IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on July 14, 2014)

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

UNITED STATES' MOTION TO DISMISS

SAM HIRSCH
Acting Assistant Attorney General

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

Attorney for the United States

OF COUNSEL:

HOLLY H. CLEMENT
Office of the Solicitor
United States Department of the Interior

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

MOTION

The United States hereby respectfully moves, pursuant to Rules 7 and 12 of the Rules of the United States Court of Federal Claims, to dismiss plaintiffs' complaint. More specifically, the United States moves to dismiss plaintiffs' Second Claim for Relief for lack of subject-matter jurisdiction and plaintiffs' First, Third, and Fourth Claims for Relief for failure to state a claim upon which relief can be granted. This motion is based upon the accompanying memorandum of points and authorities, the attached declarations of Renita Howling Wolf and Jeff Hunt, the attached oil and gas lease, and any arguments that may be advanced in reply, at argument, or with leave of Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

John Fredericks, Jr. died on December 27, 2006. He was survived by his wife, Judy, and nine children. Seven of those children are Mr. Fredericks's heirs. Judy was Mr. Fredericks's second wife and Mr. Fredericks had two children with Judy who are among his heirs. Mr. Fredericks had five children with his first wife, all of whom are also his heirs. The plaintiffs in this case are Mr. Fredericks's children from his first marriage.

Mr. Fredericks died intestate and his estate was probated by the Department of the Interior's Office of Hearings and Appeals, as he was an Indian and was the beneficial owner of trust or restricted fee status land located on the Fort Berthold Indian Reservation in North Dakota. Plaintiffs contested the probate of Mr. Fredericks's estate and appealed the administrative law judge's decision to the Interior Board of Indian Appeals ("IBIA"). The IBIA affirmed the administrative law judge's decision. To the United States' knowledge, plaintiffs have not appealed the IBIA's final probate decision to a district court under the Administrative Procedure Act.

By operation of law, upon Mr. Frederick's death, his surviving spouse, Judy, obtained a life estate without regard to waste consisting of Mr. Frederick's trust or restricted fee status lands (Mr. Fredericks's Individual Indian Money account was disbursed to Judy and his seven children in probate). Judy obtained at least two revocable permits from the Bureau of Indian Affairs to use the trust or restricted fee status land. Before Mr. Fredericks' heirs were determined and Judy was adjudicated as the life tenant, the Secretary of the Interior's designee approved an oil and gas mining lease in 2008. Plaintiffs also aver that Judy, as life tenant, executed a grazing permit or permits "both before and after April 10, 2010."

In essence, plaintiffs claim in their complaint that Judy's use of their father's land amounts to waste, that Judy has failed to secure for them, as remaindermen, the best possible terms on the leases, and that the Department of the Interior, through the Bureau of Indian Affairs, breached its trust responsibilities to plaintiffs by approving the leases at issue. Plaintiffs also attack the law governing the probate of Mr. Fredericks's estate. Plaintiffs claim that the probate law was not properly applied and, alternatively, that even if the probate law was properly applied it amounts to an unconstitutional taking without just compensation. Plaintiffs' claims should fail for several reasons.

First, this Court lacks subject-matter jurisdiction over plaintiffs' challenges to the agricultural authorizations approved by the Bureau of Indian Affairs and the application for a pasture lease submitted by plaintiffs but not approved by the Bureau of Indian Affairs in their Second Claim for Relief. Plaintiffs' challenges in this count rely exclusively on the general trust relationship between the United States and Indians and are therefore outside this Court's subject-matter jurisdiction.

Second, plaintiffs have failed to state facts evidencing a violation of the American Indian

Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773 ("Probate Reform Act") with respect to the Bureau of Indian Affairs' approval of the alleged grazing leases or its denial of the submitted agricultural lease. Accepting all of plaintiffs' allegations as true, plaintiffs have failed to establish a legal violation of the Probate Reform Act or the American Indian Agricultural Resource Management Act, codified at 25 U.S.C. §§ 3701-3746 ("Agricultural Management Act").

Third, plaintiffs have failed to state facts establishing that the Department of the Interior's approval of the oil and gas lease was in contravention of any statute or regulation.

Finally, plaintiffs have failed to state a claim for an unconstitutional taking without just compensation. Plaintiffs have failed to plead facts establishing that they have a vested and protectable property interest that has been taken.

II. QUESTIONS PRESENTED

1. Should plaintiffs' Second Claim for Relief be dismissed for lack of subject-matter jurisdiction?

2. Should plaintiffs' First Claim for Relief be dismissed for failure to state a claim?

3. Should plaintiffs' Third Claim for Relief be dismissed for failure to state a claim?

4. Should plaintiffs' Fourth Claim for Relief for an alleged unconstitutional taking be dismissed for failure to state claim?

