2010-5129

IN THE UNITED STATES COURT APPEALS FOR THE FEDERAL CIRCUIT

TODD O'BRYAN,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 08-CV-664,
Senior Judge John P. Wiese

BRIEF FOR DEFENDANT-APPELLEE, THE UNITED STATES

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December 10, 2010

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, appellee's counsel states that he is unaware of any other appeal in or from this action that was previously before this court or any other appellate court under the same or similar title. Appellee's counsel is also unaware of any case pending in this or any other court that will directly affect or be affected by this Court's decision in this appeal.

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APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN
08-CV-664, SENIOR JUDGE JOHN P. WIESE

STATEMENT OF THE ISSUES

1. Whether the Court of Federal Claims correctly found that Mr. O'Bryan's grazing permits were not contracts between the United States and him.

2. Whether the Court of Federal Claims correctly found that Mr. O'Bryan's claims challenging the cancellation of his permits are barred pursuant to the doctrine of res judicata.

3. Whether Mr. O'Bryan is barred from asserting that the cancellation of his grazing permits constitutes a breach of trust responsibility or a taking because he did not present those issues to the Court of Federal Claims.

STATEMENT OF THE CASE

I. Nature of the Case

Appellant Todd O'Bryan appeals from a decision of the United States Court of Federal Claims granting in part the Government's motion to dismiss. See O'Bryan v. United States, 93 Fed. Cl. 57 (2010). Mr. O'Bryan asserts that grazing permits issued to him by the Government on behalf of individual Indians, who owned interests in the land that was subject to those permits, were contracts between the United States and him, notwithstanding the plain language of the applicable statutes and regulations that the permits were contracts between the Indian landowners and him. App. Br. 14-22.[1] Further, Mr. O'Bryan argues that his claims challenging the cancellation of his permits are not barred pursuant to the doctrine of res judicata, notwithstanding the decision of the Interior Board of Indian Appeals ("board" or "IBIA") sustaining the cancellation of two of his permits and his failure to challenge the cancellation of the third permit before the

[1] "App. Br. ___" refers to a page in Mr. O'Bryan's brief. "A___" refers to a page in the appendix filed by Mr. O'Bryan with his brief.

board. App. Br. 25-30. Additionally, Mr. O'Bryan contends that the cancellation of his permits constitutes a breach of trust responsibility or a taking, although he never presented those arguments to the Court of Federal Claims. App. Br. 22-25. Mr. O'Bryan's permits were not contracts and, even assuming they were contracts, his claims are barred by res judicata. Moreover, Mr. O'Bryan's breach of trust responsibility and taking claims should be disregarded because they were not presented to the Court of Federal Claims. Accordingly, the Court of Federal Claims's decision should be affirmed.

II. Course Of Proceedings And Disposition Below

In his complaint, Mr. O'Bryan challenged the Government's cancellation of his permits, its collection of rent for 2004, and the imposition of penalties for violations of his permits. Mr. O'Bryan asserted eight fact-based claims based upon theories of breach of contract, taking, breach of trust responsibility, violation of Federal law and policies, and review of administrative action. He sought $550,000 in damages, as well as attorney fees, costs, and prejudgment interest.

The Court of Federal Claims dismissed counts one, two, and three, which asserted breach of contract, among other things. The trial court based its decision upon the grounds that Mr. O'Bryan's permits were contracts with the Indian landowners, not the United States. O'Bryan, 93 Fed. Cl. at 63-64, 66.

Alternatively, the trial court found that those counts were barred pursuant to the doctrine of res judicata. Id. at 64, 66.

The court treated count four, which alleged that the BIA's collection of rent for 2004 constituted a taking, among other things, as a claim for unlawful or illegal exaction and directed the clerk to enter judgment that the United States must refund the 2004 rental amount, "subject to the conditions identified in footnote 7." Id. at 65-66.[2] The court dismissed count five, which alleged essentially tortious actions of a BIA employee, for lack of jurisdiction. Id. at 62 n.4, 66. Pursuant to Mr. O'Bryan's motion for voluntary dismissal, the court dismissed, without prejudice, count six, which alleged that his individually owned land was overgrazed. Id. The court dismissed as premature count seven, which challenged the agency's assessment of damages, and count eight, which sought the recovery of attorney fees and costs. Id. at 66-67. This appeal followed.

STATUTORY AND REGULATORY FRAMEWORK

The Secretary of the Interior ("Secretary"), through the Bureau of Indian Affairs ("BIA" or "agency"), has been granted broad authority over virtually all

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[2] In that footnote, the trial court explained that payment of any judgment is subject to the Government's right of setoff pursuant to 31 U.S.C. § 3728 and "must therefore await the outcome of the IBIA's [2008] remand," discussed below, and that "[n]ot until the amount of such penalties has been determined will the BIA's ultimate liability to plaintiff, if any, be known." Id. at 66 n.7.

Indian affairs. 25 U.S.C. §§ 2 & 9; Brown v. United States, 86 F.3d 1554, 1562-63 (Fed. Cir. 1996); McNabb v. United States, 54 Fed. Cl. 759, 768-69 (2002). Congress has enacted numerous statutes granting general leasing and permitting authority to the BIA for Indian rangelands. See, e.g., 25 U.S.C. §§ 393, 395, 396, 397, 402, 402a, 403, 407, 415, 415a, 466, 3701 et seq. For example, section 6 of the Indian Reorganization Act ("IRA") directs the Secretary, among other things, to make rules and regulations to restrict grazing upon Indian range units, to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, "and like purposes." 25 U.S.C. § 466.

The American Indian Agricultural Resource Management Act ("AIARMA"), 25 U.S.C. §§ 3701-3746, was enacted to further the United States's trust responsibilities for Indian-owned agricultural lands and to promote Indian self-determination, among other things. 25 U.S.C. § 3702. Pursuant to AIARMA, the Secretary must conduct all land management activities upon Indian agricultural land in accordance with tribal laws and ordinances, unless such compliance would be contrary to the Government's trust responsibility. 25 U.S.C. § 3712(a). The term "land management activity" includes "administration and supervision of agricultural leasing and permitting activities, including determination of proper land use, carrying capacities, and proper stocking rates of livestock, appraisal,

advertisement, negotiation, contract preparation, collecting, recording, and distributing lease rental receipts." 25 U.S.C. § 3703(12)(d). Congress expressly provided that § 3712 "does not constitute a waiver of the sovereign immunity of the United States." 25 U.S.C. § 3712(d).

