IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GRACE M. GOODEAGLE, et al.,	)	
Plaintiffs,	)	
v.	)	No. 12-431L
	)	Hon. George W. Miller
UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS

Nancie G. Marzulla
Roger J. Marzulla
MARZULLA LAW, LLC
1150 Connecticut Avenue, NW
Suite 1050
Washington, DC 20036
(202) 822-6760 (telephone)
(202) 822-6774 (facsimile)
Nancie@marzulla.com
Roger@marzulla.com

Counsel for Plaintiffs

Stephen R. Ward
John Williams
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, OK 74172
(918) 586-8978 (telephone)
(918) 586-8698 (facsimile)
sward@cwlaw.com
jwilliams@cwlaw.com

Of Counsel

Dated: November 26, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules of Civil Procedure

Regulations

PLAINTIFFS' OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS

Plaintiffs, Grace M. Goodeagle, Thomas Charles Bear, Edwina Faye Busby, Phyllis Romick Kerrick, Jean Ann Lambert, Florence Whitecrow Mathews, Ardina Revard Moore, Tamara Anne Romick Parker, Fran Wood, individually and on behalf of similarly situated members of the Quapaw Tribe of Oklahoma (O-Gah-Pah) and the class they represent (collectively "Goodeagle") oppose Defendant's Partial Motion to Dismiss.

The Government bases its motion for partial dismissal largely on mischaracterizations of the Goodeagle complaint. At times the mischaracterizations are so at odds with the allegations in the complaint that it appears that the Government is referring to some other complaint in some other lawsuit. Suffice it to say that the allegations in the Goodeagle complaint fully comply with the notice pleading requirements in RCFC 8, and are timely under the Appropriations Act.

The Goodeagle complaint also rests directly on and cites extensively to the Quapaw Analysis, which the Government accepted as final in November 2010. In fact, the Government also has the entire database of up to half-a-million documents that were collected (in large part from Bureau of Indian Affairs repositories and from the National Archives and Records Administration), synthesized, and ultimately analyzed in reaching the conclusions set forth in the Quapaw Analysis. Indeed, the parties had initial mediation meetings following submission of the Quapaw Analysis. There is therefore no credible basis for the Government's motion based on its suggestion that these claims are not credible, well-documented, and timely under the Appropriations Act. There is even

less basis for the Government's motion for a more definite statement.

This Court should therefore deny the Government's motion, and require the Government to answer the Goodeagle Complaint.

Factual Background

This lawsuit, brought as a class action on behalf of all similarly situated members of the Quapaw Tribe, is based on monetary losses suffered by the Plaintiffs and their ancestors by various breaches of trust by their Government trustee. These breaches arise out of the history of the lead and zinc mining boom that occurred in Quapaw country in the early to mid-1900s, and which is detailed in the Goodeagle Complaint. As reflected in the complaint, Goodeagle alleges various breaches of trust by the Government associated with failure to collect and deposit and mismanagement of monies owed to the Plaintiffs for leasing of their town lots;[1] failure to collect and deposit and mismanagement of monies owed to the Plaintiffs for leasing of their agricultural land;[2] failure to collect monies and mismanagement of monies owed to Plaintiffs related to mining and the devastating environmental aftermath of the mining era that persists to this day;[3] and, general mismanagement of funds resulting in the loss of monies that otherwise would have gone into the Goodeagle Plaintiffs' Individual Indian Money Accounts.[4]

Goodeagle's claims for relief are based directly on the Quapaw Analysis. As set forth in paragraph 19 of the complaint, the parties have agreed that the Quapaw Analysis

[1] Compl. ¶¶ 40–45.
[2] Compl. ¶¶ 46–51.
[3] Compl. ¶¶ 52–56.
[4] Compl. ¶¶ 60–62.

serves as a meaningful accounting of the Quapaw Tribe's and tribal members' claims, within the meaning of the Appropriations Act:

> On November 5, 2004, the Quapaw Tribe of Oklahoma, in settlement of a suit for an accounting of historic federal management of the funds and assets of the Tribe, entered into a Settlement Agreement with the United States Department of Interior, the Bureau of Indian Affairs and others, in which the parties agreed that Quapaw Information Systems, Inc., a not-for-profit Tribal entity, would identify, select, and analyze documents, and prepare an analysis of the federal government's management of certain Tribal assets, as well as of the Government's management of the lands and other assets allotted to eight individual members of the Tribe. In return, the Tribe agreed to dismiss its lawsuit and to waive any rights to obtain from the United States an accounting of its trust assets or asset management history of its trust assets for all time periods up to and including the effective date of the Settlement Agreement. The Parties further agreed that upon completion of the Quapaw Analysis, the Tribe would be deemed to have been furnished with an accounting of the Tribe's trust assets from which the Tribe can determine whether there has been a loss within the meaning of Pub. L. No. 108-7 (2003), the Appropriations Act of 2003, and similar provisions passed each successive year.[5]

Funded by the federal government, the Quapaw Analysis was prepared by a third party—Quapaw Information Systems—on behalf of the Quapaw Tribe and its members. The Goodeagle Complaint describes the exhaustive 6-year process undertaken during which up to half-a-million documents—in short, every document that could be found that was still in existence—were reviewed and analyzed, resulting in the conclusions set forth in the Quapaw Analysis. Paragraph 21 of the Goodeagle Complaint states:

> [T]he Quapaw Analysis team conducted a methodical examination of the files and documents that were made available by the Office of Historical Trust Accounting and other agencies to determine whether and the extent to which the Secretary of the Interior met his or her fiduciary obligations to the Tribe and to the participating individual trust beneficiaries, as defined by applicable federal law and by regulations prescribed by the Secretary in

[5] Compl. ¶ 19.

the fulfillment of trust responsibilities to individual Indians and to Tribes. Specifically, Quapaw Information Systems:

- Examined the lease files for the individual allotments studied, and supporting documentation;
- Reconstructed lease files;
- Prepared abstracts of title from court land records;
- Tracked receipts to restore payment histories;
- Researched documents by date to establish timelines;
- Made comparisons when documents were available;
- Constructed synopses to show management practices;
- Accumulated miscellaneous facts necessary to support conclusions in analysis; and,
- Assembled relevant documents for review in a dossier for each issue.[6]

As a result, "[o]n June 1, 2010, Quapaw Information Systems completed and transmitted its completed Quapaw Analysis Report to the Government, and on November 19, 2010, the Department of Interior accepted the Report as complete."[7] The Goodeagle Complaint—this lawsuit—is the end result of the Quapaw Analysis, seeking relief for the Government's breaches of trust researched, documented, and described in that accounting: "The Quapaw Analysis identified numerous and pervasive breaches of the Government's fiduciary duty of trust as to the assets of the Quapaw Tribe and its members, as described more fully in this Complaint."[8]

[6] Compl. ¶ 21.
[7] Compl. ¶ 22.
[8] Compl. ¶ 23.

Procedural Background

Following completion of the Quapaw Analysis, and its acceptance as final by the Government in November 2010, Goodeagle filed this action on January 5, 2011, seeking money damages based on the Government's breach of its fiduciary and trust obligations owing to them. The Government moved to dismiss this lawsuit under 28 U.S.C. § 1500. In an effort to avoid triggering Section 1500, Goodeagle dismissed and then refiled the complaint on September 9, 2011. But the Government again moved to dismiss the Complaint under Section 1500, and on June 12, 2012, after briefing and argument on the motion, the court dismissed this lawsuit.[9] Goodeagle appealed this dismissal on August 13, 2012. Following discussion between the parties, Goodeagle redrafted the complaint and refiled it on June 28, 2012. Instead of answering this complaint, on August 27, 2012, the Government filed this motion for partial dismissal, on grounds other than Section 1500. On November 6, 2012, Goodeagle moved to voluntarily dismiss its appeal of the trial court's dismissal of the earlier complaint under Section 1500.

