IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed October 23, 2014)

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

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs' "protective complaint" should be dismissed because this Court lacks jurisdiction to review the constitutionality of the American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773, ("Probate Reform Act") and the regulations implementing that Act as requested by plaintiffs in their Second Claims for Relief; and because the balance of plaintiffs' claims are dependent upon a finding that has not been made by the Interior Board of Indian Appeals or a district court, namely that the Bureau of Indian Affairs' adherence to the Probate Reform Act, American Indian Agricultural Resource Management Act, codified at 25 U.S.C. §§ 3701-3746 ("Agricultural Resource Management Act"), and the Fort Berthold Mineral Leasing Act, Pub. L. No. 105-188, 112 Stat. 620 (1988), as amended by Pub. L. No. 106-67 § 1(2), 113 Stat. 979 (1999), was arbitrary, capricious, or contrary to law. Because plaintiffs have failed to properly invoke this Court's subject-matter jurisdiction and have failed to state facts establishing that the Bureau of Indian Affairs violated any specific rights-creating or duty-imposing statutory or regulatory prescriptions, plaintiffs' complaint should be dismissed in its entirety.

II. ARGUMENT

A. Plaintiffs Have Failed to Demonstrate Jurisdiction Over Their Second Claim for Relief.

The United States moved to dismiss plaintiffs' Second Claim for Relief ("Breach of Fiduciary Obligations") because plaintiffs failed to identify s specific statutory, regulatory, or treaty provision, money-mandating in breach, that the United States allegedly violated. Motion to Dismiss ("Mot.") at 8-13, ECF No. 7. In opposition, plaintiffs argue that several statutes administered by the United States for the benefit of Indians are money-mandating in breach. Opposition to Motion to Dismiss ("Opp'n") at 23-29, ECF No. 15. While this may be true,

plaintiffs' opposition misses the mark. To state a claim for damages against the United States for breach of fiduciary duty in this Court, plaintiffs must show that the United States violated a specific money-mandating statute and that specific violation caused plaintiffs' claimed harm. It is insufficient to simply point to the general trust relationship between the United States and Indians, or to other statutory schemes that may be money-mandating in breach, to state a claim within this Court's subject-matter jurisdiction for conduct by the United States implicating Indian land.

The Fort Berthold Mineral Leasing Act, the Indian Mineral Leasing Act, the Probate Reform Act, and the Agricultural Resource Management Act do not mandate that the Bureau of Indian Affairs obtain consent of remaindermen before approving leases and encumbrances of decedent's trust estate. Accordingly, even if those statutes were money-mandating in breach, plaintiffs have still failed to clear the second jurisdictional hurdle established by Supreme Court precedent: establishing a causal link between the legal violation and the claimed harm. *United States v. Navajo Nation*, 556 U.S. 287, 290-291 (2009) ("*Navajo II*") (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*")).

Plaintiffs have only alleged three specific acts or omissions of the United States as the basis for their Second Claim for Relief: (1) approval of a mineral lease without approval from the remaindermen, Opp'n at 28; (2) approval of a mineral lease "at bonus and royalty rates lower than being paid on similar leases in the area," *id.*; and (3) approval of agricultural leases without approval from the remaindermen, *id.* Even if true, this conduct does not violate any of the aforementioned statutes and, accordingly, this Court lacks subject-matter jurisdiction over those claims. *Navajo II*, 556 U.S. at 301-302 (when plaintiffs "cannot identify a specific, applicable, trust creating statute or regulations that the Government violated, . . . neither the Government's

'control' over [Indian assets] nor common-law trust principles matter.").

First, plaintiffs' argument that the Probate Reform Act itself is the breach of fiduciary duty, Opp'n at 26-27, is not cognizable in this Court. In *Menominee Tribe v. United States*, the plaintiff Indian tribe claimed "that the passage, enactment, and implementation of the Termination Act (as amended), pursuant to its terms, was a non-constitutional breach of the trust which the United States, as a governmental entity, owed to the Menominees under various treaties and long-continued practice." 607 F.2d 1335, 1339-40 (Ct. Cl. 1979). Here, plaintiffs do not and cannot argue that the Probate Reform Act itself is unconstitutional. Instead, similar to the plaintiff in *Menominee Tribe*, plaintiffs argue that the Act effectuated a breach of trust and that "the regulations [enacted pursuant to the Act] compound[ed] the breach of fiduciary duty." Opp'n at 27-28. In *Menominee Tribe*, the Court of Claims concluded that the Tucker Acts "do not authorize us to entertain the nonconstitutional claim that the enactment of [Indian legislation] was a breach of trust by Congress for which the plaintiffs can obtain monetary relief." 607 F.2d at 1343. The same result is warranted here; plaintiffs' arguments that the Probate Reform Act itself effectuated a breach of trust are not within this Court's subject-matter jurisdiction and should be dismissed.