Pursuant to the IRA, AIARMA, and several other statutes, the BIA has promulgated certain regulations governing grazing upon Indian lands. See 25 C.F.R. Part 166 ("grazing regulations"). As the Court of Federal Claims observed, the grazing regulations provide for significant control and involvement by tribes and individual landowners in the management of Indian lands, as they require the BIA to consult with Indian landowners in establishing range units, 25 C.F.R. § 166.302, and provide that "the class of ownership requirements for livestock that may be grazed on range units" will be made by tribal determination, 25 C.F.R. § 166.309. See O'Bryan, 93 Fed. Cl. at 63.

The grazing regulations describe "the authorities, policies, and procedures the BIA uses to approve, grant, and administer a permit for grazing on tribal land, individually-owned Indian land, or government land." 25 C.F.R. § 166.1(a). The BIA creates "range units" for the management and administration of grazing pursuant to a permit. See 25 C.F.R. § 166.4. A range unit "may consist of a combination of tribal, individually-owned Indian, and/or government land." Id.

The terms "government land" and "Indian land" are separately defined. Id.

The regulations expressly provide that a "permit" is "a written agreement between Indian landowners and a permittee, whereby the permittee is granted a revocable privilege to use Indian land or Government land, for a specified purpose." 25 C.F.R. § 166.4; see also 25 C.F.R. § 166.303 ("Permits may include tribal land, individually-owned Indian land, or government land, or any combination thereof."). "Indian landowner" is defined as "a tribe or individual Indian who owns an interest in Indian land in trust or restricted status." 25 C.F.R. § 166.4; see also 25 U.S.C. § 3703(13) (defining "Indian landowner" as Indian or Indian tribe that owns Indian land or "is the beneficiary of the trust under which such Indian land is held by the United States"). An "interest" is as "an ownership right to the surface estate of Indian land that is unlimited or uncertain in duration, including a life estate." 25 C.F.R. § 166.4.

Generally, Indian landowners are responsible for granting grazing permits, subject to approval by the BIA. 25 C.F.R. §§ 166.203, 166.205, 166.216, 166.217, 166.220; accord 25 U.S.C. §§ 393 ("The restricted allotment of any Indian may be leased for . . . grazing purposes by the allottee . . . , subject only to the approval of the superintendent . . . ."), 397 ("Where lands are occupied by Indians who have bought and paid for the same, . . . the same may be leased by authority of the

council speaking for such Indians, for a period not to exceed five years for grazing"), 402 ("Any Indian allotment held under a trust patent may be leased by the allottee for a period not to exceed five years, . . . and the proceeds of any such lease shall be paid to the allottee or his heirs, or expended for his or their benefit"), 415(a) ("Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, . . . for grazing purposes"), 3711(a)(6) (providing that one of Secretary of Interior's management objectives is "[t]o assist trust and restricted Indian landowners in leasing their agricultural lands for a reasonable annual return").

The BIA has authority to grant permits on behalf of Indian landowners when they have given the BIA written authority to do so, among other things. 25 C.F.R. § 166.205, 166.206, 166.217(c), 166.400. When specified in the permit, the BIA collects rent and distributes the funds to the Indian landowners. 25 C.F.R. §§ 166.411-166.413, 166.422-166.424. A permit must specify whether grazing rental payments will be made directly to the Indian landowners or to the BIA on their behalf. 25 C.F.R. § 166.413(a). If the latter is specified, the BIA will issue an invoice to the permittee. 25 C.F.R. § 166.411. Rent collected by the BIA is distributed to the Indian landowners. 25 U.S.C. §§ 402, 3711(a)(6); 25 C.F.R. §§ 166.422-166.424. A permit cannot be assigned, subpermitted, transferred, or

mortgaged without the approval of the BIA and the consent of the parties to the permit. 25 C.F.R. § 166.229(a).

Indian tribes may develop allocation procedures to apportion grazing privileges to tribal members without competition, including for Indian land that is covered by an existing permit. See 25 C.F.R. §§ 166.4, 166.203, 166.217(a), 166.218, 166.227(a)(3), 166.228(c). The tribe has adopted an allocation process and has established an allocation committee to review and to determine applicant eligibility for allocation privileges. A56-57, 61-65. The allocation committee is empowered to grant a written application for an allocation privilege for a range unit that is currently subject to a permit. A61. Any tribal members who are adversely affected by a decision of the allocation committee may appeal to the tribe's executive committee, the decisions of which are "final, conclusive and binding on all parties." A64.

The BIA has broad authority to address permit violations on behalf of the Indian landowners. See 25 C.F.R. §§ 166.700-166.709. After providing the required written notice and opportunity to cure, the BIA has discretion, among other things, (a) to cancel the permit, (b) to invoke other available remedies pursuant to the permit, or (c) to grant additional time to cure the violation. 25 C.F.R. §§ 166.703, 166.704, 166.705(a). The BIA will make such determinations

in consultation with the Indian landowners, as appropriate. 25 C.F.R. § 166.705(a).

If the BIA decides to cancel a permit, the agency must send the permittee a written notice of cancellation, including: (1) the grounds for cancellation; (2) any unpaid rent, interest charges, or late payment penalties due pursuant to the permit; (3) notice of the permittee's right to appeal; and (4) notice that the permittee must vacate the property within 30 days of the date of receipt of the written notice of cancellation, unless an appeal is filed within that time. 25 C.F.R. § 166.705(c). Cancellation decisions will generally become effective 30 days after the permittee receives notice of cancellation unless an appeal is filed, in which case the permittee must continue to pay rent and must comply with the other terms of the permit. 25 C.F.R. § 166.707. If a permittee remains in possession of Indian land after the expiration or cancellation of a permit, the BIA will treat the unauthorized use as a trespass and "will take action to recover possession of the Indian land on behalf of the Indian landowners, and pursue any additional remedies available under applicable law, including the assessment of civil penalties and costs." 25 C.F.R. § 166.709; see also 25 C.F.R. § 166.801 et seq. (setting forth procedures for addressing trespasses).