Issues Presented for Review

1. Under the Appropriations Act, claims for mismanagement of trust funds accrue upon completion of a meaningful account. The parties have agreed that the Quapaw Analysis, accepted as final by the federal government in November 2010, was to serve as that meaningful accounting of Quapaw claims, and these claims are set forth in the Goodeagle complaint. Should the Government's motion to dismiss these claims as untimely be denied?

2. Motions for a more definite statement are disfavored; to prevail the defendant must show prejudice and an inability to answer the complaint. Here, the complaint is based directly on the Quapaw Analysis, which was prepared based on information and documents from the Government itself. Plus, the Government has the

[9] *Goodeagle v. United States*, 105 Fed. Cl. 164 (2012).

Analysis in its possession. Can the Government sustain its burden of proving that a motion for a more definite statement is needed?

3. Ignoring the complaint, the Government contends that Goodeagle's Fifth Cause of Action is preempted by CERCLA. But there is no absolute bar to a challenge involving a cleanup under CERCLA. Here, Goodeagle does not challenge any EPA actions or decisions under CERCLA but instead asserts that the Government has breached its fiduciary obligations owed to Goodeagle. Does CERCLA require that this breach of trust claim be dismissed?

4. This Court has jurisdiction over trust claims for breaches of substantive law establishing specific fiduciary duties, which can be fairly interpreted as mandating money damages for the breach. Mischaracterizing and ignoring the complaint and Quapaw Analysis, the Government asks this Court to dismiss Goodeagle's Sixth Cause of Action. Since, however, the complaint identifies specific breaches of money-mandating statutory duties and cites to the Quapaw Analysis as further support, should the Government's motion be denied?

5. Courts recognize legislative and judicial takings as legally cognizable takings claims, and also recognize claims as property. Here, Goodeagle has pleaded in the alternative that if *Cobell* requires dismissal of any of its claims in this lawsuit, then Goodeagle seeks just compensation for the judicial or legislative taking of those claim. Has Goodeagle stated a legally cognizable claim for relief under Rule 12(b)(6)?

Summary of Argument

In its motion, the Government does not seek dismissal of the Goodeagle Complaint in its entirety. The Government does not seek dismissal of Goodeagle's claims related to breaches of trust by the Government in its administration of mining leases (First[10] and Second[11] Causes of Action), in mismanagement of agricultural leases (Fourth Cause of Action),[12] or in its failure in managing Individual Indian Money (IIM) accounts (Seventh Cause of Action).[13]

[10] Compl. ¶¶ 28–35.
[11] Compl. ¶¶ 36–39.
[12] Compl. ¶¶ 46–51.
[13] Compl. ¶¶ 60–62.

The Government's motion to dismiss first targets Goodeagle's Third Cause of Action,[14] which alleges "Failure to Collect Rents/Payments for Town Lots," as untimely. The town lots are in and around the town of Picher, Oklahoma, a site that developed rapidly on Quapaw lands in and around mining operations. Congress authorized the Secretary of the U.S. Department of the Interior to lease Quapaw lands as town lots or otherwise permit town lot development and imposed on the Secretary the duty to collect rents and royalties from leasing of these lots.[15] Goodeagle's third claim is based on the Secretary's failure to deposit income collected through leasing of these lots, and failure to collect penalties assessed by virtue of the leasing of these lots. The third cause of action is thus timely under the Appropriations Act, and the Government's motion therefore should be denied.

The Government also argues that the Goodeagle complaint fails to clearly allege facts demonstrating the existence of monetary claims associated with town lot leasing, and therefore argues that Goodeagle should file a more definite statement of its claims. This argument is belied, however, by the allegations in the third cause of action, which plainly do set forth monetary claims, and which are discussed in substantial detail in the Quapaw Analysis, which the Government has in its possession. At bottom, thus, the Government's motion for a more definite statement seeks to impose a greater pleading burden on Goodeagle than is required by Rule 8. Goodeagle has met the pleading requirement under Rule 8, and the Government's motion for a more definite statement

[14] Compl. ¶¶ 40–45.
[15] *See* Act of March 3, 1921, 41 Stat. 1225, 1248–49 (1921).

should be denied.

The Government also asks this Court to dismiss Goodeagle's Fifth Cause of Action,[16] which alleges "Failure to Protect Natural Resources and Failure to Protect the Environment." This claim reflects the monetary losses resulting from the devastating effect lead and zinc mining had on Quapaw lands and the Government's failure to fulfill its trust obligation to enforce contractual remuneration required of mining lessees. This claim is also timely under the Appropriations Act.

The Government further asks the Court to dismiss Goodeagle's Sixth Cause of Action[17]—"Failure to Protect Quapaw Tribal Members and Otherwise to Act in Their Best Interests." This Cause of Action is based on various breaches of trust by the Government resulting in monetary losses associated with the Government's breaches of fiduciary obligations owed to them, and based on substantive laws cited in the Complaint. The Government's motion to dismiss this claim should also be denied.

Finally, the Government asks the Court to dismiss Goodeagle's Eighth Cause of Action,[18] an alternative claim for "Just Compensation for Property Taken." The Government has previously argued that Goodeagle's claims are barred under 28 U.S.C. § 1500 by virtue of the litigation and settlement of *Cobell v. Salazar*.[19] As this Court knows, *Cobell* is a class action against the Government, in which the relief sought was originally an equitable accounting. In an effort to settle decades of litigation, Congress

[16] Compl. ¶¶ 52–56.
[17] Compl. ¶¶ 57–59.
[18] Compl. ¶¶ 63–75.
[19] D.D.C. No. 96-1285.

passed the Claims Resolution Act of 2010,[20] which gave the district court jurisdiction to certify the *Cobell* classes, allowed filing of an amended complaint, and Congressionally approved the settlement. The district court ultimately approved the settlement, and the D.C. Circuit affirmed. Should this Court decide that *Cobell* prohibits Goodeagle from pursuing the first seven causes of action set forth in the complaint, Goodeagle has pleaded in the alternative a claim for just compensation for the taking of these causes of action.

Standard of Review

Under RCFC 12(b)(1), subject-matter jurisdiction is a threshold issue.[21] "'The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'"[22] On a motion to dismiss for lack of jurisdiction, "[t]he court must accept as true the facts alleged in the complaint and must construe such facts in the light most favorable to the pleader."[23] If the facts alleged in the complaint "reveal any possible basis on which the non-moving party might prevail, the court must deny the motion."[24]

A motion to dismiss under RCFC 12(b)(6) for failure to state a claim tests the sufficiency of the complaint.[25] To survive a motion to dismiss under RCFC 12(b)(6), the complaint must contain "'enough facts to state a claim to relief that is plausible on its

[20] Pub. L. No. 111-291, 124 Stat. 3064 (2010).
[21] *Patton v. United States*, 64 Fed. Cl. 768, 773 (2005).
[22] *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984)).
[23] *Patton*, 64 Fed. Cl. at 773.
[24] *Cmty. Bank & Trust v. United States*, 54 Fed. Cl. 352, 354 (2002).
[25] *Love Terminal Partners v. United States*, 97 Fed. Cl. 355, 378 (2011).

face.'"[26] Rule 12(b)(6) is satisfied "'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'"[27] When reviewing a motion to dismiss under this standard, the court must assume the truth of all well-pleaded factual allegations and draw all reasonable inferences in favor of the pleader.[28]

ARGUMENT

I. Goodeagle's third cause of action is timely under the Interior Department appropriations rider, and no more definite statement than the Quapaw Analysis is required

