IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNITED STATES' PARTIAL MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM AND FOR A MORE DEFINITE STATEMENT

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I. INTRODUCTION

Plaintiffs are members of the Quapaw Tribe of Oklahoma, a federally recognized Indian tribe. Complaint, ¶¶1-9 (ECF No. 1). Plaintiffs individually, and on behalf of a putative class of all enrolled Quapaw tribal members, allege that the United States has historically mismanaged their trust funds maintained in Individual Indian Money accounts and their non-monetary trust assets.[1/] See id., pp. 1-2. Plaintiffs' eight count Complaint covers alleged acts or omissions of the United States reaching as far back as allotment of the Quapaw Reservation in 1893, id., ¶ 18, and pertains to a gambit of trust assets (and alleged trust assets) including funds, chat[2/], restricted trust land leases, the environment, and the general welfare of the Indians. Many claims advanced by plaintiffs are time-barred or outside this Court's subject-matter jurisdiction. By this motion, the United States seeks to dismiss those claims.

As set forth herein, several claims asserted in plaintiffs' Complaint are untimely and are barred by the six-year statute of limitations (plaintiffs' Third Cause of Action and Fifth Cause of Action). As such, this Court lacks subject-matter jurisdiction over those claims and they should be dismissed. Other claims advanced by plaintiffs should be dismissed because they are outside the United States' limited waiver of sovereign immunity and therefore outside this Court's subject-matter jurisdiction (plaintiffs' Sixth Cause of Action). Certain claims advanced by plaintiffs are preempted by statute (plaintiffs' Fifth Cause of Action). Additionally, plaintiffs' claims should be dismissed for failure to assert facts that establish jurisdiction or state a claim

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[1/] Plaintiffs' allegations are well known to this Court. Plaintiffs' allegations are substantively identical to allegations advanced in plaintiffs' prior case that was dismissed without prejudice. See Goodeagle v. United States, ___ Fed. Cl. ___, 2012 WL 2131109, *1-*2 (June 12, 2012) ("Goodeagle II") (summarizing plaintiffs' allegations).

[2/] "Chat" are mine tailings resulting from lead and zinc ore mining on the Quapaw Reservation, as well as tailings from reprocessed ore.

upon which relief can be granted (plaintiffs, Third Cause of Action, Fifth Cause of Action, Sixth Cause of Action, and Eighth Cause of Action).

II. RELATED CASE

On June 15, 2012, this Court issued a judgment of dismissal without prejudice for lack of subject-matter jurisdiction by operation of 28 U.S.C. § 1500 in Goodeagle II. Judgment (ECF No. 23) in Goodeagle v. United States, Fed. Cl. No. 11-582L. On June 28, 2012, plaintiffs re-filed their case as the instant action to, in part, cure any jurisdictional defect caused by 28 U.S.C. § 1500. Plaintiffs appropriately notified this Court that Goodeagle II is a directly related case. Notice of Directly Related Case (ECF No. 4). On August 14, 2012, plaintiffs filed a notice of appeal in Goodeagle II. Notice of Appeal (ECF No. 24) in Goodeagle v. United States, Fed. Cl. No. 11-582L.

Based on discussions between counsel, counsel for the United States believes that plaintiffs' notice of appeal in Goodeagle II is a protective notice of appeal. It is also counsel for the United States' understanding that if this case is not subject to 28 U.S.C. § 1500 plaintiffs will dismiss their appeal in Goodeagle II. The United States does not assert that this case is subject to 28 U.S.C. § 1500 (if this case is certified as a class action or if other plaintiffs intervene in this action, there may be limited exceptions for non-named putative class members such as Mr. Gilmore). Nonetheless, should plaintiffs pursue their appeal in Goodeagle II, the United States reserves its right to seek relief from this Court including, but not limited to, a stay of this action pending resolution of the appeal in Goodeagle II or consolidation for all purposes of this case and Goodeagle II.

III. QUESTIONS PRESENTED

1. Whether plaintiffs' Third Cause of Action should be dismissed for lack of subject-

matter jurisdiction because it is barred by the applicable statute of limitations?

2. Whether, alternatively, plaintiffs should be compelled to produce a more definite statement for their Third Cause of Action?

3. Whether plaintiffs' Fifth Cause of Action should be dismissed for lack of subject-matter jurisdiction based upon preemption or, alternatively, because it is barred by the applicable statute of limitations?

4. Whether plaintiffs' Third Cause of Action and Fifth Cause of Action should alternatively be dismissed for failing to set forth jurisdictional facts upon which relief can be granted?

5. Whether plaintiffs' Sixth Cause of Action should be dismissed for lack of subject-matter jurisdiction or, in the alternative, for failure to assert facts stating a claim within this Court's subject-matter jurisdiction?

6. Whether plaintiffs' Eighth Cause of Action should be dismissed for lack of subject-matter jurisdiction, for failure to state a claim, or as not ripe for adjudication?

IV. STANDARD OF REVIEW

The United States may assert by motion the defense of "lack of subject matter jurisdiction." Rules of the United States Court of Federal Claims ("RCFC") 12(b)(1). If the Court, at any time, determines that it lacks subject-matter jurisdiction, the action should be dismissed. RCFC 12(h)(3).

