No. 18-287C
(Judge Campbell-Smith)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

AARON OLSON, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant,

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS IN PART

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

STEVEN J. GILLINGHAM
Assistant Director

BORISLAV KUSHNIR
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 307-5928
Facsimile: (202) 353-0461
Steven.Kushnir@usdoj.gov

Attorneys for Defendant

OF COUNSEL:

STEPHANIE LYNCH
Attorney-Advisor
DUANE MECHAM
Senior Attorney
Office of the Regional Solicitor
U.S. Department of the Interior

January 17, 2020

TABLE OF CONTENTS

ARGUMENT 1

I. The Standard Of Review Advanced By Plaintiffs Is Incorrect 1

II. This Court Lacks Subject-Matter Jurisdiction Over Claims Related To The Trust Land Allotments 2

A. The Court Should Disregard *Oswalt* As An Unpersuasive Outlier Overruled By Subsequent Binding Authority 2

B. Plaintiffs' Suggestion That Water Appurtenances Can Independently Create A Waiver Of Sovereign Immunity Lacks Merit 5

C. The Statutes And Regulations Cited In The Amended Complaint Do Not Establish This Court's Subject-Matter Jurisdiction Either 5

III. In Any Event, Plaintiffs Have Failed To State A Claim With Respect To The Trust Land Allotments 8

A. The Leases And Permits That Govern The Trust Land Allotments Do Not Impose On The Government A Contractual Obligation To Deliver Irrigation Water 9

B. Plaintiffs Have Likewise Failed To Identify Any Statutory Or Regulatory Obligation To Deliver Irrigation Water To Them 11

IV. Plaintiffs' General Appeal To Equity Cannot Create A Cause Of Action Where None Exists 12

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Agredano v. United States,
595 F.3d 1278 (Fed. Cir. 2010)..... 11

Agwiak v. United States,
347 F.3d 1375 (Fed. Cir. 2003)..... 6

Chancellor Manor v. United States,
331 F.3d 891 (Fed. Cir. 2003)..... 5, 9

Dellew Corp. v. United States,
855 F.3d 1375 (Fed. Cir. 2017)..... 4

Dobyns v. United States,
915 F.3d 733 (Fed. Cir. 2019)..... 11

Fifth Third Bancorp v. Dudenhoeffer,
573 U.S. 409 (2014)..... 1

Flexfab, L.L.C. v. United States,
424 F.3d 1254 (Fed. Cir. 2005)..... 9

Greenlee Cty., Ariz. v. United States,
487 F.3d 871 (Fed. Cir. 2007)..... 7

Huston v. United States,
956 F.2d 259 (Fed. Cir. 1992)..... 6

McBryde v. United States,
299 F.3d 1357 (Fed. Cir. 2002)..... 6

Moody v. United States,
931 F.3d 1136 (Fed. Cir. 2019)..... 3, 4

Northrop Grumman Info. Tech., Inc. v. United States,
535 F.3d 1339 (Fed. Cir. 2008)..... 10

Normandy Apartments, Ltd. v. United States,
100 Fed. Cl. 247 (2011)..... 9

O'Bryan v. United States,
93 Fed. Cl. 57 (2010), *aff'd*, 417 Fed. App'x 979 (Fed. Cir. 2011)..... 3

Oswalt, et al. v. United States,
No. 97-733C (Fed. Cl. Oct. 17, 2000) 2, 3, 4

Perri v. United States,
340 F.3d 1337 (Fed. Cir. 2003)..... 6, 7

Peterson Indus. Depot, Inc. v. United States,
140 Fed. Cl. 485 (2018) 11

Rana v. United States,
664 Fed. App'x 943 (Fed. Cir. 2016)..... 6

S. Cal. Edison v. United States,
58 Fed. Cl. 313 (2003) 1, 2

Sangre de Cristo Dev. Co., Inc. v. United States,
932 F.2d 891 (10th Cir. 1991) 3, 4, 12

