IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically Filed on June 17, 2013)

RAMONA TWO SHIELDS, et al.,	)	
	)	
Plaintiffs,	)	No. 13-90L
	)	
v.	)	Hon. Lawrence J. Block
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF [6] MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

ROBERT G. DREHER
Acting Assistant Attorney General

STEPHEN R. TERRELL
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
Tel: (202) 616-9663
Fax: (202) 305-0506
Stephen.Terrell@usdoj.gov

Attorney for the United States

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Rules

Rules of the United States Court of Federal Claims

I. INTRODUCTION

Plaintiffs, in their opposition to the United States' motion for summary judgment as to plaintiffs' First Cause of Action, do not dispute any material facts established in the United States' opening brief. Plaintiffs do not deny that they are certified class members of the Trust Administration Class in Cobell v. Salazar, No. 96-cv-1285 (D.D.C. filed June 10, 1996). Plaintiffs do not deny that they received adequate notice of class certification and the class settlement in Cobell and did not elect to opt-out of the Trust Administration Class settlement. Plaintiffs do not dispute that they have advanced, in their First Cause of Action, Land Administration Claims that were settled and released by the Cobell settlement. In fact, plaintiffs tacitly concede that their First Cause of Action is barred by the plain language of the Cobell settlement absent some exception.

To avoid application of the Cobell release to their First Cause of Action, plaintiffs raise three mistaken arguments. First, plaintiffs attempt to contrive a "latent ambiguity" in the Cobell Settlement Agreement. Opp'n at 8-18, ECF No. 11. But, by law, the Court should not create ambiguities in a settlement agreement where the agreement's language is plain and unambiguous and where plaintiffs have failed to produce any admissible evidence that there is, in fact, a "latent ambiguity."

Second, plaintiffs argue that their claims allegedly did not "accrue" prior to the Cobell Record Date of September 30, 2009. Id. at 12-15. But this argument is belied by allegations in plaintiffs' complaint, wherein they aver that their leases were approved in 2007 and 2008, that their allegedly below market bonus payments were paid at that time, and that the Bureau of Indian Affairs ("BIA") knew or should have known long before 2009—from, inter alia, tribal resolutions and communications from plaintiffs' organization to BIA—that plaintiffs' bonus payments were below market.

Third, plaintiffs attack the validity of the Cobell settlement by asserting that the named plaintiffs in Cobell lacked Article III standing to litigate their interests. Id. at 22-26. In this regard, plaintiffs fundamentally misapply class action law. The named plaintiff in a class action, like all litigants, must establish Article III standing. There is no dispute, and there can be no dispute, that the named plaintiffs in Cobell had Article III standing. That is the end of the standing inquiry. Whether the named plaintiffs in a putative class action can bind absent class members is an issue addressed by Rule 23, due process, and, in this case, the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064. Plaintiffs do not dispute that certification of the Cobell Trust Administration Class comported with due process and the Claims Resolution Act. Two courts have already so expressly held. Based upon the undisputed facts, the United States is entitled to judgment as a matter of law on plaintiffs' First Cause of Action.

Plaintiffs, alternatively, seek discovery to oppose the United States' motion for summary judgment. Id. at 18-22. Plaintiffs have failed to establish that any discovery they seek is relevant to the issue raised by the United States in its motion. Contrary to plaintiffs' assertions, summary judgment may be granted before any discovery has occurred, especially on an issue such as waiver and release, and plaintiffs have failed to meet their burden of establishing that they cannot oppose the United States' motion at this time.

The United States moved to dismiss plaintiffs' Second Cause of Action for lack of subject-matter jurisdiction because plaintiffs failed to identify a statutory or regulatory obligation, money mandating in breach, compelling the United States to disclose information to adversaries in litigation during settlement discussions. In response, plaintiffs rely on 25 U.S.C. § 396, the Indian general leasing statute, but then admit that statute "says nothing about any disclosure obligations of the United States." Opp'n at 33. That, then, is the end of the inquiry,

for plaintiffs, to clear the "first hurdle" of establishing Tucker Act jurisdiction, must identify a trust duty created by statute, treaty, or regulation, and they have not done so. Plaintiffs' Second Cause of Action should be dismissed.

The United States moved to dismiss plaintiffs' Third Cause of Action for a Fifth Amendment taking because plaintiffs failed to identify a vested property right protected by the Fifth Amendment and, even if there were a taking, two courts and Congress have determined that plaintiffs received just compensation. Plaintiffs' arguments in opposition, if accepted, would lead to absurd results. The United States would never be able to settle claims in litigation because, under plaintiffs' theory, every plaintiff would be entitled to a trial in this Court after settlement in another court to obtain the difference between the "full value" of their claims and the settlement value of their claims under a takings theory. Id. at 42. This is not the law and plaintiffs' Third Cause of Action should be dismissed.

II. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FIRST CAUSE OF ACTION

A. Plaintiffs Fail to Meet Their Burden on Summary Judgment.

Preliminarily, plaintiffs do not dispute any material facts established by the United States in its opening brief. Id. at 6-8. As to a limited number of undisputed facts (2, 3, 5, 6, 8, 29, 30, 33, 34, and 35), plaintiffs aver that they "cannot fully acknowledge or refute the details of the Government's assertions, and on that basis, dispute their veracity." Id. at 7. This denial is insufficient under Rule 56. Where, as here, plaintiffs fail to "properly address another party's assertion of fact," that fact may be considered "undisputed for purposes of the motion." Rules of the United States Court of Federal Claims ("RCFC") 56(e). Once the United States presents evidence, as it has done, to establish the essential elements of its defense, it is entitled to summary judgment in the absence of any showing to the contrary. Bio Tech Gen. Corp. v.

