IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ROGER BIRDBEAR, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 16-75L

Honorable Elaine D. Kaplan

Oral Argument Requested

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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PLAINTIFFS' OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs are Native American Allottees and Individual Indian Money ("IIM") account holders. Plaintiffs opted out of the Trust Administration Class Action Settlement in *Cobell v. Salazar*, Case No. 96-cv-02185 (the "Cobell Trust Administration Class Settlement"). Because Defendant repeatedly asserted in the *Cobell* litigation and in fact conceded that the Court of Federal Claims had jurisdiction over the breach of trust and trust administration claims for retrospective damages, after opting out of *Cobell* Plaintiffs filed this lawsuit alleging their individual breach of trust and trust administration claims in thirteen counts against Defendant. *See* Third Amended Complaint ("TAC"), Dkt. 147. Defendant now seeks summary judgment on 9 of those 13 TAC Counts, primarily on subject matter jurisdiction arguments. *See* Def's Cross-Mot. for Summ. J. and Mem. in Supp. ("XMSJ"), Dkt. 180. As established below, Defendant's arguments fail for numerous reasons:

First, Defendant wrongly claims that this Court lacks subject matter jurisdiction under the Tucker or Indian Tucker Act for six of Plaintiffs' TAC claims – Counts 1, 3, 7, 8, 9, and 10. The public record, decisions by the Supreme Court, Court of Appeals for the District of Columbia Circuit, Federal Circuit, and Court of Federal Claims, as well as discovery in this case reveal the overwhelming pervasive and plenary fiduciary duties owed to Plaintiffs as allottees and IIM trust beneficiaries. The statutory and regulatory scheme giving Defendant pervasive fiduciary control over Plaintiffs' trust property, particularly given their status as allottees/IIM beneficiaries and *Cobell* opt outs, demonstrates the indisputable existence of a comprehensive trust relationship and the perversity of Defendant's subject matter jurisdiction argument.

In fact, Defendant conspicuously fails to mention the *Cobell* class action litigation and settlement anywhere in its XMSJ. There, the United States District Court for the District of Columbia, the United States Court of Appeals for the District of Columbia, and the United States Congress acknowledged the existence of extensive, plenary trust and trust administration duties that Defendant owes to Plaintiffs as allottees/IIM trust beneficiaries, and approved a settlement of Trust Administration claims that likely would have included the Counts at issue in Defendant's XMSJ if Plaintiffs had not opted out. *See* Plaintiffs' Appendix Exhibit 11 ("App. Ex.") (*Cobell v. Salazar* Order Granting Final Approval to Settlement), Dkt. 3850-1 at 7, 11, 12, 13 (identifying Plaintiffs in Exhibit A as Trust Administration opt-outs); *Cobell v. Salazar*, 679 F.3d 909, 918 (D.C. Cir. 2012) (approving settlement and noting "this case is extraordinary in that Congress not only expressly authorized, ratified, and confirmed the settlement [with a Trust Administration Class that would have included Plaintiffs' claims here if they had not opted out] but also appropriated $3.4 billion to fund it."); App. Ex. 10 (*Cobell v. Salazar* Class Action Settlement Agreement) ("*Cobell* Settlement Agreement") at ¶ I (2) (releases for non-opt-outs for Trust Administration claims stated in *Cobell* Amended Complaint) and ¶ I (7) (preservation of Trust Administration opt-outs), Dkt. 3660-2. Simultaneously with the execution of the *Cobell* Settlement Agreement, the Secretary of the Department of the Interior issued Order No. 3292, in which Defendant admitted that "The proper management and administration of the Individual Indian Money accounts *and trust assets are among the Department's most significant fiduciary duties*." App. Ex. 17 (emphasis added). It is specious for Defendant to now argue that this Court lacks subject matter jurisdiction for Plaintiffs' individual allottee/IIM trust beneficiary breach of trust and trust administration claims under the Tucker and Indian Tucker Acts after the District Court for the District of Columbia and the United States Congress acknowledged subject matter jurisdiction.

The utter implausibility of Defendant's subject matter jurisdiction arguments is revealed by its actions in the previous five years of litigating this case. All six Counts for which Defendant now claims the Court lacks subject matter jurisdiction were alleged in the original Complaint ("Original Complaint") and First Amended Complaint ("FAC") filed in 2016. *See* Dkts. 1 and 7. In 2016, however, Defendant sought to dismiss only two of those Counts. *See* Dkt. 10 at 15-22. Even more telling, Defendant withdrew its motion to dismiss even though its position on the existence of money mandating statutes and regulations has not changed. *Compare* Dkt. 10 at 15-20 and Dkt. 180 at 5-18.

Defendant failed to renew its subject matter jurisdiction arguments for five years. Defendant did not renew its motion after Plaintiffs filed their Second and Third Amended Complaints on December 15, 2016 and August 6, 2018, *see* Dkts. 52 and 147, after the close of fact discovery in July 2018 or after the close of all discovery in December 2020. Instead, after engaging in five years of protracted and very expensive litigation *in which Defendant has spent more than $6,400,000 in expert fees alone*, App. Exs. 22 and 23, Defendant now seeks to resurrect its subject matter jurisdiction arguments that clearly have no merit. The torpedo which sank these arguments in 2016 is the same today–the comprehensive trust relationship that Defendant has over trust assets, which was the basis for the *Cobell* and United States Congress admission of the pervasive fiduciary duties owed to Plaintiffs as allottees/trust beneficiaries. Discovery has only underscored the gaping holes in Defendant's subject matter jurisdiction claims, as Defendant through its delegates has published many Handbooks and Manuals describing in detail the extensive responsibilities it has in controlling all trust assets.

Second, Defendant wrongly argues that TAC Count 1 is barred by the statute of limitations. Under well-settled Supreme Court precedent, "[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class.'" *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350 (1983). Moreover, the Federal Circuit confirmed "the filing of a class action complaint . . . toll[s] the limitation period of 28 U.S.C. § 2501." *Bright v. United States*, 603 F.3d 1273, 1286 (Fed. Cir. 2010). Thus, the six-year statute of limitations was tolled until Plaintiffs opted out of the *Cobell* Trust Administration Class Settlement. The Original Complaint, which was filed within six years after Plaintiffs opted out, was timely. Defendant's statute of limitations argument must also be rejected because (1) Count 1 did not accrue until Plaintiffs discovered Defendant's repudiation of its trust duties, which occurred within six years of the filing of the Original Complaint and (2) Defendant's breaches are continuing.

Third, Defendant alleges summary judgment should be granted on Counts 2, 4, 6, and 7 due to an alleged "failure of proof". XMSJ at 1. Plaintiffs themselves moved for summary judgment on Count 4. Disputed issues of material fact preclude summary judgment on Counts 2, 6, and 7.

BACKGROUND

Plaintiffs are allottees and IIM trust beneficiaries who collectively or individually have beneficial interests in approximately 2,000 acres of land on the Fort Berthold Reservation. Decl. of Roger Birdbear ¶ 2, Dkt. 19 ("R. Birdbear Decl."); Decl. of Nelson Birdbear ¶ 2, Dkt. 20 ("N. Birdbear Decl."); Decl. of Thomas Birdbear ¶ 2, Dkt. 21 ("T. Birdbear Decl."); Decl. of Jamie Lawrence ¶ 2, Dkt. 22 ("Lawrence Decl."); Decl. of Rae Ann Williams ¶ 2, Dkt. 23 ("Williams Decl."). Plaintiffs all opted out of the settlement in *Cobell v. Jewell*. App. Ex. 11 (Ex. A at 7, 11, 12, 13). Plaintiffs filed their original Complaint on January 13, 2016. Dkt. 1.

Plaintiffs' allotted lands are located on multiple formations, including the Bakken Formation, which is considered the most significant oil and natural gas resource identified in the past 40 years. TAC ¶ 28; *see also*, App. Ex. 12, Expert Report of Dr. Craig Van Kirk ("Van Kirk Rpt.") at 15-16. For some tracts, Plaintiffs own both the surface rights and sub-surface mineral rights. Decl. of Beth Wenstrom ("Wenstrom Decl.") ¶ 11(b), Dkt. 13. For others, Plaintiffs' ownership is divided and they may hold surface rights in some tracts, but only mineral rights in others. *Id.* ¶ 11(a). Defendant engaged in persistent mismanagement of Plaintiffs' trust assets, including their oil and natural gas rights, as well as some of their surface interests. *See, e.g.,* Van Kirk Rpt., App. Ex. 12 at 2, 19-20; App. Ex. 14, Expert Rebuttal Report of John Akinboyewa ("Akinboyewa Rpt.") at 19, 21-22; Declaration of John Akinboyewa ("Akinboyewa Decl.") ¶¶ 3, 6, 7; App. Ex. 15, Expert Report of Rick Frazier ("Frazier Rpt.") at 4; App. Ex. 16, Rebuttal Expert Report of Rick Frazier ("Frazier Rebuttal Rpt.") at 6-7, 9-

10. The mismanagement of Plaintiffs' trust assets and Defendant's repeated and continuing failure to properly perform its fiduciary duties as trustee under the comprehensive statutory and regulatory scheme governing its conduct has resulted in at the very least, $79,852,538 in damages to Plaintiffs, and subject to this Court's final decision on other disputed issues, potentially up to $127,254,184 in damages through 2018 and is continuing. App. Ex. 24, Expert Report Jane Kidd ("Kidd Rpt.") at 36-38, 42-49 (Tables 1, 3-6); App. Ex. 25, Supplemental Expert Report of Jane K. Kidd ("Kidd Supp. Rpt.") at 4-6 (Table 2 – Revised).