Goodeagle's third cause of action alleges that the Government breached its duty to collect rents, penalties, and other monetary amounts due under leases on their allotments (town lots) located in and near the former mining town of Picher, Oklahoma. The parties agree that under an appropriations rider included in every Interior Department appropriations bill since 1990, "Congress has expressly waived its sovereign immunity and deferred the accrual of the [Indians'] cause of action until an accounting is provided" for claims of loss to or mismanagement of trust funds.[29] Likewise, both parties appear to agree that to the extent the Goodeagle Plaintiffs have alleged that the Government failed to collect such rents and other amounts due (bond payments and penalties, for example) and deposit them in the Goodeagle Plaintiffs' trust accounts, these are claims for losses to those trust accounts that fall under the Appropriations Act provision and thus do not

[26] *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
[27] *Id.* (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)).
[28] *Id.*
[29] *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) (*Shoshone II*).

accrue until an accounting is provided. In this case that accounting is set forth in the Quapaw Analysis, completed in June 2010 and accepted by the Government in November 2010.[30]

Where the parties disagree—and the sole basis for the Government's motion to dismiss—is on the question whether the Goodeagle Plaintiffs have successfully pleaded a claim for failure to collect rents and other payments due under existing town lot leases—as they intended to do. The third cause of action is titled "Failure to collect rents/payments on town lots."[31] And only by omitting some allegations and misreading others can the Government argue that it is not, in fact, a claim for failure to collect rents and other payments due on the Goodeagle Plaintiffs' town lot allotments—monies that should have been but were not deposited in their individual trust accounts. So a fair reading of the third cause of action demonstrates that it should not be dismissed.

Finally, the Government's motion for a more definite statement rings hollow because the Government has notice not only of the allegations in the complaint, which adequately alleges failure to collect rents and other sums due, but in addition has the actual Quapaw Analysis—which is the factual basis for these allegations. As the Government well knows, the Quapaw Analysis contains an accounting covering a representative sample of the Goodeagle Plaintiffs' allotments, including town lots, and detailing the Government's failure to collect rents, penalties, and other sums due under existing town lot leases. Because the Government has fair notice of the Goodeagle

[30] Compl. ¶ 22.
[31] Compl. at 19.

Plaintiffs' claim for failure to collect rents and other amounts due on town lots, it cannot show the slightest prejudice—and its motion for more definite statement should therefore be denied.

A. Under the Appropriations Rider, which displaces 28 U.S.C. § 2501, the statute of limitations on Goodeagle's third cause of action, "Failure to Collect Rents/Payments for Town Lots," did not commence to run until completion of the Quapaw accounting

To begin, the parties agree on the relevant legal principle: The statute of limitations on a breach-of-trust claim for the Government's failure to collect rents or other payments due under existing leases on Indian allotments does not start to run until the Government has provided an accounting of the sums due. As the Government's brief admits, "[t]o the extent that plaintiffs can allege facts demonstrating the existence of actual town lot leases issued by the Bureau of Indian Affairs and 'failure or delay in (1) collecting payments under the [leases]; (2) depositing the collected monies in [plaintiffs'] interest-bearing trust accounts; or (3) assessing penalties for late payment,' those claims may be timely."[32] This is because, beginning in 1990 and continuing through 2012, Congress provided through its yearly Department of Interior and Related Agencies Appropriations Acts that claims for losses due to or mismanagement of trust funds do not accrue until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the

[32] Def.'s Br. at 10.

beneficiary can determine whether there has been a loss[.][33]

In *Shoshone Indian Tribe of the Wind River Reservation v. United States* the Federal Circuit interpreted this provision, holding that "[b]y the plain language of the Act, Congress has expressly waived its sovereign immunity and deferred the accrual of the Tribes' cause of action until an accounting is provided."[34] And the *Shoshone* court went on to hold that "[t]he introductory phrase '[n]otwithstanding any other provision of law' connotes a legislative intent to displace any other provision of law that is contrary to the Act, including 28 U.S.C. § 2501."[35]

The *Shoshone* court further held that "losses to" trust funds included the Government's failure to collect revenues due under existing leases:

> A review of the language of the Act confirms that the Act defers the accrual of a cause of action relating to the Government's fiduciary duties to collect revenue for the Tribes' leases. In the context of the Act, "losses to . . . trust funds" may be understood to cover losses resulting from the Government's failure to timely collect amounts due and owing to the Tribes under its sand and gravel contracts. We therefore interpret the phrase "losses to . . . trust funds" to mean losses resulting from the Government's failure or delay in (1) collecting payments under the sand and gravel contracts, (2) depositing the collected monies into the Tribes' interest-bearing trust accounts, or (3) assessing penalties for late payment. Fiduciary breaches such as these result in losses to trust funds that are separate and distinct from the mismanagement of trust funds once collected.[36]

Finally, as the Government correctly states, *Shoshone* found this provision inapplicable to what it called a "hypothetical lease," under which the Government should

[33] Pub. L. No. 112-74, 125 Stat. 786 (2012).
[34] *Shoshone II*, 364 F.3d at 1346.
[35] *Id.*
[36] *Shoshone II*, 364 F.3d at 1350–51.

have (but did not) obtain the best available rents and royalties.[37]

Here, the Government does not attack Goodeagle's third cause of action by referring to the language of the complaint, but instead simply mischaracterizes the claim as something it is not. But a motion to dismiss tests the allegations of the complaint—and that is where the court will find the factual allegations that bring the third cause of action within the "losses to" Indian trust funds provision of the Appropriations Act.

First, Paragraph 44 of the complaint sets out the Government's fiduciary obligation to collect rents and other monies owed on town lots (which Goodeagle alleges to have been breached):

> 44. Under a comprehensive regulatory and statutory scheme, including 25 C.F.R. § 162.108 and its predecessor regulations, the United States has a fiduciary duty and a trust obligation to (among others):
>
> - "[E]nsure that tenants meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and enforcement actions."
>
> - "[A]ssist landowners in the enforcement of payment obligations that run directly to them, and in the exercise of any negotiated remedies that apply in addition to specific remedies made available to [the United States] under these or other regulations."[38]

In violation of this fiduciary obligation, the complaint alleges (as determined in the Quapaw Analysis) that for decades the Government failed to collect any rent at all on over 14,000 leased town lots:

---

[37] Def.'s Br. at 10 (citing *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1035 (Fed. Cir. 2012) (*Shoshone IV*)).
[38] Compl. ¶ 44.

> 43. The Quapaw Analysis also contains comparisons of the actual rental payments (Official Receipts) against the town lot leasing cards that the BIA made available for analysis. Those records show that there were 14,500 town lots on trust allotments. But Defendant collected no rent for years 1949 to 1962 or from 1982 to present . . . .[39]

In addition to rents, the complaint further alleges the Government's failure to hold mining companies financially liable under their leases (and thus collect reparations) for damage done to town lots, and for forfeiture of surety bonds posted to ensure performance of their lease obligations:

> 41. Further, the BIA allowed mining companies to dump large amounts of chat on the town lot trust allotments. [D]efendant failed to hold the mining lessees responsible for the environmental damage as required under the terms of their mining leases, nor were their bonds forfeited for any cleanup or reclamation efforts.[40]

The complaint alleges that the Government also allowed tenants to transfer and sublet town lot leases, pocketing the difference in rent (money owing to Goodeagle Plaintiffs):

> 42. The Quapaw Analysis states that Defendant also allowed for "Bills of Sale" and similar documents to transfer from one tenant to another, further exacerbating the BIA's failure to timely collect due and owing but unpaid rent. The BIA's own records show that tenants have obtained permits on several lots from the Agency and then sublet the restricted lots to other renters, pocketing the rent.[41]

Finally, the third cause of action alleges that as a result of the Government's failure to collect rents and other sums due for the property on which the town was built (the town lots), Goodeagle has been deprived of substantial rent and other sums that

[39] Compl. ¶ 43.
[40] Compl. ¶ 41.
[41] Compl. ¶ 42.

should have been deposited in the Tribal members' trust accounts:

> 45. As a direct and proximate result of Defendant's breach . . . Plaintiffs and the class they represent have been deprived of substantial sums of rent and other amounts for their town lots that the United States was obligated to collect and deposit in their Individual Indian Management accounts, together with interest thereon.[42]

Because these allegations fall squarely within the provisions of the Appropriations Act, the Government's motion to dismiss the third cause of action is groundless and must be denied.

