IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RAMONA TWO SHIELDS and MARY LOUISE DEFENDER WILSON individually, and on behalf of all others similarly situated,	)	
Plaintiffs,	)	No. 1:13-cv-00090-LB
v.	)	Hon. Lawrence J. Block
UNITED STATES,	)	ORAL ARGUMENT REQUESTED
Defendant.	)	

PLAINTIFFS' BRIEF IN OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT [DKT. 6]

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Plaintiffs Ramona Two Shields and Mary Louise Defender Wilson file this brief in opposition to the Government's Motion to Dismiss and for Summary Judgment. Dkt. 6. They respectfully ask the Court to deny the Government's motion in its entirety.

OVERVIEW AND STATEMENT OF THE CASE

The Government has filed a summary judgment motion on Plaintiffs' first cause of action even though it has not filed an answer and even though no discovery has taken place. The Government's motion to dismiss deals with Plaintiffs' alternative claims for failure to disclose and for a legislative taking. The Government's motions are without merit.

The summary judgment motion rests on the single, strained idea that the *Cobell* settlement of Land Administration Claims somehow "unambiguously" released any conceivable claim relating to the Government's fiduciary role as trustee to Native American allottees. It does not do so. The Government's overbroad position on the scope of the release in the *Cobell* settlement fails for a number of reasons:

- It ignores the ***legal*** principles that apply to the interpretation of releases.
- It ignores the ***uniqueness*** of the *Two Shields* claims and damages, which did not accrue until after the cutoff date for the *Cobell* Agreement.
- It ignores the objective ***factual*** circumstances surrounding the execution of the *Cobell* Agreement.
- It ignores the ***practical*** effect of such an overstretched interpretation, which fails to pay the *Two Shields* class consistently with their damages.
- It ignores settled law that a party is entitled to ***discovery*** before it can be required to respond to a motion for summary judgment—particularly when (as here) the Government supports its "plain meaning" interpretation with 459 pages of cherry-picked factual evidence.

Basic contract law has long rejected a literalist interpretation of the terms of an agreement without consideration of all the objective facts and surrounding circumstances. This is because

those surrounding facts and circumstances provide context for release terms, and "context may well reveal that" contract terms otherwise thought to be clear "are not, and never were, clear on their face." *Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 752 (Fed. Cir. 1999). Context can reveal that a literal application of terms would result only in extreme, unfair, and contradictory results never intended by the parties.

If release language is open to more than one reasonable interpretation—or if a literalist interpretation of a few words is inconsistent with the objective facts or leads to unreasonable results—then, at a minimum, a latent ambiguity exists, which precludes summary judgment.

- The burden of proving the absence of any ambiguity is on the party seeking to enforce the release limitation—in this case the Government.

- The Government has a heightened burden in this case. The "Supreme Court has long recognized" that any ambiguity in an agreement between the Government and its Indian wards must be resolved "in favor of the Indian claim." *Standing Rock Sioux Tribe v. United States*, 182 Ct. Cl. 813, 820 (1968) (per curiam).

Applying this body of law to the objective circumstances reveals that the unique *Two Shields* claims fall outside the *Cobell* release, which was negotiated by class representatives with no interest in any of the specific Fort Berthold allottee oil and gas lease claims at issue in this case. Dkt. 6-2 at 30, 46-48. The *Two Shields* case involves a sweet spot in the biggest oil discovery in American history: the Fort Berthold Indian Reservation, which sits atop the Bakken Oil Shale Formation in North Dakota. Compl. ¶¶ 5, 40. The Government estimates that there are 7.4 billion barrels of recoverable oil in the Bakken formation. Ex. 3 at 165 ¶ 12. Others estimate even more. *Id.* Thus, this case also involves what may be the biggest rip off of individual Native Americans in recent history.

- The Bureau of Indian Affairs ("BIA") improperly approved of a scheme by middlemen to lease 42,000 acres of individual Indian allottee leases for a lease bonus that ranged from $100 to $450 an acre. Compl. ¶¶ 12-13, 105.

- Those middlemen later flipped those same leases to the Williams Companies (the oil company that will do the majority of the drilling) for an estimated $10,000 an acre (almost a half-billion dollars) in November 2010. *Id.* ¶ 113.

The *Cobell* settlement released only those Land Administration Claims that "were, or should have been, asserted in the Amended [*Cobell*] Complaint" as of September 30, 2009. Dkt. 6-2 at 65, 67, 98. The *Two Shields* claims had not accrued by this date.

- The *Two Shields* leases were not flipped to the Williams Companies until November 2010—more than a year after the cut-off date for asserting a "Land Administration Claims." Compl. ¶¶ 112-13; Dkt. 6-2 at 65 ¶ 21, 67 ¶ 30.

- The Williams Companies did not begin drilling or production of these leases until after November 2010. *See* Compl. ¶ 113.

- The Government failed to disclose to the *Cobell* class or the *Two Shields* putative class any information about the magnitude of the *Two Shields* claims ***or*** the Government's liability—indeed the Government has stonewalled efforts to get any such information. *Id.* ¶ 176; Ex. 1 at 3 ¶¶ 8-9.

The unique damages in *Two Shields* dwarf the $1.5 billion set aside under the *Cobell* settlement fund for accounting and trust administration claims.

- Even conservatively estimated, potential damages to each of the estimated 1,971 *Two Shields* class member could range from $100,000 to $150,000—a total of $200 million to $300 million. Ex. 1 at 2-3 ¶ 6; Ex. 4 at 209 ¶¶ 44-45.

- The *Cobell* settlement will pay each class member only $800 with the possibility of an additional average pro rata bump of $1,600. Ex. 2 at 49 ¶ 39. But given the *Cobell* payment methodology (which is based on past income and not future damages), discovery will likely show that many in the *Two Shields* putative class will get little or no extra pro rata sum. Ex. 4 at 207 ¶ 42.

Three distinguished experts back these points: Professor Mark Zmijewski of the University of Chicago Booth Graduate School of Business; Jim Parris, former head of Trust Accounting for the Bureau of Indian Affairs; and Daniel Reineke, a 30-year petroleum engineer who has worked for such companies as Halliburton and Conoco. They explain that, from a practical and objective perspective, the magnitude and methodology for calculating settlement

payments under *Cobell* are at odds with the methodology for calculating *Two Shields* damages—and therefore inconsistent with the Government's interpretation of the scope of the release in the *Cobell* settlement.

- The alleged damages for the estimated 1,971 *Two Shields* class members did not accrue until a year after the September 30, 2009 cut-off date for the *Cobell* settlement. Compl. ¶¶ 112-13; *see* Ex. 4 at 207 ¶ 42.

- The *Cobell* payment methodology does not account for *Two Shields* damages. It bases payments on what Native Americans ***received*** in their government-controlled account through 2009—and that misses most *Two Shields* oil and gas royalties because most production did not begin until 2010. *See* Compl. ¶ 113; Ex. 4 at 201 ¶ 30, 207 ¶ 42.

- This means there is a real chance many *Two Shields* putative class members would get practically nothing for their *Two Shields* claims under *Cobell*'s backward-looking payment formula. Ex. 4 at 206 ¶ 40.

- According to Professor Zmijewski, the timing of those *Two Shields* payments, combined with the magnitude of the *Two Shields* damages and the negative correlation with any *Cobell* payment, supports, from a damages perspective, an objective understanding that the *Two Shields* claims were not released under *Cobell*. Ex. 4 at 210 ¶ 46.

The bottom line is this. How could the *Two Shields* claims have been brought when the Government kept its evidence of the problem secret and made no disclosure of any details, and when the culminating part of the alleged scheme in the *Two Shields* case did not occur until more than a year after the claim cut-off date of the *Cobell* settlement? At a minimum, these legal standards and surrounding factual circumstances—found both in the pleadings and declarations by various experts—demonstrate why the Court should deny the summary judgment motion and instead permit the case to proceed to discovery.

The Government's motion to dismiss likewise falls flat. The second cause of action is not, as the Government contends, a collateral attack on the *Cobell* settlement. Rather, it is an independent claim for a different breach of fiduciary duty arising out how the Government

conducted itself in the *Cobell* settlement negotiations as the trustee for the *Two Shields* putative class. And contrary to the Government's suggestion, the Supreme Court has unequivocally held that these claims are actionable and money-mandating under circumstances nearly identical to those at issue here.

Similarly, nothing precludes this Court from considering Plaintiffs' third cause of action for Legislative Taking. The Federal Circuit has already rejected the Government's position that a "legal cause of action" against the Government not yet reduced to judgment is not a vested property right under the Fifth Amendment's Takings Clause. Moreover, Plaintiffs are not attempting to "re-litigate" anything. The Government's assertion that the *Cobell* courts passed on the "just compensation" issue is flat wrong.

Plaintiffs respectfully ask the Court to deny the Government's motion.

STANDARDS OF REVIEW

When deciding a motion to dismiss under either Rule 12(b)(1) or Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), the court "must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006) (citation and internal quotation marks omitted). "A claim should only be dismissed for lack of subject matter jurisdiction if the claim is clearly frivolous or wholly insubstantial." *Marvel Eng'g Co. v. United States*, 14 Cl. Ct. 614, 620 (1988). If any doubt exists, "[c]ourts have uniformly held that . . . the preferable practice is to assume that jurisdiction exists and proceed to determine the merits of the claim." *Id.* And a RCFC 12(b)(6) motion must be denied unless "the facts asserted by the plaintiff do not entitle him to a legal remedy."[1] *United Pac.*, 464 F.3d at

[1] Plaintiffs note that the Government does not challenge any of the factual allegations in

1327-28 (citation and internal quotation marks omitted).

In addition, where (as here) the Government moves for summary judgment on an issue on which it bears the ultimate burden of proof, it "must affirmatively produce evidence demonstrating that 'there is no genuine dispute as to any material fact.'" *Heger v. United States*, 103 Fed. Cl. 261, 267 (Fed. Cl. 2012) (quoting RCFC 56(a)). All "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable" to Plaintiffs. *Id.* (alteration in original) (citations omitted). Only if the Government meets its burden does the onus shift to Plaintiffs to "set forth specific facts showing that there is a genuine issue." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

And notably, if the Government makes its threshold showing, Plaintiffs' obligation to show "a genuine dispute about a material fact is not a stringent one." *Campbell v. United States*, 2 Cl. Ct. 247, 249 (1983). "Summary judgment in favor of the party with the burden of persuasion . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact. *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999).

Moreover, this obligation is caveated by RCFC 56(d), which provides that summary judgment "must 'be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.'" *Clear Creek Cmty. Servs. Dist. v. United States*, 100 Fed. Cl. 78, 82 (Fed. Cl. 2011) (quoting *Anderson*, 477 U.S. at 250 n.5). As the Supreme Court has explained, this provision protects parties from being "'railroaded' by a premature motion for summary judgment." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

RESPONSE TO GOVERNMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

For purposes of this Response, Plaintiffs provide the following answer to the

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the *Two Shields* complaint on *Twombly* grounds.

Government's factual contentions.

