IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on September 22, 2014)

SUSAN FREDERICKS, *et al.,*	)
	)
Plaintiffs,	) No. 14-296L
	)
v.	) Hon. Lawrence J. Block
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)
	)
	)

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS BY UNITED STATES

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INTRODUCTION.

The United States has moved to dismiss plaintiff's Second Claim for Relief for lack of subject matter jurisdiction and the First, Third, and Fourth Claims for Relief for failure to state a claim upon which relief can be granted. Plaintiffs respond to the arguments of the United States in the order presented in its Memorandum of Points and Authorities.

I. FIRST CLAIM FOR RELIEF.

A. Procedural Posture and Standard of Review on Motions to Dismiss Under RCFC 12(b)(6).

Rule 12(b)(6) grants the court authority to dismiss plaintiffs' complaint if it fails to state a claim upon which relief can be granted. *See* RCFC 12(b)(6). "This court will dismiss a complaint for failure to state a claim upon which relief can be granted only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling him relief." *Lechliter v. United States*, 70 Fed.Cl. 536, 543 (2006). In determining whether it should grant a 12(b)(6) motion, the court "must accept as true all the factual allegations in the complaint" and make "all reasonable inferences in favor of the non-movant." *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378

(Fed. Cir. 2001) (internal citations omitted). “To state a claim, the complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. The factual allegations must be enough to raise a right to relief above the speculative level. This does not require the plaintiff to set out in detail the facts upon which the claim is based, but enough facts to state a claim to relief that is plausible on its face. *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citations omitted).

“[W]hen considering a motion filed under Rule 12(b)(6), the court typically limits its inquiry to the allegations in the complaint. *Extreme Coatings, Inc. v. United States*, 109 Fed. Cl. 450, 452 (Fed. Cl. 2013) *citing Am. Contractors Indem. Co. v. United States*, 570 F.3d 1373, 1376 (Fed. Cir. 2009) ("On a motion to dismiss, the court generally may not consider materials outside the pleadings.") (citations omitted); *see also, B & H Med., LLC v. United States*, 116 Fed. Cl. 671, 683 (Fed. Cl. 2014) (“The court's 12(b)(6) inquiry is limited to examining the facts pled in the complaint”). Thus, the court should not consider the exhibits attached to the defendant's motion to dismiss to the extent they are offered to support its motion to dismiss under Rule 12 (b) (6).

If this court were to consider matters outside the pleadings, it would have to convert the defendant's motion into a motion for summary judgment under Rule 56. *Huntington Promotional & Supply, LLC v. United States*, 114 Fed. Cl. 760, 772 (Fed. Cl. 2014). “The rules of this court require that the court provide the parties with notice of its intention to treat defendant's motion as a motion for summary judgment and an opportunity to proceed pursuant to the rules of summary judgment.” *Id*. (citations omitted). The court, however, has broad discretion not to consider the extraneous evidence. At such an early point in the proceedings, it would be improper for the court to convert the defendant's motion to a Rule 56 motion given that the plaintiffs are in the

process of exhausting their administrative remedies with the BIA on this claim. The Record in this case is not been developed at all because the BIA has not yet issued a ruling or prepared a Record on the plaintiffs' Request to Segregate Lease Income and Distribute in Accordance with the FBIMLA. See plaintiff's complaint, ¶ 30. The plaintiffs' filed this protective complaint because the statute of limitations was arguably about to run on their FBIMLA claims. As stated in plaintiffs' Motion to Stay Proceedings and supporting papers, the proper course of action at this point in the proceedings is to stay the case so that the plaintiffs can exhaust their administrative remedies with the BIA.

B. The Plaintiffs First Claim for Relief States a Cause of Action Upon Which Relief Can Be Granted.

The plaintiffs' First Claim for Relief is based on the following factual allegations; (1) Judy Fredericks executed the oil and gas lease without having any ownership interest in the property leased, (2) the BIA approved the lease without landowner consent as required by federal law, (3) The BIA approved the Oil Lease at bonus and royalty rates lower than that which plaintiffs or a prudent person would have obtained given the bonus and royalty rates being paid on oil and gas leases in the area at the time. Plaintiffs' complaint, ¶¶s 12-14, 40. The complaint further alleges that these actions violated the Ft. Berthold Indian Mineral Leasing Act (FBIMLA), Pub. L. 205-188, July 7, 1998, 112 Stat. 620, as amended Pub. L. 206-67, a money mandating statute. Complaint at ¶¶s 31-41. Finally, the first claim for relief alleges that the defendants' actions violate the FBIMLA to the extent income derived from the oil and gas lease are not paid to the plaintiffs in accordance with the statutory mandate, resulting in an unlawful exaction or retention of funds. Complaint at ¶ 42.

This court has jurisdiction to award damages under the Tucker Act for defendant's

violation of a money mandating statute. *Lummi Tribe of the Lummi Reservation, et al. v. United States*, 99 Fed. Cl. 584, 593 (Fed. Cl. 2011), *citing United States v. Mitchell,* 463 U.S. 206, 218 (1983). As shown below, the FBIMLA is a money mandating statute because it affords the Secretary no discretion when it comes to the landowner consent requirements and the mandatory requirement that payments from validly executed and approved oil and gas leases must go to the landowners in proportion to their interest. *See Lummi*, 99 Fed. Cl. At 593.[1] Further, the court has jurisdiction to award damages where, as here, the United States exacts or withholds money in contravention of a statute or regulation. *Camellia Apartments, Inc. v. United States*, 167 Ct. Cl. 224, 334 F.2d 667 (Ct. Cl. 1964), cert. denied, 379 U.S. 963 (1965) (where government required plaintiffs to make payments allegedly in violation of statute and by misconstruction of a regulation; the Tucker Act provided jurisdiction to determine whether the charges were illegally exacted by the government).

The FBIMLA , § (a) (2) (A) (i), provides that the "Secretary may approve any mineral lease or agreement that effects individually owned Indian lands if,... the owners of a majority of the undivided interest in the Indian land . . . consent . . . ; and the Secretary determines that approval of the lease or agreement is in the best interests of the Indian owners." (*Emphasis added*). Once approved, the lease or agreement is binding on all owners and parties to the lease or agreement as if they had signed. The proceeds from the lease or agreement "shall be distributed to all owners of the Indian land" in accordance with the interest owned by such owner. *Id.*, § (a) (2) (C). (*Emphasis added*). The mandatory use of the word "shall" in directing

[1] The United States argues that the Secretary executed the lease on behalf of undetermined heirs under FBIMLA § l (a) (3). As shown below, the Secretary did not "execute" the lease on behalf of the heirs, and even if he did, the Secretary would have had to determine that the lease was in the best interest of heirs, something he failed to do unless he determined first that the heirs would receive the economic benefits of the lease.

the payment satisfies the money mandate. *Greenlee County v. U.S.,* 487 F.3d 871, 877 (Fed. Cir. 2007).