The grazing regulations and the Departmental regulations governing appeals

from administrative actions by BIA officials may be appealed to the next highest official and, ultimately, to the IBIA. 25 C.F.R. §§ 2.2, 2.3, 2.4(e), 2.8, 166.3; 43 C.F.R. §§ 4.1(b)(2)(I), 4.314(b), 4.318, 4.330, 4.331(a). The board's decisions become final for the Department of the Interior upon the date of issuance and must be given immediate effect. 43 C.F.R. §§ 4.21(d), 4.312. Final decisions of the board are subject to review by a district court pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. See 25 C.F.R. § 2.6(a); 43 C.F.R. §§ 4.21(c), 4.314(a).

STATEMENT OF FACTS

This case involves the cancellation of grazing permits that were granted by the Government on behalf of Indian landowners. In January 2001, the BIA granted Mr. O'Bryan grazing permits for range units 6, 9, and 719, among others, within the Pine Ridge Reservation. A7-12. The permits were issued "[b]y authority of law and under the regulations (25 C.F.R. 166)" and granted Mr. O'Bryan "permission to hold and graze livestock on the Trust Indian and Government-owned lands" in the specified range units for the period November 2000 through October 2005. A7. The permits specified the rent and the execution or preparation fees that Mr. O'Bryan was to pay to BIA. A7.

The permits specified the number of head of cattle that Mr. O'Bryan could

graze pursuant to each permit and provided that only livestock bearing the brands and marks shown upon the permits could be grazed upon those range units. A7. Mr. O'Bryan was required to pay the annual rental and execution fees "[i]n consideration of the privileges granted by this permit." A8.

Each permit stated that it was revocable or modifiable in whole or in part, and that any part of the area covered by the permit could be excluded from the range unit by the Superintendent, Pine Ridge Agency, BIA ("Superintendent") in the exercise of his discretion. A8. Additionally, the permits stated that they could "not be assigned or sublet without the written consent of the parties thereto and the surety, pursuant to the regulations." A8.

Attached to and made part of the permits were certain range control stipulations, which stated, among other things, that "[i]f the number of livestock authorized is exceeded, the permittee shall be liable to pay as liquidated damages, in addition to the regular fees for the full grazing season as provided in the permit, a sum equal to 50% thereof for such excess livestock and such livestock shall be promptly removed from the unit." A13. The Superintendent reserved the right to direct the movement of livestock whenever he deemed such action necessary for the protection and utilization of the range. A13.

In March 2002, Mr. O'Bryan informed the tribe's allocation committee that

he wished to turn over range unit 719 to his brother and to drop his Indian preference bid for range unit 6. A44,[3] 97. In April 2002, pursuant to Mr. O'Bryan's request, the allocation committee voted to remove Mr. O'Bryan's Indian preference for range units 6 and 719. A44, 99-100. In April 2003, the allocation committee voted to allocate range unit 719 to two other members of the tribe. A44, 101.

In May 2003, the Superintendent informed Mr. O'Bryan that he had overstocked range units 6 and 9 in violation of his permits and ordered Mr. O'Bryan to remove the excess livestock within three days from receipt of the letter. A16, 45, 102. The Superintendent also stated that failure to abide by the specified use in Mr. O'Bryan's permit could subject him to cancellation of his permits within 10 days from his receipt of the letter. A16, 102. Additionally, the Superintendent noted that Mr. O'Bryan was using more than one brand in violation of his permits. A17, 103.

In June 2003, the tribe's land committee approved a motion requesting "that [the BIA] stop all actions from this day forward against [Mr. O'Bryan] until we set up a meeting to resolve this issue in a positive way" and voted to hold another meeting in late June 2003, to discuss the issue further. A17, 45, 104. However, it

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[3] In this brief, we treat factual allegations in the complaint as true.

is unclear whether the land committee in fact met in late June 2003, or what, if anything, the committee decided or recommended at that meeting. A23.

In a June 2003 letter to the Superintendent, Mr. O'Bryan contended that he was not overstocking range units 6 and 9, requested that his permits be changed to seasonal use, stated that he would remove the yearlings in July and August 2003, and explained his assumption that, because one of his brands was approved for another range unit for which he held a permit, that brand was also authorized for range units 6 and 9. A17, 45, 105-06. In July 2003, the Superintendent informed Mr. O'Bryan that his permits for range units 6 and 9 would be cancelled and that he would be assessed $55,505 in liquidated damages pursuant to § 2 of the range control stipulations. A17-18, 45, 107. Among other things, the Superintendent based his decision upon Mr. O'Bryan's overstocking of range units 6 and 9 in violation of the terms of his permits, his failure to cure the overstock violations after being requested to do so or to provide a requested grazing plan, and his use of more than one brand in violation of the terms of his permits. A17-18, 107. Mr. O'Bryan appealed the Superintendent's decision to the acting Great Plains Regional Director, BIA ("Regional Director"). A18, 45.

In October 2003, Mr. O'Bryan attempted to make a rental payment to the BIA for use of range units 6 and 9 during the 2004 grazing season. A45.

However, according to the complaint, the agency "would not authorize him to use units 6 and 9 until the appeal process had been completed because it had canceled his use of those units." A45.

In December 2003, the Superintendent sustained the Superintendent's decision to cancel the permits, increased the liquidated damages to $94,928, and directed the Superintendent to assess an additional $35,018 for grazing livestock without pasturing authorization. A18-19, 45, 109-111.

In October 2004, the BIA allowed Mr. O'Bryan to use range units 6 and 9 for the 2005 grazing season. A46. Mr. O'Bryan paid rent to the BIA for the 2005 season, but the agency applied that sum to the 2004 grazing season and required Mr. O'Bryan to make an additional payment for the 2005 grazing season. A46.

In July 2005, the IBIA sustained the Superintendent's decision to cancel Mr. O'Bryan's permits for range units 6 and 9. A15-28, 46. Among other things, the IBIA rejected Mr. O'Bryan's argument that the purported bias of James Glade, a BIA employee, led to Mr. O'Bryan's permit violations or affected the decisions of either the Superintendent or the Regional Director to cancel his permits. A22. Moreover, the board found that the overstocking violation alone was sufficient to support cancellation of the permits. A27. The IBIA also reversed the assessment of $35,018 for violation of the pasturing requirements pursuant to tribal law,

vacated the award of $94,928 in liquidated damages, and remanded the matter to the Regional Director to determine the reasonableness of the liquidated damages. A25, 28, 46.