When deciding a motion to dismiss, the Court may review the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the Court will take judicial notice. Crusan v. United States, 86 Fed. Cl. 415, 417-18 (2009). When a motion to

dismiss challenges the Court's subject-matter jurisdiction, the Court may look beyond the pleadings and inquire into jurisdictional facts to determine whether jurisdiction exists. Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991). The determination of whether this Court has subject matter jurisdiction to hear Plaintiffs' claims is a question of law. Toxgon Corp. v. BNFL, Inc., 312 F.3d 1379, 1381 (Fed. Cir. 2002).

Jurisdiction must be established before the Court may proceed to the merits of a case. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject-matter jurisdiction unless it is affirmatively indicated by the record; therefore, it is plaintiffs' responsibility to allege facts sufficient to establish the Court's subject-matter jurisdiction. Renne v. Geary, 501 U.S. 312, 316 (1991); DaimlerChrysler Corp. v. United States, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction." (citations omitted)). Once the Court's subject-matter jurisdiction is put into question, it is "incumbent upon [the plaintiffs] to come forward with evidence establishing the court's jurisdiction. . . . [The plaintiffs] bear[] the burden of establishing subject matter jurisdiction by a preponderance of the evidence." Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988) (citation omitted); accord M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

The United States may assert by motion that plaintiffs' complaint fails to state a claim upon which relief can be granted. RCFC 12(b)(6). "The purpose of [RCFC 12(b)(6)] is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail . . . ." Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993). "A dismissal for failure to state a claim . . . is a decision on the merits which focuses

on whether the complaint contains allegations that, if proven, are sufficient to entitle a party to relief." Gould, Inc. v. United States, 67 F.3d 925, 929 (Fed. Cir. 1995) (citation omitted).

In resolving a RCFC 12(b)(6) motion, the Court should assess whether plaintiffs' complaint adequately states a claim for relief under the implicated statute and regulations and whether plaintiffs have made "allegations plausibly suggesting (not merely consistent with)" entitlement to relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (rephrasing Twombly standard as requiring "a claim to relief that is plausible on its face"); accord Cambridge v. United States, 558 F.3d 1331, 1335 (Fed. Cir. 2009); McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1356-57 (Fed. Cir. 2007). Although plaintiffs' factual allegations need not be "detailed," they "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555 (citations omitted). Plaintiffs "must provide 'a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Totes-Isotoner Corp. v. United States, 594 F.3d 1346, 1354 (Fed. Cir. 2010) (quoting Twombly, 550 U.S. at 555 (alteration in original) (citation omitted) (internal quotation marks omitted)). "At the same time, a court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" Acceptance Ins. Cos. v. United States, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting Twombly, 550 U.S. at 555). The Court thus "'accept[s] as true all factual allegations in the complaint, and . . . indulge[s] all reasonable inferences in favor of the non-movant'" to evaluate whether plaintiff has stated a claim upon which relief can be granted. Chapman Law Firm Co. v. Greenleaf Const. Co., 490 F.3d 934, 938 (Fed. Cir. 2007) (alterations in original) (quoting Sommers Oil Co. v. United States, 241 F.3d 1375, 1378 (Fed. Cir. 2001)).

V. ARGUMENT

A. Plaintiffs' Third Cause of Action is Untimely.

In plaintiffs' Third Cause of Action, plaintiffs seek unspecified damages for allegedly improper alienation of portions of the Harry Crawfish allotment and other unspecified allotments as "town lots" for use as residences by individuals and for surface operations by mining companies. Compl., ¶¶ 40-45. Plaintiffs allege that lead and zinc ore was discovered in 1913 and "[a] town site developed overnight around the new workings . . . ." Id., ¶ 40. Plaintiffs contend that mining companies deposited chat on land they leased as town lots, rendering those parcels "unleasable since the early 1900s." Id., ¶ 41. As damages, plaintiffs appear to seek the maximum rental value that could have been obtained had those parcels been leaseable, but for the chat deposits. Id., see also id., ¶ 45 (seeking "substantial sums of rent and other amounts"). Plaintiffs also complain of "Bills of Sale" and town lot leases being imprudent or improper at an unspecified point in history. Id., ¶ 42. Plaintiffs' claims in their Third Cause of Action (or portions thereof) that allege failure to obtain maximum rental rates for town lot leases, allegedly imprudent transfers to fee ownership of town lots, or other alleged leasing irregularities associated with town lots are untimely and are barred by the applicable statute of limitations, 28 U.S.C. § 2501. Plaintiffs' claims accrued decades ago and plaintiffs knew or should have known of their claims substantially before 2006 (six years before plaintiffs filed their instant complaint).

The six-year statute of limitations set forth in 28 U.S.C. § 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims. John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1354 (Fed. Cir. 2006); Brickwood Contractors, Inc. v. United States, 77 Fed. Cl. 624, 629 (Fed. Cl. 2007). "Claims by individual Indians or Tribes for breach of trust are subject to the same six-year statute of limitations under 28 U.S.C. § 2501 that applies to other

litigation against the United States under the Tucker Act." Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1578 (Fed. Cir. 1988). The statute begins to run when the "claim first accrues." 28 U.S.C. § 2501. A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the government and entitle the claimant to institute the action. Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988). Additionally, a claim first accrues when the operative facts exist and are not inherently unknowable. Menominee Tribe v. United States, 726 F.2d 718, 720-22 (Fed. Cir. 1988). Indian beneficiaries, no less than anyone else, are charged with notice of whatever facts that an inquiry appropriate to the circumstances would have uncovered. Id. Inquiry notice is evaluated by an objective standard. Fallini v. United States, 56 F.3d 1378, 1380 (Fed. Cir. 1995). This objective standard applies equally to Indian breach of trust claims. San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1350 (Fed. Cir. 2011).