United States v. Algoma Lumber Co.,
305 U.S. 415 (1939)..... 3, 4, 12

United States v. Mitchell,
445 U.S. 535 (1980)..... 5

Warr v. United States,
46 Fed. Cl. 343 (2000) 3, 4, 12

Wolfchild v. United States,
731 F.3d 1280 (Fed. Cir. 2013) 7

Statutes

10 U.S.C. § 1034..... 6

25 U.S.C. § 415..... 3

43 U.S.C. § 372..... 8

43 U.S.C. § 377a..... 8

43 U.S.C. § 384..... 8

Act of Aug. 1, 1914, Pub. L. No. 63-160, 38 Stat. 582 ..... 7, 10

Regulations

25 C.F.R. § 162.214 8

25 C.F.R. § 162.415 8

25 C.F.R. § 171.515 ..... 7, 8

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

AARON OLSON, *et al.*,	)	
Plaintiffs,	)	Case No. 18-287C
v.	)	(Judge Campbell-Smith)
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS IN PART

Pursuant to Rule 7.2(b)(2) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully files this reply in support of its motion to dismiss in part (ECF No. 35). For the reasons provided herein, and for the reasons stated in our moving papers, the Court should dismiss all claims related to the Trust Land Allotments.[1]

ARGUMENT

I. The Standard Of Review Advanced By Plaintiffs Is Incorrect

Relying on cases from the 1950s through the 1970s, plaintiffs begin their response by claiming that motions to dismiss are generally "disfavored" and "should be rarely granted." Pls. Resp. at 8, ECF No. 36. These non-binding cases are outdated. As the United States Supreme Court recently explained, a motion to dismiss for failure to state a claim is "one important mechanism for weeding out meritless claims." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). In the context of breach of contract actions, RCFC 12(b) authorizes this Court to determine the meaning of contract provisions at the outset of the case, and weed out claims based on an erroneous interpretation of those provisions. *See S. Cal. Edison v. United States*, 58

[1] For consistency, we continue to use terms previously defined in our moving papers.

Fed. Cl. 313, 321 (2003) ("Contract interpretation is a matter of law and thus may be addressed by the Court in resolving a motion to dismiss."). There is nothing "disfavored" about the Court's use of this important procedural tool.

II. This Court Lacks Subject-Matter Jurisdiction Over Claims Related To The Trust Land Allotments

In out moving papers, we explained that the leases and permits that govern the Trust Land Allotments do not create privity of contract between plaintiffs and the United States. As we explained, the text of these documents, the applicable statutes and regulations, and binding precedent all support this conclusion. *See* Def. Mot. at 8-10, ECF No. 35. We also explained that none of the statutes and regulations cited in the amended complaint establish this Court's subject-matter jurisdiction, because these sources of law are not money-mandating and they do not address the rights of non-Indian lessees of trust lands, like plaintiffs. *Id.* at 11-15.

A. The Court Should Disregard *Oswalt* As An Unpersuasive Outlier Overruled By Subsequent Binding Authority

Faced with overwhelming precedent from the Supreme Court, the Federal Circuit, and this Court, plaintiffs rely exclusively on a single unpublished and non-binding decision to the contrary. *See* Pls. Resp. at 9-16, ECF No. 36 (extensively citing *Oswalt, et al. v. United States*, No. 97-733C, slip op. (Fed. Cl. Oct. 17, 2000)). The Court should not rely on this decision to find privity where none exists.

The plaintiffs in *Oswalt* farmed trust lands on the Reservation. No. 97-733C, slip op. at 2, ECF No. 7-1.[2] Much like the leases and permits at issue here, the leases in *Oswalt* stated that the Secretary was acting "on behalf of the Indians" when signing these documents. *Id.* at 6-7.

[2] We previously identified *Oswalt* as an outlier, and provided a copy of the unpublished decision to the Court. *See* Def. 1st Mot. to Dismiss at 9 n.7, ECF No. 7.