On an unspecified date after the board's July 2005 decision, Mr. O'Bryan asked for an extension of time to remove and sell his cattle, but he received no answer from the agency. A46. On an unspecified date, personnel from an unidentified police department gave Mr. O'Bryan three days to remove his cattle from range units 6 and 9. A46.

On remand, the Regional Director issued a decision reducing the liquidated damages to $23,732. A46. Mr. O'Bryan appealed that decision to the IBIA. A46. In November 2008, the IBIA vacated the Regional Director's assessment of recalculated liquidated damages and remanded for a calculation of actual damages, if any, attributable to the overstocking. A29-41. Significantly, the IBIA reiterated its 2005 holding that Mr. O'Bryan "is liable for his overstocking violations," and "again reject[ed Mr. O'Bryan's] arguments to the contrary." A31. As of the date of this brief, the Regional Director had not issued a decision pursuant to the board's November 2008 remand order.

SUMMARY OF THE ARGUMENT

The Court of Federal Claims correctly concluded that Mr. O'Bryan's permits were not contracts between the United States and him. Mr. O'Bryan's argument that his permits were contracts with the United States ignores, among other regulatory provisions, the definition of a permit as an agreement between Indian landowners and a permittee and the fact that Indian landowners are generally responsible for granting grazing permits. Thus, the Government's interpretation is consistent with the language of the permits and the applicable statutes and regulations, whereas Mr. O'Bryan's interpretation contradicts the permits and the relevant statutes and regulations.

Further, Mr. O'Bryan's claims regarding the cancellation of his permits were or could have been raised before the IBIA; thus, those claims are now barred pursuant to the doctrine of res judicata. Finally, Mr. O'Bryan's assertions that the Government's conduct constitutes a breach of trust responsibility or a taking are barred because those assertions were never presented to the Court of Federal Claims. In short, the decision of the United States Court of Federal Claims should be affirmed.

ARGUMENT

I. Standard Of Review

This Court reviews de novo the dismissal of a claim by the United States Court of Federal Claims. Conservation Group, LLC v. United States, 597 F.3d 1238, 1242 (Fed. Cir. 2010); Cambridge v. United States, 558 F.3d 1331, 1335 (Fed. Cir. 2009). This Court reviews questions of law, including the interpretation of statutes and regulations, de novo. Augustine v. Dep't of Veterans Affairs, 503 F.3d 1362, 1365 (Fed. Cir. 2007). In the absence of factual disputes, the question of contract formation is a question of law that is reviewed de novo by this Court. Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997).

II. Mr. O'Bryan's Permits Were Not Contracts With The United States

The court properly found that Mr. O'Bryan's permits were not contracts with the United States, because they were contracts between Indian landowners and him. " 'To maintain a cause of action pursuant to the Tucker Act that is based on a contract, the contract must be between the plaintiff and the government.' " Cienega Gardens v. United States, 194 F.3d 1231, 1239 (Fed. Cir. 1998) (quoting Ransom v. United States, 900 F.2d 242, 244 (Fed. Cir. 1990)) (alteration omitted). "In other words, there must be privity of contract between the plaintiff and the United States." Id. (citing Erickson Air Crane Co. v. United States, 731 F.2d 810,

813 (Fed. Cir. 1984)).

The party alleging the existence of a contract must show "a mutual intent to contract including an offer, an acceptance, and consideration," and that the Government representative who entered into or ratified the putative agreement had actual authority to bind the United States. Trauma Serv. Group, 104 F.3d at 1325. In the context of Government contracts, "consideration must render a benefit to the government, and not merely a detriment to the contractor; government officials do not have authority to make contracts in which no benefit flows to the government." Metzger, Shadyac & Schwarz v. United States, 12 Cl. Ct. 602, 605 (1987) (citations omitted).

A. The Plain Language Of The Permits And The Applicable Statutes And Regulations Demonstrates That The Permits Were Contracts With Indian Landowners, Not The United States

As the Court of Federal Claims correctly found, the authority for issuing permits upon individually-owned Indian lands rests in the first instance with Indian landowners, subject to the BIA's approval. 25 U.S.C. §§ 393, 397, 402, 415(a), 3711(a)(6); 25 C.F.R. §§ 166.1(a), 166.203, 166.205, 166.216, 166.217, 166.220. Neither Mr. O'Bryan's permits, the applicable statutes, nor the grazing regulations indicate that the United States is a party to those permits. Moreover, as the Court of Federal Claims correctly held, the Government's role in signing,

approving, and supervising Mr. O'Bryan's permits did not render the United States a party to those permits. O'Bryan, 93 Fed. Cl. at 63-64. Instead, in exercising that supervisory role, the Government was acting pursuant to its trust responsibilities for Indian-owned agricultural lands. Id. at 64.

As the Court of Federal Claims observed, the Supreme Court has held that contracts such as Mr. O'Bryan's permits between a private party and Indians or Indian tribes are not contracts with the United States. In United States v. Algoma Lumber Co., 305 U.S. 415, 419 (1939), the Secretary approved a contract for the sale of timber between the Superintendent of the Klamath Indian School and a timber company pursuant to the predecessor to 25 U.S.C. § 407. The contracts were approved by the Assistant Secretary of the Interior. Algoma Lumber, 305 U.S. at 419. Payments for timber were made payable to the Superintendent, who then deposited the payments for the benefit of the Indians. Id. at 420.

The timber company claimed that it had overpaid for the timber and brought a breach of contract claim against the Government to recover the alleged overpayments. Id. at 417. In rejecting the company's claim, the Court held that approval by the Secretary did not create privity of contract between the company and the Government, because the Government's supervisory role regarding the execution of contracts involving Indians is "consistent with the exercise of its

function as protector of the Indians without the assumption by the United States of any obligation to the [other contracting party]." Id. at 422; see also Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 372 (1968) (holding that although approval of Secretary is required for leasing of allotted land for mining purposes pursuant to 25 U.S.C. § 396, "he is not the lessor and he cannot grant the lease on his own authority").