B. No more definite statement is required because the allegations plainly allege that the claim falls under the Appropriations Act in compliance with Rule 8, and because the Government already has a complete analysis of the Goodeagle Plaintiffs' claims in the Quapaw Analysis

The Government makes no effort to show that Goodeagle's third cause of action is "so vague or ambiguous that the party cannot reasonably prepare a response," the standard required by RCFC 12(e).[43] In applying the identical language of Fed. R. Civ. P. 12(e), federal district courts have held that motions for a more definite statement are disfavored, that the defendant must show prejudice, and that lack of detail is insufficient grounds for granting this motion:

> "Motions pursuant to Rule 12(e) are disfavored and should not be granted unless the complaint is so excessively vague and ambiguous as to be unintelligible and as to prejudice the defendant seriously in attempting to answer it." *Greater N.Y. Auto. Dealers Ass'n v. Envtl. Sys. Testing, Inc.*, 211 F.R.D. 71, 76 (E.D.N.Y. 2002). "The rule is designed to remedy unintelligible pleadings, not to correct for lack of detail." *Kuklachev*, 600 F. Supp. 2d at 456. A motion for a more definite statement is only warranted if the complaint does not provide a short and plain statement as required by Fed. R. Civ. P. 8. *See Home & Nature Inc. v. Sherman*

[42] Compl. ¶ 45.
[43] Def.'s Br. at 11.

> *Specialty Co., Inc.*, 322 F. Supp. 2d 260, 265 (E.D.N.Y. 2004). Furthermore, "[m]otions for a more definite statement are generally disfavored because of their dilatory effect. The preferred course is to encourage the use of discovery procedures to apprise the parties of the factual basis of the claims made in the pleadings." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 233 F.R.D. 133, 135 (S.D.N.Y. 2005) (footnotes and internal quotation marks omitted).[44]

This Court too has denied a motion for a more definite statement in a back pay case where the Government also argued that some of the claims fell outside the statute of limitations and that the complaint was insufficiently detailed:

> The government will be able to identify the duties performed by ATCSs' during the period and will be able to ascertain the "administrative, exercise, medical, inspection and other duties," Compl. ¶ 9, allegedly performed by this group of employees without compensation. Discovery should resolve any complications. *Compare Federal Air Marshals*, 74 Fed. Cl. at 488, *with Artuso v. United States*, 80 Fed. Cl. 336, 339 (2008) (order for more definite statement was warranted by taxpayer's failure to plead special matters required in tax refund suit).
>
> * * *
>
> The government's motion for a more definite statement is accordingly denied.[45]

Here, the Government argues that it is entitled to a more definite statement because it claims "Plaintiffs' Third Cause of Action is overly broad," [46] and some claims are time-barred. But overbreadth and time-bar are not grounds for granting a motion for a more definite statement, and the Government notably does not assert that it lacks sufficient information in order to prepare a response to the third cause of action. Nor could it, given that it has in its possession the Quapaw Analysis that sets forth in far

[44] *Holmes v. Fischer*, 764 F. Supp. 2d 523, 531–32 (W.D.N.Y. 2011).
[45] *Whalen v. United States*, 80 Fed. Cl. 685, 693–94 (2008).
[46] Def.'s Br. at 11.

greater detail than a notice-pleading complaint can the rents and other amounts that, according to the Quapaw Analysis, the Government failed to collect and deposit in the Goodeagle Plaintiffs' trust accounts.

The Government makes no effort to show that it lacks sufficient information to prepare a response to the complaint, as required by RCFC 12(e). Indeed, how could it, since the Government already has an extensive statement of Goodeagle's claims in the Quapaw Analysis, and the database in which up to half-a-million documents were collected and analyzed and on which the Quapaw Analysis is based. The Government therefore suffers no prejudice because it has both the records on which the Quapaw Analysis is based (since they came from the Government) and the Analysis itself, which details Goodeagle's claims in far greater detail than could any typical complaint.

At bottom, it thus seems that the Government's motion for more definite statement seeks to impose a greater pleading burden than is required under RCFC 8, which only requires that a complaint contain "a short and plain statement of the grounds for the court's jurisdiction . . . [and] a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[47] The federal rules thus encourage brevity in pleadings, while still requiring that the pleading contain "enough" to give defendants fair notice of a complaint's claims and the grounds for them.[48] Under Rule 8 the complaint need not and should not contain a listing of all 14,500 town lot leases, nor a listing of every payment due, as the Government seems to contend.

[47] RCFC 8.
[48] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007).

In sum, the allegations of Goodeagle's third cause of action contain sufficient facts to put the Government on notice of Goodeagle's claims with respect to town lots. In addition, the allegations contain sufficient facts to "nudge [] their claims across the line from conceivable to plausible,"[49] particularly based as they are on the Quapaw accounting already prepared and accepted by the Government.

Given that Goodeagle's third cause of action complies with Rule 8, and because the Government is fully apprised of the nature of the Goodeagle Plaintiffs' claims, no more definite statement is required and the Government's motion should be denied.

II. The fifth cause of action is not barred by CERCLA

Contrary to the Government's mischaracterization, Goodeagle's fifth cause of action does not challenge EPA's removal or remedial activities at the Tar Creek superfund site, and so does not fall within the provisions of 42 U.S.C. 9613(h), which provides:

> No Federal court shall have jurisdiction under Federal law . . . or under State law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title . . . .[50]

A. This Court has jurisdiction over Goodeagle's fifth cause of action, which is not barred by CERCLA and is timely

Paragraph 53 of the Goodeagle complaint alleges that the claim arises from the breach by the Secretary of Interior and the Bureau of Indian Affairs of their statutory duties including 25 U.S.C. § 162a(d)(8), which provides:

---

[49] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
[50] 42 U.S.C. § 9613(h).

> 53. The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following: . . . (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.[51]

As the bulleted paragraphs in Paragraph 55 allege, despite this statutory duty, the Government has:

- Allowed 100 million tons of mine waste to be deposited and to accumulate on the leased land, making it unusable and valueless for any purpose;

- Allowed the mine waste to leach and emit serious soil, airborne and water-borne contaminants, including lead, arsenic, and cadmium into the surrounding area;

- Allowed the children of the Quapaw Tribe to suffer extensive lead poisoning, with resultant health effects including learning and development disabilities;

- Allowed the mines to fill with water and overflow into Tar Creek, spreading acid mine drainage throughout the area, contaminating the shallow ground aquifer and surface waters with iron, sulfate, zinc, lead, and cadmium, poisoning local water wells; and,

- Allowed mountains of chat, mine tailings, floatation ponds, sink holes, and abandoned debris to mar the terrain, damaging or destroying the wildlife, birds, and plants important for the subsistence, medicinal, and cultural uses of Plaintiffs and the class they represent.[52]

Likewise, Paragraph 56 alleges that:

> 56. [D]efendant has breached its fiduciary and other obligations with respect to its management of Quapaw lands and resources, as set forth under applicable statutes, regulations, lease agreements, and other laws. Among other legal obligations Defendant has failed to follow, or has breached, are its obligations to act in the best interests of the Indian interest

[51] 28 U.S.C. § 162a(d).
[52] Compl. ¶ 55.