The Government in its XMSJ does not discuss the facts surrounding the 2007 bid sale that resulted in several of the leases at issue in this case. For several years leading up to 2007, off-reservation land near Fort Berthold was actively being placed under lucrative oil and gas leases. R. Birdbear Decl. ¶ 5. However, very little leasing was being conducted by Defendant on the Fort Berthold Reservation itself, despite repeated requests from Roger Birdbear, on behalf of himself and his family members, including the other Plaintiffs in this case, that their lands be leased for oil and gas drilling. *Id.* During this time Roger Birdbear repeatedly requested that BIA allow him to negotiate leases for his family's land directly with potential lessees, including Simray Production Company, L.P. for the lease of tract 3111-A. *Id.* ¶¶ 6-7; Howling Wolf Decl., Dkt. 12, Ex. 3-4. But Mr. Birdbear was told by the BIA that leases on the reservation had to be put out for public auction under the regulations. R. Birdbear Decl. ¶ 6. At Plaintiffs' request, BIA conducted a public bid sale for oil and gas leases on Plaintiffs' other land on or about November 15, 2007. *Id.* A sale resulted, and the compensation was markedly less than that received by non-Indians and the Government itself for similar oil and gas producing properties. App. Ex. 15 at 7-9. Following that sale, the Government represented to Plaintiffs that the leases had been "offered for negotiated sale at Fort Berthold Agency in accordance with the regulations contained in the Code of Federal Regulations, Title 25, Indians Part 212 …" or "offered [for the specific tract] at Fort Berthold Agency in accordance with the regulations contained in the

Code of Federal Regulations, Title 25, Indians Part 212 …." Dkt. 10-2, 10-3, 10-5, 10-6 and 10-7. Defendant did not inform Plaintiffs that Defendant could allegedly have offered their oil and gas leases on Fort Berthold without conducting a public auction. R. Birdbear Decl. ¶ 6. Mr. Birdbear was *later* given permission to directly negotiate the lease for tract 3111-A, because "no bids were received" during the bid sale. *Id.* ¶ 7; Howling Wolf Decl., Dkt. 11, ¶ 3(b), Ex. 1 at Sale Tract 1600. These leases were later placed under communitization agreements by the BIA without Plaintiffs' consent. R. Birdbear Decl. ¶ 9, Ex B-D; N. Birdbear Decl. ¶ 5; T. Birdbear Decl. ¶ 4; Lawrence Decl. ¶ 4; Williams Decl. ¶ 4.

Roger Birdbear eventually also learned that lessees had re-sold their lease rights at prices that were substantially higher than what had been received by the land owners at the bid sale. R. Birdbear Decl. ¶ 10. In or around March 2010, he made phone calls and emailed the regional BIA superintendent and others to request an accounting of potential lost income and objected to any further assignments of leases for his properties. *Id.*, Ex. H. The BIA's response was to tell Mr. Birdbear that he would need to "make a claim for lost revenue …." *Id.*

Over the next couple of years, Roger and Nelson Birdbear repeatedly requested that the BIA provide them information about the leases for their properties and a complete list of their property interests on the Reservation, an identification of which properties are under lease for oil and gas mining, and information about the other issues raised in the Complaint. R. Birdbear Decl. ¶ 11, Ex. I (3/18/13 letter from R. Birdbear to BIA Superintendent requesting a "complete accounting for [his] mineral and real estates held in trust by the federal government"), Ex. J (5/1/13 letter from R. Birdbear to the BIA Superintendent requesting the same accounting), Ex. K (6/20/13 email from R. Birdbear to the Office of the Special Trustee requesting "an audit of the management of [his] trust assets"), Ex. L (3/3/14 letter requesting cancellation of leases due to drainage); N. Birdbear Decl. ¶ 7, Ex. C (5/20/13 letter to the Office of the Special Trustee for Native American Lands requesting an accounting of all of his "Indian beneficial interests"). Those requests were ignored or BIA was not capable of providing the requested information. R. Birdbear Decl. ¶ 11; N. Birdbear Decl. ¶ 7.

Defendant also says nothing about its comprehensive and pervasive trust management and administration (or lack thereof) of Plaintiffs' mineral trust assets. Defendant fails to mention the extensive set of Handbooks and Manuals produced in discovery or discovered through investigation that demonstrate Defendant's pervasive control over every detail of Plaintiffs' trust assets, all promulgated under the authority of the statutes and regulations upon which Plaintiffs have based their trust beneficiary breach of trust and trust administration claims, including:

- Department of Interior (DOI) Tripartite Memorandum (describing DOI delegation of responsibilities between Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM) and Minerals Management Service (MMS) (reorganized in to the Office of Natural Resources Revenue (ONRR)); App. Ex. 1;

- BLM Indian Diligent Development Manual (describing Defendant's responsibilities to minimize economic returns through timely and protective drilling and to prevent waste and theft through drainage); App. Ex. 2;

- BLM Manual on Drainage Protection (describing responsibilities to prevent and obtain compensation for drainage on Indian mineral estate); App. Ex. 3;

- Gas Payor Handbook (describing MMS (now ONRR) responsibilities to ensure full compensation from Indian mineral estate); App. Ex. 4;

- BLM Inspection and Enforcement Handbook (describing monitoring, supervision and enforcement obligations of BLM to ensure lessee compliance with statutes, regulations and leases on Indian mineral estate); App. Ex. 5;

- BIA Fluid Mineral Estate Procedural Handbook (describing BIA comprehensive leasing duties for Indian mineral estate); App. Ex. 6;

- DOI Mineral Estate Standard Operating Procedures (describing Defendant's allocation and delegation of comprehensive trust duties and updating Tripartite Memorandum); App. Ex. 7;

- BLM Drainage Protection Manual (describing Defendant's fiduciary duties to prevent drainage and obtain full compensation for drainage that occurs on Indian mineral estate); App. Ex. 8;

- BLM Mineral Trespass Memorandum (describing BLM responsibility to prevent trespass and theft of property such as oil through drainage); App. Ex. 9; and

- Office of Natural Resources and Revenue (ONRR) Indian Payor Handbook (describing Defendant's trust duties to ensure full compensation rom Indian mineral estate); App. Ex. 18.

Defendant also failed to mention the numerous admissions by the Secretary of the Interior and solicitor as to the comprehensive trust relationship with and fiduciary duties owed to Indian tribes and individual Indians, particularly allottees/IIM trust beneficiaries. App. Exs. 17, 19-21.

Defendant also failed to inform the Court of the *Cobell* litigation or *Cobell* Settlement, or that case's impact on the individual breach of trust and trust administration claims brought by Plaintiffs as *Cobell* opt outs. On December 10, 2010, the parties to the *Cobell* litigation submitted a Joint Motion for Preliminary Approval of Settlement and the Class Action Settlement Agreement. App. Ex. 10. The Trust Administration Class was defined as:

> Those individual Indian beneficiaries … alive as of the Record Date and who have or had IIM Accounts in the "Electronic Ledger Era" … as well as individual Indians who, as of the Record Date, had a recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM Account and regardless of the proceeds, if any, generated from the Land…

Id. at 16.

All of the Plaintiffs opted out of the *Cobell* Trust Administration Class after receiving notice on December 21, 2010 of class certification. App. Ex. 11, Ex. A at lines 308, 517, 554, 591, 664.

ARGUMENT

I. DEFENDANT'S SUBJECT MATTER JURISDICTION CROSS-MOTION IS SPECIOUS AND MUST BE DENIED.

Defendant argues that Counts 1, 3, 7, 8, 9, and 10 should be dismissed on summary judgment because Plaintiffs allegedly failed to identify in the TAC a source of substantive law imposing a duty that the United States owes that would trigger Tucker Act jurisdiction. XMSJ at 4. According to

Defendant, the pervasive statutory and regulatory schemes under which it exercises plenary authority over every aspect of Plaintiffs' trust assets "have no applicability" and "either fail to establish *specific* trust duties or do not require compensation [for those trust duties that Defendant concedes are purportedly 'specific' enough] if breached." *Id.* at 5 (emphasis added).

These arguments are specious for numerous reasons. First, they misstate, ignore, or misinterpret the applicable cases, statutes, and regulations, which firmly establish the existence of subject matter jurisdiction in Indian breach of trust and trust administration cases such as this one. Second, Defendant improperly seeks to minimize or compartmentalize its authority over the trust assets at issue in this case, whereas the plenary nature of its authority unequivocally establishes both extensive fiduciary duties and the obligation to pay damages for the breach of those duties. Third, Defendant wholly ignores repeated admissions by the Secretary of the Interior regarding the extensive fiduciary duties it owes to Plaintiffs, and even more egregiously, a multitude of Defendant's own Manuals and Handbooks published through the BIA, BLM, and Bureau of Trust Funds Administration (formerly the Office of Special Trustee for American Indians) in which Defendant describes its extensive fiduciary responsibilities arising from the statutes and regulations that are the bases for the claims in this lawsuit. Fourth, and perhaps most egregiously, Defendant has ignored or blatantly mischaracterized decisions by the United States Supreme Court, the Federal Circuit, the Federal Court of Claims, and the Court of Appeals for the District of Columbia that have held that subject matter jurisdiction exists as a matter of law under the very statutes and regulations that are the basis for Plaintiffs' individual allottee/IIM trust beneficiary breach of trust management and administration claims that they brought after opting out of *Cobell*.

A. Defendant Owes Extensive Fiduciary Trust And Trust Administration Duties To Plaintiffs As Allottees And IIM Trust Beneficiaries, And Plaintiffs Are Entitled To Money Damages For The Breaches They Allege.

1. *Cobell* Reaffirmed The Long Established Fiduciary Trust Asset Management Duties Owed By Defendant To Plaintiffs As Indian Allottees And IIM Beneficiaries – And Thus Subject Matter Jurisdiction.

Incredibly, Defendant does not mention the *Cobell* litigation. That litigation established that Defendant owes extensive fiduciary trust management and trust administration duties to Indian allottees who are IIM account holders, such as Plaintiffs, to account for its mismanagement of trust assets. *Cobell v. Babbitt ("Cobell V")*, 91 F. Supp. 2d 1, 47 (D.D.C. 1999) (IIM beneficiaries have waited "a century" for "an accurate accounting" which is the "most basic fiduciary duty."), *aff'd, Cobell v. Norton* ("*Cobell VI*"), 240 F.3d 1081 (D.C. Cir. 2001). Defendant also fails to acknowledge that the claims in this case, like those in *Cobell,* are based on its mismanagement of the trust assets it has extensive fiduciary duties to manage for Plaintiffs as allottees IIM trust beneficiaries. Defendant fails to mention that Plaintiffs opted out of the *Cobell* Settlement Agreement and pursued their individual claims in the forum that Defendant identified as having subject matter jurisdiction.