Similarly, in Sangre de Cristo Development Co. v. United States, 932 F.2d 891, 893 (10th Cir.1991), the Government approved a lease between a developer of tribal trust lands and the Tesuque Indian Pueblo pursuant to 25 U.S.C. § 415(a). The plaintiffs challenged the Secretary's cancellation of the lease pursuant to a breach of contract theory. In rejecting the plaintiffs' claim, the court of appeals held:

> The United States had no property interest in the Pueblo's land. The United States was involved only because its approval was required under 25 U.S.C. § 415(a). Nowhere in § 415 does Congress indicate that the United States is to act as a party to a lease contract between an Indian tribe and a lessee. Section 415 is no different than many other federal statutes that require federal approval of private agreements. We reject the argument that such statutes render the United States a party to agreements reached between private contracting parties merely because its approval is required before the agreements become effective.

932 F.2d at 895. The court also rejected the plaintiffs' argument that as trustee for the Pueblo, the United States became liable to the company under a breach of trust theory, as "[t]he United States never entered into a contract with [the company] on behalf of the Pueblo." Id. The court concluded that "the United States is not liable to third parties when it contracts with them on behalf of Indian tribes." Id. (citing Algoma Lumber, 305 U.S. at 423).[4]

In this case, the BIA's supervisory role regarding the execution and administration of grazing permits for Indian land is "consistent with the exercise of its function as protector of the Indians without the assumption by the United States of any obligation to the [permittee]." Algoma Lumber, 305 U.S. at 422. As in Algoma Lumber, Mr. O'Bryan's permits were agreements of individual Indians and were issued by the Superintendent on behalf of Indian landowners. 25 C.F.R. § 166.4. Thus, the permits represented an exercise of the Government's "plenary power to take appropriate measures to safeguard the disposal of property of which

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[4] The Court of Federal Claims similarly has held that the Government is not in privity with private contracting parties merely because it approves or administers the parties' agreements. See, e.g., Saguaro Chevrolet, Inc. v. United States, 77 Fed. Cl. 572 (2007); Demontiney v. United States, 54 Fed. Cl. 780 (2002), aff'd, 81 F. App'x 356 (Fed. Cir. 2003); McNabb, 54 Fed. Cl. 759; Sucesion J. Serralles, Inc. v. United States, 46 Fed. Cl. 773 (Fed. Cl. 2000); Warr v. United States, 46 Fed. Cl. 343 (2000); Navajo Nation v. United States, 46 Fed. Cl. 217, 235 (2000), rev'd on other grounds, 263 F.3d 1325 (Fed. Cir. 2001), rev'd, 537 U.S. 488 (2003).

the Indians are the substantial owners," and the Government's "[e]xercise of that power d[id] not necessarily involve the assumption of contractual obligations" by the Government. Algoma Lumber, 305 U.S. at 421.

Moreover, the United States has no property interest in the land covered by grazing permits. See Sangre de Cristo, 932 F.2d at 893. Instead, the United States is involved only because it is required to grant and to administer permits pursuant to the applicable statutes and the grazing regulations. See id. The Government cancelled Mr. O'Bryan's permits consistent with its trust responsibility to the Indian landowners to address permit violations as set forth in the grazing regulations, 25 C.F.R. §§ 166.700-166.709. See Sangre de Cristo, 932 F.2d at 895.

Nowhere in the applicable statutes or the grazing regulations does Congress indicate that the United States is to act as a party to a grazing permit between an Indian tribe or Indian landowners and a permittee. See id. In fact, Congress evinced an intent that permits subject to the grazing regulations should not be deemed contracts with the United States. Pursuant to § 3712 of AIARMA, Congress declined to waive sovereign immunity with regard to the BIA's administration and supervision of permits for Indian agricultural land. 25 U.S.C. §§ 3703(12)(d), 3712(a), 3712(d). It is reasonable to conclude that Congress did

not intend for permits for Indian agricultural land to be construed as contracts with the United States, which would enable permittees potentially to circumvent AIARMA's prohibition against recovering money damages against the United States relating to the administration of such permits.

Moreover, because all of the rent Mr. O'Bryan paid to the BIA was distributed to the Indian landowners, see 25 C.F.R. §§ 166.422-166.424; see also 25 U.S.C. §§ 402, 3711(a)(6), the Government received no consideration pursuant to the permits. Nor are we aware of any provisions in the grazing regulations – or any other statutes or regulations – that confer upon the Superintendent – or any other Government official – actual authority to bind the United States in contracts for grazing upon Indian lands. Because there was no benefit to the Government flowing from Mr. O'Bryan's permits, and there is no Government official with authority to bind the United States in contracts for grazing upon Indian-owned land, Mr. O'Bryan's permits cannot be deemed contracts with the United States. Trauma Serv. Group, 104 F.3d at 1325, 1327; Metzger, 12 Cl. Ct. at 605.

Mr. O'Bryan advances several arguments in an attempt to transform his permits into contracts with the United States, but those arguments are without merit. First, he notes that the United States holds legal title to the land that was subject to the permits, that the United States has a trust relationship with the

Indian landowners, and that the permits make reference to government-owned lands. App. Br. 19-20. As discussed above, however, courts have held that the United States's role as trustee for Indians does not render the United States liable where, as here, it does not enter into a contract on behalf of the Indians. Sangre de Cristo, 932 F.2d at 895. Moreover, whether the United States holds legal title to the land is irrelevant, as the pertinent ownership interest for purposes of the grazing regulations is the Indian landowners' "interest in Indian land in trust or restricted status," i.e., their "ownership right to the surface estate of Indian land." 25 C.F.R. § 166.4; see also 25 U.S.C. § 3703(13). The terms "Government land" and "Indian land" are separately defined, 25 C.F.R. § 166.4; thus, land owned by individual Indians is not considered Government-owned land pursuant to the grazing regulations. Indeed, Mr. O'Bryan concedes that Indian landowners have an interest in Indian land, as he sought damages in count six due to alleged overgrazing upon his "individually owned land within range unit 9." A48; see also A46. Pursuant to the relevant statutes and regulations, Mr. O'Bryan's permits were contracts with the holders of the relevant "interests" in the permitted land – i.e., the "Indian landowners," as that term is defined in those statutes and regulations – not the United States.

