2015-5069

United States Court of Appeals for the Federal Circuit

RAMONA TWO SHIELDS, and MARY LOUISE DEFENDER WILSON, individually, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in No. 1:13-cv-00090-LB, Judge Lawrence J. Block.

OPENING BRIEF OF APPELLANTS

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June 8, 2015

CERTIFICATE OF INTEREST

Counsel for Appellants certifies the following:

1. The full name of every party represented by me is: Ramona Two Shields and Mary Louise Defender Wilson.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are: None.

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or are expected to appear in this court are:

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STATEMENT OF RELATED CASES

No appeal in or from the same civil action or proceeding in the lower court or body was previously before this or any other appellate court.

The following case arising from the same factual circumstances is currently pending before the United States Court of Appeals for the Eighth Circuit: *Ramona Two Shields and Mary Louise Defender Wilson, et al., v. Spencer Wilkinson, Jr., et al.*, Case No. 13-3773. However, the United States is not a party to that action and Appellants do not believe that action will directly affect or be directly affected by any decision of this Court.

STATEMENT OF JURISDICTION

Two Shields appeal from the final order and judgment entered against them on February 10, 2015, by the United States Court of Federal Claims (hereinafter, "trial court"), which disposed of all claims. A30.[1] Two Shields filed a timely notice of appeal on April 3, 2015. A34; Fed. R. App. P. 4(a)(1)(B).

This Court has jurisdiction to review the trial court's decision pursuant to 28 U.S.C. § 1295(a)(3). The United States Court of Federal Claims had jurisdiction over Counts 1 and 2 of Two Shields's complaint pursuant to 28 U.S.C. § 1491 and 25 U.S.C. § 396 because each alleges the United States breached a money-mandating fiduciary obligation. *See Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987) (holding 25 U.S.C. § 396 and its regulation impose a money-mandating, "general fiduciary obligation [on the United States] toward the Indians with respect to the management of th[eir] oil and gas leases"). The trial court likewise had jurisdiction over Two Shields's Count 3 claim, which alleges an unlawful taking in violation of the Fifth Amendment. *Jan's Helicopter Serv., Inc. v. F.A.A.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008).

[1] Citations to "A_" refer to the parties' joint Appendix.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred as a matter of law when it granted summary judgment to the United States on its affirmative defense that Two Shields previously released their Count 1 fiduciary breach claims.

2. Whether the trial court erred as a matter of law when it dismissed for lack of subject matter jurisdiction Two Shields's Count 2 claims, which allege that, if Two Shields released their Count 1 claims, the United States breached a distinct fiduciary duty by not disclosing full information before obtaining that release.

3. Whether the trial court erred as a matter of law when it dismissed Two Shields's Count 3 claims, which allege that the United States took Two Shields's Count 1 and Count 2 claims without just compensation in violation of the Fifth Amendment when it passed the Claims Resolution Act of 2010.

STATEMENT OF THE CASE

This case concerns Plaintiffs-Appellants Ramona Two Shields's and Mary Louise Defender Wilson's (collectively, "Two Shields") attempt to hold the United States accountable for breaching the obligations it owed them and a class of other individual Native Americans in connection with oil-and-gas leases approved by the United States. Specifically, they seek to hold the United States accountable for:

- Breaching its duty under 25 U.S.C. § 396 and its regulations to manage Two Shields's oil-and-gas interests in a manner that "maximize[d] their best economic interests";

- Breaching its duty to provide Two Shields with full information about their claims before obtaining any release; and

- Taking Two Shields's claims without just compensation in violation of the Takings Clause of the Fifth Amendment.

I. FACTUAL BACKGROUND

Ms. Two Shields and Ms. Defender Wilson are individual Native Americans with storied government careers. Ms. Two Shields spent 34 years working for the U.S. Navy—earning numerous commendations. A70 ¶137. Ms. Defender Wilson worked for the Bureau of Indian Affairs ("BIA") as a land officer and for United States Senator Quentin Burdick as a legislative aide. A71 ¶138. Her husband was one of the 29 Navajo Code Talkers the U.S. military used during World War II to encode communications. *Id.*

Both women also are "Indian allottees." They are owners and heirs to property (or "allotments") held in trust for their benefit by the United States. A42 ¶¶16-17. Ms. Two Shields holds an interest in trust Allotments 651A and M868A located on the Fort Berthold Reservation in North Dakota. *Id.* Ms. Defender Wilson also holds an interest in Allotment M868A. *Id.*

Allottee status is both special and important. As is relevant here, it precluded Two Shields from leasing their oil-and-gas interests without the express approval of the United States, which the United States can give only if it "determines that approving the lease or agreement is in the best interest of the Indian owners of the Indian land." 25 U.S.C. § 396, as amended by The Act to Permit Leasing of Allotted Lands of the Fort Berthold Indian Reservation ("Fort Berthold Act"), Pub. L. No. 105-188, 112 Stat. 620 (1998); *accord* A49 ¶¶50-59. Among other things, this required the United States to approve only those leases that would "maximize[] their best economic interests." 25 C.F.R. § 212.1(a).

Congress required this federal oversight specifically "to prevent exploitation of and prejudice to the Indians' interest, or injustice to them,"[2] and this case shows why. Two Shields's allotments are located in a sweet spot of the Bakken Oil Shale Formation—the biggest domestic oil find in recent history. A38 ¶2. The United States has known of this potential for years; however, only recently have advances

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[2] *Pawnee v. United States*, 830 F.2d 187, 189 n.2 (Fed. Cir. 1987) (citing H.R. Rep No. 1225, 60th Cong., 1st Sess. at 1-2 (1908).

in fracking technology made drilling more viable. A47 ¶38; A49 ¶48. Others also knew of the enormous potential of the Bakken Shale—and the fortune to be made. This included a group operating under the corporate name "Dakota-3," A49 ¶48, which set in motion an illegal scheme to obtain leases to Two Shields's oil-and-gas interests (and those of other allottees as well) for pennies on the dollar. A38 ¶4; A40 ¶¶11-12.

The scheme was straightforward. Dakota-3 would obtain the consent of individual allottees to below-market oil-and-gas leases that it later would sell to oil-and-gas companies for a huge profit. A53 ¶¶63-75. Only one thing stood in its way—the BIA and its obligation to scrutinize every oil-and-gas lease and approve only those "in the best interest of the Indian mineral owner." 25 U.S.C. § 396; A49 ¶¶50-62. Dakota-3 had a solution for that as well. It helped Marcus Wells get elected tribal chairman and used him to push the BIA to rubber-stamp every lease Dakota-3 put before it. A53 ¶¶ 66-75.

Regrettably, the scheme worked. From 2006 to 2010, Dakota-3 obtained oil-and-gas leases on approximately 42,000 acres of allottee land for less than $22 million in upfront "bonuses" that typically ranged from $110 to $200—far less than the $1,000 payments other companies were offering.[3] *See* A40 ¶12; A55 ¶71; A63 ¶¶105-106. And while other companies were offering royalty rates as high as

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[3] Two Shields received bonuses ranging from $400 to $451.48 per acre. A70 ¶¶137-138.

40%, none of Dakota-3's leases included rates higher than 18%. A58 ¶88; A62 ¶105. That difference alone shorted allottees out of millions of dollars. *Id.*

Despite its knowledge that higher bonuses and higher royalty rates were being offered, the BIA approved every Dakota-3 lease. *E.g.*, A53 ¶¶63-64. It did not deny a single Dakota-3 lease or attempt to negotiate better terms. *Id.* Rather, as the BIA later admitted, it bowed to the pressure of companies like Dakota-3, explaining: "This was the driving force behind it: We had companies in the office. We had councilmen and mineral owners in the office—hundreds each day—and everyone saying, 'We want our money now. We want our leases now.' I think if we had said, 'Let's wait a while,' people would have strung us up." A55 ¶¶74-75.

By 2010, Dakota-3 had obtained BIA-approved leases covering roughly 85,000 acres of allottee and tribal land on the Fort Berthold Reservation. A64 ¶¶112-113. In November 2010, Dakota-3 perfected its swindle. It assigned its leases to a new company, Dakota-3 E&P, that it sold to the Williams Companies for $925 million—a profit of nearly $900 million. *Id.*; *see* A40 ¶12.

This sale raised a red flag, however. The disparity in price caused Two Shields to begin investigating the circumstances under which the United States approved their leases. This eventually led to Two Shields filing suit against the United States in the United States Court of Federal Claims in August 2011, alleging it breached its fiduciary duties when it approved their leases. *See Two*

Shields v. United States, 1:11-cv-00531-LB. Two Shields subsequently dismissed that suit without prejudice on February 1, 2013, to moot the government's argument that 28 U.S.C. § 1500 barred their suit because Two Shields were unnamed class members in *Cobell v. Salazar*, No. 96-cv-1285, when they filed their complaint.[4] *Id.* at Dkt. 32.

Two Shields re-filed this action the same day. The primary claim remained the same: Two Shields alleged the United States breached its duties when it approved their Dakota-3 leases without regard for whether they "maximize[d] their best economic interests" or "minimize[d] adverse environmental impacts or cultural impacts" as 25 U.S.C. § 396 and its regulations require. A76 ¶¶147-158. Knowing the United States intended to argue Two Shields already released those claims under *Cobell*, Two Shields also alleged two new claims:

- Count 2, which alleges that, if *Cobell* released Two Shields's Count 1 claim, then the United States breached an independent fiduciary duty to Two Shields by failing to disclose full information about their claim before obtaining that release. A80 ¶¶159-179.

- Count 3, which alleges that, if *Cobell* released either of their other claims, then the statute Congress passed to settle *Cobell* (the Claims Resolution Act of 2010) unlawfully took their property interests without just compensation in violation of the Fifth Amendment. A83 ¶¶180-193.

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[4] Given the emphasis the trial court placed on *Cobell*, Two Shields discuss its history *infra* at pages 8-10. Two Shields further note that they have never disputed they were part of *Cobell*'s "Historical Accounting Class"—one of two classes certified under *Cobell*. *Cf.* A7-9 (describing classes)

Before filing an answer and before *any* discovery had begun, the United States filed a dual "motion to dismiss and for summary judgment." In it, the United States did "not dispute [Two Shields's] characterization of the BIA's actions." A2. Rather, the United States moved for summary judgment on Two Shields's Count 1 claims, arguing Two Shields released them under *Cobell*. *Id.* The United States asked the trial court to dismiss Two Shields's remaining claims for lack of jurisdiction and failure to state a claim. *Id.*

Two Shields responded to the United States' summary judgment motion by arguing, among other things, the motion was premature and asked pursuant to Rule 56(d) of the Rules of the Court of Federal Claims ("RCFC") for an opportunity to conduct discovery to respond. *See* A11. The trial court denied their request and granted summary judgment to the United States on its release defense. A29. The court then dismissed Two Shields's Count 2 claims for lack of jurisdiction and Count 3 claims for failure to state a claim. *Id.* Two Shields timely appealed.

II. THE *COBELL* SETTLEMENT

Generally speaking, the trial court's summary of the *Cobell* litigation is correct. A5-10. *Cobell* began in 1996 and originally concerned the government's mismanagement of Individual Indian Money ("IIM") accounts. A5-6. Specifically, *Cobell* alleged the United States had not complied with the Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, which Congress passed to codify the fiduciary duties "the federal government owes IIM beneficiaries" with respect to its management of their IIM accounts. *Cobell v. Norton*, 240 F.3d 1081, 1090 (D.C. Cir. 2001).

After more than a decade of litigation before the United States District Court for the District of Columbia, the *Cobell* plaintiffs and the United States reached a settlement in December 2009 that purported to release not only their IIM-related claims, but a broad swath of additional claims never before litigated or pleaded. A6-8. This included "Trust Administration" claims, which include both "funds administration claims" and "land administration claims"—the latter of which the United States argues included Two Shields's Count 1 claims. A8.

With respect to these claims, *Cobell* provided two payments. First, it gave every class member an $800 base payment. *See* A670 ¶4; A353 ¶36. Second, it provided an additional pro rata payment whose amount depended on the funds that had passed through an individual's IIM account from October 1, 1985, to September 30, 2009. A672. As Jim Parris, a former Director of the BIA's Office of Trust Funds Management, explained, this formula would result in an average pro rata payment of $1,600.[5] A198 ¶39; A190 ¶9.

[5] In contrast, as explained in greater detail *infra* at pages 30-31, class damages stemming just from the deficient royalty aspect of Two Shields's Count 1 claims amount (conservatively) to $200 million to $300 million. A317 ¶22. As calculated by Professor Mark Zmijewski of The University of Chicago Booth School of Business, this equates to damages of roughly $100,000 to $150,000 per person. A358 ¶45; A336 ¶1.

The settlement was not immediately effective, though. Because the *Cobell* court lacked jurisdiction even to consider such claims, the agreement was "contingent on the enactment of legislation to authorize or confirm aspects of the Settlement." A6-7. Congress quickly obliged. In December 2010, it enacted the Claims Resolution Act of 2010, which provided that, "[n]otwithstanding the limitation on the jurisdiction of the trial courts of the United States in section 1346(a)(2) of title 28, United States Code, the United States District Court for the District of Columbia shall have jurisdiction of the claims asserted in the [*Cobell*] Amended Complaint for purposes of the Settlement." Pub. L. No. 111-291, § 101, 124 Stat. 3064, 3066-67. The Act also authorized the *Cobell* court to certify the "Trust Administration" class "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure." *Id.*

The district court preliminarily approved the *Cobell* settlement the same day. A9. Final approval followed in July 2011. A10. Judgment became final November 24, 2012. A10.

SUMMARY OF THE ARGUMENT

The trial court's decision to grant summary judgment to the United States on Two Shields's Count 1 claims and dismiss Two Shields's remaining claims was error this Court reviews *de novo*.

The core issue on appeal is straightforward: whether Two Shields's Count 1 claims fall within the scope of the *Cobell* settlement release language. The trial court erred in concluding as a matter of law that Two Shields's claims were released by *Cobell* for any of three fact-intensive reasons:

- The trial court refused to consider the objective facts and circumstances surrounding the execution of the *Cobell* release language (or allow Two Shields *any* discovery into those facts). The trial court did this even though black-letter law requires a court to consider this evidence before it could decide the *Cobell* settlement release language was ambiguous as Two Shields's claims.

- The trial court held that *Cobell* unambiguously released Two Shields's claims even though differing interpretations reasonably exist about *Cobell*'s scope and whether it released Two Shields's claims. And it is black-letter law that when more than one reasonable interpretation exists, a fact issues results and the language must be construed in favor of Indian-allottees like Two Shields (especially in light of their pleadings and the affidavits of their prominent experts).

- The trial court ignored entirely that the need to subject the scope of the *Cobell* release language to an objective factual analysis is all the more important given the United States' affirmative duty to disclose "full information" to Indian-beneficiaries like Two Shields before obtaining the release of their claims. This, too, is black-letter law.

A concrete, down-to-earth look at both the *Cobell* release language and the objective surrounding circumstances of that language demonstrate the clear light of day between the *Cobell* settlement and Two Shields's claims. The *Cobell* agreement limits its release to those "known and unknown claims that have been or could have been asserted through the Record Date" of September 30, 2009, A653 ¶21; A655 ¶30. And even the known objective facts and circumstances show:

- A critical time gap exists between the September 2009 Record Date and the date when Two Shields first would have been able to assert claims following the sale of their leases in November 2010.

- Before then, no sale occurred and no significant production had begun, which meant the *Cobell* "compensation" methodology took zero account of these claims—indeed, it had no relation to the timing or magnitude of Two Shields's claims.

- The United States did not provide any information regarding the release of Two Shields's claims.

Not only do these facts show the uniqueness of Two Shields's claims, but they demonstrate that a factual issue exists as to whether the broad but vague *Cobell* settlement language released Two Shields's claims. And had the trial court not refused to permit Two Shields any discovery, the weight and magnitude of *other* distinctions also may have come to light. It is this unique combination of objective surrounding facts and circumstances underlying Two Shields's claims that are at odds with the trial court's dismissal.

There is a separate and final reason supporting a limited interpretation of the *Cobell* release. The *Cobell* agreement released only those claims the named *Cobell* plaintiffs *could* have asserted in their amended complaint, and the *Cobell* plaintiffs could not have asserted Two Shields's unique and later-occurring Fort Berthold Act claims. Again, all this cumulatively puts light of day factually between the Two Shields's claims and the scope of the *Cobell* release language.

The trial court also erred in holding it lacked jurisdiction over Two Shields's Count 2 claims. The Supreme Court has held that Tucker Act jurisdiction exists so long as some statue or regulation (or combination thereof) imposes a fiduciary relationship on the United States that rises above a bare trust. And here, this Court already has held that 25 U.S.C. § 396 satisfies this requirement.

The trial court also erred in holding that Two Shields's Count 3 "takings" allegations failed to state a viable claim any of two reasons:

- First, it applied Ninth Circuit law to hold that a claim must be reduced to final judgment before it can serve as a cognizable property interest, despite the fact that this Court has found that claims against the United States are cognizable even if not reduced to final judgment.

- Second, it held that the Claims Resolution Act of 2010 did not take those interests even though that Act gave the *Cobell* district court jurisdiction to settle Two Shields's claims, but not litigate them (and allowed *Cobell* class counsel to release them notwithstanding that fact). Nothing more is required to state a viable claim.

For each of these reasons, Two Shields ask the Court to vacate the trial court's decision and remand this matter with instructions to start discovery.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for each of the trial court's decisions is *de novo*.

The Court must review the trial court's granting of summary judgment "'completely and independently, construing the facts in the light most favorable to the non-moving party.'" *Little Six, Inc. v. United States*, 280 F.3d 1371, 1373 (Fed. Cir. 2002) (citation omitted). Because the United States moved for summary judgment on its "release" defense, an issue on which it bears the ultimate burden of proof, the Court must evaluate whether it "affirmatively produce[d] evidence demonstrating that 'there is no genuine dispute as to any material fact.'" *Heger v. United States*, 103 Fed. Cl. 261, 267 (2012) (quoting RCFC 56(a)); *Eden Isle Marina, Inc. v. United States*, 89 Fed. Cl. 480, 523 (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.").

If so, the burden shifts to Two Shields 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, the 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, these standards are further caveated here by RCFC 56(d), which protects parties from being "'railroaded' by a premature motion for summary judgment." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). The Rule 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 (2011) (emphasis added) (quoting *Anderson*, 477 U.S. at 250 n.5).

The Court likewise must review the trial court's dismissals of Two Shields's other two counts *de novo*. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003); *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314 (Fed. Cir. 2006). In doing so, it again must "assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Anaheim*, 444 F.3d at 1314-15 (citation and internal quotation mark omitted); *see Marvel Eng'g Co. v. United States*, 14 Cl. Ct. 614, 620 (1988) ("A claim should only be dismissed for lack of subject matter jurisdiction if the claim is clearly frivolous or wholly insubstantial.").

II. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO THE UNITED STATES ON TWO SHIELDS'S COUNT 1 FIDUCIARY BREACH CLAIMS.

The trial court's decision to grant the United States summary judgment before Two Shields could issue a single request for production, ask a single interrogatory, or take a single deposition was error that must be reversed for either of the following reasons:

- The trial court misapplied basic contract principles by refusing to consider the objective context surrounding the execution of the *Cobell* agreement when interpreting its release provisions—an error magnified by the court's refusal to permit Two Shields to obtain basic discovery to respond to the government's summary judgment motion.

- Given just the known facts, the trial court erred in granting summary judgment because a reasonably intelligent person familiar with the surrounding circumstances could conclude that *Cobell* did not release Two Shields's claims—precluding summary judgment.

A. The Trial Court Applied the Wrong Standard to Interpret the *Cobell* Settlement and Conclude Both That It Was Unambiguous and That Two Shields's Request for Discovery Was Futile.

The trial court's decision first must be reversed because it misapplied basic contract law by refusing to consider objective context evidence when interpreting the *Cobell* agreement.

Black-letter law supports Two Shields's position that objective surrounding circumstances must be considered *before* determining whether the contract is unambiguous, not afterwards. This principle is universal. The reason is straightforward: "in the case of contracts, the avowed purpose and primary function of the court is the ascertainment of the intention of the parties." *Alvin Ltd. v. U.S. Postal Serv.*, 816 F.2d 1562, 1565 (Fed. Cir. 1987) (citation and internal quotation marks omitted).

This Court has held this "intent must be gathered from the instrument as a whole ... from the perspective of 'a reasonably intelligent person *acquainted with the contemporary circumstances*.'" *Id.* (emphasis added) (quoting *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (1971)); *accord Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 752 (Fed. Cir. 1999). To "determine 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 (2008) (emphasis added).[6]

This includes "evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties." RESTATEMENT (SECOND) OF CONTRACTS § 212, cmt. b (1981) (emphasis added); *accord Rockies Exp. Pipeline LLC v. Salazar*, 730 F.3d 1330, 1340-41 (Fed. Cir.

[6] The trial court's conclusion that *Imprimis* permits a court to consider the "facts and circumstances attending [the contract's] execution" only if the contract is ambiguous, A23, is flatly contradicted by *Metric*, 169 F.3d at 752, and *Rockies Exp. Pipeline LLC v. Salazar*, 730 F.3d 1330, 1340-41 (Fed. Cir. 2013)—both of which considered such context evidence to determine whether an ambiguity exists.

2013) (looking to the "initial negotiations" of the parties to properly interpret disputed provision of agreement).

The facts and circumstances surrounding the execution of an agreement provide the *context* necessary to properly interpret its terms, including to determine whether an ambiguity exists. *Metric*, 169 F.3d at 752. This is because "context may well reveal that the terms of a contract [thought to be clear] are not, and never were, clear on their face." *Id.* As explained in 3 Corbin on Contracts § 542 (1960): "Some of the surrounding circumstances *always* must be known before the meaning of the words can be plain and clear; and proof of the circumstances may make a meaning plain and clear when in the absence of such proof some other meaning may also have seemed plain and clear." *Id.* (emphasis added).

And to be clear, the trial court's conclusion that context evidence is subject to the rule that "it is improper to rely on extrinsic evidence" in the absence of an ambiguity is wrong. That is obvious from the rule itself, which states that, "[*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*, 169 F.3d at 752.

The RESTATEMENT (SECOND) OF CONTRACTS also makes this point directly, explaining:

> It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be

> plain except in a context. Accordingly, the rule stated in Subsection (1) [that "the interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances"] *is not limited to cases where it is determined that the language used is ambiguous*.

§ 212, cmt. b (1981) (emphasis added).

This Court has never deviated from this approach by limiting context to "evidence of trade practice and custom." *Cf.* A23. This is evident from *Metric*, which *first* described the general principle that "contemporaneous circumstances" always must be considered when interpreting a contract and then looked to "evidence of trade practice and custom" only because that was the context evidence *at issue*. 169 F.3d at 752.

It also is clear from this Court's decision in *Rockies*. There, citing *Metric*, the Court looked to "*the initial negotiations* by the parties" as the "context" guiding its interpretation of the agreement at issue. 730 F.3d at 1341 (emphasis added). And demonstrating the importance of such context, the Court held that these negotiations showed the parties never intended for the plain "dictionary definition" of the disputed term to apply and reversed the decision in favor of the United States below, explaining: the "general dictionary definition … overlooks the context in which the term arose and the intention of the parties—most notably, the initial negotiations by the parties." *Id.* (citing *Metric*).

This case is no different. The trial court could not interpret the *Cobell* agreement or determine whether it was ambiguous without considering the surrounding context—context that includes, at a minimum, the "negotiations by the parties" to see if they discussed or even contemplated the claims now brought by Two Shields. *See id.*; *accord* RESTATEMENT (SECOND) OF CONTRACTS § 212, cmt. b. The court's refusal to consider such evidence thus was reversible error, *Rockies*, 730 F.3d at 1341—a reality compounded by the court's refusal even to permit Two Shields to conduct limited discovery into that context to respond to the United States' summary judgment arguments.

As the Supreme Court explains in *Celotex*, "the plain language of Rule 56(c)" permits the entry of summary judgment only "after adequate time for discovery." 477 U.S. at 322 (emphasis added). Thus, "[w]here the nonmoving party has not had the opportunity to discover information that is essential to his opposition," "summary judgment must be refused." *See Anderson*, 477 U.S. at 250 & n.5 (explaining non-moving party's burden to set forth specific facts 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" essential to his opposition" (citation omitted));[7] *accord* RCFC 56(d).[8]

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[7] Subdivision (d) of Rule 56 was amended in 2010 to "carr[y] forward without substantial change the provisions of former subdivision (f)." Fed. R. Civ. P. 56, Advisory Committee Notes.

In fact, in cases like this one (where the motion comes before discovery begins), this Court has relied on nothing more than the assertion of the non-moving party that it "could not present sufficient facts to prove its case without discovery" to vacate summary judgment awards. *E.g.*, *Dunkin' Donuts of Am., Inc. v. Metallurgical Exoproducts Corp.*, 840 F.2d 917, 919 (Fed. Cir. 1988) (vacating summary judgment because plaintiff "ha[d] not had any opportunity to gather evidence through discovery on MEC's intent"). As it has explained, when requested "discovery is reasonably directed to 'facts essential to justify the party's opposition, ... such discovery must be permitted or *summary judgment refused*." *Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 852 (Fed. Cir. 1992) (emphasis added). Anything less is reversible error. *E.g.*, *id.*

That is exactly the case here. Discovery was not even begunwhen the United States filed its motion. *See* RCFC 26(d) (stating that "[a] party may not seek discovery from any source" until after, *inter alia*, the defendant has filed its answer). And Two Shields told the trial court both that the court needed to consider

[8] 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.

the context surrounding the *Cobell* agreement's execution to properly interpret its provisions and that Two Shields needed discovery, including discovery "related to the 'negotiation and execution' of the [*Cobell*] Agreement," to provide that context. A117 (Opposition to Motion); *accord* A155 ¶17 (McNeil Declaration); A633 (RCFC 56(d) Motion for Discovery).

The trial court's refusal to consider such evidence or permit such discovery was reversible error. *E.g.*, *Rockies*, 730 F.3d at 1341; *Dunkin' Donuts*, 840 F.2d at 919. For this reason alone, the Court should reverse and remand the trial court's decision to grant summary judgment on Two Shields's Count 1 claims.

B. Under the Objective Surrounding Circumstances, a Reasonably Intelligent Observer Could Interpret the *Cobell* Release Language to Exclude Two Shields's Claims—Precluding Summary Judgment.

Notwithstanding the United States' refusal to consider objective context evidence, summary judgment still was not appropriate.

Even in the ordinary case, this Court has held that, "[w]hen a contract is susceptible to more than one reasonable interpretation, it contains an ambiguity." *Metric*, 169 F.3d at 751. And when an ambiguity exists, "interpretation becomes a matter of fact." *Imprimis*, 83 Fed. Cl. at 61. "[G]enuine issues of material fact abound" and extrinsic evidence must be considered. *Jay Cashman, Inc. v. United States*, 88 Fed. Cl. 297, 307 (2009); *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.").

And because the *Cobell* agreement is between the United States and its Indian-allottees, the government's burden is even greater. Pursuant to the Indian canon of construction, the agreement "is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 174 (1973) (emphasis added).[9] Rather, "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*." *Standing Rock Sioux Tribe v. United States*, 182 Ct. Cl. 813, 820 (1968).

Applied here, these principles precluded the court from granting the United States summary judgment on its release defense. *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."). Even under the known facts, a person familiar with the circumstances reasonably could conclude *Cobell* did not release Two Shields's Count 1 claims for any of the following reasons:

[9] While *McClanahan* described this rule in the context of a treaty, "[t]he United States Supreme Court has long recognized" that courts must "resolve[] 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).

- The *Cobell* agreement limits its release to those "known and unknown claims that have been or could have been asserted through the Record Date" of September 30, 2009, A653 ¶21; A655 ¶30, and here Two Shields's claims did not accrue until November 2010.

- The *Cobell* payment methodology has no relation to the timing or magnitude of Two Shields's claims and provides no compensation for their release. A355 ¶41; A359 ¶46.

- The United States disclosed no information about Two Shields's unique claims.

- The *Cobell* agreement further limits its release to "claims and/or causes of action that were, or should have been, asserted in the Amended Complaint when it was filed," A686 ¶2, and the named *Cobell* plaintiffs could not have asserted Two Shields's Fort Berthold Act claims in their amended complaint.

1. A Reasonably Intelligent Person Could Conclude *Cobell* Did Not Release Two Shields's Claims Because They Accrued After the September 2009 Settlement Cut-Off Date.

To succeed on its release defense, the United States must show that Two Shields's claims satisfy *Cobell*'s "Land Administration Claims" definition, which includes only

> 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 ….

A653 ¶21 (emphasis added). And here, a reasonable intelligent person could conclude that Two Shields's claims did not satisfy this definition because they only became "claims" after Two Shield's leases were sold to the Williams Companies for roughly $10,000 per acre in November 2010—more than a year after the *Cobell* Record Date. A64 ¶¶112-113.

As Two Shields told the trial court, "[i]t is hornbook law that a claim does not accrue until *all events* necessary to fix the liability of the defendant have occurred." *Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993) (emphasis added). Only then does "'the plaintiff ha[ve] a legal right to maintain his or her action.'" *Id.* (citation omitted). And "'[f]irst accrual' has usually been put, in broad formulation, as the time when *all events* have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money." *Nager Electric Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966) (emphasis added). This includes the events that give rise to damages. *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 24 (2007).

The Supreme Court's decision in *Bowen v. City of New York*, 476 U.S. 467 (1986), reflects a similar understanding. At issue in *Bowen* was whether the plaintiffs' claims accrued when the government decision at issue (a denial of benefits) occurred or when they *later learned* of the illegal reasons behind the government's decision. *E.g.*, *id.* at 481-82. On appeal, the Supreme Court held that their claims accrued at the later date, because while 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). Only then did "the full extent" of the Government's breach get uncovered. *Id.*

Given these commonly understood principles, Two Shields argued to the trial court that a reasonably intelligent person could conclude that *Cobell* did not release their claims, which—at a minimum—created a genuine issue precluding summary judgment. *Metric*, 169 F.3d at 751. After all, the United States did not admit any wrongdoing or liability before September 2009. Nor did the government disclose any information about the BIA's actions. And while there were some complaints about those actions, there was no evidence of any wrongdoing specific to Two Shields, their land, or their leases. A18-19. Thus, even more so than the *Bowen* plaintiffs (who at least received individual denials), all events necessary to fix the liability of the United States for its breaches to Two Shields did not occur until at least late 2010. Only then (more than a year after the settlement cut-off date) did Two Shields's claims come into existence.

Despite the reasonableness of Two Shields's interpretation, the trial court rejected it outright, faulting Two Shields for looking to statute of limitations and equitable tolling principles to justify their position and ignoring their key date-gap evidence. A17-18. It cited *Johnson, Drake & Piper, Inc. v. United States,* 531 F.2d 1037, 1047 (Ct. Cl. 1976), for the principle that "Plaintiff gets no help from the rule that a claim does not accrue for the purpose of the beginning of a period of limitations until the damages are ascertainable" because "[t]he issue here is not a matter of when a claim for damages not yet fully ascertained is barred by the passage of time, but whether a claimant 'had' or possessed a claim, sufficiently to reserve it from a general release, at a time when all the damages had not yet been ascertained." A17-18. The trial court's reliance on *Johnson* and its progeny is incorrect for any of three reasons:

First, the trial court ignored that *Johnson* did not purport to state a black-letter rule. *Johnson* reached the result it did (that the parties did not intend for statute of limitations rules to apply) only after it looked to the context provided by *their negotiations*—noting the plaintiff "admitted" it "knew not only ... the facts which form[ed] the basis of [its] 11 claims" during those negotiations, but "that these facts would be the basis for [its] claims." 531 F.2d at 1047. Here, no such evidence exists (as explained, the trial court refused to allow any discovery into the negotiations of the *Cobell* settlement). Thus, nothing precludes a reasonably intelligent observer from treating Two Shields's position as a reasonable one. *Cf. Rockies*, 730 F.3d at 1341 (reversing decision because context provided by "the [parties'] initial negotiations" showed they did not intend dictionary definition).[10]

[10] As Two Shields told the trial court, simply because *some* parties *may* intend to release all claims regardless of "whether a claim exists in the statute of limitations context" does not mean *all* parties in *all* cases share that intent.

Second, even *Johnson* took care to note that it may not have reached the same result if the plaintiff's claims were not exclusively "based upon events occurring prior to the date of the release." 531 F.2d at 1047. That is the situation here. Two Shields's claims depend on the 2010 sale of their leases to the Williams Companies—an event that occurred almost a year *after* the September 2009 Record Date (or the December 7, 2009 date the release was signed).

Third—and perhaps most critical—*Johnson* does not control here because it depends on the principle that, when parties intend "a general release," that release bars any "claim whose facts were well enough known for the maker of the release to frame a general description of it and request an explicit reservation." 531 F.2d at 1047. And whatever application this rule has in a case like *Johnson*, which involved an arms-length contract between the United States and *a civilian contractor* (to whom it did not owe fiduciary obligations), it does not apply here.

In the case of a purported release between the United States *and Indian-beneficiaries*, "the beneficiary [must be] furnished by the trustee or third party involved *with full information* as to the relevant facts, the rights of the beneficiary, and as to the legal effect of the transaction," for the release "to be effective." *See Shoshone Indian Tribe v. United States*, 58 Fed. Cl. 542, 545 (2003) (first alteration in original) (emphasis added). If not, no release occurs, *id.*—a result that is all the more appropriate in a case like this one where, as Two Shields have extensively pleaded, *unlike Two Shields*, the United States knew of its hidden wrongdoing, including the "systematic procedural irregularity that rendered them subject to court challenge," and the likely magnitude of the losses that were to occur in Act 2 of the government's fiduciary breach performance. A53 ¶¶63-75.

Thus, all that remains of the trial court's decision is its conclusion that Two Shields ignore "[t]he fact that the definition includes 'unknown' claims clearly indicates that a party can have a land administration claim against the government, regardless of whether it is fully aware of the extent of the harm caused by the government's actions." A18. This, too, is incorrect. As explained, pursuant to the case law cited above, a claim does not accrue until "all events necessary to fix the liability of the defendant have occurred." *Catawba*, 982 F.2d at 1570. Thus, because Two Shields's claims did not come into existence until November 2010, they did not become capable of being "known or unknown" until that date.

Because *Cobell* limits its effect to "claims that have been or could have been asserted" before September 30, 2009, and because all events necessary to fix the liability of the United States did not occur until November 2010, a reasonably intelligent person could conclude *Cobell* did not release Two Shields's claims. The trial court thus erred in granting summary judgment.

2. The *Cobell* Payment Mechanics Also Support the Conclusion That *Cobell* Did Not Release Two Shields's Claims.

Cobell provides two payments for Trust Administration claims. First, it gives every class member an $800 base payment. A670 ¶4; A353 ¶36. Second, it provides an additional pro rata payment based on the amount of money deposited in an IIM account from October 1, 1985, *through September 30, 2009*. A672.

This formula makes no sense as applied to Two Shields's claims—further demonstrating the *Cobell* settlement did not consider, cover, or release Two Shields's claims. Two Shields presented the trial court with unrebutted evidence in the form of an affidavit from Daniel Reineke, a petroleum engineer with roughly 40 years of experience in the field, including experience valuing oil-and-gas reserves, supporting a conservative valuation of their claims (as a class) of $200 million to $300 million. A317 ¶22; A312 ¶¶1-6. As calculated by Professor Mark Zmijewski of The University of Chicago Booth School of Business, this equates to damages of roughly $100,000 to $150,000 per person. A358 ¶45. Yet, at best the nearly 497,000 individuals that make up the *Cobell* Trust Administration class will receive only $1,600 in pro rata payments. *Id.*; A198 ¶39.

Also unrebutted is the fact that little drilling occurred on the Fort Berthold reservation before November 15, 2010. A65 ¶113. Thus, little to no Fort Berthold royalties would have factored into the pro rata payments that are *Cobell*'s primary compensation—key objective circumstance evidence. *See* A355 ¶¶40-42.

As a result, the government's position boils down to an argument that Two Shields waived their claims *for nothing*. Alone, this is key objective evidence that *Cobell* never was intended to release such claims. *Nw. Marine Iron Works v. United States*, 493 F.2d 652, 657 (Fed. Cl. 1974) ("Construction of the terms of a contract, like construction of a statute, should avoid absurd and whimsical results."). As the Supreme Court has explained: "if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

And notably, the trial court's rejection of this argument "as an impermissible collateral attack on the D.C. Circuit's final judgment" fails for a simple reason. Aside from the trial court, no court has held that *Cobell* released Two Shields's claims. Thus, no collateral attack can exist. *See Rosebud*, 75 Fed. Cl. at 25 (rejecting collateral attack argument where plaintiff did not seek to "set aside" prior judgment); *see also Glitsch, Inc. v. Koch Eng'g Co.*, 216 F.3d 1382, 1386 (Fed. Cir. 2000) (explaining that a collateral attack occurs when party attempts to use second action to "alter the judgment" in prior action).

3. The United States' Failure to Disclose Full Information About Two Shields's Claims Is Another Objective Circumstance Showing *Cobell* Did Not Release Two Shields's Claims.

The failure of the United States to provide full information is an additional, cumulative factor the Court must take into account in analyzing the *Cobell* release. For example, the complaint describes a number of facts about the government's breaches of its fiduciary duties and the magnitude of the damages—both of which the government never disclosed before obtaining the *Cobell* release. A53 ¶¶63-75. That lack of full information is an important objective surrounding circumstance.