The United States does not dispute that the FBIMLA is a money mandating statute, or that there would be an unlawful exaction or retention of funds if the FBIMLA were violated as alleged in the Complaint. Instead, The United States argues that there has been no violation of the Act. The argument should be rejected, for the reasons stated below.

The argument is made by the United States that the Secretary of Interior was free to lease the estate lands under FBIMLA § (a) (3) (A) without approval of the heirs, including the plaintiffs here, because the probate had not been finalized and the heirs had not been determined. This argument is unpersuasive for the following reasons. First, FBIMLA § (a) (3) (A) requires that the Secretary execute the lease, not someone else. Second, the Secretary did not execute the lease, Judy Fredericks did, and did so without any lawful authority. Third, the Secretary approved a lease entered into by Judy Fredericks, as opposed to "execut(ing) a mineral lease or agreement that affects individually owned land," required under the statute. Fourth, if the probate had not been completed and the heirs not determined, Judy Fredericks had no authority to enter into any lease on behalf of the heirs and the Secretary had no authority to approve a lease signed by Judy Fredericks. Fifth, the Secretary knew or should have known that Judy Fredericks was not an heir because she did not meet the definition of eligible heir under 25 U.S.C. § 2201(9). And sixth, the BIA agency Superintendant who approved the lease presumably also knew the names of decedent's seven children, including plaintiffs. The Secretary violated FBIMLA in numerous ways as established above. The Secretary allowed Judy Fredericks to enter into the lease; did not secure the consent of a majority of the owners whose identity was known; failed to issue the lease itself but rather allowed a person who at the

time had no known interest to enter into the lease; and only approved a lease entered into by someone else, i.e., Judy Fredericks. If plaintiffs "were not required or eligible to approve the lease" as asserted in the United States' memorandum at 18, most certainly Judy Fredericks had no authority to enter into any lease on behalf of the owners.

The United States relies heavily on a form entitled "ACCEPTANCE OF LESSOR TO BE ATTACHED TO OIL AND GAS MINING LEASE" (Acceptance Form). The Acceptance Form was attached to Defendant's Exhibit 3 at the end of the oil and gas lease executed by Judy Fredericks and approved by the agency Superintendent. The United States contends that this form establishes that the BIA executed the lease on behalf of the undetermined heirs of the estate of John Fredericks Jr. in accordance with FBIMLA § (a) (3) (A). There are a number of reasons why this argument should be rejected.

First, the Acceptance Form was not attached to the lease that plaintiff John Fredericks received from the BIA in March of 2013. Complaint, § 14. A true and correct copy of the lease that John Fredericks received from the BIA is attached hereto as plaintiffs' exhibit 1. The plaintiffs are perplexed as to why the BIA failed to provide this Acceptance Form until the United States filed its motion to dismiss, even though the plaintiffs have been asking for complete copies of their father's oil and gas leases for some time. In light of this unforeseen fact, the plaintiffs will seek leave to amend their complaint to allege that: (1) the official version of the oil and gas lease that plaintiff John Fredericks received from the BIA's Land Titles and Records Office (LTRO) in Aberdeen South Dakota consisted of 4 pages, with the last page being the execution page signed by Judy Fredericks and approved by the agency Superintendent in New Town, North Dakota, (2) that both plaintiffs' Exhibit 1 and defendant's Exhibit 3 are identical through page 4, and both have LTRO recording stamps on the execution page of the

lease (page 4), but an LTRO recording stamp is noticeably absent from the Acceptance Form included with defendant's Exhibit 3, (3) that the lack of an LTRO recording stamp on the Acceptance Form indicates a fatal or critical title error which resulted in the LTRO's refusal to record the Acceptance Form, and (4) that the Acceptance Form is insufficient to constitute the Secretary's execution of a lease on behalf of the undetermined heirs in accordance with FBIMLA § (a) (3) (A).

Second, the Acceptance Form is not conclusive or even persuasive evidence of the Secretary's execution of a lease on behalf of the deceased owner as required by FBIMLA § (a) (3) (A). The statute says that the Secretary may "execute a mineral lease" on behalf of an Indian owner if the owner's heirs have not been determined. By contrast, the Acceptance Form indicates only that the Secretary "accepts" the bonus paid by the lessee, "subject to the terms" of the lease executed by Judy Fredericks and approved by the Superintendent on her behalf, the same official who signed the Acceptance Form. The government cannot dispute that Judy Fredericks had no legal authority to execute the lease on behalf of the heirs. Only the United States had that authority pursuant to FBIMLA. Inasmuch as the lease was not legally executed and approved, it is *void ab initio*. 25 U.S.C. § 177. "Actions by the local agency contrary to the regulations and contrary to the best interest of the Indian do not create a vested right in the lease. Agents of the government must act within the bounds of their authority: and one who deals with them assumes the risk that they are so acting." *Gray v. Johnson*, 395 F.2d 533, 537 (10th Cir. 1968), *cert. denied*, 392 U.S. 906 (1968) (*emphasis added*); *see Jicarilla Apache Tribe v. Andrus*, 1980 U.S. Dist. LEXIS 17836, 16-17 (D.N.M. Feb. 12, 1980) (holding that the Secretary had the authority to cancel a mineral lease not approved in accordance with federal law).

Because the lease is invalid, it may now only be ratified or reformed with the consent of a majority of the owners, the plaintiffs here.

Third, BIA officials have a fiduciary duty to comply with the Indian mineral leasing statutes which Congress has entrusted them to administer in accordance with the terms of the statute. *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589-591 (10th Cir. 1992); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1564-1565 (10th Cir. 1984) (Seymour, J. Dissenting).[2] The government's fiduciary obligation applies equally to the allotted trust land at issue in this case. *Enos v. United States*, 672 F. Supp. 1391, 1393-1395 (D. Wyo. 1987) (finding that the fiduciary obligations to protect the interests of Indian tribes applies equally to allottees, and transferring the case to the Federal Court of Claims under the Tucker Act). [3] That duty includes complying with the terms of the statute that gives them the authority to act. *Sangre de Cristo Dev. Co. v. United States*, 932 F.2d 891, 894 (10th Cir. 1991) (holding that a lease of tribal lands was *void ab initio* despite its approval by the Department of the Interior because the lease failed to satisfy other requirements imposed by 25 U.S.C. § 415(a)) *citing* Gray 395 F.2d at 537); *see* Indian Contract, 18 Op. Atty. Gen. 497 (1986) (approval by the Secretary does not validate an otherwise defective contract).