Second, plaintiffs have not shown a violation of the Fort Berthold Mineral Leasing Act. Although plaintiffs argue that they were beneficial "owners" of their father's land in 2008, when the Kodiak lease was executed, their ownership interest was undetermined at the time. Plaintiffs' own complaint establishes that John Fredericks, Jr., "died intestate on December 27, 2006, owning surface and mineral interest in trust or restricted land on the Fort Berthold Reservation." *Estate of John Fredericks, Jr.*, 57 IBIA 204, 205 (2013); Compl. ¶¶ 1, 5, 10, ECF No. 1. Furthermore, the probate of plaintiffs' father's estate was not completed until July 11, 2013.

Compl. ¶¶ 21-23. In relevant part, the result of the probate was that Judy obtained a life estate without regard to waste and plaintiffs' obtained a remainder interest. *Estate of John Fredericks, Jr.*, 57 IBIA at 205-206, 211 (affirming probate officer's decision). As such, between December 27, 2006, and July 11, 2013, the beneficial owners of the land were not determined and the estate remained in probate.

Because there were no determined heirs for plaintiffs' father's land at the time, on April 23, 2008, the Superintendent executed the Kodiak lease pursuant to 25 C.F.R. § 212.21. Mot. Ex. 3, ECF No. 7-3.[1/] 25 C.F.R. § 212.21(a) permits the Secretary of the Interior's designee to execute a mineral lease "when such owner is deceased and the heirs to or devisee of the estate have not been determined." Similarly, the Fort Berthold Mineral Leasing Act permits the Secretary of the Interior's designee to execute leases where the "owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined." Pub. L. No. 105-188 § 1(a)(3)(A). Thus, plaintiffs have failed to show that any law required their approval of the Kodiak lease in 2008 and the allegations in plaintiffs' own complaint show that the Secretary of the Interior's designee executed the Kodiak lease consistent with, and pursuant to, the law. Because plaintiffs have not shown a violation of the Fort Berthold Mineral Leasing Act,

[1/] Contrary to plaintiffs' suggestion, Opp'n at 11-12, the Court may consider the Kodiak lease on this motion to dismiss without converting the motion to a motion for summary judgment. When deciding a motion to dismiss, the Court may review the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the Court will take judicial notice. *Crusan v. United States*, 86 Fed. Cl. 415, 417-18 (2009). The Kodiak lease is referenced repeatedly in plaintiffs' complaint, is incorporated into the complaint, and forms the basis of several of plaintiffs' claims. *See, e.g.*, Compl. ¶ 12. Accordingly, the Court may consider the oil and gas lease on this motion to dismiss because it is referenced in the complaint, plaintiffs' claims rely heavily on the lease's terms and effect, and the authenticity of the lease is not subject to reasonable dispute. *Bristol Bay Area Health Corp. v. United States*, 110 Fed. Cl. 251, 262 (2013).

it is irrelevant to the jurisdictional inquiry whether that statute is money-mandating in breach; plaintiffs' claim should be dismissed.

Third, the Agricultural Resource Management Act does not vest this Court with subject-matter jurisdiction over plaintiffs' Second Claim for Relief. The United States Court of Appeals for the District of Columbia Circuit has held that the Agricultural Resource Management Act is not money-mandating in breach. *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 898-99 (D.C. Cir. 2014). Even if this Court were to determine that the Agricultural Resource Management Act is money-mandating in breach, plaintiffs' Second Claim for Relief should still be dismissed because plaintiffs have failed to allege any facts evincing a violation of the Act by the United States. Plaintiffs claim they have been "deprived of the right to lease the land" because Judy, as life tenant, has that right under the Probate Reform Act. Opp'n at 28. Plaintiffs' arguments based on the Agricultural Resource Management Act therefore collapse with their arguments that the Probate Reform Act itself effectuated a breach of trust. That argument, as set forth above, is not tenable here. Because Judy has a legal right to a life estate without regard to waste, plaintiffs have not and cannot show that the United States violated a statutory or regulatory prescription by permitting Judy to lease agricultural lands that are part of the life estate.