Again, the central question here is whether the light of day between the scope of *Cobell*'s release language and Two Shields's claims permits a reasonable person familiar with the objective surrounding circumstances to conclude *Cobell* did not release Two Shields's unique, later-occurring claims. And as Two Shields's pleadings show, *e.g.*, *id.*, the United States never provided the detailed information it possessed about their interests or their claims. This further shows the ambiguity in the *Cobell* language and the need for a fact-intensive inquiry.

Shoshone demonstrates this point. There, like here, Indian-beneficiaries sued the United States "for breach of trust with respect to management of oil and gas." 58 Fed. Cl. at 544. And there, like here, the United States argued those beneficiaries already had released their claims. *Id.* at 544-45 (noting letter stating that, "[f]or the periods and leases listed below, the Tribes do not intend to seek damages for breach of trust with respect to management of oil and gas").

The court disagreed. It held that, because the United States had not shown *as a threshold matter* that it had disclosed "full information" to the plaintiffs, including "evidence that major oil companies, including lessees on the Reservation, had deliberately undervalued their oil for many years," before obtaining the release, it could not prevail on its "release theory"—eliminating any need even to consider the purported release. *Id.*

This case is no different. As Two Shields told the trial court, the United States never even claimed it had provided "full information" about Two Shields's claims before entering into the *Cobell* agreement—much less presented evidence of such disclosure. Given the United States' affirmative duty to provide full information before obtaining a release of particular claims, *id.*, this simply reinforces both the uniqueness of Two Shields's claims and the fact-intensive nature of the analyses the trial court should have undertook. It reinforces that the trial court's dismissal of their claims without considering context, without permitting discovery, and despite the objective reasonableness of Two Shields's interpretation of the *Cobell* agreement, was simply improper.

4. A Reasonable Person Also Could Conclude *Cobell* Did Not Release Two Shields's Claims Because the *Cobell* Plaintiffs Could Not Assert Two Shields's Later-Occurring Claims.

Finally, in addition to the other cumulative objective surrounding circumstances, the United States also needs to show Two Shields's claims *could* have been asserted in the Amended *Cobell* Complaint when it was filed because 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.

A686 ¶2 (emphasis added). And a person familiar with the objective facts here reasonably could conclude the named *Cobell* plaintiffs did not and could not assert Two Shields's unique, later-occurring Count 1 claims because they allege Fort Berthold Act violations, which the *Cobell* plaintiffs lacked standing to assert.

Notably, this is not arguing the *Cobell* plaintiffs did not have standing to release claims actually within the *scope* of the *Cobell* settlement. Two Shields's argument simply reinforces that the objective surrounding circumstances at issue at least creates a fact issue as to whether the *Cobell* release language applied to Two Shields's claims that the trial court failed to analyze sufficiently given the unique, fact-driven circumstances of those claims.

The Supreme Court has held that, "[t]o 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 nursing home patients contesting transfer to a *lower* level of care lacked standing to assert claims on behalf of otherwise similarly situated patients challenging transfers to higher levels of care. 457 U.S. 991, 999 (1982). The fact that the claims otherwise were similar or sought relief from the same government entities did not matter. *Id.* The Supreme Court explained:

> 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. (first emphasis in original).

Likewise, in *Lewis*, the Supreme Court rejected the contention that an illiterate Arizona prisoner had "standing to complain of injuries to non-English speakers and lockdown prisoners," even though all injuries stemmed from Arizona's overall management of prison libraries, explaining:

> [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*."

518 U.S. at 357-58 & n.6 (some emphasis added) (citation omitted).

Applied here, these basic class action standing principles show that, by its own terms, *Cobell* did not release Two Shields's Count 1 claims. The operative *Cobell* complaint does not contain even a whisper of Two Shields's claims; nor does it allege a single fact showing the named *Cobell* plaintiffs could assert such claims. *Compare* A768 ¶¶8-12, *and* A783 ¶41 (not alleging any Fort Berthold oil-and-gas claims or interests), *with Lewis*, 518 U.S. at 357 (named plaintiffs must "allege and show that they personally have been injured").

There is a good reason. The named *Cobell* plaintiffs had no Fort Berthold oil-and-gas interests. *E.g.*, A768 ¶¶8-12; A783 ¶41. Thus, unlike Two Shields, they could not assert a violation of the Fort Berthold Act—which imposes special duties on the United States specific to its management of Fort Berthold oil-and-gas interests. *Compare* Pub. L. 105-188 (amending 25 U.S.C. § 396 to require the

Secretary to approve only those Fort Berthold mineral leases "in the best interest of the Indian owners"), *with Schlesinger*, 418 U.S. at 216 (requiring named plaintiff have "same interest" and "same injury").[11]

Despite this precedent and these undisputed facts, the trial court rejected Two Shields's argument. However, none of its rationales are persuasive.

First, Two Shields's argument is not a collateral attack on *Cobell*. Aside from the trial court, no court has held that *Cobell* released Two Shields's claims. Thus, no collateral attack can exist. *Rosebud*, 75 Fed. Cl. at 25; *see Glitsch*, 216 F.3d at 1386. Two Shields simply point out (rightly) that, because *Cobell* itself limits its reach to claims that "were, or should have been, asserted in the Amended Complaint when it was filed," a court must consider whether Two Shields's claims "were, or should have been, asserted in the Amended Complaint" by the named *Cobell* plaintiffs when it was filed. *Imprimis*, 83 Fed. Cl. at 63-66 (finding release of "all matters[and] claims ... that have been asserted or that could have been asserted in the Actions" *did not* release claim plaintiffs had no power to assert). Because Supreme Court precedent shows the *Cobell* plaintiffs lacked standing to assert such claims, by its own terms *Cobell* did not release those claims.

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[11] Congress's passage of the Claims Resolution Act of 2010 does not alter this reality. "It 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).

Second, Ms. Good Bear's statements (and the District of Columbia Circuit Court's response) do not alter or affect this result. Ms. Good Bear's comments were directed at the "funds administration claims" portion of the *Cobell* settlement, which—as explained—are *not at issue in this case*.[12] The government argues "plaintiffs' Count I claims are land administration claims," A8, and those claims stand on entirely different footing than funds administration claims for at least one simple reason: *all* funds administration claims were premised on the violation of a common statute—the Indian Trust Fund Management Reform Act. *Cobell v. Norton*, 240 F.3d 1081, 1089-1104 (D.C. Cir. 2001) (finding United States violated the Act as illuminated and "reinforced by basic common law trust principles"). Thus, with respect to all funds administration claims, the named *Cobell* plaintiffs shared the "same interest" and "same injury" as all class members and *could* assert such claims in their complaint—demonstrating why the *Cobell* courts held as they did. *Cf. Schlesinger*, 418 U.S. at 216.

Third, the trial court's statement that "unnamed plaintiffs 'need not make any individual showing of standing'" likewise does not support its conclusion. A21. The question prompted by *Cobell* is whether *the class representatives* had standing to assert Two Shields's claims, which *the majority decision* in *Lewis*

[12] As the United States also is well aware, Ms. Good Bear opted out of the land administration claim portion of *Cobell*, which precluded her from raising objections to such claims. *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993) (holding opt-outs "lack standing to object to settlement agreements on appeal").

shows is a threshold requirement for whether they could have asserted such claims in their complaint. 518 U.S. at 357-58 & n.6. And here, because the named *Cobell* plaintiffs had no oil-and-gas interests on the Fort Berthold Reservation, they indisputably lacked standing to assert a 25 U.S.C. § 396 Fort Berthold Act claim. Thus, pursuant to *Cobell*'s own terms, it did not release those claims.

Because *Cobell* limits its effect to claims "that were, or should have been, asserted in the Amended Complaint when it was filed," and because Two Shields's claims could not have been asserted in that complaint, the trial court erred in granting summary judgment to the United States.

III. THE TRIAL COURT ERRED WHEN IT DISMISSED TWO SHIELDS'S COUNT 2 FIDUCIARY BREACH CLAIMS FOR LACK OF JURISDICTION.

The trial court also erred when it dismissed Two Shields's Count 2 claims for lack of subject matter jurisdiction.

The basis for the trial court's decision can be summarized in three points:

- It was not enough for Two Shields to show that, by statute or regulation, Congress entered into a trust relationship with allottees specific to their oil-and-gas interests.
- For Tucker Act jurisdiction to exist, Two Shields had to point to specific statutory language imposing the exact fiduciary duty the United States violated—a duty to disclose "full information" to Two Shields before securing any release.
- Because the statutory framework on which Two Shields relies—25 U.S.C. § 396 and its regulations—says nothing about a "fiduciary duty to disclose," no jurisdiction exists.

See A25.

None are true. *E.g.*, *Jicarilla Apache Nation v. United States* (*Jicarilla II*), 100 Fed. Cl. 726, 738 (2011) (explaining "zero" decisions have held that "the government's fiduciary duties are limited to the plain dictates of the statutes themselves"). To be sure, statutory authority for the fiduciary duty at issue must exist. As the Supreme Court explained in *United States v. Navajo Nation* (*Navajo II*), "two hurdles ... must be cleared" to invoke Tucker Act jurisdiction:

> First, the [claimant] 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].

556 U.S. 287, 290 (2009) (first alteration added) (citations and internal quotation marks omitted).

Contrary to the trial court's conclusion, however, the necessary threshold "substantive source of law" does not need to spell out the exact fiduciary duty claimed. *E.g.*, *Jicarilla II*, 100 Fed. Cl. at 738 (citing cases in which the "Court of Claims had repeatedly dismissed the notion that defendant's fiduciary duties must be specifically enumerated by statute"). To overcome the first jurisdictional hurdle, a claimant needs to show only that a source of law imposes a *fiduciary relationship* on the United States related to the conduct at issue that amounts to something more than a "limited" or "bare" trust. *United States v. White Mountain Apache Tribe*

(*White Mountain II*), 537 U.S. 465, 473 (2003) ("The two *Mitchell* cases give a sense of when it is fair to infer a fiduciary duty qualifying under the Indian Tucker Act and when it is not. The characterizations of the trust as 'limited' or 'bare' distinguish the Allotment Act's trust-in-name from one with hallmarks of a more conventional fiduciary relationship" sufficient to confer jurisdiction. (internal citations omitted)); *Pawnee*, 830 F.2d at 190 ("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." (emphasis added)).

If a fiduciary relationship exists, the claimant satisfies his threshold obligation and can turn to common law principles to flesh out the bounds of the duties owed. *White Mountain II*, 537 U.S. at 475-76; *see United States v. Jicarilla Apache Nation* (*Jicarilla I*), 131 S. Ct. 2313, 2325 (2011) (explaining that once a court finds "that particular statutes and regulations ... clearly establish fiduciary obligations of the Government" it can "look[] to common-law principles to inform [its] interpretation of statutes and to determine the scope of liability that Congress has imposed").

And while the trial court never reached the second Tucker Act hurdle, it is met here as well. The Supreme Court has held that common law duties mandate compensation. *White Mountain II*, 537 U.S. at 477.

A. 25 U.S.C. § 396 and Its Regulations Establish a Fiduciary Relationship Between the United States and Two Shields That Satisfies the First Tucker Act Hurdle.

A slew of cases show the trial court erred when it held that (1) the United States' "fiduciary duties must be specifically enumerated by statute" to trigger Tucker Act jurisdiction and (2) that a trust relationship is not sufficient to trigger jurisdiction and permit the application of common law trust principles.

In *White Mountain II*, for example, the Supreme Court *rejected* the argument "that jurisdiction was lacking here 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"—the specific duty the tribe claimed it violated. 537 U.S. at 470, 473. The Supreme Court held instead that, because the relevant legal framework "goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach," i.e., because it "expressly defines a fiduciary relationship," jurisdiction existed even though the statute *did not* "expressly subject the Government to duties of management and conservation." *Id.* at 474-75.

Similarly, in *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206 (1983)—which the Supreme Court has described as one of two seminal, "pathmarking" case on the issue of when jurisdiction exists under the Tucker Act[13]—"the Supreme Court deduced that [the Court of Federal Claims] had jurisdiction over the tribal damage claims *not only* for breaches of fiduciary duties that immediately sprang from the statute, such as the failure to obtain a fair market value for timber sold, but also for breaches of obligations that seemingly *had no direct tie to the statutory language*." *Jicarilla II*, 100 Fed. Cl. at 738 (emphasis added).

The Supreme Court explained that jurisdiction existed because the language of the relevant statutory and regulatory provisions "directly support[ed] the existence of *a fiduciary relationship*" between the United States and allottees with respect to the property at issue (allottee timber interests). *Mitchell II*, 463 U.S. at 225 (emphasis added). The Supreme Court held that nothing more is required to trigger Tucker Act jurisdiction because "[w]here the Federal Government takes on or has control or supervision over tribal monies or properties, *the fiduciary relationship* normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though *nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection*." *Id.* (emphasis added).

[13] *United States v. Navajo Nation* (*Navajo I*), 537 U.S. 488, 503 (2003) ("*Mitchell I* and *Mitchell II* are the pathmarking precedents on the question whether a statute or regulation (or combination thereof) 'can fairly be interpreted as mandating compensation by the Federal Government.'" (quoting *Mitchell II*)).

And, to be clear, the Supreme Court has never retreated from this principle. In its order dismissing Two Shields's claim, the trial court cited *Navajo I* for the principle that "[m]erely establishing the existence of a trust relationship between the government and plaintiffs 'is insufficient to support jurisdiction under the Indian Tucker Act.'" A26 (quoting *Navajo I*, 537 U.S. at 506). What the Supreme Court actually said in *Navajo I*, however, was that the bare "'*general trust relationship* between the United States and the Indian people' ... alone is insufficient to support jurisdiction under the Indian Tucker Act." 537 U.S. at 506 (emphasis added) (quoting *Mitchell II*, 463 U.S. at 225).

In other words, *Navajo I* stuck to the path hewn by *Mitchel II* and *White Mountain II*. It distinguished "a trust relationship that is 'limited' or 'bare'" from one that "compare[s] to a trust relationship between private parties at common law" and reiterated that only the latter triggers Tucker Act jurisdiction. *Compare White Mountain II*, 537 U.S. at 473 (explaining "it is fair to infer a fiduciary duty qualifying under the Indian Tucker Act" when a trust is more than a "'limited' or 'bare'" trust—when it has "hallmarks of a more conventional fiduciary relationship"), *with Jicarilla I*, 131 S. Ct. at 2323 ("As we have recognized in prior cases, Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law."). As the Supreme Court had explained previously in *Mitchell II*,

> In [*Mitchell I*], this Court recognized that the General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited. We held that the Act could not be read "as establishing that the United States has a fiduciary responsibility for management of allotted forest lands." *In contrast to the bare trust created by the General Allotment Act*, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. *They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities*.

463 U.S. at 224 (internal citations omitted) (emphasis added).

Furthermore, even in *Navajo I* the Court explained that a jurisdiction-triggering relationship exists if, as a result of some statute or regulation, or combination thereof, the United States is "assigned a comprehensive managerial role []or, at the time relevant here, expressly invested with responsibility to secure 'the needs and best interests of the Indian owner and his heirs.'" 537 U.S. at 507-08 (quoting *Mitchell II*, 463 U.S. at 224). That is exactly the situation here.

Like the claimants in *Mitchell II*, Two Shields have identified the necessary "rights-creating or duty imposing" framework—25 U.S.C. § 396 and its regulations. Even prior to Congress's passage of the Fort Berthold Act, this Court held they gave the United States "comprehensive," "wide powers to Interior" to manage "all aspects of the leasing arrangement" and thus imposed a money-mandating, "fiduciary obligation toward the Indians with respect to the management of those oil and gas leases." *Pawnee*, 830 F.2d at 187 (citing *Mitchell II*, 463 U.S. at 226); *see White Mountain Apache Tribe v. United States* (*White Mountain I*), 249 F.3d 1364, 1375 (Fed. Cir. 2001) (pointing to *Pawnee* to support holding that a claimant only needs to identify a "pertinent statute or other authorizing document creating [a] *trust relationship*" to satisfy Tucker Act).

Nothing more is required to find that jurisdiction exists. The Supreme Court, this Court, and the Court of Federal Claims all have held that, once a party identifies a relationship-establishing statutory scheme, a court can "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).

White Mountain II also demonstrates this principle. There, too, as explained *supra* at pages 40-42, the Supreme Court found the claimant satisfied its burden of identifying the rights-creating statute necessary at the outset to trigger jurisdiction over its claim that the United States had failed "to maintain, protect, repair and preserve" trust property—even though the identified statute *did not* "expressly subject the Government to [the] duties of management and conservation" that formed the basis of the suit. 537 U.S. at 475-76. The Supreme Court held that the absence of specific language imposing the exact duty claimed did not matter. *Id.* Because the statute established a *fiduciary relationship* with respect to the property at issue, jurisdiction existed and a court could turn to the common law to define the full scope of the duties owed:

> 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).

Thus, because a "trust relationship" exists here between the United States and Two Shields with respect to Two Shields's oil-and-gas interests, Two Shields can turn to "elementary trust law" to define the scope of the obligations owed. *E.g.*, *id.* And "elementary trust law" imposes the "duty to disclose" Two Shields allege. As the RESTATEMENT (SECOND) OF TRUSTS § 170(2) (1959) explains: "The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know."

Shoshone also demonstrates this point. There, specifically in the context of claims against the United States for "breach of trust with respect to management of oil and gas" interests, the court held that the United States owed its Indian-beneficiaries an "affirmative 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 the release of any claim. 58 Fed. Cl. at 544-45 (emphasis added).

And notably, the Fort Berthold Act only reinforces the application of this duty here. The Act requires the Secretary to consider "the *best interest* of the Indian owners" before approving any mineral lease *or related agreement*, stating:

> The Secretary may approve any mineral lease or agreement that affects individually owned Indian land, if—
> (i) the owners of a majority of the undivided interest in the Indian land that is the subject of the mineral lease or agreement ...; and
> (ii) *the Secretary determines that approving the lease or agreement is in the best interest of the Indian owners of the Indian land.*

Pub. L. No. 105-188, § 1(a)(2)(A) 112 Stat. 620, 620 (emphasis added).

If the Court were to look simply to the Act's requirement that the Secretary consider "the best interest of the Indian owners" before approving any lease, that alone eliminates any doubt that a fiduciary relationship exists between the United States and Two Shields with respect to the management of their oil-and-gas interests that triggers Tucker Act jurisdiction. *Navajo I*, 537 U.S. at 507-08 (no jurisdiction because the Secretary was not "invested with responsibility to secure 'the needs and best interests of the Indian owner'" (citation omitted)). As the Supreme Court held in *Mitchell II*, the requirement that the government consider the "'best interests of the Indian owner and his heirs'" when managing their timber resources "directly support[ed] the existence of a fiduciary relationship" that triggered Tucker Act jurisdiction. 463 U.S. at 224.

