IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NAVAJO NATION, a federally recognized Indian Tribe; IDENTIFIABLE GROUP OF RELOCATION BENEFICIARES, 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. THE UNITED STATES, Defendant.	Case No. 1:21-cv-1746-ZNS Judge Zachary N. Somers

THE UNITED STATES' SUPPLEMENTAL BRIEFING IN SUPPORT OF ITS MOTION TO PARTIALLY DISMISS PLAINTIFFS' COMPLAINT

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The United States respectfully submits this supplemental brief in response to the Court's November 8, 2022 Order (ECF No. 19) requesting briefing on the implications of (1) *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996) and 25 U.S.C. § 415 and 25 C.F.R. Part 162, cited therein, on Plaintiffs' leasing claims (Claim 2); and (2) 25 U.S.C. §§ 323–325, and the discussions thereof in *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 211 (1983), on Plaintiffs' rights-of-way claims (Claim 3). For the reasons discussed below, the above-cited statutes and regulations, which apply *exclusively* to the Department of the Interior (Interior) and Bureau of Indian Affairs (BIA), have no application or effect on the pending motion to partially dismiss in this case. In addition, neither *Mitchell II* nor *Brown* support Plaintiffs' case. The Court should grant the United States' Motion to Partially Dismiss Plaintiffs' Complaint (ECF No. 7).

ARGUMENT

Mitchell II and *Brown* found specific fiduciary duties where a network of statutes and regulations provided the Secretary of the Interior (Secretary) with sufficient managerial control over a tribal resource and Interior's implementing regulations expressly "define[d] the contours" of the federal government's responsibilities to manage that resource. *Mitchell II*, 463 U.S. at 224; *Brown*, 86 F.3d at 1556. Subsequently, the Supreme Court confirmed that "[t]he Federal Government's liability cannot be premised on control alone." *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 301 (2009). Under the Supreme Court's decisions in *United States v. Jicarilla Apache Nation* and *Navajo II*, Plaintiffs may not sue the United States for an alleged breach of trust unless they point to substantive law that "expressly" establishes a trust responsibility for their rights-of-way and leasing claims and then show that the duty in question is money-mandating in breach. *Jicarilla*, 564 U.S. 162, 177 (2011); *Navajo II*, 556 U.S. at 302. Plaintiffs cannot make this showing.

First, the Indian Right-of-Way Act of 1948, 25 U.S.C. §§ 323-328, the Indian Long-Term Leasing Act, 25 U.S.C. § 415, and Interior's implementing regulations, which are discussed in *Mitchell*

II and *Brown,* do not aid Plaintiffs' case. These statutes and regulations do not apply to the Office of Navajo and Hopi Indian Relocation (ONHIR), or the "New Lands" added to the Navajo Reservation, pursuant to the Navajo and Hopi Land Settlement Act (Settlement Act), as amended. Pub. L. No. 96-305, 94 Stat. 929 (1980); 25 U.S.C. § 640d-10(a). Second, *Mitchell II* and *Brown* do not suggest that Plaintiffs can establish jurisdiction for their rights-of-way and leasing claims. The Settlement Act was enacted to settle a land dispute between the Navajo and Hopi, facilitate relocation, and provide for administration of the New Lands until relocation is complete. Pub. L. No. 93-531, 88 Stat. 1712 (1974); 25 U.S.C. § 640d-10. The Act creates only a bare trust, with no specific fiduciary—let alone money-mandating—duties with respect to rights-of-way or leasing. Nor has ONHIR promulgated regulations regarding rights-of-way or leasing on the New Lands.[1] Plaintiffs bear the burden to demonstrate that their claims are based on a money-mandating legal duty imposed upon the United States by a constitutional, statutory, or regulatory provision. *Navajo II*, 556 U.S. at 290. They have not met this burden for Claims 2 and 3, and thus, those claims should be dismissed.