III. STANDARD OF REVIEW

A. Motion to Dismiss for Lack of Subject-Matter Jurisdiction.

The United States may assert by motion the defense of "lack of subject matter jurisdiction." Rules of the United States Court of Federal Claims ("RCFC") 12(b)(1). If the Court, at any time, determines that it lacks subject-matter jurisdiction over a case or claim, it has to be dismissed. RCFC 12(h)(3).

Jurisdiction must be established before the Court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject-matter jurisdiction unless it is affirmatively indicated by the record; therefore, it is plaintiffs' responsibility to allege facts sufficient to establish the Court's subject-matter jurisdiction. *Renne v. Geary*, 501 U.S. 312, 316 (1991); *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction." (citations omitted)). Once the Court's subject-matter jurisdiction is put into question, it is "incumbent upon [the plaintiffs] to come forward with evidence establishing the court's jurisdiction. . . . [The plaintiffs] bear[] the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (citation omitted); *accord M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

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). When a motion to dismiss challenges the Court's subject-matter jurisdiction, the Court may look beyond the pleadings and inquire into jurisdictional facts to determine whether jurisdiction exists. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991). The determination of whether this Court has subject matter jurisdiction to hear plaintiffs' claims is a question of law. *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1381 (Fed. Cir. 2002).

B. Motion to Dismiss for Failure to State a Claim.

The United States may assert by motion that plaintiffs' complaint fails to state a claim

upon which relief can be granted. RCFC 12(b)(6). "The purpose of [Rule 12(b)(6)] is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail . . . ." *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993). "A dismissal for failure to state a claim . . . is a decision on the merits which focuses on whether the complaint contains allegations that, if proven, are sufficient to entitle a party to relief." *Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995) (citation omitted).

In resolving a Rule 12(b)(6) motion, the Court should assess whether plaintiffs' complaint adequately states a claim for relief under the implicated statute and regulations and whether plaintiffs have made "allegations plausibly suggesting (not merely consistent with)" entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (rephrasing *Twombly* standard as requiring "a claim to relief that is plausible on its face"); *accord Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356-57 (Fed. Cir. 2007). Although plaintiffs' factual allegations need not be "detailed," they "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (citations omitted). Plaintiffs "must provide 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1354 (Fed. Cir. 2010) (quoting *Twombly*, 550 U.S. at 555).

The Court thus "'accept[s] as true all factual allegations in the complaint, and . . . indulge[s] all reasonable inferences in favor of the non-movant'" to evaluate whether plaintiffs have stated a claim upon which relief can be granted. *Chapman Law Firm Co. v. Greenleaf*

Const. Co., 490 F.3d 934, 938 (Fed. Cir. 2007) (quoting *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001)). "At the same time, a court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Twombly*, 550 U.S. at 555).

IV. RELEVANT FACTS AND ALLEGATIONS

The following facts are alleged in plaintiffs' complaint, may be judicially noticed, or are jurisdictional facts that may properly be considered by this Court on this motion.

John Fredericks, Jr., "died intestate on December 27, 2006, owning surface and mineral interests 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. Upon his death, Mr. Fredericks was the beneficial owner of "22 interests in land in which Decedent's interest was 5% or more of each parcel, [and] 3 that were each less than 5%." *Id.*; *see also* Compl. ¶ 9.

Mr. Fredericks was the beneficial owner of 100% of the mineral estate underlying Allotment 301-M1029A-A on the Fort Berthold Indian Reservation at his death. Decl. of Howling Wolf ¶ 3, attached hereto as Exhibit 1. Allotment 301-M1029-A-A is a 160 acre parcel with a divided surface and mineral estate situated in the southeast quarter of Section 3, Township 147 N, Range 93 W of the Fifth Principal Meridian, located on the Fort Berthold Indian Reservation. *Id.* Allotment 301-M1029A-A was offered for oil and gas leasing by competitive bid in November 2007 ("2007 Competitive Lease Sale"). *Id.* ¶ 4. In the 2007 Competitive Lease Sale, 2,097 parcels were advertised for sale including the minerals underlying Allotment 301-M1029-A-A, which was identified as Tract 575. *Id.* Tract 575 received no bids in the 2007 Competitive Lease Sale. *Id.* ¶ 5. Subsequent to the 2007 Competitive Lease Sale, on February 4, 2008, Kodiak Oil and Gas (USA), Inc. ("Kodiak") presented an oil and gas lease offer to the Bureau of Indian Affairs' Fort Berthold Agency for parcel 301-M1029A-A . *Id.* ¶ 6.