In *Cobell,* Defendant repeatedly argued that the Court of Federal Claims had subject matter jurisdiction for all claims by allottees/IIM trust beneficiaries because claims for mismanagement of trust assets and breach of *any* fiduciary duty were *by definition* claims for money damages. *See, e.g., Cobell v. Babbit* ("*Cobell I"),* 30 F. Supp. 2d 24, 38 n. 14 (D.D.C. 1998) (allottee/IIM trust beneficiary breach of trust and trust administration claims were actually claims for money damages over which the Court of Federal Claims "would have proper jurisdiction under 28 U.S.C. § 1491"); *Cobell v. Babbitt* ("*Cobell III"),* 52 F. Supp. 2d 11, 26 (D.D.C. 1999) (noting again that Defendants took the position throughout that litigation that Indian allottees with IIM accounts alleging breach of trust and trust administration in the mismanagement of their trust asserts were seeking money damages and had "to be brought in the United States Court of Federal Claims" because subject matter jurisdiction existed in that forum).

While the District of Columbia District Court and the Court of Appeals for the District of Columbia rejected those arguments, finding the relief sought was prospective and not retrospective, it is not surprising that both *held as a matter of law* that Defendant owed fiduciary duties – specifically including the duty to account for trust asset mismanagement – to every Indian allottee with an IIM account for *all* of their trust assets:

> The federal government has *substantial trust responsibilities* toward Native Americans. *This is undeniable.* Such duties are grounded in the very nature of the government-Indian relationship. "[A] fiduciary relationship *necessarily arises* when the government assumes . . . elaborate control over . . . *property belonging to Indians."* It is equally clear that the federal government has failed time and again to discharge its fiduciary duties.

Cobell VI, 240 F.3d at 1086 (emphasis added) (quoting *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 225 (1983)).

The D.C. Circuit held that Defendant's plenary control over all allottees/IIM trust beneficiaries and therefore its plenary control over the lands Defendant held in trust and the management administration of those trust lands and allottee trust assets unequivocally created extensive fiduciary trust and trust administration duties:

> Because the United States holds IIM lands in trust for individual beneficiaries, it assumes the fiduciary obligations of a trustee. "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or a fiduciary connection." [*Mitchell II,* 463 U.S. at 225]. . . . *As a result of allotment, individual Indians became beneficiaries of the trust lands, but lost the right to sell, lease, or burden the property without the federal government's approval.* . . . Income generated from trust lands is to be paid to individual beneficiaries.
>
> Under current law, the Secretary of the Interior and the Secretary or Treasury are the designated trustee delegates for the IIM trust. Each Secretary, or his designates, *has specific fiduciary responsibilities that must be fulfilled lest the United States breach its fiduciary obligations.* Several governmental agencies have specific trust obligations. They include, among others, BIA, Office of Trust Funds Management ("OTFM") and Office of the Special Trustee ("OST"). . . . BIA *is responsible [as a fiduciary] for trust fund management, including the approval of leases and land transfers and income collection. . . . [T]he Treasury Department has substantial trust responsibilities as well . . . hold[ing] and invest[ing] IIM funds . . . and provid[ing] accounting and financial management services.*

Cobell VI, 240 F.3d at 1088 (emphasis added).

The Court of Appeals for the D.C. Circuit went on to emphasize the extensive fiduciary duties owed to IIM beneficiaries and the existence of subject matter jurisdiction for claims of trust asset mismanagement. Its holding was directed to the duty to provide an accounting for the funds collected by Defendant on behalf of Indian allottees and IIM beneficiaries, but it clearly included the duty to manage and administer *all* trust assets as a fiduciary:

> *There is no doubt that the federal government has a longstanding fiduciary obligation to IIM trust beneficiaries.* "[T]he law is 'well established that the Government in its dealings with Indian [trust property] acts in a fiduciary capacity.'" . . . . This rule operates as a presumption. . . . *[C]ourts correctly recognize a trust relationship even where it is not explicitly laid out by statute.* . . . [While] [i]t is no doubt true that "the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations[,]" . . . *[t]his does not mean that the failure to specify the precise nature of the fiduciary obligation or to enumerate [all of] the trustee's duties absolves the government of its responsibilities. . . . [T]he interstices [of the government's obligations] must be filed in through reference to general trust law.*

Id. at 1098-99, 1101 (emphasis added) (citations omitted).

Given the plenary authority over the management and administration of allottee/IIM beneficiary trust assets, the D.C. Circuit in *Cobell* held that Defendant owed fiduciary duties far above and beyond those duties explicitly set forth in the statutes or regulations which were the basis for the lawsuit. *Id.* at 1100-02. Given the holding in *Cobell* with respect to the existence of fiduciary trust management and administration duties, particularly as to allottees/IIM trust beneficiaries like Plaintiffs and their pursuit of individual claims as *Cobell* opt outs, there can be no doubt that Defendant has extensive trust duties with respect to Plaintiffs' trust assets or that subject matter jurisdiction exists.

2. <u>*Mitchell II* Eliminated All Doubt Regarding Subject Matter Jurisdiction For Allottee/IIM Beneficiary Breach Of Trust And Trust Administration Claims.</u>

The Supreme Court decision in *Mitchell II* was the foundation for the jurisdictional rulings in *Cobell* and is the "pathmarking precedent" for determining when a statute or regulation "can fairly be interpreted as mandating compensation by the Federal Government," thereby establishing subject matter jurisdiction under the Tucker Act. *United States v. Navajo Nation ("Navajo I"),* 537 U.S. 488, 503 (2003). "In *Mitchell II,* [the Supreme Court] held that a network of other statutes and regulations [in addition to the bare trust created by the General Allotment Act of 1887, 25 U.S.C. § 331 *et. seq.* (§§ 331-333 repealed 2000)] did impose judicially enforceable fiduciary duties upon the United States in its management of forested allotted lands . . . [because those] statutes and regulations . . . clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 504-05 (citation omitted).

> The timber management statutes, 25 U.S.C. §§ 406-407, 466, and the regulations promulgated thereunder, 25 CFR Part 163 (1982), establish the *"comprehensive" responsibilities* of the Federal Government in managing the harvesting of Indian timber. . . . The Department of Interior – through the Bureau of Indian Affairs – "exercises literally daily supervision over the harvesting and management of tribal timber." . . . "Virtually every stage of the process is under federal control."
>
> *   *   *
>
> Because the statutes and regulations . . . clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, *they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained*. Given the existence of a trust relationship, *it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties*. It is well established that a trustee is accountable in damages for breaches of trust. . . .
>
> The recognition of a damages remedy also furthers the purposes of the statutes and regulations, which clearly require that the Secretary manage Indian resources so as to generate proceeds for the Indians. It would be anomalous to conclude that these [statutory and regulatory] enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed. Absent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties . . .

Mitchell II, 463 U.S. at 222, 226-27 (emphasis added) (citations omitted).

3. <u>The Federal Circuit Has Held That Pervasive Fiduciary Duties Exist – And Thus Subject Matter Jurisdiction – Under Several Statutes And Regulations Upon Which Plaintiffs Have Based Their Claims.</u>

Plaintiffs claim that Defendant has breached the fiduciary duties it owes under the Indian Mineral Leasing Act ("IMLA"), 25 U.S.C. §§ 396a-396g (enacted in 1938), the Act of March 3, 1909, as amended, 25 U.S.C. § 396, the Federal Oil and Gas Royalty Management Act ("FOGRMA"), the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 *et seq*., 30 U.S.C. §§ 1701-57 (enacted in 1982), 25 CFR Part 212 ("Leasing of Allotted Lands for Mineral Development"), 30 CFR Part 3160 ("Onshore Oil and Gas Operations") and 30 CFR Part 1206 (Natural Resources Revenue Product Valuation). TAC ¶ 32-35.

The existence of subject matter jurisdiction under the Tucker Act for breaches of trust, trust management, and trust administration for oil and gas trust assets was conclusively decided in *Pawnee v. United States,* 830 F.2d 187, 189 (Fed. Cir. 1987). "The total of these regulations is comprehensive, giving wide powers to Interior as to all aspects of the [oil and gas] leasing arrangement." *Id.* at 190. "Because the statutes and regulations [on oil and gas leasing] clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages." *Id.* (citing *Mitchell II,* 463 U.S. at 226); *see also Poafipybitty v. Skelly Oil Co.,* 390 U.S. 365, 372-73 (1968) (the Government has "trust obligations" because it "exercise[s] supervisory authority over Indian oil and gas leases in considerable detail.").

4. A Pervasive Statutory And Regulatory Scheme That Establishes Fiduciary Trust, Trust Management and Trust Administration Duties Necessarily Mandates Money Damages For Breaches.

In *United States v. White Mountain Apache Tribe,* 537 U.S. 465 (2003), the Supreme Court focused on whether the source of law creating the fiduciary duties of Defendant must explicitly provide a damages remedy to be money-mandating, *i.e.,* the "second prong" of the two-prong subject matter jurisdiction test established in *Mitchell II*. The Supreme Court ruled that no such explicit statutory or regulatory statement of a right to money damages is required for subject matter jurisdiction. To the contrary, administrative control over Indian trust assets inherently and necessarily requires a damages remedy for breaches of trust, trust management, and trust administration fiduciary duties:

> To the extent that the Government would demand an explicit provision for money damages to support every claim that might be brought under the Tucker Act, it would substitute a plain and explicit statement standard for the less demanding requirement of fair inference that the law was meant to provide a damages remedy for breach of a duty. To begin with, this would leave *Mitchell II* a wrongly decided case, for one would look in vain for a statute explicitly providing that inadequate timber management would be compensated through a suit for damages. But the more fundamental objection to the Government's position is that, if carried to its conclusion, it would read the trust relation out of the Indian Tucker Act analysis; if a specific provision for damages is needed, a trust obligation and trust law are not.

Id. at 476-77.

Thus, the Supreme Court made it clear that trust asset management and administration, particularly plenary management and administrative control over all trust assets, such as Defendant has over all allottee/trust beneficiary assets, requires the payment of money damages for breaches. No explicit compensation-mandating statutory or language is needed for subject matter jurisdiction:

> This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. "One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.". . . Given this duty on the part of the trustee to preserve corpus, "it naturally follows that the Government should be liable in damages for breach of its fiduciary duties."

Id. at 475 (citations omitted).

Accordingly, statutes and regulations that provide Defendant with "comprehensive control," a "pervasive role," or "full responsibility to manage Indian resources and land for the benefit of the Indians," "could 'fairly be interpreted as mandating compensation' through money damages if the Government faltered in its responsibility." *Id.* at 474 (quoting *Mitchell II*, 463 U.S. at 224-26).