Congress's specific directive that the Secretary consider "the best interest of the Indian owners" before approving any oil-and-gas related *agreement* only further bolsters that conclusion. It directly supports the existence of a justiciable fiduciary duty with respect to the exact conduct at issue: the Secretary's failure to disclose full information to Two Shields prior to approving the *Cobell* agreement that the trial court believed affected Two Shields's claim for damages related to the government's mismanagement of their individual oil-and-gas interests.

In sum, 25 U.S.C. § 396 imposes a fiduciary relationship on the United States with respect to its management of Two Shields's oil-and-gas interests that rises above a bare trust. Elementary trust law thus applies to define the scope of that relationship and impose the disclosure duty Two Shields allege the United States breached if *Cobell* released their Count 1 claims. The first hurdle is satisfied.

B. The Duty to Disclose Two Shields Allege Is Money-Mandating and Therefore Satisfies the Second Tucker Act Hurdle.

The second jurisdictional hurdle also is satisfied. As the Supreme Court explained in *Mitchell II*, "[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust." 463 U.S. at 226.

The Supreme Court made that point again in *White Mountain II*, explaining:

> 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.

537 U.S. at 477 (emphasis added).

Because the United States had a fiduciary relationship with Two Shields "with respect to the management of th[eir] oil and gas leases," and because that duty was money-mandating, Tucker Act jurisdiction exists. *See, e.g.*, *Pawnee*, 830 F.2d at 187. The trial court thus erred when it "blithely accept[ed] 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." *Jicarilla II*, 100 Fed. Cl. at 738.

The Court should reverse and remand the trial court's dismissal of Two Shields's Count II claims.

IV. THE TRIAL COURT ERRED WHEN IT DISMISSED TWO SHIELDS'S COUNT 3 "LEGISLATIVE TAKING" CLAIMS FOR FAILURE TO STATE A CLAIM.

The final issue is the trial court's dismissal of Two Shields's Fifth Amendment "Legislative Taking" claims.

To determine whether a Fifth Amendment taking has occurred, this Court employs a two-part test. "[A]s 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.* The trial court erroneously held that Two Shields could not satisfy either element.

A. Two Shields Had a Cognizable Property Interest in Their "Legal Causes of Action" Against the United States.

With respect to the first element of the test, the issue on appeal is straightforward: whether, for purposes of the Takings Clause, a cognizable property interest exists in a claim against the United States before a final, unreviewable judgment exists. Citing Ninth Circuit and other non-controlling precedent, the trial court held it cannot. A27-28. This was error.

In *Alliance of Descendants v. United* States, this Court considered takings claims brought against the United States for its "taking" of claims that had not been reduced to final judgment. 37 F.3d 1478, 1481-82 (Fed. Cir. 1994). Directly contrary to what the trial court held here, this Court found the plaintiffs had a cognizable property interest in those non-final claims, explaining:

> 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, 37 F.3d at 1481 (emphasis added).

Similarly, in *Abrahim-Youri v. United States*, this Court considered claims alleging the "taking" of non-final claims. 139 F.3d 1462, 1465 (Fed. Cir. 1997) (noting plaintiffs argued their claims were taken when United States reached settlement agreement with Iran requiring them to submit their claims to Foreign Claims Settlement Commission, which only *later* upheld their claims). The Court's conclusion again was clear: "We agree with plaintiffs that *their property rights*—their choses in action against Iran—were extinguished when the Government espoused and settled their claims." *Id.* (emphasis added).

Given this *binding* precedent, it simply does not matter what the Ninth Circuit or other courts have held, and the trial court erred by following their example. *See Aviation & Gen. Ins. Co. v. United States*, No. 14-687C (May 26, 2015) (Opinion and Order) (attached at A791) (refusing to dismiss claim because, "to the extent any of the[government's non-precedential case law] holds that only final judgments are considered property under the Fifth Amendment, this authority is directly contrary to the Federal Circuit precedent"). Nevertheless, it is worth noting that even the cases cited by the trial court do not support its conclusion. In

Bowers v. Whitman, for example, the repealed statute at issue did not relate to any underlying "vested statutory entitlement to compensation" or underlying *protected* interest in land. *Id.* at 914-16. Here that is not the case. The interests underlying the causes of action taken by the United States are Two Shields's mineral interests—an established property interest. *See 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); *see Alliance*, 37 F.3d at 1481 (finding cause of action related to taken interest in land sufficient to support takings claim)

The second case cited by the trial court, *Shinnecock Indian Nation v. United States*, simply quoted *Bowers* and has since been vacated in part and remanded by this Court. 112 Fed. Cl. 369, 384 (2013) (quoting *Bowers*), *vacated in part* 782 F.3d 1345 (Fed. Cir. 2015). In reversing that decision, this Court did not cite *Bowers* or demonstrate any intent to deviate from *Alliance* or *Abrahim-Youri.*

Finally, to the extent the trial court questioned whether "a breach of fiduciary duty claim is a cognizable property interest regardless of whether it has been reduced to judgment or not," A27-28, no question exists. As Two Shields told the court, 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 v. United*

States, 391 F.3d 1212, 1226 (Fed. Cir. 2004) (emphasis added) (holding that claim "to recover compensation for an interest in land" is "a property interest cognizable under established takings jurisprudence"); *see Edwardsen v. Morton*, 369 F. Supp. 1359, 1379 (D.D.C. 1973) (holding that "claims for ... breach of fiduciary duty" were "vested property rights protected by the Fifth Amendment" that Congress could not "wipe out" without compensation). And here, as explained, the interests underlying the claims at issue are Two Shields's mineral interests

The trial court thus erred when it held Two Shields had no cognizable property interest in their claims.

B. Congress Took Two Shields's Rights and Fact Issues Exist as to Whether Two Shields Received "Just Compensation" in Return.

Because Two Shields had a protected property interest, the question turns to whether Congress took that interest and, if so, whether it provided "just compensation" in return. The trial court held no taking occurred because, despite the fact that the Claims Resolution Act directed the *Cobell* court to certify the *Cobell* class without regard for Rule 23 of the Federal Rules of Civil Procedure, the *Cobell* courts applied Rule 23. A28-29. That is not enough.

The application of Rule 23 is only half of the issue. As the Supreme Court recognized in *Amchem Products, Inc. v. Windsor*, the purpose of Rule 23 is to safeguard the interests of absent class members by helping "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." 521 U.S. 591, 621 (1997). And the Supreme Court indicated that Rule 23 cannot achieve this purpose in cases where no threat of litigation exists because "[c]lass 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.* In other words, absent the ability to litigate a claim, "both class counsel and court would be disarmed." *Id.*

That is exactly what occurred here. Congress took Two Shields's claims when it gave the district court jurisdiction to *settle* the *Cobell* damages case, *but not try it*. Pub. L. No. 111-291, § 101(d), 124 Stat. 3064 (conferring jurisdiction only "for purposes of the Settlement"). It set up Two Shields for exactly what the Supreme Court feared—exploitation by a defendant who knew class counsel (who also only had the ability to release Two Shields's claims because of the Act) could not press for a better offer. Nothing more is necessary to establish a Fifth Amendment taking. As this Court has explained: "A taking can occur simply when the Government by its actions deprives the owner of all or most of his interest in his property, and [t]here can be a taking if the Government makes it possible for someone else to obtain the use or benefit of another person's property." *Langenegger v. United States*, 756 F.2d 1565, 1570 (Fed. Cir. 1985) (alteration in original) (internal quotation marks and citation omitted).

Because Congress took away Two Shields's rights, the only question is whether they received just compensation in return—an inquiry the trial court never undertook and this Court cannot undertake now, A27-29, because the "just compensation" inquiry is highly factual and rarely amenable even to summary judgment, let alone dismissal at the motion to dismiss stage. *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 the United States gave *full fair market value* for the interest taken. *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). This requires more than some compensation; the government must give its "ward the fair equivalent of what [it] acquires," *id.*—an inquiry in which a "presumption of congressional good faith" plays no part. *United States v. Sioux Nation*, 448 U.S. 371, 415-16 (1980). Only "a thoroughgoing and impartial examination of the historical record" suffices. *Id.* And not only did this not occur in this case, but the opinions of Two Shields's esteemed experts as to the value of their claims—and what they purportedly got in return—itself creates an issue of fact as to whether the United States provided just compensation.

In sum, because the trial court erred in holding Two Shields had no protected property interest taken by the United States, and because discovery is necessary to resolve the "just compensation" question, the Court must reverse and remand for further proceedings.[14]

[14] The trial court's concern that "Count III appears to be a due process claim masquerading as a takings claim" likewise was misplaced. A28-29. As Two Shields told the court, it is not asking it to revisit "whether the Trust Administration Class should have been certified" or "the Cobell Settlement Agreement approved." Two Shields ask only that the court evaluate, as a matter of first impression, whether Congress provided "just compensation" for the rights it took via the Claims Settlement Act.

CONCLUSION

For each of the reasons discussed above, the trial court erred when it granted the United States summary judgment on its release defense, dismissed Two Shields's Count 2 claims for lack of jurisdiction, and dismissed their Count 3 claims for failure to state a claim. Two Shields asks the Court to reverse these decisions in their entirety and remand for further proceedings.

Respectfully submitted,

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ADDENDUM

United States Court of Federal Claims

No. 13-90 L
February 6, 2015

RAMONA TWO SHIELDS and MARY LOUISE DEFENDER WILSON, *etc.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Subject Matter Jurisdiction; *Cobell v. Norton*; Class Action Suit; Fiduciary Duty; Indian Tucker Act

Kenneth E. McNeil, Shawn L. Raymond, and Charles R. Eskridge III, Susman Godfrey LLP, Houston, TX, for plaintiffs.

Stephen R. Terrell, Environmental & Natural Resources Division, United States Department of Justice, Washington, DC, for defendant.

OPINION *and* ORDER

Block, *Judge*.

This case is one of the myriad of breach of trust claims brought by Native Americans against various federal agencies.[1] Paradoxically, the parties present very little in common. Like the proverbial two ships passing in the night,[2] plaintiffs and defendant here present the court with two competing narratives that raise entirely different legal issues.

Plaintiffs[3] Ramona Two Shields and Mary Louise Defender Wilson claim that the Bureau of Indian Affairs ("BIA") breached its fiduciary duty to prudently manage their mineral rights, which are held in trust by the United States. Plaintiffs include a detailed narration of the depredations experienced by their tribes, and characterize the BIA's alleged breach as "the latest

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[1] Between 2000 and 2015, the Court of Federal Claims issued opinions on at least 265 Indian trust cases.

[2] *See* LONGFELLOW, *The Theologian's Tale*, in H. LONGELLOW, TALE OF A WAYSIDE INN 224 (Riverside Press ed. 1913).

[3] Plaintiffs file this law suit on behalf of themselves and the putative "*Two Shields* class."

chapter of United States mismanagement or outright abuse regarding the members of the Three Affiliated Tribes." Compl. ¶ 24. Plaintiffs seek damages on behalf of themselves and their purported class.

Defendant presents an entirely different story. Defendant does not dispute plaintiffs' characterization of the BIA's actions; in fact, defendant barely mentions them at all. Rather, defendant argues that the BIA's alleged misdeeds are immaterial because plaintiffs' claims have already been litigated and settled. Specifically, defendant argues that plaintiffs' claims were subsumed by the *Cobell* class action suit[4] against the United States Department of the Interior ("DOI"), and that plaintiffs' claims have already been settled pursuant to the $3.4 billion settlement ("Settlement Agreement") that brought the *Cobell* suit to a close in 2011, after more than a decade of litigation.[5] According to defendant, plaintiffs forfeited any right to pursue their claims by failing to opt out of the class action Settlement Agreement. Plaintiffs, in contrast, hardly mention *Cobell* at all in their complaint, and argue in their opposition brief that their claims are entirely unrelated to the *Cobell* litigation. It is the role of the court to determine which of these two narratives prevails.

This litigation has given rise to a myriad of claims and motions. Before the court are defendant's motion for summary judgment as to plaintiffs' breach of fiduciary claim (Count I), defendant's motion to dismiss for lack of subject matter jurisdiction plaintiffs' alternate breach of fiduciary duty claim (Count II), and defendant's motion to dismiss for failure to state a claim plaintiffs' legislative takings claim (Count III). Also before the court are plaintiffs' motion for discovery, defendant's motion for judicial notice and plaintiffs' motion for a sur-reply concerning defendant's motion for judicial notice.

For the following reasons, as fully explained below, the court shall grant defendant's motion for summary judgment regarding Count I, as well as defendant's motion to dismiss Counts II and III. Furthermore, the court will deny plaintiffs' motion for discovery, yet will grant their motion for sur-reply. Finally, defendant's motion for judicial notice will be granted-in-part.

I. BACKGROUND

A. The Instant Action

Plaintiff Ramona Two Shields is a member of the Three Affiliated Tribes in North Dakota. Compl. ¶ 16. Plaintiff Mary Louise Defender Wilson is a member of the Standing Rock Sioux Tribe. Compl. ¶ 17. Plaintiffs both own allotments that are situated in the Fort Berthold Indian Reservation, which has been a "sweet spot" for development of the Bakken shale oil

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[4] *See Cobell v. Babbitt*, 30 F. Supp. 2d 24, 28 (D.D.C. 1998).

[5] *Cobell v. Salazar*, No. 1:96CV01285 TFH, 2011 WL 10676927, (D.D.C. July 27, 2011) *aff'd*, 679 F.3d 909 (D.C. Cir. 2012) (finding that the Settlement terms were fair, reasonable, and adequate to absent class members).

formation. Compl. ¶¶ 2, 5, 7-10. According to recent estimates, the Bakken formation has over 7 billion barrels of recoverable oil.[6]

As intimated above, this suit concerns the BIA's alleged mismanagement of allotments belonging to plaintiffs. An allotment is a specific parcel of land belonging to a Native American that was originally part of a common holding, such as a reservation.[7] The creation of such allotments dates back to the General Allotment Act of 1887, 24 Stat. 388 (also known as the "Dawes Act"), which sought to encourage assimilation of Native Americans by dividing communal lands located in Indian reservations into individual parcels, or allotments. *See* 24 Stat. 388 (repealed by Pub. L. 106-462, 114 Stat. 2007 (2000)). The Act provided that Indian lands would be held in trust by the federal government for twenty-five years before being "patented"—at that point, the allotments would become freely alienable and subject to taxation. *Id.*; *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 8-12 (1995).

In 1934, Congress abandoned this project of assimilation by passing the Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984, which prohibited any further division of Indian lands into allotments. Land that had been already allotted prior to 1934 and that was still patent-free would be indefinitely held in trust and managed by the federal government. Following the 1934 Act, "individual Indians became beneficiaries of the trust lands, but lost the right to sell, lease, or burden the property without the federal government's approval." *Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001). As a result of the creation of these allotments and the indefinite extension of the trust relationship, the United States is the trustee of approximately 11 million acres of individual allotments. *See Cobell v. Babbitt*, 91 F. Supp. 2d 1, 9 (D.D.C. 1999) *aff'd and remanded sub nom*. *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

The Bureau of Indian Affairs is responsible for the management of trust lands such as plaintiffs' allotments. Specifically, for the purpose of this case, the Indian Long-Term Leasing Act, 25 U.S.C. § 396, 112 Stat. 620 (1998), places control over the lease of allotted lands for mining purposes with the BIA.[8] No oil or gas lease of allotted land may be executed unless the BIA determines that the lease is "in the best interest of the Indian owners of the Indian land." 25 U.S.C. § 396. The BIA has a fiduciary duty to ensure that the Indians' mineral resources "will be developed in a manner that maximizes their best economic interests and minimizes any

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[6] *See, e.g.*, Lenny Bernstein, *Northern plains site has twice as much oil as previously thought, Interior says*, WASHINGTON POST, April 30, 2013, http://www.washingtonpost.com/national/health-science/northern-plains-site-has-twice-as-much-oil-as-previously-thought-interior-says/2013/04/30/16e0a436-b1cf-11e2-9a98-4be1688d7d84_story.html; *National Assessment of Oil and Gas Fact Sheet*, U.S. Geological Survey, April 2013, http://pubs.usgs.gov/fs/2013/3013/fs2013-3013.pdf. *See also* Compl. ¶¶ 35-49.

[7] "Allotment is a term of art in Indian law. . . . It means a selection of specific land awarded to an individual allottee from a common holding." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972) (citations omitted).

[8] Under the Indian Long-Term Leasing Act, 25 U.S.C. § 396 *et seq*, "[a]ll lands allotted to Indians in severalty . . . may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior."

adverse environmental impacts or cultural impacts resulting from such development." 25 C.F.R. § 212.1(a).

As mentioned above in the introduction, the gravamen of plaintiffs' complaint is that the BIA breached this fiduciary duty by "rubber stamping" oil and gas lease agreements with below market bonuses, by failing to secure a royalty interest rate above 18 percent, and by allowing the "flipping" or reassignment of leases without allottee consent or compensation. Compl. ¶¶ 63-75. The following facts are taken from both the Complaint and the affidavit provided by Renita Wolf, one of defendant's expert witnesses, and are undisputed, except as otherwise noted.

Both Ms. Two Shields and Ms. Wilson have an interest in Allotment M 868A, a 314.180 acre tract of land located on the Fort Berthold Indian Reservation. Compl. ¶¶ 103-104, 137-138; Def.'s Wolf Decl. at ¶¶ 3-4 [App. Ex. 2 at 21]. Ms. Two Shields also has an interest in Allotment 651A, a 320 acre tract of land located on the Fort Berthold Indian Reservation. Compl. ¶¶ 103, 137; Def.'s Wolf Decl. at ¶ 3. Defendant alleges that in November 2007, the BIA initiated a competitive lease sale involving 2,087 parcels on the Fort Berthold Indian Reservation, including Allotments M868A and 651A. Def.'s Wolf Decl. at ¶ 5.[9]

On December 19, 2007, the BIA approved a five-year oil and gas mining lease of Allotment 651A to Zenergy Properties LLC ("Zenergy"), an oil and gas producer, for a lease bonus (*i.e*., a one time, up-front payment) of $451.48 per acre and a royalty rate (*i.e*., a percentage of profits based on resources extracted) of 18 percent. Compl. ¶¶ 103, 137; Def.'s Wolf Decl. at ¶ 6. On April 28, 2009, the BIA approved the assignment of this lease by Zenergy to Dakota-3 E&P Company, LLC ("Dakota-3"), another oil and gas producer.[10] Plaintiffs allege that this assignment was made without their prior knowledge or consent. Compl. ¶¶ 103, 137.