Based on the understanding that numbered paragraphs 14, 15, and 17 refer to the named plaintiffs in *Cobell* and not to the Plaintiffs in this case, Plaintiffs do not dispute the Government's contentions as expressed in its numbered paragraphs 1, 4, 7, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 31, 32, 36, 37, 38, 39, 40, 41, and 42. They note that each of these paragraphs (as well as any inferences that could be drawn from them) must be viewed in a light most favorable to Plaintiffs. *Heger*, 103 Fed. Cl. at 267.

Numbered paragraphs 2, 3, 5, 6, 8, 29, 30, 33, 34, and 35 are based exclusively upon the Declarations of Michelle D. Herman, Renita Howling Wolf, Katherine Kinsella, and Jennifer M. Keogh. Plaintiffs have not had an opportunity to depose any of these individuals, who base their testimony on records within the control of the Government, not Plaintiffs. The Government has not produced any documents pertinent to the statements averred to by these declarants. Plaintiffs are entitled to discovery to determine the basis for, the veracity of, and the complete context to each of these assertions. As such, for present purposes, Plaintiffs cannot fully acknowledge or refute the details of the Government's assertions, and on that basis, dispute their veracity. *See also infra* pp. 18-22 (arguing that the Government's motion is premature and therefore improper).[2] Accordingly, a genuine issue of material fact exists and, on this basis alone, the Court must deny the Government's summary judgment motion. *Anderson*, 477 U.S. at 248 ("[S]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

Additionally, certain of the Government's assertions are based principally upon the Herman and Howling Wolf Declarations, while also providing additional, secondary citation to a

[2] Plaintiffs note that they have also filed a separate alternative motion on this issue.

paragraph of Plaintiffs' Complaint. As to the following numbered paragraphs, Plaintiffs admit the contention only to the extent expressed and as phrased in the Complaint: 9, 10, 11, 12, and 13. As to all other matters expressed upon the basis of the Herman and Howling Wolf Declarations, Plaintiffs dispute them on the basis asserted above.

Certain of the Government's assertions purport to characterize, summarize, or paraphrase public records, rather than allowing each document to speak for itself. Plaintiffs object to having to respond to, clarify, and make complete Government assertions within the following numbered paragraphs: 16 (as to *Cobell* Amended Complaint) and 25 (as to Claims Resolution Act of 2010). To the extent the Government actually quotes and argues from each document, Plaintiffs do not object, and reserve the right to do same.

ARGUMENT

I. *COBELL* DID NOT RELEASE PLAINTIFFS' FIRST CAUSE OF ACTION.

The Government claims that it is entitled to summary judgment on Plaintiffs' first cause of action because, pursuant to the *Cobell* Settlement Agreement, Plaintiffs "waived, released, and forever discharged the United States from liability" for those claims (hereinafter "*Two Shields* claims"). Mot. at 14-18. By raising this issue now—before asserting the defense in an answer and before ***any*** discovery has even begun—the Government makes four critical mistakes:

- It ignores the fact that, for the reasons explained above, ***Plaintiffs dispute many of the material facts the Government needs to prove its case***. This precludes summary judgment and obviates the Court's need to consider any of Plaintiffs' remaining arguments as to Count 1. *Anderson*, 477 U.S. at 248.

- It ignores the fact that, even under the minimal facts now known to Plaintiffs, the language of the *Cobell* Agreement is open to differing reasonable interpretations. Not only does this create a fact issue, but it is a settled rule of construction that "***any ambiguity***" in an Indian agreement "***must be construed in the Indians' favor***." *Standing Rock Sioux Tribe v. United States*, 182 Ct. Cl. 813, 820 (1968) (per curiam) (emphasis added).

- It ignores the fact that "[t]he Supreme Court has made clear that summary judgment is inappropriate unless a tribunal permits the parties adequate time for discovery." *Dunkin' Donuts of Am., Inc. v. Metallurgical Exoproducts Corp.*, 840 F.2d 917, 919 (Fed. Cir. 1988). As a result, Plaintiffs must be permitted "a full opportunity to conduct discovery" ***before*** they can be required to respond to the Government's motion. *Anderson*, 477 U.S. at 250 n.5, 257.

- Finally, it ignores the fact that the *Cobell* Agreement released only those claims "that ***were, or should have been, asserted in the Amended Complaint*** when it was filed." Dkt. 6-2 at 98 (emphasis added). Because none of the named *Cobell* plaintiffs had standing to allege Plaintiffs' specific Fort Berthold oil and gas claims, Plaintiffs' claims ***could not have been*** asserted in the Complaint and thus could not have been released in *Cobell*.[3]

Because Plaintiffs have already explained their first point, the remainder of this section focuses on the last three of the Government's critical mistakes.

A. The Government Has Not Met Its Burden of Demonstrating that the *Cobell* Agreement "Clearly Bars" Plaintiffs' First Cause of Action.

The Government's entire argument against Plaintiffs' first cause of action begins and ends with a single point—that this Court need look no further than the *Cobell* Agreement to find that its language "clearly bars" Plaintiffs' *Two Shields* claims.[4] Mot. at 14. Not true.

To begin with, the Government misstates the law. The Federal Circuit has made clear that "[t]his court adheres to the principle that 'the language of a contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.'" *Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 752 (Fed. Cir. 1999) (citation omitted). Accordingly, to "determine

[3] To be clear, this is not an attack on the *Cobell* Agreement itself. Plaintiffs simply rely on foundational standing principles to help resolve the threshold ***interpretative*** question—whether *Two Shields* claims were "clearly" released under ***the language*** of the Agreement.

[4] As part of that argument, the Government devotes much of its discussion to the unremarkable points that, generally speaking, a class settlement binds class members and a party "may waive a future cause of action in a settlement agreement." Mot. at 14, 16. But these cases simply support Plaintiffs' point. To be released, Plaintiffs' claims actually had to be included in *Cobell*. And to be included, they had to exist by September 2009. Dkt. 6-2 at 65 ¶ 21, 67 ¶ 30.

which claims a release is intended to bar, courts consider the entirety of the instrument of the release ***and the 'facts and circumstances attending its execution***.'" *Imprimis Investors LLC v. United States*, 83 Fed. Cl. 46, 61 (Fed. Cl. 2008) (emphasis added).

The reason is simple. The surrounding facts and circumstances provided context for the terms of the release, and "context may well reveal that" contract terms otherwise thought to be clear "***are not, and never were, clear on their face***."[5] *Metric Constructors*, 169 F.3d at 752 (emphasis added). In that case, a latent ambiguity exists, and "***interpretation becomes a matter of fact***." *See Imprimis*, 83 Fed. Cl. at 61 (emphasis added); *Cray Research, Inc. v. United States*, 41 Fed. Cl. 427, 436 (Fed. Cl. 1998) (explaining that "a latent ambiguity becomes evident when, considered in light of the objective circumstances, two conflicting interpretations appear reasonable" while "a patent ambiguity is obvious, gross, or glaring" on the face of the agreement itself (citation omitted)). "[G]enuine issues of material fact abound," which the court must permit the parties to introduce extrinsic evidence to resolve. *Jay Cashman, Inc. v. United States*, 88 Fed. Cl. 297, 307 (Fed. Cl. 2009); *see Daewoo Eng'g & Const. Co., Ltd. v. United States*, 557 F.3d 1332, 1337 (Fed. Cir. 2009) ("Where the meaning of a written instrument is unclear, courts look to extrinsic evidence to resolve the question."). Thus, "[b]efore an interpreting court can conclusively declare a contract ambiguous or unambiguous, it ***must*** consult the context in which the parties exchanged promises." *Metric Constructors*, 169 F.3d at 752 (emphasis added).

Moreover, the Government's burden is even greater in this case because the agreement at issue is between the Government and its Indian wards. *See, e.g.*, *Standing Rock*, 182 Ct. Cl. at 820. As a result, "the document is ***not*** to be read as an ordinary contract agreed upon by parties

[5] Notably, this is reason enough to deny the Government's motion and, for the reasons discussed *infra* pages 18 through 22, permit Plaintiffs an opportunity to get discovery about the facts and circumstances surrounding the *Cobell* Agreement's execution.

dealing at arm's length with equal bargaining positions." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 174 (1973). Rather, "the general rule" is that ***if*** ambiguities or "[d]oubtful expressions" exist in the language, they must "be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *Id.* (alteration in original). As Chief Judge Cowen and Judges Laramore, Durfee, Davis, Skelton, and Nichols recognized in *Standing Rock*, "any ambiguity . . . ***must be construed in the Indians' favor***, especially when the construction urged by the Government is based on facts which they ***did not disclose to the Indians beforehand***." 182 Ct. Cl. at 820 (emphasis added).[6]

These basic interpretative principles doom the Government's motion. Because the Government misstates the law, it fails to attempt (much less satisfy) its burden of establishing "every element" of its waiver and release affirmative defense. *Eden Isle Marina, Inc. v. United States*, 89 Fed. Cl. 480, 523 (Fed. Cl. 2009) ("[I]t is incumbent on defendant to demonstrate both a meeting of the minds and a lack of ambiguity to establish its affirmative defenses."). It focuses solely on the "plain language" of the Agreement and thus fails even to consider whether a reasonably intelligent person acquainted with the surrounding facts and circumstances ***could*** understand the Agreement not to release Plaintiffs' unique Fort Berthold oil and gas claims. *See id.* This is reason enough to deny its motion. *Anderson*, 477 U.S. at 250 (explaining that the burden to rebut a summary judgment claim shifts to the non-moving party only if the moving

[6] To be clear, "[t]he United States Supreme Court has long recognized" that this canon "resolves ambiguity ***in any document*** related to Indian lands ***in favor of the Indian claim.***" *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000) (emphasis added). This includes contracts. *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 447 (1975) (explaining that the canon guides the interpretation of "treaties, statutes, and contracts"). It also benefits individual Indians as well as tribes. *See, e.g.*, *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956) (applying the canon to construe a statute in favor of an individual Indian allottee); *United States v. Felter*, 752 F.2d 1505, 1511-12 & n.10 (10th Cir. 1985) ("The Government's crabbed reading of this canon of construction to exclude [non-member] mixed-blood Ute Indians from its protections is not supported in the case law or by the purposes of the canon.").

party first satisfies its threshold evidentiary burden).

And notably, even if the Court were inclined to give the Government a pass on its procedural shortcoming, the fact remains that the facts and circumstances surrounding the execution of the *Cobell* Agreement—much of which Plaintiffs have yet to fully develop because the parties have yet to engage in any discovery—show that "a reasonably intelligent person" could reasonably interpret the Agreement not to include *Two Shields* claims. These include:

- The fact that Plaintiffs' *Two Shields* claims did not accrue and therefore could not have asserted until at least November 15, 2010—more than a year after the cut-off date for asserting a *Cobell* "Trust Administration" claim. Compl. ¶¶ 112-13; *see* Ex. 4 at 207 ¶ 42.

- The fact that the Government has yet to disclose "full information" regarding its secretive, systematic failures regarding approval of allottee oil and gas leases and the extent of its liability for those failures, and thus, the "Indian-ambiguity canon" applies with special force in this case. Compl. ¶ 176; Ex. 1 at 3 ¶¶ 8-9.