5. <u>This Court Repeatedly Has Held That Subject Matter Jurisdiction Exists For Breach Of Trust And Trust Administration Claims Under Many Of The Same Statutes And Regulations Upon Which Plaintiffs Base Their Claims.</u>

The Shoshone Tribe brought breach of trust and trust administration claims for the mismanagement of oil and gas production and the payment of royalties. *Shoshone Indian Tribe of the Wind River Reservation v. United States ("Shoshone I"),* 56 Fed. Cl. 639 (2003). Because the Shoshone Tribe, unlike Plaintiffs, were not allottees and IIM trust beneficiaries and thus could not simply rely on *Mitchell II* and its progeny as having already determined the existence of money mandating fiduciary duties as a matter of law, the Court applied the *Mitchell II* test to the Shoshone Tribe's claims arising under the IMLA, 25 U.S.C. §§ 396a-g, FOGRMA, 30 U.S.C. §§ 1701-59, and the regulations promulgated under those statutes. The Court held that the pervasive statutory and regulatory scheme established fiduciary duties even as to the Tribe. "[T]his comprehensive valuation framework creates fiduciary responsibilities on the part of the government." *Shoshone I*, 56 Fed. Cl. at 648; *see also Shoshone Indian Tribe of the Wind River Reservation v. United States* ("*Shoshone II"),* 58 Fed. Cl. 77, 92 (2003) ("These regulations [30 CFR §§ 206 *et seq*.] satisfy the *Navajo* standard and 'establish specific fiduciary or other duties' for the Secretary with respect to the oil and gas leases.") (quoting *Navajo I*, 537 U.S. at 506").

Just as in *Shoshone I*, Plaintiffs allege that Defendant mismanaged Indian oil and natural gas leases under both the IMLA and FOGRMA, and their implementing regulations, as well as terms of the leases at issue. *See, e.g.*, TAC ¶¶ 32-35 (violations of regulations promulgated under the IMLA), and ¶¶ 32-35 (FOGRMA violations). Because Defendant has pervasive control over oil and gas leasing on Fort Berthold under this comprehensive statutory and regulatory scheme, and pervasive control over all trust assets belonging to Plaintiffs as allottees and IIM beneficiaries, the statutory and regulatory scheme creates Defendant's fiduciary trust and trust administration obligations to Plaintiffs and those obligations are enforceable through money damages. *Shoshone I*, 56 Fed. Cl. at 647-48.

6. <u>Defendant's Numerous Admissions Underscore The Pervasive Control It Exercises Over Plaintiffs Trust Assets As Allottees And IIM Beneficiaries.</u>

Defendant has promulgated numerous handbooks, manuals, and guidance publications in which it describes its extensive, pervasive "responsibilities" and "duties" under the same statutes and regulations upon which Plaintiffs base their claims for breach of trust, trust management, and trust administration. *See, e.g.*, Declaration of Michael R. Cashman ("Cashman Decl.") ¶¶ 2-17, 26-30 and App. Exs. 1-9, 18 described *supra* at 7-8; Akinboyewa Decl. ¶¶ 16, 29, 42-44; Van Kirk Rpt. at 26-28;

see also, App. Ex. 2 at ¶ .01 (describing "purpose," "objectives" and "responsibility" of Defendant, "including management of Indian diligent development program within the oil and gas program" to "assure that producing Indian oil and gas leases are diligent developed in accordance with lease terms and regulations" under the authority of the Indian Long Term Leasing Act of 1909 ("ILTLA") for allotted lands, the Indian Mineral Development Act of 1982, FOGRMA, 43 CFR Part 3160, 25 CFR Part 211, 25 CFR Part 212 and allotted leases); App. Ex. 3 at ¶ .06 (describing the purposes, objectives and responsibilities of Defendant for "ensuring . . . [*inter alia*] Indian lands are adequately protected from drainage and that Indian allottee oil and gas minerals are diligently developed and fully compensated); App. Ex. 4 at 1-1 (describing Defendant's responsibility for and complete control over oil and gas valuation); App. Ex. 5 at I-1 (describing the rights which Defendant possesses, as the trustee for the management and administration of allottee/IIM beneficiary and other trustee assets, for supervising and managing the activities of lessees); App. Ex. 6 at § 1.2.B. (describing in detail BIA responsibilities for all leasing of allottee/IIM trust beneficiary mineral estate, and outlining "the specific responsibility in all phases of the lease/agreement development process" on allottee leases between the BIA, the BLM, ONRR and OST); Ex. 7 at A-10 (describing in detail the division of responsibilities amongst Defendant's agencies for cradle to grave responsibility for Indian mineral trust assets); App. Ex. 8 at § 1.3 (stating that Defendant, through the BLM, is responsible for preventing and compensating drainage on Indian mineral estate under the ILTLA, the IMLA, 43 CFR Part 3160, 25 CFR Part 211 and 25 CFR Part 212, and emphasizing that "the Secretary [of the Department of Interior], through delegations in the Department Manual . . . has assigned to the BLM part of the Secretary's trust responsibilities to regulate oil and gas operations on . . . Indian lands" and that "43 CFR Part 3160 applies to oil and gas operations on Indian lands."); and App. Ex. 18 at § 1.0 (stating that Defendant "is tasked with the responsibility of ensuring that both tribes and individual Indian mineral owners receive what is rightfully owed them . . ." and admitting that lessees on Indian trust leases "the [lessee] agrees to federal government supervision and oversight" which is more extensive and pervasive than the supervision and oversight required on federal lands under the authority of the ILTLA and the IMLA, amongst other authorities), § 1.3 (admitting that "the United States is required to supervise and approve all disposition of trust asserts, including oil and gas resources," and that the BIA "is responsible lease agreement approval, administration and termination" and the BLM "is responsible for oil and gas production and development activities.").

The Handbooks and Manuals include repeated admissions by Defendant as to its comprehensive fiduciary trust, trust management, and trust administration responsibilities. Thus, it is no surprise that Secretaries for the Department of Interior repeatedly have admitted that the trust responsibilities Defendant owes under the pervasive statutory and regulatory scheme are "among the Department's most significant fiduciary duties," App. Ex. 17 at § 2, that the discharge of those "most significant fiduciary duties" "requires, without limitation, that [Defendant] with a high degree of care, skill, and loyalty . . . [p]rotect and preserve Indian trust asserts from loss, damage, unlawful alienation, waste and depletion" and [a]ssure that any management of Indian trust assets that [Defendant] has an obligation to undertake promotes the interest of the beneficial owner . . . ," App. Ex. 20 at § 5; and that Defendant's "trust responsibility is a well-established legal obligation" under which Defendant has the "highest moral obligations" which are "so fundamental to the role of a trustee that [Defendant] must be held accountable for failing to conduct itself in a manner that meets the standard of a common law trustee." App. Ex. 21 at § 3.a. As established by *Mitchell II*, *White Mountain Apache, Cobell VI*, and *Pawnee*, among others, these Handbooks, Manuals, and Secretarial admissions have even greater force for allottee/IIM trust beneficiary assets.

Given (1) the statutes and regulations cited in the TAC by which Defendant has exercised plenary authority over Plaintiffs' oil and gas and all other trust assets; (2) Plaintiffs' status as allottees/IIM trust beneficiaries; (3) binding precedent that holds that the extensive fiduciary duties that Defendant owes to Plaintiffs are money mandating; (4) the plethora of publications in which Defendant concedes and describes its plenary authority over Plaintiffs' trust assets; and (5) Defendant's admissions, through the Secretary of the Department of Interior, there can be no doubt that subject matter jurisdiction under the Tucker Act exists in this case. There can also be no doubt that Defendant has speciously argued otherwise, a further breach of its fiduciary duties which has forced Plaintiffs to incur unnecessary fees and costs to respond in this memorandum.

B. The Cases Cited By Defendant Are Inapplicable Because They Do Not Address Allottee/IIM Trust Beneficiary Claims Or The Plenary Statutory And Regulatory Scheme By Which Defendant Controls Trust Beneficiary Assets.

Defendant's failure to address the "pathmarking" authority in *Mitchell II*, as well as *Cobell, White Mountain Apache, Pawnee*, *Shoshone I* or *II*, or *Osage Tribe of Indians of Okla. v. United States* ("*Osage I*"), 68 Fed. Cl. 322 (2005), among others, is both glaring and fatal. Instead, Defendant relies on cases which are not even facially applicable here.

First, none of the cases upon which Defendant relies, *see* XMSJ at 5-6, involved breach of fiduciary trust and trust administration claims *by allottees or IIM trust beneficiaries,* and, on that basis alone, all of those cases are clearly distinguishable. *See Navajo I*, 537 U.S. at 493 (dealing with coal leases negotiated and executed by the Navajo Tribe); *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 289 (2009) (same); *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) (attorney-client privilege between Tribes and Defendant); *Hopi Tribe v. United States*, 113 Fed. Cl. 43, 45 (2013) (Tribal claim concerning reservation water quality). In all of those cases, there was not even a "bare trust" relationship, and thus no duty. Here, by contrast, the existence of extensive fiduciary trust and trust administration duties owed to Plaintiffs as allottees/IIM Trust beneficiaries has been established by the controlling precedent set forth above. Thus, there can be no dispute over the existence of specific fiduciary duties for the breach of trust and trust administration claims Plaintiffs have asserted as allottee/IIM trust beneficiary *Cobell* opt outs. *See infra* I.C. Defendant's cases therefore are inapposite.

Second, the cases upon which Defendant relies are factually distinguishable, in that none of them involves any of the statutes or regulations relied upon by Plaintiffs, and none involves the pervasive and plenary authority that Defendant exercises over allottee trust assets or allottee oil and gas minerals. Defendant relies heavily on *Navajo I & II,* but the *Navajo* cases did not change the test laid out in *Mitchell II. See, e.g., Osage Tribe of Indians of Okla. v. United States ("Osage IV"),* 93 Fed. Cl. 1, 27-28 (2010) (*Navajo II* "merely 'reiterates' existing law" under *Mitchell II,* and does not apply even in non-allottee/non-IIM trust beneficiary tribal cases where Defendant has plenary authority over the management of trust assets).