Because Mr. Fredericks was deceased, and his heirs had not been determined, on April 23, 2008, the Acting Superintendent of the Bureau of Indian Affairs' Fort Berthold Agency, pursuant to his delegated authority, and under the Fort Berthold Mineral Leasing Act, executed and approved the lease on behalf of undetermined heirs of the John Fredericks, Jr., estate. *Id.* ¶ 7; *see also* Oil and Gas Lease, attached hereto as Exhibit 3.

Relevant here, the term of the oil and gas lease was for five years from approval "and as much longer thereafter as oil and/or gas is produced in paying quantities;" the royalty is 18%; and the bonus was $300. *Id.* As of the time of filing this motion, the oil and gas lease is producing in paying quantities. Decl. of Hunt ¶ 4, attached hereto as Exhibit 2.

On June 20, 2009, the Bureau of Indian Affairs probate hearing officer determined that Judy was the surviving spouse and was therefore entitled to a "life estate without regard to waste" as to those twenty-two parcels where Mr. Fredericks had an interest of 5% or more. *Estate of John Fredericks, Jr.*, 57 IBIA at 205-06 (citing 25 U.S.C. § 2206(a)(2)(A)(i)). That probate decision was appealed by plaintiffs and ultimately affirmed by IBIA on July 11, 2013. Compl. ¶¶ 21-23.

Plaintiffs aver that, both "before and after" April 10, 2010, Judy entered into grazing leases with Garvin Gullickson. *Id.* ¶ 17. Plaintiffs do not challenge the terms of those leases, they instead argue that the alleged grazing leases are void because they were "not authorized or approved by plaintiffs." *Id.*

Finally, plaintiffs aver that on July 6, 2012, and November 18, 2013, plaintiffs submitted to the Bureau of Indian Affairs for approval an agricultural lease to Casey Fredericks of some of Mr. Fredericks's allotted land. *Id.* ¶¶ 27-28. Plaintiffs allege that the Bureau of Indian Affairs denied approval of that agricultural lease. *Id.* ¶ 29.

V. ARGUMENT

A. Plaintiffs' Second Claim for Relief Should be Dismissed for Lack of Subject-Matter Jurisdiction.

Plaintiffs' Second Claim for Relief is for "breach of fiduciary obligations." Plaintiffs claim that, as heirs and remaindermen, the United States' statutory trust obligations run to them, not to Judy, the life tenant. Compl. ¶ 52. As such, plaintiffs claim that the Department of the Interior's approval of leases of Mr. Fredericks's land without their approval amounts to a breach of "its trust responsibility to plaintiffs." *Id.* ¶ 53. Plaintiffs therefore seek damages for the alleged breach of the United States' general trust relationship to plaintiffs as individual Indians. As such, plaintiffs' Second Claim for Relief should be dismissed for lack of subject-matter jurisdiction.

As long held by the Supreme Court, the general trust relationship between the United States and Indians does not create specific duties that, in breach, would invoke this Court's subject-matter jurisdiction. *See United States v. Mitchell*, 445 U.S. 535, 542 (1980) ("*Mitchell I*") (General Allotment Act created only "limited trust relationship" that did not give rise to enforceable fiduciary obligations against the United States). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003) ("*Navajo I*") (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("*Mitchell II*")). A waiver of sovereign immunity must be "'unequivocally expressed' in statutory text," *FAA v. Cooper*, 566 U.S. ___, 132 S. Ct. 1441, 1448 (2012) (citations omitted), and the "scope" of any such waiver has to be "strictly construed . . . in favor of the sovereign," *Lane v. Peña*, 518 U.S. 187, 192 (1996), and "not 'enlarge[d] . . . beyond what the language requires.'" *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (citation omitted); *see Cooper*, 132 S. Ct. at 1448.

The Tucker Act provides a "[l]imited" waiver of the United States' immunity from suit (*United States v. Navajo Nation*, 556 U.S. 287, 289 (2009) ("*Navajo II*")) by granting this Court jurisdiction over

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).

While the text of the Tucker Act addresses damages claims "founded . . . upon" the Constitution or a federal statute or regulation, it is well settled that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable." *Mitchell II*, 463 U.S. at 216. Instead, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-217 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967))); *accord Navajo I*, 537 U.S. at 503.

