2015-5069

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RAMONA TWO SHIELDS, and MARY LOUISE DEFENDER WILSON, individually and on behalf of all other similarly situated, Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS, No. 1:13-CV-00090-LB, Judge Lawrence J. Block

RESPONSE BRIEF OF THE UNITED STATES OF AMERICA

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for the United States makes the following representations:

1. Counsel is unaware of any other appeal in or from the same civil action or proceeding in the lower court that was previously before this or any other appellate court.

2. Counsel is aware of a case recently decided by the Eighth Circuit involving the same plaintiffs, and some of the same alleged facts as this appeal, *Two Shields v. Wilkinson*, 790 F.3d 791, 799 (8th Cir. 2015). The United States was not a party to this action, although it did file an amicus brief in the district court proceedings. The Plaintiffs have been granted an extension to October 12, 2015, to file a petition for a writ of certiorari in the Supreme Court. *Two Shields v. Wilkinson*, No. 15A154. The United States does not believe that the Eighth Circuit decision will affect the decision in this case, and that the decision in this case will not affect the decision in the Eighth Circuit case.

STATEMENT OF JURISDICTION

A. Jurisdiction in the Court of Federal Claims — Plaintiffs-Appellants Ramona Two Shields and Mary Louise Defender Wilson (collectively "Plaintiffs") alleged that the Court of Federal Claims ("CFC") had jurisdiction of their claims under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505. A43, ¶ 20. The United States agrees that the CFC had jurisdiction of Counts One and Three of Plaintiffs' Complaint under the Tucker Act, but not the Indian Tucker Act because Plaintiffs are not a "tribe, band, or other identifiable group of American Indians." 28 U.S.C. § 1505. The United States agrees with the CFC's ruling that it lacked jurisdiction of Count Two under either the Tucker Act or the Indian Tucker Act because Plaintiffs failed to "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." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*").

B. Appellate Jurisdiction — The United States agrees with Plaintiffs' statement of appellate jurisdiction.

STATEMENT OF THE ISSUES

The issues in this case all relate to whether Plaintiffs' claims are barred by the United States' settlement of a class action brought by Indians alleging breaches of fiduciary duties by the United States, known as *Cobell*

v. Salazar, Nos. 08–5500, 08–5506 (D.D.C.) (the "*Cobell* litigation"). The *Cobell* Settlement Agreement resolved claims for, among other things, alleged "breach of trust and fiduciary mismanagement of land, oil, natural gas, mineral, [and other resources]," "known or unknown," that could have been asserted by September 30, 2009. A653-54, A658. The United States District Court for the District of Columbia approved the Settlement Agreement, and the United States Court of Appeals for the District of Columbia Circuit affirmed. *Cobell v. Salazar*, 679 F.3d 909, 913 (D.C. Cir. 2012) ("*Cobell XXIII*").

Plaintiffs claim in Count One that the United States committed breach of trust and fiduciary mismanagement of land, oil, natural gas, and other resources by approving leases of mineral rights on allotments they own at the Fort Berthold Reservation at below-market bonus and royalty rates. In Count Two, assuming that Count One is barred by the *Cobell* Settlement Agreement, Plaintiffs allege that the United States breached a fiduciary duty owed to them in settling the *Cobell* litigation, such that Plaintiffs' claims in Count One are revived. In Count Three, which is also pled in the alternative should Count One fail, Plaintiffs allege that Congress's authorization of the *Cobell* Settlement Agreement, through the Claims Resolution Act of 2010, was a legislative taking of their claims in

Count One for which they are entitled to compensation under the Fifth Amendment. The specific issues presented are:

1. Whether the *Cobell* Settlement Agreement bars Plaintiffs' claims in Count One.
2. In the alternative, whether in Count Two the Plaintiffs identified a substantive source of law that establishes specific fiduciary or other duties breached by the United States in entering the *Cobell* Settlement Agreement, such that the CFC had jurisdiction over Plaintiffs' claim.
3. In the alternative, whether Plaintiffs have stated a claim for a legislative taking of their claims alleged in Count One through Congress's enactment of the Claims Resolution Act of 2010, Pub. L. No. 111–291, 124 Stat. 3064 (Dec. 8, 2010) ("Claims Resolution Act"), where that Act did not prevent Plaintiffs from opting out of or objecting to the *Cobell* Settlement Agreement.

STATEMENT OF THE CASE

A. Statutory Background – Jurisdiction of the Court of Federal Claims over Indian Claims

Both the Tucker Act, 28 U.S.C. §§ 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, waive the United States' sovereign immunity for certain

claims. The Tucker Act gives the CFC "jurisdiction to render judgment upon any claim against the United States * * * for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Indian Tucker Act provides an Indian tribe, band, or other identifiable group of Indians essentially the "same access" to the CFC for monetary relief. *United States v. Mitchell*, 445 U.S. 535, 540 (1980) ("*Mitchell I*").

Indians asserting a non-contract 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, the [plaintiffs] 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" *Id*. (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*")). That "threshold" showing must be based on "specific rights-creating or duty-imposing [constitutional,] statutory or regulatory prescriptions" that establish "specific fiduciary or other duties" that the government allegedly has failed to fulfill. *Navajo I*, 537 U.S. at 506.

Second, "[i]f that threshold is passed," the plaintiffs must further show that "the relevant source of substantive law," the violation of which forms the basis of their claim, "'can fairly be interpreted as mandating

compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" *Navajo II*, 556 U.S. at 290-91 (quoting *Navajo I*, 537 U.S. at 506) (brackets omitted). That second showing reflects the understanding that not "all [such provisions conferring] substantive rights" mandate the award of money damages from the government "to redress their violation," and that the limited waivers of sovereign immunity in the Tucker Acts extend only to claims that the government has violated provisions that require payment of a damages remedy. *United States v. Testan*, 424 U.S. 392, 400 (1976).

B. Factual Background

1. The *Cobell* Litigation and Settlement

In 1996, Eloise Cobell and four other Indians filed in the D.C. District Court a class action on behalf of themselves and other Indians in which they alleged that United States officials had violated their fiduciary duties as trustees to individual Indians in managing "Individual Indian Money" ("IIM") trust accounts. *Cobell XXIII*, 679 F.3d at 913. The *Cobell* plaintiffs sought an accounting of the funds owed to them and other account beneficiaries. *Id*. The *Cobell* litigation proved contentious and lengthy. By 2006, the D.C. Circuit had heard nine appeals in six years, *see Cobell v. Kempthorne*, 455 F.3d 317, 319, 372 (D.C. Cir. 2006), and others followed.

Significant problems existed in reconciling the IIM accounts. The expense of a complete accounting would have been tremendous, with "an average cost of $3,000 to $3,500 for reconciliation of a single transaction." *Id*. Congress, however, had not appropriated the funds that the Department of the Interior had requested to carry out the accounting. *Id*.

Faced with these problems, and after 13 years of litigation, in the summer of 2009 the parties began settlement negotiations. *Cobell XXIII*, 679 F.3d at 914. By December 7, 2009, the parties entered into a proposed class settlement agreement. *Id*. The proposed agreement contemplated the filing of an amended complaint seeking recovery for two classes of claimants: (1) the "Historical Accounting Class," which consisted of individual beneficiaries who had IIM accounts between October 25, 1994, and September 30, 2009 (the "record date" of the proposed settlement) and on whose behalf the initial class claims were filed; and (2) the "Trust Administration Class," a new class, which included individuals who suffered losses from the United States' alleged mismanagement of their trust lands and non-monetary trust assets. A726-27, ¶¶ 43-52. Members of the Historical Accounting Class could not opt out of the Settlement Agreement. Members of the Trust Administration Class retained the right to opt out of the Settlement. A7.