As noted above, the statute and regulations at issue in the *Navajo* cases did not even create the bare trust that exists between Defendant and allottees by virtue of the Allotment Act of 1887. *See Mitchell II*, 463 U.S. at 224. The Supreme Court in the *Navajo* cases explained that the statutes and regulations cited by the tribe for coal leasing were critically and materially different than the exhaustive and pervasive statutory and regulatory scheme by which Defendant controls every aspect of oil and gas leasing and trust asset administration for allottees/IIM trust beneficiaries. "[T]he regulations [under the IMLA] treat[] oil and gas leases in more detail than coal leases," thereby giving rise to fiduciary obligations that do not exist in the coal leasing context. *Navajo I,* 537 U.S. at 494-95, 508 n. 11 ("both the IMLA and its implementing regulations address oil and gas leases in considerably more detail than coal leases").

In *Navajo II*, the Supreme Court noted the inherent but critical distinction between the absence of even a bare trust owed to the Navajo tribe for coal leasing under the plain language of the IMLA, 25 U.S.C. § 396a-g, and the extensive fiduciary trust and trust administration duties owed (particularly to allottees/IIM trust beneficiaries) for oil and gas assets under the IMLA:

> We distinguished *Mitchell II*, which involved a series of statutes and regulations that gave the Federal Government "*full responsibility to manage Indian resources and land for the benefit of the Indians*" …. Title 25 U.S.C. § 406(a) 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 bests interests of the Indian owner and his heirs" and enumerated specific factors to guide that decisionmaking. We understood that statute – in combination with several other provisions and the applicable regulations – to create a fiduciary duty with respect to Indian timber." But neither the IMLA nor its regulations established any analogous duties or obligations *in the coal context*.

Navajo II, 556 U.S. at 294 (internal citations omitted) (emphasis added); *see also Shoshone I*, 56 Fed. Cl. at 646 (even for non-allottee/non-IIM trust beneficiaries such as the Shoshone Tribe, for "oil and gas leases … there is a much more elaborate statutory and regulatory framework than the coal leasing regime involved in *Navajo [I]*"). Thus, unlike *Mitchell II* and its progeny, the analysis and results in *Navajo I* and *II* do not apply to breach of trust and breach of trust administration claims by allottees/IIM trust beneficiaries, such as Plaintiffs. *Navajo I* and *II* certainly do not apply to allottee/IIM beneficiary oil and gas leasing, given the pervasive plenary authority of Defendant under the extensive statutory and regulatory scheme by which it controls and manages those allottee/IIM trust assets. The *Jicarilla* and *Hopi* cases are inapposite for the same reasons.

Defendant also fails to mention that the year after *Navajo II* was decided, this Court rejected the very argument Defendant makes here. In *Osage I*, this Court considered claims similar to those presented here arising from mismanagement of oil and gas resources of the Osage Tribe – non-allottees/non-IIM trust beneficiaries – including the revenues derived from those leases. 68 Fed. Cl. at 331. Even in the case of a *non*-allottee/*non*-IIM trust beneficiary plaintiff, this Court found that Defendant exercised "a complex and comprehensive regulatory system for managing the operations and finances of the Osage mineral estate" that mandated compensation for breaches under *Mitchell II*. *Id*. Subsequently, this Court rejected the contention that the obligation to pay money damages for breaches had to be tied to a specific statute or regulation. *Osage IV*, 93 Fed. Cl. at 27-28. That conclusion is mandated by *White Mountain Apache*, 537 U.S. at 477.

In sum, Defendant relies on cases that have no applicability here. Its attempts to bootstrap those cases onto allottee/IIM trust beneficiary claims for breach of trust and trust administration have already been rejected by the United States Supreme Court and the Federal Circuit for the specific individual breach of trust and trust administration claims that Plaintiffs have asserted here as *Cobell* opt outs.

C. Subject Matter Jurisdiction Is Clear For Counts 1, 3, 7, 8, 9, And 10 – Each Of Which Are Based On The Extensive Money-Mandating Statutory And Regulatory Scheme By Which Defendant Exercises Plenary Authority Over The IIM Trust Beneficiary Assets That Are The Basis For Plaintiffs' Claims.

Further, and although it is not required, all of the claims in the TAC are based on statutory and regulatory trust, trust management, and trust administration duties owed to allottees/IIM trust beneficiaries, as previously established in cases such as *Mitchell II, Cobell VI,* and *Pawnee.* The existence of money-mandating duties for breaches likewise was conclusively established in *White Mountain Apache.*

1. Count 1 – Breach Of Legal Obligation And Trust Duty To Subject Leases For Plaintiffs' Lands To Competitive Advertising And Bidding And Failure To Pay Reasonable Royalties.

With respect to Count 1, Defendant concedes it has fiduciary trust and trust administration leasing duties over Plaintiffs' trust assets under the "first prong" of the *Mitchell II* subject matter jurisdiction test. Defendant instead focuses on prong two and argues there is no money-mandating obligation even if it breaches its duties. *See* XMSJ at 14-15.

As explained above, the Supreme Court conclusively held that the breach of admitted fiduciary trust and trust administration duties with plenary statutory and regulatory authority mandates money damages. *White Mountain Apache*, 537 U.S. at 477; *see also Osage I,* 68 Fed. Cl. at 331-32 (because Defendant has "assumed management and operation" of oil and gas mineral trust assets in a complex and comprehensive regulatory scheme, Defendant is responsible for money damages and subject matter jurisdiction exists for mismanagement and failure to supervise claims).

Defendant's contention that it has no money damage obligations for fiduciary duty breaches has been clearly rejected by the United Supreme Court and, in fact, is a breach of fiduciary duty in and of itself. *Osage IV,* 93 Fed. Cl. at 11 ("[D]efendant has a responsibility to properly construe the legal framework that sets out its trust duties. . . . [and the] failure [by Defendant] to interpret accurately its trust duties, when such failure results in a loss of revenue [to Plaintiffs] is deemed a breach of defendant's trust duties."). The failure by Defendant to properly interpret its own trust duties is a money-mandating breach that results in subject matter jurisdiction. *Id.* at 12 (the misinterpretation by Defendant of its regulatory responsibilities as trustee and administrator of trust assets is a "derogation of defendant's duties as trustee").

With respect to Count 1, Defendant asserts there is no money-mandating obligation under the Fort Berthold Mineral Leasing Act ("FBMLA"), Pub. L. 105-188, 112 Stat. 620. XMSJ at 14. Defendant, through the BIA, has extensive responsibilities in leasing allottee lands for mineral development under 25 CFR Part 212, Subpart B. *See, e.g.,* 25 CFR § 212.1 (Indian oil and gas resources are to "be developed in a manner that maximizes their best economic interests and minimizes any adverse environmental or cultural impacts . . ."); 25 CFR § 212.20 (describing Defendant's responsibilities in leasing allotted lands for mineral development). Those extensive trust and trust administration leasing duties have been recognized and described in great detail by Defendant. *See, e.g.*, App. Ex. 1 at A-1–A-4; App. Ex. 6 at § 1.2.B.; App. Ex. 7 at A-10.; App. Ex. 18 at §§ 1.0, 1.2-1.3.

To the extent Defendant contends the FBMLA alters or supersedes the statutes, regulations, Manuals, and Handbooks which the BIA has recognized apply to the leasing of allottee/IIM trust beneficiary assets, *see, e.g.,* 25 CFR 212.20, App. Exs. 6 and 7, Plaintiffs have already demonstrated how that assertion is incorrect. *See* Dkt. 118 at 24-25. Defendant does not even attempt to rebut that analysis. 25 CFR § 212.1 flatly states the leasing regulations apply to *any* individual Indian lands held in trust by Defendant.

Moreover, while Defendant may not be *required* to offer a lease through a public auction or sale *before or as a condition* of Secretarial approval, he may be required to do so to fulfill his trust and trust administration duties if a public auction or sale is "in the best interests of the Indian owners of the Indian land." FBMLA §1(a)(2)(A)(ii). Defendant can breach its fiduciary trust and trust administration duties by violating the statutory and regulatory leasing requirements, *see supra* I.A.6., and by failing to act "in the best interests of the Indian owners of Indian land" notwithstanding the FBMLA.

Defendant next contends that breaches of its fiduciary leasing duties somehow are not money mandating because its obligation under 25 CFR § 212.1(a) to "ensure that Individual Indian mineral owners desiring to have their resources are assured that [their mineral resources] will be developed in a manner that maximizes their best economic interests" need not be performed "at all costs." XMSJ at 14-15. This is a straw man; Plaintiffs have never made an "all costs" argument. Instead, Plaintiffs claimed that Defendant "fail[ed] to lease Plaintiffs' land in compliance with its own regulations and in accordance with a competitive bidding process." *See* TAC ¶ 40. Defendant has provided no evidence that it actually did comply with its own regulations, including, among other things, that it developed Plaintiffs' mineral interests "in a manner that maximizes their best economic interests," in violation of 25 CFR § 212.1, or advertised Plaintiffs' land for lease in such a manner that they receive "optimum competition" for bonus consideration as required by 25 CFR § 212.20(b). *See also*, App. Exs. 15, 16.

Perhaps most importantly, regardless of whether or how Defendant allegedly balanced the best economic interests of Plaintiffs against any alleged environmental or cultural impacts under 25 CFR § 212.1(a) from leasing their mineral trust estate, Plaintiffs contend that Defendant nevertheless breached its fiduciary duties and that Plaintiffs were damaged by those breaches. *See* TAC ¶¶ 35(a)-(q). Neither *Mitchell II*, *White Mountain Apache*, *Cobell VI,* nor *Pawnee* required any *specific* duty when the trust relationship is comprehensive and gives Defendant plenary authority and control, especially over allottee/IIM trust beneficiaries' assets, nor do they require a showing of any specific statutory or regulatory standard of conduct or any specific right to claim money damages for breaches.

Lastly, Defendant contends it is exempt from a claim for money damages despite the leasing statutes and regulations by which it exercised plenary authority over all trust assets belonging to Plaintiffs because it had discretion such that the Court cannot "determine when this discretionary balance" was breached or calculate the damages. XMSJ at 15. This is not a subject matter jurisdiction argument, which is the basis for Defendant's challenge to Count 1. Even if it were, Defendant's contention was explicitly rejected in *White Mountain Apache*. 537 U.S. at 476-77. According to the reasoning in that case the greater the discretion given to or exercised by Defendant over trust assets, the greater its fiduciary trust management and trust administration duties and the greater the applicability of common law trust principles. *Id.* at 475. As demonstrated in *Mitchell II*, 463 U.S. at 225, and again in *Cobell VI*, 240 F.3d at 1101, that is a truism that applies with even greater force to allottees/IIM trust beneficiaries like Plaintiffs.