An Indian asserting a non-contract claim under the Tucker Act must therefore clear "two hurdles" to invoke federal jurisdiction. *Navajo II*, 556 U.S. at 290. "First, the [plaintiffs] 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" *Id.* (quoting *Navajo I*, 537 U.S. at 506). That "threshold" showing must be based on "specific rights-creating or duty-imposing [constitutional,] statutory or regulatory prescriptions" that establish "specific fiduciary or other duties" that the government allegedly has failed to fulfill. *Navajo I*, 537 U.S. at 506; *see also United States v. Jicarilla Apache Nation*, 564 U.S. ___, 131 S. Ct. 2313, 2325 (2011) (holding that the government's duties vis-a-vis Indians are defined by "specific, applicable, trust-

creating statute[s] or regulation[s]," not "common-law trust principles"); *Navajo II*, 556 U.S. at 302 (same).

Second, "[i]f that threshold is passed," the plaintiff must further show that "the relevant source of substantive law," the violation of which forms the basis of his claim, "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" *Navajo II*, 556 U.S. at 290-291 (quoting *Navajo I*, 537 U.S. at 506) (brackets and citation omitted). That second showing reflects the understanding that not "all [such provisions conferring] substantive rights" mandate the award of money damages from the government "to redress their violation," and that the limited waiver of sovereign immunity in the Tucker Act extends only to claims that the government has violated provisions that themselves require payment of a damages remedy. *Testan*, 424 U.S. at 400-401 (citing *Eastport S.S. Corp.*, 372 F.2d at 1009); *see also Navajo I*, 537 U.S. at 503, 506; *Mitchell II*, 463 U.S. 216-218.

In other words, "the basis of the federal claim—whether it be the Constitution, a statute, or a regulation"—that is identified in the first step of the analysis can in turn give rise to a claim for money damages under the Tucker Act only if "that basis 'in itself can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Testan*, 424 U.S. at 401-402 (ellipsis and citation omitted). The Tucker Act therefore "waive[s] sovereign immunity for claims premised on other sources of law (*e.g.*, statutes or contracts)" "only if " the "other source of law" creating "the right or duty" that the government has allegedly violated "'can fairly be interpreted as mandating compensation.'" *Navajo II*, 556 U.S. at 290 (quoting *Testan*, 424 U.S. at 400); accord *AAFES v. Sheehan*, 456 U.S. 728, 739-741 (1982) (Tucker Act "jurisdiction . . . cannot be premised on the asserted violation of regulations that do not

specifically authorize awards of money damages.").

Here, plaintiffs claim that the Probate Reform Act and its implementing regulations conflict with the United States' general trust obligations to plaintiffs. Compl. ¶ 51. Thus, plaintiffs argue that the United States' compliance with the Probate Reform Act and its implementing regulations is "in violation of the defendant's fiduciary obligation owed to the plaintiffs." *Id.* This argument cannot be squared with the plain language of the Probate Reform Act and its implementing regulations or Congress's broad plenary authority over Indian affairs, *see United States v. Lara*, 541 U.S. 193, 200-201 (2004); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Furthermore, plaintiffs' arguments that the Fort Berthold Mineral Leasing Act, Pub. L. No. 105-188 (1988), 112 Stat. 620 as amended by Pub. L. No. 106-67 § 1(2) (1999), 113 Stat. 979, either amends the Probate Reform Act or its application here is inconsistent with the general trust obligation are also inconsistent with the plain language of the statute.

Plaintiffs' Second Claim for Relief fails to clear the first jurisdictional hurdle established by Supreme Court precedent: identifying a specific statutory, regulatory, or treaty provision that the United States allegedly breached. Plaintiffs do not allege in their Second Claim for Relief that the United States failed to faithfully comply with the Probate Reform Act, Department of the Interior regulations implementing the Probate Reform Act, or the terms of the Fort Berthold Mineral Leasing Act. *See* Compl. ¶¶ 43-54. In fact, the Probate Reform Act specifically provides that if an Indian dies intestate with one or more heirs, the surviving spouse "shall receive trust and restricted land and trust personality in the estate . . . [specifically] 1/3 of the trust personalty of the decedent and a life estate without regard to waste in the interest in trust or restricted lands of the decedent." 25 U.S.C. § 2206; *see also* 25 C.F.R. § 179.3. That is what

happened here. Compl. ¶ 11.

Also, the Fort Berthold Mineral Leasing Act provides that the Secretary of the Interior "may execute a mineral agreement that effects individually owned Indian land on behalf of an Indian owner if . . . that 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 Probate Reform Act has a parallel provision. 25 U.S.C. § 2218(c). This occurred for the oil and gas lease at issue in plaintiffs' complaint. Exhibit 3. Because Mr. Fredericks was deceased at the time the oil and gas lease was approved and his heirs were not determined, the Department of the Interior did not obtain "approvals and consents" from plaintiffs. *C.f.* Compl. ¶ 14. By law, the United States did not need to obtain such "approvals and consents."