Finally, plaintiffs' citation to the Indian Mineral Leasing Act, Opp'n at 24, is misplaced because plaintiffs do not allege facts establishing a violation of that Act or its implementing regulations. The mere fact that the Indian Mineral Leasing Act "entrusted the Secretary of Interior with comprehensive responsibilities," *id.*, is insufficient to invoke this Court's subject-matter jurisdiction. As held by the Supreme Court, "neither the Government's 'control' over coal nor common-law trust principles matter" in the jurisdictional analysis unless plaintiffs can

identify a "specific, applicable, trust-creating statute or regulation that the Government violated." *Navajo II*, 556 U.S. at 302. The Supreme Court held that the "Federal Government's liability cannot be premised on control alone." *Id.* at 301. Accordingly, to premise this Court's subject-matter jurisdiction on the Indian Mineral Leasing Act, plaintiffs must plead a violation of an express statutory or regulatory provision, and they have failed to do so in their complaint.

Plaintiffs' argument that the Kodiak "lease was approved at bonus and royalty rates lower than being paid on similar leases in the area," Opp'n at 28 (citing Compl. ¶ 40), is insufficient to state a claim under the Indian Mineral Leasing Act within this Court's subject-matter jurisdiction. Plaintiffs do not, and cannot, allege that the Kodiak lease violates any provisions of the Indian Mineral Leasing Act or its implementing regulations. Indian Mineral Leasing Act regulations obligate the Secretary of the Interior to act in the best interest of the Indian mineral owners where the Secretary permits a private negotiation. 25 C.F.R. § 212.20(b). Decedent's land was placed up for public auction. Howling Wolf Decl. ¶ 4, ECF No. 7-1. The regulations also require consideration of the best interest of the Indian mineral owners when approving unitization agreements. 25 C.F.R. § 212.28. Plaintiffs' complaint does not place unitization agreements at issue. Finally, the regulations require consideration of the best interest of the Indian mineral owners in approving a royalty rate of less than 16 2/3 percent. 25 C.F.R. § 212.41. The Kodiak lease calls for a royalty of 18 percent, in excess of the regulatory minimum. Kodiak lease ¶ 3(c). Thus, any alleged failure to act in the "best interest of the Indian mineral owner," 25 C.F.R. § 212.3, is not at issue in plaintiffs' complaint and they have pointed to no other violation of the Indian Mineral Leasing Act or its implementing regulations.

Plaintiffs' claims that the United States allegedly failed to maximize bonuses and royalty rates is more analogous to *Navajo II* than *United States v. Mitchell*, 463 U.S. 206 (1983)

("*Mitchell II*"). *Mitchell II* involved a series of statutes and regulations that gave the government "full responsibility to manage Indian resources and land for the benefit of the Indians," 463 U.S. at 224, and 25 U.S.C. § 406(a) (a statute at issue in *Mitchell II*) permitted Indians to sell timber with the consent of the Secretary of the Interior, but directed the Secretary to base his decisions on "a consideration of the needs and best interests of the Indian owner and his heirs" and enumerated specific factors to guide that decisionmaking. There are no similar factors present here. As observed by the Supreme Court "neither the [Indian Mineral Leasing Act] nor its regulations established any analogous duties or obligations in the coal context." *Navajo II*, 556 U.S. at 294. Similar to *Navajo II*, plaintiffs' claims with respect to the Kodiak lease do not implicate comprehensive government control.

In sum, plaintiffs' Second Claim for Relief is premised on the general trust relationship between the United States and individual Indians and is therefore a claim outside this Court's subject-matter jurisdiction. Plaintiffs' reliance on other statutes or portions of statutes, some of which may be money-mandating in breach, does not save plaintiffs' Second Claim for Relief. To properly invoke jurisdiction based on those other statutes plaintiffs have to allege a violation of those statutes that caused their harm. Plaintiffs have not done so and their Second Claim for Relief should be dismissed for lack of subject-matter jurisdiction.