Duramed Pharms., Inc., 325 F.3d 1356, 1361 (Fed. Cir. 2003). Furthermore, once the moving party presents evidence entitling it to judgment as a matter of law at trial if left uncontroverted, the non-moving party has to show by specific facts the existence of a genuine issue of material fact at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Plaintiffs "may not rest upon mere . . . denials. A mere scintilla of evidence supporting the case is insufficient." Fox Grp., Inc. v. Cree, Inc., 700 F.3d 1300, 1303-4 (Fed. Cir. 2012) (quoting Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994)). Because plaintiffs have presented no evidence whatsoever to support their denial of these facts, for purposes of this motion they should be treated as undisputed.

Plaintiffs further admit undisputed facts 9, 10, 11, 12, and 13, but contest the alternative evidence produced by the United States to support those facts. Opp'n at 8. This distinction is immaterial; a fact is undisputed no matter how it is substantiated.

Finally, plaintiffs object to the United States' citation to public records in undisputed facts 16 and 25. Id. Despite this objection (which lacks merit, see Fed. R. Evid. 402 (relevant evidence is admissible) and 803(8) (public records exception to the hearsay rule)), plaintiffs do not dispute the veracity of these facts.

In sum, plaintiffs do not dispute any facts in their opposition to the United States motion, as is their burden as the non-moving party. Thus, if the undisputed material facts entitle the United States to judgment as a matter of law, its motion should be granted. RCFC 56(a).

B. Plaintiffs Fail to Establish Any "Latent Ambiguity" in the Cobell Settlement Agreement.

The thrust of plaintiffs' opposition to the United States' motion for summary judgment is an argument that the parties to the Cobell Settlement Agreement sub silentio intended to exclude from Land Administration Claims plaintiffs' leasing claims. To so argue, plaintiffs attempt to contrive a "latent ambiguity" in the Settlement Agreement. See Opp'n at 11. Because plaintiffs

have to resort to an alleged "latent ambiguity," they have to concede that the plain language of the Cobell Settlement Agreement does, in fact, cover their claims, as established in the United States' opening brief. U.S. Br. at 14-18, ECF No. 6-1.

In advancing their "latent ambiguity" argument, plaintiffs fundamentally misstate basic contract law. To the extent this Court needs to interpret the Cobell Settlement Agreement, it should do so as an issue of law, not as an issue of fact as argued by plaintiffs. "Construction of the language of the contract to determine whether there is an ambiguity is a question of law which we review without deference." Gardiner, Kamya & Assocs., P.C. v. Jackson, 467 F.3d 1348, 1353 (Fed. Cir. 2006). At the same time, "whether ambiguities are latent or patent and whether the contractor's interpretation thereof is reasonable are also questions of law subject to de novo review." Interwest Constr. v. Brown, 29 F.3d 611, 614 (Fed. Cir. 1994).[1/] Interpreting a contract is a question of law amenable to summary judgment, where, as here, there are no relevant disputed facts. Varilease Tech. Grp., Inc. v. United States, 289 F.3d 795, 798 (Fed. Cir. 2002).

"When the terms of a contract are clear and unambiguous, there is no need to resort to extraneous circumstances, such as prior negotiations . . . for its interpretation." Gutz v. United States, 45 Fed. Cl. 291, 297 (1999); see also City of Tacoma, Dep't of Pub. Utils. v. United States, 31 F.3d 1130, 1134 (Fed. Cir. 1994) ("Outside evidence may not be brought in to create an ambiguity where the language is clear."); Thanet Corp. v. United States, 591 F.2d 629, 633 (Ct. Cl. 1979) ("Words [in a contract] are to be given their plain and ordinary meanings."). As such, "[t]he precise, unambiguous language of the Agreement renders any evidence of discourse

[1/] At this juncture, the United States notes that the Cobell Settlement Agreement is not a procurement contract. Instead, it was an agreement made by the government "in its sovereign, or governmental capacity." Trudeau v. United States, 68 Fed. Cl. 121, 127 (2005). Plaintiffs rely heavily, if not exclusively, on procurement law in their opposition.

during mediation irrelevant to an interpretation of the Agreement." Speed v. United States, 108 Fed. Cl. 648, 655 (2013).

Here, the Cobell Settlement Agreement waives and releases "known and unknown" Land Administration Claims that existed as of September 30, 2009. UF 23-24. "Land Administration Claims" include claims for "[f]ailure to obtain fair market value for leases" (Cobell Settlement Agreement at ¶ A.21.b); for "[f]ailure to prudently negotiate leases" (id. at ¶ A.21.c); for "[f]ailure to include or enforce terms requiring that Land be conserved, maintained, or improved" (id. at ¶ A.21.e); for "[p]ermitting loss, dissapation, waste or ruin, including failure to preserve Land . . . involving . . . oil, natural gas, [and] mineral resources . . ." (id. at ¶ A.21.f); and for "[f]ailure to control, investigate allegations of, or obtain relief in equity and at law for, . . . theft, misappropriation, fraud or misconduct regarding Land" (id. at ¶ A.21.h). Plaintiffs do not dispute that their First Cause of Action advances Land Administration Claims, including allegations that the United States allegedly "approved an inadequate lease bonus price" on their leases (Compl. at ¶ 118, ECF No. 1); "approved inadequate royalty percentages" on their leases (id. at ¶ 119); and failed to include lease provisions that precluded assignment of leases, had certain well spacing provisions, contained allegedly inadequate environmental protection provisions, and failed to contain terms protecting cultural resources (id. at ¶ 120). The plain language of the Cobell Settlement Agreement unambiguously bars plaintiffs' claims advanced in their First Cause of Action.