- The fact that the *Cobell* payment methodology only takes into account payments received prior to September 30, 2009, and has no correlation to the timing or magnitude of *Two Shields* claims. Ex. 4 at 206 ¶ 40, 209 ¶ 47.

Accordingly, at this preliminary stage of the litigation, summary judgment is simply inappropriate. *Anderson*, 477 U.S. at 248 ("[S]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."); *see also Cray Research*, 41 Fed. Cl. at 435 ("[I]f external evidence is needed to interpret the contract, that case is not amenable to summary judgment.").

1. A Reasonably Intelligent Observer Could Interpret the *Cobell* Claim Definition Language to Exclude *Two Shields* Claims.

The Government contends that the *Two Shields* claims are no different than the "Land Administration Claims" released under *Cobell*. Mot. at 23. Plaintiffs disagree. More importantly, a reasonably intelligent observer could disagree.

The Agreement defines "Land Administration Claims" narrowly to include only those

> known and unknown claims ***that have been or could have been asserted through the Record Date [of September 30, 2009]*** for Interior Defendants' alleged breach of trust and fiduciary mismanagement of land, oil, natural gas, mineral, timber, grazing, water and other resources and rights (the "resources") . . . .

Dkt. 6-2 at 65 ¶ 21, 67 ¶ 30 (emphasis added). The requirement that the claims "have been or could have been asserted through" September 30, 2009, is critical.

It is critical because, as the Government's own cases explain, it is commonly understood that a claim can be asserted only when complete in "nature, scope, ***and implications***." *Luttrell v. Cooper Indus., Inc.*, 60 F. Supp. 2d 629, 632 (E.D. Ky. 1998) (emphasis added). After all, "[i]t is hornbook law that a claim does not accrue until all events necessary to fix the liability of the defendant have occurred," that is, "when 'the plaintiff has a legal right to maintain his or her action.'" *Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993) (citation omitted). Or as Judge Merow has explained, it is "too well established to require citation to authority that ***a claim does not accrue until the claimant has suffered damages***." *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 24 (Fed. Cl. 2007) (emphasis added) (citation and internal quotation marks omitted).

This same understanding of the "have been or could have been asserted" language is also supported by the Supreme Court's decision in *Bowen v. City of New York*. 476 U.S. 467, 481 (1986). There, the Court found that "the Government's secretive conduct" had prevented the plaintiffs from asserting a claim because, as the Court explained, though the plaintiffs "knew of the denial or loss of benefits, they did not and could not know that those adverse decisions had been made on the basis of a systematic procedural irregularity ***that rendered them subject to court challenge***." *Id.* (emphasis added) (citation omitted). In other words, the Court held that,

despite some indication of harm, no claim accrued (and therefore no claim "could have been asserted") until "the ***full extent***" of the Government's breach came to light. *See id.* (same).

Given these black-letter principles, a reasonably intelligent observer certainly could therefore conclude that the *Cobell* Agreement did not include Plaintiffs' unperfected *Two Shields* claims.[7] It is undisputed that the Government has yet to admit any wrongdoing or liability in relation to Fort Berthold mineral leasing, much less as of September 2009. *E.g.*, Dkt. 6-2 at 106 ¶ 2 ("By entering into this Agreement, Defendants in no way admit any liability to Plaintiffs and the Classes, individually or collectively, all such liability being expressly denied."). Nor has the Government ever disclosed any information related to the BIA's actions. Ex. 1 at 3 ¶¶ 8-9 (McNeil Declaration). Thus, even more so than the plaintiffs in *Bowen* (who at least received outright ***denials*** of their benefits to challenge), Plaintiffs had no claim to assert until after the Williams Companies purchased Plaintiffs' leases for roughly $10,000 per acre in November 2010. Only then (more than a year after the September 2009 cut-off date) did the complete implications of the Government's breaches come to light. Only then did the final piece of the puzzle come into existence. *Bowen*, 476 U.S. at 481.

The Government's authorities do not refute the reasonableness of this interpretation. For example, in relying on *Mississippi Power* as one example of a case in which the parties ***intended*** to release all claims regardless of "whether a claim exists in the statute of limitations context," the Government overlooks the fact that the release language at issue in that case released all claims "known or hereafter discovered, ***and whether or not asserted***." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 729 F. Supp. 504, 507 (S.D. Miss. 1989) (emphasis added). In

[7] Frankly, the fact that the Government felt compelled to argue against this hornbook interpretation in ***its opening brief*** should plainly demonstrate the reasonableness of Plaintiffs' suggested construction.

contrast, the *Cobell* Agreement released only those claims that "have been or ***could have been asserted***" by a specific date—September 30, 2009. Dkt. 6-2 at 65 (emphasis added). Thus, the Government's contention that Plaintiffs "***may*** waive a ***future*** cause of action in a settlement agreement, ***even one yet to accrue***," Mot. at 16 (emphasis added), actually supports Plaintiffs' point. Under *Cobell*, if Plaintiffs' claims were "future" claims that had "yet to accrue," they ***could not have been asserted*** by September 2009 and were therefore not released. Dkt. 6-2 at 65 ¶ 21, 67 ¶ 30.

More importantly, the Government overlooks the fact that simply because ***some*** parties ***may*** intend to release all claims regardless of "whether a claim exists in the statute of limitations context," Mot. at 16, does not mean that ***all*** releasing parties in ***all*** other cases share that intent. *Miss. Power*, 729 F. Supp. at 507-08. The rest of the Government's own cases make that clear. They state that a plaintiff "***may*** waive a future cause of action"—not that it ***must***. *E.g.*, *Luttrell*, 60 F. Supp. 2d at 632. Which meaning applies is a fact-based question of intent. *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir. 1995) ("Where a release waives rights unknown to the releaser at the time of signing the waiver, . . . the release must be particularly scrutinized as to the intent of the parties."). Thus, even in *Adams* the court denied the defendant's summary judgment motion, noting cases that had found "summary judgment inappropriate where the release stated it applied to 'all claims, known or unknown'" but the moving party (here, the Government) had not set forth sufficient evidence of which meaning the parties intended.[8] 67 F.3d at 584.

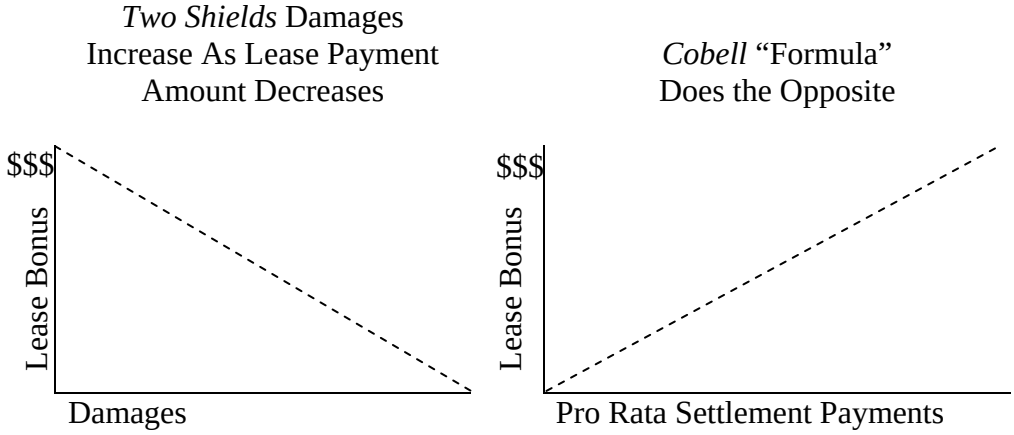
[8] The Government's use of *Allen v. Nicholson*, 573 F. Supp. 2d 35, 38-39 (D.D.C. 2008), stretches the holding of that case. While the release in that case did include language waiving future claims, that language was never at issue. *Id.* To the contrary, the court found that the plaintiff had stated his claim in two prior complaints and subsequently released that claim in two separate agreements drafted after the complaints were filed. *Id.* at 39-40. Thus, the court had little trouble finding that plaintiff's ***past*** claim had already been "explicitly" released. *Id.*

And again, this is no ordinary case. Pursuant to the Indian-ambiguity canon, Plaintiffs' understanding controls and precludes the Government's interpretation of the *Cobell* Agreement. *See Standing Rock*, 182 Ct. Cl. at 820. By definition then, Plaintiffs' claims were not included as "Land Administration Claims" and could not have been released. Dkt. 6-2 at 65, 67, 98.

2. The *Cobell* Payment Mechanics Support the Reasonable Understanding that *Cobell* Did Not Include Two Shields Claims.

The mechanics of the payment provisions set forth in the *Cobell* Agreement also support Plaintiffs' understanding of the Agreement's scope. The Agreement provides two payments for Trust Administration claims. First, it gives every class member an $800 base payment. *See* Dkt. 6-2 at 82-83. Second, it gives each an additional pro rata payment based on the amount of money that flowed through his or her IIM account from October 1, 1985, through September 30, 2009. *Id.* at 84. The more money that flowed into the account during that period, the more money the individual will receive. *Id.* Conversely, the less money that flowed into the account, the less money that person will receive. *Id.*

This formula makes no sense as applied to Plaintiffs' claims, even without knowing their full scope. Plaintiffs contend that they received ***less*** money than they should have due to the Government's breaches, including its approval of below market lease bonus amounts and royalty rates. *E.g.*, Dkt. 1 at ¶¶ 103-106, 113. But under the *Cobell* formula, *Two Shields* class members with lower lease bonuses and royalty rates (and thus ***higher*** damages) will receive less than *Two Shields* class members with higher lease bonuses and royalty rates (and thus ***lower*** damages) because less money flowed through those class members' IIM accounts:



The Government's brief does not address this point at all. Indeed, it overlooks the fact that because very little drilling occurred prior to November 15, 2010, much less prior to September 30, 2009, *see* Compl. ¶ 113, little or no *Two Shields* royalties would have been included in the pro rata calculations. *See* Ex. 4 at 206 ¶ 40, 207 ¶ 42. Thus, the Government's position boils down to the absurd assertion that Plaintiffs "clearly" waived their valuable *Two Shields* claims ***for nothing***. Yet "[c]onstruction of the terms of a contract, like construction of a statute, should avoid absurd and whimsical results." *Nw. Marine Iron Works v. United States*, 493 F.2d 652, 657 (Fed. Cl. 1974); *accord Magnum Opus Techs., Inc. v. United States*, 94 Fed. Cl. 512, 536 (Fed. Cl. 2010) (same). The Government's construction is unpersuasive and should be rejected.[9]

Finally, as evidenced by the attached declarations of Prof. Mark Zmijewski, Mr. Daniel Reineke, and Mr. Jim Parris, the conservative value of Plaintiffs' unique *Two Shields* claims ranges from $200 million to $300 million. Ex. 3 at 168 ¶ 22. This equates to damages averaging roughly $100,000 to $150,000 per person. Ex. 4 at 209 ¶ 45. Yet at best, the nearly 497,000

[9] The Government's contention that *Cobell* "***clearly*** bars" Plaintiffs' *Two Shields* claims is also absurd given the layers of documents a reasonably intelligent observer would have needed to sift through to understand what may have been at stake. *See* Mot. at 14 (emphasis added). The notices class members received pointed to a web site that pointed to the Agreement that points to the Amended Complaint. Not a single one of these documents mentions Fort Berthold.

individuals that make up the *Cobell* Trust Administration class will share only $1,600 in pro rata payments. Ex. 2 at 49 ¶ 39. This massive divide further demonstrates the difference between *Cobell* and *Two Shields* and the lack of any objective evidence of any intent to include Plaintiffs' *Two Shields* claims in the *Cobell* Agreement. Ex. 4 at 206 ¶ 40, 209 ¶ 46.