2. <u>Count 3 - Breach Of Legal Obligation And Trust Duty To Maintain Proper Production, Manage and Prevent Drainage.</u>

For Count 3, Defendant concedes the existence of fiduciary duties but asserts it has no money mandating fiduciary trust or trust administration duties to prevent drainage of Plaintiffs' mineral estate. XMSJ at 15. This absurd contention is contrary to established law as discussed above, not to mention the statutes and regulations. Moreover, it has been explicitly refuted by Defendant itself in the Handbooks and Manuals it promulgated, all of which emphasize the "responsibility" to prevent drainage and ensure Plaintiffs are fully compensated for the value of their mineral trust estate. *See App.* Ex. 6 at § 1.2.B. Indeed, through the BLM, Defendant has promulgated Drainage Protection Manuals which explicitly state that Defendant has multiple responsibilities and duties to prevent drainage, and to ensure compensation when it occurs. *See* App. Ex. 3 at H-3160-2, ¶ .06 ("Protecting . . . Indian lessors from loss of royalty as a result of drainage is a prime responsibility of the Bureau of Land

Management"); App. Ex. 8 at § 1.6 ("One of the BLM's primary responsibilities is to protect . . . Indian lessors from loss of royalty due to drainage."). Defendant's repeated efforts to minimize and shirk its fiduciary trust and trust administration duties, which Defendant itself has characterized as one of its "most important responsibilities," is a clear breach in itself. *Osage IV,* 93 Fed. Cl. at 11.

In any event, abundant authority establishes that the extensive oil and gas responsibilities set forth in 43 CFR Part 3160 are plenary and apply to allottee/IIM trust beneficiary mineral assets. *See, e.g.,* 25 CFR Part 212-Leasing of Allotted Lands for Mineral Development, § 212.4 ("The functions of the Bureau of Land Management are found in 43 CFR Part 3160-Onshore Oil and Gas Operations . . . and currently include, but are not limited to, resource evaluation, approval of drilling permits, mining and reclamation, production plans, mineral appraisals, inspection and enforcement, and production verification. . . . *Those regulations [including 43 Part 3160] apply to leases issued under this part [212-Leasing of Allotted Lands for Mineral Development.*"). Nevertheless, Defendant contends that 43 CFR Part 3160, including the regulations from 43 CFR Part 3160 cited in TAC ¶¶ 32-35, cannot give rise to a "specific trust duty" because they apply to *federal and* Indian trust land. XMSJ at 15. Defendant is wrong.

First, by the plain language of 25 CFR § 212.4, 43 CFR Part 3160 applies in its entirety to the leasing of allotted lands for mineral development. Second, a "specific trust duty" is not required. *See supra* I.A.4. Third, the existence of extensive money-mandating trust and trust administration duties have been recognized for allottees/IIM trust beneficiaries. *See, e.g., Mitchell II*, 463 U.S. at 226*, White Mountain Apache*, 537 U.S. at 475, *Pawnee*, 830 F.2d at 190, and *Cobell VI*, 240 F.3d at 1104. Fourth, Defendant's argument is nonsensical as it claims that the established trust and trust administration obligations it owes to allottees/IIM trust beneficiaries under 43 CFR Part 3160 are *less than* the non-trust responsibilities it has to manage mineral leasing on federal land. XMSJ at 15. That argument is a breach of fiduciary duty in and of itself. *See Osage IV,* 93 Fed. Cl. at 11. Fifth, this claim not only is refuted by 25 CFR § 212.4, it is directly contradicted by Secretarial admissions. *See, e.g.*, App. Ex. 17 at

§ 2 ("The proper management and administration of the Individual Money ('IIM') accounts and trust asserts (collectively the 'trust administration system') are among the Department's most significant fiduciary duties."). Sixth, this claim also is contradicted by admissions Defendant has made in its Manuals and Handbooks. *See, e.g.*, App. Ex. 5 at I-1 ("the BLM is committed to a balanced oil and gas [Inspection and Enforcement] program that will fulfill our Indian trust responsibilities and serve to protect, on an equal basis … Federal and Indian mineral interests. … The BLM must ensure that oil and gas operations on Federal and Indian lands are prudently conducted … properly developed in a manner that maximizes recovery while minimizing waste … [and that] oil and gas production from Federal and Indian lands is properly handled, measured accurately, and reported correctly."); App. Ex. 18 at §§ 1.0, 1.3 ("the United States tasked with the responsibility of ensuring that both tribes and individual Indian mineral owners receive what is rightfully owed to them attributable to their oil and gas leases" and "is required to supervise and approve all dispositions of trust assets, including oil and gas resources" under its "Federal Indian trust responsibility," which is derived in part from 43 CFR Part 3160).

Next, Defendant again attempts to shirk its fiduciary trust and trust administration duties by arguing it has *no* control over lessees. XMSJ at 16. Defendant's failure to supervise and manage lessees is a critical failure that has caused Plaintiffs to file this lawsuit. Defendant asserts, "A provision placing an obligation on the lessee and merely noting the government's ability, in its discretion to require royalty payments cannot be read as an obligation to obtain such payments." *Id.* That statement is a damning admission indeed. Apparently, Defendant's "discretion" does not require it to ensure that Plaintiffs' minerals are not stolen, that royalties are correctly calculated under the regulations or lease terms, or that Plaintiffs get paid at all. That is a preposterous position that, again, is in itself a breach of fiduciary duty. *See Osage IV,* 93 Fed. Cl. at 11. Furthermore, it is not the law under *Mitchell II*, *White Mountain Apache* or *Cobell,* among other precedent. And, that claim flies in the face of Defendant's numerous admissions in Manuals and Handbooks. *See supra* I.A.6.; *see also* App. Ex. 18 at § 1.0 ("When a company enters into a lease or agreement with an Indian tribe or individual Indian mineral owner, the company agrees to *federal government supervision and oversight* … similar to what would be required on federal lands, but with *additional requirements specific to Indian lands*.") (emphasis added).

3. Count 7 - Breach Of Legal Obligations And Trust Duties By Exceeding Acreage Limitations And By Approving Communitization Agreements Without Plaintiffs' Consent.

Count 7 is another instance in which Defendant concedes the existence of fiduciary duties but alleges it owes no compensation for breaching these duties because it has discretion. XMSJ at 17-18. The cases on which Defendant relies are inapplicable to the money-mandating analysis because none of them are allottee/IIM trust beneficiary cases; instead, all of them analyzed whether a statutory duty existed. *See id.* I.C.1. Notwithstanding its reliance on inapposite cases, Defendant contends that, because it purportedly has "discretion" on acreage limitations and communitization agreements, it is IIMune from a suit for money damages for breaches of its fiduciary trust and trust administration leasing obligations. *Id. Mitchell II, White Mountain Apache*, and *Cobell*, among others, refute Defendant's assertion. *See supra* at 25. While Defendant suggests that alleged "broad" discretion puts its conduct beyond question, those cases establish the contrary: if Defendant has "discretion," and "broad discretion" in particular, the right to money damages under common-law trust principles is clear, and the existence of subject matter jurisdiction under the Tucker Act indisputable. Under Defendant's theory, there would be no need for any of the leasing regulations, nor any of the numerous Manuals and Handbooks in which it describes in detail the leasing procedures that must be followed, because its exercise of "discretion" IIMunizes it from any claim for money damages.

4. Count 8 – Breach Of Legal Objections And Trust Duties By Delays In The Drilling Of Oil And Gas Wells On Plaintiffs' Leased Land.

For Count 8, Defendant focuses on the first prong of the subject matter jurisdiction test and argues it has "no duty to dictate the timing of drilling operations." XMSJ at 6-9. Count 8 alleges that

Defendant breached its fiduciary trust and trust administration duties to Plaintiffs as allottee/IIM trust beneficiaries by, *inter alia,* failing to require the drilling of timely and protective wells on Plaintiffs' tracts to prevent drainage from drilling on adjacent tracts and ensure that Plaintiffs received what was and is rightfully owed to them for their oil and gas mineral rights. *See* TAC ¶¶ 81-88. Count 8 is related to Count 3, which alleges that Defendant failed to protect Plaintiffs' mineral trust assets from drainage, as is required under 25 CFR Part 212, 43 CFR Part 3160, and the numerous Manuals and Handbooks in which Defendant sought to implement its fiduciary trust and trust administration duties. *Cf.* TAC ¶¶ 46-57 (Count 3) and ¶¶ 81-88 (Count 8 - "drilling of neighboring allotments proceeded in advance of that of Plaintiffs', resulting in increased drainage from Plaintiffs' land").

Defendant mischaracterizes Count 8 in claiming it has no duty to "*dictate the timing* of drilling operations," "take any *specific* action with respect to the timing of drilling," or not "allow[] lessees to determine when to drill." XMSJ at 6-7 (emphasis added). Regardless, these arguments ignore the clear fiduciary trust and trust administration duties owed to allottee/IIM trust beneficiaries to diligently manage and develop their trust assets, especially their oil and gas trust assets. In what is a clear pattern, this misrepresentation of its fiduciary duties is in itself a breach of fiduciary duty. *See Osage IV,* 93 Fed. Cl. at 11.

Defendant, through the BLM, has developed an entire program under which it has the *responsibility* to "assure the diligent development of producing Indian oil and gas leases in an orderly and timely manner." App. Ex. 2 at ¶ 0.1. The Indian Diligent Development Program "assure[s] that producing Indian oil and gas leases are diligently developed in accordance *with lease terms and regulations*." *Id.* at ¶ .02 (emphasis added). Defendant has the obligation to take a combination of steps to meet that duty. *Id.* Doing nothing is a clear breach of fiduciary duty.