Because plaintiffs have failed to allege facts establishing that the United States failed to comply with the Probate Reform Act or Fort Berthold Mineral Leasing Act, plaintiffs' Second Claim for Relief is premised on the notion that the foregoing statutes and regulations were "controversial and contested," Compl. ¶ 47, and amount to a violation of the general trust relationship, *see* Compl. ¶¶ 53-54. In plaintiffs' Second Claim for Relief, plaintiffs have failed to "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed to faithfully perform those duties." *Navajo I*, 537 U.S. at 506. Because plaintiffs have failed to identify a "specific, applicable, trust-creating statute or regulation that the Government violated," they have failed to clear the first jurisdictional hurdle under the Tucker Act and neither the general trust relationship "nor common-law trust principles matter." *Navajo II*, 556 U.S. at 302. Plaintiffs' Second Claim for Relief should be dismissed for lack of subject-matter jurisdiction.

Moreover, this Court lacks jurisdiction over claims for relief seeking declarations that

regulations issued by agencies are invalid. *See Cienega Gardens v. United States*, 33 Fed. Cl. 196, 224 (1995), judgment vacated, on other grounds, 194 F.3d 1231 (Fed. Cir. 1998), cert. denied, 528 U.S. 820 (1999) ("This court has no authority to order [an agency] to adopt or change any particular regulation, nor may it declare any particular regulation invalid."); *see also, e.g.*, *Garrett v. Lyng*, 877 F.2d 472 (6th Cir. 1989); *Villegas v. Concannon*, 742 F. Supp. 1083, 1086 (D. Or. 1990); *Hess v. Hughes*, 500 F. Supp. 1054, 1061 (D. Md. 1980). The Court of Federal Claims "lacks the general federal question jurisdiction of the district courts, which would allow it to review the agency's actions and to grant relief pursuant to the [Administrative Procedure Act]." *Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997); *accord Century Exploration New Orleans, LLC v. United States*, 745 F.3d 1168, 1179-80 (Fed. Cir. 2014); *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1370 n.11 (Fed. Cir. 2005). If plaintiffs believe the Probate Reform Act is unconstitutional or has been improperly applied to Mr. Fredericks's probate, their remedy is in the district courts after exhausting administrative appeals with the Department of the Interior.

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

In plaintiffs' Third Claim for Relief, plaintiffs aver that the United States violated the Agricultural Management Act by denying plaintiff Casey Fredericks's proposed agricultural lease, Compl. ¶ 64, and by permitting Judy, as life tenant, to enter into grazing leases, ¶ 65. Plaintiffs appear to argue that the life estate created under the Probate Reform Act is inconsistent with the Agricultural Management Act's provision calling for agricultural leases to be approved by "a majority interest in any trust or restricted land," 25 U.S.C. § 3715(c)(2). *See id.* ¶¶ 64-65. Plaintiffs argue that the Probate Reform Act's saving provision, Pub. L. No. 108-374 § 6(a)(11), codified at 25 U.S.C. § 2218(g), requires the remaindermen's approval when the life tenant

leases trust or restricted fee status land subject to the Agricultural Management Act. Compl. ¶¶ 60-62. Plaintiffs misconstrue the statutes and have failed to allege facts establishing a violation of either statutory scheme.

The Probate Reform Act and its implementing regulations unambiguously grant life tenants authority to lease restricted fee status land. The Probate Reform Act gave Judy a life estate "without regard to waste" for her life. 25 U.S.C. § 2206(a)(2)(A). As life tenant, Judy had authority to "lease the land without the consent of the owners of the remainder interests or our approval, for the duration of the life estate." 25 C.F.R. § 162.004(b)(1). The current version of 25 C.F.R. § 162.004 was effective beginning on January 4, 2013. *See* Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440-01 (Dec. 5, 2012). This version of 25 C.F.R. § 162.004 was therefore in effect on the date of the final IBIA probate decision with respect to Mr. Fredericks's estate.

Regardless, as claimed by plaintiffs, prior to conclusion of the IBIA probate proceedings, the Bureau of Indian Affairs had granted Judy one, or more, revocable permits. Compl. ¶ 16. Under the regulations in effect prior to January 4, 2013, the Bureau of Indian Affairs had authority to issues those revocable permits. *See* 25 C.F.R. § 166.4 (2001) (identifying, *inter alia*, authority to issue "a revocable privilege to use Indian land or Government land, for a specified purpose").