Claims asserted by the Trust Administration Class included "Land Administration Claims," which, for purpose of the release, were defined as "known and unknown claims that could have been asserted through [September 30, 2009] for [the United States'] alleged breach of trust and fiduciary mismanagement of land, oil, natural gas, mineral, timber, grazing, water and other resources." A653-54, ¶ A.21; A655. Included in the Land Administration Claims were claims based on alleged "failure[s] to obtain fair market value for leases, easements, rights-of-way, or sales," and "[c]laims 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." A653, at ¶A.21. The estimated membership of the Trust Administration Class was in "excess of 300,000 individual Indians." A783, ¶ 37.

Congressional action was required in order to approve and to carry out the proposed Settlement Agreement. In December 2010, Congress enacted the Claims Resolution Act, Pub. L. No. 111–291, 124 Stat. 3064 (Dec. 8, 2010), which "authorized, ratified, and confirmed" the proposed settlement. The Act conferred upon the D.C. District Court jurisdiction to certify the two proposed classes and approve the proposed Settlement Agreement. The Act also exempted the Trust Administration Class from the

certification requirements of Fed. R. Civ. P. 23. Finally, the Act increased the settlement amount for the Trust Administration Class by $100 million and exempted all settlement payments from federal taxation. *Cobell XXIII*, 679 F.3d at 434.

On December 21, 2010, the *Cobell* plaintiffs filed an amended complaint in the D.C. District Court alleging, *inter alia*, Land Administration Claims. Also on that date, the D.C. District Court granted preliminary approval to the Settlement Agreement. A9. The court's order gave class members who wanted to opt-out of the Trust Administration Class 120 days, or until April 20, 2011, to postmark their opt-out or objection forms. *Id*. Ultimately, the Claims Administrator received 1,826 timely notices from members of the Trust Administration Class opting out of the *Cobell* Settlement Agreement, and an additional 39 late notices, for a total of 1,865. A9. On July 27, 2011, after holding a hearing to consider objections to the settlement, the District Court finally certified both the Historical Accounting Class and the Trust Administration Class and approved the Settlement.

The proposed *Cobell* Settlement Agreement provided for payment by the United States of $1.5 billion into a settlement fund.[1] Each member of the Historical Accounting Class would receive a payment of $1,000. *Cobell XXIII*, 679 F.3d at 914. The Trust Administration Class members would receive a minimum projected payment of $800, and would be entitled to an additional pro rata share of the remaining settlement funds under a formula set forth in the Settlement Agreement. *Id*. at 915.

The Settlement provided that on becoming effective, the members of the Trust Administration Class who did not 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 and/or causes of action that were, or should have been, asserted in the Amended Complaint when it was filed * * * by reason of, or with respect to, or in connection with, or which arise out of, matters stated in the Amended Complaint for Funds Administration Claims or Land Administration Claims that [they] have against [the United States]." A696.

As noted above, the D.C. District Court found that the proposed *Cobell* Settlement Agreement was "fair, reasonable, and adequate." *Cobell*

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[1] An additional $1.9 billion was approved to be used by the Secretary to buy back highly fractionated land interests. *Cobell XXIII*, 679 F.3d at 915.

XXIII, 679 F.3d at 434. The D.C. Circuit affirmed. *Id*. The Settlement Agreement became effective on November 24, 2012, when the time for all possible appeals had passed. A10. Since that time, payments to members of both classes have been made from the Settlement Fund.

2. The Litigation of Plaintiffs' Claims in the Court of Federal Claims

Two Shields is a member of the Three Affiliated Tribes in North Dakota, and Defender Wilson is a member of the Standing Rock Sioux Tribe. A42. Both own allotments located in the Fort Berthold Indian Reservation in western North Dakota that may contain valuable oil and gas deposits. *Id*. Plaintiffs are members of both the Historical Accounting Class and the Trust Administration Class under the *Cobell* Settlement framework, and neither opted out of the Trust Administration Class. A16. As *Cobell* class members, Plaintiffs were entitled to receive payments for the settlement of any Trust Administration Claims and for any Historical Accounting Claims as well. Plaintiffs have never alleged that they did not receive their payments under the *Cobell* Settlement Agreement.[2]

[2] Because the process of distributing the *Cobell* settlement payments had just begun when Plaintiffs filed their complaint, evidence showing receipt of payments by Plaintiffs was not part of the record before the CFC. If the Court requests proof, the United States can provide records showing the amounts received by Plaintiffs from the *Cobell* Settlement Fund.

Plaintiffs filed the Complaint in this case in February 2013, on behalf of themselves and others owning allotments on the Fort Berthold Reservation who entered into leases for oil and gas development between January 1, 2006, and November 1, 2010, and whose leases were acquired by the Williams Companies. A68, ¶ 123. In the Complaint, Plaintiffs allege that Plaintiff Two Shields entered into a lease of the mineral rights on her allotment with Zenergy Properties LLC ("Zenergy") that BIA approved on December 19, 2007, even though the lease payments were allegedly below market rate. A62, ¶ 103.[3] Plaintiffs allege that Zenergy assigned the lease to a company identified as Dakota-3 E & P, and that BIA approved the assignment on April 28, 2009. *Id.* Plaintiffs Two Shields and Defender Wilson share ownership of another allotment at the Fort Berthold Reservation, and they allege that BIA approved a lease of the mineral rights in this allotment to Zenergy on February 24, 2008, despite the payment terms being allegedly below market rates. *Id.* ¶ 104. BIA allegedly approved Zenergy's transfer of this lease to Dakota-3 E&P on April 21, 2009. *Id.* In

[3] As the CFC resolved this case on motions for summary judgment and to dismiss, we treat Plaintiffs' allegations as true. The CFC noted, however, that "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." A4 n.9. We in no way concede any breach of any fiduciary duty owed to Plaintiffs.

November 2010, a corporation known as the Williams Cos., Inc. (the "Williams Companies") acquired Dakota-3 and all its assets, including the oil and gas leases for the allotments owned by Plaintiffs for a sum of $925 million. A64-65, ¶¶ 112-113.

In Count One of their Complaint, Plaintiffs allege that BIA violated its fiduciary obligations under 25 U.S.C. § 396, which gives BIA "the right to reject all bids [for leases] whenever in [its] judgment the interests of the Indians will be served by so doing." Plaintiffs claim that BIA failed to serve their best interests by approving those leases, for which they allege the royalty and bonus payments provisions were at less than fair market value. A66-67, ¶¶ 118-19.

Plaintiffs pled Counts Two and Three as alternatives if Count One was held to be barred by the *Cobell* Settlement Agreement. A80, ¶ 162; A83, ¶ 181. In Count Two, Plaintiffs alleged that before entering into the *Cobell* Settlement Agreement, the United States had "an absolute fiduciary duty to disclose to the *Cobell* class the potential liability associated with BIA's oil and gas approval activity for allottees on the Fort Berthold Reservation, if it wished to include them in the *Cobell* litigation." A82-83, ¶ 175. Plaintiffs claim that the United States breached this alleged fiduciary duty by not providing any such disclosure "to the *Cobell* class counsel." A83, ¶ 176. As a

result, Plaintiffs claim that they can seek damages for the claims alleged in Count One. In Count Three, Plaintiffs allege that Congress's enactment of the Claims Resolution Act constituted a legislative taking of Plaintiffs' claims in Count One without compensation in violation of the Fifth Amendment to the Constitution. A84, ¶¶ 183-188.