Defendant suggests it has no fiduciary duties to supervise lessees, and cannot require lessees to drill or take any other steps. This is false under Defendant's own Manuals and Handbooks. In fact, Defendant has the responsibility to "monitor producing Indian leases" to ensure diligent development, *id.* at ¶ .04(C)(1), and "assure that additional development occurs on required wells are timely drilled on undeveloped spacing units." *Id.* at ¶ .04(C)(2). Diligent development is defined by Defendant as "operations that lead to the enhancement of production, or drilling of well(s) necessary for the orderly and timely development for the lease or agreement at a rate reasonable for the area … A reasonable development schedule requires consideration by the authorized officer of the specific factual and economic situation for each lease or agreement." *Id.* at Glossary, p. 1. In addition to developing mineral trust assets through drilling, Defendant has an obligation to prevent loss of royalties through drainage by the requiring the affected lessees to drill protective wells or pay compensatory royalties. App. Ex. 3 at H-3160-2, § .06C; App. Ex. 8 at § 1.4 ("It is the responsibility of [Defendant] to protect Indian lesser from loss of royalty as a result of drainage [by, *inter alia*], requiring that lessees … take measures to protect leased Federal and Indian lands … from drainage."); App. Ex. 18 at § 1.0 ("When a company enters into a lease agreement with … [an] individual Indian mineral owner, the company agrees to federal supervision and oversight."); App. Ex. 5 *passim* (detailed procedures for BLM to supervise and enforce compliance by lessees on Indian lands). It is specious for Defendant to argue that it has no control over, authority, or duty to require drilling, both for economic development and to prevent loss of royalties through drainage, or that it has no control over lessees. By its own admission, it does and to contend otherwise is a breach of duty. *Osage IV,* 93 Fed. Cl. at 11

It is surprising Defendant has ignored the regulatory scheme and lease terms it created. The purpose of the oil and gas regulations is to "promote the orderly and efficient exploration, development and production of oil and gas;" Defendant is responsible for requiring that all operations "are conducted in a manner which … results in the maximum recovery of oil and gas with minimum waste and with minimum adverse effect on the ultimate recovery of other mineral resources[;]" and the United States is responsible for protecting Plaintiffs' oil and gas resources against drainage, including through use of communitization agreements or other means. 43 CFR § 3160.0-4, § 3161.2, and § 3162.2-2. In addition to these regulations, Count 8 also is supported by 43 CFR § 3162.2-1(b) (previously § 3162.2(c)), which requires that Plaintiffs' resources be "properly and timely developed and produced in accordance with good economic practices," TAC ¶ 83, and the requirement that the oil and gas supervisor take action to prevent waste on Plaintiffs' property. TAC ¶ 85. Moreover, the leases also require the lessees "[t]o drill and produce all wells necessary to offset or protect the leased land from drainage or in lieu thereof to compensate the lessor in full each month for the estimated loss of royalty through drainage …" and give the Secretary the power to "require the drilling and production of such wells to the number necessary, in his opinion, to insure reasonable diligence in the development and operation of the property …." App. Ex. 31 at § 3(b); R. Birdbear Decl., Ex. A-G § 3(b); *see also* 43 CFR § 3161.2 (Defendant must "require compliance with lease terms"). While the existence of trust management and trust administration fiduciary duties owed to allottees/trust beneficiaries like Plaintiffs has already been decided in *Mitchell II*, *Cobell, Pawnee* and others, there can be no doubt as to the existence of extensive money-mandating duties to diligently develop Plaintiffs' tracts and simultaneously prevent drainage or obtain compensation for drainage that occurs. These are the bases for Count 8, and subject matter jurisdiction cannot be credibly disputed under Defendant's comprehensive statutory and regulatory allottee oil and gas mineral development regime.

5. Count 9 – Breach Of Legal Obligations And Trust Duties By Failing To Lease Plaintiffs' Unleased Allotted Lands For Oil And Gas Mining Purposes.

Count 9 is based on the same regulations that support Count 8, but Count 9 specifically addresses unleased land, as opposed to land that was leased but not drilled, or not drilled in a timely manner. The Court has jurisdiction over Count 9 for the same reasons stated above as to Count 8.

6. Count 10 – Breach Of Legal Obligations And Trust Duties By Failing To Lease Plaintiffs' Unleased Allotment Land For Grazing Purposes.

In Count 10 Plaintiffs allege that Defendant breached its fiduciary duty by failing to lease Plaintiffs' surface interests for grazing or other agricultural uses despite Plaintiffs requests. TAC ¶ 95. Defendant argues Count 10 does not identify an "affirmative" duty to lease. XMSJ at 10. Despite its attempts to again avoid its fiduciary duty, the applicable statutes and regulations clearly identify fiduciary duties and obligations owed by Defendant regarding grazing and agricultural leases and uses. As Defendant acknowledges, Count 10 relies on the American Indian Agricultural Resource Management Act ("AIARMA"), Pub. L. No. 103-177, 107 Stat. 2011 (1993) (codified as amended at 25 U.S.C. §§ 3701-46). AIARMA states that "the United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation[s] …" 25 U.S.C. § 3701(2). Whether a tribe has adopted policies with respect to tribal lands is irrelevant to and does not alter the fiduciary duties owed to allottees/IIM trust beneficiaries under Defendant's plenary authority over their trust assets. *See, e.g., Mitchell II*, 463 U.S. at 225 and *Cobell VI*, 240 F.3d at 1099. Defendant simply is incorrect in claiming it owes no grazing leasing obligations to Plaintiffs or anyone else on Fort Berthold.

Defendant's attempt to distinguish between its admitted duties on lease approval and compliance enforcement, XMSJ at 11, and an "affirmative" duty to lease is a non-sequitur that was rejected in *Fredericks v. United States*, 125 Fed. Cl. 404 (2016). *Fredericks* recognized Defendant's "specific and extensive duties" under 25 CFR § 162 (leasing) and § 166 (permits). *Id.* at 419. "Surveying this regulatory landscape, the court finds that 25 U.S.C. §§ 380, 415, 415a, and 3715, in addition to the above-cited provisions of 25 CFR Parts 162 and 166, impose specific and extensive duties on the government in favor of Indians and Indian heirs … [which] give the government responsibility over trust and restricted assets and empower the government to enter leases on behalf of Indians …[which] are 'specific obligation[s]' that bear 'the hallmarks of a conventional fiduciary relationship.'" *Fredericks*, 125 Fed. Cl. at 419-20 (citation omitted).

II. COUNT 1 IS NOT BARRED BY THE STATUTE OF LIMITATIONS

Defendant argues that TAC Count 1 is barred by the six-year statute of limitations in 28 U.S.C. § 2501 because the claim accrued when the leases were approved. XMSJ at 19-22. Defendant's motion must be denied for several reasons: (i) the statute of limitations was tolled until Plaintiffs opted out of the *Cobell* class action settlement; (ii) Plaintiffs did not learn of Defendant's repudiation of its trust leasing obligations until less than six years prior to the filing of the Complaint; and (iii) Count 1 alleges continuing violations that are not barred.

A. The Statute Of Limitations Was Tolled Until Plaintiffs Opted Out Of The *Cobell* Trust Administration Class.

The filing of the *Cobell* class action tolled the six-year statute of limitations in 28 U.S.C. § 2501, which did not begin to run until Plaintiffs opted out of the *Cobell* class no earlier than December 21, 2010. Thus, their January 13, 2016 Complaint was filed well within the six-year limitations period, and thus timely preserved all claims.

1. Commencement Of A Class Action Tolls The Statute Of Limitations For Class Members.

The filing of a class action tolls the statute of limitations as to all members of the class. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552-53 (1974). In *American Pipe*, the Supreme Court held that the filing of a class action tolled the statute of limitations for class members who sought to intervene after the class certification motion was denied. *Id.* Later, the Court clarified that *American Pipe*'s tolling rule does not depend on intervening in or joining an existing suit but instead extends to putative class members who "prefer to bring an individual suit rather than intervene . . . once the economies of a class action [are] no longer available." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350 (1983). Put simply, "[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to intervenors." *Id.* at 350 (quoting *American Pipe*, 414 U.S. at 554).

Significantly for this case, the Supreme Court extended *American Pipe*'s tolling rule to class members, like Plaintiffs, who opted out after a certification motion was granted. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n. 13 (1974); *In re WorldCom Secs. Litig.*, 496 F.3d 245, 250 (2d Cir. 2007). In *Eisen*, the Supreme Court held that Fed. R. Civ. P. 23(c)(2) required individual notice to absent class members in order to allow them to decide whether to opt out of the class and retain their right to pursue their own lawsuit. 417 U.S. at 176. The named plaintiff had argued that individual notice would be pointless "because the statute of limitations has long since run out on the claims of all class members other than petitioner." *Id.* at 176 n. 13. The Supreme Court rejected that argument because it "was disposed of in our recent decision in" *American Pipe*, "which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." *Id.* The *Eisen* Court thus "concluded that the right to opt out and press a separate claim remained meaningful because the filing of the class action tolled the statute of limitations under the rule of *American Pipe*." *Crown, Cork & Seal*, 462 U.S. at 351-52 (citations omitted); *see also Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999) (holding "that the fact that the Realmontes' participation in the class action terminated with a decision to opt out of a certified class rather than with the denial of class certification is irrelevant to the applicability of the *American Pipe* tolling rule.") *Grispino v. New England Mut. Life Ins. Co.*, 358 F.3d 16, 19 (1st Cir. 2004) (observing "a consistent line of federal circuit court cases holding that the *American Pipe* tolling doctrine applies to plaintiffs who opt out of a class action in federal district court").

Applying the foregoing precedent, the statute of limitations "begins running anew from the date when the class member exercises the right to opt out because before this time, the class member is deemed to be actively prosecuting her rights."[1] *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985); *see also WorldCom*, 496 F.3d at 254 ("class members' claims would be tolled until they opted out of the class action"); *Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 610 (7th Cir. 1980) (where a class is certified, the statute of limitations is tolled until a class member "is notified of the suit and chooses to opt-out."); *Santiago v. Fischer*, No. 09-CV-1383 (MKB) (ST), 2017 WL 4349378, *6 (E.D.N.Y. Sept. 29, 2017) ("tolling continues after class certification is granted" until plaintiff opts out of class).

Importantly, the tolling rules set forth in *American Pipe* and its progeny apply in full force to claims brought under the Tucker Act. *See Bright v. United States*, 603 F.3d 1273, 1286 (Fed. Cir. 2010); *see also Abernethy v. United States*, 108 Fed. Cl. 183, 186 (2012) ("Without question, the Federal Circuit in *Bright* adopted class action tolling for matters brought in our court"). In *Bright*, the Federal Circuit rejected arguments that the six-year statute of limitations in 28 U.S.C. § 2501 is not tolled by the filing of a class action. "[T]he filing of a class action complaint . . . toll[s] the limitation period of 28 U.S.C. § 2501. *Bright*, 603 F.3d at 1286. That holding "comports with the logical goal of having class action procedures in the Court of Federal Claims operate in a manner consistent with the *American Pipe* rationale for class actions," which sought to promote "litigative efficiency and economy" while providing defendants "the essential information necessary to determine both the subject matter and size of the prospective litigation." *Id.* at 1286-87 (quoting *American Pipe*, 414 U.S. at 555).