Mr. O'Bryan also contends that nothing in AIARMA or the grazing

regulations renders the United States not liable for breach of the permits. That argument is a red herring, as Mr. O'Bryan did not assert any claims pursuant to AIARMA or the grazing regulations, nor has he argued that those provisions are money-mandating. See Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) ("[A] plaintiff must identify a separate source of substantive law that creates the right to money damages," i.e., a source that is "money mandating."). Nor could he have prevailed upon that argument, as AIARMA does not waive sovereign immunity with regard to the BIA's administration and supervision of permits for Indian agricultural land. 25 U.S.C. §§ 3703(12)(d), 3712(a), 3712(d). Instead, Mr. O'Bryan alleged that his permits were contracts with the United States. See 28 U.S.C. § 1491 (Court of Federal Claims possesses jurisdiction to entertain claims against the United States founded either upon "any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States" (emphasis added)).

Additionally, Mr. O'Bryan points to the permits' references to "parties" and contends that the permits do not mention Indian landowners. App. Br. 18-19, 21. Those assertions are without merit. First, the permits never identify the Superintendent as a "party." Instead, "Superintendent" and "parties" are distinct terms within the permits. See A8 ("The Superintendent will make decisions

relative to the interpretation of the terms of this permit and the range control stipulations which are attached hereto, and the terms of this permit cannot be varied in any detail as herein provided without the written approval of the parties thereto and the surety." (emphasis added)). Second, as Mr. O'Bryan concedes, his permits not only referred to Indian landowners, but treated them as distinct from the United States: "all of the permittee's obligations under the permit and the obligation of his sureties are to the United States as well as to the owner of the land." App. Br. 17 (quoting permits) (emphasis added)); see also A8 ("It is understood and agreed by the permittee that he shall fence out all open range lands which the owners have not authorized for inclusion under this permit" (emphasis added)).

B. The Government Administered Mr. O'Bryan's Grazing Permits As Revocable Licenses

The Government administered Mr. O'Bryan's permits as revocable licenses. Courts routinely hold that grazing permits for Government-owned land are not contracts. See Or. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 983 (9th Cir. 2006) ("A grazing permit is a license."); United States v. Smith, 39 F.2d 851, 856 (1st Cir. 1930) (holding that a license or permit to do business is not a contract); Hage v. United States, 35 Fed. Cl. 147, 166 (1996) (finding that the

plaintiffs' "grazing permit has the traditional characteristics and language of a revokable license, not a contract" and holding that "as a matter of law the permit does not create a contract between the parties"); accord Colvin Cattle Co. v. United States, 67 Fed. Cl. 568, 576 (2005), aff'd, 468 F.3d 803 (Fed. Cir. 2006); cf. Alabama Power Co. v. Fed. Power Comm'n, 128 F.2d 280, 288-89 (D.C. Cir. 1942) (holding that a license is a privilege from the sovereign). For example, in Hage, the court found that the plaintiffs' grazing permit was a license because, among other things, the Government had merely agreed to allow plaintiffs to graze cattle according to the permit terms for a specified period of time, the Government could modify the permit because of "resource conditions or management needs," and Congress had not conferred upon the Forest Service the requisite authority to enter into a grazing contract with plaintiffs. 35 Fed. Cl. at 167.

In this case, Mr. O'Bryan's permits were "revocable privileges" that allowed him to use certain land for the specific purpose of grazing his cattle. See 25 C.F.R. § 166.4 (stating that permit is "revocable privilege"); A59 (same); A8 (stating that "this permit is revocable in whole or in part pursuant to" the grazing regulations); Young v. Great Plains Reg'l Dir., Bureau of Indian Affairs, 40 IBIA 261, 262 (2005) (citing identical permit clause and stating that "Appellant's grazing permit explicitly allow[s] the removal of land without Appellant's

consent"). Further, land may be removed from a permit by the Superintendent. See 25 C.F.R. § 166.227; A13. The plain language of Mr. O'Bryan's permits "evidence[] no intention on behalf of the government to create a contract." Hage, 35 Fed. Cl. at 167. Additionally, neither the Superintendent nor any other BIA official was a contracting officer or had actual authority to bind the Government. 35 Fed. Cl. at 167 (concluding that Congress had not conferred upon Forest Service requisite authority to enter into grazing contract with plaintiffs, even though "Congress could turn these permits into contracts, leases or even fee estates, if it chose"). The fact that Mr. O'Bryan's permits were administered as revocable licenses further demonstrates that those permits were not contracts with the United States.

C. The Administration And Cancellation Of Grazing Permits Are Properly Challenged Through The Department Of The Interior's Administrative Process

Pursuant to the grazing regulations, the administration and cancellation of grazing permits may be appealed pursuant to a well-defined administrative process that includes the opportunity to appeal to the IBIA. 25 C.F.R. §§ 2.2, 2.3, 2.4(e), 2.8, 166.3, 166.705, 166.707; 43 C.F.R. §§ 4.1(b)(2)(i), 4.314(b), 4.318, 4.330, 4.331(a); see also McNabb, 54 Fed. Cl. at 772. After administrative appeals have been exhausted and Interior has issued a final decision, a district court may review

the agency's actions and grant relief pursuant to the APA. See 25 C.F.R. § 2.6(a); 43 C.F.R. §§ 4.21(c), 4.314(a); Anderson v. Babbitt, 230 F.3d 1158 (9th Cir. 2000); Crocker v. United States, 125 F.3d 1475, 1476 (Fed. Cir. 1997); Consol. Edison Co. of New York v. United States, 247 F.3d 1378, 1382 (Fed. Cir. 2001); McNabb, 54 Fed. Cl. at 772. Thus, the cancellation of a grazing permit constitutes final agency action which is "open to administrative and judicial review" pursuant to the APA. Wilkie v. Robbins, 551 U.S. 537, 553-54 (2007); cf. Fla. Rock Indus., Inc. v. United States, 791 F.2d 893, 898 (Fed. Cir. 1986) ("[W]e think it is indisputable[] that the proper way to challenge the decision to grant or withhold the permit would be under the [APA]."). Although Mr. O'Bryan cannot challenge the cancellation of his permits pursuant to a breach of contract theory in the Court of Federal Claims, he may ultimately appeal the cancellation decision to a district court pursuant to the APA. See O'Bryan, 93 Fed. Cl. at 66 (declining to transfer claims not within court's jurisdiction to district court pending determination of damages by agency).

In short, Mr. O'Bryan's permits were not contracts between the United States and him, as they were not entered into by an official with actual authority to bind the Government in contract, gave no consideration to the United States, and do not establish monetary remedies against the Government for their breach.