The United States moved for summary judgment on Count One and to dismiss Counts Two and Three. The United States argued that Count One was barred by the *Cobell* Settlement Agreement's release of Land Administration Claims. The United States maintained that the CFC lacked jurisdiction over Count Two because Plaintiffs could not identify a specific statutory basis for the fiduciary duty allegedly breached. The United States asserted that Count Three failed to state a claim upon which relief could be granted because Congress had not taken a vested property right that was held by Plaintiffs and protected by the Fifth Amendment.

As part of their opposition, Plaintiffs moved for discovery regarding whether the *Cobell* Settlement Agreement barred their claims. A11, A21-22. Plaintiffs described the discovery they needed as including (1) "information related to the Government's awareness or knowledge prior to September 30, 2009, and December 10, 2010" of Plaintiffs' claims, (2) "information related to the *Cobell* payment methodology and any payments to be made

to Two Shields's class members under the *Cobell* settlement," (3) "information in the Government's possession related to the value of the Two Shields's 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." A154-55. The United States opposed the motion for discovery, stating that the language of the *Cobell* Settlement Agreement was unambiguous, and therefore discovery could not produce relevant evidence to alter the meaning of that Agreement. A22.

The CFC granted summary judgment on Count One. The CFC found that Plaintiffs were members of the Trust Administration Class and that they had not opted out of the *Cobell* Settlement Agreement. A16. The CFC held that Plaintiffs' Count One claims were "Land Administration Claims" discharged by the *Cobell* Settlement Agreement. A17. It found no merit in Plaintiffs' argument that discovery was required to clarify the meaning of the *Cobell* Settlement Agreement, and denied Plaintiffs' request for discovery as "futile." A23-24.

The CFC also granted the United States' motion to dismiss Count Two for lack of jurisdiction. The court held that Plaintiffs failed to identify "some federal source of law [that] creates a duty" to disclose possible Land

Administration claims to the *Cobell* class members or class counsel. A25-26.

The Court dismissed Count Three for failure to state a claim. The CFC ruled that Plaintiffs failed to allege a cognizable property interest that had been taken because a breach of fiduciary duty cannot be a property right until a final unreviewable judgment is obtained. A28 (citing *Bowers v. Whitman*, 671 F.3d 905, 913-14 (9th Cir. 2012)). The CFC further held that Plaintiffs could not establish that a taking occurred, because members of the Trust Administration Class "had been given fair and adequate notice of their opportunity to opt of the Settlement Agreement" to preserve their claims and had failed to do so. A28 (citing *Cobell XXIII*, 679 F.3d at 922-24).

This appeal followed.

SUMMARY OF ARGUMENT

No matter how Plaintiffs phrase it, their goal is to undo the *Cobell* Settlement Agreement. Plaintiffs do not challenge the CFC's conclusions that they were members of the Trust Administration Class, that they received notice of the proposed *Cobell* Settlement Agreement, and that they did not opt out of the Settlement Agreement. As members of that class (and the Historical Accounting Class as well), Plaintiffs received the funds due them under the *Cobell* Settlement Agreement. The United States lived up to

its part of the *Cobell* Settlement Agreement, and that should be the end of Plaintiffs' claims.

Undeterred, Plaintiffs argue in their brief that the *Cobell* Settlement Agreement does not apply to their claims in Count One, but they fail to identify any textual ambiguity in the Settlement Agreement showing a reservation of these claims. Plaintiffs seek a remand to take discovery in hopes of finding evidence of such ambiguity. Hope is not enough to justify discovery, and Plaintiffs fail to provide any factual predicate to show that the information they seek exists. In any event, the lack of ambiguity in the text of the *Cobell* Settlement Agreement would make any such evidence (assuming it exists) inadmissible.

Plaintiffs' alternative claim in Count Two fares no better. In Count Two, Plaintiffs assert that if the Settlement Agreement does apply to them, then the Agreement breached a separate fiduciary duty to disclose information regarding Plaintiffs' claims in Count One that brings back to life the very claims the Agreement resolved. Plaintiffs fail to show any substantive source of law that establishes specific fiduciary or other duty to make such disclosures. The extensive notice program and right to opt out afforded to absent class members define the extent of the parties' obligations in settling the *Cobell* litigation. The D.C. District Court and the

D.C. Circuit both concluded that these protections had been afforded to class members. Moreover, Plaintiffs claim the United States has an obligation to provide disclosures on an individual basis, making settlement with hundreds of thousands of class members impossible. No reason exists to impose such a duty on the United States when it must resolve many competing interests, including that of hundreds of thousands of other Indians who favored the *Cobell* Settlement.

Count Three fails because Congress took nothing from Plaintiffs in the Claims Resolution Act. Plaintiffs retained the right to opt out of the Cobell Settlement Agreement and retain their claims in Count One. Additionally, Plaintiffs lacked a protected property interest in their unlitigated Count One claims that had not been reduced to judgment.

What is apparent is that Plaintiffs regret their decision to participate in the *Cobell* Settlement. Having chosen not to opt out of the Settlement Agreement, they now believe the amounts they received in settlement of their claims to be too little. Whether correct or not, that belief provides no basis for undoing a settlement that resolved an enormously difficult lawsuit, cost the United States billions, and provided valuable payments to hundreds of thousands of Indians. There are always dissatisfied class members in a class-action settlement. But their remedy is to opt out or

object. Plaintiffs did neither. The CFC correctly entered judgment for the United States.

STANDARD OF REVIEW

This Court reviews a summary judgment entered by the Court of Federal Claims "completely and independently, construing the facts in the light most favorable to the non-moving party." *Am. Airlines, Inc. v. United States*, 204 F.3d 1103, 1108 (Fed. Cir. 2000).

This Court reviews "*de novo* the Court of Federal Claims' dismissal of a claim for lack of jurisdiction." *Holmes v. United States*, 657 F.3d 1303, 1309 (Fed. Cir. 2011). Similarly, the Court reviews *de novo* the "dismissal of a case for failure to state a claim for which relief can be granted." *Hartford Fire Ins. Co. v. United States*, 772 F.3d 1281, 1284 (Fed. Cir. 2014).

In interpreting the *Cobell* Settlement Agreement, this Court treats the Agreement as a contract. *VanDesande v. United States*, 673 F.3d 1342, 1351 (Fed. Cir. 2012). This Court holds that"[t]he proper interpretation of a contract is a question of law." *Landmark Land Co. v. FDIC*, 256 F.3d 1365, 1373 (Fed. Cir. 2001).

ARGUMENT

I. The *Cobell* Settlement Agreement Bars Plaintiffs' Claims in Count One.

A. As Members of the *Cobell* Trust Administration Class, Plaintiffs Are Bound by the Settlement of that Class's Claims.

"[U]nder 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). The binding effect of a class judgment is the same when the judgment is pursuant to a settlement agreement. *See Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 378 (1996). Unnamed members of a class are bound "even though they are not parties to the suit." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011); *see also In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001). Under the doctrine of res judicata, class members are bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *C.I.R. v. Sunnen*, 333 U.S. 591, 597 (1948).

The terms of releases in the *Cobell* Settlement Agreement are broad and clear. That Agreement releases "known and unknown" Land Administration Claims that could have been asserted as of September 30,

2009. A686. "Land Administration Claims" include claims for "[f]ailure to obtain fair market value for leases" and for "[f]ailure to prudently negotiate leases." A.653.