Finally, and most importantly, even if the BIA had executed the lease on behalf of the decedent before the heirs were determined, it was obligated to act in the best interests of the heirs. *Gooday v. Southern Plains Regional Director*, 38 IBIA 166 , 2002 I.D. LEXIS 149 *16

[2] Judge Seymour's dissent was adopted on rehearing en banc in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10th Cir. 1986) (en banc), *cert. denied sub nom.* Southern Union Co. v. Jicarilla Apache Tribe, 479 U.S. 970(1986).

[3] For this reason, the plaintiffs arguments made to support its Second Claim For Relief are pertinent here as well.

(October 25, 2002).[4] The Secretary's own Appeals Board has consistently held that the trust responsibility is owed to Indian heirs of allotted land. *Id.*; *Estate of John Joseph Kipp,* 1980 I.D. LEXIS 15, * n.7 and accompanying text , 8 IBIA 30 (March 14, 1980); *Estate of Joseph Simmons*, *Sr*., 1978 I.D. LEXIS 63, *10, 7 IBIA 43 (March 31, 1978); *Estate of Tennyson B. Saupitty*, 1977 I.D. LEXIS 100, *6, 6 IBIA 140 (September 2, 1977); s*ee also*, Final Rule, Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 66 FR 7068, 7073 (January 22, 2001) (Secretary has a trust responsibility to preserve the decedent's IIM account for the probable heirs and beneficiaries). This is consistent with the requirement that the United States act in the best interest of the Indian mineral owners in administering the trust estate. *Jicarilla; Enos, supra*. It should be obvious that an oil and gas lease can never be in the heirs' best interest unless the heirs receive the financial benefits of the lease. *See Jicarilla*, 728 F.2d at 1565 (The evident purpose of the Indian Mineral Leasing Act is to ensure that Indians receive the maximum benefit from mineral deposits on their lands through leasing). The FBIMLA must be construed accordingly. Thus, in cases where an oil and gas lease is executed by the BIA on behalf of a deceased owner before the heirs are determined, the BIA must preserve the funds derived from the lease and pay those funds to the heirs after they receive beneficial title following the final probate order. Failure to do so would constitute conversion and a breach of trust.[5]

[4] Notably, the IBIA in *Gooday* construed the FBIMLA; Id., at 5.

[5] The Acceptance Form itself is contrary to the United States' position that the economic benefits from the lease should go to the surviving spouse. The second paragraph of the Acceptance Form states that the Secretary "agrees" that if decedents land is "divided into separate parcels held by different owners" then "each separate owner shall receive" the income from the lease.

The court should reject the United States contention that the plaintiffs are not the owners of the land they inherited from their father (Defendant's Motion 24-25). The "owners" in this case as contemplated by the FBIMLA are the decedent's "eligible heirs" his seven children. 25 U.S.C. § 2201 (9) (defining eligible heirs as decedent's children and excluding the surviving spouse). Only the heirs can hold beneficial title to trust land. *Estate of Barnes*, 17 IBIA 72, 1989 I.D. LEXIS 45, *9-10 (February 15, 1989) (Title to Indian trust property subject to a life estate is in the remaindermen, not in the life tenant). Based on documents on file with the LTRO plaintiff will show that; (1) the LTRO lists the decedent's seven children as the owners of his trust land, each holding an undivided 1/7 interest in the parcels in which decedent owned a 100 percent interest, and (2) the surviving spouse is listed as a "special interest holder" i.e. a life tenant. The LTRO's title listing is consistent with the definitions of "Indian land" and "individually owned Indian land" in the FBIMLA. Indian land means "an undivided interest in a single parcel of land" located on the Fort Berthold Reservation and held in trust by the United States. § (a) (1) (A). Individually owned Indian land means "Indian land that is owned by 1 or more individuals." § (a) (1) (B). Thus, any notion that a life tenant can be considered an owner is belied by the plain language of the statute itself, and any BIA regulation to the contrary is null and void.

The court should also reject the United States' argument that plaintiffs are not entitled to revenue from gas and oil because of express provisions in AIPRA. First, the express provisions of FBIMLA say that "(t)he proceeds derived from a lease or agreement ...shall be distributed to all owners of the Indian land that is subject to the lease or agreement." Plaintiffs are owners of the land. Second, it is inaccurate to say that the term "owners of Indian land" needs further

definition. As shown above, the term is plain and clear, as defined by the FBIMLA. Third, the definition proposed by the United States under 25 CFR 212.3 is not applicable, as the definitions in the FBIMLA control. Fourth, AIPRA is subject to various exceptions for other laws, such as the FBIMLA above. 25 USC 2218 (f) provides that nothing in AIPRA amends or modifies FBIMLA providing standards for percentage of Indian ownership that must approve a lease or agreement on a specified reservation. FBIMLA says all proceeds from a lease by a majority of the owners approved by the Secretary must be distributed to all owners. No exception is made for life interests as a form of Indian ownership nor is there any percentage interest of Indian ownership allocated to a life interest. 25 USC § 2218 (g) says nothing in AIPRA shall be construed to modify any general or specific statute authorizing the grant or approval of any type of land use transaction which includes FBIMLA and its provision for distribution of proceeds to the owners of the land. Finally, 25 USC § 2206 (g) (2) says nothing in AIPRA "amends or otherwise affects" the application of any Federal law that pertains specifically to trust or restricted land located on any Indian reservation that are expressly identified in such law. This includes the FBIMLA and its provisions for gas and oil leases and distribution of proceeds derived therefrom to owners of lands, such as plaintiffs in this case. AIPRA, contrary to the assertions of the United States, is not controlling over the provisions of the FBIMLA for distribution of proceeds derived from oil and gas leases. Judy Fredericks, as the holder of a life interest, is not the owner of any of the land subject to any oil and gas lease under the FBIMLA.

Finally, the United States cites the provisions of 25 CFR 179.201. This regulation is silent as to the effects of FBIMLA and does not indicate whether any consideration was ever given to the FBIMLA when it was enacted. The regulation is not supported by the specific provisions of the FBIMLA and the regulation can have no effect on oil or gas leases, agreements,

or land and the distribution of any proceeds derived from them on the Ft. Berthold Indian Reservation. If the regulation were to be applied, it would violate the statutory mandate in the FBIMLA and would be void. *See E.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185 at 13 (1976) (It is a well established rule of law that the rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute); *Eversharp, Inc. v. United States*, 129 Ct. Cl. 772, 776, 125 F. Supp. 244, 247 (1954) (holding that an illegal exaction of money occurs when the Government exacts money by enforcing a regulation that was contrary to statute); *Pan American World Airways v. United States,* 129 Ct. Cl. 53, 55, 122 F. Supp. 682, 683-84 (1954) ("the collection of money by Government officials, pursuant to an invalid regulation" is an illegal exaction and not a tort); *Camellia Apartments,* 167 Ct. Cl. at 234, 334 F.2d 667 (Ct. Cl. 1964) (where government required plaintiffs to make payments allegedly in violation of statute and by misconstruction of a regulation; the Tucker Act provided jurisdiction to determine whether the charges were illegally exacted by the government); *U.S. ex rel. Chase v. Wald*, 557 F2d 157,161 (8th Cir. 1977) (agency rulemaking power is not power to make law, and regulation imposing trespass fine in excess of that authorized by statute was invalid). In short, a "regulation cannot override a clearly stated statutory requirement." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1575 (Fed. Cir. 1996) (citing *Brush v. Office of Personnel Management*, 982 F.2d 1554, 1560 (Fed. Cir. 1992). The United States' reliance upon a regulation cannot save them when the regulation violates the clear statutory mandate.