> holders in real property and other non-monetary assets, to consider the potential environmental, cultural, social, and other effects of its actions on the Quapaw Tribe and its members, to protect the Indian lessor from the commission of waste, to prevent unnecessary and undue degradation of lands and resources, to protect the environment and to promote conservation, to ensure that a lessee completes a reasonable restoration of the surface and subsurface of lands before it is released from its obligations, and other similar requirements.[53]

The Complaint further alleges that:

> 57. As a direct and proximate result of Defendant's breach . . . Plaintiffs and the class they represent have been deprived of substantial sums of rent and other amounts that they would have received from their land had it not been contaminated and destroyed, and that the United States was obligated to collect and deposit in their Individual Indian Money accounts, together with interest thereon, as well as the value of the land, wildlife, plants, ground and surface water, air and other natural resources that have been destroyed—including the very health of Plaintiffs and the class they represent.[54]

Seeking only breach-of-trust damages for the environmental devastation caused by mining operations that occurred under the supervision of the Secretary of Interior, Goodeagle's fifth cause of action does not challenge any EPA remedial or removal action at the Tar Creek Superfund Site—nor does it even mention EPA. So, because Goodeagle's fifth cause of action does not challenge EPA's remediation activities at the Tar Creek Superfund Site, this Court does not lack subject-matter jurisdiction over this claim.

But in its zeal to dismiss this claim, the Government conjures up allegations in its motion that are not actually in the complaint. The Government, for instance, incorrectly contends that "Plaintiffs seek damages because they believe that the remediation is

[53] Compl. ¶ 56.
[54] Compl. ¶ 57.

proceeding too slowly, Compl., ¶ 54," and "because the remedial plan does not adequately consider 'cultural uses of Plaintiffs,'"[55] but paragraph 54 contains no such allegations. Similarly, the Government asserts that "they believe that the remediation will not make them whole for harms suffered,"[56] but again paragraphs 37 and 47 of the complaint contain no such allegations.

As the Government admits, not every case relating to CERCLA cleanup is barred by 42 U.S.C. 9613(h): "Where a claim relates to, but is collateral to, the CERCLA remedy, Section 113(h) does not bar such a suit."[57] So too this Court has found no lack of jurisdiction to decide takings cases involving EPA's physical occupancy of land,[58] stating:

> "[N]owhere in this CERCLA has Congress withdrawn the Tucker Act grant of jurisdiction to hear a suit founded upon the constitutional right [to just compensation that may be available under takings jurisprudence when water has been contaminated by government activity]."[59]

Similarly, this Court has found jurisdiction to decide contract claims even though they deal with CERCLA liability.[60]

And as another judge of this Court recently stated:

> In other contexts, too, courts have been reluctant to find that non-CERCLA claims are somehow displaced or preempted by CERCLA. The general rule is that courts have not found CERCLA to exclusively occupy the field

[55] Def.'s Br. at 15.
[56] *Id.* (citing Compl. ¶¶ 37, 47).
[57] *Id.* (citing *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir. 1998)).
[58] *See, e.g., Bassett, N.M., LLC v. United States*, 55 Fed. Cl. 63 (2002); *Hendler v. United States*, 952 F.3d 1364 (Fed. Cir. 1991).
[59] *Clark v. United States*, 8 Cl. Ct. 649 (1985).
[60] *Am. Int'l Specialty Lines Ins. Co. v. United States*, No. 05-1020C, 2008 WL 1990859 *14 (Fed. Cl. Jan. 31, 2008).

> of environmental contamination litigation. *See ARCO Envtl. Remediation, L.L. C. v. Dep't of Health and Envtl. Quality of Mont.*, 213 F.3d 1108, 1115–16 (9th Cir. 2000) (noting, in the context of an environmental cleanup dispute, that state law claims that only indirectly affect a CERCLA cleanup are not preempted by CERCLA); . . . *New York v. United States*, 620 F. Supp. 374, 378–79, 385–86 (E.D.N.Y. 1985) (considering, in that environmental contamination case, relief sought under the Federal Tort Claims Act, 28 U.S.C. § 2671–2680 (2006), and CERCLA as alternative claims cognizable in a United States district court). For these reasons, the court finds that the CERCLA covenants in the 2003 deed do not necessarily, as a jurisdictional matter, restrict plaintiffs' legal theories and recoveries to those provided by CERCLA.[61]

Tarrant v. United States,[62] on which the Government relies (and quotes out of context), does not help the Government here. That case simply holds that a claim brought under CERCLA does not belong in the Court of Federal Claims but in the district court—and should be transferred.[63] *Tarrant* has nothing to do with 42 U.S.C. § 9613(h) nor challenges to EPA's remedial or removal actions.

Similarly, *McClellan Ecological Seepage Situation v. Perry*,[64] which holds that 42 U.S.C. § 113(h) "protects the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort,"[65] is entirely inapposite here because nothing in this breach of trust suit for damages threatens to interfere with the expeditious cleanup of the Tar Creek Superfund Site—and the Government suggests no way in which a judgment for the Goodeagle Plaintiffs would create any such interference. *McClellan*, after all, was a suit for injunctive relief to compel the

[61] *U.S. Home Corp. v. United States*, 92 Fed. Cl. 401, 409 (2010).
[62] 71 Fed. Cl. 554 (2006).
[63] *Id.* at 558.
[64] 47 F.3d 325 (9th Cir. 1995).
[65] *Id.* at 329.

Government to clean up an Air Force base according to different standards from those the Government had adopted and, as that court held, compelling the Government to obtain for example a permit under the Resource Conservation and Recovery Act (RCRA) would directly interfere with the ongoing cleanup:

> [A]n injunction or declaration requiring McClellan to comply with RCRA permitting requirements would also interfere with the CERCLA cleanup. As McClellan points out, the entire purpose of a permit requirement is to allow the regulating agency to impose requirements as a condition of the permit. The injection of new requirements for dealing with the inactive sites that are now subject to the CERCLA cleanup (or McClellan's defense against imposition of such requirements) would clearly interfere with the cleanup.[66]

The Government's reliance on *New Mexico v. General Electric*[67] is likewise misplaced, for that was a case in which the court squarely held that the state was directly challenging the remedial phase of a superfund cleanup:

> Despite the State's contrary assertion, its expert-intense argument that the remedial phase of the cleanup does not address the entirety of the contamination and will not restore the groundwater to beneficial use as drinking water is, in all respects, a challenge to an EPA-ordered remediation. In its opening brief, the State repeatedly takes aim at the ongoing remediation. The State argues the EPA is not applying the "proper remediation standard[s]." The State complains the EPA "abandon[ed] the ROD and require[d] remediation of only the shallowest portion of the total plume."[68]

Goodeagle's complaint, in contrast, is devoid of any challenge to remedial standards.

Later in its motion, the Government completely reverses position and states: "The environmental harm of which plaintiffs complain in their Fifth Cause of Action occurred

---

[66] *McClellan Ecological Seepage Situation*, 325 F.3d at 330.
[67] 467 F.3d 1223 (10th Cir. 2006).
[68] *Id.* at 1249.

substantially earlier than six years prior to their filing of their Complaint, and plaintiffs actually knew or reasonably should have known of that contamination decades ago."[69] This argument places the accrual of this claim long before EPA designated any remedial action for the Tar Creek Superfund Site—and perhaps even before EPA itself was created. The Government fails to explain how such a claim could be characterized as a challenge to EPA's action at Tar Creek, and thus barred by 42 U.S.C. § 9613(h).