The parties also allege that on February 24, 2008, the BIA approved a five-year oil and gas mining lease of Allotment M 868A to Zenergy, for a lease bonus of $400 per acre and a royalty rate of 18 percent. Compl. ¶¶ 104, 138; Wolf Decl. at ¶ 8. On April 21, 2009, BIA approved the assignment of this allotment to Dakota-3.[11] Compl. ¶¶ 104, 138. Plaintiffs allege that this assignment was made without their prior knowledge or consent. *Id*.

Even more broadly, plaintiffs allege that the allotments of many putative class members were leased at a lower bonus price. For instance, plaintiffs allege that between June 2006 and January 2008, the BIA approved the tribal lease of 42,500 acres located on the Fort Berthold

[9] As will be evident further below, plaintiffs do not directly dispute the fact that the leases were subject to a "competitive lease sale," but allege that the terms of the leases did not represent fair market value. *See, e.g.,* Compl. ¶ 24.

[10] There is a discrepancy over the exact dates on which the BIA approved the assignment of each lease—Ms. Wolf avers that the BIA approved the assignment on April 10, 2009, rather than April 28, 2009. Compl. ¶¶ 103, 137; *c.f.* Def.'s Wolf Decl. at ¶ 6. Nevertheless, the court finds that this difference is not material to defendant's motion for summary judgment.

[11] Ms. Wolf avers that this assignment was approved on April 10, 2009. Def.'s Wolf Decl. at ¶ 9.

Indian Reservation to Dakota-3 for a lease bonus of only $50 per acre[12] and a royalty rate of 18 percent.

Plaintiffs allege that the terms of these leases were far below market value. Compl. ¶¶ 63-75. In the first place, plaintiffs point out that on November 15, 2010—a little over two years after the BIA approved these leases—Dakota-3 re-leased plaintiffs' allotments to Williams Cos., Inc. ("Williams") for roughly $10,000 per acre,[13] which is roughly twenty times the bonus price under the terms of the original lease. ¶¶ 117-121. Plaintiffs also point out that around the same period that the BIA approved the lease of plaintiffs' allotments for about $500 per acre, land in close proximity was leased for a bonus price of $2,000 an acre or higher. Compl. ¶ 77. Plaintiffs also note that other comparable allotments in the vicinity were leased at a much higher royalty rate. For instance, plaintiffs allege that in December 2007, Peak North Dakota, LLC, entered into several leases for a bonus of $1,000 and an 18 percent royalty, and in the case of two other leases, a bonus of $1,000 per acre and a royalty of 22.5 percent. Compl. ¶ 79. Plaintiffs also allege that in April 2008, "at least one lease within the outer boundaries of Fort Berthold but owned in fee simple by a non-Native American went for a bonus of $500 per acre and a 20 percent royalty rate." Compl. ¶ 80. According to plaintiffs, a mere 2 percent increase in royalty rate can result in significantly greater revenues.[14] Compl. ¶ 106.

In short, plaintiffs argue that the BIA breached its fiduciary duty by failing to lease the allotments held in trust at market rates and by including other unfavorable terms. In this case, however, plaintiffs' breach of fiduciary duty claim is largely overshadowed by the *Cobell* litigation, mentioned briefly above in the introduction. *Cobell*, also a class action, has already been litigated and settled. Defendant argues, in its motion to dismiss and for summary judgment, that plaintiffs' breach of fiduciary duty claims were included in the *Cobell* litigation, and that plaintiffs' failure to opt out of the settlement releases the government from any liability on the matter before the court. The court now proceeds with a brief overview of the sprawling *Cobell* litigation, which ran from 1996 until 2012.

B. The *Cobell* Litigation and Settlement Agreement

The original *Cobell* class action complaint was filed in 1996, on behalf of more than 300,000 Native Americans. *See Cobell v. Babbitt*, 30 F. Supp. 2d 24, 28 (D.D.C. 1998). The plaintiffs in that case alleged that the government had mismanaged their Individual Indian Money ("IIM") accounts and had failed to account for billions of dollars relating to the lease of

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[12] NB: elsewhere the complaint describes the bonus price as $40 per acre. *See* Compl. ¶ 82 ($40 per acre); *c.f.* Compl. ¶¶ 12, 64, 76 ($50 per acre).

[13] Plaintiffs do not provide a breakdown of the bonus price and royalty rate for these leases, but state that "Williams Companies paid Dakota-3 $925 million for 85,000 acres of tribal and allottee mineral leases on the Fort Berthold Reservation," which amounts to "approximately $10,000 per acre." Compl. ¶ 113.

[14] Defendant does not address whether these more favorable terms reflect BIA mismanagement or a rapid rise in the value of the mineral rights. Rather, as intimated above, defendant argues that any claims arising from the 2007 and 2008 leases is covered by the *Cobell* Settlement.

allotments for oil extraction and logging.[15] Turning this class action into something approaching a nightmare, the government had lost or destroyed much documentation relating to the IIM accounts. *Id*. at 46. Although the Indian Trust Fund Management Reform Act of 1994 required a full historical accounting of individual accounts, the federal government only provided the Office of the Special Trustee for American Indians ("OST") a fraction of the funds that would have been required for such an accounting. *Cobell v. Norton*, 240 F.3d 1081, 1092 (D.C. Cir. 2001).

On December 21, 1999, the district court found that defendants had breached their respective statutory trust duties. *Cobell v. Babbit*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999), *aff'd and remanded sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). The district court went as far as to hold a number of U.S. officials, including the Secretary of the Interior, in contempt, an action that was eventually countermanded by the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). *See Cobell v. Babbitt*, 37 F. Supp. 2d 6, 38 (D.D.C. 1999); *Cobell v. Norton*, 226 F. Supp. 2d 1, 19-20 (D.D.C. 2002); *c.f. Cobell v. Norton*, 334 F.3d 1128, 1148-50 (D.C. Cir. 2003) (holding that the district court erred as a matter of law in holding Secretary Norton in criminal contempt).

Aside from the acrimony among the parties, the *Cobell* litigation was controversial for other reasons. To begin with, it is doubtful that the Federal District Court for the District of Columbia had jurisdiction in the first place, as the Tucker Act—read in conjunction with the Little Tucker Act—gives the Court of Federal Claims exclusive jurisdiction over money claims against the government not sounding in tort, unless the relief demanded by plaintiff is $10,000 or less. *See* 28 U.S.C. § 1491(a)(1); *c.f.* 28 U.S.C. § 1346(a)(2) (allowing federal district courts to hear claims "not exceeding $10,000 in amount").[16] Congress eventually addressed this jurisdictional deficiency by retrospectively conferring jurisdiction on the federal district court over the *Cobell* litigation.[17]

Eventually, in December 2009, the *Cobell* parties entered into a settlement agreement. *See Cobell* Settlement Agreement, ECF No. 3660-2 [attached as Def.'s Ex. 4, ECF No. 6-2]. The Settlement would be "contingent on the enactment of legislation to authorize or confirm aspects of the Settlement." *Id.* at B.1 [Def.'s Ex. 4 at 67]. The Settlement Agreement provided that following the enactment of the legislation, an amended complaint would be filed,

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[15] The IIM accounts, which were initially created under the General Allotment Act of 1887, serve to provide Indians revenue from the exploitation of the lands held in trust for them. The BIA distributes this revenue on a pro rata basis by placing it in the appropriate IIM accounts, which are also held in trust by the federal government for the benefit of individual Indians. *See Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001).

[16] *See generally* discussion in Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. L.J. 83, 97, 103-05 (2013).

[17] The Claims Resolution Act provides that "[n]otwithstanding the limitation on the jurisdiction of the district courts of the United States in section 1346(a)(2) of title 28, United States Code, the United States District Court for the District of Columbia shall have jurisdiction of the claims asserted in the Amended Complaint for purposes of the Settlement." Pub. L. No. 111-291, § 191, 124 Stat. 3064, 3066-67.

concurrently to the Settlement Agreement, "for the sole purpose of settling" the litigation. *Id*. at A.2 [Def.'s Ex. 4 at 58].

The Amended Complaint set forth two classes. The Historical Accounting Class consists of "individual Indian beneficiaries . . . who had an IIM Account open [with at least one cash transaction credited to it] between October 25, 1994 and [September 30, 2009]." *Id*. at A.15 [Def.'s Ex. 4 at 62]. The Trust Administration Class consists of "individual Indian beneficiaries . . . who [had] an IIM account in the 'Electronic Ledger Era,'" which dates from approximately 1985 to the present, or had, as of September 30, 2009, "a recorded or other demonstrable ownership interest in land held in trust or restricted status." *Id*. at A.35 [Def.'s Ex. 4 at 66]. Of the two classes, only the Trust Administration Class was an opt-out class. *Id*. at C.2 [Def.'s Ex. 4 at 71].

In its motion to dismiss and for summary judgment, defendant proffers evidence that plaintiffs Two Shields and Wilson were members of both the *Cobell* Historical Accounting Class and the Trust Administration Class. Michelle D. Herman, an expert for the government, examined the combined *Cobell* dataset,[18] which has unique identifying numbers for people (NABN) and for accounts (NAAN). Ms. Herman identified one NABN and two NAANs for Two Shields. Herman Decl. at ¶ 10 [App. Ex. 1 at 3]. Ms. Herman also "identified three NABNs associated with some derivation of the name Mary Louise Defender Wilson Packineau ('Mary L. Wilson,' 'Mary Defender,' and 'Mary J. Packineau Hale') with an interest in tract 301 M 868A. *Id*. at ¶¶ 12-13.[19] This information is consistent with plaintiffs' allegation that they have an interest in Allotments M 868A and 651A. *See* Compl. ¶¶ 103-104, 137-138; *see also* Def.'s Wolf Decl. at ¶¶ 3-5 [Def.'s Ex. 2 at 21].

In addition to specifying two different types of classes, the *Cobell* Settlement Agreement set forth several different types of claims. The *Cobell* Settlement covered, *inter alia*, the *Cobell* class action plaintiffs' claims for a historical accounting (*i.e*., "historical accounting claims"), which had been the subject of the *Cobell* litigation since 1996. Under the terms of the Amended Complaint and the *Cobell* Settlement, plaintiffs with historical accounting claims were organized in a "Historical Accounting Class." *See Cobell* Settlement Agreement at I.1 [Def.'s Ex. 4 at 95-96].

But after years of litigation, the government apparently desired to settle not only the accounting claims raised by plaintiffs in the *Cobell* litigation, but also a number of claims relating to government mismanagement of funds and land owned by Indians. *See Cobell* Settlement Agreement at Background, ¶ 10 [Def.'s Ex. 4 at 56] ("Recognizing that individual

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[18] This combined dataset includes both the Department of the Interior's Integrated Records Management System (IRMS) and the Trust Funds Accounting System (TFAS). According to Herman, these two datasets, "in conjunction . . . represent the most complete, accessible source of individual Indian account and transaction data from early 1985 through present." Herman Decl. at ¶ 7 [App. Ex. 1 at 7].

[19] Defendant acknowledges that "[t]here are three individuals with similar names that share an interest in tract 301 M 868A," but states that "based upon the information contained in the complaint, the United States understands plaintiff to be Mary L. Wilson of the Standing Rock Sioux Tribe (NABN x9982)." Def.'s Mot., ECF No. 6-1, at 7 n.3 (citations omitted).

Indian trust beneficiaries have potential additional claims arising from Defendants' management of trust funds and trust assets, Defendants have an interest in a broad resolution of past differences in order to establish a productive relationship in the future."). Accordingly, the Amended Complaint included not only accounting claims against the government but also, for the first time, "funds administration claims" and "land administration claims," which were held by the Trust Administration Class. *See* Amended Complaint at XI(36) [attached as Def.'s Ex. 3, ECF No. 6-2, at 44]; *Cobell* Settlement Agreement at A.35 [Def.'s Ex. 4 at 66]. This new category of land administration claims is of particular relevance here because the government argues that plaintiffs' Count I claims are land administration claims that already have been settled under the Settlement Agreement.

The Settlement Agreement defines "land administration claims" as "known and unknown claims that could have been asserted through the Record Date [Sept. 30, 2009] for . . . alleged breach of trust and fiduciary mismanagement of land, oil, natural gas, mineral, timber . . . situated on, in or under [plaintiffs'] Land." *Cobell* Settlement Agreement at ¶ A.21 [App. Ex. 4, ECF No. 6-2, at 63-64]. Such claims include a wide variety of actions or omissions on the part of defendant, including:

> a. Failure to lease Land, approve leases or otherwise productively use Lands or assets;
>
> b. Failure to obtain fair market value for leases, easements, rights-of-way, or sales;
>
> c. Failure to prudently negotiate leases, easements, rights-of-way, sales or other transactions;
>
> d. Failure to impose and collect penalties for late payments; . . .
>
> j. Claims of like nature and kind arising out of allegations of Interior Defendants' breach of trust and/or mismanagement of Land through the Record Date, that have been or could have been asserted.

Id.

The Settlement Agreement provided compensation to class members, pursuant to the Claims Resolution Act of 2010, Pub. L. No. 111-291, § 191, 124 Stat. 3064, 3066-67. Additionally, and of particular importance in this case, the Settlement Agreement provided that upon final approval of the settlement, members of the Trust Administration Class who fail to opt out

> shall be deemed to have released, waived and forever discharged [the United States] from, and . . . shall be deemed to be forever barred and precluded from prosecuting, any and all claims . . . that were, or should have been, asserted in the Amended Complaint when it was filed, on behalf of the Trust Administration Class . . . in connection with . . . matters stated in the Amended Complaint for Funds Administrations Claims or Land Administration Claims . . . .

Cobell Settlement Agreement at ¶ I.2 [Def.'s Ex. 4 at 96].

In December 2010, Congress passed the Claims Resolution Act of 2010, which appropriated a settlement amount of $3.4 billion and "authorized, ratified and confirmed" the Settlement Agreement as modified by the parties. Pub. L. No. 111–291, 124 Stat. 3064, 3066. On Dec. 21, 2010, the *Cobell* plaintiffs filed an amended complaint pursuant to the terms of the Settlement Agreement, as authorized by the Claims Resolution Act of 2010. *See Cobell* Am. Compl., ECF No. 3671; *Cobell* Settlement Agreement, ECF No. 3660-2. On that very day, the district court granted preliminary approval of the Settlement Agreement. Order of Dec. 21, 2010 (*Cobell* ECF No. 3667) [Def.'s Ex. 8, ECF 6-2, at 403-6]. The court ordered that plaintiffs who wished to opt out of the Trust Administration Class had 120 days to postmark their opt out or objection forms—*i.e.*, until April 21, 2011. *Id*. at ¶ 11 [Def.'s Ex. 8 at 405].

In its motion to dismiss and for summary judgment, defendant alleges that plaintiffs failed to opt out of the *Cobell* Settlement Agreement. Defendant points out that as of May 4, 2011, the Claims Administrator received 1,826 timely notices, in addition to 39 late notices, for a total of 1,865. *See* Keogh Decl. at ¶ 3 [Def.'s Ex. 9, ECF No. 6-2, at 408]; *see also* July 27, 2011, Order Granting Final Approval of Settlement (*Cobell* ECF No. 3850) Ex. A and B [Def.'s Ex 6, ECF No. 6-2, at 191-230] (listing the names of individuals who had opted out of the Settlement Agreement). The court notes that plaintiffs' names are not among the ones listed in the court order. *Id.*

On July 27, 2011, the District Court certified both the Historical Accounting Class and the Trust Administration Class. Order Granting Final Approval to Settlement (*Cobell* ECF No. 3850) at 5 [Def.'s Ex. 6 at 182-83]. The court noted that notice of the Settlement, and of class members' opt-out right, had been mailed to "[a] list of all readily identifiable Class Members whose names and addresses were readily available and provided by the Department of the Interior . . . , or whose addresses could be reasonably obtained through advanced legal research." Kinsella Decl. at ¶ 11 [App. Ex. 7 at 236]. Notice also had been provided in print media, by radio, on the internet, and on television. *Id*. at ¶¶ 22-33.

The certification of the *Cobell* class also proved contentious for several reasons. First and foremost, the Claims Resolution Act of 2010 permitted certification of the Trust Administration Class "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure." Pub. L. No. 111-291, § 191, 124 Stat. 3064, 3066-67. A number of settlement protesters argued, on appeal, that exempting the Settlement from the requirements of Rule 23 of the Federal Rules of Civil Procedure ("FRCP")[20] violated the Fifth Amendment due process rights of class members. The *Cobell* protesters characterized the Trust Administration Class as "sprawling,"[21] and also argued that Elouise Cobell's request for a $13 million incentive payment

[20] FRCP 23(a) permits the certification of class action suits only if the following conditions are satisfied: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

[21] The Trust Administration Class, as one of the *amici* argued,

> covered a wide variety of conduct, including allegations that the federal government did not keep adequate records (in some cases destroying them), did not account to the trust beneficiaries with respect to the money they were owned,

created an impermissible conflict between the interests of the named class representatives and the unnamed members of the class. *See* Opening Brief of Appellant Craven at in *Cobell v. Salazar,* D.C. Cir. No. 11-5205 [ECF No. 14-1, Ex. 1 at 35-48].

Despite these concerns, the District Court granted final approval to the Settlement Agreement on June 27, 2011. Order Granting Final Approval to Settlement at 3-4 [App. Ex. 6, ECF No. 6-2, at 180-81]. The district court noted that the parties were facing "years of litigation . . . with rather dubious chances of ultimate success," and that the Settlement "at least now provides some measure of certainty for most class members." Fairness Hr'g Tr. At 213-14, 217. The District Court found "that the terms of the [S]ettlement [were] 'fair, reasonable and adequate' from the perspective of absent class members" and that the proposed settlement provided adequate notice and opportunity to be heard. *Id*. at 217. Order Granting Final Approval to Settlement at 4.

The District Court ordered that the Settlement Agreement be "binding on all members of the Trust Administration Class who are not identified among the excluded members"—*i.e*., binding on those who had failed to opt out—and also ordered that "[s]uch members . . . shall be deemed to have released, waived and forever discharged" the United States from land administration claims. *Id*. at 8. Final judgment was entered on Aug. 4, 2011. Judgment in a Civil Action (*Cobell* ECF No. 3853) [App. Ex. 10 at 453]. The Court of Appeals for the D.C. Circuit affirmed this judgment on May 22, 2012. *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012); *Good Bear v. Salazar*, 2012 WL 1884702 (D.C. Cir. May 22, 2012). The Settlement Agreement became effective on Nov. 24, 2012, after all possible appeal periods had expired. *See* Order, *Cobell* ECF No. 3923, Dec. 11, 2012 [App. Ex. 11 at 454-57].