Despite this fact, the Court held that "plaintiffs entered seven separate leases with defendant," and that "[p]laintiffs, therefore, are in privity of contract with defendant for these seven trust lands." *Id.* at 10.

The key aspects of the leases in *Oswalt* – that each document was an agreement between a tenant-plaintiff and an Indian or Indians, which the Secretary signed and approved in accordance with the Government's statutory responsibility, *see* 25 U.S.C. § 415(a) – are not unique. To the contrary, the leases and permits found in other cases involving trust lands contain identical provisions. *See, e.g., United States v. Algoma Lumber Co.*, 305 U.S. 415, 421 (1939) ("By its terms the contract is declared to be entered into 'between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part' and the Lumber Company, 'party of the second part.'"); *Moody v. United States*, 931 F.3d 1136, 1138 (Fed. Cir. 2019) ("the Oglala Sioux Tribe was a signatory to all five leases," and "[t]he leases stated that 'the Secretary of the Interior was acting for and on behalf of Indians.") (alterations omitted). Based on this language, the Supreme Court has held, and the Federal Circuit recently affirmed, that the Government is not in privity of contract with lessees. *See Algoma Lumber*, 305 U.S. at 421-23; *Moody*, 931 F.3d at 1140-41. These holdings are consistent with a long line of decisions uniformly holding that leases and permits governing trust lands, like the leases and permits at issue here, do not establish privity of contract with the United States. *See, e.g., Sangre de Cristo Dev. Co., Inc. v. United States*, 932 F.2d 891, 895 (10th Cir. 1991) ("the United States is not liable to third parties when it contracts with them on behalf of Indian tribes"); *O'Bryan v. United States*, 93 Fed. Cl. 57, 63 (2010), *aff'd*, 417 Fed. App'x 979 (Fed. Cir. 2011) (unpublished) (grazing permits "are contracts with the Indian landowners and not with the United States."); *Warr v. United States*, 46 Fed. Cl. 343, 348 (2000) (citing *Algoma Lumber* and

Sangre de Cristo, and concluding that Mr. Warr "cannot establish privity of contract between [himself] and the United States based upon the lease agreement.").

Plaintiffs correctly note that, notwithstanding the similarity in contract terms, this Court reached a contrary conclusion about privity in *Oswalt*. But *Oswalt* is an unpublished, trial-court decision that carries no precedential weight. This Court cannot choose to follow *Oswalt* in lieu of binding precedent from the Supreme Court and the Federal Circuit. *See Dellew Corp. v. United States*, 855 F.3d 1375, 1382 (Fed. Cir. 2017) ("the Court of Federal Claims must follow relevant decisions of the Supreme Court and the Federal Circuit"). Thus, the Court must rely on *Algoma Lumber* and *Moody*, and disregard *Oswalt*, when deciding the privity question posed by the Government's motion.

Plaintiffs' attempt to distinguish *Oswalt* from all other cases involving identical leases is likewise unavailing. Plaintiffs claim that "in *Algoma*, *Moody*, *Saguaro Chevrolet*, *Sangre de Cristo*, and *Warr*, the defendant did not undertake[] any obligation to the other signatory party(ies) to the at-issue contracts." Pls. Resp. at 12, ECF No. 36. But as we explain later in this reply, the Government did not have a contractual, statutory, or regulatory obligation to deliver irrigation water to plaintiffs either. And, in any event, this is not a distinguishing factor. In *Warr*, for example, Mr. Warr alleged – just as plaintiffs allege here – that the WIP had an obligation to deliver irrigation water upon the payment of O&M assessments, and that its failure to deliver a sufficient amount of water resulted in crop destruction and low crop yield. 46 Fed. Cl. at 345-46. This Court nonetheless dismissed Mr. Warr's claim, holding, in pertinent part, that Mr. Warr "cannot establish privity of contract between [himself] and the United States based upon the lease agreement." *Id.* at 348. Plaintiffs offer no reasons why this holding, resolving an identical claim based upon an identical lease agreement, should not equally apply here.