"Contracts are not necessarily rendered ambiguous by the mere fact that the parties disagree as to the meaning of their provisions . . . . A contract is ambiguous if it is susceptible of two different and reasonable interpretations, each of which is found to be consistent with the contract language." Cmty. Heating and Plumbing Co. v. Kelso, 987 F.2d 1575, 1578–79 (Fed.

Cir. 1993). Here, there is no dispute that the plain language of the Cobell Settlement Agreement applies to plaintiffs' First Cause of Action. Plaintiffs' only argument is that they speculate they may discover some parol evidence that may lead to a potential alternative, and unreasonable, interpretation of the plain language of the Cobell Settlement Agreement. Opp'n at 12. This speculation, unsupported by any evidence, is insufficient to defeat the United States' motion for summary judgment. This is especially true because plaintiffs argue that the Cobell litigants intended to preserve plaintiffs' Land Administration Claims and exclude them from the Settlement Agreement's release. Case law makes clear that although parties can reserve the right to litigate a claim that would otherwise be barred by res judicata, that reservation must be express. Norfolk S. Corp., v. Chevron U.S.A., Inc., 371 F.3d 1285, 1289 (11th Cir. 2004). There is no express reservation of plaintiffs' claims in the Cobell Settlement Agreement. Plaintiffs cannot invent out of whole cloth a "latent" claim exclusion from a settlement agreement release that plainly and unambiguously bars plaintiffs' claims.

The factual basis for plaintiffs' "latent ambiguity" argument also does not pass muster. Plaintiffs' aver that the payment mechanism for the Trust Administration Class is unfair, and they purport to support this argument with "preliminary opinions" from Dr. Zmijewski and Messrs. Parris and Reineke. Opp'n at 16-18. Plaintiffs' argument has already been rejected by the United States Court of Appeals for the District of Columbia. As argued by a Cobell objector to the District of Columbia Circuit:

> Worse, the Indians who were most injured by these errors are the ones who receive disproportionately the least amount. A class member whose account was administered appropriately will, ceteris paribus, have more revenue than a class member whose account was improperly administered. Yet under the settlement, the first class member, who has suffered no injury, will receive more money than the class member who suffered injury.

Opening Brief of Appellant Kimberly Craven at 24 in Cobell v. Salazar, D.C. Cir. No. 11-5205

(attached hereto as Exhibit 1). This argument is indistinguishable from that advanced by plaintiffs (and their purported experts) in their opposition. Opp'n at 16-18. In response to this argument, the District of Columbia Circuit affirmed the United States District Court for the District of Columbia:

> As the district court found, however, the distribution scheme is fair, Fairness Hr'g Tr. at 219, and "[i]t is hard to see how there [c]ould be a better result," id. at 218, because Craven offers no persuasive evidence to support her claim of unfair compensation.

Cobell v. Salazar, 679 F.3d 909, 919 (D.C. Cir. 2012) ("Cobell XXIII").

Two courts have rejected plaintiffs' unfair compensation argument. If plaintiffs truly believed they were not fairly compensated by the Cobell Settlement Agreement, their remedy was to opt-out of the Trust Administration Class, not to argue in this Court that their disappointment with the Cobell Settlement Agreement rises to the level of a "latent ambiguity."

Plaintiffs also make much of the so-called Indian canon of statutory construction. See Opp'n at 2, 8, 10-11. But plaintiffs fail to establish that the canon applies here. In general, ambiguous statutes affecting Indians may, under certain circumstances, be interpreted liberally in their favor. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985). Here, the Settlement Agreement is unambiguous; it clearly and explicitly waives plaintiffs' Land Administration Claims. See id. (canons of construction applicable in Indian law only require interpretation of statutes "with ambiguous provisions interpreted to their [the Indians'] benefit") (emphasis added); c.f. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). The case upon which plaintiffs primarily rely, Standing Rock Sioux Tribe v. United States, is in accord. 182 Ct. Cl. 813, 820 (1968) ("any ambiguity that does not adequately express the understanding must be

construed in the Indian's favor . . .") (emphasis added). Because plaintiffs have failed to establish that the Cobell Settlement Agreement is ambiguous[2/], the Indian canon of construction has no application.

C. Plaintiffs' Claims Accrued Prior to the Cobell Record Date.

Plaintiffs also attempt to avoid the Cobell release by arguing their leasing claims did not accrue until after the Cobell Record Date of September 30, 2009. Opp'n at 12-15. Plaintiffs' argument is factually and legally incorrect.