B. At a Minimum, the Court Should Deny the Government's Premature Motion under RCFC 56(d) and Permit Plaintiffs to Obtain Discovery.

The Government's summary judgment motion is also starkly improper for no other reason than it is a bald attempt to "railroad" Plaintiffs into responding to the Government's fact-based argument without the benefit of ***any*** discovery. *See* RCFC 26(d) ("A party may not seek discovery from ***any*** source" until after the defendant has filed its answer and the parties have conferred pursuant to Appendix A ¶ 3.).

The Government relies on RCFC 12(d) to justify the assertion of its affirmative defense in its summary judgment motion rather than in the proper vehicle: its answer. But the Federal Circuit has explained that "courts have disfavored conversion [under RCFC 12(d)] when 'the motion comes quickly after the complaint was filed [or] discovery is in its infancy and the nonmovant is limited in obtaining and submitting evidence to counter the motion.'" *Easter v. United States*, 575 F.3d 1332, 1336 (Fed. Cir. 2009) (second alteration in original) (citation omitted). Thus, in *Easter*, the court permitted conversion only because the motion came "well after the government had responded to the appellants' discovery requests." *Id.* Obviously, that is not the case here. Discovery is not even in its infancy; it has yet to be born. RCFC 26(d). On this basis alone, the Court should deny the motion.[10]

[10] The Government's reliance on *Transclean Corp. v. Jiffy Lube Int'l, Inc.*, 474 F.3d 1298, 1308 (Fed. Cir. 2007), is perplexing. Mot. at 5 n.1. In that case, the court raised claim preclusion sua sponte ***only*** because the "Defaulting Defendants" ***never appeared*** and the plaintiff stated that "all relevant data and legal records are before the court." *Id.* Neither is true here. Plaintiffs have appeared and specifically request discovery.

The motion is also improper under RCFC 56 itself. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment" only "***after adequate time for discovery***." *Celotex*, 477 U.S. at 326 (emphasis added). Thus, "[w]here the nonmoving party has not had the opportunity to discover information that is essential to his opposition," RCFC 56(d)[11] authorizes this Court to deny the Government's motion and allow Plaintiffs to obtain the discovery they require. *See Anderson*, 477 U.S. at 250 & n.5 (explaining that the onus on the non-moving party to show a genuine issue "is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition" (citation omitted)).[12]

Such requests under RCFC 56(d) "are generally favored and should be liberally granted." *Jade Trading, LLC v. United States*, 60 Fed. Cl. 558, 565 (Fed. Cl. 2004) (internal quotation marks omitted) (quoting *Theisen Vending Co. v. United States*, 58 Fed. Cl. 194, 197 (2003)). In fact, where a motion for summary judgment comes before discovery even begins, the Federal Circuit has repeatedly relied on nothing more than the bare assertion of the non-moving party that it "could not present sufficient facts to prove its case without discovery" to deny the motion. *E.g.*, *Dunkin' Donuts*, 840 F.2d at 919 (finding the Rule met where the plaintiff submitted a simple affidavit stating that it "could not present sufficient facts to prove its case without discovery"); *see Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 852 (Fed. Cir.

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[11] RCFC 56(d) states:

> **(d) When Facts Are Unavailable to the Nonmovant**. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

[12] Rule 56(f) became Rule 56(d) "without substantial change" in 2010. FED. R. CIV. P. 56 advisory committee notes to 2010 amendment. And RCFC 56 was subsequently "rewritten in its entirety to reflect" that revision. RCFC 56 rules committee notes to 2011 amendment.

1992) (explaining that summary judgment must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition").

So have other members of this Court. In *Tennessee Valley Authority v. United States*, for example, Judge Lettow explained that "[a] party that has not had the opportunity to obtain evidence in support of its opposition to a motion for summary judgment should not have that inability held against it." 60 Fed. Cl. 665, 675 (Fed. Cl. 2004). Accordingly, he denied the motion without further discussion. *Id.* at 675-76. Plaintiffs voice these exact concerns. Ex. 1 at 3-5, ¶¶ 11-18.

Still, for the sake of completeness, Plaintiffs note that they also satisfy the five-factor test often employed by this Court to check "the bona fides of the party opposing summary judgment" under RCFC 56(d). *Theisen*, 58 Fed. Cl. at 198 (noting however that "[t]hese prerequisites should not impair the salutary, generous purposes of the Rule"). In their affidavits and in this response, Plaintiffs "(1) specify the particular factual discovery being sought, (2) explain how the results of the discovery are reasonably expected to engender a genuine issue of material fact, (3) provide an adequate factual predicate for the belief that there are discoverable facts sufficient to raise a genuine and material issue, (4) recite the efforts previously made to obtain those facts, and (5) show good grounds for the failure to have discovered the essential facts sooner." *See id.*

With regard to the first factor, Plaintiffs seek discovery related to the circumstances surrounding the execution of the *Cobell* Agreement. Based on Plaintiffs' limited present knowledge, this includes evidence related to the "negotiation and execution" of the Agreement, the Government's knowledge of the *Two Shields* claims at the time it negotiated the Agreement, any disclosures made by the Government to *Cobell* class counsel, and the payments each class member is expected to receive under *Cobell*. *See* Ex. 1 at 3-5, ¶¶ 11-18 (describing in greater

detail the evidence sought). Other members of this court have previously found that such requests satisfy *Theisen* factors one through three. *Clear Creek*, 100 Fed. Cl. at 83 (concluding that plaintiff's request for evidence "related to the 'negotiation and execution' of [a] Contract in order to" interpret its provisions entitled plaintiff to discovery under RCFC 56(d)).

As required by factor two, this evidence will reasonably engender a genuine issue of material fact. *Theisen*, 58 Fed. Cl. at 198. As explained previously, even absent an ambiguity, the facts and circumstances surrounding the execution of a settlement agreement guide its interpretation. *Imprimis*, 83 Fed. Cl. at 61. They can show that terms otherwise thought to be clear "are not, and never were, clear on their face." *Metric Constructors*, 169 F.3d at 752 (Fed. Cir. 1999) (citation omitted). Moreover, the need for discovery is doubly true in every case where (as here) two reasonable interpretations of contractual language exist. *Imprimis*, 83 Fed. Cl. at 61; *supra* pp. 9-18; *infra* p. 26 n.16. As explained, "interpretation becomes a matter of fact" and extrinsic evidence may be introduced to resolve the dispute. *Id.*; *Clear Creek*, 100 Fed. Cl. at 83 (finding summary judgment inappropriate where the plaintiff moved pursuant to RCFC 56(d) for "discovery related to the 'negotiation and execution' of the Contract); *Jade Trading*, 60 Fed. Cl. at 566 (finding that a dispute over intent is a "quintessential example of a fact-intensive inquiry where summary judgment would be inappropriate" under RCFC 56(d)).

The third *Theisen* factor is also satisfied. If the Government truly intended to release Plaintiffs' *Two Shields* claims as it now contends, then it should have no difficulty demonstrating that fact with documents and other objective evidence discussing those unique claims. Plaintiffs, however, reasonably believe no such evidence exists—a fact that will buttress Plaintiffs' position that the *Cobell* Settlement never considered, contemplated, or covered the *Two Shields* claims. *See Clear Creek*, 100 Fed. Cl. at 83 (finding such requests sufficient to satisfy factor three). This

is especially true given the Government's fiduciary duty to disclose "***full information*** as to the relevant facts, the rights of the beneficiary, and as to the legal effect of the transaction" before it can obtain the release of a claim from an Indian beneficiary. *Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States*, 58 Fed. Cl. 542, 545 (Fed. Cl. 2003) (emphasis added).

Finally, in *Jade Trading*, Judge Williams explained that the last two *Theisen* factors are unequivocally met where "only preliminary discovery has been had, and there was no failure . . . to have discovered these facts any sooner ***in this litigation***." 60 Fed. Cl. at 566 (emphasis added); *accord Clear Creek*, 100 Fed. Cl. at 84 (finding factors met because discovery period had not yet closed). Here, discovery has not even begun—precluding Plaintiffs from seeking "discovery from ***any*** source." RCFC 26(d). Thus, even more so than in *Jade Trading*, "[t]he ***as yet unprobed*** nature of the transactions ***and intent of the parties*** which are at the heart of this case satisfy Rule 56([d])'s requirements." 60 Fed. Cl. at 566 (emphasis added).

In sum, at a minimum, Plaintiffs have met their burden under RCFC 56(d) to demonstrate their entitlement to discovery. To the extent the Court does not deny the Government's motion for summary judgment outright on the merits, Plaintiffs respectfully request that the Court deny the Government's motion as premature and "authorize[] full-blown discovery." *Id.* at 558, 566.

C. The *Cobell* Settlement Does Not "Clearly Bar" Plaintiffs' Claims.

Finally, even assuming this Court finds that the *Cobell* Agreement is not open to differing reasonable interpretations under the objective surrounding facts and circumstances, and that Plaintiffs are not entitled to discovery, then the language of the Agreement clearly excludes the release of Plaintiffs' specific *Two Shields* claims.

The *Cobell* Agreement states that it released only those

> claims and/or causes of action that ***were, or should have been, asserted in the Amended Complaint when it was filed, on behalf of the Trust Administration Class***, by reason of, or with respect to, or in connection with,

> or which arise out of, matters stated in the Amended Complaint for Funds Administration Claims or Land Administration Claims that the Mismanagement Releasors, or any of them, have against the Releasees, or any of them.

Dkt. 6-2 at 98 (emphasis added). Yet at no point in its briefing does the Government ever discuss whether the named *Cobell* plaintiffs even ***could*** have asserted Plaintiffs' specific *Two Shields* claims in the *Cobell* Amended Complaint. There is a good reason.

"To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the ***same interest*** and suffer the ***same injury*** shared by ***all*** members of the class he represents." *Schlesinger v. Reservists Comm'n to Stop the War*, 418 U.S. 208, 216 (1974) (emphasis added). Named plaintiffs "***must allege and show*** that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (emphasis added) (citations and internal quotation marks omitted).

This alignment of interest and injury must be exact. In *Blum v. Yaretsky*, for example, the Supreme Court found that nursing home patients contesting transfer to a lower level of care lacked standing to assert class claims on behalf of otherwise identical nursing home patients challenging transfers to higher levels of care. 457 U.S. 991, 999 (1982). That the claims were similar and sought relief from the same government entities simply did not matter. *Id.*

> It is not enough that the conduct of which the plaintiff complains will injure ***someone***. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.

Id.