B. Plaintiffs' Suggestion That Water Appurtenances Can Independently Create A Waiver Of Sovereign Immunity Lacks Merit

Plaintiffs also suggest that each parcel of land has an appurtenant water right, and that plaintiffs can separately sue the United States for breach of such appurtenances. Pls. Resp. at 15-16, ECF No. 36. Plaintiffs do not explain what form these appurtenances take, or how they can be a "party" to them without an ownership interest in the land. *See id.* And, in any event, this novel theory entirely ignores well established principles of sovereign immunity. A plaintiff "must prove that the United States waived its sovereign immunity, for the United States, as sovereign, is immune from suit save as it consents to be sued." *Chancellor Manor v. United States*, 331 F.3d 891, 898 (Fed. Cir. 2003) (alterations omitted). Such "[w]aivers of sovereign immunity are construed narrowly." *Id.* And "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (internal quotations omitted).

Here, plaintiffs fail to offer any express and unequivocal waiver of sovereign immunity that would allow plaintiffs to sue the United States for "breach" of an appurtenant water right. *See generally* Pls. Resp., ECF No. 36. There is no contract, statute, or regulation that expressly permits such suits. And, because the leases and permits at issue do not themselves create privity between plaintiffs and the Government, a right established solely through those documents cannot amount to a waiver of sovereign immunity.

C. The Statutes And Regulations Cited In The Amended Complaint Do Not Establish This Court's Subject-Matter Jurisdiction Either

Next, plaintiffs argue that the statutes and regulations cited in the amended complaint are money-mandating, and that they apply to non-Indian lessees of trust lands like plaintiffs. The Court should reject this position, as plaintiffs' arguments misconstrue the relevant inquiry.

The cited statutes and regulations are not money-mandating. Plaintiffs correctly note that "the use of the word 'shall' generally makes a statute money-mandating." Pls. Resp. at 16, ECF No. 36 (citing *Agwiak v. United States*, 347 F.3d 1375 (Fed. Cir. 2003)). But, to be *money*-mandating, that statutory directive must refer to the payment of money, not to the provision of some good or service. In *Agwiak*, for example, "shall" referred to the payment of a remote duty allowance. 347 F.3d at 1380. The same is true of other cases that discuss the import of the term "shall" in statutory text. *See, e.g., McBryde v. United States*, 299 F.3d 1357, 1360 (Fed. Cir. 2002) (addressing reimbursement of litigation expenses); *Huston v. United States*, 956 F.2d 259, 260 (Fed. Cir. 1992) (addressing an employee's right to a pay adjustment).

Here, in contrast, the word "shall" within the statutes and regulations cited in the amended complaint does not refer to the payment of money. At most, it refers to the delivery of irrigation water to members of the Yakama Nation. *See* Pls. Resp. at 16, ECF No. 36. And the Federal Circuit has already determined that use of the term "shall" in a non-monetary context does not immediately convert the statute into a money-mandating one. In *Rana v. United States*, 664 Fed. App'x 943 (Fed. Cir. 2016), a plaintiff argued that the Military Whistleblower Protection Act (MWPA) was a money-mandating statute. *Id.* at 348. The MWPA also uses the word "shall" in mandating the correction of certain military records. *Id.* (citing 10 U.S.C. § 1034(g)(5)). Nonetheless, because the correction of military records is a non-monetary remedy, the Court held that the MWPA was not money-mandating for Tucker Act purposes. *Id.* A statute mandating the delivery of water, without addressing the availability of monetary compensation by the United States, is likewise not money-mandating. *See also Perri v. United States*, 340 F.3d 1337, 1340-41 (Fed. Cir. 2003) ("Unless the statute requires the payment of money damages, there has been no waiver of the government's sovereign immunity from

liability for such damages, and the Court of Federal Claims would not have jurisdiction to entertain the claim.").