Likewise, the Government argues a claim that Goodeagle never advances in its complaint, a challenge to a model sales agreement published as part of the Operable Unit 4 Record of Decision.[70] That model sales agreement is plainly intended to indemnify chat owners (and the Government) against claims by chat purchasers,[71] but it is mentioned nowhere in Goodeagle's complaint. Likewise, the model CERCLA settlement agreements (Appendices C and D of the Record of Decision) expressly preserve the right to recover money damages for the Government's breach of trust: [72]

> The Settlors reserve, and this Agreement is without prejudice to, claims against the United States not listed in Paragraph 10, including but not limited to, claims based on the United States' accounting to restricted Indian Settlors for any sales of chat, all claims arising before the Effective Date of this Agreement, and claims for negligence, not including oversight or approval of the Settlors' plans or activities, when such claims are

[69] Def.'s Br. at 16.
[70] Def.'s Br. at 13.
[71] *See* Operable Unit 4 Record of Decision, Appendix E at 7–8, http://www.epa.gov/region6/6sf/oklahoma/tar_creek/ok_tar_creek_chat_sales_agreement.pdf.
[72] Appendices C, D ¶ 11, http://www.epa.gov/region6/6sf/oklahoma/tar_creek/ok_tar_creek_distal_chat_settlement_agreement.pdf; http://www.epa.gov/region6/6sf/oklahoma/tar_creek/ok_tar_creek_distal_chat_settlement_agreement_sale.pdf.

> brought pursuant to any statute other than CERCLA or RCRA, 42 U.S.C. §§ 6901 et seq., and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA.[73]

B. Under the continuing trespass doctrine this claim is not barred by the statute of limitations

The Government correctly asserts that Goodeagle's fifth cause of action is for trust asset mismanagement, and therefore the provisions of the appropriations rider[74] applicable to the third cause of action do not apply. But the Government is wrong in asserting that the claim must therefore be dismissed because the continuing trespass doctrine allows the Goodeagle Plaintiffs to recover for breaches of trust arising within the six years preceding the filing of this complaint (that is, back to June 28, 2006).

The Federal Circuit recently described the continuing trespass doctrine in *Shoshone IV*, a case involving a claim that oil and gas wells on tribal property constituted a continuing trespass:

> The Tribes argue that, under the continuing trespass theory, each trespass is its own cause of action with its own six-year statute of limitations. *See, e.g., United States v. Hess*, 194 F.3d 1164, 1177 (10th Cir. 1999) ("In trespass cases, where the statute of limitations has expired with respect to the original trespass, but the trespass is continuing, we and other courts have calculated the limitation period back from the time the complaint was filed, rather than forward from the date of the original trespass, or where applicable, back to the reasonable discovery date."); *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 571 (Fed. Cl. 1990) (explaining that plaintiff's claims for trespasses that occurred more than six-years before the suit was filed were barred by the statute of limitations, but that claims for

[73] Appendices C, D ¶ 11, http://www.epa.gov/region6/6sf/oklahoma/tar_creek/ok_tar_creek_distal_chat_settlement_agreement.pdf; http://www.epa.gov/region6/6sf/oklahoma/tar_creek/ok_tar_creek_distal_chat_settlement_agreement_sale.pdf.

[74] Pub. L. No. 108-7 (2003).

> trespasses that occurred less than six-years from the filing of suit were not barred by the statute of limitations); *cf. Oenga v. United States*, 83 Fed. Cl. 594, 597–98, 616–19 (2008) (allowing the plaintiffs to proceed on a theory that every time the defendant used their property for oil and gas development a separate trespass occurred).[75]

Adopting the continuing trespass theory, the Federal Circuit remanded to the trial court for a determination of whether the occupancy of Shoshone lands was, in fact, a trespass—and thus subject to the continuing trespass doctrine.[76]

The trespass here—consisting of mountains of mining waste, toxic dust, and air pollution—constitutes a continuing trespass.[77] Until removed, that trespass continues—and the Goodeagle Plaintiffs are entitled to recover for the breach of trust this trespass constitutes going back to 2006. Although the statute of limitations cuts short the long history of environmental depredation of the Goodeagle Plaintiffs' allotted lands, it does not relieve the Government entirely of liability for this breach of trust.

So Goodeagle's claims to recover under their fifth cause of action, for damages accruing since June 28, 2006, should not be dismissed.

III. The sixth cause of action adequately alleges jurisdictional facts and a claim for relief

The Government's criticism of Goodeagle's sixth cause of action goes less to substance than to form. The Government seems to argue that each cause of action must cite statutes and regulations and, "[b]ecause plaintiffs' Sixth Cause of Action does not

---

[75] *Shoshone IV*, 672 F.3d at 1035–36.
[76] *Shoshone IV*, 672 F.3d at 1041.
[77] *See Shoshone IV*, 672 F.3d. at 1041; *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 570–71 (1990); *White Mountain Apache Tribe of Ariz. v. United States*, 11 Cl. Ct. 614 (1987).

identify any statutes or regulations,"[78] it should be dismissed. Importantly, the Government does not deny that it has such statutory and regulatory obligations—its sole criticism is that Goodeagle did not expressly cite them in this particular cause of action. Of course, there is no rule requiring citation of statutes or regulations in a complaint, and it is doubtful that RCFC 8's notice pleading principle even contemplates such citation.

As the Government well knows (and certainly does not deny in its motion), 25 U.S.C. § 162a(d)(8) provides that "[t]he Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following: (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands." 25 U.S.C. § 2218 further provides that "[n]otwithstanding any other provision of law, the Secretary may approve any lease or agreement that affects individually owned allotted land or any other land held in trust or restricted status by the Secretary on behalf of an Indian."

The Secretary of Interior has adopted regulations specifically regulating mining operations on Quapaw lands.[79] And the Supreme Court has stated that:

> The Quapaw Indians are under the guardianship of the United States. The land and Indian owners are bound by restrictions specified in the patent and the acts referred to. It is the duty and established policy of the government to protect these dependents in respect of their property.[80]

These statutes and regulations, among others, amply establish the Government's fiduciary obligations with respect to the Goodeagle Plaintiffs' lands and natural resources,

[78] Def.'s Br. at 17.
[79] 25 C.F.R. § 215.23 .
[80] *Jaybird Min. Co. v. Weir*, 271 U.S. 609 (1926).

mandating compensation for the damages sustained:

> Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.[81]

Goodeagle's sixth cause of action plainly alleges multiple violations of the Government's fiduciary duties—a point the Government does not deny. Among those breaches for which monetary damages are due, the complaint alleges in paragraph 58 that the Government has:

- Allowed individual Quapaw restricted personal property (trust personalty) to be sold or stolen, without any compensation to the restricted interest holders;

- Miscalculated percentages of restricted Quapaw ownership interests and allowed restricted trust property to be transferred to non-Indians, contrary to law and without any compensation to the Quapaw owners;

- Permitted individual Quapaw restricted owners to be sued by non-Indian third parties, including mining companies, for acts of the Defendant, including acts in permitting contamination of Quapaw lands, for which Defendant is legally responsible as a trustee, without providing a defense and indemnity, as provided under applicable law;

- Provided information to the restricted Quapaw asset holders concerning their Indian trust assets, including chat, which the Defendant knew or reasonably should have known were inaccurate or false;

- Failed properly to manage commingled restricted Indian and fee lands and assets in accordance with applicable laws and consistent with the Defendant's fiduciary obligations;

[81] *United States v. Mitchell*, 463 U.S. 206, 226 (1983).

- Cooperated with non-Indians in coercing restricted Quapaw owners into selling restricted property at below-market values, including attempting to induce restricted owners to sign unapproved contracts for the sale of Indian trust property and contracts purporting to retroactively approve unlawful removal of Indian trust property; and,

- Participated in efforts to artificially suppress values of rentals and sales of restricted Indian property.[82]

The Government surely does not purport to contend that none of these acts violate its fiduciary duties. Accordingly, the Government's motion to dismiss the sixth cause of action should also be denied.