Lastly the United States claims that the following allegation does not state a claim upon which relief can be granted: “The BIA approved the Oil Lease at bonus and royalty rates lower

than that which plaintiffs or a prudent person would have obtained given the bonus and royalty rates being paid on oil and gas leases in the area at the time." Complaint ¶ 40, This is a factual allegation, not a legal conclusion. If proved, it will establish that the BIA failed to act in the best interest of the plaintiffs. *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589-590 (10th Cir. 1992). The BIA accepted the first offer that came in the door, from Kodiak. It did so without considering all relevant factors that affected the interest of the Indian mineral owner, primarily the fact that oil and gas lease bonuses and royalty rates were much higher for comparable leases in the same area as a result of an oil and gas boom that came after the BIA advertised the land for lease. *Id.*

Since the BIA must act in the best interest of the plaintiffs under the FBIMLA, the allegation in ¶ 40 of the complaint sufficiently states a claim for which relief may be granted. No more specific facts need be plead. A claim for relief must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 (a) (2). This requires pleaders to give their opponents fair notice of their claim and the grounds upon which it rests. *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 319 (2007). Intricately detailed factual allegations are not necessary, *Ashcraft v. Iqbal*, 556 U.S. 662, 678 (2009), nor need pleaders factually allege a prima facie case, *Swierkiewicz v. Sorema*, 534 U.S. 506, 510-513 (2002), or even identify their precise legal theory. *Skinner v. Switzer*, 131 S.Ct. 1289, 1296 (2011). A claim's allegation must "possess enough heft" to show an entitlement to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). A claim must be plausible. *Id*. However, this does not require a claim to be "likely" or "probably true." *Ashcraft v. Iqbal*, *supra*. Moreover on a motion to dismiss the court presumes that all well pleaded allegations are true, resolves all reasonable doubts and inferences in the pleader's favor, and view the pleading in the light most

favorable to the non-moving party. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009); *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted). No claim will be dismissed merely because the trial judge disbelieves the allegations or feels that recovery is remove or unlikely. *Bell Atlantic v. Twombly, supra.* Pleadings are to read as a whole. *Braden v. Wal-Mart Stores, Inc.,* 588 F3d 585, 594 (8th Cir. 2009).

Clearly the allegations made in the complaint and attacked by the United States are sufficient under the law and will be proved at trial.

II. SECOND CLAIM FOR RELIEF

The United States has money mandating trust responsibility to preserve and protect Indian trust property and prevent its improvident alienation. *U.S. v. Mitchell*, 463 U.S. 206, 224 (1983) *(Mitchell)*; *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003); *Brown v. U.S.,* 86 F3d 1554, 1560 (Fed.Cir. 1996). Moreover, plaintiffs have also established elsewhere in this memorandum that both the AIARMA and FBIMLA are money mandating, and that the Secretary acts as a fiduciary duty to act in the Indian owners best interest in the administration of oil and gas leases. *See* plaintiffs' points at pages 10-11, infra, and pages 26-28, supra.

There is no question that the United States exercises pervasive control over the trust property at issue in this case so as to establish a fiduciary duty within the test laid out in *Mitchell II*. Federal oil and gas regulations provide that "...(T)he Secretary of Interior continues to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any minerals agreement, and to uphold the duties of the United States as derived from the trust relationship and from any treaties, executive orders, or agreements between the United States and any Indian Tribe." 25 CFR 225.1.

The United States under the FBIMLA has extensive responsibilities to lease mineral

rights for the benefit of the Indian owner. *U.S. v. Newmont USA Ltd.*, 504 F.Supp. 2d 1050, 1072 (E.D. Wash. 2007). In approving a mineral lease, the Secretary of Interior must determine the highest obtainable economic royalty, *Hallam v. Commerce Min. & Royalty Co.*, 49 F.2d 103, 109 (10th Cir. 1931), and the government has a fiduciary duty to properly value the oil and gas upon which the royalties were paid. *Shoshone Indian Tribe of the Wind River Reservation v. U.S.*, 56 Fed. Cl. 639, 648 (Fed. Cl. 2003). The Indian Mineral Leasing Act (IMLA) and its implementing regulations imposes on the United States a money mandating trust responsibility with respect to the management of Indian mineral resources. *Shoshone Indian Tribe of Wind River v. U.S.*, 56 Fed. Cl. 639, 648 (Fed. Cl. 2003). Congress deliberately entrusted the Secretary of Interior with comprehensive responsibilities under the IMLA to achieve uniformity in leasing, to increase Indian authority in granting leases, and to protect Indians' economic return on their property. *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of State of Montana*, 792 F2d 782, 794 (9th Cir. 1986); *Kerr-McGee Corp v. Navajo Tribe of Indians*, 731 F2d 597, 601 N.3 (9th Cir. 1984)(important part of IMLA was to secure greatest return to Indians from their property).

The scope and extent of a fiduciary relationship with respect to oil and gas leases is established by the leases themselves and the statutes and regulations governing them. *Pawnee v. U.S.*, 830 F2d 187, 192 (Fed Cir. 1987).

The lease at issue has provisions for Department of Interior, Bureau of Indian Affairs oversight and decision making throughout the lease. The lease is a standard Department of Interior Oil and Gas Mining Lease form. Monies are to be paid to the payee designated by the Area Director; the lease is effective only after proper execution by the owners and approval by the Secretary of Interior; drilling is supervised by the oil and gas supervisor appointed by the

Secretary of Interior; bond as required by regulation of the Secretary of Interior must be posted; offset wells shall be as required by the oil and gas supervisor or payment in lieu determined by the Secretary of Interior; other wells are to be subject to a system of well spacing or production allotments authorized by the law and regulations and approved by the Secretary of Interior; the Secretary of Interior can require additional wells be drilled to insure reasonable diligence in the operation development and operation of the property or payments in lieu; the Secretary of Interior determines value for purposes of calculating royalties; lessor must provide monthly statements in such detail as required by the oil and gas supervisor; all books and records of lessor must be open for inspection by the Secretary of Interior; logs must be kept showing information required by the Secretary of Interior; the Secretary of Interior must consent to drilling closer than 200 feet to any house or barn; lessor must comply with all regulations of the Secretary of Interior including those in 30 CFR 221; all assignments or sublets must be approved by the Secretary of Interior; the Secretary of Interior can after notice terminate the lease for violations; on termination the lessee can remove all property except casing in wells and other property determined by the Secretary of Interior to be necessary for the continued operation of the wells; the Secretary of Interior can impose restrictions on time of drilling to protect natural resources; and unit operations must be approved by the Secretary of Interior.