C. Procedural History and Issues Before the Court

Plaintiffs filed the instant complaint on February 1, 2013. Plaintiffs argue, in Count I, that the BIA has a fiduciary duty to maximize the economic interests of Indian allottees by prudently managing their allotments, and that the BIA breached that duty by "rubber stamping" oil and gas lease agreements with below market bonuses, by failing to secure a royalty interest rate above 18 percent, and by allowing the reassignment of leases without allottee consent or compensation. Compl. ¶¶ 63-75. Plaintiffs allege that this mismanagement has caused named plaintiffs and putative class members millions of dollars in damages— plaintiffs point out that only two and a half years after the BIA initially approved the leases, these leases were assigned

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> obstructed the appointment of a proper Special Trustee, mismanaged trust funds, lost trust funds, under-invested trust funds, charged improper administrative fees, did not investigate charges of embezzlement, and mismanaged land and resources, including oil, natural gas, mineral, timber, grazing, and other resources and rights by, among other things, not leasing land, not getting fair market values for land they did lease, and other instances of mismanagement. The list of alleged transgressions is long and varied, and contains a number of activities that are mutually exclusive from each other. (The government could not, for example, under-invest funds it had failed to invest, or imprudently negotiate the lease of land that it had failed to lease).

Amicus Curiae Brief of Competitive Enterprise Institute in Support of Movant-Appellant Kimberly Craven, No. 11-5205, 2011 WL 5093118 at17-18 (C.A.D.C. Oct. 26, 2011).

for a bonus price roughly twenty times higher than the bonus price under the original terms of the lease. Compl. ¶¶ 113-121, 157.

Defendant filed a motion to dismiss and for summary judgment ("Def.'s Mot. Dismiss") on March 29, 2013. In this motion, defendant argues that plaintiffs are certified class members in *Cobell v. Salazar*, D.D.C. No. 96-cv-1285, who "did not opt-out of the Trust Administration Class" and thereby "released the United States from any liability associated with oil and gas leasing of their allotted land that occurred prior to September 30, 2009." Def.'s Mot. Dismiss at 1. Defendant concludes that it is entitled to summary judgment, pursuant to Rule 56(b) of the Rules of the Court of Federal Claims ("RCFC"). *Id*.

Plaintiffs, in turn, assert that the Settlement Agreement does not encompass their Count I claims and argue that in any event, they are entitled to discovery on the matter. *See generally* Pl.'s Opp'n Mot. Dismiss, ECF No. 11, at 8-22. Defendant opposes discovery on the ground that the Settlement Agreement is unambiguous and that any discovery would be futile in raising a genuine issue of material fact. Def.'s Reply, ECF 14, at 15-17.

Plaintiffs argue, in Count II, that the United States breached a separate fiduciary duty to disclose to interested parties that the *Cobell* litigation includes potential claims against the government in connection with the leasing of mineral rights located on the Fort Berthold Indian Reservation. Compl. ¶¶ 159-179. Defendant, in turn, argues that the court has no jurisdiction to hear Count II because plaintiffs fail to allege a specific source of federal law for the government's alleged duty to disclose, as required by the Tucker Act and precedents of the Court of Appeals for the Federal Circuit ("Federal Circuit"). Defendant, accordingly, moves for dismissal of Count II for lack of subject matter jurisdiction, pursuant to RCFC 12(b)(1). Def.'s Mot. Dismiss at 18-21.

Finally, plaintiffs argue that even if defendant prevails on Counts I and II, plaintiffs are still entitled to damages under the theory that the Claims Resolution Act of 2010 amounts to a legislative taking of plaintiffs' Count I and II claims, in violation of the Fifth Amendment of the United States Constitution. Compl. ¶¶ 180-193. Defendant, in its motion to dismiss, argues that a claim against the government is not a cognizable property interest for purposes of the Fifth Amendment. Def.'s Mot. Dismiss at 36-38. Defendant also argues that even if there were a taking of a property interest, plaintiffs have received just compensation as members of the *Cobell* Settlement Class. *Id*. at 35. Defendant accordingly requests the court to dismiss Count III for failure to state a claim, pursuant to RCFC 12(b)(6).

Additionally, on June 28, 2013, defendant filed a motion requesting the court to take judicial notice of the June 20, 2011, transcript of the fairness hearing in *Cobell v. Salazar*, No. 96-cv-1285, ECF No. 3842-1 (D.D.C. June 20, 2011) (attached by defendant as Ex. 1, ECF No. 17). Plaintiffs' oppose this request, and also seek leave to file a sur-reply regarding defendant's motion for judicial notice.

The following five issues remain for the court's resolution:

1) Whether to grant defendant's motion for judicial notice and plaintiffs' motion for sur-reply;

2) Whether the *Cobell* Settlement Agreement precludes plaintiffs from pursuing their Count I claims, entitling defendant to summary judgment as to Count I;

3) Whether plaintiffs are entitled to discovery as to Count I;

4) Whether the court lacks subject matter jurisdiction to hear Count II, and

5) Whether defendant is entitled to dismissal of Count III for failure to state a plausible claim for relief.

The court will now address these issues *seriatim.*

II. APPLICABLE LEGAL STANDARDS

As a preliminary matter, any federal court must determine its jurisdiction to hear a case before it advances to the merits, regardless of whether the court's jurisdiction is raised by the parties. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (citing *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). In "determining jurisdiction, a court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (2011). Nonetheless, the burden of establishing the court's subject matter jurisdiction lies with the party seeking to invoke it. *See Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994); *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind*., 298 U.S. 178, 189 (1936)). When the court's jurisdiction is challenged, the plaintiff must establish jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv*., 846 F.2d 746, 748 (Fed. Cir. 1988).

For the Court of Federal Claims, it is primarily the Tucker Act that confers upon it jurisdiction to adjudicate money claims against the United States. This Act, in particular, grants this court jurisdiction over claims against the United States founded on a money-mandating source of law and not sounding in tort. 28 U.S.C. § 1491(a)(1). The Indian Tucker Act, 28 U.S.C. § 1505, confers essentially the "same access" to relief. *United States v. Mitchell*, 445 U.S. 535, 540 (1980).

Although the Tucker Act explicitly waives the sovereign immunity of the United States against such claims, it "does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Rather, in order to fall within the scope of the Tucker Act, "a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part).

Native Americans asserting a breach of fiduciary claim under the Tucker Act or Indian Tucker Act must clear "two hurdles" to invoke federal jurisdiction. *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) ("*Navajo II*"). "First, [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*. (internal citations omitted). The government's duties must be defined by "specific, applicable, trust-creating statute[s] or regulation[s]," not "common-law trust principles." *Id*. at 302. Second, "[i]f that threshold is passed," plaintiffs must show that "the relevant source of substantive law can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties" imposed by the governing law. *Id*. at 291 (citation omitted).

As for defendant's motion to dismiss under RCFC 12(b)(6), such motions test the legal sufficiency of a complaint in light of RCFC Rule 8(a), which requires "a plausible 'short and plain' statement of the plaintiff's claim, showing that the plaintiff is entitled to relief." *K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc*., 714 F.3d 1277, 1282 (Fed. Cir. 2013) (quoting *Skinner v. Switzer*, 131 S. Ct. 1289, 1291 (2011)). The court should begin to assess the sufficiency of the complaint by identifying allegations that can be disregarded as legal conclusions. Although the court must "assume [the] veracity" of "well-pleaded factual allegations," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), "conclusory allegations are not entitled to be assumed as true." *Ashcroft*, 556 U.S. at 681. Although a complaint "does not need detailed factual allegations," the plaintiff must plead enough factual allegations "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Accordingly, the court should dismiss a complaint "when the facts asserted by [the] claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

As to the instant summary judgment motion pursuant to RCFC 56(a), the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In considering a motion for summary judgment, the court must draw all reasonable inferences in favor of the nonmoving party without weighing the evidence or making credibility determinations. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Nonetheless, mere conclusory allegations are not sufficient to withstand summary judgment, for a dispute is "genuine" only if there are factual issues that "may reasonably be resolved in favor of either party." *Marriott Intern. Resorts, L.P. v. United States*, 586 F.3d 962, 968 (Fed. Cir. 2009) (*citing Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986)). Moreover, a factual dispute is only material if it may "affect the outcome of the suit" in light of the substantive law governing the suit. *Marriott*, 586 F.3d at 968 (quoting *Anderson*, 477 U.S. at 250). The party opposing the motion has the burden of proving by sufficient evidence that a genuine issue of material fact actually exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324–25 (1986); *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 157 (1970).

III. DISCUSSION

A. The Court Grants-in-Part Defendant's Motion for Judicial Notice

On June 28, 2013, defendant filed a motion requesting that the court take judicial notice of a June 20, 2011, transcript of the fairness hearing in *Cobell v. Salazar*, No. 96-cv-1285, ECF No. 3842-1 (D.D.C. June 20, 2011) (attached by defendant as Ex. 1, ECF No. 17). Defendant requests that the court take judicial notice of the district court's public findings to address several assertions made by plaintiff in its opposition brief. For instance, plaintiffs assert, in the opposition brief, that their claims are "unique" because none of the named class representatives had any "interest in . . . the specific Fort Berthold allottee oil and gas lease claims at issue in this case." Plaintiffs' Opp'n to MTD, ECF No. 11, at 2.

Defendant, in turn, argues that this assertion is belied by the fact that one of the *Cobell* objectors "was a member of the Three Affiliated Tribes and specifically raised oil and gas leasing issues on the Fort Berthold Reservation at the fairness hearing." Def.'s Mot. Judicial Notice, ECF No. 17, at 3 (citing Hearing Tr. at 48:15-20). Also, plaintiffs characterize the government's summary of the compensation to be awarded to members of the Trust Administration Class under the Settlement as "specious," "improper," and "unfounded." Plaintiffs' Opp'n to Mot. Dismiss, ECF No. 11, at 44 (referring to Def.'s Mot. Dismiss, ECF 6-1, at 27-28). Defendant argues that its account of the compensation provisions is supported by statements made by plaintiffs' class counsel during the Fairness Hearing. Def.'s Mot. Judicial Notice, ECF No. 17, at 1 (citing Hearing Tr. at 16:7-11).

This court adheres to Rule 201 of the Federal Rules of Evidence when invoking judicial notice. *See, e.g.*, *Osage Tribe of Indians of Oklahoma v. United States*, 96 Fed. Cl. 390, 401 (2010); *Global Computer Enterprises, Inc. v. United States*, 88 Fed. Cl. 52, 70 (2009). Pursuant to Rule 201, the court may take notice of adjudicative facts that are "not subject to reasonable dispute" and may do so "if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(b)-(c).

The court finds that defendant's request is neither untimely nor prejudicial to plaintiffs. Defendant only seeks to elicit facts in response to plaintiffs' accusation that defendant had made "specious" and "unfounded" statements in its briefing. Defendant filed its motion for judicial notice promptly, only one day after plaintiffs' response was filed. Additionally, the court finds that the transcript of the *Cobell* Fairness Hearing is relevant, but that not all of the facts therein are beyond "reasonable dispute." The court, accordingly, takes judicial notice of the transcript of the *Cobell* Fairness Hearing, but only for the following purposes.

1) The court takes judicial notice of the account provided by the class action plaintiffs' counsel regarding compensation for class members for the purpose of showing what was contemplated in the settlement of Land Administration Claims, and to show that defendant's account was not "specious" or "unfounded," but not for the purpose of establishing what compensation was actually awarded.

2) The court takes judicial notice of Ms. Goodbear's objection to the Settlement, but only for the purpose of showing "that Fort Berthold oil leasing was open and notorious at the time the District Court approved the Cobell Settlement Agreement." Def.'s Reply in support of Mot. Judicial Notice, ECF No. 19, at 3.

The court, in its discretion, grants plaintiffs' request for leave to file a sur-reply, and accepts the attached memorandum as filed on July 26, 2013.

B. Defendant Is Entitled to Summary Judgment As to Count I Because the *Cobell* Settlement Discharged Defendant of Liability for Any Claim Covered by the Settlement Agreement

In Count I, plaintiffs argue that the Bureau of Indian Affairs, an agency within the Department of the Interior, breached its fiduciary duty to maximize the interests of Indians in the management of their allotted properties. The Court has subject matter jurisdiction over Count I, pursuant to the Tucker and Indian Tucker Acts.[22]

As explained above, plaintiffs allege that the BIA failed to compare the per acre lease bonuses it approved with the much higher prices it could have been obtained. Plaintiffs argue that, on account of this failure, they received below-market acre bonuses. Compl. ¶¶ 153-54. Plaintiffs also allege that the BIA failed to secure a royalty interest above 18 percent or lease terms of fewer than five years. Compl. ¶ 155. Plaintiffs further allege that the BIA breached its fiduciary duty by allowing the "flipping" or reassignment of leases without allottee consent and compensation. Compl. ¶ 156.

Defendant argues that the terms of the *Cobell* Settlement Agreement preclude plaintiffs from asserting these breach of fiduciary duty claims, and that it is accordingly entitled to summary judgment on the issue. As explained above, the release clause of the *Cobell* Settlement Agreement states that members of the *Cobell* Trust Administration Class who failed to opt out of the *Cobell* Settlement Agreement are barred from prosecuting land administration claims against the government.[23] "Land administration claims," as stated above, are "known and unknown claims that have been or could have been asserted through [Sept. 30, 2009] for [DOI's] alleged breach of trust and fiduciary mismanagement of land, oil, natural gas, mineral, timber . . . situated on, in or under [plaintiffs'] Land . . . ." *Cobell* Settlement Agreement, ¶ A.21 [App. Ex. 4 at 63-64].

In short, the release clause applies to plaintiffs only if the following conditions are satisfied: if plaintiffs are (1) members of the Trust Administration Class, (2) failed to opt out of the Settlement Agreement, and (3) seek to pursue land administration claims—i.e., claims of fiduciary mismanagement of trust land that "have been or could have been asserted through" the Record Date of September 30, 2009. *Id*. Defendant argues that all three of these conditions are satisfied and that the United States is accordingly discharged of any further liability associated

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[22] The Tucker and Indian Tucker Acts confer upon this court jurisdiction to hear breach of fiduciary claims against the government, as long as the plaintiff identifies a substantive source of law that establishes a specific fiduciary duty and alleges that the government breached that duty. *See Navaho II*, 556 U.S. at 290-291, 302. As explained above, the Indian Long-Term Leasing Act, 25 U.S.C. § 396 *et seq*, states that the BIA has a fiduciary duty to prudently manage allotments in the interests of Indian property owners. Plaintiffs allege, in Count I, that defendant breached this duty. Therefore, the court has jurisdiction over this claim.

[23] The release clause of the *Cobell* Settlement Agreement provides that upon final approval of the settlement, members of the Trust Administration Class who fail to opt out

> shall be deemed to have released, waived and forever discharged [the United States] from, and . . . shall be deemed to be forever barred and precluded from prosecuting, any and all claims . . . that were, or should have been, asserted in the Amended Complaint when it was filed, on behalf of the Trust Administration Class . . . in connection with . . . matters stated in the Amended Complaint for Funds Administrations Claims or Land Administration Claims . . . .

Cobell Settlement Agreement, ¶ I.2 [App. Ex. 4, ECF No. 6-2, at 96].

with oil and gas leasing of plaintiffs' allotted land other than the relief provided to class members under the terms of the Settlement. Def.'s Mot. Dismiss at 1.

Plaintiffs do not contest that they failed to opt out of the Settlement Agreement, but argue that the Agreement does not encompass their claims for the following reasons. First, plaintiffs refuse to concede, without discovery, that they are members of the Trust Administration Class. Second, plaintiffs point out that "land administration claims" include only "known and unknown claims that have been or could have been asserted through the Record Date [of September 30, 2009]." Plaintiffs argue that Count I "could not have been asserted through the Record Date" because plaintiffs did not become fully aware of the extent of their damages until Dakota-3 assigned the leases to Williams, an event that happened 14 months after the Record Date. Third, plaintiffs argue that other aspects of the Settlement Agreement—namely, the payment mechanics of the agreement and the fact that the agreement does not mention the general leasing statute that encompasses the Two Shields claims—proves that the Cobell Agreement "did not and could not include plaintiffs' *Two Shields* claims." Pl.'s Opp'n at 26. Finally, plaintiffs argue that defendant's motion for summary judgment is premature and that they are "entitled to discovery to determine the basis for, the veracity of, and the complete context" of defendant's factual allegations. Pl.'s Opp'n, ECF No. 11, at 7.

The court finds, for the reasons that follow, that plaintiffs are members of the Trust Administration Class and that plaintiffs seek to pursue land administration claims against the government. Since plaintiffs failed to opt out of the Settlement Agreement, the court finds that plaintiffs are precluded from asserting their Count I claims. Defendant is accordingly entitled to summary judgment on Count I. The court will explain these findings in turn but will consider plaintiffs' motion for discovery further below, in Part III.C.

1. The Court Finds That Plaintiffs Are Members of the *Cobell* Trust Administration Class

The court begins by noting that the Settlement Agreement defines "Trust Administration Class" in very broad terms, as including beneficiaries "alive as of the Record Date" who have a "demonstrable ownership interest in land held in trust or restricted status." *See* definition of "Trust Administration Class," *Cobell* Settlement Agreement at A.35 [Def.'s Ex. 4 at 66]. The court finds that the allegations made by plaintiffs themselves in their complaint, which are consistent with the Herman and Wolf Declarations submitted by defendant, show that plaintiffs are members of the Trust Administration Class, as defined under these terms.

As explained above in Part I.A, plaintiffs allege that Ms. Two Shields is an "owner and heir to Allotment 651A" and that both Ms. Two Shields and Ms. Wilson are "owners and heirs to Allotment M 868A." Compl. ¶¶ 103-04; *see also* Compl. ¶¶ 16-17, 137-38. The Herman and Wolf Declarations likewise state that plaintiffs have interests in these particular allotments. *See* Herman Decl. at ¶ 10, 12-13 [App. Ex. 1 at 3]; Wolf Decl. at ¶¶ 3-9 [App. Ex. 2 at 21]. It is uncontroverted that these allotments are held in trust by the BIA—both the government and plaintiffs allege that the BIA approved the lease of these allotments to Zenergy and the assignment of these leases to Dakota-3. *See* Compl. ¶¶ 16-17, 103-04, 137-38; *c.f.* Wolf Decl. at ¶ 5-9. Based on this information, the court finds that plaintiffs Two Shields and Wilson had a "demonstrable ownership interest in land held in trust" before or at the time of the Record Date, and are accordingly members of the Trust Administration Class.

2. The Court Finds That the Claims Advanced by Plaintiffs in Count I Are "Land Administration Claims"

To begin with, Plaintiffs observe that "land administration claims" only include "known and unknown claims that have been or *could have been asserted* through the Record Date" of September 30, 2009. *Cobell* Settlement at ¶ A.21 [App. Ex. 4 at 63-64] (emphasis added). Plaintiffs argue that they could not have asserted their breach of fiduciary duty claims before September 30, 2009, and that, consequently, their claims are not "land administration claims" as defined by the Settlement Agreement.