The cited statutes and regulations also do not apply to non-Indian lessees of trust lands, like plaintiffs. As we explained in our moving papers, only one of the cited authorities establishes entitlement to irrigation water. *See* Act of Aug. 1, 1914, Pub. L. No. 63-160, 38 Stat. 582, 604 (directing the Secretary to "furnish . . . at least seven hundred and twenty cubic feet per second of water available when needed for irrigation."). This directive is based on a finding that "the Indians of the Yakima Reservation in the State of Washington[] have been unjustly deprived of the portion of the natural flow of the Yakima River to which they are equitably entitled for the purposes of irrigation," and it is intended to achieve "satisfaction of the rights of the Indians in the low-water flow of Yakima River." *Id.* There is no mention of non-Indian lessees anywhere in the statutory text. *See id.* at 604-05. As such, plaintiffs are not within the class of plaintiffs covered by this Act, and the Act therefore cannot establish this Court's jurisdiction. *See Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 876 n.2 (Fed. Cir. 2007); *Wolfchild v. United States*, 731 F.3d 1280, 1288-89 (Fed. Cir. 2013). The fact that the Act also directs that water be furnished as a particular location, *see* Pls. Resp. at 14, ECF No. 36, is irrelevant to this analysis.

Plaintiffs' payment of O&M assessments does not alter this conclusion. Plaintiffs claim that their alleged payment of O&M assessments establishes the Government's statutory obligation to deliver irrigation water to non-Indian users. Pls. Resp. at 15, ECF No. 36. But plaintiffs are required to pay O&M assessments as a condition of leasing trust lands from members of the Yakama Nation – not as a condition of receiving irrigation water from the BIA. Indeed, the applicable regulation provides that O&M assessments are not tied to irrigation water, as lessees must pay these assessments "whether [they] request water or not." 25 C.F.R.

§ 171.515(b). And each lease and permit establishes a contractual obligation to pay these assessments, without any mention of irrigation water, such that a "[f]ailure to pay O&M assessments will be treated as a lease violation." *See, e.g.*, Ex. A, ECF No. 34-1 at 5, ¶ 17. Plaintiffs cannot use their own contractual and regulatory duties to generate additional obligations not apparent from any cited statute or regulation, and impose those additional obligations on the Government.

The remaining statutes and regulations cited by plaintiffs are immaterial. *See* Pls. Resp. at 14-15, ECF No. 36. None of these provisions requires the Government to deliver irrigation water. *See* 43 U.S.C. § 372 (providing that water rights are appurtenant to the land); *id.* at § 377a (setting forth a limitation on use of Bureau of Reclamation funds when organizations or individuals are in arrears); *id.* at § 384 (establishing a mechanism for seeking extensions of time); 25 C.F.R. §§ 162.214, 415 (addressing circumstances in which land can be leased). Because these authorities do not impose an obligation to deliver water, they cannot establish this Court's subject-matter jurisdiction pursuant to the Tucker Act. *See also* Def. Mot. at 12, ECF No. 35 (explaining that general appropriations statutes are insufficient to establish jurisdiction).

III. In Any Event, Plaintiffs Have Failed To State A Claim With Respect To The Trust Land Allotments

In our moving papers, we also explained that the Court can separately dismiss all claims related to the Trust Land Allotments pursuant to RCFC 12(b)(6). As we explained, plaintiffs have failed to state a breach of contract claim because the leases and permits at issue do not impose a contractual obligation on the Government to deliver irrigation water. *See* Def. Mot. at 15-17, ECF No. 35. And while one of the statutes cited does mandate that water be furnished, that directive applies only to members of the Yakama Nation, and not to non-Indian lessees of trust lands, like plaintiffs. *Id.* at 17.