Plaintiffs never claim that the class notice or the *Cobell* settlement was deficient, they did not receive notice of the proposed *Cobell* Settlement Agreement or that they did not know of their right to opt out of the Trust Administration Class. Plaintiffs chose not to opt out of the proposed Settlement Agreement. They do not claim the United States has breached its obligations under the *Cobell* Settlement Agreement to pay them the amounts they were entitled to receive.

Nevertheless, Plaintiffs argue that despite getting the benefits of the *Cobell* Settlement Agreement, they are not bound by that Agreement. Rather, Plaintiffs maintain that with discovery they might be able to show that the broad language of the Agreement does not include their claims. While not pointing to any ambiguity in the Agreement, Plaintiffs still contend that the Agreement contains anomalies allowing an inference that Plaintiffs' claims were not covered by the Agreement. Plaintiffs' claim in substance is that the *Cobell* Settlement Agreement contains "latent" ambiguities (although plaintiffs fail to acknowledge this fact). *Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 93 (3d Cir. 2001) ("latent

ambiguity arises from extraneous or collateral facts which make the meaning of a written agreement uncertain although the language thereof, on its face, appears clear and unambiguous") (internal quotation marks and citation omitted).

However, Plaintiffs cannot show that they are entitled to relief under Rule 56(d), which requires that

> the non-movant must by affidavit and supporting papers: (1) specify the particular factual discovery being sought, (2) explain how the results of the discovery are reasonably expected to engender a genuine issue of material fact, (3) provide an adequate factual predicate for the belief that there are discoverable facts sufficient to raise a genuine and material issue, (4) recite the efforts previously made to obtain those facts, and (5) show good grounds for the failure to have discovered the essential facts sooner.

Thiesen Vending Co. v. United States, 58 Fed. Cl. 194, 198 (2003). Plaintiffs also have to show that the requested information is "relevant and necessary" to oppose the motion. *Paalan v. United States*, 57 Fed. Cl. 15, 18 (2003).

As we show, the CFC correctly denied the request for discovery as "futile," explaining that that "none of [the information sought by Plaintiffs] is likely to raise any material issue of fact." A24. Additionally, Plaintiffs have provided no "factual predicate" showing that relevant and admissible information could be obtained through the discovery they seek. And any

concern that the Cobell Settlement Agreement was ambiguous should have been raised as an objection to approval of the Agreement.

B. Plaintiffs Have Not Shown an Ambiguity Justifying Discovery Given the Clear Language of the *Cobell* Settlement Agreement.

1. There Is No Automatic Right to Discovery into the Formation of a Contract Absent a Showing of Ambiguity.

Plaintiffs first argue that it is always proper to take discovery concerning the circumstances surrounding formation of a contract. Plaintiffs state that "objective surrounding circumstances [concerning formation of a contract] must be considered *before* determining whether the contract is unambiguous, not afterward. This principal is universal." Plaintiffs' Brief at 16 (emphasis in original).

In rejecting this argument, the CFC stated "Plaintiffs' disregard for Federal Circuit precedent is truly striking." A24. As the CFC recognized, this Court has repeatedly held that if the terms of a contract are clear and unambiguous, a court should not consider extrinsic evidence to vary those terms. *See*, *e.g.*, *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (en banc) (holding that a party "cannot rely on extrinsic evidence to interpret the phrases [in a contract] to contradict the plain language of the Agreement"); *Landmark Land Co.*, 256 F.3d at 1373 ("Because the Agreement's provisions are clear and unambiguous, they

must be given their plain and ordinary meaning.") (internal citations and quotation marks omitted). A party is not entitled to discovery in the hope of showing an ambiguity where none exists in the written agreement. *See City of Tacoma v. United States*, 31 F.3d 1130, 1134 (Fed. Cir. 1994) ("Outside evidence may not be brought in to create an ambiguity where the language is clear.").

Indeed, this principle is recognized in cases cited by Plaintiffs. For example, in *Imprimis Investors LLC v. United States*, 83 Fed. Cl. 46, 61-62 (Fed. Cl. 2008) (cited in Plaintiffs' Brief at 17), the CFC stated that "[t]he general rule is that extrinsic evidence will not be received to change the terms of a contract that is clear on its face, [but would be allowed] if a contract is found to be uncertain or ambiguous."

Where an ambiguity can be shown, discovery may be appropriate. In *Rockies Express Pipeline LLC v. Salazar*, 730 F.3d 1330 (Fed. Cir. 2013) (cited in Plaintiffs' Brief at 19-20), a disputed contract provision allowed the Department of the Interior to terminate a contract if "directed * * * by a change in * * * Federal or State Policy." *Id.* at 1334. The phrase "change in Federal or State Policy" was not defined in the contract, unlike the key terms of the *Cobell* Settlement Agreement, and the Court found the dictionary

definition unhelpful. *Id*. Accordingly, the Court looked to the history of contract negotiations to determine the meaning of the disputed phrase. *Id*. Plaintiffs' inability to identify a single important ambiguous phrase in the *Cobell* Settlement Agreement makes *Rockies Express Pipeline* irrelevant here.

This Court has also recognized an exception to the bar on the use of extrinsic evidence where a party contends that a term in a contract has a special meaning within an industry or trade ("trade practice"). As noted by one of the cases cited by Plaintiffs, however, this Court has expressed caution even as to the use of extrinsic evidence of a trade practice. *Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 751-52 (Fed. Cir. 1999) (cited in Plaintiffs' Brief at 17) (holding that evidence of trade practice cannot be used "to create an ambiguity where a contract was not reasonably susceptible of differing interpretations at the time of contracting"). But Plaintiffs do not claim that any of the terms in the *Cobell* Settlement Agreement can be defined by reference to trade practices. All the crucial terms in the *Cobell* Settlement Agreement, such as "Trust Administration Class" or "Land Administration Claims," are carefully defined or explained. Accordingly, even if

something akin to a trade practice existed, it could not countermand the plain language of the *Cobell* Settlement Agreement. *See R.B. Wright Const. Co. Through Rembrant, Inc. v. United States*, 919 F.2d 1569, 1572 (Fed. Cir. 1990) ("Neither a contractor's belief nor contrary customary practice, however, can make an unambiguous contract provision ambiguous, or justify a departure from its terms.").

Plaintiffs' claim that there is "universal" agreement to allow discovery concerning contract formation is contradicted by this Court's decisions. The CFC appropriately rejected the argument below.

2. Two Shields's Claims Accrued Before the September 30, 2009 Settlement Cutoff Date.

Implicitly relying on the latent-ambiguity doctrine, Plaintiffs assert that discovery is justified here because of an alleged ambiguity concerning whether the *Cobell* Settlement Agreement bars their claims. Plaintiffs assert that their claims are outside the period of the *Cobell* release for "Land Administration Claims." The release applies to claims "known and unknown that have been or could have been brought through the Record Date [of September 30, 2009]." A653. Plaintiffs assert that their claims could not have been brought until November 2010, when Dakota-3 E & P was acquired by the Williams Companies "for almost $1 billion." Plaintiffs' Brief at 24-25; A40, ¶ 11; A65, ¶ 113.

A claim against the United States first accrues on the date when all the events have occurred that fix the liability of the government and entitle the claimant to institute the action. *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988). A breach-of-trust claim brought by an individual Indian or an Indian tribe, band, or representative group accrues when the United States "repudiates" the trust. *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("*Shoshone II*"). The trustee may repudiate the trust by taking actions inconsistent with his responsibilities as a trustee or by express words. *Jones v. United States*, 801 F.2d 1334, 1336 (Fed. Cir. 1986).