A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the government and entitle the claimant to institute the action. Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988). For a claim for breach of trust brought by an individual Indian or an Indian tribe, band, or representative group, such a claim "traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." Shoshone Indian Tribe of the Wind River Reservation v. United States, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("Shoshone II"). The trustee may repudiate the trust by taking actions inconsistent with his responsibilities as a trustee or by express words. Jones v. United States, 801 F.2d 1334, 1336 (Fed. Cir. 1986). As to the "knowledge of that repudiation" element of the accrual definition set forth in Shoshone II, it is defined further as "placing the beneficiary on notice that a breach [of trust] has occurred." Shoshone II, 364 F.3d at 1348. This "on notice"

[2/] Plaintiffs appear to erroneously argue that the United States bears the burden of disproving plaintiffs' "latent ambiguity" argument in its opening brief. Opp'n at 10-11. For this proposition plaintiffs cite a discovery ruling from Judge Sweeney that stands for the unremarkable proposition that a defendant bears the burden of proof on its affirmative defenses. Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480, 523 (2009). But where, as here, the plaintiffs claim that a contract is ambiguous, they have the burden of proof on that point. Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 565 (7th Cir. 1995) (extrinsic evidence cannot be used to create an ambiguity and "[t]he party claiming that a contract is ambiguous must first convince the judge that this is the case"); see also Blinderman Const. Co. v. United States, 15 Cl. Ct. 121, 126-27 (1988) (plaintiff "failed to prove by a preponderance of the evidence that the contract . . . was ambiguous . . . .").

standard is no different than the objective standard commonly applied to the "accrual suspension rule," which states that the accrual of a claim against the United States is suspended until the claimant "knew or should have known" that the claim existed. Young v. United States, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (citation omitted).

Plaintiffs are incorrect when they argue that all damages must have been incurred by the plaintiffs before their cause of action accrues. Opp'n at 13. As recently reaffirmed by the United States Court of Appeals for the Federal Circuit,

> even though a plaintiff might not be aware of the full economic cost of a taking at the time it occurs, for purposes of determining when the statute of limitations begins to run, the "proper focus" must be "upon the time of the [defendant's] acts, not upon the time at which the consequences of the acts [become] most painful."

Navajo Nation v. United States, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (citation omitted). In this case, plaintiffs claim that they did not receive adequate bonus payments when their leases were issued, that their leases did not contain non-assignment clauses when they were issued, that their leases did not "maximize" royalty rates when issued, that their leases did not contain adequate spacing or environmental protection provisions when they were issued, and that their leases did not contain provisions prohibiting assignment when issued. Compl. at ¶¶ 118-120. As such, all acts or omissions of the United States placed at issue by the plaintiffs' First Cause of Action occurred prior to September 30, 2009. The fact that plaintiffs may claim continuing damages stemming from these alleged breaches does not mean that those claims had not accrued by the Cobell Record Date. See Shoshone Indian Tribe of Wind River Reservation v. United States, 672 F.3d 1021, 1032 (Fed Cir. 2012) ("Shoshone IV") ("The failure to follow the notice, advertisement, and competitive bidding requirements of the 1938 Act when the conversions occurred was the harm suffered by the Tribes; the economic consequences of the new leases may define the scope of that harm, but they are not the event that triggers the statute of limitations.").

In fact, the only event that plaintiffs can point to that occurred after September 30, 2009, was Williams Companies' purchase of 85,800 acres of existing leases from private lessees. Opp'n at 14; see also Plaintiffs' Appendix at 476, ECF No. 11-3. Even plaintiffs acknowledge that Williams Companies' purchase of lease interests in 2010 is not the basis for their damages claims, it is instead when "the complete implications" of their claims "came to light." Opp'n at 14. "Complete implications" of damages is different than damages. It is clear from the facts set forth in plaintiffs' complaint that they claim damages that accrued at the time of lease issuance in 2007 and 2008 and that were known or knowable to plaintiffs long before 2009.

As for plaintiffs' claims that they received insufficient bonus payments (Compl. at ¶118), those bonuses were paid at the time of lease execution, which was in 2007 and 2008 (Compl. at ¶¶ 103-104). See Hunt Decl. at ¶¶ 26, 32, ECF 11-1 (attached as Exhibit 1-A to the Declaration of Kenneth E. McNeil). As for plaintiffs' claims that their leases had inadequate royalty rates or terms (Compl., ¶¶ 119-20), those terms were finalized when the leases were executed in 2007 and 2008 and approved by BIA on December 19, 2007, and February 24, 2008. UF 10-11. Thus, all acts or omission of the United States that gave rise to plaintiffs' damages claims occurred no later than February 24, 2008, long before the Cobell Record Date.

Furthermore, plaintiffs knew or should have known of their claims long before September 30, 2009. Plaintiffs claim that a tribal lease "was not for fair market value, as later events confirmed before its final approval in January 2008. . . ." Compl. at ¶ 82. In December 2006, the Tribal Council was warned that "small companies would attempt to lock up leases for less than fair market value." Id. at ¶ 84. This fact was purportedly confirmed in February 2007. Id. at ¶ 85. "By December 2007, Nagel [a tribal employee] had sent numerous letters and reports to various United States officials regarding the conspiracy he believed to be afoot." Id. at ¶ 89.

By March 2008, "[t]ribal members at the Fort Berthold Reservation warned the BIA about what the real market value was." Id. at ¶ 91. Valuations of plaintiffs' leases that "vastly exceeded the lease rates being presented to the BIA for approval" (id.) were "distributed and widely discussed at the Reservation" in March 2008 (id. at ¶ 92). "On March 26, 2008, the Elders Organization"—of which plaintiff Two Shields served as Secretary/Treasurer (id. at ¶ 137(b))—"sent letters to The Office of Services and Trust for American Indians and again to the Attorney General" discussing "outrage" over leasing on the Reservation. Id. at ¶ 95. There was even a Senate hearing pertaining to oil and gas leasing on the Fort Berthold Reservation held in May 2008. Id. at ¶ 99. In light of these prolific allegations it is incredible for plaintiffs to claim that their Land Administration Claims did not exist or were unknown as of September 30, 2009.

The Cobell Settlement Agreement explicitly and unambiguously releases Land Administration Claims "known or unknown" that existed as of September 30, 2009. UF 23-24. Plaintiffs' First Cause of Action falls squarely within the Cobell release.