Here, plaintiffs' town lot claims are untimely. Plaintiffs allege that "[i]n 1913, lead and zinc ore was discovered on the Harry Crawfish Allotment and other allotments[,] mining began immediately," and that a "town site developed overnight around the new workings . . . ." Complaint, ¶ 40. Where activities are open and notorious the claimant is "on inquiry as to its possible injury." Coastal Petroleum Corp. v. United States, 228 Ct. Cl. 864, 867 (1981). Plaintiffs knew or should have known that individuals and mining companies were using town lots shortly after 1913. Plaintiffs were further aware that the town of Picher was incorporated in 1918 and had a population of over 9,700 by 1920. Compl., ¶ 40. The development of a mining boom town is open and notorious, and certainly was known or knowable by plaintiffs decades ago.

Plaintiffs allege that mining companies deposited chat on certain town lots. Complaint, ¶

41. According to plaintiffs, those chat piles rendered those town lots "unleasable since the early 1900s." Id. A simple visual inspection would reveal mountains of chat on plaintiffs' land. Thus, plaintiffs knew or should have known of the claims advanced in their Third Cause of Action for over a century before they filed their instant lawsuit. If, as plaintiffs allege, allowing chat to be deposited on town lot leases was a breach of trust, that breach of trust occurred, and was known to plaintiffs, "since the early 1900s." Such claims are clearly untimely.

In 1919, Congress passed a law permitting the sale of town lots (in fee) on Quapaw allotments by allottees who held a majority interest in those allotments. An Act Authorizing the Sale of Inherited and Unpartitioned Allotments for Town-Site Purposes in the Quapaw Agency, Oklahoma, Pub. L. No. 66-82 (1919), 41 Stat. 355. Plaintiffs, like all litigants, are presumed to know the law. Harris Corp. v. Ericsson, Inc., 417 F.3d 1241, 1263 (Fed. Cir. 2005), citing Pittsburg & Lake Angeline Iron Co. v. Cleveland Iron Min. Co., 178 U.S. 270, 278 (1900) ("Everyone is presumed to know the law"). Plaintiffs knew or should have known if any town lot "Bills of Sale," Compl., ¶ 42, were inconsistent with the 1919 Act at the time they were made. Given that the Picher mining boom was "between 1917 and 1947," id., ¶ 40, plaintiffs' claims with respect to the sale of town lots accrued long before 2006 and are barred.

Plaintiffs also appear to seek damages for hypothetical town lot leases that may have issued but for the sale of town lots in fee to third-parties or the storage of chat on town lots. See id., ¶ 41 (discussing unleaseable lots that may have been leased); id., ¶ 45 (discussing deprivation of potential rent). Plaintiffs' claims that town lots should have been leased, but were not, accrued at the time that those leases could have been made, which, according to plaintiffs, appears to have been back to the "early 1900s." Id., ¶ 41. Indeed, the number of town lot leases actually issued on allotted land appears to have dwindled from 14,500 at some point prior to

1946 to "very few active leases in 2006 . . . ." Id., ¶ 43. To the extent plaintiffs claim that the United States should have leased town lots, but did not, those claims accrued long before 2006 and are barred by the statute of limitations.

Plaintiffs' Third Cause of Action alleges trust asset mismanagement. Trust asset mismanagement claims are subject to the six-year statute of limitations. 28 U.S.C. § 2501. These claims are unaffected by the various Department of the Interior Appropriations Act riders enacted for the last several years. The Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786, provides, in part,

> [t]hat, notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, 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 beneficiary can determine whether there has been a loss.

Id., Div. E, Tit. I, Office of the Special Trustee [125 Stat. at 1002].[3/] For claims that fall within the Appropriations Act's ambit, the statute of limitations does not commence to run until the individual Indian is provided with a meaningful accounting. Shoshone Indian Tribe of the Wind River Reservation v. United States, 364 F.3d 1339, 1347 (Fed. Cir. 2004) ("Shoshone II"). But the Appropriations Act does not reach all trust mismanagement claims. The Appropriation Act's outer boundaries have been delineated by the Federal Circuit. The Appropriations Act "applies to losses or mismanagement of trust funds only." Shoshone Indian Tribe of the Wind River Reservation v. United States, 672 F.3d 1021, 1034 (Fed. Cir. 2012) ("Shoshone IV"). The

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[3/] The first version of this provision was adopted in 1990. The original version provided, inter alia, "[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 the accounting of such funds." 104 Stat. 1915. This provision was modified, with minor changes, every year until the current language was adopted in 2003. 117 Stat. 11, 236.

Appropriations Act does not apply to "claims involving trust assets." Shoshone II, 364 F.3d at 1350. As such, "[a] claim premised upon the terms of a lease being suboptimal is a claim related to trust assets, and, therefore, outside the scope" of the Appropriations Act. Shoshone IV, 672 F.3d at 1035. Similarly, "a claim premised upon the Government's failure to collect royalties in accordance with a hypothetical lease is a claim for mismanagement of trust assets." Id.