The Supreme Court repeated this lesson in *Lewis*. 518 U.S. at 357-58. There, it rejected

the contention that an illiterate Arizona prisoner had "standing to complain of injuries to non-English speakers and lockdown prisoners" even though all of their injuries stemmed from Arizona's management of its prison libraries. *Id*. at 357-58 & n.6. As the Court explained:

> [S]tanding is not dispensed in gross. If the right to complain of ***one*** administrative deficiency automatically conferred the right to complain of ***all*** administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, "[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."

Id. at 358 n.6 (quoting *Blum*, 457 U.S. at 999). The Court held that the named plaintiff lacked standing to assert any claim except those tailored to the "particular inadequac[ies] in government administration" that had harmed him directly.[13] *Id.* at 358.

And notably, while the Court has explained that less detail is required at the pleading stage than at the merits stage, *see Lewis*, 518 U.S. at 357-58, it still requires that named class plaintiffs plead "general factual allegations of injury resulting from the defendant's conduct" sufficient to support standing. *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (citations omitted) (noting the specific factual allegations of harm to the named plaintiffs). This is especially true post-*Twombly*. Because standing is an "indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, "something beyond the mere possibility of loss causation must be

[13] Only one of the Government's cases conceivably touches on this issue. The Government quotes *Matsushita Electrical Industrial Co. v. Epstein*, 516 U.S. 367, 378 (1996), for the proposition that the "court 'would afford preclusive effect to the settlement judgment . . . notwithstanding the fact that respondents could not have pressed their Exchange Act claims in the Court of Chancery." Mot. at 14. But the quoted passage actually states: "***Given these statements of Delaware law***, we think that ***a Delaware court*** would afford preclusive effect to the settlement judgment ***in this case***, notwithstanding the fact that respondents could not have pressed their Exchange Act claims in the Court of Chancery." 516 U.S. at 378. And obviously Delaware law has no bearing on the issue of Article III standing.

alleged." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007). Named class plaintiffs must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "[N]aked assertion[s] devoid of further factual enhancement" simply do not suffice. *Id.* (second alteration in original) (quoting *Twombly*, 550 U.S. at 557).

Application of these basic class action and pleading principles to this case makes clear that Plaintiffs' *Two Shields* claims were never released under *Cobell*.[14] Certainly, Plaintiffs' claims are not captured within the "were . . . asserted" provision in the *Cobell* Amended Complaint. Not only does that Complaint not contain even a whisper of the *Two Shields* claims, Dkt. 6-2 at 26-52, but it alleges no ***facts*** to support even a general inference that ***any*** of the named *Cobell* plaintiffs had standing to bring such claims.[15] *Lewis*, 518 U.S. at 357 (explaining that named plaintiffs "***must allege and show*** that they personally have been injured" (emphasis added)); *cf. Heger*, 103 Fed. Cl. at 267 (noting that all inference must be drawn in the non-moving party's favor anyway).

Likewise, the Government has not put forth any evidence to show that Plaintiffs' *Two Shields* claims are captured within the "should have been asserted" provision in the *Cobell* Amended Complaint. *Cf. Heger*, 103 Fed. Cl. at 267 (no inferences). The only evidence before this Court is that the named *Cobell* plaintiffs had no connection whatsoever to the Fort Berthold

[14] The fact that the *Cobell* plaintiffs could not purport to settle the *Two Shields* claim serves as an additional objective circumstance informing the Court's inquiry into whether a reasonably intelligent observer could find that the Agreement did not cover *Two Shields* claims.

[15] Congress' passage of the Claims Resolution Act of 2010, Pub. L. 111-291, § 101, 124 Stat. 3064, did not affect this outcome. That Act only altered Ruler 23, and as the Court stated in *Lewis*, "[t]he standing determination is quite separate from certification of the class." 518 U.S. at 358 n.6 (rejecting Justice Steven's suggestion that the majority merely concluded "that the class was improper"). Moreover, "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

Reservation. *E.g.*, Dkt. 6-2 at 30, 46-48 (not alleging any Fort Berthold interests). Thus, unlike Fort Berthold allottees, they had no right to claim the benefit of the unique and aptly titled "Act to Permit Leasing of Allotted Lands of the Fort Berthold Indian Reservation" that applies ***only to leases of individual allottee Fort Berthold mineral interests*** and imposes ***additional*** fiduciary obligations on the United States ***only*** with respect to those leases. *See* Pub. L. 105-188, 112 Stat. 620 (1998) (amending 25 U.S.C. § 396 to add the express requirement that the Secretary approve only those Fort Berthold mineral leases that are "in the best interest of the Indian owners"); *Schlesinger*, 418 U.S. at 216 (requiring "same interest" and "same injury").

As a result, the ***only*** conclusion that can clearly be drawn at this point from the plain language of the *Cobell* Agreement is that it did not and could not include Plaintiffs' *Two Shields* claims.[16] Pursuant to the Agreement itself, the Government's "waiver and release" defense fails.

II. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' SECOND CAUSE OF ACTION, WHICH IS NOT A COLLATERAL ATTACK ON *COBELL*.

The Government next claims that this Court lacks subject matter jurisdiction over Plaintiffs' "in the alternative" second cause of action for failure to disclose, and that the claim is an improper collateral attack on *Cobell*. Mot. at 18-25; Compl. ¶¶ 161-62, 175. Neither argument is persuasive.

A. This Court Has Jurisdiction under 25 U.S.C. § 396 and the Tucker Act to Consider Plaintiffs' Second Cause of Action.

The Government's jurisdictional argument relies entirely on the false premise that the Government can be sued by its Native American wards only for those duties specifically spelled

[16] Notably, if the "were, or should have been, asserted" release language does not clearly show that the *Cobell* Agreement did not release Plaintiffs' claims, then Plaintiffs' suggested understanding is at least reasonable under the objective circumstances. *Imprimis*, 83 Fed. Cl. at 61 (finding that a release of "all matters" and "claims . . . that have been asserted or that could have been asserted in the Actions" did not release a claim that the named class plaintiffs had no power to bring in the prior action). At the very least, this demonstrates the presence of a latent ambiguity and precludes summary judgment. 83 Fed. Cl. at 61.

out by statute or regulation. Mot. at 21-22. Not true. The Supreme Court, the Federal Circuit, and other members of this Court have each rejected this very argument. As the Supreme Court explained in *United States v. White Mountain Apache Tribe* (*White Mountain II*), the "fundamental objection to the Government's position is that, if carried to its conclusion, it would read the trust relation out of [the] Indian Tucker Act analysis." 537 U.S. 465, 472 (2003). Thus, as Judge Allegra stated 21 months ago in *Jicarilla Apache Nation v. United States* (*Jicarilla II*):

> Defendant would have this court blithely accept what so many courts have rejected—that for the breach of a fiduciary duty to be actionable in this court, that duty must be spelled out, in no uncertain terms, in a statute or regulation. But to conclude this, this court would have to perform a logic-defying feat of legal gymnastics.
>
> That routine would commence with a full jurisprudential gainer—a twisting, backwards maneuver that would allow the court to ignore cases like *White Mountain Apache* [*II*] and *Mitchell II* ***that have relied upon the common law*** to map the scope of enforceable fiduciary duties established by statutes and regulations.

100 Fed. Cl. 726, 738 (Fed. Cl. 2011) (emphasis added); *see also id.* at 737 ("[T]he Court of Claims had repeatedly dismissed the notion that defendant's fiduciary duties must be specifically enumerated by statute.").

Statutory authority must exist of course. As the Supreme Court succinctly stated in *United States v. Navajo Nation* (*Navajo Nation II*), "two hurdles . . . must be cleared" before one can invoke jurisdiction under the Tucker Act for an alleged breach of fiduciary duty:

> First, the tribe 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. If that threshold is passed, the court must then determine whether the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]. At the second stage, principles of trust law might be relevant in drawing the inference that Congress intended damages to remedy a breach.

556 U.S. 287, 290 (2009) (alterations in original) (citations and internal quotations omitted); *see*

White Mountain II, 537 U.S. at 472 (explaining that the same tests apply to individuals under the Tucker Act as apply to tribes under the Indian Tucker Act).

But the statutory role is far more limited than the Government would have this Court believe. Discussing the Supreme Court's decision in *Jicarilla I* (upon which the Government relies almost entirely), Judge Allegra explained that "while a [plaintiff] needs to point, ***at the outset***, to a specific, trust-creating statute, ***the language of such a statute ultimately does not cabin defendant's fiduciary obligations***." *Jicarilla II*, 100 Fed. Cl. at 736 (quoting of the *United States v. Jicarilla Apache Nation* (*Jicarilla I*), 131 S. Ct. 2313, 2325 (2011)) (emphasis added). Rather, "once federal law imposes such duties," *Jicarilla I*, 131 S. Ct. at 2325, courts "look to the ***common law of trusts*** 'for assistance in ***defining the nature of that obligation***.'" *Jicarilla II*, 100 Fed. Cl. at 736 (emphasis added) (quoting *White Mountain Apache Tribe v. United States* (*White Mountain I*), 249 F.3d 1364, 1377 (Fed. Cir. 2001)); *see also Jicarilla I*, 131 S. Ct. at 2325 ("We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed.").

No better example of this principle in action exists than the Supreme Court's decision in *White Mountain II*. There, in an opinion handed down the same day as *United States v. Navajo Nation* (*Navajo Nation I*), 537 U.S. 488 (2003), the Court considered the Federal Circuit's conclusion that the United States had breached its ***common law fiduciary duties*** "to maintain, protect, repair and preserve" property on the "former Fort Apache Military Reservation." *White Mountain II*, 537 U.S. at 469 (citation and internal quotation marks omitted). As here, the Government had moved to dismiss those claims, arguing "that jurisdiction was lacking . . . because no statute or regulation cited by the Tribe could fairly be read as imposing a legal obligation on the Government to maintain or restore the trust property, let alone authorizing

compensation for breach." *Id.* at 470.

In response, the Supreme Court "thoroughly repudiated defendant's cramped view of its fiduciary obligations." *Jicarilla II*, 100 Fed. Cl. at 736. It found that the tribe had satisfied its burden of identifying a rights-creating statute—***even though the identified statute did not require the Government to undertake any of the common law duties that formed the basis of the tribe's suit***. *White Mountain II*, 537 U.S. at 475-76. As the Court explained, however, that simply did not matter. Because the statute established a general fiduciary relationship, the Court could turn to the common law to define the full scope of the Government's duties:

> While it is true that the 1960 Act ***does not . . . expressly subject the Government to duties of management and conservation***, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because ***elementary trust law***, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. One of the fundamental ***common-law duties*** of a trustee is to preserve and maintain trust assets.

Id. (emphasis added) (citations and internal quotation marks omitted).