D. Plaintiffs' Standing Argument is Incorrect.

Plaintiffs' final argument to avoid application of the plain language of the Cobell release is tantamount to an effort to limit the effect of the Cobell settlement to the named plaintiffs, and to exempt its provisions from application to all unnamed class members. Opp'n at 22-26. Plaintiffs' argument, in a nutshell, is that the named plaintiffs in Cobell lacked "standing" to assert unnamed class-members' Land Administration Claims. Plaintiffs' opposition fundamentally misconstrues Article III standing and class action settlements. Plaintiffs also improperly conflate Article III standing with class representative adequacy under Rule 23.

It is undisputed that a class representative must have Article III standing. Nowhere in plaintiffs' opposition do they dispute that the named plaintiffs in Cobell had Article III standing (and the District Court never determined that the named plaintiffs in Cobell lacked standing).

For Article III purposes, the issue is whether "the party invoking federal court jurisdiction" has a personal stake in the litigation. Baker v. Carr, 369 U.S. 186, 204 (1962). The parties invoking federal court jurisdiction in Cobell were the class representatives. As observed by Justice Souter, citing leading class action treatises, in his concurrence in Lewis v. Casey

> [Unnamed plaintiffs] need not make any individual showing of standing [in order to obtain relief], because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court. Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions.

518 U.S. 343, 395-96 (1996) (Souter, J., concurring-in-part and dissenting-in-part) (citation omitted). Even plaintiffs do not dispute that the named plaintiffs in Cobell had Article III standing, thus plaintiffs' Article III arguments (and the Article III cases cited by plaintiffs) are a red herring.[3/]

Instead, plaintiffs' argument is correctly interpreted as an attack on the District Court's determination that the named plaintiffs in Cobell were adequate class representatives for the Trust Administration Class under the Claims Resolution Act. Plaintiffs argue that because each class member has a different interest in allotted trust land that may be subject to different leasing statutes, the Trust Administration Class could not be certified. Opp'n at 25-26. Again, this argument has been advanced before, and squarely rejected by, the District Court and the District of Columbia Circuit. The District of Columbia Circuit's summary of Ms. Craven's objection to

---

[3/] Cobell objectors asserted that the Claims Resolution Act was unconstitutional because it only vested the District Court with jurisdiction over the settlement, instead of a "case or controversy" under Article III, an argument similar to plaintiffs' "standing" argument and plaintiffs' argument in footnote 22 of their opposition brief. See Reply Brief of Appellants at 5 in Good Bear v. Salazar, D.C. Cir. No. 11-5270 (attached hereto as Exhibit 2). In response to these arguments, the District of Columbia Circuit held they "are utterly without merit." Good Bear v. Salazar, Nos. 11-5270, et al., 2012 WL 1884702 at *1 (D.C. Cir. May 22, 2012).

the Cobell settlement accurately summarizes plaintiffs' "standing argument:" "Craven's due-process objection boils down to a challenge to the adequacy of class representation." Cobell XXIII, 679 F.3d at 922. In response to this argument, the District of Columbia Circuit held, "[a]lthough Craven characterizes the Class as 'sprawling' and encompassing 'dozens of wildly different theories of liability,' . . . all of the class members' trust claims revolve around resolution of a single issue—the extent of the Secretary's fiduciary obligation as trustee of the IIM accounts." Id. There can be no legitimate dispute that the Trust Administration Class was properly certified under the Claims Resolution Act. It is undisputed that plaintiffs are members of the Trust Administration Class. UF 3, 8. Plaintiffs admit that "a class settlement binds class members." Opp'n at 9 n.4. Thus, the Cobell Settlement Agreement, by its terms, applies to plaintiffs' First Cause of Action.

Plaintiffs also ignore the plain language of the Cobell Settlement Agreement release, which applies to all claims that "were, or should have been asserted in the Amended Complaint" (UF 23) and argue that their specific claims "could" not have been asserted in the Cobell Amended Complaint. Opp'n at 23. This argument makes no sense, since it is undisputed that plaintiffs' Land Administration Claims actually were asserted in the Cobell Amended Complaint. UF 17.

Plaintiffs also claim that their Land Administration Claims should be exempted from the Cobell Settlement Agreement because of the Fort Berthold leasing statute. Opp'n at 26. Again, this argument makes no sense because there are multiple statutory and regulatory leasing schemes that apply only to specific reservations or specific groups of Indians. See 25 C.F.R. Part 215 (Quapaw mining regulations). Nonetheless, all leasing claims were advanced in the Cobell Amended Complaint. UF 17.

In sum, there is no basis in Article III, Rule 23, or the Claims Resolution Act to conclude that plaintiffs are not bound by the Cobell Settlement Agreement. Because it is undisputed that plaintiffs are certified class members, and that plaintiffs' First Cause of Action advances Land Administration Claims, the United States is entitled to judgment as a matter of law on plaintiffs' First Cause of Action.

