of those cases avoids the explicit language of Section 28 U.S.C. §1492(a)(2) that supports equitable relief ancillary to Plaintiffs' cognizable claims for ongoing federal maladministration of the New Lands and resulting revenue. The Court is not yet faced with determining "such direction as it may deem proper and just" per the Tucker Act, so the award and scope of allowable equitable relief should be deferred here.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's Motion to Partially Dismiss Plaintiffs' Complaint on all issues except for the acknowledged waiver of only the Nation's own

claims that predate its August 2014 Settlement.

Respectfully submitted March 17, 2022.

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