Like the plaintiffs in *White Mountain II*, Plaintiffs have identified "at the outset" the necessary "specific rights-creating or duty imposing" statute to establish this Court's jurisdiction. *Navajo Nation I*, 537 U.S. at 506; *Jicarilla II*, 100 Fed. Cl. at 736. Plaintiffs rely on 25 U.S.C. § 396 and its implementing regulations to establish the threshold general fiduciary relationship between the United States and Plaintiffs with regard to their oil and gas leases. Compl. ¶¶ 19, 52-59. The Federal Circuit has already found that these statutory and regulatory scheme imposes a money-mandating, "general fiduciary obligation toward the Indians with respect to the management of those oil and gas leases." *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987). As it held: "[f]rom these statutes and regulations we must draw the conclusion . . . that

the United States has a general fiduciary obligation toward the Indians with respect to the management of those oil and gas leases." *Id.*; *see also id.* ("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." (quoting *United States v. Mitchell*, 463 U.S. 206, 226 (1983)).

Having identified the necessary jurisdiction-granting, threshold statutory obligation, this Court can thus "look to the common law of trusts 'for assistance in defining the nature of that obligation.'" *Jicarilla II*, 100 Fed. Cl. at 736 (quoting *White Mountain I*, 249 F.3d at 1375). As already explained, it is settled law that the Government owes its Indian beneficiaries an affirmative common law fiduciary duty to provide "***full information as to the relevant facts, the rights of the beneficiary, and as to the legal effect of the transaction***" before obtaining a release of claims. *Shoshone Indian Tribe*, 58 Fed. Cl. at 545 (emphasis added). Indeed, *Shoshone Indian Tribe* emphatically shows that the Government ***has*** a common law fiduciary duty to disclose, among other things, the deliberate undervaluation of the plaintiffs' oil rights ***before*** it obtains any release relating to such claims. *Id.* This is in line with settled fiduciary-settlement principles. *E.g.*, *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1306 (5th Cir. 1983) ("[A] party to a release was not required to disclose all claims another party might reasonably have against it unless there existed a fiduciary relationship between them."); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481-82 (6th Cir. 1990) ("When a fiduciary makes a contract with the person beneficially interested . . . [***t]he person beneficially interested must be put on an equal footing with full understanding of his legal rights and of all relevant facts that the fiduciary knows or should know***.'" (citation and internal quotation marks omitted)).

Equally important, the Supreme Court has held that such common law duties are money-mandating. 537 U.S. at 475-77. As it explained in *White Mountain II*, when it rejected the

Government's identical argument that common law duties could not be money-mandating:

> To the extent that the Government would demand an explicit provision for money damages to support every claim that might be brought under the Tucker Act, it would substitute a plain and explicit statement standard for the less demanding requirement of fair inference that the law was meant to provide a damages remedy for breach of a duty. . . . But the more fundamental objection to the Government's position is that, if carried to its conclusion, it would read the trust relation out of [the] Indian Tucker Act analysis; ***if a specific provision for damages is needed, a trust obligation and trust law are not***.

Id. at 477 (emphasis added). This plainly refutes the Government's assertion that "the Tucker Act extends only to claims that the government violated provisions that themselves require payment of a damages remedy." *See* Mot. at 20-21.

Moreover, *White Mountain II* even went so far as to expressly distinguish the very two cases upon which the Government relies to support that point: *AAFES v. Sheehan*, 456 U.S. 728, 739-41 (1982), and *United States v. Testan*, 424 U.S. 392, 400 (1976)). The Supreme Court explained that it applied a ***different*** standard in those cases because both "*Sheehan* and *Testan* . . . were cases ***without any trust relationship*** in the mix of relevant fact, but with affirmative reasons to believe that no damages remedy could have been intended, absent a specific provision." *White Mountain II*, 537 U.S. at 477-78 (emphasis added). "But that was not the case in *Mitchell* . . . and is not the case here" where a trust relationship exists. *Id.* at 478. "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." *Mitchell*, 463 U.S. at 226 (emphasis added).

Jicarilla I also does not support the Government's position. The Government itself notes that case did not involve disclosure obligations related to the release or settlement of claims as in *Shoshone Indian Tribe*. *See* Mot. at 21. Rather, *Jicarilla I* concerned ***only*** the fiduciary exception to the attorney-client privilege—a point the Court emphasized when it stated: "Courts

and commentators have long recognized that '[n]ot every aspect of private trust law can properly govern the unique relationship of tribes and the federal government.' The fiduciary exception to the attorney-client privilege ranks among those aspects inapplicable to the Government's administration of Indian trusts."[17] 131 S. Ct. at 2330.

Yet even as to that specific common-law exception, the Supreme Court's decision was quite narrow. First, the Court found that the tribe had failed to show entitlement under the exception itself. *Jicarilla I*, 131 S. Ct. at 2327 (citations omitted). Obviously, that is not a concern here. *E.g.*, *Shoshone Indian Tribe*, 58 Fed. Cl. at 545.

Second, the Court found the exception inapplicable because "[t]he common law of trusts does not override the specific trust-creating statute and regulations that apply here." *Jicarilla I*, 131 S. Ct. at 2329-30. This, too, is not a concern here. Contrary to the Government's suggestion, *Jicarilla I* did not hold that common law duties ***never*** apply. Mot. at 21-22. The Court held only that the fiduciary exception to the attorney-client privilege did not apply ***in that case*** because it conflicted with the specific disclosure requirements set forth ***in the "relevant statute"***: 25 U.S.C. § 162a(d). *Jicarilla I*, 131 S. Ct. at 2330 ("When Congress provides specific statutory obligations, we will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated."). The Court had explained even pre-*Jicarilla I* that common law duties must give way when they conflict with specific statutory directives. *E.g.*, *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (Courts "***must*** infer that Congress intended to impose on trustees traditional fiduciary duties ***unless*** Congress has unequivocally expressed an intent to the contrary." (emphasis added)).

[17] This statement plainly shows that some "aspect[s] of private trust law" do apply, rebutting the Government's assertion that "[t]he Supreme Court has therefore already rejected the general duty of disclosure that underpins [P]laintiffs' Second Cause of Action." Mot. at 22.

No such problem exists in this case. Unlike § 162a(d), § 396 says nothing about any disclosure obligations of the United States. Nor has the Government pointed to any disclosure requirements in the regulations, much less any "narrowly defined disclosure obligations" like those in *Jicarilla I.* 131 S. Ct. at 2329-30. That is because none exist. *See* 25 C.F.R. Part 212.

In sum, this case is no different than *White Mountain II*. Because the relevant statute is silent as to any disclosure requirements, there is no indication that Congress intended to preclude the application of "elementary trust law" principles. *See* 537 U.S. at 475. As a result, this Court "must infer that Congress intended to impose . . . traditional fiduciary duties" under § 396. *Amax Coal*, 453 U.S. at 329. Importantly, this includes the well-settled principle that a beneficiary must disclose "full information" to his beneficiaries prior to obtaining a release of claims from them. *Shoshone Indian Tribe*, 58 Fed. Cl. at 545. This Court has jurisdiction under § 396 and the Tucker Act to consider Plaintiffs' common law failure to disclose claim.

B. The Second Cause of Action Is Not a Collateral Attack On *Cobell*.

Unable to demonstrate that this Court lacks jurisdiction to consider Plaintiffs' claim, the Government builds a strawman. It attempts to re-characterize the claim as a collateral attack on the *Cobell* settlement and describes the many reasons it believes that such an attack is precluded by statute and prior judicial determinations. Mot. at 22-25. The Government is wrong.

Count Two does not collaterally attack the *Cobell* Agreement on due process or any other grounds. Plaintiffs do not ask this Court to revisit whether the *Cobell* Agreement was "fair, reasonable and adequate," Mot. at 23, much less set aside its substance. Rather, Plaintiffs claim simply that ***if*** the *Cobell* Agreement released Plaintiffs' claims (because otherwise there would be no reason to complain), then the United States had an absolute fiduciary duty to disclose ***full information*** related to its trust administration of Plaintiffs' Fort Berthold mineral interests

(including information relevant to its potential liability)[18] to the *Cobell* class ***before*** it obtained a release of those claims. Compl. ¶¶ 162, 175; *Shoshone Indian Tribe*, 58 Fed. Cl. at 545. When it failed to satisfy that independent fiduciary duty, it committed an independent fiduciary breach.

Notably, under nearly identical circumstances, Judge Merow found in *Rosebud Sioux Tribe* that such claims against the Government for fiduciary breaches "incident" to a settlement—but not seeking revocation of the settlement itself—do not constitute an "impermissible collateral attack" on the underlying settlement and judgment. 75 Fed. Cl. at 22. In that case, the tribe brought a claim against the Government for alleged fiduciary breaches related to its "handling of . . . various lawsuits," including its efforts to "encourage" the tribe to settle its claims. *Id.* at 21-22. Like it does here, the Government responded by moving to dismiss the claim as an "impermissible collateral attack" on the settlement and judgment. *Id.* at 25. It complained of the "chilling effect on its willingness to compromise Native American claims, if a tribe independently represented by counsel, can later claim breach of trust alleging it was strong-armed by the government to accept settlement." *Id.*

Judge Merow disagreed. *Id.* Noting that the Indian beneficiaries did "not seek to set aside the substance of the Consent Judgment" and that the settlement did not release the claims subsequently asserted against the Government, he refused to dismiss the tribe's claim for "breach of trust alleging it was strong-armed by the government to accept settlement." *Id.* He held instead: "It cannot be said on this record, that plaintiff does not state a facially viable cause of action for breach of fiduciary duty in connection with the conduct and settlement of that litigation and renegotiation of the Land Lease." *Id.* at 31.

[18] The Government's assertion that Plaintiffs seek information "not related to trust administration" is baseless. Mot. at 22 ("Here, plaintiffs argue that the general trust relationship between the United States and Indians compels the United States to disclose information that is not related to trust administration."). That is precisely the information Plaintiffs seek.

Other courts have held the same in similar contexts. In *Jacobs v. Jacobs*, for example, beneficiaries brought a claim against a trustee, alleging that he breached his fiduciary duties to them in the course of settling their claims. No. 1:07CV1043, 2008 WL 828079, at *3 (N.D. Ohio Mar. 26, 2008). The trustee responded by moving to dismiss. *Id.* at *2. The court refused. Just like in *Rosebud Sioux Tribe*, it relied on federal common law to find that the claims were not an impermissible collateral attack on the underlying settlement because "the alleged breach and injury 'arose out of the negotiation and execution of the Settlement Agreement itself,' . . . was not barred by the terms of the release, and did not require the Beneficiaries to rescind the Settlement Agreement before asserting it." *Id.* at *3 (citation omitted).

This case is no different. Like the tribe in *Rosebud Sioux Tribe* and the beneficiaries in *Jacobs*, Plaintiffs do not seek to set aside the underlying settlement and judgment. To the contrary, their claim depends on the validity and application of that settlement to their *Two Shields* claims. Compl. ¶¶ 162, 175. And like the agreements at issue in both *Rosebud Sioux Tribe* and *Jacobs*, the *Cobell* Agreement did not release Plaintiffs' Count Two claim. The Government did not breach its duty unless and until it actually obtained the release of Plaintiffs' claims without first disclosing "full information," *Shoshone Indian Tribe*, 58 Fed. Cl. at 545, and the Government did not obtain that release until July 27, 2011, when the "District Court granted final approval to the Settlement Agreement," *see* Mot. at 12 ¶ 37.[19] This was long after the September 2009 definitional cut-off date for a *Cobell* claim. Dkt. 6-2 at 65, 67.