B. Plaintiffs' First Claim for Relief Should Be Dismissed for Failure to State a Claim.

The United States moved to dismiss plaintiffs' First Claim for Relief because plaintiffs failed to allege facts that, if accepted as true, establish that the Kodiak lease was unlawfully approved or that its terms were contrary to law. Mot. at 17-21. In response, plaintiffs advance several legal arguments that are belied by the plain language of the Probate Reform Act and the Fort Berthold Mineral Leasing Act. Factually, plaintiffs rely exclusively on their conclusory

allegations that the Kodiak lease was not "in the best interests of the heirs" and that "an oil and gas lease can never be in the heirs' best interest unless the heirs receive the financial benefits of the lease." Opp'n at 17-18. These assertions are both legally incorrect and fail to state facts, as opposed to mere conclusions, that support plaintiffs' First Claim for Relief.

There can be no reasonable dispute that the Kodiak lease was executed by the Secretary of the Interior's designee because, at the time the lease was executed, no heirs had been determined for plaintiffs' father's estate. Until the completion of probate, including all appeals proceedings, the heirs of a decedent's estate are not finally determined. *Estate of Barnes*, 17 IBIA 72, 76-77 (1989). As discussed above, Section II.A, *supra*, at the time the Kodiak lease was executed, plaintiffs' father's estate's probate was still pending. Accordingly, the only party that could execute the Kodiak lease was the Secretary of the Interior's designee. Pub. L. No. 105-188 § 1(a)(3)(A). Plaintiffs' argument that they, as putative potential heirs, had authority to approve the Kodiak lease, *see* Opp'n at 19, is contrary to law.

The fact that plaintiffs may have received an incomplete copy of the Kodiak lease in response to a Freedom of Information Act request or an informal request to the Bureau of Indian Affairs, Opp'n at 15-16, does not detract from the fact that the Secretary of the Interior's designee executed that lease. As previously discussed, the Court may take judicial notice of the Kodiak lease on this motion to dismiss without converting it to a motion for summary judgment. *Bristol Bay Area Health Corp.*, 110 Fed. Cl. at 262. The Realty Officer of the Bureau of Indian Affairs Fort Berthold Agency confirmed that the Acting Superintendent executed the Kodiak lease on behalf of the undetermined heirs of plaintiffs' father's estate. Howling Wolf Decl. ¶ 7.

The lease was signed by the Acting Superintendent[2/] pursuant to 25 C.F.R. § 212.21. Mot. Ex. 3. 25 C.F.R. § 212.21(a) permits the Secretary of the Interior's designee to execute a mineral lease "when such owner is deceased and the heirs to or devisee of the estate have not been determined." Similarly, the Fort Berthold Mineral Leasing Act permits the Secretary of the Interior's designee to execute leases where the "owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined." Pub. L. No. 105-188 § 1(a)(3)(A). The Kodiak lease was executed by the Secretary of the Interior's designee—not Judy and not plaintiffs—consistent with the Fort Berthold Mineral Leasing Act.

The mere fact that Judy signed the Kodiak lease does not detract from the fact that the lease was executed by the Secretary of the Interior's designee. As confirmed by the Realty Officer, and not contradicted by plaintiffs, the fact that Judy signed the Kodiak lease is irrelevant, because the lease was executed by the Secretary of the Interior's designee. Howling Wolf Decl. ¶ 7.

Having disposed of plaintiffs' procedural argument (that the lease was allegedly unlawfully executed by Judy), plaintiffs First Claim for Relief boils down to two arguments that lack merit: (1) that the lease was approved "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," Compl. ¶ 40; and (2) that plaintiffs as heirs are somehow entitled to revenues from the lease, Opp'n at 19-20. Plaintiffs' contentions are incorrect and are unsupported by facts in the complaint and plaintiffs' First Claim for Relief

[2/] Plaintiffs appear to argue that the lease is invalid because it was not personally signed by then-Secretary Salazar himself. Opp'n at 14. There can be no reasonable dispute that the Secretary of the Interior lawfully delegated his authority to approve mineral leases to the Superintendent.

should accordingly be dismissed.