Plaintiffs support this argument by applying principles of equitable tolling—according to plaintiffs, "it is commonly understood that a claim can be asserted only when complete in 'nature, scope, *and implications*.'" Pl.'s Opp'n at 13 (quoting *Lutrell v. Cooper Indus., Inc*., 60 F. Supp. 2d 629, 632 E.D. Ky. 1998) (emphasis added by plaintiffs). Plaintiffs also quote *Catawba Indian Tribe v. United States*, which states that "a claim does not accrue until all events necessary to fix the liability of the defendant have occurred," *i.e.*, "when 'the plaintiff has a legal right to maintain his or her action.'" Pl.'s Opp'n at 13 (quoting *Catawba Indian Tribe*, 982 F.2d 1564, 1570 (Fed. Cir. 1993)). Plaintiffs also cite *Young v. United States* for the proposition that the statute of limitations only begins to run when a plaintiff learns or could have learned "all of the relevant facts." *Id*. (*citing* 529 F.3d 1380, 1386 (Fed. Cir. 2008)).

Although the BIA originally leased plaintiffs' mineral interests to Dakota-3 between 2007 and 2008—*i.e., before* the September 30, 2009 Record Date—plaintiffs argue that their Count I claims never "accrued" before the Record Date because they were not aware of the full extent of the harm caused by the government's actions until Dakota-3 re-assigned the leases to Williams at a bonus price of $10,000 per acre, an event that occurred about 14 months *after* the Record Date had passed. "Only then . . . did the complete implications of the Government's breaches come to light." Pl.'s Opp'n at 14. It was only at that point that "the final piece of the puzzle came into existence." *Id*. Plaintiffs, accordingly, conclude that none of the Count I breach of fiduciary duty claims "could have been asserted through the Record Date," and therefore are not land administration claims. Pl.'s Opp'n at 13-14. According to plaintiffs, "a reasonably intelligent observer . . . could . . . conclude that the *Cobell* Agreement did not include Plaintiffs' unperfected *Two Shields* claims." *Id*. at 14.

The court finds that the equitable tolling cases cited by plaintiffs simply have no bearing on the question of whether plaintiffs "could have" asserted their claims, for purposes of the Release Clause. The issue raised by the *Cobell* Settlement's definition of "land administration claims" is simply whether plaintiffs *could have* asserted their claims before the Record Date. In contrast, in statute of limitations cases, the issue is whether plaintiffs were *required* to assert a claim by a certain date to avoid running afoul of the statute of limitations. As the appellate division of the Court of Claims (the predecessor of the Federal Circuit) has explained, the two matters are distinct:

> Plaintiff gets no help from the rule that a claim does not accrue for the purpose of the beginning of a period of limitations until the damages are ascertainable. . . . The issue here is not a matter of when a claim for damages not yet fully ascertained is barred by the passage of time, but whether a claimant 'had' or possessed a claim, sufficiently to reserve it from a general release, at a time when all the damages had not yet been ascertained. The rule for releases is that absent

> special vitiating circumstances, a general release bars claims based upon events occurring prior to the date of the release.

Johnson, Drake & Piper, Inc. v. United States, 531 F.2d 1037, 1047 (Ct. Cl. 1976). *See also Raytheon Co. v. United States*, 96 Fed. Cl. 548, 553 (2011) (holding that plaintiffs are generally "barred from seeking compensation for claims based on events that occurred before the execution of a release"); *Info. Sys. & Networks Corp. v. United States*, 68 Fed. Cl. 336, 342-43 (2005).

Additionally, plaintiffs' application of the rules for equitable tolling does not make sense in the context of settlement release clauses. Plaintiffs' approach, which posits that no claim accrues until a plaintiff has learned "all of the relevant facts" regarding damages, would make any general release—and hence many settlements—impracticable, as the extent of the damage caused by a defendant's alleged wrongdoing frequently does not become apparent until years after the Record Date has passed. In fact, one of the principal purposes of settling is to reduce uncertainty and give plaintiffs a monetary payout without waiting to find out the exact nature and extent of the damages. *See, e.g., S & T Mfg. Co., Inc. v. Hillsborough Cnty., Fla*., 815 F.2d 676, 678 (Fed. Cir. 1987). In any settlement, both parties bear a certain amount of risk—the plaintiff bears the risk that the settlement will provide less than what plaintiff would have been awarded by a jury at trial, while the defendant bears the risk of paying more than plaintiff would have been able to win at trial, once more information has become available.

The court also finds that plaintiffs' interpretation of "land administration claims" conflicts with the plain language of the Settlement Agreement. The Settlement Agreement provides that "land administration claims" cover all "known *and unknown* claims that could have been asserted . . . ." *Cobell* Settlement at ¶ A.21 [App. Ex. 4 at 63-64] (emphasis added). The fact that the definition includes "unknown" claims clearly indicates that a party can have a land administration claim against the government, regardless of whether it is fully aware of the extent of the harm caused by the government's actions.

In short, the court finds that the definition of "land administration claims" is quite clear—plaintiffs had land administration claims as long as they "'had' or possessed a claim, sufficiently to reserve it from a general release," before the Record Date, regardless of whether they were fully aware of the full extent of the damages. *Johnson, Drake & Piper*, 531 F.2d at 1047.

The court finds that plaintiffs possessed such claims. First and foremost, the actions on the part of the government that occasioned the alleged breach of fiduciary duty occurred *prior to* the Record Date. The leases that the BIA purportedly "rubber stamped" were executed and approved by the BIA on December 19, 2007 and on February 24, 2008. Hence, the court finds that plaintiffs possessed claims prior to the Record Date.

Secondly, the court notes that plaintiffs had considerable notice of the breach prior to the Record Date, even if they were not aware of the full extent of the consequences. As plaintiffs point out, other Fort Berthold Reservation allotments had already been reassigned well before the Record Date. *See* Compl. ¶¶ 83-89 (noting that in late 2006, Black Rock Resources assigned leases, which it had acquired several years earlier for $35 per acre, to Marathon Oil for a lease bonus of $400 per acre). In response to these reassignments, Jerry Nagel, a tribal Program Analyst, sent letters to numerous officials in December 2006 "regarding the conspiracy he believed to be afoot." Compl. ¶¶ 84, 89. On March 26, 2008, the Elders Organization "sent letters to The Office of Services and Trust for American Indians and again to the Attorney General" expressing "outrage" over the leasing on the Fort Berthold Reservation. Compl. ¶ 92. Although plaintiffs argue that tribal officials were in cahoots with the Dakota-3 and hence ignored Nagel's warning, plaintiff Two Shields was serving as Secretary/Treasury of the Elders Organization and thus had actual notice of the government's breach prior to the Record Date. *See* Compl. ¶¶ 95, 137(b); Def.'s Reply at 12.

For the foregoing reasons, the court finds that plaintiffs possessed claims that they "could have" asserted prior to the Record Date. The court also finds that in all other respects, plaintiffs' breach of fiduciary duty claims are "land management claims" as defined under the terms of the *Cobell* Settlement. Plaintiffs' Count I claims are consistent with the examples of mismanagement provided by the definition, including "[f]ailure to obtain fair market value for leases," and the "[f]ailure to prudently negotiate leases." *Cobell* Settlement at ¶ A.21 [Def.'s Ex. 4, ECF No. 6-2, at 63-63].

3. The Court's Finding That the Cobell Settlement Agreement Encompasses Count I Is Consistent with Other Parts of the Cobell Settlement Agreement

a. Plaintiffs' Payment Mechanics Argument

Plaintiffs argue that the "mechanics of the release agreement" support their view that the Settlement Agreement could not possibly encompass their Count I claims. Pl.'s Opp'n at 16. As plaintiffs explain, the Settlement Agreement:

> provides two payments for Trust Administration Claims. First, it gives every class member an $800 base payment. . . . 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. . . . The more money that flowed into the account during that period, the more the individual will receive.

Id. According to plaintiffs, this payment mechanism "makes no sense as applied to Plaintiffs' claims" because under this 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." *Id*.

But this very argument was raised before the D.C. Circuit by one of the *Cobell* objectors, as defendant points out:

> A class member whose account was administered appropriately will, *ceteris paribus* [all else being equal], 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 as Ex. 1, ECF No. 14-1. The D.C. Circuit rejected this argument, for the following reasons:

> Although Craven has standing to challenge the fairness of the distribution scheme on the basis of the alleged intraclass conflict, her contention fails on the merits. As an initial matter, Craven's discussion of a hypothetical conflict is an inadequate basis for vacating the class settlement agreement. . . . Even assuming those claims survived, that class member, like any other class member who is allegedly under-compensated by the distribution formula, could have opted out of the Trust Administration Class; the record indicates the class member at issue declined to do so. Indeed, the existence of the opt-out alternative effectively negates any inference that those who did not exercise that option considered the settlement unfair.

Cobell v. Salazar, 679 F.3d at 920 (D.C. Cir. 2012) cert. denied, 133 S. Ct. 543 (2012).

This court has already found that plaintiffs were part of the *Cobell* Trust Administration Class. *See supra*, Part III.B.1. Plaintiffs undisputedly failed to opt out of the Settlement Agreement. Accordingly, plaintiffs are bound by the D.C. Circuit's judgment on the matter: "There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). *See also Smith v. Bayer Corp*., 131 S. Ct. 2368, 2380 (discussing the principle that "unnamed members of a class action [may] be bound, even though they are not parties to the suit"). The court rejects plaintiffs' payment mechanics argument as an impermissible collateral attack on the D.C. Circuit's final judgment.

b. Plaintiffs' Standing Argument

As explained above, the *Cobell* Settlement Agreement only discharges the government of liability for those "claims . . . that were, or should have been, asserted in the Amended Complaint . . . ." Settlement Agreement, ¶ I.2 [App. Ex. 4 at 96]. Plaintiffs argue that the *Cobell* Settlement "did not and could not include Plaintiffs' *Two Shields* claims" because the named *Cobell* plaintiffs purportedly would have lacked standing to assert the *Two Shields* claims. Pl.'s Opp'n at 26. Plaintiffs assert that "[t]he named *Cobell* plaintiffs had no connection whatsoever to the Fort Berthold Reservation," and that the amended *Cobell* complaint does "not contain even a whisper of the *Two Shields* claims." *Id*. at 25. Plaintiffs note that the general leasing statute that encompasses the Two Shields claims—*i.e*., 25 U.S.C. § 396—was never mentioned in the Amended Complaint. Pl.'s Opp'n at 26. According to plaintiffs, "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." *Id*. at 26 (original emphasis).

The court disagrees. As defendant points out, the *Cobell* class representatives undisputedly had standing to assert their own claims and, for Article III purposes, unnamed plaintiffs "need not make any individual showing of standing." Def.'s Reply at 12 (quoting *Lewis v. Casey*, 518 U.S. 343, 395-96 (1996) (Souter, J., concurring-in-part and dissenting-in-part).

Moreover, the fact that the Amended Complaint—which was filed on behalf of more than 300,000 unnamed plaintiffs—fails to mention the particular general leasing statute that applies to Ms. Two Shields' and Ms. Wilson's claims is not dispositive. As defendant points out, Carol Good Bear, one of the *Cobell* class action plaintiffs who challenged the fairness of both the *Cobell* class certification and the terms of the *Cobell* Settlement Agreement—made a similar argument: "There is no plaintiff from the most active and largest oilfield in the nation. The money in the Fort Berthold accounts, or that should be in the Fort Berthold accounts, has very little in common with what should be in a very small account, for example, in Nebraska and Montana, Oklahoma or Wisconsin." *Cobell* Fairness Hearing Tr. at 48:15-20 [attached as Ex. 1, ECF No. 17-1, at 13]. But the district court, as well as the D.C. Circuit, rejected this line of reasoning:

> Under Rule 23(a), commonality requires that plaintiffs advance a "common contention" that "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." [*Wal–Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011).] The Trust Administration Class satisfies this requirement. Although Craven characterizes the Class as "sprawling" and encompassing "dozens of wildly different theories of liability," Appellant's Br. at 42, 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.

Cobell, 679 F.3d at 922.

The court finds that plaintiffs' standing argument lacks merit and amounts to an impermissible collateral attack on the D.C. Circuit's judgment affirming the certification of the *Cobell* class. The court accordingly rejects this argument as well.

* * * * *

For the foregoing reasons, the court finds that plaintiffs are members of the Trust Administration Class whose land administration claims are encompassed by the *Cobell* Settlement Agreement. Plaintiffs failed to opt out of the Settlement Agreement, and are thus precluded from pursuing their Count I claims in this court. The court accordingly grants defendant's motion for summary judgment as to Count I. The court now proceeds to consider plaintiffs' motion for discovery.

C. The Court Denies Plaintiffs' Motion for Discovery

Plaintiffs characterize defendant's motion for summary judgment as a "starkly improper" attempt to "railroad Plaintiffs into responding to the Government's fact-based argument without the benefit of *any* discovery." Pl.'s Opp'n at 18-19. Plaintiffs point out that trial courts are reluctant to consider summary judgment arguments if "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." *Id*. (quoting *Easter v. United States*, 575 F.3d 1322, 1336 (Fed. Cir. 2009) and *Jade Trading, LLC v. United States*, 60 Fed. Cl. 558, 565 (2004) (holding that requests for additional discovery pursuant to RCFC 56(d) are generally "favored" and "liberally granted.")). Plaintiffs accordingly move for discovery, both in their opposition brief and in a separate motion. *See* Pl.'s Opp'n Mot. Dismiss, at 18-22; *see also* Pl.'s Mot. Discovery, ECF No. 12.

The court begins by noting that even if motions for discovery are treated liberally at this early stage in the litigation, such motions are not automatically granted. To be entitled to discovery, "a party must state with precision the material he hopes to obtain with further discovery and how that material will allow the party to oppose summary judgment and rebut any showing of the absence of a genuine issue of fact." *Chevron U.S.A. Inc. v. United States*, 72 Fed. Cl. 817, 819 (2006). The courts, accordingly, deny discovery requests that are futile or are unlikely to elicit evidence that would be relevant in establishing a genuine issue of material fact. *See, e.g., T & M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999); *Theisen Vending Co., Inc. v. United States*, 58 Fed. Cl. 194, 198 (2003).

Defendant, in fact, opposes plaintiffs' discovery request on this very ground. Defendant argues that the release clause unambiguously applies to plaintiffs' land management claims, and contends that any discovery would be futile because the rules of contract interpretation prohibit consideration of extrinsic evidence if the disputed language is clear and unambiguous. Def.'s Reply, ECF No. 14, at 15-18. Defendant, in short, argues that the court should deny plaintiffs' discovery motion on the ground that it is unlikely to elicit information likely to create any genuine issue of material fact.

Plaintiffs disagree, and argue that Federal Circuit precedent permits this court to consider extrinsic evidence in order to ascertain whether a contract provision is clear or ambiguous in the first place. *See* Pl.'s Opp'n at 9-10 (citing *Imprimis Investors LLC v. United States*, 83 Fed. Cl. 46, 61 (2008) and *Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin*., 169 F.3d 747, 752 (Fed. Cir. 1999)). The court now proceeds to consider plaintiffs' argument regarding extrinsic evidence, followed by plaintiffs' motion for discovery.

1. Plaintiffs' Invitation To Use Extrinsic Evidence in Construing the Release Clause

The dispute here, regarding whether the court is permitted to consult extrinsic evidence in construing the Release Clause, a specie of contract, [24] is governed by the rules of contract interpretation. These rules, as defined by the Federal Circuit, require the trial court to begin its analysis of the disputed contract provision by examining the plain language of the agreement. *See, e.g., Bell/Heery v. United States*, 739 F.3d 1324, 1331 (Fed. Cir. 2014) ("Contract interpretation begins with the language of the written statement") (quotations omitted); *LAI Servs., Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009); *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004). Federal Circuit precedent generally precludes the trial court from considering extrinsic evidence if the language of the provision in question is "clear and unambiguous." *Bell/Heery*, 739 F.3d at 1331 ("When interpreting a contract, if the provisions are clear and unambiguous, they must be given their plain and ordinary meaning") (internal quotations omitted); *see also Shell Oil Co. v. United States*, 751 F.3d 1282, 1295 (Fed. Cir. 2014) ("The Government has not established ambiguity in the relevant provision, in the absence of which it is improper to rely on extrinsic evidence.").

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[24] In *VanDesande v. United States*, the Federal Circuit held that settlement agreements "should be viewed for enforcement purposes as having the attributes of a contract," "even if they are incorporated into judicial or administrative consent decrees." 673 F.3d 1342, 1350 (Fed. Cir. 2012). Accordingly, the rules of contract interpretation apply.

Notwithstanding these precedents, plaintiffs argue that the court cannot conclude that the language of a release is unambiguous unless it considers "the entirety of the instrument of the release and the facts and circumstances attending its execution." Pl.'s Opp'n at 9-10 (citing *Imprimis*, 83 Fed. Cl. 46 at 61). Plaintiffs assert that "[t]he 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.'" Pl.'s Opp'n at 10 (quoting *Metric Constructors*, 169 F.3d 747 at 752).

The court finds that plaintiffs quote *Imprimis* out of context. The phrase quoted (courts consider the "facts and circumstances attending [the contract's] execution") only applies when a contract is ambiguous in the first place. In the very same paragraph, the court states that "extrinsic evidence will be allowed to interpret an *ambiguous* clause." *Imprimis*, 83 Fed. Cl. at 61 (emphasis added). Consistent with Federal Circuit precedent, the court in *Imprimis* states that it may consider extrinsic evidence only "if a contract is found to be uncertain or unambiguous," and not if the contract is "clear on its face." *Id*. at 55, 61.

The court also finds plaintiffs' reliance on *Metric Constructors* unavailing. At issue in *Metric Constructors* was whether a provision requiring that "[n]ew lamps . . . be installed immediately prior to completion of the project" called for the replacement of all lamps or only the replacement of broken, defective, or burned out lamps. *Metric Constructors*, 169 F.3d at 749. Although the contract specifications on their face called for "new lamps," Metric pointed out that the term "relamping" is usually used when the replacement of all lamps is called for. *Id*. Moreover, as the Armed Services Board of Contract Appeals had noted in a prior opinion, it is uncommon for specifications for new construction to require relamping. *Id*. Metric argued that its reliance on trade custom was reasonable in light of NASA's conduct. In particular, NASA's cost estimates did not include relamping the facility. *Id*. at 750. The Federal Circuit ultimately held that when a disagreement over the meaning of a contract provision is raised on the basis of trade practice and custom, extrinsic evidence can be considered even if the plain language of the provision is unambiguous. *Id*. at 752.

Nonetheless, the Federal Circuit expressly limited the application of this approach to the context of "trade custom and interpretation." *Id*. at 751 ("This case squarely presents the recurring issue of the role of evidence of trade practice and custom in contract interpretation"). The Federal Circuit cautioned that extrinsic evidence cannot be used "to create an ambiguity where a contract was not reasonably susceptible of different interpretations at the time of contracting." *Id*. at 752. The Federal Circuit contemplated the consideration of trade custom or practice "only where a party makes a showing that it relied reasonably on a competing interpretation of the words when it entered into the contract." *Id*.