Thus, the Court should deny the Government's motion to dismiss their Count Two claim.

III. PLAINTIFFS HAD A VALID PROPERTY INTEREST IN THEIR CLAIMS THAT THE GOVERNMENT TOOK WITHOUT JUST COMPENSATION

Finally, the Government attacks Plaintiffs' Fifth Amendment "Legislative Taking" claim,

[19] Paragraph 37 of the Government's statement of undisputed fact should state July 27, not June 27. Dkt. 6-2 at 180, 192.

which is brought in the alternative and only to the extent the Court finds Plaintiffs are precluded from recovering under Counts One and Two. Compl. ¶ 181. It argues first that the claim should be dismissed because Plaintiffs lacked a valid property interest in their claims against the Government. Mot. at 25-27. It then reconstructs its strawman—claiming that the *Cobell* courts found that the Government paid "just compensation" for that taking and that, regardless, this Court lacks jurisdiction to "re-litigate" those issues. Mot. at 27-30.

These arguments fail. The Claims Resolution Act—if construed as the Government contends—took Plaintiffs' valid property interests in their claims against the Government and failed to give just compensation in return. Moreover, no court has ever even considered this issue, much less found that no taking had occurred.

A. Plaintiffs Have Alleged a Valid "Legislative Taking" Claim

To determine whether the Government has committed a Fifth Amendment taking, this court employs a two-part test. "First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). "Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest." *Id.*

1. Plaintiffs Had a Valid, Vested Property Interest in Their "Legal Causes of Action" Against the United States.

The Government makes two broadside attacks on the validity of Plaintiffs' property interest. It argues first that a cause of action against the Government is a special type of interest not protected by the Takings Clause. Mot. at 26-27. It then goes one step further, relying on non-binding Ninth Circuit precedent to argue that, even if a cause of action is a recognized Takings Clause property interest, then that is true only after "a final unreviewable judgment is

obtained." *Id.* (quoting *Bowers v. Whitman*, 671 F.3d 905, 914 (9th Cir. 2012)). The Federal Circuit has squarely rejected each of these points.

In *Alliance of Descendants v. United States*—a case not discussed or cited in the Government's brief—the Federal Circuit considered the ***exact*** question at issue here: whether the plaintiffs had a cognizable Takings Clause property interest in a "legal cause of action" ***against the Government***. 37 F.3d 1478, 1481-82 (Fed. Cir. 1994).[20] And despite the fact that Congress "retained the power to withdraw consent at any time," *Lynch v. United States*, 292 U.S. 571, 581-82 (1934), and no "final unreviewable judgment" had been obtained, the Federal Circuit readily concluded that the plaintiffs had a valid, vested Takings Clause property interest:

> The claimants do not in this suit allege a taking of the land in Texas itself. Rather they allege that the United States took away their legal right to sue for compensation for that land. ***Because a legal cause of action is property within the meaning of the Fifth Amendment, claimants have properly alleged possession of a compensable property interest.***

Alliance of Descendants, 37 F.3d at 1481 (emphasis added).

The Federal Circuit's conclusion controls this case. It succinctly demonstrates that Plaintiffs have a protected Takings Clause property interest in their legal causes of action against the Government. *Id.* Other courts agree. *See, e.g.*, *Adams v. United States*, 391 F.3d 1212, 1226 (Fed. Cir. 2004); *Edwardsen v. Morton*, 369 F. Supp. 1359, 1379 (D.D.C. 1973) (concluding that "claims for accrued causes of action for trespass and ***breach of fiduciary duty***" were "vested property rights protected by the Fifth Amendment" that Congress could not "wipe out" without compensation (emphasis added)).

[20] There, "the 1941 Treaty's terms released the United States from all liability for Texas land grant claims from Mexican citizens." *Alliance of Descendants*, 37 F.3d at 1481-82. But the fact that the taking occurred by treaty rather than statute is immaterial to the takings analysis. *Breard v. Greene*, 523 U.S. 371, 376 (1998). "[A]n Act of Congress . . . is on a full parity with a treaty." *Id.* (alteration in original) (citation omitted)).

Plaintiffs could leave it at that, but note that not even the Government's cases support its position. The Government quotes two phrases from *Lynch* but completely ignores the Supreme Court's holding in that case: that the Government took the plaintiffs' property interests for purposes of the Fifth Amendment when it enacted legislation eliminating their right to seek relief from the Government but did not withdraw (as it could have) its consent to be sued. 292 U.S. at 575, 589 (holding that Congress violated the Takings Clause when it passed legislation repealing "[a]ll laws granting or pertaining to yearly renewable term insurance"). This proves Plaintiffs' point. *Lynch* shows that a taking can occur ***even though*** "consent to sue the United States is a privilege accorded, not the grant of a property right protected by the Fifth Amendment."[21] *See id.* at 581-82, 589; *see also id.* at 583 (concluding that Congress could assert or reinstate its immunity without violating the Takings Clause, but could not take away the statutory right).

Nor does *Sharkey v. United States* support the Government. 17 Cl. Ct. 643 (1989). There, the United States simply asserted its sovereign immunity in defense to a suit by servicemen ***for whom it had never waived immunity in the first place***. *Id.* at 648. Not surprisingly, the court held that no taking had occurred because the Government had merely "properly asserted its sovereign immunity as a defense" and it was "axiomatic" that under such circumstances "plaintiffs had no legally protected property interest in a cause of action against the government." *Id*. Here, however, the Government has waived its immunity. Thus, *Sharkey* has no application to this case. *Lynch*, 292 U.S. at 583; *Alliance of Descendants*, 37 F.3d at 1481.

The same holds true for *Bowers*. In that non-controlling case, the Ninth Circuit stated its

[21] Obviously, *Lynch* itself refutes the Government's reliance on *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1731 (2009), and *Silver v. Silver*, 280 U.S. 117, 122 (1929), for the proposition that the United States is free to abolish rights without consequence. Mot. at 26. If that were the case, the protection provided by the Takings Clause would be truly meager.

general rule "that although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." *Bowers*, 671 F.3d at 914 (citation and internal quotation mark omitted). But as *Bowers* went on to explain, this rule does not apply when the repealed statutory right pairs with a vested interest in land. *Id.* at 915-16. A critical difference exists when Congress enacts a statute that deprives individuals of an expected interest in land. *Id.* That is exactly what Plaintiffs alleged happened here. *E.g.*, Compl. ¶ 15. Plaintiffs claim that the Government had "essentially 'given away'" Plaintiffs "valuable mineral interests." *Id.*

Moreover, regardless of how the Ninth Circuit might treat the issue, the Federal Circuit has made clear that when the interest underlying the "taken" cause of action is "to recover compensation for an interest in land" or some other "property interest cognizable under established takings jurisprudence," the "cause of action protects a legally-recognized property interest" for purposes of the Takings Clause. *Adams*, 391 F.3d at 1226; *Alliance of Descendants*, 37 F.3d at 1481 (interest in land); *see Lynch*, 292 U.S. at 571, 581-82 (contract interest).

In this case, the interests underlying the causes of action taken by the Claims Resolution Act of 2010 are Plaintiffs' vested property rights in their mineral interests on the Fort Berthold Reservation. *E.g.*, Compl. ¶ 15. This is an established property interest for Takings Clause purposes. *See, e.g.*, *Foster v. United States*, 607 F.2d 943, 949 (Ct. Cl. 1979) (explaining that even a "leasehold interest" in "reserved mineral rights is compensable" under the Fifth Amendment). As a result, under settled Federal Circuit law, Plaintiffs possessed a valid Takings Clause property interest in their legal cause of action.

2. At a Minimum, Fact Questions Exist as to Whether Plaintiffs Received "Just Compensation" for Their Claims.

Having established a protected property right, the question turns to whether Congress

took those rights and, if so, whether it provided "just compensation" in return.

The first question is easily resolved. If the Government prevails in its contentions about the scope of the *Cobell* settlement, then Congress unquestionably took Plaintiffs' causes of action when it enacted the Claims Resolution Act and eviscerated the protections of Rule 23 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1346(a)(2) that otherwise would have precluded the named *Cobell* plaintiffs from affecting Plaintiffs' rights in their oil and gas causes of action. Pub. L. 111-291, § 101(d), 124 Stat. 3064.

The Supreme Court recognized that much in *Amchem Products, Inc. v. Windsor*, upon which the Government relies in its brief. 521 U.S. 591, 621 (1997). There the Court noted the negative, rights-stripping effect the absence of Rule 23(a) and (b) can have on the interests of absent class members like Plaintiffs. *Id.* As it explained: "The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement-class context." *Id.* Rather, "the standards set ***for the protection of absent class members*** serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Id.* (emphasis added). Thus, "***if a fairness inquiry under Rule 23(e) controlled certification***, eclipsing Rule 23(a) and (b), ***and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed***. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation." *Id.* (emphasis added) (citations omitted).

This is exactly what occurred here. Congress took Plaintiffs' vested rights when it waived the requirements of the Federal Rules of Civil Procedure and gave the district court

jurisdiction to ***settle*** the *Cobell* damages case, ***but not to try it***.[22] Pub. L. 111-291, § 101(d), 124 Stat. 3064 (waiving the requirements of Rule 23 and giving the district court jurisdiction only "for purposes of the Settlement"). It set Plaintiffs up for exactly what the Supreme Court feared—***exploitation at the hands of the class defendant***.

Because Congress took away Plaintiffs' rights, the focus turns to whether Plaintiffs received just compensation in return. And notably, for all its bluster, the Government never acknowledges the exacting standard required for it prevail on this argument. As the Supreme Court explained in *United States v. Sioux Nation of Indians*, even though the Government possesses plenary power over Indian affairs, it is not free to take Indian property at will. 448 U.S. 371, 415 (1980). Rather, a Fifth Amendment taking occurs when the Government takes property without making a good faith effort to pay "full value" for that taken interest. *Id.* at 416 (holding that *Fort Berthold Reservation v. United States*, 390 F.2d 686, 691 (Ct. Cl. 1968), set the "standard that ought to be emulated by courts faced with" the question of "whether Congress has made a good faith effort to give the Indians the full value of their" property (citation omitted)). This requires more than ***some*** compensation; the Government must give its "ward the fair equivalent of what [it] acquires." *Id.* As the Federal Circuit noted in *Fort Berthold*:

> There is no basis in reason to distinguish between no compensation, minimal compensation, or compensation arbitrarily determined. If Congress pays the Indians a nominal amount, or (as it did here) an amount ***arbitrarily arrived at*** with no effort to ascertain if it corresponds to the true market value of the land, then it cannot be said that Congress is merely authorizing the conversion of one form of tribal property to another.

[22] Plaintiffs' allegation at ¶ 165 that the *Cobell* district court lacked jurisdiction to consider claims for damages against the Government in 2008 and 2009 is correct. Compl. ¶¶ 163-66. *But see* Mot. at 24 n.7. Congress did not amend the district court's jurisdiction until December 8, 2010. Pub. L. 111-291, § 101(d), 124 Stat. 3064. Even then, it merely gave the court jurisdiction "for purposes of the Settlement." *Id.* It never provided jurisdiction for the court to actually decide *Cobell*'s claims for money damages.