E. Plaintiffs Are Not Entitled to Discovery.

Plaintiffs argue that the United States' motion should be denied or deferred under Rule 56(d) to allow plaintiffs to conduct discovery into Cobell settlement negotiations. Opp'n at 18-22. Contrary to plaintiffs' arguments, Rule 56 "does not require trial courts to allow parties to conduct discovery before entering summary judgment." Humphreys v. Roche Biomedical Labs., Inc., 990 F.2d 1078, 1081 (8th Cir. 1993) (citation omitted). The Rule allows the United States to move for summary judgment "at any time." RCFC 56(b). Courts routinely resolve pre-discovery motions for summary judgment on the merits, either as motions for summary judgment in their own right or as motions for judgment on the pleadings or motions to dismiss that are converted to motions for summary judgment. See, e.g., D & D Landholdings v. United States, 82 Fed. Cl. 329, 340-42 (2008) (reaching merits of pre-discovery motion for summary judgment); Jordan v. United States, 77 Fed. Cl. 565, 571 (2007) (pre-discovery motion to dismiss converted and granted as motion for summary judgment); ConocoPhillips v. United States, 73 Fed. Cl. 46, 59 (2006) (pre-discovery motion for summary judgment granted). The United States' motion is timely and procedurally proper.

Plaintiffs seek the following discovery: 1) information on the government's knowledge, assessment, and valuation of plaintiffs' potential leasing claims asserted in their First Cause of Action (McNeil Decl. at ¶¶ 13, 16); 2) settlement communications between government counsel and Cobell class counsel (id. at ¶¶ 14, 17); 3) information on the amount of compensation that

will be paid to plaintiffs as part of the Trust Administration Class settlement (id. at ¶ 15); and 4) information on the government's record retention practices (id. at ¶ 18). None of the information sought by plaintiffs is relevant to resolving the United States' motion for summary judgment, thus plaintiffs' Rule 56(d) request should be denied.

As held by the Court of Federal Claims, to be entitled to relief under Rule 56(d)

> [T]he non-movant must by affidavit and supporting papers: (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.

Thiesen Vending Co. v. United States, 58 Fed. Cl. 194, 198 (2003). Plaintiffs request should fail because the requested discovery will not "engender a genuine issue of material fact."

Plaintiffs do not dispute that the Cobell Settlement Agreement is plain and unambiguous. Instead, plaintiffs seek discovery into the "facts and circumstances" surrounding execution of the Cobell Settlement Agreement in hopes of potentially uncovering a "latent ambiguity." Opp'n at 21. Plaintiffs have no evidence that there is, in fact, any latent ambiguity, nor have they advanced even a "scintilla of evidence" to overcome the plain and unambiguous language of the Cobell Settlement Agreement. It is well established that a party seeking discovery under Rule 56(d) "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." Simmons Oil Corp. v. Tesoro Petroleum Corp., 86 F.3d 1138, 1144 (Fed. Cir. 1996) (quoting SEC v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980)). Here, plaintiffs rely exclusively on "vague assertions" that they may discover some evidence that could lead to an argument that the plain and unambiguous Cobell Settlement Agreement has a latent ambiguity (which may, or many not, be resolved in their favor). This is

an insufficient showing to entitle plaintiffs to Rule 56(d) relief.

Plaintiffs also have to show that the requested information is "relevant and necessary" to oppose the motion. Paalan v. United States, 57 Fed. Cl. 15, 18 (2003). That relevant evidence has to be admissible. RCFC 56(c)(2). Parol evidence is admissible only if there is ambiguity in the words of the agreement. Greco v. Dep't of the Army, 852 F.2d 558, 560 (Fed. Cir. 1988). Just as in Speed, "[w]hether or not" the parties discussed in detail plaintiffs' leasing claims "during the negotiations over the Settlement Agreement in this case is not material because the Agreement itself is fully integrated and is unambiguous on the issue." 108 Fed. Cl. at 654. Thus, the evidence plaintiffs seek through discovery is neither relevant nor admissible.

Some of the information sought by plaintiffs is not discoverable. Specifically, plaintiffs' request for the United States internal evaluations of plaintiffs' claims in Cobell and this case (McNeil Decl. at ¶¶ 13, 16) seeks attorney work-product that is protected from discovery. Fed. R. Evid. 502(g)(2); Jicarilla Apache Nation v. United States, 88 Fed. Cl. 1, 12-13 (2009) overruled on other grounds by United States v. Jicarilla Apache Nation, 564 U.S. ___, 131 S. Ct. 2313 (2011). Thus, because that information is neither discoverable nor admissible it should not be the basis for Rule 56 relief.

Other information sought by plaintiffs could have been obtained by plaintiffs from other sources prior to their deadline to oppose the United States' motion. Specifically, plaintiffs request for an estimate of their Trust Administration Class settlement payment (McNeil Decl. at ¶ 15) could have been sought by plaintiffs from the Claims Administrator or class counsel. Plaintiffs provide no explanation why they have not sought this information previously or that they were unsuccessful in obtaining such information. Furthermore, for reasons discussed above, such information is irrelevant.

In sum, plaintiffs' Rule 56(d) argument is nothing more than a request for permission to conduct a fishing expedition in furtherance of a contract interpretation argument that is objectively unreasonable. Because plaintiffs have failed to show that any of the discovery sought is relevant or necessary to oppose the United States' motion, their request should be denied.

III. PLAINTIFFS SECOND CAUSE OF ACTION SHOULD BE DISMISSED

A. Plaintiffs Have Failed to Invoke Tucker Act Jurisdiction in their Second Cause of Action.

Plaintiffs admit, as they must, that to invoke this Court's Tucker Act jurisdiction over an Indian breach of trust claim "[s]tatutory authority must exist of course." Opp'n at 27. "Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable." United States v. Mitchell, 463 U.S. 206, 216 (1983) ("Mitchell II"). Instead, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Id. at 216-17 (internal quotation marks and citations omitted).