I. *Mitchell II* and the Indian Right-of-Way Act do not apply.

Because the Supreme Court's *Mitchell II* decision preceded and informed the Federal Circuit's ruling in *Brown*, the United States addresses the applicability of *Mitchell II* and its discussion of the Indian Right-of-Way Act, first. *Mitchell II*, the Indian Right-of-Way Act, and the Department of the Interior's implementing regulations at 25 C.F.R. Part 169 do not demonstrate (as Plaintiffs have alleged in Claim 3) that ONHIR has specific fiduciary duties to obtain fair market value for rights-

[1] ONHIR has handled livestock grazing on the New Lands differently. In contrast to rights-of-way and leasing, ONHIR has promulgated regulations to govern New Lands grazing. 25 C.F.R. §§ 700.701–31. Because of this key difference, the United States did not seek to dismiss, at the pleading stage, Plaintiffs' grazing claim (Claim 1) for failure to identify an alleged money-mandating statutory or regulatory trust duty.

of-way on the New Lands, seek consent from the Nation regarding rights-of-way, or maintain related records, the breach of which would be compensable with money damages.

In *Mitchell II*, the Supreme Court analyzed whether the United States—in that instance the Department of the Interior—had an enforceable fiduciary duty to manage forest resources on allotted lands. 463 U.S. at 209. Ultimately, *Mitchell II* held that specific fiduciary duties arose from the timber management statutes and regulations that gave the federal government "comprehensive responsibilities" for managing "the harvesting of Indian timber" and provided detailed standards to guide the government's actions. *Id.* at 222 (internal citation and quotation marks omitted). In doing so, the Court stated that the Department of the Interior exercises "comparable control" over rights-of way under the Indian Right-of-Way Act, and that Interior's regulations "detail the scope of federal supervision." *Id.* at 223. The Indian Right-of-Way Act "empower[s]" the Secretary of the Interior to "grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes," subject to requirements of Tribal and individual consent, and conditioned on the payment of compensation that the Secretary deems "just." 25 U.S.C. §§ 323-325. Interior's implementing regulations set forth that the Secretary must "determine the adequacy of the compensation;" that deposits are to be held in a "special account for distribution to Indian landowners;" and the Secretary can impose required elements of the right-of-way agreement, such as restoring the land to its original condition. *Mitchell II*, 463 U.S. at 223 (citing 25 C.F.R. §§ 169.12, 169.14 (1982)); *id.* at 223 n.28 (citing 25 C.F.R. §§ 169.3, 169.5).

The Indian Right-of-Way Act, 25 U.S.C. §§ 323-328, and implementing regulations do not apply to the New Lands. Congress gave ONHIR, not Interior, "sole authority for final planning decisions regarding the development" of the New Lands. 25 U.S.C. § 640d-10(h). The Indian Right-of-Way Act and Interior's implementing regulations, however, expressly apply only to trust

lands administered by Interior and BIA (not ONHIR, which is not part of the Department of the Interior). 25 U.S.C. § 323 (stating that "the Secretary of the Interior" is "empowered to grant rights-of-way"); 25 C.F.R. § 169.1 (the regulations provide the "procedures and conditions under which BIA will consider a request to approve (i.e., grant) rights-of-way").[2]

Congress, in the Settlement Act, created ONHIR, an independent federal agency, to facilitate relocation and administer the New Lands until relocation is complete. 25 U.S.C. § 640d-10(h). The Settlement Act does not reference the Indian Right-of-Way Act, and there is no authority for ONHIR to apply the Indian Right-of-Way Act or to approve rights-of-ways under 25 C.F.R. Part 169. Although the Settlement Act originally gave the Secretary of the Interior authority to issue leases and rights-of-way over the New Lands for housing, Congress later amended the Act to remove that authority, granting sole authority for final planning decisions to ONHIR instead. 25 U.S.C. § 640d-11(c)(2)(A); Pub. Law No. 100-666, 102 Stat. 3929 (1988); Pub. Law. No. 99-190, 99 Stat. 1185 (1985).