Plaintiffs allege that BIA breached its trust responsibility by approving mineral leases on their allotments at rates below existing market prices. A65, ¶ 114; A75, ¶ 135; A78, ¶ 154; A78-79, ¶ 155. The Complaint alleges that BIA's actions with respect to the leases occurred before September 30, 2009. The Complaint states that on December 19, 2007, the BIA approved a lease of the mineral resources on an allotment owned by Plaintiff Two Shields with Zenergy. A62, ¶ 103. On April 28, 2009, BIA approved Zenergy's assignment of this lease to Dakota-3 E&P. *Id*. The Complaint also states that Plaintiffs Two Shields and Defender Wilson jointly own another allotment, and that BIA approved an oil and gas lease

with Zenergy on February 24, 2008. *Id.* ¶ 104. On April 21, 2009, BIA approved an assignment of this lease from Zenergy to Dakota-3 E&P. *Id.*

Plaintiffs also allege that BIA approved these leases at rates below existing market prices at the time. A65, ¶ 114; A75, ¶ 135; A78, ¶ 154; A78-79, ¶ 155. If true, then Plaintiffs could have sued the United States the day after approval of the leases for the difference between the lease rates and bonuses and market rates. As BIA's last actions with respect to the leases were to approve their assignment from Zenergy to Dakota-3 E&P on April 21, 2009 and April 28, 2009, the April 28, 2009 date is the latest one that might have generated a claim by Plaintiffs. Plaintiffs' claims accrued months before the September 30, 2009 cutoff date for Land Administration Claims resolved by the *Cobell* Settlement Agreement.

Because Plaintiffs could have brought suit before September 30, 2009, Plaintiffs are not helped by the cases they cite to define when a cause of action accrues. *See Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993) ("It is hornbook law that a claim does not accrue until all events necessary to fix the liability of the defendant have occurred—when the plaintiff has a legal right to maintain his or her action.") (citations omitted) (cited in Plaintiffs' Brief at 25); *Nager Elec. Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966) ("First 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.").

Plaintiffs assert in their brief that they only had "'claims' when in November 2010 the Williams Companies acquired Dakota-3 E & P, the company holding their leases, for about one billion dollars." Plaintiffs' Brief at 24-25. But Plaintiffs offer no coherent explanation for why this transaction is relevant to the accrual of their claims. Plaintiffs do not allege that BIA had approval authority over the Williams Companies' acquisition of the Dakota-3 company; BIA lacks the authority to approve the acquisition of one company by another.

Plaintiffs seem to assert (their reasoning is unclear) that they had to know of their claims by September 9, 2009, for the *Cobell* Settlement Agreement to apply, and that they gained this knowledge only when the Williams Companies acquired Dakota-3 E&P. Plaintiffs' Brief at 25-26. And while not cited in Plaintiffs' opening brief, Plaintiffs implicitly rely on this Court's decision in *Shoshone II*, held that for statute-of-limitations purposes an Indian Tribe's claim does not accrue until it has some knowledge of the Government's repudiation of a trust relationship. 364 F.3d at 1348.

Plaintiffs' argument ignores the release language in the *Cobell* Settlement Agreement stating that it releases Land Management Claims that are "known and unknown." A653-54, ¶ A.21. To ignore the word "unknown" is to ignore the requirement that a contract must be construed "in a manner that gives meaning to all of its provisions and makes sense." *Hughes Comm's Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993). Certainly parties can and do routinely waive "unknown claims." *In re Managed Care*, 756 F.3d 1222, 1238 (11th Cir. 2014); *CIC Property Owners v. Marsh USA Inc.*, 460 F.3d 670, 672-73 (5th Cir. 2006). Nor does this Court's decision in *Shoshone II* prevent application of the "known and unknown" phrase in the *Cobell* Settlement Agreement. *Shoshone II* determined when a claim accrued for statute of limitations purposes, not when the claim could have been first brought. Even assuming a knowledge requirement exists, it could be waived for purposes of the *Cobell* Settlement Agreement. Finally, Plaintiffs could have objected to the inclusion of "unknown claims" in the *Cobell* Settlement Agreement, but did not do so.

Even absent the plain language of the *Cobell* Settlement Agreement, plaintiffs need not know they are injured for their claim to accrue, as this Court confirmed in *Catawba Indian Tribe*, 982 F.2d at 1570. Plaintiffs' Brief at 25. This Court held that any claim the tribe had concerning harm

from legislation terminating its trust relationship with the United States accrued on the effective date of the legislation, and not years later when the tribe realized the effect of that legislation on land claims it wished to pursue. *Id*. Plaintiffs here make essentially the same argument that this Court rejected in *Catawba Indian Tribe* by claiming that only when the Williams Companies purchased Dakota-3 E&P did they realize that they had been injured through BIA's earlier approval of their leases. Plaintiffs should be held to the same standard for accrual of their claims as in *Catawba Indian Tribe*. As explained by this Court, "We have 'soundly rejected' the notion 'that the filing of a lawsuit can be postponed until the full extent of the damage is known.'" *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1354 (Fed. Cir. 2011) (citation omitted).

Further demonstrating the failure of Plaintiffs' argument is the decision by the predecessor to this Court in *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1047 (Ct. Cl. 1976). In construing the scope of a release that only applied to claims existing as of a certain date, the court held that "[p]laintiff 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 facts of *Johnson* are close to those in this case. At issue were cost overruns in constructing a military base in Greenland.

Plaintiffs entered into an agreement releasing "as of December 31, 1962, * * * 'all claims' which the contractor and its agents 'now have.'" *Id*. at 1037. Plaintiffs claimed the release did not apply to claims for which the total amount of costs could not be known until 1963. *Id*. The Court disagreed, noting "plaintiff knew all about the present claims except the total of the costs for which claim would be made." *Id*. Accordingly, Plaintiffs here cannot argue that they had to have full knowledge of their damages for their claims to have accrued.

Finally, the allegations in Plaintiffs' Complaint show that they knew or should have known of their claims long before September 30, 2009. Plaintiffs have admitted that they had knowledge of allegations that leases for allotments on the Fort Berthold Reservation were being approved at less than market rates. Indeed, the Complaint states that "[o]n March 26, 2008, the Elders Organization"—which plaintiff Two Shields served as Secretary-Treasurer (A70, ¶ 137(b))—"sent letters to The Office of Services and Trust for American Indians and again to the Attorney General" discussing "outrage" over leasing on the reservation. A60, ¶ 95. Plaintiffs also claims that a tribal lease "was not for fair market value, as later events confirmed before its final approval in January 2008." A57, ¶ 82. In December 2006, the Tribal Council was warned that "small companies would attempt to lock

up leases for less than fair market value." A57, ¶ 84. This fact was purportedly confirmed in February 2007. A57, ¶ 85. "By December 2007, Nagel [a tribal employee] had sent numerous letters and reports to various United States officials regarding the conspiracy he believed to be afoot." A58, ¶ 89. By March 2008, "[t]ribal members at the Fort Berthold Reservation warned the BIA about what the real market value was." A59, ¶ 91. Valuations of plaintiffs' leases that "vastly exceeded the lease rates being presented to the BIA for approval" (*id.*) were "distributed and widely discussed at the Reservation" in March 2008. A58, ¶ 92. There was even a Senate hearing pertaining to oil and gas leasing on the Fort Berthold Reservation held in May 2008. A61, ¶ 99. In light of their allegations, Plaintiffs admit they had reason to know of their claims prior to September 9, 2009.