First, the United States did not owe a duty to plaintiffs, as potential heirs, when the lease was approved, rather, the United States owed its fiduciary obligations to the estate. The Department of the Interior has long been of the view that a putative, but undetermined, heir does not hold a trust or restricted fee interest in allotted land prior to conclusion of probate. *Gooday v. S. Plains Reg'l Dir.*, 38 IBIA 166, 170 (2002) (Indian who "was not a determined heir at the time the Acting Superintendent granted the lease" "did not hold a trust/restricted interest" in the land at the time an oil and gas lease was executed). The beneficiary of the Kodiak lease is the estate, not plaintiffs. That is precisely why the Fort Berthold Mineral Leasing Act contains provisions that permit the Secretary of the Interior to execute leases when the beneficial owner of the land is deceased and heirs have yet to be determined.

The lease therefore became part of the estate, and upon conclusion of probate the lease inured to Judy, as life tenant. The Probate Reform Act is clear that "the surviving spouse shall receive . . . a life estate without regard to waste in the interests in trust or restricted lands of the decedent." 25 U.S.C. § 2206(a)(2)(A). "A life estate is a right to use property, but does not convey title to that property. Title to the property is in the remaindermen, *i.e.*, those persons to whom the property passes upon the expiration of the life estate." *Estate of Barnes*, 17 IBIA at 76.

Accordingly, between December 27, 2006, and July 11, 2013, there were no determined heirs to plaintiffs' father's estate and beneficial title of plaintiffs' father's lands was undetermined. On April 23, 2008, the Secretary of the Interior's designee executed the Kodiak lease pursuant to Section 1(a)(3)(A) of the Fort Berthold Mineral Leasing Act. By law, that lease became "binding, to the same extent as if all of the Indian owners of the Indian land involved

had consented to the lease or agreement, upon" the estate, the owner of the Indian land at the time. Pub. L. No. 105-188 § 1(a)(2)(B). On July 11, 2013, Judy obtained a life estate "without regard to waste" in plaintiffs' father's land, including the Kodiak lease. 25 U.S.C. § 2206(a)(2)(A). Plaintiffs' unencumbered beneficial title to their father's land will not vest until termination of the life estate. *Estate of Barnes*, 17 IBIA at 76. The United States therefore did not owe a duty *to plaintiffs* to maximize bonus or royalty rates at the time that the Kodiak lease was approved. *Cf.* Opp'n at 17-18. Plaintiffs accordingly cannot state a claim for violation of the Fort Berthold Mineral Leasing Act, or any other act, as a result of the United States' execution of the Kodiak lease. Moreover, plaintiffs' claim that their expected future interest in their father's land may have somehow been harmed by the execution of the Kodiak lease would be no more than a claim for consequential damages, a claim that is outside this Court's subject-matter jurisdiction. *Mitchell v. United States*, 664 F.2d 265, 271 (Ct. Cl. 1981) (en banc) ("But there can be no recovery for other, consequential, indirect damages which a private cestui might possibly recover because of his trustee's derelictions.").

Plaintiffs' claims for damages because the Department of the Interior has not distributed bonus payments, rents, and royalties received as a result of the Kodiak lease to plaintiffs also fails. Plaintiffs' argument rests upon a conclusion that "owners of the Indian land" in the Fort Berthold Mineral Leasing Act, Pub. L. No. 105-188 § 1(a)(2)(C), must mean "eligible heirs" as defined in the Probate Reform Act, 25 U.S.C. § 2201(9). Opp'n at 19-20. Plaintiffs' argument is not the Department of the Interior's interpretation of the statutes and is not supported by the law.

That the surviving spouse owns an interest, or is a life tenant "owner of Indian land, " under the Fort Berthold Mineral Leasing Act by operation of the Probate Reform Act is clear from the Probate Reform Act which provides, in part, "the surviving spouse shall receive . . . a

life estate without regard to waste in the interests in trust or restricted lands of the decedent." 25 U.S.C. § 2206(a)(2)(A). Additionally, the holder of the life estate is entitled to the receipt of all income, including bonuses, rents, and royalties from such land to the exclusion of the remaindermen. 25 U.S.C. § 2201(10). Plaintiffs' construction of the Fort Berthold Mineral Leasing Act gives no effect to the express language of the Probate Reform Act. Such a construction is unwarranted because the two acts are complementary and not in conflict.