Here, plaintiffs' claims asserted in their Third Cause of Action that town lots were allegedly unlawfully or imprudently alienated, that town lots could have been leased but were not, that town lots were rendered unleasable by chat deposits, or that there were alleged historical town lot leasing irregularities are trust asset mismanagement claims and are barred by the applicable statute of limitations. Compl., ¶¶ 41, 42, 45. Plaintiffs' foregoing claims are similar to plaintiffs' untimely "unlawful conversion" of oil lease claims at issue in Shoshone IV, which the Federal Circuit found to be untimely under the six-year statute of limitations. 672 F.3d at 1027. Plaintiffs' Third Cause of Action should be dismissed for lack of subject-matter jurisdiction. Plaintiffs have not alleged any specific town lot lease claims that are not time barred. It is plainitffs' burden to plead facts establishing claims that are not time barred. LeMear v. United States, 9 Cl. Ct. 562, 569 (1986).

To 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. Shoshone II, 364 F.3d at 1350. As currently plead, plaintiffs have not alleged such facts in their Complaint. No town lot leases are identified by lease number, date of issuance, or with any particularity. Compl., ¶¶ 40-45. It appears that there are, at most, a "few" town lot leases that have been

recently issued by the Bureau of Indian Affairs. Id., ¶ 43. It is unknown if plaintiffs allege any malfeasance associated with those "few" modern town lot leases.[4/]

"A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." RCFC 12(e). Plaintiffs' Third Cause of Action is overly broad, and clearly contains claims that are barred by the applicable statute of limitations. The United States is unable to ascertain, with any particularity, what timely town lot claims, if any, are asserted by plaintiffs in their Third Cause of Action that fall within this Court's subject-matter jurisdiction. Thus, under such circumstances, plaintiffs' untimely claims in their Third Cause of Action should be dismissed, and plaintiffs should be ordered to file a more definite statement (if they can) as to those town lot lease claims they believe to fall within this Court's subject-matter jurisdiction. See Tahir Erk v. Glenn L. Martin Co., 116 F.2d 865, 870 (4th Cir. 1941) ("To have amplified the complaint and to have tested it for any vital defects, the defendant might have moved for a more definite statement or for a bill of particulars.").

B. This Court Lacks Jurisdiction Over Plaintiffs' Fifth Cause of Action.

In plaintiff's Fifth Cause of Action, plaintiffs challenge the United States' "subsequent efforts to clean up the environmental devastation left behind" from decades of mining in and around the Quapaw Reservation. Compl., ¶ 54. Plaintiffs allege that the United States should not have allowed the Quapaw Reservation to become contaminated, that it has failed to properly

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[4/] The United States suspects that similar jurisdictional infirmities lie with claims encompassed by plaintiffs' Fourth Cause of Action for alleged agricultural lease mismanagement. Compl., ¶¶ 46-51. Unlike the town lot claims in plaintiffs' Third Cause of Action, plaintiffs have plead in their Fourth Cause of Action alleged agricultural leases issued by the United States for allotted land and have alleged failure by the United States to "collect rent due [and] enforce lease provisions." Id., ¶ 50. Thus, the United States does not challenge plaintiffs' Fourth Cause of Action at this time, but anticipates raising jurisdictional issues after plaintiffs specify their agricultural leasing claims in discovery.

address that contamination, and that it is derelict in its current management of plaintiffs' contaminated lands. Id., ¶¶ 52-55. As a result of the foregoing alleged malfeasance, plaintiffs seek an unspecified amount in collateral damages for alleged leasing that could have occurred but for the contamination. Id., ¶ 56. This Court lacks subject-matter jurisdiction over these claims.

1. Plaintiffs' claims are preempted by CERCLA.

On September 8, 1983, the Tar Creek Superfund Site was placed on the National Priorities List. Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40,658, 40,668 (Sept. 8, 1983). Although the Tar Creek Superfund Site "has no clearly defined boundaries, [it] consists of the areas of Ottawa County impacted by mining waste." Operable Unit 4 ("OU4") Record of Decision ("ROD") at 5 (Feb. 20, 2008).[5/] Plaintiffs' allotted trust land is located within Ottawa County, Oklahoma, Compl., ¶¶ 1-9, and is within the Tar Creek Superfund Site, id., ¶47. Investigation and remedial activities at the Tar Creek Superfund Site have been divided into five Operable Units to date. Those Operable Units have addressed, among other things, water quality monitoring, residential property contamination issues, and chat piles. See, e.g., OU4 ROD at 5. Currently, the United States Environmental Protection Agency ("EPA") is administering OU4 cleanup activities. EPA's selected remedy for OU4 involves voluntary relocation of residents, phased consolidation of chat and chat base, chat sales, and on-site disposal of certain contaminates. Id. at 31-34, 44.

[5/] Available, along with other Tar Creek-related documents, at: http://www.epa.gov/region6/6sf/oklahoma/tar_creek/index.htm.

This document may be judicially noticed because it may be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. Alternatively, this Court may consider the OU4 ROD on this motion to dismiss for lack of subject-matter jurisdiction, even though it is extraneous to the Complaint. Rocovich, 933 F.2d at 993.