Plaintiffs' argument that their claims had not accrued as of the Record Date of the *Cobell* Settlement Agreement is refuted by the decisions of this Court and their own admissions as to what they knew before September 3, 2009. The CFC correctly granted the United States summary judgment on this claim.

3. The *Cobell* "Payment Mechanics" Do Not Create an Ambiguity Concerning Application of the *Cobell* Release to Plaintiffs' Claims.

Plaintiffs argue that the payment provisions in the *Cobell* Settlement Agreement create an ambiguity concerning whether the Agreement applies to Plaintiffs' claims. Plaintiffs' Brief at 30-31. The Agreement gave every Trust Administration class member a payment of $800, and "an additional pro rata payment based on the amount of money that was deposited in [the class member's] IIM account from October 1, 1985 through September 30, 2009." Plaintiffs' Brief at 30 (citing A30) (emphasis omitted). Plaintiffs complain that this "formula makes no sense as applied to Two Shields's claims," and that these claims were worth much more. Plaintiffs' Brief at 30 (citing A317). Plaintiffs assert that holding them to the terms of the *Cobell* Settlement Agreement means that they "waived their claims *for nothing*." Plaintiffs' Brief at 31 (emphasis in original).

This statement is not true, as the quoted sentences from Plaintiffs' brief show. Plaintiffs are entitled to payments under the *Cobell* Settlement Agreement. Plaintiffs also incorrectly state the amounts to be received through the pro rata payments. Plaintiffs claim that "at best, the nearly 497,000 members that make up the *Cobell* Trust Administration class *will receive only* $1,600.00 in pro rata payments," and cite a declaration from one of their purported experts in support. Plaintiffs' Brief at 30 (citing

A198, ¶ 39 (Declaration of Jim Parris)) (emphasis added). In fact, the statement of the expert is quite different; he asserts that the pro rata payments "would *average* nearly $1,600 per class member."A198, ¶ 39. (emphasis added). This is a very different statement than asserting that all class members will receive at most $1,600 in pro rata payments.

Plaintiffs may *now* be dissatisfied with the amounts they received from the *Cobell* Settlement Agreement. But in response to the notice of the *Cobell* Settlement, Plaintiffs chose to take those amounts instead of opting out of the Trust Administration Class and taking their chances with litigation. Had Plaintiffs' dissatisfaction with the Settlement amounts been expressed in a timely manner, Plaintiffs could have challenged the fairness of the *Cobell* Settlement Agreement, or opted out of the Trust Administration Class altogether. Others objected to the fairness of the payments under the Settlement Agreement in the D.C. District Court and on appeal to the D.C. Circuit, and in an unsuccessful petition to the Supreme Court. As the D.C. Circuit noted, one objector argued that "the Trust Administration Class's distribution scheme is unfair under Federal Rule of Civil Procedure 23(e) 'because it bears no relation to the underlying claims and perversely undervalues the claims of the most injured class members while providing windfalls to class members who have suffered

little or no injury.'" *Cobell XXIII*, 679 F.3d at 918-19 (quoting Appellant Kimberly Craven's Brief at 23).

The D.C. Circuit affirmed the fairness of the payments under the Settlement Agreement, noting that the D.C. District Court had "found, however, [that] the distribution scheme is fair, and '[i]t is hard to see how there [c]ould be a better result,' because [appellant] Craven offers no persuasive evidence to support her claim of unfair compensation." *Cobell XXIII*, 679 F.3d at 910 (quoting the Transcript of the Fairness Hearing at 219). The D.C. Circuit also found the payments fair because individuals dissatisfied with the payments could opt out of the Trust Management Claims and preserve their claims: "the existence of the opt-out alternative effectively negates any inference that those who did not exercise that option considered the settlement unfair." *Id.* at 920.

Plaintiffs here chose not to opt out. They are bound by the D.C. Circuit's affirmance of the district court's finding that the payment amounts were fair. Plaintiffs' more recent dissatisfaction with Settlement payments cannot allow them to evade the results of their participation in the *Cobell* Settlement Agreement.

4. The United States Provided All Necessary Information Relating to the Settlement for the Courts to Conclude that the Settlement Was Fair, Adequate, and Appropriate.

Plaintiffs next argue that the *Cobell* Settlement Agreement was ambiguous because the United States had not disclosed "detailed information" about Plaintiffs' claims to the *Cobell* class or class counsel. Plaintiffs' Brief at 32. There is no difference between this argument, and the claim made in Count Two, which asserts that the United States breached a fiduciary duty to provide detailed information about potential claims Plaintiffs might have had. Plaintiffs' Brief at 39-50.

The United States follows the CFC's treatment of the arguments (A24), and addresses both in its response to Plaintiffs' defense of Count Two. Any contention that the United States had a fiduciary duty to disclose information as part of the *Cobell* Settlement Agreement should have been raised as an objection to the fairness of that Agreement. The judicial approval of that Settlement Agreement bars any attempt to do so now.

5. The Named *Cobell* Plaintiffs Had Standing to Settle Plaintiffs' Claims.

Plaintiffs' final claim of ambiguity in the *Cobell* Settlement Agreement is their assertion that the named *Cobell* plaintiffs lacked Article III standing to assert Land Administration Claims on their behalf, and

therefore the Agreement could not have resolved their claims. Plaintiffs' Brief at 34-45.

For Article III purposes, a party establishes standing by alleging "specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 507-08 (1975). Plaintiffs do not dispute that the named plaintiffs in *Cobell* met this requirement. *See* A768, ¶¶ 8-11 (allegations in *Cobell* Amended Complaint by named plaintiffs that they suffered "losses from mismanagement of [their] trust funds and assets").

The standing requirement does not require the representative plaintiffs in a class action to show that they could have brought all the possible claims of the absent class members. Rather, representative plaintiffs must show under Fed. R. Civ. P. 23 that they have sufficient connection to the claims of class members and lack conflicts with those claims. Justice Souter, citing leading class-action treatises, explained this distinction in his concurrence in *Lewis v. Casey*:

> [Unnamed plaintiffs] need not make any individual showing of standing [to obtain relief], because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court. Whether or not the named plaintiff who meets individual standing requirements may assert the

> rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions.

518 U.S. 343, 395-96 (1996) (Souter, J., concurring in part and dissenting in part) (citations omitted).

Plaintiffs' argument here should have been raised during the approval process of the *Cobell* Settlement Agreement. Indeed, in the context of a due-process argument, it was raised and rejected in that process. The D.C. Circuit ruled that "[a]lthough [appellant] Craven characterizes the [Trust Administration] Class as 'sprawling' and encompassing 'dozens of wildly different theories of liability,' * * * all of the class members' trust claims revolve around resolution of a single issue—the extent of the Secretary's fiduciary obligation as trustee of the IIM accounts." *Cobell XXIII*, 679 F.3d at 922.