Indeed, Plaintiffs' Complaint appears to acknowledge that the Indian Right-of-Way Act is not relevant here. Plaintiffs did not invoke the Indian Right-of-Way Act as a basis for their claim, *see, e.g.*, Compl. ¶¶ 99–111, nor did Plaintiffs allege that the United States failed to comply with the Indian Right-of-Way Act. *Id.* And although Plaintiffs focused on a reference to Interior's rights-of-way regulations in ONHIR's management manual, ECF No. 12 at 29 (citing ONHIR's Management Manual, § 1810.11), the manual merely states that *applications* for rights-of-way on the New Lands

[2] Notably, Interior's regulations recognize that the Indian Right-of-Way Act is not the exclusive authority for granting rights-of-way across tribal land: "This part does not apply to grants of rights-of-way on tribal land under a special act of Congress specifically authorizing rights-of-way on tribal land without [Interior's] approval." 25 C.F.R § 169.1(d).

should conform with 25 C.F.R. Part 169.[3] It does not state that rights-of-ways on the New Lands must entirely conform with Part 169, nor does it state that Interior's regulations govern ONHIR's approval or management of rights-of-ways on the New Lands. The Indian Right-of-Way Act and Interior's implementing regulations thus have no applicability to ONHIR, the New Lands, or Plaintiffs' rights-of-way claim. Because they "do not apply" to the New Lands "at all," they do not provide "a basis for [the Nation's] breach-of-trust lawsuit against the Federal Government." *Navajo II*, 556 U.S. at 302.

Nor does *Mitchell II* and its discussion of the Indian Right-of-Way Act apply to this case by analogy. Unlike the Indian Right-of-Way Act and its implementing regulations, the Settlement Act does not set up a comprehensive system requiring ONHIR to manage rights-of-way on the New Lands. The Indian Right-of-Way Act grants the Secretary of the Interior the express and broad authority to grant rights-of-way for all purposes. 25 U.S.C. §§ 323, 325. And Interior's regulations detail—extensively—BIA's role and responsibilities regarding rights-of-way eligibility, the application process, duration and renewal, and compliance and enforcement. 25 C.F.R. §§ 169.1–169.415. Conversely, the Settlement Act is silent with respect to rights-of-way except as related to housing in the Act's amendments. *See* Pub. L. No. 100-666, 102 Stat. 3929 (1988) (transfer of authority from Interior); Pub. L. No. 99-190, 99 Stat. 1185, 1236 (1985) (discretionary right to "issue leases and rights-of way for housing and related facilities"). In fact, the Settlement Act contains no discussion whatsoever of the meaning of "final planning decisions" or ONHIR's duty to grant or approve rights-of-way. Under *Jicarilla*, that silence is dispositive because "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts [them]." 564 U.S. at 177.

[3] ONHIR's management manual is available at https://www.onhir.gov/assets/documents/mangement-manual/ONHIR-Management-Manual.pdf (last visited Dec. 6, 2022)

Furthermore, unlike with the Indian Right-of-Way Act, there are no implementing regulations to "define the contours" of ONHIR's responsibility for rights-of-way under the Settlement Act. *Mitchell II*, 463 U.S. at 224. Indeed, ONHIR has not promulgated regulations "expressly accept[ing]" trust responsibilities regarding rights-of-way. *Jicarilla*, 564 U.S. at 177. And contrary to *Mitchell II*, the Settlement Act does not address "virtually every aspect" of rights-of-way on the New Lands. 463 U.S at 220.

Because the Settlement Act does not impose any duty upon ONHIR regarding rights-of-way and ONHIR has not promulgated rights-of-way regulations that could establish specific fiduciary obligations, the Court should grant the United States' motion to dismiss Claim 3.