Because the Department of the Interior complied with the Probate Reform Act in approving the agricultural authorizations and denying plaintiffs' submitted agricultural lease, and plaintiffs have alleged no facts in their complaint showing that the Department of the Interior violated any terms of the Probate Reform Act or associated regulations, plaintiffs' Third Claim for Relief must be premised on an argument that the Probate Reform Act's saving clause voids

other provisions of the Probate Reform Act when applied in this case, or that in this case the Probate Reform Act is trumped by the leasing provisions of the Agricultural Management Act. Compl. ¶¶ 60-65. Plaintiffs' legal theory fails.

The savings clause in the Probate Reform Act upon which plaintiffs rely provides

> 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.

25 U.S.C. § 2218(g).

Plaintiffs argue that this provision means that, as remaindermen, they have to approve leases under the Agricultural Management Act, not the life tenant. Compl. ¶¶ 37-38. Plaintiffs are incorrect, and the provisions of the Probate Reform Act pertaining to the devise or descent of trust or restricted property are fully consistent with the Agricultural Management Act, and the facts as alleged show that the Bureau of Indian Affairs complied with both acts.

The Agricultural Management Act would apply to the approval of the grazing leases and consideration of the agricultural lease at issue here. The Agricultural Management Act provides that

> 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 interests with not less than fair market value for such land.

25 U.S.C. § 3715(c)(2)(A).

The Agricultural Management Act defines "majority interest" as "an interest greater than 50 percent of the legal or beneficial title." 25 U.S.C. § 3715(c)(2)(B). Department of the Interior regulations define "interest" as "an ownership right to the surface estate of Indian land that is unlimited or uncertain in duration, including a life estate." 25 C.F.R. § 166.4. Giving full

effect to both the Probate Reform Act and the Agricultural Management Act is straightforward. The Probate Reform Act determines who has an "interest" in trust or restricted property when an Indian dies intestate with a surviving spouse: the life tenant. The Agricultural Reform Act determines what percentage of the land interest is necessary to approve a lease: greater than fifty percent.

The Agricultural Management Act requires a majority of the interest in land to approve a lease, but does not control how the interests in land are ascertained upon death of an Indian. Instead, unless there is another specific federal law "relating to the devise or descent of trust or restricted property," the Probate Reform Act governs the transfer of land interests upon death. 25 U.S.C. § 2206(a)(1). The Probate Reform Act applies to "devise or descent." The Agricultural Management Reform Act applies to leasing. These acts are complimentary, not inconsistent.

The foregoing establishes that the Probate Reform Act and the Agricultural Management Act are fully consistent and there is no conflict. The Agricultural Management Act requires a majority interest in restricted fee status land to approve grazing leases. The Probate Reform Act provides Judy, as life tenant, a complete interest "without regard to waste" in Mr. Fredericks's restricted fee status land. Thus, Judy, as life tenant, not plaintiffs, as remaindermen, holds the authority to lease under the Agricultural Management Act because she owns the entire interest in property for the term of her life. When Judy approved the alleged grazing leases at issue, her life estate is counted towards the "majority interest," not plaintiffs' remainder interest. *See* 25 C.F.R. 162.004(b)(2). Moreover, her revocable permit granted her the authority to lease. Thus, plaintiffs' consent or disapproval of the proposed agricultural lease does not implicate either the Probate Reform Act or the Agricultural Management Act. The person that may approve the

agricultural lease is Judy, not plaintiffs.

Plaintiffs have failed to plead facts in their Third Claim for Relief establishing that the Department of the Interior violated the provisions of the Probate Reform Act or its implementing regulations in approving the alleged grazing leases or refusing to approve the submitted agricultural lease. Plaintiffs, instead, argue in their Third Claim for Relief that, by operation of law, plaintiffs as remaindermen have to approve leases of Mr. Fredericks's trust or restricted fee status land under the Agricultural Management Act. Plaintiffs' legal theory is incorrect, and plaintiffs' legal conclusions couched as factual allegations may be disregarded on this motion to dismiss. *Acceptance Ins. Cos.*, 583 F.3d at 853. Thus, plaintiffs' Third Claim for Relief should be dismissed for failure to state a claim.

