18-2227

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

VERNON MOODY AND ANITA MOODY,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims,
Case No. 16-107C, Senior Judge Edward J. Damich

APPELLANTS' REPLY BRIEF

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STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

United States, defendant/appellee, has filed its responsive brief and the Moodys reply as follows hereafter. Moodys will address the government's arguments as they deem necessary and in the order set forth in the government's brief.

II. Regulatory Framework

The government seemingly implies that because AIARMA does not waive sovereign immunity of the United States, it cannot be subject to suit for its actions. That is not the case. *See* Resource Conservation Group, LLC v. U.S. Dept. Of Navy, 86 Fed. Cl. 475, 478 (2009), aff'd in part, rev'd in part, 597 F3d 1238 (Fed. Cir. 2010) (Federal Claims jurisdiction provided by Tucker Act). The government has presumptively waived its sovereign immunity regarding claims within the Act. Hewlett Packard Co. v. U.S., 41 Fed. Cl. 99, 101 (1998); U.S. v. Mitchell, 473 U.S. 206, 212 (1983).

While the regulations provide that a lease is between an Indian landowner and a lessee, that does not end the question. The United States is title holder of the land. It is privy to the leases in this case. It has extensive and plenary authority over trust lands, including the lands at issue in this case. As trustee, it has authority to provide for the use of the land in the best interest of the

beneficiary.

III. Statement of Facts And Course of Proceedings Below

It is important to note that after the Moodys received the April 18, 2013, cancellation notices they were instructed to continue farming the leased land until June 3, 2013, when they were informed they were in trespass. Between these times, a sizable amount of the planting was accomplished along with the attendant monetary costs and time necessary to complete the planting. When they were advised that they were in trespass, after being told that they should continue to farm, they contacted another superintendent who again told them to continue farming. To make sure, the Moody's called the Regional Office in Aberdeen, the supervisors of the superintendents who told them they should continue to farm, and were told again to continue farming. Then shortly thereafter Bureau of Indian Affairs (BIA) employees told the Moodys to remove their property and belongings from the leased premises and to cease farming. They were never reimbursed for the thousands of dollars they invested in the planting after they were told to continue farming despite the April 18, 2013, cancellation notices, nor were they given their share of any harvest which normally is conducted in late summer or early fall. They did not appeal the April 18, 2013, cancellation notices because they were told to continue farming. After they were removed from leased

property, after they had been instructed to continue farming, the 30 days time period to appeal in the April 18, 2013, cancellations had passed. And even if had not, the Interior Board of Indian Appeals (IBIA) has no authority to grant money damages. The Moodys received no notice of cancellation after the April 18, 2013, cancellation notices, after they had been instructed to continue farming, except for one of the five leases.

ARGUMENT

II (A). The Leases Are Not Contracts With The United States

As argued by the Moodys in their opening brief, the United States has authority to lease or permit Indian trust land. E.g., 25 USC § 3715 (a) (2); 25 CFR §§ 162.013 (c) and 162.209. The United States is title holder to the land and must approve any lease of the land. 25 CFR §§ 162.010 (a) (2) (3); 162.215 (lease effective on date of BIA approval). Approval is tantamount to permitting or making. The footprints of the United States are all over the Moody leases. Moodys' opening brief at 10-14. No specific Indian is identified as lessor, only that the United States is acting in place of the Indian owners. The United States as trustee has the duty and obligation to permit the use of Indian trust land in the best interest of the beneficiary and that would be the case regardless of any regulations. *See* Fredericks v. U.S., 125 Fed. Cl. 404 (2016). The United States as trustee can

be liable to third parties for breaching a contract, Sherr v. Winkler, 552 F2d 1367, 1373 (10th Cir. 1977), especially when, as here, it was the United States and not the Indian beneficiaries who undertook every single action giving rise to the Moodys' claims. The Indians were not responsible in this action, it was the BIA. It is the BIA, not the Indians, who have the legal responsibility to administer and enforce agricultural leases. *See* 25 CFR §§ 162.108 (a) (initiation of appropriate collection and enforcement action); 25 CFR 162.247-256.

The cases cited by the government have no relevance here because they are all factually or legally distinguishable, see Moody's opening brief 14-18, primarily because in those cases cited by the government, it was the Indians who were responsible for the action that resulted in the claimed breaches, not the BIA.

II (B). Cancellation Of Leases Challengeable Through Administrative Process

Because the Moody's were told to continue farming after they received notices of cancellation on April 18, 2013, and they did so up to June 3, 2013, when they were instructed to remove themselves and their property from the lease premises, they could not appeal the April 18, 2013, notices because the 30 day time period for appealing expired on May 18, 2013. They could not appeal through the administrative process because of the instructions they received from

the BIA.