The regulations pertaining to leasing of allotted lands cover all aspects of the leasing process. 25 CFR 212.1 through 212.58; 25 CFR 225.1 through 225.40; and 30 CFR Chapter II. They are at least as pervasive and all encompassing as to every detail from granting to terminating a mineral lease and all requirements in between as those found determinative in *Mitchell II*, 463 U.S. at 224:

> 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 Indians. They thereby establish a fiduciary relationship and define the contours of the United States fiduciary responsibilities.

In its direct management of tribal resources the Interior Department is held to the same standards of care in the administration of resources as a private trustee, at least when the applicable statutes and regulations, as here, create a fiduciary relationship. Once that relationship is found to exist, common law principles determine damages. *E.g., U.S. v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2315 (2011). One of the fundamental common law duties of a trustee is to preserve and maintain trust assets. *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003). A trustee has the duty of undivided loyalty: the trustee is "under a duty to administer the trust solely in the interest of the beneficiaries." Restatement (Third) of Trusts, § 170. A corollary of the duty of loyalty is that a trustee may not represent interests in conflict with the interests of the beneficiary. *See, e.g., Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256, 257 (D.D.C. 1972).

Although cases involving challenges to legislative action based on the breach of fiduciary relationship are sparse, such challenges have been adjudicated. *Red Lake Bank of Chippewa Indians v. Swimmer*, 740 F.Supp. 9 (D.D.C. 1990), reviewed a breach of trust challenge to Indian Gaming Regulatory Act under rational basis standard. The court in *U.S. v. Mitchell*, 445 U.S. 535, 546 n. 7 (1980), did not reach the question whether the special fiduciary relationship between Indians and the United States could be money mandating. *Accord, North Slope Borough v. Andrus*, 642 F2d 589, 611 N.148 (U.S. App. D.C. 1980). And in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. U.S.*, 367 F3d 650, 666, 668 (7th Cir. 2004), the court held that a breach of trust may be a violation of due process, equal protection, or constitute

a fifth amendment taking, while in *Navajo Tribe v. U.S.*, 364 F2d 320, 324 (Ct. Cl. 1966), government action constituted both on breach of trust as well as well as fifth amendment. The breach of trust responsibility rose to the level of a fifth amendment taking in *Babbitt v. Youpee*, 519 U.S. 234, 249, 245 (1997) (Indian Land Consolidation Act escheating individual interests violated fifth amendment), and in *Hodel v. Irving*, 481 U.S. 704, 716-717 (1987) (same, as to Land Consolidation interests). Clearly Congress' decisions regarding Indians are clearly reviewable. *Delaware Tribal Business Comm. Weeks*, 430 U.S. 73 (1977); *U.S. v. Sioux Nation*, 448 U.S. 372, 415 (1980)*; Littlewolf v. Lujan*, 877 F2 1058, 1064 (U.S. App. D.C. 1989) *See also Menominee Tribe v. U.S.*, 707 F2d 1335, 1340 (Ct. Cl. 1979), holding that the court would have jurisdiction over officials violating fiduciary duties in carrying out legislative required termination.

Decedent at the time of his death left 3,477 acres of trust land that he owned solely in his own name or in common. Plaintiffs constitute 5 of the 7 rightful heirs to decedent's property. AIPRA at 25 USC § 2206 (a) (2) (A), as interpreted by the United States, deprives plaintiffs of the property for the life of the surviving widow, and decedent of his right to leave his property to the immediate satisfaction of all his heirs, by the providing the surviving wife with a life estate without regard to waste, defined as the right to all income from the trust property to the exclusion of the remaindermen. First, the trust responsibility is owing to the trust land left by decedent and with decedent and plaintiffs in this case, not to a surviving widow who is given a life estate with complete power of waste. The effect is to allow the trust land to be dissipated contrary to the trustee's specific duty to conserve, preserve, and maintain the property as set forth in 25 USC 3701 (2). *Cf. U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003). Second, it is beyond comprehension, and a gross violation of trust principles, to give one person

a life estate with the unfettered power to waste and dissipate the property during that lifetime. The effect is little different than that struck down as a taking in *Babbitt v. Youpee*, 519 U.S. 234 (1997), and *Hodel v. Irving*, 481 U.S. 704 (1987), and the conduct held to require money damages in *U.S. v. Mitchell*, 463 U.S. 233 (1983). Third, the regulations compound the breach of fiduciary duty by allowing the life estate holder to waste the property or to lease the property without consent of plaintiffs and without BIA approval. The regulations do not save the statute and are themselves invalid because they are not supported by the applicable statutes as shown at 18 of this Memorandum.

The power given to the life estate holder also violates the FBIMLA that requires the consent of owners to any mineral lease and BIA approval only if the lease is determined to be in the best interest of those owners. FBIMLA at (a) (2) (A) (i) and (ii). Plaintiffs are 5/7 owners of the lease. Their consent to the lease was never secured. *See* exhibit 3 to Memorandum of Points and Authorities in support of the Motion to Dismiss filed by the United States. Plaintiffs have alleged in the complaint at ¶ 40 that the lease was approved at bonus and royalty rates lower than being paid on similar leases in the area. Similarly, AIARMA at USC 3715 (c) (2) (A) and (B), a money mandating statute, allows the majority owners to enter into agricultural leases. Not only have plaintiffs been deprived of the right to lease the land 25 alleged at ¶¶ 27, 28, and 29 of the complaint, but the BIA permitted the life estate holder to lease the land without plaintiffs' consent. Complaint at ¶¶ 16, 17. Moreover, the FBIMLA at (a) (2) (C) requires that all proceeds of a mineral lease be distributed to the owners of the lease. Although the mineral lease in question has generated significant revenues, none of those revenues have been distributed to plaintiffs although they are entitled to their pro rata share. *See* complaint at ¶¶ 30, 53. The United States had the fiduciary obligation to comply with the FBIMLA and AIARMA, money

mandating statutes, and a breach of that law requires damages to be paid as alleged in the complaint.

The complaint alleges at ¶¶ 18 and 19 that the BIA permitted Garvin Gullickson to "illegally graze livestock, unlawfully remove grass and other forage, and dig up a spring, ruin a stock tank, and despoil two of three sources of water causing a diminution in flow of creeks on the land." Clearly this court has jurisdiction over this breach of fiduciary duty under *Mitchell II*, 463 U.S. at 224; *White Mountain Apache Tribe*, 537 U.S at 474.