A. The Leases And Permits That Govern The Trust Land Allotments Do Not Impose On The Government A Contractual Obligation To Deliver Irrigation Water

In their response, plaintiffs do not dispute – and therefore concede – that the leases and permits at issue do not contain an express obligation to deliver irrigation water. *See generally* Pls. Resp., ECF No. 36. Instead, plaintiffs argue that the leases and permits incorporate a statutory mandate to do so, or, alternatively, that the Court should read a contractual obligation into the leases. *See id.* at 8 n.4 (claiming that the leases and permits incorporate relevant statutes and regulations); *id.* at 11-12 (claiming that the purpose behind the leases, and the payment of O&M assessments, imply an obligation to deliver water).

At the outset, the Court should note the inherent limitation of plaintiffs' arguments. "[F]or the government to be sued on a contract pursuant to the Tucker Act, there must be privity of contract between the plaintiff and the United States." *Chancellor Manor*, 331 F.3d at 899. "This is so because the doctrine of sovereign immunity precludes a suit against the United States without its consent and because, under the Tucker Act, the United States has consented to be sued only by those with whom it has privity of contract." *Normandy Apartments, Ltd. v. United States*, 100 Fed. Cl. 247, 254 (2011) (quoting *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1263 (Fed. Cir. 2005)) (internal quotations omitted). If the Court determines, as it should, that the leases and permits at issue do not create privity of contract between plaintiffs and the United States, then the Court should dismiss plaintiffs' breach of contract claims for lack of jurisdiction, regardless of what duties those contracts purportedly impose on the Government. Put simply, plaintiffs' contracts with members of the Yakama Nation – even if they incorporate statutes and regulations, and even if they imply an obligation to deliver irrigation water – do not amount to a waiver of sovereign immunity by the Government.

Even if, for the sake of argument, we were to assume that plaintiffs are in privity with the United States, notwithstanding contractual language and binding precedent to the contrary, the Court should nonetheless dismiss plaintiffs' breach of contract claim as to the Trust Land Allotments. Contrary to plaintiffs' creative arguments, the leases and permits at issue do not impose a contractual obligation on the Government to deliver irrigation water. Plaintiffs have thus failed to identify any contract provision that the Government allegedly breached, and, as such, they have failed to state a breach of contract claim.

First, the leases and permits that govern the Trust Land Allotments do not incorporate any statutory entitlement to irrigation water. The Federal Circuit has established a bright-line test for determining whether a contract incorporates by reference external sources of law. To properly incorporate an external source, "the incorporating contract must use language that is *express* and *clear*, so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract." *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1344 (Fed. Cir. 2008) (emphasis in original). This means that "the language used in a contract to incorporate extrinsic material by reference [1] must explicitly, or at least precisely, identify the written material being incorporated and [2] must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, *e.g.*, as background law or negotiating history)." *Id.* at 1345.

The leases and permits here fail to satisfy either element of this two-prong test. These documents do not specifically reference the Act of Aug. 1, 1914. *See, e.g.*, Ex. A, ECF No. 34-1. Nor do they clearly state that this (or any other) statute was incorporated as a contract term. *See*

id. Without such express and clear language, the leases and permits do not incorporate external sources of law. *See also Peterson Indus. Depot, Inc. v. United States*, 140 Fed. Cl. 485, 491-93 (2018) (similarly holding that a contract did not incorporate by reference various Department of Defense standards and reports).

Second, this Court cannot create a contractual obligation to deliver water by implication. In fact, the Federal Circuit has already rejected similar efforts to convert statutory and regulatory duties into implicit contractual duties. In *Dobyns v. United States*, 915 F.3d 733 (Fed. Cir. 2019), the Court refused to imply contractual duties of safety and non-discrimination, because such duties "went well beyond those contemplated in the express contract and altered the contractual allocation of the burdens and benefits." *Id.* at 740. Similarly, in *Agredano v. United States*, 595 F.3d 1278 (Fed. Cir. 2010), the Court held that an agency's "responsibility to remove contraband from forfeited vehicles does not provide a contractual warranty to future purchasers of the vehicles that it has done so." *Id.* at 1281. The Court reached this conclusion because "the source of any responsibility on the part of [the agency] to search vehicles and remove contraband is its regulatory function and a failure to adequately perform this responsibility does not provide a contractual remedy." *Id.* By the same token, a statutory or regulatory duty to deliver irrigation water cannot morph into a contractual obligation.