II. *Brown* and the Indian Long-Term Leasing Act do not apply.

Similarly, *Brown*, the Indian Long-Term Leasing Act, and the Department of the Interior's implementing regulations, 25 C.F.R. Part 162, do not demonstrate (as Plaintiffs allege in Claim 2) that ONHIR has specific fiduciary duties to lease New Lands, prevent occupation of New Lands properties without a lease, obtain fair market value for rent, seek consent from the Nation, or maintain related records, the breach of which would be compensable with money damages.

In *Brown v. United States*, the Federal Circuit held that the Indian Long-Term Leasing Act and related-regulations imposed money-mandating fiduciary duties on the United States (there, again, the Department of the Interior). 86 F.3d at 1563. *Brown* predates *Navajo II* and *Jicarilla* and thus does not entirely reflect the Supreme Court's direction on fiduciary duty claims. Following *Brown*, the Supreme Court made clear that the United States' "control" over a resource cannot, in and of itself, establish any judicially enforceable trust obligation. *Navajo II*, 556 U.S. at 301. In any event, in *Brown*, the Federal Circuit, relying on what it described as *Mitchell II's* "control or supervision test," reviewed whether the Secretary of the Interior or allottees had control over the leasing of allotted lands pursuant to 25 U.S.C. § 415 and 25 C.F.R Part 162. 86 F.3d at 1561. The Federal Circuit held

that although the Secretary of the Interior did not supervise the leasing program, the leasing regulations "make it clear beyond any doubt that the Secretary exercises his or her control over commercial leasing" for both general welfare purposes and to protect the allottees' financial interests. *Id.* at 1562. The court reasoned this was because the Secretary: (1) must approve all leases; (2) dictates the terms and forms of leases; (3) must approve lease cancellation; and (4) can cancel a lease unilaterally. *Id.* at 1561–62. The court found further support in the fact that the government had assumed specific fiduciary duties based on regulations promulgated by Interior to manage commercial leasing. *Id.* (citing 25 C.F.R. §§ 162.5(b), 162.5(h)(2), 162.8).

Like the Indian Right-of-Way Act, the Indian Long-Term Leasing Act does not apply to the New Lands because Congress gave ONHIR (not Interior) "authority for final planning decisions." 25 U.S.C. § 640d-10(h). And as discussed above, Interior no longer has any authority to issue leases on the New Lands. 25 U.S.C. § 640d-11(c)(2)(A). Further, the Indian Long-Term Leasing Act and Interior's implementing regulations apply only to Interior, of which ONHIR is not part. 25 U.S.C. § 415 (lands may be leased subject to the approval of the Secretary of the Interior); 25 C.F.R. § 162.006(a) ("This part applies to leases of Indian land entered into under 25 U.S.C. 380, 25 U.S.C. 415(a), and 25 U.S.C. 4211, and other tribe-specific statutes authorizing surface leases of Indian land with our approval."). The Settlement Act does not reference the Indian Long-Term Leasing Act and there is no authority for ONHIR to apply that statute to the New Lands. Additionally, Plaintiffs did not rely on the Indian Long-Term Leasing Act or Interior's regulations as a source for their leasing claim, *see*, *e.g.*, Compl. ¶¶ 59–98, nor did Plaintiffs contend that the United States failed to comply with this statute and regulation. *Id.* That alone means Plaintiffs have not met their jurisdictional burden with respect to the statute and its implementing regulations. In sum, the Indian Long-Term Leasing Act and Interior's implementing regulations do not apply to ONHIR,

the New Lands, or Plaintiffs' leasing claim. Thus, they cannot provide a "basis" for Plaintiffs' claim for money damages. *Navajo II*, 556 U.S. at 302.