This court has subject matter jurisdiction over the Second Claim For Relief.

III. THIRD CLAIM FOR RELIEF

The American Indian Agricultural Resource Management Act (AIARMA), 25 USC §§ 3701-3746, provides in part, at 25 USC § 3701 (2), that Congress found and declared that the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian Tribes. The purposes of the Act at 25 USC § 3702, in addition to other purposes, was to carry out the trust responsibility of the United States and promote the self-determination of Indian tribes and to authorize the Secretary to take part in the management of Indian agricultural lands in a manner consistent with the trust responsibility of the Secretary and objectives of the owners. The Secretary is required to conduct all management activities consistently with its trust responsibility. 25 USC §3712 (a) & (e). Nothing in the Act was to diminish the trust responsibility of the United States or any legal obligation or remedy resulting therefrom. 25 USC § 3742.

The trust responsibility language found throughout AIARMA and the fact that the United States holds the agricultural Indian lands at issue here in trust proves that there is a fair inference

that United States has assumed a fiduciary duty and trust responsibility to carry out all provisions of the Act and as a holder of legal title to preserve the property and carry out the objectives of the owners. "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. *See U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003).

25 USC § 3715 (c) provides that "(t)he owners of a majority interest in any trust or restricted land are authorized to enter into an agricultural lease of the surface interest of a trust or restricted allotment and the lease is binding on minority interests so long as the lease provides fair market value."

Most modern agricultural and grazing leases are made under authority granted by a combination of provisions of AIARMA and the Indian Long Term Leasing Act at 25 USC 415. *See* 66 Fed. Reg. 7068, 7079 (2001).

Regulations, revised to implement AIARMA, were adopted for both agricultural lands, 25 CFR Part 162, and grazing permits. 25 CFR Part 166. The two sets of regulations are substantively the same, 66 Fed. Reg. 6068, 7080 (2001), although the leasing regulations expressly do not apply to grazing permits. 25 CFR 162.103 (a) (2).

The regulations pertaining to agricultural leases are set forth at 25 CFR Part 162. *See* 25 CFR 162.100 - 25 CFR 162.256. In addition to the regulatory provisions governing all surface leases, agricultural leases are subject to specific regulations. Leases must require that farming and grazing operations comply with sustained yield management, conservation principles, integrated resource management and other standards required by tribal law. The responsibilities and duties of the United States as to agricultural lands held in trust for Indians are pervasive throughout the regulations and cover all aspects of the leasing process and administration. *Cf.*

U.S. v. Mitchell, 463 U.S. 206, 224 (1983) (comprehensive management and elaborate control over Indian property by the United States). "The regulations thus make it clear beyond any doubt that the Secretary exercises his or her control over ...leasing on allotted lands not only for traditional general welfare purposes, ...but also for the purpose of protecting the allottee's financial interest. This protection of another's financial interest by the exercise of independent judgment and control is, of course, the essence of a fiduciary's duty to the beneficial owner of a trust corpus." *Brown v. U.S.*, 86 F3d 1554, 1562-1563 (Fed. Cir. 1996) (regulations controlling leasing establish scope and extent of the fiduciary relationship); *Rosebud Sioux Tribe v. U.S.*, 75 Fed. Cl. 15, 48-49 (2007) (25 CFR Part 162 regulations establish management and control). And, as shown above, the United States has a fiduciary duty to act in the best interest of the Indian owner, a duty that the AIARMA expressly acknowledges 25 USC § 3701 (2).

As stated in *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 474 (2003):

> The subsequent case of *Mitchell II* arose on a claim that did look beyond the Allotment Act, and we found that statutes and regulations specifically addressing the management of timber on allotted lands raised the fair implication that the substantive obligations imposed on the United States by those statutes and regulations were enforceable by damages. The Department of the Interior possessed "comprehensive control over the harvesting of Indian timber" and "exercised literally daily supervision over (its) harvesting and management, *Mitchell II*, supra, at 209, 222 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) (internal quotation marks omitted), giving it a "pervasive" role in the sale of timber from Indian lands under the regulations addressing "virtually every aspect of forest management," *Mitchell II*, supra, at 2921, 220. As the statutes and regulations gave the United States "full responsibility to manage Indian resources and land for the benefit of Indians," we held that they "defined ...contours of the United States fiduciary responsibilities "beyond the "bare" or minimal level, and thus could "fairly be interpreted ad mandating compensation" through money damages if the government faltered in its responsibility. 463 U.S. 224-226.

The United States does not claim or argue that the AIARMA is not money mandating,

but that there has been no violation of the Act.

25 USC 3715 (c) addresses the right of individual owners as plaintiffs by stating as follows:

> (1). Nothing in this section shall be construed as limiting or altering the authority or right of an individual allottee or Indian tribe in the legal or beneficial use of his, her, or its own land or to enter into an agricultural lease of the surface interest of his, her, or its allotment or land under any other provision of law.
>
> (2) (A). The owners of a majority interest in any trust or restricted land are authorized to enter into an agricultural lease of the surface interest of a trust or restricted allotment, and such lease shall be binding upon the owners of the minority interests in such land if the terms of the lease provide such minority interest with not less than fair market value of the land.
>
> (B). For the purposes of subparagraph (A), a majority interest in trust or restricted land is an interest greater than 50 per cent of the legal or beneficial title.

See also O'Bryan v. U.S., 93 Fed. Cl. 57, 59 (Fed. Cl. 2010) (Indian land owners held authority to issue tribal members' grazing permits). The complaint at ¶ 58 alleges that plaintiffs' lands are Indian agricultural lands and that Casey Fredericks is an Indian Rancher within AIARMA. Plaintiffs own 71.42% of the land; two other individuals own the remaining 28.58% of the land. Plaintiffs own a majority interest in the land.

Although the intestate provisions of 25 USC § 2206 generally give a life tenant the right to income derived from trust land, nowhere in AIPRA does it give any right to the life tenant to lease trust land or minerals. AIPRA expressly protects the heirs from the exploitation of trust land not under lease at the time of decedent's death. Specifically, 25 USC § 2218 (g) states that "nothing in this chapter shall be construed to supersede, repeal, or modify any general or specific statute authorizing the grant or approval of any type of land use transaction involving fractional interests in trust or restricted land." Moreover, 25 USC § 2218 (a) specifically recognizes the

authority of owners of trust land to consent to any lease agreement. 25 USC § 2218(f) expressly preserves the majority consent requirement of AIARMA: "Nothing in this section shall be construed to amend or modify the provisions...[of AIARMA]...or any other Act that provides specific standards for percentage of ownership interest that must approve a lease or agreement on a specified reservation."