Rather, the permits were agreements between the Indian landowners and Mr. O'Bryan that were granted and administered by the Government on behalf of the Indian landowners, and any claims against the Government related to those permits must be brought pursuant to the Department of the Interior's administrative process. Accordingly, the Court of Federal Claims's holding that Mr. O'Bryan's permits were not contracts with the United States should be affirmed.

III. Mr. O'Bryan's Contract Claims Are Barred By Res Judicata

The Court of Federal Claims properly held that, even if Mr. O'Bryan's permits were contracts with the United States, his breach of contract claims are barred pursuant to the doctrine of res judicata, because they were or could have been presented to the IBIA. The doctrine of res judicata "embraces the two related concepts of claim preclusion and issue preclusion." Nasalok Coating Corp. v. Nylok Corp., 522 F.3d 1320, 1323 (Fed. Cir. 2008) (citation omitted). Issue preclusion, also called collateral estoppel, refers to "the effect of foreclosing relitigation of matters that have once been litigated and decided." Id. (internal quotation marks and citation omitted).

"Issue preclusion is generally appropriate if: (1) an issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3)

the resolution of the issue was essential to a final judgment in the first action; and (4) the party defending against issue preclusion had a full and fair opportunity to litigate the issue in the first action." Shell Petroleum, Inc. v. United States, 319 F.3d 1334, 1338 (Fed. Cir. 2003). Pursuant to the doctrine of claim preclusion, a party is precluded from litigating issues that could have been raised in the prior action when: (1) the prior decision was rendered by a forum with competent jurisdiction; (2) the prior decision was a final decision upon the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. Carson v. Dep't of Energy, 398 F.3d 1369, 1375 (Fed. Cir. 2005). Issue preclusion and claim preclusion apply with equal force to the findings of administrative bodies such as the IBIA. See Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991) ("We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality."); United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) ("When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.").

As the Court of Federal Claims correctly determined, the relevant facts at issue in Mr. O'Bryan's second and third claims – whether the cancellation of his permits for range units 6 and 9 was improper – are identical to issues that the IBIA already adjudicated, were actually litigated in the IBIA proceeding, and were rendered by a forum with competent jurisdiction. A15-28, 31, 46. Moreover, the board's July 2005 decision sustaining the cancellation of Mr. O'Bryan's permits for range units 6 and 9 became final on the date of issuance and was given immediate effect. 25 C.F.R. § 166.707; 43 C.F.R. §§ 4.21(d), 4.312.

Indeed, the only issue that the board remanded to the Regional Director was the calculation of damages – not the propriety of the permit cancellations. A25, 28, 46. In fact, in its November 2008 remand decision, the IBIA reiterated that Mr. O'Bryan "is liable for his overstocking violations," and "again reject[ed Mr. O'Bryan's] arguments to the contrary." A31. Thus, the cancellation of Mr. O'Bryan's permits for range units 6 and 9 is a final decision, and Mr. O'Bryan is precluded from re-litigating that issue before the Court of Federal Claims and this Court.

As demonstrated above, the IBIA decision was rendered by a forum with competent jurisdiction, was a final decision upon the merits, and the same cause of action and the same parties were involved in both cases. Accordingly,

Mr. O'Bryan's first claim, which alleged that the cancellation of his permit for range unit 713 was improper, is barred pursuant to the doctrine of res judicata, because that issue could have been advanced within his IBIA proceeding.

Mr. O'Bryan contends that he was denied a full and fair opportunity to litigate before the board, because he did not have the opportunity to call witnesses for live testimony and subject them to cross-examination, and because the IBIA could not award money damages, strike down Federal laws, set aside transfers of land, or convene jury trials. App. Br. 26-27. In support, he cites a single case from another circuit, but that case actually demonstrates that the board's decision should be given res judicata effect. See United States v. Wilson, 974 F.2d 514 (4th Cir. 1992) (holding that bankruptcy court order approving tax settlement between bankruptcy trustee and United States constituted determination of tax liabilities of debtor's estate even though debtor objected to settlement).

In this case, the Court of Federal Claims correctly concluded that the IBIA's inability to provide monetary relief did not render the decision not final, because Mr. O'Bryan was afforded a full and fair opportunity to be heard in the administrative proceeding, including the right to challenge any opposing evidence. O'Bryan, 93 Fed. Cl. at 64 n.6 (citing Restatement (Second) of Judgments § 83(2)(b) (1982)). Additionally, the IBIA may require a hearing if it determines

that there is an issue of fact.

Moreover, as the trial court observed, Mr. O'Bryan did not explain how the fact that the IBIA decision was made upon the basis of affidavits rather than live testimony hindered the effective presentation of his case. Id. The court correctly found that the IBIA "based its decision on undisputed facts" and, thus, that there was "no significance to this choice of procedure." Id. (citing EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc., 746 F.2d 375, 378 (7th Cir. 1984)). Further, like the IBIA, the Court of Federal Claims lacks jurisdiction to strike down Federal laws, to set aside transfers of land, or to convene jury trials. See Yeskoo v. United States, 34 Fed. Cl. 720, 731 & n.7, aff'd, 101 F.3d 715 (Fed. Cir. 1996) (holding that Court of Federal Claims lacks jurisdiction to declare a statute invalid); Brown v. United States, 105 F.3d 621, 624 (Fed. Cir. 1997) (holding that demands for declaratory or injunctive relief are outside jurisdiction of Court of Federal Claims); Bernard v. United States, 59 Fed. Cl. 497, 502, aff'd, 98 F. App'x 860 (Fed. Cir. 2004) (explaining that Court of Federal Claims "does not have equitable jurisdiction, other than bid protest claims."); Cook v. United States, 46 Fed. Cl. 110, 116 n. 13 (2000) (observing that Court of Federal Claims conducts trials without juries).

Mr. O'Bryan also asserts that the issue before the board was whether his

permits should have been modified to allow for seasonal use, not whether the cancellation of his permits was improper, and that the board never considered the actions of James Glade. App. Br. 28-29. Those contentions are demonstrably false. See A28 (affirming "the cancellation of [Mr. O'Bryan's] grazing permits for [range units] 6 and 9"); A22 (finding that Mr. O'Bryan failed to show that "the alleged bias of a BIA employee was the cause of [his] permit violation or that it affected" the decisions of the Superintendent or the Regional Director).