EPA's cleanup efforts at the Tar Creek Superfund Site are ongoing, and may be ongoing for some time. See id. at 1 ("the timeframe for chat sales is extended to 30 years), 34 ("2 years to complete the Voluntary Relocation once it is fully funded, and 30 years to implement the remaining components").

Section 113(h) of the Comprehensive Environmental Response, Contamination, and Liability Act ("CERCLA") provides, in relevant part, that "[n]o Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under [CERCLA] . . . ." 42 U.S.C. § 9613(h). Because plaintiffs' Fifth Cause of Action challenges EPA's remediation activities at the Tar Creek Superfund Site, this Court lacks subject-matter jurisdiction over these claims.

Plaintiffs seek to litigate the appropriateness of EPA's chosen remedy for the Tar Creek Superfund Site and the Bureau of Indian Affairs' participation in implementing that remedy. Specifically, plaintiffs challenge the Indian chat sales model documents to be used by EPA and the Department of the Interior to facilitate the sale of chat as part of OU4. Compare OU4 ROD Appendix E - Chat Sales Agreement with Complaint, ¶ 37 ("Officials from the BIA have and continue to advise Quapaw Tribal members who own restricted interests in chat piles that their ability to obtain any compensation for the chat already removed depends on their agreeing to sign release and indemnity agreements for the sale of restricted Indian property.").

Plaintiffs indirectly challenge EPA's decision to allow chat piles to remain in situ until sold or otherwise disposed of. Compl., ¶ 47 ("Defendant allowed the mining companies to pile hundreds of millions of tons of toxic mining wastes on the land, undermine the subsurface support of the area, create toxic millponds, pollute Tar Creek and other surface and ground waters with lead, zinc and cadmium, and create toxic dust storms of blowing mine tailings.").

Plaintiffs directly challenge EPA's remediation efforts as an alleged breach of trust. Id., ¶ 54 (In "subsequent efforts to clean up the environmental devastation . . . . Defendant has failed utterly in its fiduciary duty of trust to manage appropriately the natural resources located on these lands . . . ."). Plaintiffs allege the United States has "[a]llowed 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." Id. Plaintiffs also allege that the United States has failed to "ensure that a lessee completes a reasonable restoration of the surface and subsurface of lands before it is released from its obligations . . . ," id., ¶ 55, directly challenging the United States ongoing efforts to identify Potentially Responsible Parties and recover cleanup costs. Plaintiffs' Fifth Cause of Action is a collateral attack on EPA's selected remedy for the Tar Creek Superfund site.

Section 113(h) "protects the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort." McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 329 (9th Cir. 1995). The "obvious meaning" of Section 113(h) is that "when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy." Schalk v. Reilly, 900 F.2d 1091, 1095 (7th Cir. 1990); see also McClellan, 47 F.3d at 330-331; Alabama v. United States Envtl. Prot. Agency, 871 F.2d 1548, 1557-59 (11th Cir. 1989). Because plaintiffs' Fifth Cause of Action is a collateral attack on the CERCLA remedy for the Tar Creek Superfund Site, this Court lacks jurisdiction to entertain plaintiffs' claims.

Plaintiffs' Fifth Cause of Action is largely indistinguishable from the State of New Mexico's claims in New Mexico v. Gen. Elec. Co., 467 F.3d 1223 (10th Cir. 2006). In that case,

the State sought natural resource damages based upon an argument that EPA's selected "cleanup does not address the entirety of the contamination," that the EPA-selected remedial plan was inadequate and did not apply the "proper remediation standard[s]," and that the remedial plan was too "limited in scope." Id. at 1249. Similarly here, plaintiffs challenge the speed and adequacy of the Tar Creek Superfund Site remediation plan. Plaintiffs seek damages because they believe that the remediation is proceeding too slowly, Compl., ¶ 54, because the remedial plan does not adequately consider "cultural uses of Plaintiffs," id., and because they believe that the remediation will not make them whole for harms suffered, id., ¶¶ 37, 47. Plaintiffs' damages claims, based upon plaintiffs' disagreement with the remedial activities underway, "is, in all respects, a challenge to an EPA-ordered remediation." New Mexico, 467 F.3d at 1249.

Plaintiffs' Fifth Cause of Action is a claim for damages that has a direct bearing on the ongoing remedial actions at the site. Where a claim relates to, but is collateral to, the CERCLA remedy, Section 113(h) does not bar such a suit. Costner v. URS Consultants, Inc., 153 F.3d 667, 675 (8th Cir. 1998) (False Claims Act claims not preempted by Section 113(h)). But, as the Court of Federal Claims has held, "[t]o the extent that [plaintiff's] claim in this court rests on actions taken by EPA under CERCLA, jurisdiction is therefore lacking." Tarrant v. United States, 71 Fed. Cl. 554, 557 (2006). The Quapaw Reservation was contaminated by years of lead and zinc mining. The United States has invested years, and millions of dollars, to investigate and remediate that contamination. The United States has developed (and continues to develop) a comprehensive plan, under CERCLA, to remediate the environment in and around the Quapaw Reservation. Under CERCLA, the United States has the ability to recover response costs from responsible parties and the United States (as well as the Quapaw Tribe) has the ability to seek natural resource damages. Plaintiffs' Fifth Cause of Action rests upon the United States'

allegedly inadequate attention to the Tar Creek Superfund Site and jurisdiction is therefore lacking. Plaintiffs' Fifth Cause of Action should be dismissed because it rests on actions taken by EPA under CERCLA.