390 F.2d at 691 (emphasis added).

Also left unsaid by the Government is that the "just compensation" inquiry is highly factual and rarely amenable to summary judgment, let alone dismissal on a motion to dismiss. *Sioux Nation*, 448 U.S. at 415-16 (explaining that a takings analysis requires ***a "throughgoing and impartial examination" of all "objective facts"*** to determine not just whether the Government has made a good faith effort to provide fair compensation, but whether "Congress gave the Indians ***full value***" for their property (emphasis added)); *see Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887 (Fed. Cir. 1983) ("The fact-intensive nature of just compensation jurisprudence to date, however disorienting in other contexts, argues against precipitous grants of summary judgment."). Courts must scrutinize the compensation provided to determine whether, under the particular circumstances, it equated to a good faith attempt to provide ***full fair market value***. *See, e.g.*, *United States v. Creek Nation*, 295 U.S. 103, 111-12 (1935) (explaining that "just compensation" requires payment of fair market value plus interest).

Notably, even these general principles undercut the Government's baseless "no harm, no foul" argument that no taking occurred because the "'benefits a class may gain . . .' is 'a matter fit for legislative consideration,'" or because "any eventual historical accounting to which plaintiffs may be entitled would ultimately be subject to congressional control." Mot. at 28-29 (citing *Amchem*, 521 U.S. at 622, and other cases). Additionally, the Supreme Court has also expressly rejected the Government's argument, explaining in *Sioux Nation* that courts ***must*** "engage in a thoroughgoing and impartial examination of the historical record" in which a "presumption of congressional good faith" ***has no place***. 448 U.S. at 415-16 ("A presumption of congressional good faith cannot serve to advance such an inquiry."). Thus, this court has never hesitated to reject the assertion that "just compensation" is simply "a matter fit for legislative

consideration":

> There is no indication of how Congress arrived at the $2.50 figure. There was no attempt to classify the school lands, so the flat $2.50 per acre applied whether the school lands consisted of first or second class agricultural land or grazing land. . . .
>
> The conclusion is unavoidable that, with regard to the land given to the state, Congress simply said the land was worth $2.50 per acre, but made no effort to determine whether that was what the land was truly worth. In other words, $2.50 appears to be just the figure Congress wanted to pay. Congress apparently didn't even attempt to ascertain what type of land comprised the sections given to the state, let alone what it was worth.

Fort Berthold, 390 F.2d at 694-95.

These basic principles doom the Government's attempts to justify the compensation Plaintiffs received ($800 and the illogical pro rata payment formula discussed previously, *supra* pages 16 through 18) and its attempts to convince this Court that Plaintiffs received "just compensation" as a matter of law. First, the compensation Plaintiffs may receive under the settlement has no bearing on whether Plaintiffs received "just compensation" for the rights taken by the Claims Resolution Act. The inquiries are distinct. Second, even under the Government's theory, under which the settlement compensation is relevant to the issue of just compensation for the statutory taking, the "compensation" Plaintiffs may receive, Compl. ¶ 191, has no relationship whatsoever to the value of Plaintiffs' property—their oil and gas claims. Plaintiffs have alleged that class damages measure in the hundreds of millions of dollars, *id.* ¶¶ 106, 113. And this does not even account for Plaintiffs' claims for environmental damages, etc. *Id.* ¶ 115.

Not one of the Government's arguments or authorities refutes this reality. Mot. at 28-29. None of the *Cobell* courts ever analyzed whether the Claims Settlement Act amounted to a taking, much less that Congress provided just compensation in return. *See, e.g.*, *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012) (never considering whether the Claims Resolution Act

constituted a Fifth Amendment taking). The Government's suggestion that they did is entirely specious.[23] *Cf.* Mot. at 29. Also specious (and improper) is the Government's unfounded assertion that "compensation for members of the Trust Administration Class is expected to range from a low of $800 to a high, for some individuals, of tens or hundreds of thousands of dollars, or even over $1 million." Mot. at 28. Not even the Government's own witnesses vouch for that statement.

Equally hollow is the Government's citation to *Amchem* for the proposition that "'[t]he benefits' that a class may gain from 'the establishment of a grandscale compensation scheme' is 'a matter fit for legislative consideration.'" Mot. at 28. The quoted language has nothing to do with a Takings Clause analysis. The Court points out only that courts cannot ignore the Rules of Civil Procedure on a whim. 521 U.S. at 622 (reversing the court's decision to apply a simple "fairness" inquiry in lieu of the Rule 23(b)(3) predominance test). Similarly, there is no basis for the Government's assertion that Plaintiffs would never be entitled to anything more than an "accounting." Mot. at 28. Unlike the *Cobell* plaintiffs, Plaintiffs have sued in the proper court and are not limited to seeking equitable relief. They are entitled to prove damages.

On the issue of damages, *Tohono O'Odham Nation* merely echoed *Lynch* in concluding "that ***relief*** is available by grace and not by right," 131 S. Ct. at 1731 (emphasis added)—not that "claims would be 'available by grace and not by right'" as the Government states. Mot. at 28. Moreover, like *Amchem*, that quote (and that case) has nothing to do with the Takings Clause or even a new imposition of sovereign immunity. 131 S. Ct. at 1731. The Court explained only that courts cannot deviate from 25 U.S.C. § 1500 on policy grounds. *Id.* ("Even were some

[23] Equally specious (and improper) is the Government's assertion that "compensation for members of the Trust Administration Class is expected to range from a low of $800 to a high, for some individuals, of tens or hundreds of thousands of dollars, or even over $1 million." Mot. at 28. Not even the Government's own witnesses vouch for that unfounded assertion.

hardship to be shown, considerations of policy divorced from the statute's text and purpose could not override its meaning.").[24]

Finally, *Littlewolf v. Lujan* actually supports Plaintiffs' point. 877 F.2d 1058, 1062 (D.C. Cir. 1989). There, as the Government explains, Congress took away allottees' right to sue for property deprivations in return for "administratively determined compensation." *Id.*; *see* Mot. at 29. What the Government fails to disclose, however, is that the court decided the highly factual "just compensation" question ***on summary judgment grounds***—not on a motion to dismiss. *Id.* Moreover, contrary to the Government's assertion, the compensation scheme in *Littlewolf* was anything but "largely indistinguishable" from the one at issue here. Mot. at 29. In *Littlewolf*, the "administratively determined compensation" Congress provided was "the fair market value of the land at the time of the defective transaction, less compensation already received, plus five percent interest compounded annually," 877 F.2d at 1062—the identical remedy those plaintiffs would have received had they proved a taking, *e.g.*, *Creek Nation*, 295 U.S. at 111-12 (requiring payment of fair market value). Congress also allowed the *Littlewolf* plaintiffs to "opt-out" and sue the Government under the Tucker Act ***after*** being told how much they would receive under this formula. *Littlewolf*, 877 F.2d at 1062. In short, *Littlewolf* shows what Congress ***should*** do to avoid a Fifth Amendment Taking. And plainly, the Claims Resolution Act falls woefully short of that standard.

In sum, Congress made no attempt to give Plaintiffs "full" value for their property. Just like in *Fort Berthold*, Congress simply picked a number out of thin air "with no effort to determine whether that was what" their property "was truly worth." *Cf.* 390 F.2d at 694-95.

[24] Likewise, *Jicarilla I* is not a takings case and has no bearing on a takings analysis. 131 S. Ct. 2313. The passage quoted by the Government states only that Congress can structure its trust relationship with Indians as it pleases ***at the outset***. *Id.* at 2323-24; Mot. at 28-29. It says nothing about taking away vested rights. *See Lynch*, 292 U.S. at 581-82, 589.

More is required to satisfy the Takings Clause. *E.g.*, *id.*

B. This Court Has Jurisdiction to Consider Plaintiffs' Takings Claim.

In a last-ditch effort to preclude this Court from proceeding on the merits of Plaintiffs' Fifth Amendment "Legislative Takings" claim, the Government once again mischaracterizes Plaintiffs' claim as an attempt to "re-litigate" matters "decided by the [*Cobell*] District Court and the District of Columbia Circuit." Mot. at 30.

Again, there is nothing to "re-litigate." The *Cobell* courts held only that that ***the settlement*** was "fair, reasonable and adequate." *E.g.*, Mot. at 29-30. Plaintiffs do not challenge that conclusion or ask this Court to revisit "whether the Trust Administration Class should have been certified" or "the *Cobell* Settlement Agreement approved." *But see* Mot. at 30. Rather, Plaintiffs ask the Court to consider an entirely different question: whether Congress provided Plaintiffs "just compensation" for its passage of ***the Claims Settlement Act***. Pub. L. 111-291, § 101(d), 124 Stat. 3064 (waiving Rule 23 (a) and (b)); *cf. Amchem*, 521 U.S. at 621 (explaining the harm to absent class members that would result from waiver of Rule 23(a) and (b) and application of only a simple Rule 23(e) fairness determination). The Government's own cases demonstrate that this Court has jurisdiction to consider that argument.

In *Allustiarte v. United States*, the Federal Circuit stated point blank that while this Court lacks jurisdiction "to review the decisions of district courts," this limitation "does not preclude [a plaintiff's] ability to bring a takings claim in the Court of Federal Claims" ***directed at the statute itself***. 256 F.3d 1349, 1352 (Fed. Cir. 2001). Indeed, *Allustiarte* explains that the Supreme Court had already found that petitioners who "had challenged the constitutionality of a statute" in district court, and lost, could thereafter bring suit in the Court of Federal Claims "to seek compensation for the alleged taking." 256 F.3d at 1352 (discussing *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 11-17 (1990)). It even notes that on remand from the

Supreme Court in *Preseault*, "this court determined that the [petitioners] had suffered a taking for which they were entitled to just compensation." *Id.*

Vereda, Ltda. v. United States does nothing to alter this established rule. 271 F.3d 1367, 1375 (Fed. Cir. 2001). Rather, it explains that *Allustiarte* stands for nothing more than the established rule that the Court of Claims lacks jurisdiction to review the "correctness" of another court or tribunal's decision. *Id.* ("Just as in *Allustiarte*, 256 F.3d at 1352, where the Court of Federal Claims did not have jurisdiction over a taking claim requiring a determination of whether a bankruptcy judgment was correctly decided, here the Court of Federal Claims does not have jurisdiction over Vereda's taking claim requiring a determination of the correctness of the administrative forfeiture."). It says absolutely nothing about this Court's jurisdiction to consider a challenge to the statute itself as a Fifth Amendment taking. *See id.* Because Plaintiffs do not ask this Court to consider any court's decision—much less the "correctness" of any decision—nothing precludes this Court's jurisdiction over Plaintiffs Legislative Taking claim.

CONCLUSION

Plaintiffs respectfully ask this Court to deny the Government's motions in their entirety and allow this case to proceed to full-scale discovery on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2013, I caused the foregoing **PLAINTIFFS' BRIEF IN OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT** to be served on opposing counsel via the Court's CM/ECF system.

Dated: June 3, 2013.

/s/ Kenneth E. McNeil
Kenneth E. McNeil