The United States argues that AIPRA gives a life tenant the right to lease land. On the contrary, the term "life estate without regard to waste" in 25 USC § 2006 (a) (2) (A) says nothing about who can lease land. Moreover, they rely upon 25 CFR § 162.004 (b) (1), a regulation enacted in 2013 that purports to give the holder of a life estate the authority to lease Indian land without the consent of the remaindermen. Both regulations conflict with AIARMA's mandate that the Indian owners have the right to leases their land for agricultural purposes and with AIPRA's savings clauses cited above which preserve the plaintiffs' rights under AIARMA. It is axiomatic that a regulation must be supported by the statute under which it was passed or it cannot stand. AIPRA is completely silent as to the right of a life tenant to lease. However, the IBIA has held that AIPRA did not give a life tenant the authority to lease land without the consent of the remaindermen. *Enemy Hunter v. Acting Rocky Mountain Regional Director*, 51 IBIA 322, 327 (2010). Moreover, a regulation purporting to give a life tenant the right to lease is contrary to specific provisions of AIPRA that authorize the majority owners of agricultural land under AIARMA to lease agricultural land. 25 USC § 2218 (a), (f) and (g). 25 CFR § 162.004 (b) (1) is invalid and unenforceable to the extent that it is inconsistent with the AIPRA. *Eversharp*, 129 Ct. Cl. at 776 (government illegally exacts money by enforcement of a regulation that is contrary to statute); *Aerolineas*, 77 F.3d at 1575 (United States may not rely on a regulation that violates a clear statutory mandate).

A further claim is made by the United States that the BIA had authority to issue permits to Judy Fredericks. It is difficult to discern the authority for this proposition, but it appears they rely upon the definition of a permit under 25 CFR 166.4. A permit is defined as a written agreement between Indian landowners and a permittee, "whereby the permittee is granted a revocable permit to use Indian land or government land, for a specified purpose." *Id.* (*emphasis added*). A permit is between Indian landowners and a permittee, not by the United States and a permittee which would be the case if Judy Fredericks had a permit. Moreover, the definition says nothing about the criteria to be used in issuing permits. The criteria for issuing a permit by the BIA are set forth at 25 CFR 166.205 (a) (1) through (7). Nothing in that regulation gave the BIA authority to issue a permit to Judy Fredericks under 166.205.

The assertion is made by the United States, without support other than its bare conclusion, that the savings clause in 25 USC § 2218 (g) does not require the remaindermen to consent to any lease. The argument misses the point. Section 2218 (g) states that nothing in AIPRA can be construed to deprive the Plaintiffs' of their right to lease their land under AIARMA. The statute is clear. It does not have to expressly state that "remaindermen" have the right to lease. This right is given to the plaintiffs who are "owners" under AIARMA.

Finally the government concedes that 25 USC § 3715 (c) authorizes a majority of the owners of agricultural land to lease the land. It then cites to the regulations at 25 CFR 166.4, defining interest, which, as shown above, pertains to permits which the BIA had no authority to issue to Judy Fredericks because she did not meet any of the conditions in 25 CFR 166.205. But even so, a regulatory definition of interest does not overcome the legal conclusion that 25 USC 3715 (c) giving the owners of Indian land the right to lease the land was specifically preserved by AIPRA at 25 USC 2218 (f). Again, the regulation cannot override plaintiffs' statututory rights

To say that AIPRA determines interest and AIARMA determines percentage is simply wrong. The right of Indian landowners under AIARMA to lease Indian agricultural land is unequivocal and straight forward. Boiled to its core, this argument by the government is simply another route to the regulation at 25 CFR 162.004 (b) (2) that has absolutely no support in either AIPRA or AIARMA.

Clearly the Third Claim for Relief asserts a claim upon which relief can be granted. Casey Fredericks was and is being deprived of his right to lease the agricultural land; the five plaintiffs have been deprived of their rights as majority interest holders to lease the land and receive their share of the proceeds; and by allowing Judy Fredericks to lease the land plaintiffs have been deprived of money which they could have earned by leasing the land under AIARMA.

IV. FOURTH CLAIM FOR RELIEF

When Congress takes tribal or individual property, the fifth amendment requires the payment of compensation. *U.S. v. Sioux Nation*, 448 U.S. 371, 416 (1980); U.S. Const. Amend. V. An uncompensated taking may be enjoined, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113-114 (1912), or a statutory scheme providing no compensation may be invalidated as violative of the takings clause. *Babbit v. Youpee*, 519 U.S. 234, 244-245 (1997) (Indian Land Consolidation Act escheating individual interests violates fifth amendment); *Hodel v. Irving*, 481 U.S. 704, 716-717 (1987) (same, as to Land Consolidation amendents).

Decedent died on December 27, 2006. At the time of his death, he was survived by his wife, Judy, and her two children by decedent, as well as the five plaintiffs in this case who are children from a previous marriage.

The American Indian Probate Reform Act (AIPRA) was the fourth amendment to the Land Consolidation Act effective one year after publication in the Federal Register. It was

published on June 28, 2005, and became effective on June 28, 2006. At the time of decedent's death there were no regulations promulgated under the AIPRA. The regulations under AIPRA not in effect at the time of decedent's death cannot be applied to his probate. See Estate of Fredericks, Jr., 57 IBIA 204, 211 (2013)("Nothing in AIPRA conditioned its effectiveness or applicability on the promulgation of implementing regulations.").

The administrative probate of decedent's probate began in 2008 and the decision of the Interior Board of Indian Appeals became final on July 11, 2013. It was this decision that determined that Judy Fredericks would be entitled to a life interest in decedent's property without regard to waste but the ownership would be with decedent's seven children held in common.

Prior to the passage of the final AIPRA amendments effective on June 28,2006, a decedent understood that his property and income derived therefrom would be distributed to his wife and children. Both his wife and children would share in a decedent's intestate estate. After the passage of the AIPRA amendments, this was all changed according to the United States. His wife now, to the exclusion of his children, is, according to the United States, entitled to a life interest in all of his property including all income derived from it and without regard to waste to the property available to the children upon the wife's death.