B. Plaintiffs Have Likewise Failed To Identify Any Statutory Or Regulatory Obligation To Deliver Irrigation Water To Them

As already explained above, plaintiffs have failed to identify any statute or regulation that requires the Government to deliver irrigation water to non-Indian lessees of trust lands, like plaintiffs. In addition to the lack of subject-matter jurisdiction, the Court can dismiss plaintiffs' statutory claims for failure to state a claim upon which relief could be granted.

IV. Plaintiffs' General Appeal To Equity Cannot Create A Cause Of Action Where None Exists

Throughout their response, Plaintiffs appeal to the Court's sense of equity and justice to overcome our legal arguments. They suggest that our position would create "a license to steal," whereby the Government can "sign up tenant-[plaintiffs] on written contracts, take monies from the tenant-plaintiffs under those contracts, not perform its obligation, and then get off scot-free." Pls. Resp. at 2, ECF No. 36. But plaintiffs neglect to mention that they knew full well what they signed up for. Nothing prevented plaintiffs from reading the leases and permits at issue and seeing for themselves that the Government owed them no contractual obligation. Likewise, nothing prevented plaintiffs from reading applicable statutes and regulations and seeing for themselves that the Government had no duty to deliver irrigation water to them. Plaintiffs could even have reviewed *Algoma Lumber*, *Sangre de Cristo*, and *Warr* prior to leasing trust lands, all of which would have demonstrated the well-established limits on plaintiffs' ability to sue the United States.

As an apt summary of their efforts to circumvent binding precedent with inventive arguments, plaintiffs assert that "[l]iability should exist, irrespective of the technicalities the defendant's lawyers are urging." Pls. Resp. at 3, ECF No. 36. But the waiver of sovereign immunity, subject-matter jurisdiction, and a valid legal theory are *not* technicalities. Instead, these are the essential bedrock of every civil case against the Government, and a plaintiff's inability to establish any one of these principles must result in the dismissal of their claim. *See* RCFC 12(b).

CONCLUSION

For these reasons, and for the reasons stated in our moving papers, we respectfully request that the Court dismiss all claims alleged by plaintiffs Aaron Olson (lease nos. 1-2-2801-

1216, 1-2-2891-1317, 2-2-2284-0913, and 1-2-2141-0918), Darin Olson (lease no. 124 P111300316 NS), the Domans (lease no. 1-2-3020-1317 and permit no. 4-2-3029-1317), El Rancho Bella Vista, LLC (lease no. 1-2-2926-1322), George DeRuyter (lease no. 1-2-2698-1120), and Green Acre Farms, Inc. (lease no. 1-2-3110-1317). We also respectfully request that the Court dismiss claims related to the Trust Land Allotments alleged by plaintiffs the Wiltses (lease no. 1-2-3076-1314), the Boiselles (lease no. TP13-18), and the Youngs (lease no. 1-2-2682-1014).

Respectfully Submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/ Steven J. Gillingham
STEVEN J. GILLINGHAM
Assistant Director

/s/ Borislav Kushnir
BORISLAV KUSHNIR
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 307-5928
Facsimile: (202) 353-0461
Steven.Kushnir@usdoj.gov

Attorneys for Defendant

OF COUNSEL:

STEPHANIE LYNCH
Attorney-Advisor
DUANE MECHAM
Senior Attorney
Office of the Regional Solicitor
U.S. Department of the Interior

January 17, 2020