2. Plaintiffs' Fifth Cause of Action is untimely.

Assuming, arguendo, that plaintiffs' Fifth Cause of Action could survive CERCLA Section 113(h), plaintiffs' claims would be barred by the applicable statute of limitations. The "environmental devastation" of which plaintiffs complain occurred "through the mining boom of World War I and World War II." Compl., ¶ 54. Plaintiffs allege that "mountains of chat," id., ¶ 54, were allowed to accumulate on their land, some "since the early 1900s," id., ¶ 41. The Quapaw Reservation was identified as a Superfund site in 1983. 48 Fed. Reg. at 40,667. On December 10, 2003, the Quapaw Tribe and certain putative class members filed suit in the United States District Court for the Northern District of Oklahoma over environmental contamination on tribal and allotted land. Quapaw Tribe of Okla. v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1174-75 (N.D. Okla. 2009). The environmental harm of which plaintiffs complain in their Fifth Cause of Action occurred 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. Thus, plaintiffs' claims are untimely and this court lacks subject-matter jurisdiction over those claims by operation of the statute of limitations, 28 U.S.C. § 2501.

The environmental harm claims asserted in Plaintiffs' Fifth Cause of Action are trust asset mismanagement claims, as defined by the Federal Circuit. Plaintiffs do not allege, in their Fifth Cause of Action, mismanagement of trust funds, failure or delay in collecting payments due under leases, failure or delay in depositing monies collected under leases in plaintiffs' interest-bearing trust accounts, or failure or delay in assessing penalties for late payments due under

leases. Compl., ¶¶ 52-56. As such, plaintiffs' Fifth Cause of Action alleges trust asset mismanagement and the Appropriations Act riders' tolling provisions do not apply. Shoshone IV, 672 F.3d at 1035. Thus, plaintiffs' Fifth Cause of Action should be dismissed as untimely.

C. Plaintiffs' Sixth Cause of Action is Outside this Court's Subject-Matter Jurisdiction.

Plaintiffs' Sixth Cause of Action is a "catch-all" claim for alleged breach of general trust obligations owed by the United States to Indians and alleged failure to "act in the best interests of the individual Indian." Compl., ¶ 57. As long held by the Supreme Court, claims for breaches of the general trust relationship between the United States and Indians are outside this Court's subject-matter jurisdiction. See United States v. Mitchell, 445 U.S. 535, 542 (1980) ("Mitchell I") (General Allotment Act created only "limited trust relationship" that did not give rise to enforceable fiduciary obligations against the United States). Because plaintiffs' Sixth Cause of Action does not allege a violation by the United States of a specific statutory or regulatory obligation that is money-mandating in breach, plaintiffs' Sixth Cause of Action should be dismissed for lack of subject-matter jurisdiction.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Navajo Nation, 537 U.S. 488, 502 (2003) ("Navajo I") (quoting United States v. Mitchell, 463 U.S. 206, 212 (1983) ("Mitchell II")). A waiver of sovereign immunity must be "'unequivocally expressed' in statutory text," FAA v. Cooper, ___ U.S. ___, 132 S. Ct. 1441, 1448 (2012) (citations omitted), and the "scope" of any such waiver must be "strictly construed . . . in favor of the sovereign," Lane v. Peña, 518 U.S. 187, 192 (1996), and "not 'enlarge[d] . . . beyond what the language requires.'" United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992) (citation omitted); see also Cooper, 132 S. Ct. at 1448.

The Tucker Act provides a "[l]imited" waiver of the United States' immunity from suit, United States v. Navajo Nation, 556 U.S. 287, 289 (2009) ("Navajo II"), by granting this Court jurisdiction over

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). The corresponding Indian Tucker Act, 28 U.S.C. § 1505, provides essentially the "same access" to relief.[6/] Mitchell I, 445 U.S. at 540.

While the text of the two Tucker Acts addresses damages claims "founded . . . upon" (28 U.S.C. § 1491(a)(1)) or "arising under" (28 U.S.C. § 1505) the Constitution or a federal statute or regulation, it is well settled that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable." Mitchell II, 463 U.S. at 216. Instead, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Id. at 216-217 (quoting United States v. Testan, 424 U.S. 392, 400 (1976) (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967))); accord Navajo I, 537 U.S. at 503.

An Indian plaintiff asserting a non-contract claim under the Tucker Act or Indian Tucker Act must therefore clear "two hurdles" to invoke federal jurisdiction. Navajo II, 556 U.S. at 290. "First, the [Indian] '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.'"

6/ Plaintiffs cite the Indian Tucker Act as a basis for this Court's jurisdiction in their Complaint. Compl., ¶ 11. The United States disputes that plaintiffs may assert claims under the Indian Tucker Act because they are neither a "tribe, band, or other identifiable group of American Indians. . . ." 28 U.S.C. § 1505. This dispute need not be resolved in adjudicating the United States' motion to dismiss.

Id. (quoting Navajo I, 537 U.S. at 506). That "threshold" showing must be based on "specific rights-creating or duty-imposing [constitutional,] statutory or regulatory prescriptions" that establish "specific fiduciary or other duties" that the government allegedly has failed to fulfill. Navajo I, 537 U.S. at 506; see also United States v. Jicarilla Apache Nation, ___ U.S. ___, 131 S. Ct. 2313, 2325 (2011) (holding that the government's duties vis-a-vis Indian tribes are defined by "specific, applicable, trust-creating statute[s] or regulation[s]," not "common-law trust principles"); Navajo II, 556 U.S. at 302 (same).