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

Plaintiffs' First Claim for Relief pertains to the oil and gas lease. *See* Compl. ¶¶ 31-42. Plaintiffs appear to advance three related claims in their First Claim for Relief. First, plaintiffs argue that the oil and gas lease is invalid because it was not subject to their approval as remaindermen. *Id.* ¶¶ 36-39. Second, plaintiffs aver that the United States has violated the Fort Berthold Mineral Leasing Act by distributing oil and gas lease income to Judy. Compl. ¶¶ 33-35, 41-42. Finally, plaintiffs claim that the Bureau of Indian Affairs approved the oil and gas 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." *Id.* ¶ 40. Plaintiffs' claims fail as a matter of law and plaintiffs have failed to state facts that would entitle them to relief under any of these theories.

As to plaintiffs' first claim, the oil and gas lease was executed by the Secretary of the Interior's designee, thus neither Judy nor plaintiffs were required to approve the lease for it to be

effective. As explained above, because the oil and gas lease was entered into after Mr. Fredericks's death, but before his probate was concluded, it was executed on behalf of his estate by the Secretary of the Interior's designee. Exhibit 3. The Fort Berthold Mineral Leasing Act provides that

> The Secretary may execute a mineral lease or agreement that affects individually owned Indian land on behalf of an Indian owner if—
>
> > (A) that owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined

Id. § 1(a)(3). The Department of the Interior employed this provision of the Fort Berthold Mineral Leasing Act in this case. Thus, plaintiffs were not required or eligible to approve the lease. Plaintiffs' claim that the lease is invalid because they did not approve the lease should be dismissed for failure to state a claim.

As to plaintiffs' second claim, they contend that they are entitled to the revenue from the oil and gas lease as reamaindermen despite the express provisions of the Probate Reform Act. Plaintiffs are incorrect and there is no legal basis to support their claim. The Fort Berthold Mineral Leasing Act provides that

> The proceeds derived from a lease or agreement that is approved by the Secretary under subparagraph (A) shall be distributed to all owners of the Indian land that is subject to the lease or agreement in accordance with the interest owned by each such owner.

Id. § 1(a)(2)(C). The Act does not define "owners of the Indian land." To determine who the "owners of the Indian land" are, the Court should look to other applicable statutes and regulations.

The Indian Mineral Leasing Act regulations provide guidance as to who are "owners of the Indian land." Department of the Interior regulations provide that

> Indian mineral owner means any individual Indian or Alaska Native who owns

> mineral interests in oil and gas, geothermal, or solid mineral resources, title to which is held in trust by the United States, or is subject to the restriction against alienation imposed by the United States.

25 C.F.R. § 212.3. Here, the Probate Reform Act gave Judy a life estate without regard to waste in Mr. Fredericks's mineral estate. 25 U.S.C. § 2206(a)(2)(A)(i). A life estate "without regard to waste" means "that the holder of such estate is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen." 25 U.S.C. § 2201(10). The Probate Reform Act is controlling in matters relating to "devise and descent." *See* 25 U.S.C. § 2206(a). Thus, Judy is the "owner" of the life estate, even if she is not the beneficial Indian owner of the restricted fee status land. As owner of the life estate, by law, Judy is entitled to the revenue generated by the oil and gas lease.

Judy, as life tenant, not plaintiffs, as remaindermen, is the "owner[] of the Indian land" under the Fort Berthold Mineral Leasing Act. Because Judy is the life tenant, "[t]he Secretary must distribute all income, including bonuses and royalties, to the life estate holder to the exclusion of any holders of remainder interests." 25 C.F.R. § 179.201. Plaintiffs claim for distribution of the bonus, rents, royalties, and income from the mineral lease to them should be dismissed for failure to state a claim.

As to plaintiffs' third claim, that the lease was "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 have articulated no facts to support this claim in their complaint. This Court "is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Acceptance Ins. Cos.*, 583 F.3d 853 (quoting *Twombly*, 550 U.S. at 555). Paragraph forty of plaintiffs' complaint simply sets forth plaintiffs' legal conclusion that the bonus and royalty rates on the oil and gas lease are impudent. Plaintiffs'

legal conclusions are insufficient to state facts to entitle plaintiffs to relief.

Plaintiffs' legal conclusions are also inconsistent with the governing regulations and the terms of the lease, which may be judicially noticed because the terms of the lease can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned: the official files of the Department of the Interior. Fed. R. Evid. 201(b). Moreover, the Court may consider the oil and gas lease on this motion to dismiss because it is referenced in the complaint, Compl. ¶ 12-15, 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).

By regulation, royalties for oil and gas leases on allotted Indian land must be a minimum of 16 2/3 %, "unless a lower royalty rate is agreed to by the Indian mineral owner and is found to be in the best interest of the Indian mineral owner." 25 C.F.R. § 212.41(b). Here, the royalty rate on the oil and gas lease is 18%, which exceeds regulatory minimum. Exhibit 3.