Additionally, Mr. O'Bryan urges that his third claim is not subject to res judicata because that claim alleged that he was not allowed to use range units 6 and 9 in 2004. However, the Court of Federal Claims properly found that Mr. O'Bryan's third claim was predicated upon the same argument as his second claim, i.e., "that his express and implied contract rights were . . . violated by the cancellation of his permits for range units 6 and 9 and by his exclusion from those range units during the 2004 grazing season." O'Bryan, 93 Fed. Cl. at 62 n.4.

Even assuming for the sake of argument that count three asserted a claim for Mr. O'Bryan's inability to use range units 6 and 9 during the 2004 grazing season, he would be barred from recovering damages pursuant to that claim. The Court of Federal Claims held that Mr. O'Bryan was entitled to a return of the rent he paid during the 2004 grazing season pursuant to count four. See id. at 65.

Mr. O'Bryan may not recover twice for that single injury pursuant to two separate legal theories. See City Line Joint Venture v. United States, 503 F.3d 1319, 1323 (Fed. Cir. 2007).

Further, Mr. O'Bryan asserts that count five "dealt with the contractual right to have full use and enjoyment of range units 6 and 9 during 2005." App. Br. 15. That claim, however, was not predicated upon a breach of contract theory. See A47. Thus, Mr. O'Bryan is barred from arguing in this Court that count five includes a breach of contract claim. See Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); Rentrop v. Spectranetics Corp., 550 F.3d 1112, 1117 (Fed. Cir. 2008) (noting that "appellate courts do not consider a party's new theories, lodged first on appeal" (citations and internal quotation marks omitted)).

Because Mr. O'Bryan's claims regarding the cancellation of his permits were or could have been presented to the IBIA, the Court of Federal Claims's holding that those claims are now barred pursuant to the doctrine of res judicata should be affirmed.[5]

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[5] Mr. O'Bryan does not challenge the trial court's decision with respect to counts four, six, seven, and eight, and the non-contract-based theories asserted in counts one, two, three, and five; thus, he has waived those issues. See Becton

IV. This Court Should Disregard Mr. O'Bryan's Breach Of Trust Responsibility And Taking Arguments Because He Did Not Raise Those Issues Below

Mr. O'Bryan asserts that even if his permits were contracts with the Indian landowners and not the United States, the cancellation of his permits constitutes a breach of trust responsibility or a taking pursuant to the Fifth Amendment to the United States Constitution. Mr. O'Bryan did not present those arguments to the Court of Federal Claims.[6] Thus, this Court should not consider those contentions on appeal. See Singleton, 428 U.S. at 120; Rentrop, 550 F.3d at 1117.

Even assuming for the sake of argument that Mr. O'Bryan had argued in the Court of Federal Claims that the cancellation of his permits constituted a breach of trust responsibility or a taking, those arguments would not have withstood our motion to dismiss. To raise a breach-of-trust claim for damages against the United

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Dickinson & Co. v. C.R. Bard, Inc., 922 F.2d 792, 800 (Fed. Cir. 1990) ("[A]n issue not raised by an appellant in its opening brief . . . is waived.").

[6] Mr. O'Bryan did allege in his sixth claim that his individually owned land had been overgrazed and permanently damaged in violation of the United States's trust responsibilities to maintain the land, and his fourth claim asserted that the BIA's application of his rental payment to the 2004 grazing season constituted a taking of his property. O'Bryan, 93 Fed. Cl. at 62 n.4; A47-48. As discussed above, the trial court dismissed count six pursuant to Mr. O'Bryan's motion for voluntary dismissal, and the court treated count four as a claim for unlawful or illegal exaction and directed the clerk to enter judgment upon that count. O'Bryan, 93 Fed. Cl. at 65-66.

States, a plaintiff " '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.' " United States v. Navajo Nation, --- U.S. ----, 129 S. Ct. 1547, 1552 (2009) (quoting United States v. Navajo Nation, 537 U.S. 488, 506 (2003)). " 'If that 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.' " Id. (quoting Navajo Nation, 537 U.S. at 506) (alterations omitted). The existence of a general trust relationship between the United States and the Indian people alone is insufficient to support jurisdiction. Navajo Nation, 537 U.S. at 506. "Instead, the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." Id.

Mr. O'Bryan's complaint does not identify a substantive source of law that establishes specific fiduciary or other duties, nor does he allege that the Government failed faithfully to perform any such duties. Those pleading failures warrant dismissal of his breach of trust responsibility claim for lack of jurisdiction. See Lebeau v. United States, 474 F.3d 1334, 1340 (Fed. Cir. 2007); Ledford v. United States, 297 F.3d 1378, 1381-82 (Fed. Cir. 2002). Nor could Mr. O'Bryan identify a money-mandating source of law that would support an award of

damages for the cancellation of his permits. As demonstrated above, Congress expressly declined to waive sovereign immunity with regard to the BIA's administration and supervision of grazing permits upon Indian agricultural land. 25 U.S.C. §§ 3703(12)(d), 3712(a), 3712(d).

Even assuming for the sake of argument that Mr. O'Bryan could identify a money-mandating source of law, the United States's role as trustee for the Indian landowners does not render the United States liable to a permittee pursuant to a breach of trust theory, because "[t]he United States never entered into a contract with [Mr. O'Bryan] on behalf of" the Indian landowners. Sangre de Cristo, 932 F.2d at 895.

Moreover, Mr. O'Bryan cannot assert a taking claim because his permits were contracts with Indian landowners. See, e.g., Hughes Commc'ns Galaxy, Inc. v. United States, 271 F.3d 1060, 1070 (Fed. Cir. 2001) ("[T]he concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking claim." (internal citation omitted)), reh'g and reh'g en banc denied (Fed. Cir. 2002). Therefore, any breach of trust responsibility or taking claims relating to the cancellation of Mr. O'Bryan's permits necessarily

would have been dismissed by the Court of Federal Claims.

CONCLUSION

For these reasons, the decision of the United States Court of Federal Claims should be affirmed.

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December 10, 2010

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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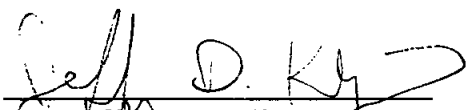

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December 10, 2010

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 10th day of December, 2010, I caused to be placed in the United States mail (first class mail, postage prepaid) copies of "BRIEF FOR DEFENDANT-APPELLEE," addressed as follows:

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