Second, "[i]f that threshold is passed," the plaintiff must further show that "the relevant source of substantive law," the violation of which forms the basis of his claim, "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" Navajo II, 556 U.S. at 290-291 (quoting Navajo I, 537 U.S. at 506) (brackets and citation omitted). That second showing reflects the understanding that not "all [such provisions conferring] substantive rights" mandate the award of money damages from the government "to redress their violation," and that the limited waivers of sovereign immunity in the Tucker Acts extend only to claims that the government has violated provisions that themselves require payment of a damages remedy. Testan, 424 U.S. at 400-401 (citing Eastport S.S. Corp., 372 F.2d at 1009); id. at 397-398; see also also Navajo I, 537 U.S. at 503, 506; Mitchell II, 463 U.S. 216-218.

In other words, "the basis of the federal claim—whether it be the Constitution, a statute, or a regulation"—that is identified in the first step of the analysis can in turn give rise to a claim for money damages under the Tucker Act only if "that basis 'in itself can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Testan, 424 U.S. at 401-402 (ellipsis and citation omitted). The Tucker Acts therefore "waive sovereign

immunity for claims premised on other sources of law (e.g., statutes or contracts)" "only if " the "other source of law" creating "the right or duty" that the government has allegedly violated "'can fairly be interpreted as mandating compensation.'" Navajo II, 556 U.S. at 290 (quoting Testan, 424 U.S. at 400); accord AAFES v. Sheehan, 456 U.S. 728, 739-741 (1982) (Tucker Act "jurisdiction . . . cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages.").

"Congress may style it relations with Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between parties at common law." Jicarilla, 131 S. Ct. at 2323 (quoting Mitchell I, 445 at 532, 542 and Mitchell II, 463 U.S. at 224). Plaintiffs' Sixth Cause of Action alleges general breaches of trust based upon unspecified "legal responsibilities" and "legal duties." Compl., ¶ 58. The mere existence of a general ("limited" or "bare") trust relationship between the United States and Indians is insufficient to bring plaintiffs' Sixth Cause of Action within this Court's subject-matter jurisdiction. Because plaintiffs' Sixth Cause of Action does not identify any statutes or regulations that are money-mandating in breach, or allege that the United States has violated any of those statutes or regulations, plaintiffs' Sixth Cause of Action cannot clear the first hurdle of establishing subject-matter jurisdiction under the Tucker Acts and should be dismissed.

D. Plaintiffs Fail to State a Claim for a Judicial Taking in Their Eighth Cause of Action.

Plaintiffs' Eighth Cause of Action, styled an "alternative claim," for an alleged judicial taking should be dismissed for lack of subject-matter jurisdiction or failure to state a claim. RCFC 12(b)(1), 12(b)(6). Three flaws in plaintiffs' takings theory warrant dismissal. First, plaintiffs have failed to plead a cause of action that is recognized by the United States Court of

Appeals for the Federal Circuit as being within this Court's jurisdiction. Second, plaintiffs allege a judicial taking of a chose in action, but have failed to identify any specific, vested, property interest allegedly taken. Third, plaintiffs' judicial taking claim, if any, is unripe.

In a plurality opinion authored by Justice Scalia, four justices of the Supreme Court suggested that the actions of a court may affect a taking of real property. Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., ___ U.S. ___, 130 S. Ct. 2592, 2602 (2010) (plurality opinion). To fall within Justice Scalia's test for a judicial taking, the plaintiff must establish a "right of private property" that existed before a judicial decision that was subsequently taken away by that decision. Id. at 2602, 2611. As only three justices joined with Justice Scalia, the holding that a takings claim may be asserted based on the actions of another court is non-precedential and is not binding on this Court. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987).

Further, the Federal Circuit has held that this Court lacks jurisdiction over claims alleging that a court effectuated a taking in violation of the Fifth Amendment. Such claims would require this Court "to determine whether appellants suffered a categorical taking of their property at the hands of the . . . courts." Allustiarte v. United States, 256 F.3d 1349, 1351 (Fed. Cir. 2001). This Court lacks jurisdiction to scrutinize the decisions of other federal courts. Id.; Vereda, Ltd. v. United States, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (recognizing that the "Court of Federal Claims does not have jurisdiction to review the decisions of district courts" and "cannot entertain a taking[s] claim that requires the court to 'scrutinize the actions of' another tribunal.") (quotation marks and citations omitted).

Plaintiffs' Eighth Cause of Action calls upon this Court to, inter alia, scrutinize the United States District Court for the District of Columbia's decision to certify a non-opt out class

in Cobell, et al. v. Salazar, D.D.C. No. 96-cv-1285, Compl., ¶ 66; to review the District Court and the United States Court of Appeals for the District of Columbia Circuit's conclusion that the settlement of plaintiffs' Historical Accounting Claims was fair and reasonable, see Cobell v. Salazar, 679 F.3d 909, 918 (D.C. Cir. 2012) ("Cobell XXIII") (affirming certification of and settlement of Historical Accounting Class claims); and to review this Court's prior decision that it lacked subject-matter jurisdiction over plaintiffs' previous complaints in this Court, Compl., ¶¶ 68-69. Plaintiffs' request that this Court declare the District Court's decision in Cobell a judicial taking runs afoul of Allustiarte, and plaintiffs' challenge to this Court's prior judgments of dismissal without prejudice for lack of subject-matter jurisdiction is nothing more than a collateral attack on a ruling that could have been (and has been) appealed by plaintiffs.