The Fort Berthold Mineral Leasing Act does not speak to descent. Congress specifically dealt with descent in the Probate Reform Act. *See* 25 U.S.C. § 2206(a)(1) (providing that Indian land and interests in Indian land shall devise pursuant to the Probate Reform Act absent specific descent provisions in other federal laws). Because the Fort Berthold Mineral Leasing Act does not relate to "devise or descent of trust or restricted interest in land," the Probate Reform Act controls distribution of proceeds from the Kodiak lease in this case.

Plaintiffs allege no facts in their complaint that the Department of the Interior has failed to comply with the provisions of the Probate Reform Act and its implementing regulations with respect to the distribution of proceeds from the Kodiak lease. Instead, plaintiffs argue that the Department of the Interior's compliance with the Probate Reform Act is a breach of trust. Opp'n at 17-21. Such allegations fail to state a claim upon which relief can be granted and plaintiffs' First Claim for Relief should be dismissed.

C. Plaintiffs' Third Claim for Relief Should be Dismissed for Failure to State a Claim.

Plaintiffs fail to state a claim in their Third Claim for Relief because they fail to apply the law as written at the time when they allege the United States erred by approving agricultural leases or denying proposed agricultural leases of their father's land. Plaintiffs fault the United States for three acts in their Third Claim for Relief: (1) for approving an agricultural lease on

April 10, 2010, Compl. ¶ 17; (2) for failing to approve or "take action on" an agricultural lease submitted by plaintiffs on July 6, 2012, *id.* ¶ 27-28; and (3) for disapproving an agricultural lease submitted by plaintiffs on March 28, 2014, *id.* ¶ 29. Even accepting these allegations as true, they were fully consistent with the law applicable at the time and plaintiffs therefore have failed to state a claim.[3/]

First, the Bureau of Indian Affairs rejection of plaintiffs' proposed agricultural lease submitted on November 18, 2013, and disapproved on March 28, 2014, cannot be a violation of the Agricultural Resource Management Act. At all relevant times, Judy had a life estate without regard to waste. *Estate of John Fredericks, Jr.*, 57 IBIA at 205-206. Upon Mr. Fredericks's death a "legal estate in fee passed to" the United States as trustee and "so long as the life estate continue[s]" Judy enjoys exclusive use of the land. *Doe ex dem. Poor v. Considine*, 73 U.S. 458, 463 (1867). The Agricultural Resource Management Act permits leasing of Indian land by "a majority interest in trust or restricted land is an interest greater than 50 percent of the legal or beneficial title." 25 U.S.C.A. § 3715(c)(2)(B). When plaintiffs submitted their proposed lease in 2013, Judy, by operation of the Probate Reform Act, held exclusive beneficial title to the property and Judy was accordingly the person with authority to lease plaintiffs' father's land in 2013.

Second, on April 10, 2010, and July 6, 2012, plaintiffs were not determined heirs of their father's estate and they therefore had no determined interest in their father's land under the Agricultural Resource Management Act. Again, plaintiffs' father's estate was not finally

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[3/] Plaintiffs argue that the Agricultural Resource Management Act is money-mandating. Opp'n at 29-31. As noted, the District of Columbia Circuit has held to the contrary. *El Paso Natural Gas Co.*, 750 F.3d at 898-99. The Court need not resolve this issue on this motion because even if the Agricultural Resource Management Act is money-mandating in breach, plaintiffs have still failed to state a claim.

probated until July 11, 2013. *See generally Estate of John Fredericks, Jr.*, 57 IBIA at 211. Thus, prior to July 11, 2013, plaintiffs had only a potential contingent future interest in their father's property, not a determined heirship interest. *Estate of Barnes*, 17 IBIA at 76-77. To this day, plaintiffs do not have an unencumbered beneficial interest in their father's land, they have a beneficial interest that will pass upon termination of the life estate. *Id.* at 76. The leasing (and attempted leasing) that occurred in 2010 and 2012 is therefore distinguishable from the situation presented in *Hunter v. Acting Rocky Mountain Regional Director*, 51 IBIA 322 (2010). In that case, the putative lessor had an established life estate resulting from a gift deed. *Id.* at 323. Here, no life estate existed in 2010 or 2012, and Judy, instead, had a revocable permit. Compl. ¶ 16. In 2010 and 2012 the land was "owned" by the estate, not by plaintiffs.