Plaintiffs fail to show a lack of connection, or a conflict, between the *Cobell* representative plaintiffs and Indians owning allotments at Fort Berthold. Plaintiffs argue that none of the representative *Cobell* plaintiffs could have alleged a claim under what Plaintiffs call the "Fort Berthold Act," Pub. L. 105-188. Plaintiffs' Brief at 36. Plaintiffs assert that this statute "imposes special duties on the United States specific to its management of Fort Berthold oil-and-gas interests." *Id.* Plaintiffs, however, never explain what "special duties" are imposed by the Act. Both Section

396 and the Fort Berthold Act (which amended Section 396) impose a "best interests of the Indians" standard for approval of mineral leases. *See* 25 U.S.C. § 396 ("The Secretary of the Interior shall have the right to reject all bids [for mineral leases] whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale."); Fort Berthold Act, PL 105–188, § 1(a)(2)(A) ("The Secretary may approve any mineral lease or agreement that affects individually owned Indian land, if * * * (ii) the Secretary determines that approving the lease or agreement is in the best interest of the Indian owners of the Indian land.").

The purpose of the Fort Berthold Act was more mundane than Plaintiffs believe. The Act facilitated allotment mineral-rights leasing by allowing the leases to go forward with approval by a majority of the holders of undivided rights (as opposed to all of the holders of such rights) in those allotments. S. Rep. No. 105-205, at 6.[4]

Plainly, the *Cobell* plaintiffs brought claims for alleged approval of mineral leases of allotments at below-market rates, as have Plaintiffs in

[4] Section 1(a)(4) of the Fort Berthold Act provides: "Public auction or advertised sale not required.—It shall not be a requirement for the approval or execution of a lease or agreement under this subsection that the lease or agreement be offered for sale through a public auction or advertised sale." Notwithstanding this provision, BIA held a widely advertised competitive lease sale in 2007 because it was in the "best interest" of the allottees. *See supra* note 3.

Count One. *See* A705; A712; A716. The overlap in claims makes this case quite different from those cited in Plaintiffs' Brief to show a lack of standing. Plaintiffs' Brief at 35-36 (citing *Lewis*, 518 U.S. at 357-58 (where only injury in suit alleging inadequate legal resources at prison was to illiterate or non-English speaking prisoners, literate English-speaking plaintiffs could not pursue relief given different needs of classes); *Blum v. Yaretsky*, 457 U.S. 991, 1001-02 (1982) (Medicare patients alleged injury from procedures used to discharge them from nursing home or to transfer them from nursing home to facility providing *lower* levels of care or from discharge from nursing home lacked standing to challenge procedure for transfers to *higher* levels of care because named plaintiffs had never suffered and were not at risk for such a transfer, and because issues raised by a transfer from a lower level of care to a higher level "are sufficiently different from those which respondents do have standing to challenge")).[5] The named *Cobell* plaintiffs asserted Land Management Claims that do not differ in any significant way from those Plaintiffs alleged in Count One. The

[5] The remaining case cited by Plaintiffs, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222-23 (1974), is irrelevant as it merely stands for the proposition that something more than citizen status was required to have a "concrete injury" creating standing to raise "Incompatibility Clause" objection to military reservists serving in Congress.

Cobell plaintiffs had Article III standing to act as representatives for the Trust Administration Class of which Plaintiffs are members.

II. The CFC Lacked Jurisdiction to Hear Count Two Because Plaintiffs Did Not Identify a Substantive Source of Law Establishing the Specific Fiduciary Duty that Plaintiffs Allege the United States Breached.

In Count Two, Plaintiffs claim that even if the *Cobell* Settlement Agreement bars their claims in Count One, the United States nevertheless breached a fiduciary duty owed to them by entering into the Settlement Agreement without disclosing Plaintiffs' possible claims to the *Cobell* class or the *Cobell* class counsel. As a result, Plaintiffs argue, the Trust Administration Claims are reinstated despite the provisions releasing those claims in the *Cobell* Settlement Agreement. Plaintiffs' Brief at 42-46. If Plaintiffs' contentions were true, the United States would get nothing for its payments to Plaintiffs.

As we discussed earlier, to establish jurisdiction in the CFC, 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." *Navajo Nation I*, 537 U.S. at 506. Plaintiffs identify no "substantive source of law" requiring the United States to disclose potential claims to Indian members of a class-action settlement, and the CFC correctly concluded that it lacked jurisdiction over Count Two. A26.

Plaintiffs claim that 25 U.S.C. § 396 and its regulations serve as the "substantive source of law." Plaintiffs' Brief at 45. That statute addresses only the obligation of the United States to reject proposed mineral-lease terms on Indian allotments "whenever in [the Secretary of the Interior's] judgment the interests of the Indians will be served by so doing." *Id*. The statute says nothing about the United States' obligations when settling adversarial claims brought against it by Indians. Nevertheless, Two Shields insists the statutory obligation is close enough to import common-law trust principles, citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003). Plaintiffs' Brief at 46.

In *White Mountain*, unlike this case, the United States had a clear trust duty: Congress had instructed that it hold buildings and land "in trust for the White Mountain Apache Tribe.'" *White Mountain*, 537 U.S. at 474-75 (quoting Pub. L. 86-392, 74 Stat. 8 (1960)). The issue in the case was whether the United States had properly maintained parts of the property. The Supreme Court looked to common-law principles of trusts to clarify the United States' obligations to maintain property because the United States was "expressly subject to a trust." *Id*. The Court did not rely on common-law principles to create the fiduciary duty. As this Court has explained, *White Mountain* "does not stand for the proposition that in every case

'express trust plus actual government control equals enforceable trust duties' according to common-law principles." *Hopi Tribe v. United States*, 782 F.3d 662, 668 (Fed. Cir. 2015) (quoting *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 896 (D.C. Cir. 2014)). As this Court further explained:

> The Supreme Court used common-law trust principles in a more limited fashion. It referred to common-law trust principles because the statutory language evoked them, by combining trust language and authorization to use the land in the same provision. The Supreme Court thus inferred that Congress intended to accept the common-law duty of a trustee to preserve the land that it actually administers. * * * As the Supreme Court's subsequent decisions make clear, common-law trust duties standing alone, including those premised on control, are not enough to establish a particular fiduciary duty of the United States.

Hopi Tribe, 782 F.3d at 662 (citing *Navajo II*, 556 U.S. at 302).

Here, Plaintiffs do not look to common law to fill out the United States' obligations to oversee leasing activity under 25 U.S.C. § 396, but rather to create a new duty altogether to disclose potential claims in settling an adversarial lawsuit.

Another reason not to invent a fiduciary duty here is that the United States acted in its capacity as sovereign in entering the *Cobell* Settlement Agreement. The Supreme Court has previously "noted that the relationship between the United States and the Indian tribes is distinctive, 'different from that existing between individuals whether dealing at arm's length, *as trustees and beneficiaries*, or otherwise.'" *United States v. Jicarilla Apache*

Nation, 131 S. Ct. 2313, 2332 (2011) ("*Jicarilla*") (quoting *Klamath and Moadoc Tribes v. United States*, 296 U.S. 244, 254 (1935)) (emphasis added by Court in *Jicarilla*). As the Supreme Court explained, "in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law." *Id.* at 2338. The United States as sovereign "may be obliged to balance competing interests when it administers a tribal trust. The Government may need to comply with other statutory duties, such as the environmental and conservation obligations * * *. The Government may also face conflicting obligations to different tribes or individual Indians." *Id.* at 2328.

In settling the *Cobell* litigation, the United States acted as sovereign. In particular, it had to consider the competing interests of other Indians in obtaining the benefits of the *Cobell* Settlement Agreement. Disclosure of all potential claims belonging to the Trust Administration Class would have made the Settlement impossible. The United States also had to consider its own interests as sovereign, having spent 15 years in "hard-fought" litigation." *Cobell XXIII*, 679 F.3d at 918, 924.