IV. The Goodeagle Plaintiffs' alternative claim for the taking of their causes of action for breach of trust states a claim for relief and is ripe for review

The Government's characterization of Goodeagle's eighth and final cause of action as a claim for a judicial taking is only partly correct. The complaint also alleges legislative action that combined with judicial action to take Goodeagle's claims—which are property protected by the Fifth Amendment:

> In the alternative, and only to the extent plaintiffs are precluded from recovery on any of their claims set forth in the first through seventh causes of action . . . as a result of any action by the United States . . . , plaintiffs are entitled to recover just compensation for the taking of such claim.[83]

Contrary to the Government's assertion, the Fifth Amendment right to just compensation is not limited to takings caused only by the executive branch. As the plurality of the Supreme Court stated in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*:

There is no textual justification for saying that the existence or the scope of

[82] Compl. ¶ 58.
[83] Compl. ¶ 63.

> a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.[84]

A. Congress's enactment of the Claims Resolution Act of 2010 was an integral part of the taking

First, as the eighth cause of action alleges, Congress played an essential role in the taking when it passed the Claims Resolution Act of 2010.[85] Without that Congressional action the district court lacked jurisdiction to certify the *Cobell* classes, allow filing of the amended complaint, or approve the settlement. By approving the settlement and granting the district court jurisdiction to approve and implement it, Congress took the first giant step in the taking of Goodeagle's existing claims.

The Settlement Agreement expressly states that settlement was contingent on Congressional approval, and that if Congress did not pass authorizing legislation then the Settlement Agreement would become null and void:

> 1. Legislation Required. The Parties agree that the Agreement is contingent on the enactment of legislation to authorize specific aspects of the Agreement. The Parties agree that enactment of this legislation is material and essential to this Agreement and that if such legislation is not enacted into law by the Legislation Enactment Deadline, unless such date is mutually agreed by the Parties in writing to be extended, or is enacted with material changes, the Agreement shall automatically become null and void In the event this Agreement becomes null and void, nothing in this Agreement may be used against any Party for any purpose.[86]

---

[84] *Stop the Beach Renourishment v. Fla. Dept. of Env. Protection*, 130 S. Ct. 2592, 2601 (2010).
[85] Pub. L. No. 111-291, 124 Stat. 3064 (2010).
[86] Settlement Agreement, *Cobell v. Salazar*, No. 96-1285 (D.D.C. Dec. 10, 2010), Doc. 3660-2 at 15.

Once Congress approved the Settlement Agreement, the parties agreed that the plaintiffs were to file an amended complaint:

> Amendment of Complaint. Within two business days of enactment of the legislation, or by January 15, 2010, whichever is later, Plaintiffs will file an Amended Complaint to which Defendants will provide written consent provided that such Amended Complaint conforms with the proposed Amended Complaint attached as Exhibit "B" to this Agreement. Defendants' obligation to answer the Amended Complaint shall be held in abeyance pending Final Approval.[87]

The Settlement Act passed by Congress expressly authorized filing of that amended complaint, granted the district court jurisdiction over the amended complaint, and waived the requirements of Federal Rule of Civil Procedure 23 in order to ensure that the court would certify one of the settlement's classes:

> (1) IN GENERAL.—Notwithstanding the limitation on the jurisdiction of the district courts of the United States in section 1346(a)(2) of title 28, United States Code, the United States District Court for the District of Columbia shall have jurisdiction of the claims asserted in the Amended Complaint for purposes of the Settlement.
>
> (2) CERTIFICATION OF TRUST ADMINISTRATION CLASS.—
>
> > (A) IN GENERAL.—Notwithstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class.
> >
> > (B) TREATMENT.—On certification under subparagraph (A), the Trust Administration Class shall be treated as a class certified under rule 23(b)(3) of the Federal Rules of Civil Procedure for purposes of the Settlement.[88]

Without these highly unusual provisions of law enacted by Congress the district court

---

[87] Settlement Agreement, *Cobell v. Salazar*, No. 96-1285 (D.D.C. Dec. 10, 2010), Doc. 3660-2 at 15.

[88] Pub. L. No. 111-291, 124 Stat. 3064 § 101(d) (2010).

would never have been able to approve and enforce the *Cobell* settlement:

> (c) AUTHORIZATION.—
>
> (1) IN GENERAL.—The Settlement is authorized, ratified, and confirmed.
>
> (2) AMENDMENTS.—Any amendment to the Settlement is authorized, ratified, and confirmed, to the extent that such amendment is executed to make the Settlement consistent with this section.[89]

Where Congress acts to deprive a plaintiff of an existing property right, a taking (often termed a "legislative taking") may be found. For example, in *Love Terminal Partners, L.P. v. United States*, Congress passed a statute mandating the demolition of 6 gates of a privately owned airport terminal, codifying an agreement among several airlines and two public airports that otherwise would have been an illegal restraint of trade under the Sherman Antitrust Act.[90] The owners of the terminal filed a takings lawsuit, and the court held on partial summary judgment that the legislation had physically taken the terminal because the legislation required demolition of the terminal.[91]

Similarly, in *Whitney Benefits, Inc. v. United States*,[92] Congress passed a statute, the Surface Mining Control and Reclamation Act of 1977,[93] which had the effect of prohibiting Whitney Benefits from conducting surface mining operations. The Federal Circuit held that Congress had worked a taking when Congress enacted the law:

---

[89] Pub. L. No. 111-291, 124 Stat. 3064 § 101(c) (2010).
[90] *Love Terminal Partners, L.P. v. United States*, 97 Fed. Cl. 355 (2011); *Love Terminal Partners, L.P. v. Dallas*, 527 F. Supp. 2d 538 (N.D. Tex. 2007).
[91] *Love Terminal Partners, L.P.*, 97 Fed. Cl. at 387–388.
[92] 926 F.2d 1169 (Fed. Cir. 1991).
[93] 30 U.S.C. §§ 1201–1328.

> Before SMCRA was enacted, Benefits had a property right it could expect to exercise, i.e., to surface mine the Whitney coal. The moment SMCRA was enacted, Benefits no longer had that property right, for it had no permit and could not possibly under the statute obtain one for a mine that would obviously violate the conditions expressly set forth in SMCRA.[94]

So if this Court decides that Congress's enactment of the Claims Resolution Act of 2010, combined with the decisions of the district court, extinguished the Goodeagle Plaintiffs' claims against the Government, then the Act took the Goodeagle Plaintiffs' property and the Fifth Amendment mandates that the Goodeagle Plaintiffs receive just compensation for that taking.

B. Court action may also constitute a taking

In *Boise Cascade Corp. v. United States*,[95] the Federal Circuit confirmed that if the Government uses the judicial system to take private property for public use, the Government must still pay compensation. In *Boise Cascade*, the district court had issued a preliminary injunction prohibiting logging on Boise Cascade's property, believed to be inhabited by a species of endangered owl.[96] The district court lifted the injunction about a year later, after it had been determined that there were not any living endangered owls on the land. Boise Cascade then sued the Government, seeking just compensation for the temporary taking of merchantable timber that Boise was prevented from logging by the injunction.[97]

---

[94] *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172 (Fed. Cir. 1991).
[95] *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002).
[96] 16 U.S.C. §§ 1531–1544.
[97] *Boise Cascade*, 296 F.3d at 1342–1343.

Citing the same two cases the Government relies on here, *Allustiarte*[98] and *Vereda Ltda.*,[99] the Government argued that this Court lacked jurisdiction to hear the case because Boise Cascade was purportedly asking the Court to review the merits of a district court decision. But the Federal Circuit disagreed, holding that resolution of Boise Cascade's taking claim was not a review of the decision of the district court:

> [R]esolution of this case did not require the Court of Federal Claims to review the merits of the district court's order enjoining Boise from logging without a permit. Boise has accepted the validity of the injunction, and only filed suit in the Court of Federal Claims to determine whether the Service's . . . obtaining the injunction worked a taking of its property that requires compensation under the Takings Clause. Whether or not the government action took Boise's property was not before the district court, nor could it have been.[100]

The Federal Circuit distinguished *Allustiarte* and *Vereda* on several grounds. Unlike in *Allustiarte* and *Vereda*, Boise Cascade's just compensation claim was "not based on the propriety of the district court's decision, and the trial court therefore would not be called upon to review the merits of the district court's decision in order to decide the merits of Boise's claim."[101] Likewise, Goodeagle has accepted, and in no way challenges, the validity of the district court's *Cobell* orders and judgments. But Goodeagle does assert that to the extent the district court's orders and judgments—specifically authorized by Congress in the Claims Resolution Act—have deprived Plaintiffs of their right to recover damages for the Government's various breaches of its

[98] *Allustiarte v. United States*, 256 F.3d 1349 (Fed. Cir. 2001).
[99] *Vereda Ltda. v. United States*, 271 F.3d 1367 (Fed. Cir. 2001).
[100] *Boise Cascade*, 296 F.3d at 1344 (footnote omitted).
[101] *Id.*

trust obligations, that deprivation is a taking for which the Fifth Amendment requires just compensation.