As held by the Supreme Court, Indians asserting a non-contract claim under the Tucker Acts must therefore clear "two hurdles" to invoke federal jurisdiction. United States v. Navajo Nation, 556 U.S. 287, 290 (2009) ("Navajo II"). "First, the [plaintiffs] '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.'" Id. Second, "[i]f that threshold is passed," the plaintiffs must further show that "the relevant source of substantive law," the violation of which forms the basis of their claim, "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law

imposes.'" Id. at 290-91 (citation omitted) (alterations in original).

Here, the "substantive source of law" relied upon by plaintiffs to clear the "first hurdle" in the jurisdictional analysis is 25 U.S.C. § 396. Opp'n at 29. Plaintiffs admit, as they must, that Section 396, a general leasing statute, "says nothing about any disclosure obligations of the United States." Id. at 33. Thus, by plaintiffs own admission, they have failed to clear the "first hurdle" of the jurisdictional question: identifying a specific statutory or regulatory obligation that the United States has allegedly breached. As such, plaintiffs cannot even get to the "second hurdle," where the "fair inference" test permits the Court to look to the common law to ascertain whether the statutory or regulatory trust obligation is money-mandating in breach. As recently held by the Supreme Court when discussing United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) (the case relied upon primarily by plaintiffs):

> [The "fair inference test"] is the test for determining whether a statute that imposes an obligation but does not provide the elements of a cause of action qualifies for suit under the Tucker Act—more specifically, whether the failure to perform an obligation undoubtedly imposed on the Federal Government creates a right to monetary relief.

United States v. Bormes, 568 U.S. ___, 133 S. Ct. 12, 20 (2012).

Because plaintiffs have failed to identify any statute that "undoubtedly imposed on the Federal Government" an obligation to disclose information to an adversary in settlement discussions, plaintiffs have failed to invoke Tucker Act jurisdiction over their Second Cause of Action. The general leasing statute has nothing to do with disclosure obligations to Indians or to adversaries in litigation. When "the [Indians] cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." Navajo II, 556 U.S. at

302.[4/] The disconnect between leasing statutes and an alleged duty to disclose information to an adversary in litigation is patent.

Plaintiffs do not meaningfully distinguish Jicarilla, which is directly on point. The United States' disclosure obligations to Indians are not defined by the common law in a vacuum, but instead plaintiffs "must point to a right conferred by statute or regulation in order to obtain" settlement discussions by the government against its wishes. Jicarilla, 131 S. Ct. at 2325. There is no trust obligation to disclose information to adversaries in settlement discussions, thus there is no Tucker Act jurisdiction over a claim for a breach of that alleged obligation.

B. Plaintiffs Have Failed to State a Claim in their Second Cause of Action.

Plaintiffs fail to respond to the United States' Rule 12(b)(6) challenge to their Second Cause of Action. U.S. Br. at 22-25. Plaintiffs simply re-argue their contention that the United States has a common law duty of full disclosure to litigation adversaries. Opp'n at 33-35. Plaintiffs do not dispute that two courts and Congress have found the Cobell settlement to be "fair, reasonable and adequate." UF 37, Cobell XXII, 679 F.3d at 913. Thus, plaintiffs have failed to allege or demonstrate in their complaint any injury resulting from the United States' alleged failure to disclose information to adversaries in litigation, and their Second Cause of Action should be dismissed for failure to state a claim. See Todd Const., L.P. v. United States, 656 F.3d 1306, 1315-16 (Fed. Cir. 2011) (plaintiffs' complaint dismissed for lack of standing because plaintiff failed to allege injury stemming from "minor procedural violations").

IV. PLAINTIFFS' THIRD CAUSE OF ACTION SHOULD BE DISMISSED

The United States established in its opening brief that plaintiffs' Land Administration

---

[4/] Plaintiffs' reliance on Judge Hewitt's ruling on a non-jurisdictional motion in limine is misplaced. Opp'n at 31-32 citing Shoshone Indian Tribe of the Wind River Reservation v. United States, 58 Fed. Cl. 542, 546 (2003). That opinion, which was decided before Navajo II and Jicarilla, has no relevance to the jurisdictional issue raised by the United States.

Claims are not property protected by the Fifth Amendment. U.S. Br. at 25-27. In opposition, plaintiffs rely upon Alliance of Descendants of Tx. Land Grants v. United States, 37 F.3d 1478 (Fed. Cir. 1994) ("Alliance of Descendants"). Opp'n at 37. The issue in that case was whether plaintiffs' claims were barred by the statute of limitations. Id. at 1481. The Federal Circuit affirmed the Court of Federal Claims' judgment of dismissal, finding that plaintiffs' takings claims (if any) were untimely. Id. at 1482. In dicta, the Federal Circuit noted that "a legal cause of action is property within the meaning of the Fifth Amendment." Id. at 1481. In support of that proposition, the Federal Circuit cited Cities Serv. Co. v. McGrath, 342 U.S. 330 (1952).

In McGrath, the Supreme Court held that if an obligor on a debenture were to "suffer judgment the payment of which would effect a double recovery" they would have a plausible takings claim against the United States. 342 U.S. at 334-35. McGrath bears no resemblance to the case at bar. In McGrath, the plaintiff faced the possibility of forfeiting their debenture to the Attorney General and having to pay the full value of the debenture to the holder pursuant to a foreign judgment. Here, plaintiffs will not be subject to any liability (from the United States or others) as a result of the Claims Resolution Act. Instead, the Claims Resolution Act extinguishes and compensates plaintiffs for claims against the United States and there is no possibility that plaintiffs will suffer pecuniary loss based on those claims from any other source.