The United States says it can pay the life tenant the revenue from the oil and gas and agriculture leases executed after decedents death, despite the plaintiffs' rights under the FBIMLA and AIARMA. This constitutes a taking. Plaintiff's had a vested interest in the decedent's property left on his death, *Hodel v. Irving*, 481 U.S. 704, 711-712 (1986). Plaintiffs and their decedent could not lawfully suffer a deprivation of that property, including millions of dollars in oil revenues, over the course of Judy Fredericks' life, and then receipt of property

utilized by Judy Fredericks without regard to waste. Decedent's expectations in his wife and children sharing in his intestate estate from the time of his death, rather than having his wife receiving all of his property during her lifetime, have, according to the Government, been permanently abolished by the amendments to AIPRA. Decedent under the AIPRA amendments was deprived of an important property right and plaintiffs concomitantly suffered monetary loss. Considering the economic impact, its effect on investment back expectations, the essential character of the measure, the provision for life estate cannot be sustained. Decedent's vast ownership was unfractionated. *Compare Hodel v. Irving, supra* at 715. The economic impact and effect on investment back expectations, because of the loss of millions of dollars in oil and gas and other revenues to the plaintiffs, is immense. *Hodel v. Irving, supra* at 714. The provision is extraordinary because it deprives decedent's children of the use of his property for an indeterminate of amount of time. *Babbit v. Youpee*, 519 U.S. 234, 239-240 (1997). Decedent's right to either assume upon intestacy or voluntarily devise that his property would go to his wife and children upon his death was, according to the United States, abolished by the requirement that his wife receive a life interest for an indeterminate amount of time. 25 USC 2206 (a) and (b); *Hodel v. Irving*, supra 717-718. A virtual abrogation of the right to pass on certain type of property for an indefinite time cannot be sustained.

The United States argues that the widow received a life estate permitting her to commit waste upon the property. 25 USC 2201 (10). The children, including plaintiffs, are the only eligible heirs to their father's property under AIPRA. 25 USC 2206 (a) and (b). Permitting a life estate holder to unilaterally enter into leases after decedents death and take income from non renewable resources from property that eligible heirs own clearly violates due process of law and constitutes a taking of property for which compensation must be paid. There is no rational

justification for such a provision. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (taking found when physical invasion of property permitted); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (U.S. 2005) (government regulation of private property may sometimes be so burdensome "that its effect is tantamount to a direct appropriation or ouster" compensable under the fifth amendment) (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). The plaintiffs have adequately pled a taking under these principles.[6]

Plaintiffs allege that the BIA approved an illegal oil and gas lease, illegally granted grazing permits and denied the plaintiffs their right to authorize an agricultural lease, and that an interpretation of AIPRA to authorize such actions abrogates the plaintiffs' property rights under federal law and constitutes a taking. Complaint, ¶¶ 12-13, 15-19, 68, 72-75. The allegations are sufficient to state a claim for a fifth amendment taking. *Central Pines Land Co. v. U. S*, 2008 U.S. Claims LEXIS 801 (Fed. Cl. Sept. 30, 2008) (Owners of mineral rights properly stated takings claims against the government since the government allegedly granted mineral leases under an erroneous claim of right); opinion replaced and judgment entered in *Central Pines Land Co. v. United States*, 107 Fed. Cl. 310, 2010 U.S. Claims LEXIS 948 *39-44 (2010); *rev'd on other grounds, 99* Fed. Cl. *394 (2011). See Yuba Goldfields, Inc. v. United States,* 723 F.2d 884, 887-888 (Fed. Cir. 1983)

Not only must the provision permitting waste be invalidated, *Eastern Enterprises v.*

[6] The Government's expansive interpretation of AIPRA in favor of the life tenant not only violates the plaintiffs' rights under the FBIMLA and AIARMA, it goes against well settled principles of law restricting life tenants from leasing land post death without the consent of remaindermen, and violates the well settled open mines doctrine. Eide v. Tveter, 143 F.Supp. 665, 671 (D.N.D. 1956) (It is the uniform rule that the life tenant or the tenant for years is not privileged to take oil and gas, nor has he the power to create such privilege in others by way of lease of the land for oil and gas purposes); 1-8 Kuntz, Law of Oil and Gas, Section 8.4 (In the absence of special provision or special circumstances, a life tenant is not entitled to extract oil, gas, or other minerals on a lessee). Moreover, a life tenant cannot make a lease which will extend beyond the life estate or confer greater rights upon a lessee as against the holders of the future interests. Drees Farming Ass'n. V. Thompson, 246 NW2d 883, 887-888 (N.D. 1976); Englehart v. Larson, 608 NW2d 673, 677 (S.D. 2000). Compare 25 CFR Part 179, the regulation on life estates and future interests prior to the enactment of AIPRA, a copy of which is attached as exhibit 2.

Apfel, 524 U.S. 498, 520 (1998); *Babbit v. Youpee*, 519 U.S. 234, 245 (1997); *Hodel v. Irving*, 481 U.S. 704, 718 (1987), but compensation paid for any deprivation that had taken place under the provision. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

The provision in AIPRA at 25 USC 2206 (a) (2) (D) requiring that intestate distributions of remainder interests of less than 5% of an entire undivided ownership of the parcel of land of which such interest is a part must be made to the oldest surviving child is no different than the provisions for escheat struck down in *Hodel v. Irving*, 481 U.S. 704 (1987), and *Babbit v. Youpee*, 519 U.S. 234 (1970). Instead of escheating to the United States or tribe, the less than 5% interest goes to the oldest surviving child. The other children, as here, are deprived of any interest, enjoyment, or benefit from the land going to the oldest child and decedent is deprived of his reasonable expectation that his property would be divided intestate equally between his children.

The United States cites *Wyatt v. United States*, 271 F3d 1090 (Fed. Cir. 2001), and *United States v. Jim*, 409 U.S. 80 (1972), for the proposition that plaintiffs could not raise the taking claims. However, in *Hodel v. Irving*, 481 U.S. 704, 711-712 (1986), plaintiff's were permitted to raise post death claims on behalf of the decedent and plaintiffs can do the same in the present proceeding. *United States v. Jim*, 409 U.S. 80 (1972), pertained to amending a class of beneficiaries and not to the rights of decedent under a descent and distribution scheme such as AIPRA. Moreover, the issue of broad power to act must be treated separately from the duty to pay compensation, such as taking claims. *Choate v. Trapp*, 224 U.S. 665, 673 (1912).

The IBIA determined that Judy Fredericks was entitled to a life interest under AIPRA. However, it did not decide any constitutional claims related to AIPRA such as the single heir

rule or violation of government's trust responsibility and any taking claims. *Estate of John Fredericks, Jr.*, 57 IBIA 204, 210 (2013) (citing *Estate of Joyce Mary James*, 4 IBIA 82, 82 (1975), "Only the courts have the authority to take action which runs counter to the will of the legislature"). Nothing in the above decision was said concerning waste. *Id.,* 57 IBIA 209. The IBIA decision in this case does not prevent this court from determining the claims set forth in the complaint.

CONCLUSION

For all of the above reasons the First, Third, and Fourth Claims for Relief state claims upon which relief can be granted. This court has subject matter jurisdiction over the Second Claim for Relief. The United States' motion to dismiss should be denied in its entirety.

Dated September 22, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this September 22, 2014, a copy of the foregoing response to motion to dismiss was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the court's electronic filing system. Parties may access this filing through the court's system.

/S/ Terry L. Pechota
Terry L. Pechota