The court finds that *Metric Constructors* is not applicable to the instant case. Plaintiffs do not allege reasonable reliance on a trade custom or that a misunderstanding exists due to confusion over some undefined term of art. The Settlement Agreement includes a lengthy section defining various phrases used in the Settlement, such as "Record Date," "Trust Administration Class," "Land Administration Claims," etc. Plaintiffs do not allege that any of these terms is poorly defined, but speculate that discovery will reveal evidence that indicates that the Settlement Agreement does not apply to Count I. The court finds plaintiffs' broad construction of *Metric Constructors* especially inappropriate in light of the various statements made by the Federal Circuit in that case emphasizing the narrow nature of the opinion.

Plaintiffs' disregard for Federal Circuit precedent is truly striking. Plaintiffs not only misapply *Imprimis* and *Metric Constructors*, but go so far as to argue that the court should ignore the plain language of the Settlement Agreement—plaintiffs argue that their Count I claims "could not have been asserted in the Amended Complaint . . . *regardless of whether they otherwise satisfied the definitional requirements of Land Administration Claims*." Pl.'s Reply Supporting Mot. Discovery, ECF No. 16, at 14 (emphasis added). The court declines to adopt this radical approach.

2. The Court Denies Plaintiffs' Discovery Request As Futile

Plaintiffs have supplied the court with a detailed and wide-ranging list of information they seek to discover, including (1) "information related to the Government's awareness or knowledge prior to September 30, 2009, and December 10, 2010" of the *Two Shields* claims, (2) "information related to the *Cobell* payment methodology and any payments to be made to *Two Shields* class members under the *Cobell* settlement," (3) "information in the Government's possession related to the value of the *Two Shields* mineral interests," (4) information related to "the 'negotiation and execution' of the *Cobell* Settlement Agreement," and (5) "information related to the Government's document retention policies." *See* Pl.'s Ex. 1, ECF No. 11-1, at 3-5, ¶¶ 11-18; *see also* Pl.'s Opp'n to Mot. Dismiss, ECF No. 11, at 20-21; Pl.'s Mot. Discovery, ECF No. 12.

The court finds that none of this information is likely to raise any genuine issue of material fact. As explained above, this court has already found that plaintiffs are members of the Trust Administration Class and that plaintiffs failed to opt out of the *Cobell* Settlement Agreement. The court also found that the disputed portions of the Settlement Agreement are unambiguous and that the court is barred from considering extrinsic evidence about the circumstances in which the Agreement was formed or regarding the parties' intentions. Therefore, any information regarding the negotiation or execution of the Settlement Agreement is irrelevant because the court would not be permitted to consider it.

Moreover, any information regarding the government's knowledge of the Two Shields claims at the time the Settlement Agreement was executed, or about the *Cobell* payment methodology, is irrelevant in light of the fact that plaintiffs' are precluded by the Settlement Agreement from pursuing any further land administration claims against the government. In the court's view, plaintiffs' speculation that their claims could not possibly have been intended to fit the broad definition of "land administration claims," and their demand for wide-ranging discovery in search of evidence to prove this theory, is nothing more than an attempt to end-run the D.C. Circuit's judgment on the matter.

Finally, to the extent that plaintiffs seek to elicit information showing that defendant breached a fiduciary duty to disclose to the *Two Shields* class plaintiffs that their claims would be subsumed by the Settlement Agreemenrt, the court finds this information irrelevant in light of the court's holding, discussed below, that this court lacks jurisdiction to consider such a claim. *See* discussion regarding Count II, *infra* Part III.D.

For the foregoing reasons, the court denies plaintiffs' motion for discovery.

D. The Court Lacks Subject Matter Jurisdiction over Count II

Plaintiffs argue, in Count II, that should defendant prevail in arguing that the *Cobell* Settlement releases it from the breach of fiduciary claims alleged in Count I, "such [a] strategy . . . gives rise to a second, independent breach of fiduciary claim." Compl. ¶ 161. "Because the United States acts as fiduciary to the Plaintiffs and Class Members, it had an absolute fiduciary duty to fully disclose to the *Cobell* class the potential liability associated with the BIA's oil and gas approval activity for allottees on the Fort Berthold Reservation, if it wished to resolve them in the *Cobell* litigation." Compl. ¶ 175. Plaintiffs allege that the United States failed to make such a disclosure to the *Cobell* class members or class counsel. Compl. ¶ 176. Plaintiffs argue that "[a]s a direct, foreseeable, and proximate result of these breaches of duties of loyalty and care," they have suffered "damages . . . in an amount that is currently unknown but which shall be proved at trial." Compl. ¶ 178.

Defendant moves to dismiss Count II for lack of subject matter jurisdiction. Def.'s Mot. Dismiss at 18-21. Defendant notes that to establish jurisdiction under the Tucker Act or Indian Tucker Act over a breach of fiduciary duty claim, plaintiffs must establish that some federal source of law creates such a duty in the first place. Defendant argues that plaintiffs have failed to make this requisite showing. Defendant also argues that Count II amounts to an impermissible collateral attack on the D.C. Circuit's judgment that the Settlement Agreement was fair, and should be accordingly dismissed for failure to state a claim.

As discussed above in Part II, Native American plaintiffs asserting a breach of fiduciary claim under the Tucker Act or Indian Tucker Act must clear "two hurdles" in order to establish jurisdiction. First, plaintiffs must identify a substantive source of law that establishes a specific fiduciary duty, and allege that the government violated that very duty. *Navajo II*, 556 U.S. at 290. This requirement cannot be met by relying on common law trust principles. *Id*. at 302. Second, if the initial threshold requirement is satisfied, plaintiffs must show that "the relevant source of substantive law can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties" imposed by the governing law. *Id.* at 291.

As for the initial, threshold hurdle, plaintiffs rely on the Indian Long-Term Leasing Act, 25 U.S.C. § 396. As explained above, this general leasing statute does create an enforceable fiduciary duty to maximize the economic value of plaintiffs' allotments. *See* 25 U.S.C. § 396 (placing allotted Indian lands under the control of the Secretary of the Interior) (discussed *supra*); 25 C.F.R. § 212.1(a); *see also White Mountain*, 249 F.3d at 1375 (holding that § 396 creates an enforceable fiduciary duty to prudently manage allotted oil interests). Nevertheless, as plaintiffs concede, § 396 "says nothing about any disclosure obligations of the United States." Pl.'s Opp'n at 33.

The court finds that this flaw is fatal to Count II because the breach alleged in Count II is a failure to disclose, not a failure to prudently manage plaintiffs' oil interests. Stated otherwise, the Indian Long-Term Leasing Act only applies to plaintiffs' Count I land management claims, not to plaintiffs' Count II failure to disclose claims. In light of the absence of any statutory reference in § 396 to any fiduciary duty to disclose, the court finds that plaintiffs fail to satisfy the threshold requirement described in *Navajo II*.

Plaintiffs contend that such a finding "relies entirely on the false premise that the Government can be sued by its Native American wards only for duties specifically spelled out by government," and argue that it is permissible for them to rely on common law trust principles. *See* Pl.'s Opp'n at 26-27 (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) ("*White Mountain II*"); *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 738 (2011)). But plaintiffs misstate the law. As explained above, the court is not allowed to apply common law trust principles unless plaintiffs succeed in satisfying the first, threshold hurdle. Merely establishing the existence of a trust relationship between the government and plaintiffs "is insufficient to support jurisdiction under the Indian Tucker Act. Instead, the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U.S. at 506.

Additionally, the court finds that plaintiffs misapply both *White Mountain II* and *Jicarilla Apache Nation* by quoting language that applies only to the second hurdle, which is inapplicable here due to plaintiffs' failure to meet the first hurdle.

In *White Mountain II*, the plaintiffs alleged that the United States breached its fiduciary duty to "maintain, protect, repair, and preserve" property held in trust for the tribe but occupied by the United States. The *White Mountain II* plaintiffs met the first hurdle by identifying a substantive source of law that establishes the same fiduciary duty that they claim the government breached—specifically, plaintiffs pointed out that Pub. L. 86-392, 74 Stat. 8 (1960) provides that the "former Fort Apache Military Reservation" be "held by the United States in trust for the White Mountain Apache Tribe . . . ." *White Mountain II*, 537 U.S. at 480. Finding that plaintiffs had successfully identified a substantive law establishing the alleged fiduciary duty, the *White Mountain II* Court held that plaintiffs met the second "fair interpretation" requirement, despite the fact that the statute did not specifically provide for money damages. But as explained above, the Two Shields plaintiffs failed to meet the initial hurdle, therefore the "fair interpretation rule" never comes into play.

Plaintiffs' reliance on *Jicarilla Apache Nation* is similarly misplaced. The plaintiffs in *Jicarilla* argued that the Government had breached its fiduciary duties by "failing to pool the Apache Nation's trust funds with those of other tribes for investment purposes" and by "immediately removing funds from the trust fund to cover disbursement checks, thereby creating a lag between the removal of funds and check negotiation, during which time no income was earned on the subject funds." *Jicarilla*, 100 Fed. Cl. at 729. As in *White Mountain II*, the plaintiffs in *Jicarilla* were able to identify a statutory provision that created a fiduciary duty for the particular alleged duty. Specifically, the *Jicarilla* plaintiffs relied on 25 U.S.C. §§ 161, 161a, 162a, and 4001 *et seq*., which "expressly refer to the United States as 'trustee of the various tribes' . . . and to the accounts at issue as 'tribal trust funds.'" *Id.* at 731. Accordingly, the court found it permissible to apply common law trust principles to determine whether the statute could be fairly interpreted as mandating compensation for the alleged breach of fiduciary duty, despite the absence of explicit language to that effect. *Id.* at 731-32. But in contrast to the *Jicarilla* plaintiffs, the *Two Shields* plaintiffs failed to satisfy the initial threshold requirement. Thus trust principles do not come into play.

In conclusion, plaintiffs have failed to "identify a separate source of substantive law that creates the right to money damages" for the breach of the alleged fiduciary duty of disclosure, as required by the Tucker Act. *See Fisher*, 402 F.3d at 1172. The court therefore finds that it lacks subject matter jurisdiction over Count II, and grants defendant's motion to dismiss Count II. Since the court lacks subject matter jurisdiction over Count II, the court finds no need to consider the non-jurisdictional arguments raised by defendant in its motion to dismiss.

E. The Court Dismisses Count III for Failure To State a Claim

Plaintiffs assert, in Count III, that the claims advanced in Count I and II are vested private property interests within the meaning of the Fifth Amendment. Compl. ¶ 183. Plaintiffs argue that but for the Claims Resolution Act of 2010,[25] the *Cobell* Settlement would not have precluded them from advancing their Count I and II breach of fiduciary duty claims. Compl. ¶¶ 185-89; Pl.'s Opp'n Def.'s Mot. Dismiss, ECF No. 11, at 40. Plaintiffs, accordingly, argue that to the extent that the *Cobell* settlement extinguished plaintiffs' breach of fiduciary duty claims, those claims have been taken by defendant without just compensation, in violation of the Fifth Amendment's Takings Clause.[26] Compl. ¶¶ 181-93.

The Fifth Amendment prohibits the government from taking private property for public use unless it provides just compensation. S*ee* U.S. Const. amend. V, cl. 4 ("[N]or shall private property be taken for public use, without just compensation."). It is uncontroverted that the Tucker Act confers upon this court jurisdiction to hear takings claims, as the reference in the Takings Clause to "just compensation" is an explicit money-mandating provision. *See, e.g.*, *Jan's Helicopter Serv., Inc. v. F.A.A.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008).

The Federal Circuit applies a two-part test to determine whether a government act constitutes a taking under the Fifth Amendment. The first, threshold inquiry, is to determine whether a plaintiff's asserted interest is a cognizable property right under the Fifth Amendment. *See*, *e.g.*, *Boise Cascade Corporation v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002). The determination of whether the rights or interest claimed by plaintiffs qualifies turns on "existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, [that] define the dimensions of the requisite property interests for purposes of establishing a cognizable taking." *Air Pegasus of D.C. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2009). Second, the court must determine whether any taking of that property right has actually occurred. *See Boise Cascade Corporation*, 296 F.3d at 1343.

As for the initial threshold inquiry, plaintiffs assert that Counts I and II are, *ipso facto*, "a valid, vested property interest." Pl.'s Opp'n Def.'s Mot. Dismiss, ECF No. 11, at 36. In so arguing, plaintiffs rely on language from *Alliance of Descendants v.United States*, which states that "a legal cause of action is property within the meaning of the Fifth Amendment." Pl.'s

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[25] As explained above in Part I.B, the Claims Resolution Act retroactively conferred jurisdiction on the Federal District Court for the District of Columbia "for purposes of the Settlement," "[n]otwithstanding the limitation on the jurisdiction of the limitation on the jurisdiction of the district courts of the United States in [28 U.S.C. § 1346(a)(2)]." Pub. L. No. 111-291, § 191, 124 Stat. 3064, 3066-67. The Act also permitted certification of the Trust Administration Class "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure." *Id.*

[26] Plaintiffs also contend that the Claims Resolution Act's retroactive remedy was ineffective, because the wording of the Act only granted the district court jurisdiction "for purposes of the Settlement." According to plaintiffs, the Act failed to give the court jurisdiction to try the suit in the first place. See Compl. ¶ 165; Pl.'s Opp'n at 41 n.22. The court rejects this argument, as it has already been considered and rejected by the D.C. Circuit. *Good Bear v. Salazar*, Nos 11-5270, et al., 2012 WL 1884702 at *1 (D.C. Cir. May 22, 2012).

Opp'n Def.'s Mot. Dismiss, ECF No. 11, at 36 (quoting *Alliance*, 37 F.3d 1478, 1481 (Fed. Cir. 1994)). But this broad construction of *Alliance* conflicts with Federal Circuit precedent: a claim can only be a property right under the Fifth Amendment if it "protects a legally-recognized property interest." *Adams v. United States*, 391 F.3d 1212, 1225-26 (Fed. Cir. 2004). In Count I, plaintiffs are not seeking compensation for an actual taking of their mineral rights, but are alleging that the BIA breached a fiduciary duty by leasing plaintiffs' mineral rights on terms below market value. The court finds it unclear whether a breach of fiduciary duty claim is a cognizable property interest, and plaintiffs present no authority on the matter.

In any event, the Court of Federal Claims has held that "[f]or purposes of the Takings Clause, "no 'vested' right [in a claim] attaches until there is a final, unreviewable judgment." *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 384 (2013) (quoting *Rogers v. Tristar Prods., Inc.*, Nos.2011–1494 and 2011–1495, 2012 WL 1660604, at *2 (Fed. Cir. May 2, 2012) (per curiam) (unpublished). The Ninth Circuit, similarly, has held that "a property right in a cause of action does not vest until a final unreviewable judgment is obtained" because a cause of action, in and of itself, is "inchoate" and "speculative." *Bowers v. Whitman*, 671 F.3d 905, 913-914 (9th Cir. 2012). This court agrees, and finds that due to the absence of a final judgment, plaintiffs' Count I and II claims do not amount to a cognizable property interest.

Moreover, even if the court proceeds to the second hurdle, plaintiffs cannot show that a taking ever occurred. Despite the fact that Claims Resolution Act authorized the district court to certify the Trust Administration Class without being bound by the requirements of FRCP 23, *see* Pub. L. No. 111-291, § 191, 124 Stat. 3064, 3066-67, the district court applied Rule 23 anyway, and found that the requirements of the rule had been satisfied. *See Cobell v. Salazar*, No. 1:96CV01285 TFH, 2011 WL 10676927, at *2 (D.D.C. July 27, 2011) *aff'd*, 679 F.3d 909 (D.C. Cir. 2012). As explained above, the D.C. Circuit also affirmed the district court's finding that members of the Trust Administration Class had been given fair and adequate notice of their opportunity to opt out of the Settlement Agreement. *See Cobell v. Salazar*, 679 F.3d at. 922-24. Therefore, plaintiffs' argument that the Claims Resolution Act "eviscerated" plaintiffs' procedural rights is without merit.

Finally, the court is doubtful that Count III is even a takings claim to begin with. The gravamen of Count III is that the Claims Resolution Act of 2010 deprived plaintiffs of their due process rights by eliminating the protections afforded to absent class members by Rule 23[27] of the Federal Rules of Civil Procedure ("FRCP")—according to plaintiffs, the Act "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." Pl.'s Opp'n Mot. Dismiss, ECF No. 11, at 40. Looking to the

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[27] As explained above, Rule 23(a) permits the certification of class action suits only if the following conditions are satisfied: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

substance, Count III appears to be a due process claim masquerading as a takings claim, designed to hurdle the jurisdictional bar to hearing due process claims in this court.[28]

The court therefore grants defendant's motion to dismiss Count III.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' MOTION for discovery is DENIED. Defendant's MOTION for judicial notice is GRANTED-IN-PART, and plaintiffs' MOTION for leave to file a sur-reply, is GRANTED. Accordingly, the sur-reply attached to plaintiffs' motion is deemed filed into the record. Defendant's MOTIONS for summary judgment, and to dismiss Counts I, II and III, are GRANTED. The Clerk is hereby directed to take the necessary steps to dismiss this matter.

IT IS SO ORDERED.

s/ Lawrence J. Block
Lawrence J. Block
Judge

[28] In contrast to the Takings Clause, the Due Process of the Fifth Amendment is not a "money-mandating provision." *James v. Caldera*, 159 F.3d at 581. The Tucker Act does not provide this court with jurisdiction over Fifth Amendment Due Process claims unless the alleged violation constitutes an illegal exaction, *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1363 (Fed. Cir. 2002), which occurs only if the Government has "improperly exacted or retained" money from the plaintiff, *Testan*, 424 U.S. at 401, 96 S.Ct. 948.

In the United States Court of Federal Claims

No. 13-90 L

RAMONA TWO SHIELDS and MARY LOUISE DEFENDER WILSON, individually and on behalf of all others similarly situated

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's Opinion and Order, filed February 6, 2015, granting defendant's motion to dismiss and for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' complaint is dismissed.

Hazel C. Keahey
Clerk of Court

February 10, 2015 By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

United States Court of Appeals
for the Federal Circuit
Shields v. US, No. 2015-5069

PROOF OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by SUSMAN GODFREY L.L.P., Attorneys for Appellants to print this document. I am an employee of Counsel Press.

On **June 8, 2015,** counsel has authorized me to electronically file the foregoing **Brief of Appellants** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to any of the following counsel registered as CM/ECF users:

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Paper copies will also be mailed to the above counsel at the time paper copies are sent to the Court.

Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court within the time provided in the Court's rules.

June 8, 2015 /s/ Robyn Cocho
Counsel Press

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because it contains 13,915 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Word version 2010 in 14-point Times New Roman font.

/s/ Kenneth E. McNeil
Kenneth E. McNeil