In addition, an administrative appeal would have been ineffective. First, the IBIA does not possess jurisdiction to award monetary damages or to order the BIA to reimburse Moodys for either the thousands of dollars they spent planting the crops or the value of the harvested products that Moodys were deprived after they were told to remove themselves from the leases after June 3, 2018. Neither does the IBIA possess any authority to determine taking claims under the United States Constitution. Secondly, the IBIA process is lengthy and in all likelihood the leases would have been expired by the time the IBIA had made any decision in the case.

III. Implied In Fact Contracts

The government argues, and the trial court held, that no implied contract could be created while there was an express contract in place and that the BIA could not create a contract without authorization of the landowners.

After notice of lease cancellation was given on April 18, 2013, the Moodys were told to continue farming on April 22, 2013, which they did until shortly after June 3, 2013. The original leases were thus canceled and an implied contract was created or the original contract revived by the BIA's oral representations on April 22 to continue farming under the same terms as the written contract that had been

canceled. Any implied contract or revival was based on the original written leases and a writing was in place. There was no need to secure additional consent from the landowners because the implied contract or revival was of the written leases to which the owners had already consented.

Government also argues that the April 18, 2013, did not become effective until 30 days after on May 19, 2013, and until then there could be no implied contract or revival. First, both the Moodys and the superintendent treated the leases as having been canceled on April 18 and revived anew on April 22, 2013. Clearly the 30 days could be waived by both parties as it was done in this case by the action of the superintendent instructing Moodys to continue farming and the Moodys agreeing by so doing. The intention of both parties is clear. Second, it was logical for the BIA to instruct Moodys to keep farming without waiting 30 days because if not there would be no spring planting and no subsequent harvest in the fall to the loss of the Indian owners. Thirdly, in June, 2013, after 30 days from April 18, 2013, Moodys received trespass notices and they again went to the superintendent to make inquiry and were told by a different superintendent and the Area Office that they should continue to farm affirming the previous implied contract and revival. There can be no defense based on the need to wait 30 days until the cancellation became effective.

Government is silent as to Moodys request for damages based on quantum merit set forth at 27 of their opening brief. *See* Perri v. U.S., 340 F3d 1337, 1343-1344 (Fed. Cir. 2003). Quantum merit is most often awarded where a contract has been deemed invalid and recovery only possible under an equitable theory of implied in fact contract. Barrett Refining Corp. v. U.S., 242 F3d 1055, 1059 (Fed. Cir. 2001); Northrop Grumman Corp. v. U.S. 47 F3d. Cl. 20, 40-41 (2000). It is relevant that the contract was fully performed, as in this case. Fluor Enterprises, Inc. v. U.S., 64 Fed. Cl. 46, 495-496 (2005).

III. Taking Claim

Rule 8 (d) (2) and (3) of the Federal Rules of Civil Procedure allows alternative statement of a claim. Under (2), a party may set out two or more statements of a claim alternatively or hypothetically, either in a single count or separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. Under (3), a party may state as many separate claims as it has, regardless of consistency. Accord, Rule 8 (e) of the Court of Federal Claims.

The complaint in this case made no claim asking that administrative action be reviewed. There was no appeal based on the unlawfulness of administrative action. In fact the government argues in this case that no administrative appeal

was taken being the only remedy available to the Moodys. As stated in its opening brief, the government action confiscated for its own use the money used to plant crops for 2013 and the subsequent value of those crops when they were harvested. In alleging the taking claim, Moodys could make inconsistent statements concerning whether the governmental action was unlawful or lawful or whether it was or was not contrary to applicable regulations. The complaint states a taking claim.

CONCLUSION

For all the above reasons and for the reasons set forth in the Moodys' opening brief, the decision of the Court of Federal Claims should be reversed and remanded for discovery and trial.

Dated: January 10, 2018.

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CERTIFICATE OF SERVICE

I certify that on this 10th day of January, 2019, I served upon Margaret J. Jantzen, Attorney, Civil Division, Commercial Litigation Branch, United States Department of Justice, a copy of Appellants' Reply Brief via Electronic Submission and by U.S. Mail, First Class, Postage Prepaid, Ben Franklin Station, Box 480, Washington, D.C. 20044.

/S/ Terry L. Pechota
Terry L. Pechota

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the page limitations of FRAP 32 (a) (7) (A) and the brief contains 1905 words of text and is printed in proportional typeface of 14 points.

/S/ Terry L. Pechota
Terry L. Pechota