Unlike the plaintiff in *Allustiarte v. United States*,[102] on which the Government relies, the Goodeagle Plaintiffs do not assert that either the *Cobell* court or this court (in dismissing their previous complaint under Section 1500) acted wrongfully. Rather, as required in any taking case, they accept the validity of the governmental actions (here, the courts' and Congress's decisions) and demand just compensation for the resulting taking.

This is the opposite of the allegations of the plaintiffs in *Allustiarte*, who were debtors who had filed bankruptcy petitions and gone through bankruptcy proceedings in the Ninth Circuit and then sued the United States in the CFC alleging that errors by the bankruptcy court had taken their property in violation of the Just Compensation Clause.[103] Specifically, the *Allustiarte* debtors alleged that the court-appointed bankruptcy trustees sold assets for less than they were worth, wrongfully included one debtor's property in another's, and did not award the correct interest.[104] Because Allustiarte's claim was based directly on the alleged errors under bankruptcy law allegedly made by the bankruptcy court, the Federal Circuit held on review that the CFC "lack[ed] jurisdiction over [plaintiffs'] challenges to the actions of the Ninth Circuit bankruptcy courts."[105]

---

[102] *Allustiarte v. United States*, 256 F.3d 1349 (Fed. Cir. 2001).
[103] *Id.* at 1350; *see also id.* at 1351 ("[Plaintiffs] assert that the losses they suffered as a result of the bankruptcy courts' approval of the actions of the bankruptcy trustees constitute takings for which they are entitled to just compensation.").
[104] *Id.* at 1350–51.
[105] *Id.* at 1351.

In *Stop the Beach Renourishment*,[106] Justice Scalia, speaking for himself and three other justices, stated that the action of a court, no less than the action of the executive or legislative branch, could constitute a taking.[107] The Government correctly notes that Justice Scalia's opinion did not command a fifth vote and that Justice Kennedy, joined by Justice Sotomayor, expressed a preference for examining the issues by means of the Due Process Clause, but none of the justices rejected judicial takings.[108] Justice Breyer, joined by Justice Ginsburg, instead stated "the plurality unnecessarily addresses questions of constitutional law that are better left for another day."[109] Justice Stevens recused himself.

The Supreme Court has stated that although a plurality opinion is not automatically binding precedent, "as the considered opinion of . . . Members of this Court it should obviously be the point of reference for further discussion of the issue."[110] More importantly, there is no authority for rejecting this claim at the pleading stage and therefore the Government's motion to dismiss this claim under Rule 12 (b)(6) should be denied.

C. Goodeagle's claims are property within the meaning of the Fifth Amendment

The Government is flat wrong in asserting that Goodeagle's causes of action are not property for purposes of the Just Compensation Clause. In *Dames & Moore v.*

---

[106] *Stop the Beach Renourishment*, 130 S. Ct. at 2601.
[107] *Id.*
[108] *Id.* at 2614–15 (Kennedy, J., concurring in part and concurring in the judgment).
[109] *Id.* at 2618 (Breyer, J., concurring in part and concurring in the judgment).
[110] *Texas v. Brown*, 460 U.S. 730, 737 (1983).

Regan,[111] the Supreme Court upheld the President's authority to nullify private creditors' prejudgment attachments of assets belonging to Iran and to suspend their claims then pending in American courts, in the context of a settlement of disputes between the United States and Iran. Responding to the claim that suspension of the chosen action would constitute an uncompensated taking, the Supreme Court stated: "Accordingly, to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act."[112]

Here Goodeagle alleged that to the extent any of its first seven claims for relief (which were all earlier dismissed on the Government's motion) has been lost by reason of the Claims Settlement Act of 2010, the district court's orders and judgments in *Cobell*, or this Court's earlier dismissal (based as it was on the pendency of the *Cobell* case), Plaintiffs have suffered a taking for which the Fifth Amendment provides just compensation. These claims are property within the meaning of the Fifth Amendment.

D. The eighth cause of action is ripe for judicial review

The Government's argument that Goodeagle's judicial/legislative takings claim is not ripe for review ignores the fact that Goodeagle's eighth cause of action is stated as an alternative claim: "In the alternative, and only to the extent plaintiffs are precluded from recovery on any of their claims set forth in the first through seventh causes of

[111] 453 U.S. 654 (1981).
[112] *Id.* at 689–690. *See also Abrahim-Youri v. United States*, 139 F.3d 1462, 1465–66 (Fed. Cir. 1997) (holding that the property had not been taken without just compensation, but expressly recognizing that the plaintiffs' legal claims against Iran were property).

action . . . ."[113] Pleading in the alternative is perfectly proper, and indeed, expressly authorized by the Rule 8(d)(2). District courts, applying the identical Fed. R. Civ. P. 8(d)(2), have routinely rejected the argument, made here by the Government, that an alternative cause of action is necessarily unripe:

> On this point—that an inconsistent claim pled in the alternative is not ripe or does not establish a judicially cognizable case or controversy—the plaintiff is wrong.
>
> Rule 8(e)(2),[114] Fed. R. Civ. P., specifically provides that a party may plead in the alternative, even where the alternative claims are inconsistent:
>
> > A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds.[115]

The CFC routinely deals with cases where two alternative claims are pleaded, such as a claim for breach of contract and an alternative claim for just compensation. As the Federal Circuit has expressly held, a plaintiff is not precluded

> from alleging in the same complaint two alternative theories for recovery against the Government, for example, one for breach of contract and one for a taking under the Fifth Amendment to the Constitution. That is

[113] Compl. ¶ 63.
[114] This is the substantively identical predecessor to FRCP 8(d)(2).
[115] *Lawser v. Poudre Sch. Dist. R-1*, 171 F. Supp. 2d 1155, 1157–58 (D. Colo. 2001); *see also* RCFC 8(d) (authorizing alternative claims using language identical to the Federal Rules).

> expressly permitted by the Federal Rules, and the fact that the theories may be inconsistent is of no moment.[116]

So the mere fact that Goodeagle has pleaded in the alternative does not make the claim unripe nor subject to a motion to dismiss.

Conclusion

For all these reasons, the Government's motion should be denied and this case should finally be allowed to proceed to discovery and resolution of the merits.

Respectfully submitted,

s/ Nancie G. Marzulla
Nancie G. Marzulla
Roger J. Marzulla
MARZULLA LAW, LLC
1150 Connecticut Avenue, NW
Suite 1050
Washington, DC 20036
(202) 822-6760 (telephone)
(202) 822-6774 (facsimile)
Nancie@marzulla.com
Roger@marzulla.com

Counsel for Plaintiffs

Stephen R. Ward
John Williams
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, OK 74172
(918) 586-8978 (telephone) (918)
586-8698 (facsimile)
sward@cwlaw.com
jwilliams@cwlaw.com

Of Counsel

Dated: November 26, 2012

[116] *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1368 (Fed. Cir. 2009) (citing Fed. R. Civ. P. 8(d)(3)).