Plaintiffs' Eighth Cause of Action is largely indistinguishable from the claim advanced by plaintiffs in Allustiarte. In Allustiarte, the plaintiffs asserted that court-appointed bankruptcy trustees had improperly managed their assets in bankruptcy proceedings by selling their assets for less than they were worth and by otherwise mishandling their assets. 256 F.3d at 1350-51. The plaintiffs contended that the bankruptcy court's approval of these actions constituted a taking. Id. Specifically, plaintiffs alleged that the "improprieties in certain actions of the Bankruptcy Courts in the Ninth Circuit … constituted a taking without just compensation in violation of the Fifth Amendment to the United States Constitution." Id. at 1350.

The Federal Circuit explained that adjudicating a claim alleging that a court effectuated a taking would require the Court of Federal Claims "to determine whether [the plaintiffs] suffered a categorical taking of their property at the hands of the bankruptcy trustees and courts, or whether the courts' and trustees' actions defeated their reasonable, investment-backed expectations." Id. at 1351. Although the appellants argued otherwise, the Federal Circuit

decided that undertaking such a determination would necessarily require the Court of Federal Claims to "scrutinize the actions of the bankruptcy trustees and courts," id. at 1351-52, and held that the Court of Federal Claims lacked jurisdiction to undertake that scrutiny because it did not have "jurisdiction to review the decisions of district courts," id. at 1352 (citing Joshua v. United States, 17 F.3d 378, 380 (Fed. Cir. 1994)). The same result is warranted here. Plaintiffs' judicial takings claim would require this Court to scrutinize and review the actions of the District Court and the District of Columbia Circuit, something that is outside this Court's jurisdiction. As in Allustiarte, plaintiffs' remedy, if any, is with the District Court, the District of Columbia Circuit, or the Supreme Court. 256 F.3d at 1352.

To the extent that plaintiffs disagree with this Court's judgment of dismissal without prejudice in Goodeagle II, see Compl., ¶ 69, plaintiffs should have appropriately addressed that disagreement in a motion for new trial, RCFC 59, in a motion for relief from the judgment, RCFC 60, or in their appeal to the Federal Circuit, RCFC 58.1. A collateral attack on the Court's prior ruling under the guise of a "judicial taking" should not be countenanced.

Even if this Court were to adopt the plurality's reasoning in Stop the Beach, plaintiffs cannot plead facts here that fall within Justice Scalia's test for a judicial taking. Indeed, plaintiffs' complaint appears to propose an expansion of the judicial takings doctrine even beyond what was contemplated by the four justices in Stop the Beach. Under Justice Scalia's approach, for there to be a judicial taking, plaintiffs must establish that they had a vested property right under applicable substantive law prior to the judicial decision taking that property interest. Stop the Beach, 130 S. Ct. at 2611. Here, plaintiffs allege, at best, that they had one or more legal claims that were compromised by the Cobell settlement. Compl., ¶¶ 63-71. Although some causes of action may be assigned or transferred, a cause of action for an equitable

accounting that may or may not be awarded by the District Court is a far cry from the property interests at issue in Stop the Beach. There is no guarantee plaintiffs would have prevailed on their claims in Cobell. See Cobell XXIII, 679 F.3d at 918 (appellant's "argument ignores that the record developed through extensive and hard-fought litigation indicates that the different interests she alleges likely do not exist and that even if they do exist, they would not be revealed by the type of sampling-heavy accounting that would almost certainly occur if the plaintiff class prevailed in the litigation"). Thus, plaintiffs have failed to allege a particularized and vested property right that was allegedly taken by any judicial action and dismissal for failure to state a claim is appropriate.

Finally, plaintiffs' judicial takings claim is admittedly not ripe for review. See Compl., ¶ 71 ("Should this Court nevertheless rule that Plaintiff cannot pursue those seven claims, which are property within the meaning of the Fifth Amendment, those claims will have been taken by the United States without just compensation paid to Plaintiffs.") (emphasis added). In the context of regulatory takings, the Supreme Court has held that "a takings claim challenging the application of land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001) (citations and internal quotation marks omitted). Similarly, here, plaintiffs' judicial takings claim, if any, is not ripe in light of plaintiffs' appeal in Goodeagle II and because none of plaintiffs' instant claims have yet been adjudicated by any court.[7/]

For the foregoing reasons, plaintiffs' Eighth Cause of Action should be dismissed.

[7/] Cobell objectors petitioned for certiorari with the Supreme Court on August 20, 2012. Thus, per the explicit terms of the Cobell settlement agreement, the Cobell settlement will not be final until that petition for certiorari (and a potential additional petition by other objectors who were granted an enlargement of time to file their petition on August 17, 2012) is resolved.

VI. CONCLUSION

Wherefore, the United States respectfully requests that its partial motion to dismiss be granted in full.

Dated: August 27, 2012

Respectfully submitted,

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