Finally, the requirements for settlement of a class action and the fairness hearing held by the D.C. District Court negate any purported need

to create additional protections for Indians where no basis exists to create such protections.

Plaintiffs have failed to identify "a substantive source of law that establishes [the] specific fiduciary duty" (*Navajo I*, 537 U.S. at 506) alleged in Count Two. The CFC correctly granted the United States' motion to dismiss this claim for lack of jurisdiction.

III. Plaintiffs Failed to Allege a Valid Claim in Count Three.

A. Congress Took Nothing from Plaintiffs by Enacting the Claims Resolution Act, as Plaintiffs Retained Their Rights to Opt Out of the *Cobell* Settlement Agreement.

Plaintiffs claim that Congress's enactment of the Claims Resolution Act constituted a taking of their claims in Counts One and Two in violation of the Fifth Amendment's prohibition against taking "private property * * * for public use, without just compensation." U.S. Const. amend. V. Plaintiffs' Brief at 51-57. But Plaintiffs chose not to opt out of the *Cobell* Settlement Agreement, and received compensation for their claims. The D.C. Circuit affirmed the D.C. District Court's finding that the compensation for Land Administration Claims was "fair, just, and adequate." On these facts, Plaintiffs cannot state a valid takings claim under the Fifth Amendment.

The CFC dismissed this claim because Plaintiffs failed to show a taking occurred, and because the unlitigated claims of Plaintiffs are not a

valid property interest for Fifth Amendment purposes. A27 (citing *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002)).

Both of the CFC's conclusions were correct. The Claims Resolution Act did not remove the right of members of the Trust Administration Class to opt out of the *Cobell* Settlement Agreement, and Plaintiffs have never asserted anything to the contrary. Plaintiffs waived their Land Administration Claims by choosing to remain in the settlement class and obtain the benefits of the *Cobell* Settlement, instead of preserving those claims by opting out.

In *Littlewolf v. Lujan*, 877 F.2d 1058 (D.C. Cir. 1989), the D.C. Circuit held that this process meets Constitutional requirements. *Littlewolf* concerned a statute enacted by Congress to resolve certain Indians' land claims. The statute created an administrative process meant to pay them fair market value for their claims. *Id*. at 1065-66. Alternatively, the Indians could opt out of the settlement and bring suit on their claims under the Tucker Act. *Id*. The D.C. Circuit found that the Act's "basic compensation mechanism will yield a fair payment in most cases and therefore does not, on its face, violate the Just Compensation clause." *Id*. The process approved by the D.C. Circuit in *Littlewolf* is in all material respects the same process available to Plaintiffs here.

In contrast, the claimants in the cases cited by Plaintiffs as examples of legislative taking allegedly had their claims taken by Congress without providing an alternative forum to receive compensation for those claims. *See Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1482 (Fed. Cir. 1994) (claiming treaty with Mexico abolished plaintiffs' claims); *Aviation & Gen. Ins. Co., Ltd. v. United States*, 121 Fed. Cl. 357, 361 (Fed. Cl. 2015) (claiming that recognition of Libya's sovereign immunity, without giving plaintiffs a forum to resolve existing claims against Libya for terroristic acts, constituted a Fifth Amendment taking of their claims) (cited in Plaintiffs Brief at 51-52).

Even if the process provided by the Claims Resolution Act theoretically could be a taking, the CFC correctly concluded that Count Three failed to state a claim because Plaintiffs had no valid property interest in their unlitigated claims in Counts One and Two. The CFC held that "'no 'vested' right [in a claim] attaches until there is a final, unreviewable judgment.'" A28 (quoting *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 384 (2013), *affirmed in part & reversed in part on other grounds*, 782 F.3d 1345, 1352 (Fed. Cir. 2015)). The CFC noted that the Ninth Circuit had rejected the argument that a legal claim not reduced to final judgment is a valid property interest under the Fifth

Amendment. A28 (citing *Bowers v. Whitman*, 671 F.3d at 913-14).[6] The CFC recognized that dicta in *Alliance of Descendants*, 37 F.3d at 1482, supports the argument that an unresolved claim can be a valid property interest, but concluded that "it [is] unclear whether a breach of fiduciary duty claim is a cognizable property interest, and plaintiffs present no authority on the matter." A28.

The CFC's analysis is persuasive. While it has been established since *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898), that there is a Constitutional bar preventing a legislature from negating a final judgment, that restriction applies *only* to a final judgment. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 310 (1945) (upholding retroactive change in statute of limitations where defendant's immunity from suit had not been litigated to final judgment). This principle applies here by analogy. Given the uncertainty accompanying litigation, the CFC correctly held that a Plaintiffs' unadjudicated claims did not constitute a valid property interest under the Fifth Amendment.[7]

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[6] There is an unpublished (and therefore nonprecedential) decision of this Court holding that there is no valid property interest in a litigation claim that had not become a final judgment. *Rogers v. Tristar Prods., Inc.*, 2012 WL 1660604, at *2 (Fed. Cir. 2012).

[7] We do not mean to suggest, by not further discussing the issue, that a final judgment is always a valid property interest for purposes of the

Cont.

B. Plaintiffs' Due-Process Claim Is Not Cognizable in the CFC.

We here address a disjointed argument that Plaintiffs include within their defense of Count Three. As recognized by the CFC (A28-29), Plaintiffs' claim is really that Congress's certification of the Trust Administration Class was an unconstitutional violation of their due-process rights. This is shown by Plaintiffs' citation and discussion of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 607 (1997). Plaintiffs' Brief at 54-55. In that decision, which had nothing to do with a legislative taking, the Supreme Court affirmed the Third Circuit's ruling that a class-action settlement had to be vacated for noncompliance with the class-certification provisions of Fed. R. Civ. P. 23(b)(3). The proposed settlement of claims relating to asbestos-caused illness would have applied both to those who had existing claims and to class members who would make such claims in the future. 521 U.S. at 601. As the Supreme Court noted, there were inherent conflicts between future claimants and those with existing claims. *Id*. at 624-25. In negotiating a settlement for future claims, counsel had less leverage with the defendants than they would for pending claims as future claims could not be litigated now. *Id*. at 621.

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takings prohibition in the Fifth Amendment. As Plaintiffs do not have a final judgment, the Court need not reach the issue.

Plaintiffs make the hyperbolic statement that in passing the Claims Resolution Act, Congress "set up Two Shields for exactly what the Supreme Court feared [in *Amchem*]—exploitation by a defendant who knew that 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." Plaintiffs' Brief at 55. As the CFC noted, this is not a takings claim but an argument that Plaintiffs' due-process rights were violated by Congress allowing the D.C. District Court to certify the Trust Administration Class. A28-29. The CFC lacks jurisdiction over Plaintiffs' allegations because such a claim lacks a "'money-mandating provision.'" A29 n.28 (citing *James v. Caldera*, 159 F.3d 573, 581 (Fed. Cir. 1998)). Plaintiffs also ignore the D.C. District Court's certification of the Trust Administration Class (A9) and the ruling by the D.C. Circuit that this certification was constitutionally sound. *Cobell XXIII*, 679 F.3d at 921-22 (rejecting challenges to the certification of the Trust Administration Class as inconsistent with constitutional due process). Plaintiffs cannot relitigate the issue now.

For these reasons, the CFC properly dismissed Count Three for failure to state a claim.

CONCLUSION

For these reasons, the judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,028 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/Robert H. Oakley
Robert H. Oakley

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

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