Brown and its discussion of the Indian Long-Term Leasing Act also provide no help to Plaintiffs by analogy. Unlike the Indian Long-Term Leasing Act and its implementing regulations, the Settlement Act does not give ONHIR sufficient managerial control or specific responsibilities over leasing to support Tucker Act jurisdiction. The Settlement Act does not provide any guidance, standards, or specific obligations to guide ONHIR in administering its supposed fiduciary responsibility. Rather, it is silent as to ONHIR's commercial leasing authority and obligations, *see*, *e.g.*, 25 U.S.C. § 640d-10(h), and ONHIR has not promulgated regulations "expressly accept[ing]" trust responsibilities regarding leasing. *Jicarilla*, 564 U.S. at 177. By contrast, *Brown* relied upon what the panel viewed as a statutory and regulatory regime giving Interior specific duties and responsibilities regarding leasing, such as a prohibition on approving leases at less than fair annual rent, a requirement that leases "be limited to the minimum duration" that will provide the "highest economic return," and the ability to direct rental payments to BIA rather than the allottees. *Brown*, 86 F.3d at 1561–62 (citing 25 C.F.R. §§ 162.5(b), 162.5(h)(2), 162.8) (1996)). Plaintiffs have identified nothing comparable to support their leasing claim. Because Plaintiffs cannot show that ONHIR owes them an affirmative, judicially enforceable duty regarding leasing on the New Lands, the Court should grant the United States' motion to dismiss Claim 2.

III. The Settlement Act creates a bare trust without specific and money-mandating fiduciary duties.

Even if the Court finds ONHIR has some level of managerial control over rights-of-way or leasing on the New Lands, Plaintiffs still cannot identify a substantive source of law that the agency has breached, as they must under *Navajo II* and *Jicarilla*. *Brown* illustrates this point. There, the Federal Circuit explained that although "the commercial leasing regime created for trust lands in 25 U.S.C. § 415(a) and 25 C.F.R. Part 162 imposes general fiduciary duties . . . [that] does *not* mean

that any and every claim by the Indian lessor necessarily states a proper claim for breach of trust." 86 F.3d at 1563 (internal quotation marks and citation omitted). The court held that, notwithstanding the Secretary's control over leasing, the plaintiffs must still allege a breach of a "specific statutory requirement or regulation" or "the money claim against the government must fail." *Id.* Because it was "not at all clear" that the plaintiffs had "alleged the breach of a specific duty that the regulations squarely place[d]" on Interior, the Federal Circuit remanded the case. *Id.* Later, the Court of Federal Claims dismissed the majority of the plaintiffs' claims. *Brown v. United States ("Brown II"),* 42 Fed. Cl. 538, 546 (1998), *aff'd,* 195 F.3d 1334 (Fed. Cir. 1999). "[A]fter a careful examination of these provisions, no duty therein was placed on the government to monitor lease compliance," ensure accurate reporting of gross receipts, "require proof of insurance," or "perform a periodic review of rentals," the court held. *Id.* at 552–60.

In the same way, Plaintiffs cannot allege a breach of a "specific statutory requirement or regulation" to support Claims 2 and 3. *Brown*, 86 F.3d at 1563. The Settlement Act creates only a bare trust with respect to rights-of-way or leasing on the New Lands. The Act requires the United States to accept title of up to 400,000 acres of lands "in trust for the benefit of the Navajo Tribe as a part of the Navajo Reservation," 25 U.S.C. § 640d-10(a), and states only that ONHIR has the "sole authority for final planning decisions regarding the development" of the New Lands until relocation is complete. 25 U.S.C. § 640d-10(h). It does not provide any terms, conditions, or guidance with respect to this authority for final planning decisions, nor does it specify what responsibilities, if any, ONHIR possesses regarding rights-of-way or commercial leasing. The Settlement Act does not require ONHIR to obtain just compensation for rights-of-way or fair annual rent for leases. It does not require consent of the Navajo Nation or the Relocatees prior to granting rights-of-way or leasing. The Settlement Act neither compels nor restricts ONHIR's ability to grant rights-of-way or approve leases. The Settlement Act is thus more akin to the General Allotment Act which "created

only a limited trust relationship . . . that does not impose any duty upon the Government to manage [tribal] resources." *Mitchell II*, 463 U.S. at 210-11 (quoting *United States v. Mitchell ("Mitchell I")*, 445 U.S. 535, 542 (1980)). Plaintiffs therefore cannot allege a breach of any specific statute or regulation and their claim for money damages in Claims 2 and 3 "must fail." *Brown*, 86 F.3d at 1563.