The Federal Circuit in Alliance of Descendants also cited to Ware v. Hylton, 3 U.S. 199 (1796). Alliance of Descendants, 37 F.3d at 1481. Ware involved a Virginia statute that allowed citizens of the Commonwealth to satisfy their debts to British subjects by depositing the amount of the debt with the Commonwealth. 3 U.S. at 220-21. That Virginia statute was enacted after the Commonwealth declared independence from Britain and before the Articles of Confederation. Id. at 222. The defendant (a private party) in Ware argued that its partial

payment to Virginia of its debt owed to plaintiff (another private party) was a defense to plaintiff's claim on the debt. Id. at 221.

At issue in Ware was whether the Treaty of Paris in 1783 preempted the Virginia law under the Constitution's supremacy clause. Id. at 229. Justice Chase held that the Treaty of Paris did preempt the Virginia law and that the treaty unambiguously removed all restrictions on British subjects' authority to collect on pre-war debts. Id. at 239. In light of that finding, Justice Chase discussed, in dicta, whether the defendant should have any right of indemnity against Virginia. He concluded that "Virginia is not bound to make compensation to the debtors." Id. at 245. Also in dicta, Justice Chase observed

> That Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but the immutable principles of justice; the public faith of the States, that confiscated and received British debts, pledged to the debtors; and the rights of the debtors violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public. This principle is recognized by the Constitution, which declares, "that private property shall not be taken for public use without just compensation."

Id. Thus, Ware did not decide the issue presented in this case and is not controlling. Plaintiffs here do not seek indemnity from the United States, nor do they face the possibility of a judgment against them by a third party as a result of the settlement of their Land Administration Claims.

In sum, Alliance of Descendants did not resolve the question presented in the United States' motion: whether plaintiffs' Land Administration Claims are property protected by the Fifth Amendment. Neither of the cases cited in Alliance of Descendants answered that question either. Another case cited by plaintiffs, Adams v. United States, 391 F.3d 1212 (Fed. Cir. 2004), supports the United States' position advanced in its opening brief. In Adams, the Federal Circuit adopted the United States' position on when a claim can be property for purposes of the Fifth Amendment, holding "that sometimes a cause of action may fall within the definition of property

recognized under the Takings Clause, [but] we observe, like the Court of Federal Claims, that precedent has limited the application of the Takings Clause to cases in which the cause of action protects a legally-recognized property interest." Id. at 1225-26. In that case, the Federal Circuit held that "a claim of Government liability before an administrative agency" is not property under the Fifth Amendment. Id. at 1226. Similarly, here, plaintiffs' inchoate claims against the United States are not property protected by the Fifth Amendment. Sharkey v. United States, 17 Cl. Ct. 643, 648 (1989) (a cause of action against the government is not a protected property interest under the Fifth Amendment).

Even if plaintiffs Land Administration Claims are property interests protected by the Fifth Amendment, they also have to aver that property was taken without just compensation. Plaintiffs admit, as they have to, that this Court lacks jurisdiction to scrutinize the decisions of other federal courts. Opp'n at 46-47. As such, plaintiffs have to concede that the compensation they will receive from the Cobell Trust Administration Class settlement (be it $800, $1,600 (Parris Decl. at ¶ 39), or some greater amount) is "fair, reasonable and adequate." UF 37. Plaintiffs, nonetheless, believe they should be entitled, in this Court, to establish the "full fair market value" of their Land Administration Claims (presumably their value after trial and final judgment after appeals) and to obtain the difference (if any) under a takings theory. Opp'n at 39-46. This argument is untenable, as it would always subject the United States to potential takings liability every time it settled claims with parties.

Plaintiffs' citations to Indian Claims Commission Act ("ICCA") cases are unavailing. Opp'n at 41-43 citing United States v. Sioux Nation of Indians, 448 U.S. 371, 415 (1980) and Three Affiliated Tribes v. United States, 390 F.2d 686 (Ct. Cl. 1968). The ICCA vested the Indian Claims Commission with jurisdiction over "claims based upon fair and honorable

dealings." ICCA § 2, Pub. L. No. 79-726, 60 Stat. 1049, 1050 (1946). Those cases involved claims by Indians that the United States did not pay fair and honorable compensation for land ceded to or acquired by the United States. This Court does not have similarly broad and expansive jurisdiction. Those cases did not involve a legislative settlement of Land Administration Claims and have no application in this case.

Finally, plaintiffs' efforts to distinguish Littlewolf v. Lujan, 877 F.2d 1058 (D.C. Cir. 1989) are unavailing. Opp'n at 45. In Littlewolf, the United States Court of Appeals for the District of Columbia concluded that the White Earth Settlement Act would "yield a fair payment in most cases" and therefore did not violate the Fifth Amendment's takings clause. 788 F.2d at 277-78. As in Littlewolf, there is no basis here to distinguish a "fair, reasonable and adequate" settlement from "just compensation." Because plaintiffs will be compensated for their Land Administration Claims by the Cobell settlement, plaintiffs have failed to state a claim in their Third Cause of Action and it should be dismissed.

V. CONCLUSION

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

Respectfully submitted, June 17, 2013,

ROBERT G. DREHER
Acting Assistant Attorney General

s/ Stephen R. Terrell
STEPHEN R. TERRELL
Trial Attorney
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Tel.: (202) 616-9663
Fax: (202) 305-0506
Stephen.Terrell@usdoj.gov

Attorney for the United States

OF COUNSEL:

HOLLY CLEMENT
MICHAEL BIANCO
STEPHEN SIMPSON
SHARON PUDWILL
Office of the Solicitor
United States Department of the Interior