The bonus on the oil and gas lease was $300. *Id.* "A 'bonus' is a consideration in addition to or in excess of that which would ordinarily be given. . . . In many instances where leases have considerable value, one seeking a lease from an owner is willing to pay in addition to the usual royalty reserved in the lease, something more." *Wright v. Brush,* 115 F.2d 265, 267 (10th Cir. 1940). There is no statutory or regulatory minimum bonus on oil and gas leases. Instead, the bonus on an oil and gas lease reflects the going rate of the market at the time the lease is offered for bid. *See* 25 C.F.R. § 212.20(b)(1) (" Leases shall be advertised to receive optimum competition for bonus consideration . . ."). Although the Fort Berthold Leasing Act dies not require oil and gas leases to be advertized, *id.* at § 1(a)(4), the Secretary did advertize this lease as part of the 2007 Competitive Lease Sale but received no bids, Declaration of

Howling Wolf ¶ 5. Plaintiffs have set forth no facts in their complaint establishing that the bonus received on the oil and gas lease was not consistent with market rates at the time in light of the unique aspects of the specific land at issue, or in any way in contravention of express statutory or regulatory obligations. Thus, plaintiffs' First Claim for Relief should be dismissed for failure to state a claim.

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

In plaintiffs' Fourth Claim for Relief they seek just compensation for an allegedly unconstitutional taking of their interest in their father's land by operation of the Probate Reform Act. Compl. ¶¶ 68-76. Plaintiffs argue that the Probate Reform Act has effectuated a legislative taking of their property interests in their father's land and their "right to income from trust lands derived from post death leases." *Id.* ¶¶ 72-75. Plaintiffs Fourth Claim for Relief should fail because the Probate Reform Act did not deprive plaintiffs of any vested property interest.

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"). The Supreme Court has held that Congress can freely alter the terms of any provision relating to the distribution of Indian lands at any point prior to the time those interests are allotted or individuals otherwise obtain vested rights in the property. *See United States v. Jim*, 409 U.S. 80, 82 (1972) (Congress may alter the distribution scheme of an earlier statute that created a trust relationship with a tribe); *Sizemore v. Brady*, 235 U.S. 441, 449 (1914); *Gritts v. Fisher*, 224 U.S. 640, 648 (1912).

Here, plaintiffs allege that the Probate Reform Act effectuated the taking of their property. Compl. ¶ 73-74. The Probate Reform Act was enacted on October 27, 2004. On

October 27, 2004, Mr. Fredericks was alive and plaintiffs had no interest whatsoever in Mr. Fredericks's restricted fee status land. Any inchoate future interest in that land that plaintiffs possessed as potential heirs upon Mr. Fredereicks's death was not vested.

Moreover, IBIA determined plaintiffs' and Judy's property interests. Applying the Probate Reform Act, the IBIA granted Judy a life estate without regard to waste and plaintiffs a remainder interest in the life estate. *Estate of John Fredericks, Jr.*, 57 IBIA at 205-06. IBIA's determination of plaintiffs' and Judy's property interests are binding on this Court. *See Freese v. United States*, 221 Ct. Cl. 963, 964-65 (1979) (granting summary judgment to government because the court was bound by the Secretary of the Interior's administrative determination that plaintiff's mining lode claims were null and void); *Underwood Livestock, Inc. v. United States*, 79 Fed. Cl. 486, 497 (2007) (In resolving a takings claim, the Court of Federal Claims "does not have either the jurisdiction to review, or the authority to disregard, IBLA decisions that adjudicate property rights"); *Aulston v. United States*, 11 Cl. Ct. 58, 61 (1986), vacated in part but aff'd on merits by 823 F.2d 510 (Fed. Cir. 1987) (court cannot disregard the IBLA's decision that plaintiff lacked a valid mining claim); *Bayshore Res. Co. v. United States*, 2 Cl. Ct. 625, 632 (1983) (case dismissed for failure to state a claim because the Court of Claims has no authority to set aside Interior determinations declaring unpatented mining claims null and void).

Plaintiffs have failed to identify a vested property interest that was taken by Congress's enactment of the Probate Reform Act. Thus, plaintiffs have failed to state a claim for an unconstitutional taking and their Fourth Claim for Relief should be dismissed.

VI. 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, July 14, 2014,

SAM HIRSCH
Acting Assistant Attorney General

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

Attorney for the United States

OF COUNSEL:

HOLLY H. CLEMENT
Office of the Solicitor
United States Department of the Interior