Although Plaintiffs stated that the Settlement Act "alone" provides jurisdiction for their rights-of-way and leasing claims, ECF No. 12 at 26, they also relied heavily on ONHIR's management manual. But Plaintiffs cannot sue to enforce an asserted trust obligation unless they can "identify a specific, applicable, trust-creating statute or regulation that the Government violated." *Jicarilla*, 564 U.S. at 177. The manual does not satisfy that standard—it is not a statute or regulation. Further, as the United States previously explained, the manual does not meet the Federal Circuit's test to show that it has the binding force and effect of law. ECF No. 15 at 14–16. This policy manual includes "advisory" language, *Hamlet v. United States*, 63 F.3d 1097, 1105 (Fed. Cir. 1995), and sets forth "general processes" for the agency. ONHIR's Management Manual, 1. And ONHIR does not consider the manual's provisions to be binding. The manual itself expressly states that ONHIR may "deviat[e] from the procedures" when "appropriate." *Id.* It leaves "substantial discretion" to ONHIR and does not establish a specific and enforceable duty. *Wolfchild v. United States*, 731 F.3d 1280, 1292 (Fed. Cir. 2013) (citation omitted). Thus, the manual is not akin to the network of statutes and regulations at issue in *Mitchell II* and *Brown*.[4] The manual cannot provide the

[4] Nor is it like the Veterans Affairs management letter and handbook that the Court considered in *Carson v. United States*, 161 Fed. Cl. 696 (2022). Those materials are distinguishable from ONHIR's manual on multiple grounds. The Veterans Affairs' letter and handbook "prescribe[d] mandatory VHA procedures and/or operational requirements," involved a pay issue that related "to agency management or personnel," were promulgated as a result of "binding arbitration," and "most importantly," the agency "demonstrated it considered the provisions" mandatory. *Id.* at 708 (citations omitted).

required substantive source of law to establish a trust responsibility for Plaintiffs' rights-of-way and leasing claims.

Lastly, even if the Court finds that the Settlement Act (or some other source of statutory or regulatory authority) includes specific fiduciary duties regarding rights-of-way and leasing, Plaintiffs have not shown that they can "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties . . . ." *Navajo II*, 556 U.S. at 290–91 (citation omitted). *Mitchell II* provides a helpful contrast. In the timber management statutes, the Court found a statutory direction for Interior to follow—to manage the asset "to generate proceeds for the Indians"—and therefore a measure of damages if that direction was not fulfilled. 463 U.S. at 227. Here, the Settlement Act does not contain an express provision for monetary relief or monetary benefit for Plaintiffs. Thus, the Act lacks the hallmarks of a statutory provision that contemplates monetary relief, such as a potential measure of damages, unlike the circumstances in *Mitchell II*. This lack of direction in the statute not only indicates that it does not create a specific fiduciary duty, but that a breach of any such duty is not of the nature that permits monetary compensation and would thereby confer Tucker Act jurisdiction.

CONCLUSION

Mitchell II, *Brown*, and the statutes and regulations discussed in those cases, do not support Plaintiffs' case. Instead, they highlight what Plaintiffs have failed to do. Unlike the *Mitchell II* and *Brown* plaintiffs, Plaintiffs have not identified a money-mandating statutory or regulatory "regime" creating specific money-mandating fiduciary duties that would support their rights-of-way and leasing claims. *Brown*, 86 F.3d at 1563. Accordingly, the Court should grant the United States' Motion to Partially Dismiss Plaintiffs' Complaint (ECF No. 7).

Respectfully submitted this 8th day of December 2022.

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