There is nothing unlawful about the Department of the Interior issuing revocable permits on behalf of the estate. Pursuant to regulations promulgated in 2001, the Bureau of Indian Affairs has authority to lease agricultural lands on behalf of the "undetermined heirs and devisees of a deceased Indian landowner." 25 C.F.R. § 166.205(a)(4). Prior to July 11, 2013, the Bureau of Indian Affairs had authority to issue revocable permits and leases on behalf of the estate of plaintiffs' father's land. The Bureau of Indian Affairs lawfully exercised this authority and issued revocable permits to Judy. Compl. ¶ 16; 25 C.F.R. § 166.4. Those revocable permits provided Judy with the legal "interest" under the Agricultural Resource Management Act to lease the land. *See* 25 C.F.R. § 166.4 ("Interest means, when used with respect to Indian land, an ownership right to the surface estate of Indian land that is unlimited or uncertain in duration, including a life estate."); *see also* 25 C.F.R. § 166.203(b).

In sum, plaintiffs' Third Claim for Relief can only survive the United States' motion to dismiss if plaintiffs had a determined unencumbered ownership interest in 2010 or 2012.

Plaintiffs did not have any determined interest in their father's land until July 11, 2013. After July 11, 2013, plaintiffs' interest was subject to a life estate and Judy had authority to lease plaintiffs' father's land without consent of plaintiffs as remaindermen by operation of her life estate. Plaintiffs' Third Claim for Relief should be dismissed.

D. Plaintiffs' Fourth Claim for Relief Should be Dismissed for Failure to State a Claim.

Because plaintiffs fail to establish that they had a vested property interest in plaintiffs' father's land at the time the Probate Reform Act was passed, they have failed to state a claim for an unconstitutional taking. To state a claim for a taking sunder the Fifth Amendment, plaintiffs must show that they owned a distinct property interest at the time it was allegedly taken. *See, e.g.*, *Wyatt v. United States*, 271 F.3d 1090, 1097 (Fed. Cir. 2001) (holding that "the existence of a valid property interest is necessary in all takings claims"). Plaintiffs had no determined interest in their father's land until probate was concluded in 2013, *Gooday*, 381 IBIA at 170, and at that time they only obtained an interest encumbered by the life estate and a future right to obtain an unencumbered interest upon termination of the life estate, *Estate of Barnes*, 17 IBIA at 76-77. Moreover, when the Probate Reform Act was enacted on October 27, 2004, Mr. Fredericks was alive and plaintiffs had no interest whatsoever in Mr. Fredericks's trust land.

Plaintiffs' inchoate future interest in their father's land was not impacted at all by the Probate Reform Act. *Hodel v. Irving*, conversely, involved provisions of the Indian Land Consolidation Act that resulted in the virtual "the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs." 481 U.S. 704, 716 (1987). Similarly, *Babbit v. Youpee*, involved amendments to the Indian Land Consolidation Act that severely restricted "the right of an individual to direct the descent of his property." 519 U.S. 234, 244-45 (1997). Nothing in the Probate Reform Act restricted or prohibited Mr. Fredericks from

devising his property by will. But, Mr. Fredericks died intestate. *Estate of John Fredericks, Jr.*, 57 IBIA at 205. Accordingly, *Hodel* and *Babbit* have no application here.

Because plaintiffs had no property interest that was affected by the Probate Reform Act, plaintiffs cannot state a claim for an unconstitutional taking. Plaintiffs' Fourth Claim for Relief should be dismissed.

III. CONCLUSION

Wherefore, for the reasons stated herein, the United States respectfully requests that plaintiffs' complaint be dismissed in its entirety, with plaintiffs' Second Claim for Relief dismissed for lack of subject-matter jurisdiction, and plaintiffs' First, Third, and Fourth Claims for Relief dismissed for failure to state a claim.

Respectfully submitted, October 23, 2014,

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