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[1] The tolling rules described herein are not limited to class members who can prove they relied on the pendency of the class action in not earlier filing their individual suit. *Tosti*, 754 F.2d at 1489 (quoting *American Pipe*, 414 U.S. at 551) ("We think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action…").

2. Plaintiffs' Claims In Count 1 Were Encompassed In *Cobell's* Trust Administration Class.

Plaintiffs' breach of trust and trust administration claims alleged in TAC Count 1 undoubtedly are encompassed by the *Cobell v. Salazar* Class Action Settlement Agreement and the *Cobell* Amended Complaint which was filed with Defendant's stipulated agreement. In *Cobell*, the plaintiffs brought a claim for "Breaches of Trust by Defendants with Respect to Management of Trust Land and Other Natural Resources." App. Ex. 10, *Cobell* Class Action Settlement Agreement (Ex. B, Am. Compl. at 13). For that claim, the *Cobell* plaintiffs alleged that the United States "consistently and egregiously has failed to discharge prudently its fiduciary duties as trustee in its management and administration of Individual Indian Trust land and other natural resources," by, among other things, failing to: (a) "lease trust land and otherwise prudently contract for the use of trust lands and sale of subsurface rights and other natural resources;" (b) "obtain fair market value in its lease or sale of IIM Trust lands, subsurface rights, and other natural resources;" and (c) "negotiate prudently leases, royalty and bonus agreements, easements, rights-of-way, similar encumbrances and sales contracts." *Id.*, Ex. B, ¶ 28. Here, Plaintiffs' claims in Count 1 are substantively identical to those in *Cobell*. *See* TAC ¶¶ 37, 38.

A case decided by the Federal Circuit underscores the substantive overlap between Plaintiffs' claims in this case and those asserted in *Cobell*. In that case, individual Indian allottees (as are Plaintiffs) who held interests in allotment land on Forth Berthold (as do Plaintiffs) alleged that the BIA breached its fiduciary duty by failing to ensure that oil and gas leases on the allotment lands were in the best interests of the Indian owners (as do Plaintiffs). *Two Shields v. United States*, 820 F.3d 1324, 1329 (Fed. Cir. 2016). The Federal Circuit affirmed the Court of Federal Claims' grant of summary judgment because, unlike Plaintiffs in this case, the plaintiffs in *Two Shields* did *not* opt out of the *Cobell* settlement. *Id.* at 1328, 1331. The Court of Appeals held that the plaintiffs' claims "that the BIA approved leases that were below market value, and therefore were not in their 'best interests' as required by the Fort

Berthold Act…are *precisely the same ones implicated* by *Cobell's* land administration claims." *Id.* at 1331 (emphasis added).

Like the claims in *Two Shields*, Plaintiffs' claims in Count 1 "are precisely the same ones implicated" in *Cobell.* Accordingly, the statute of limitations to bring Count 1 was tolled by *Cobell.*

3. Plaintiffs Opted Out Of The *Cobell* Class Action Settlement.

The *Cobell* district court certified the Trust Administration Class on December 21, 2010. App. Ex. 11 at 3. The Trust Administration Class was defined as "Those individual Indian beneficiaries … alive as of the Record Date … and who have or had IIM Accounts …, as well as individual Indians who, as of the Record Date, had a recorded or other demonstrable ownership interest in land held in trust or restricted status. *Id.* at 5-6. The *Cobell* defendants subsequently provided notice to members of the Trust Administration Class, and all of the Plaintiffs in this case opted out of the *Cobell* Trust Administration Class. App. Ex. 11 at 6 (Ex. A at lines 308, 517, 554, 591, 664). Thus, the statute of limitations for Count 1 expired no earlier than December 22, 2016, meaning that Plaintiffs' lawsuit filed on January 13, 2016 was well within the statute of limitations.

B. Count 1 Did Not Accrue Until Plaintiffs Discovered The Breach And The Government Repudiated The Trust, Which Occurred Less Than Six Years Before Plaintiffs Filed The Complaint.

Count 1 also is timely because Plaintiffs did not discover the breach of trust until less than six years before they filed the Complaint.

As previously established, Defendant is the trustee and owes extensive fiduciary trust management and administration duties to Plaintiffs as allottees/IIM trust beneficiaries. "Beneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees, and cannot be expected to discover malfeasance relating to their trust assets." *Shoshone Tribe of Wind River Reservation v. United States* ("*Shoshone III"),* 364 F.3d. 1339, 1347 (Fed. Cir. 2004). "[A] trustee relationship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement." *Mitchell II*, 463 U.S. at 227. Thus, "[i]t is often the case … that the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred." *Shoshone III*, 364 F.3d at 1348. "[A] cause of action for breach of trust traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Id.* Such repudiation may occur "by express words or by taking actions inconsistent with his responsibilities as trustee." *Id.*

Defendant argues the statute began running when the leases were approved because (without providing any evidence to support its contentions) Plaintiffs allegedly knew the nature of the action as it happened. XMSJ at 22. This contention is factually unsupported and wrong, and also legally incorrect. As to the facts, approval of leases by Defendant does not mean Plaintiffs were aware of its breaches of the fiduciary trust management and administration duties which Plaintiffs contend have been violated. Plaintiffs did not know and could not have known the facts upon which their claims here are based on the date of approval. Due in part to the fact that the BIA misrepresented that the bid sale was conducted in accordance with 25 CFR § 212, Plaintiffs did not discover Defendant's failure to comply with the regulations, or that the Secretary did not conduct a best-interest analysis until Roger and Nelson Birdbear began making inquiries in or about March, 2010. R. Birdbear Decl. ¶ 10; N. Birdbear Decl. ¶¶ 6-7. It was not until the BIA and the Secretary refused to provide information in response to those requests, and instructed Plaintiffs that they needed to "make a claim for the lost revenue" that the United States repudiated its trust duties, and Plaintiffs' claims first accrued. R. Birdbear Decl. ¶ 10, Ex. H (3/24/10 email from H. Bemer at BIA); *Shoshone III*, 364 F.3d at 1348. The Complaint was filed less than six years later, within the time allowed by 28 U.S.C. § 2501.

Legally, the Government's reliance on *Two Shields* is misplaced. That case is distinguishable on several grounds. First, the issue in *Two Shields* was whether the *Cobell* settlement precluded the claims that the Government mismanaged oil and gas lease bidding, because the leases at issue were approved prior to the settlement and the *Two Shields* plaintiffs did not opt-out of the settlement. 820 F.3d at 1328-29. The Federal Circuit affirmed dismissal of the *Two Shields* claims because the *Cobell* settlement released all "known *and unknown claims* that have been or could have been asserted through [September 30, 2009]."' *Id.* at 1329 (emphasis added). Here, by contrast, Plaintiffs opted out of the *Cobell* settlement. App. Ex. 11, (Ex. A at lines 308, 517, 554, 591, 664).

Second, *Two Shields* did not address the issue of the Defendant, as the trustee, making affirmative misrepresentations that the leases were "offered for negotiated sale … *in accordance with the regulations contained in [25 CFR § 212]*" when they were not, as the Government now concedes. Dkts. 10-2, 10-3, 10-5, 10-6, and 10-7 at § 6 (alteration in original) (emphasis added).

Third, *Two Shields* was based on Defendant's negotiation of below market lease rates, not its failure to conduct any best interest analysis, as required by 25 CFR § 212.20(b)(6) and FBMLA § (a)(2)(A)(ii). TAC ¶ 26(d); *see Two Shields,* 820 F.3d at 1329.

Because Plaintiffs did not know Defendant breached its trust duties with respect to leasing until well after the auctions, Count 1 is timely.

C. Count 1 Alleges Continuing Breaches That Are Not Barred.

Plaintiffs allege that the leases on Plaintiffs' land are void for failure to competitively bid those leases and because Defendant did not conduct a "best interests" determination in accordance with the regulations. The lessees, however, remain on the property, despite the Government's responsibility to remove them. 25 CFR § 211.54 ("Lease or permit cancellation"); Dkts. 10-1 -10-7 at § 6 ("Cancellation and Forfeiture"). The lessees' continuing trespasses each give rise to their own cause of action with its own six-year limitations period. *See Shoshone Indian Tribe of Wind River Reservation v. United States ("Shoshone IV")*, 672 F.3d at 1021, 1035-36 (Fed. Cir. 2012); *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 571 (1990) (claims based on ongoing trespasses that occurred less than six years before complaint was filed were not barred by the statute of limitations). Accordingly, even if the Court determines that the statute of limitations was not tolled by *Cobell* and that Plaintiffs initially knew or should have known that the leases violated the regulations, Plaintiffs still may recover against the Government for later accrued damages based on continuing trespasses within the past six years.

III. PLAINTIFFS HAVE PRODUCED EVIDENCE THAT CREATES GENUINE ISSUES OF MATERIAL FACT ON COUNTS 2, 4, 6, AND 7.

A. Count 2: Defendant Breached its Trust Duties by Failing to Properly Value Oil and Gas Production in Determining Royalties.

Defendant misconstrues and misinterprets Plaintiffs' claims in Count 2 in an attempt to deny liability and ignore the evidence that has been produced through discovery. Defendant's own expert, Gregory Chavarria, admits that he only verified approximately 66% of the total collections. Pltfs.' Mot. for Partial Summ. J., Ex. 7 ("Chavarria Rpt."), at ¶ 14, Dkt. 178-5. Mr. Chavarria was only able to "reconcile a substantial amount of collections," and that review did not consider internal records of operators. *Id.* at ¶ 21. He also recognized Defendant's extensive statutory, regulatory, and executive control of Indian trust properties. *Id.* at ¶ 12 ("ONRR's extensive audit manual incorporates and cites several laws, regulations and secretarial orders focused on oil and gas issues specific to Indian trust properties as its overall focus and responsibilities.").

Defendant further misconstrues the claims asserted in Count 2 because the claims in Count 2 are directly related to the allegations and relief sought in Count 1. As explained above, Plaintiffs' Count 1 alleges that Defendant breached its fiduciary duty by failing to competitively auction and negotiate Plaintiffs' leases in the best interest of the allottee mineral interest holder. As a result of Defendant's failures and breaches of its fiduciary duties, Plaintiffs have not received the appropriate royalty and bonus payments under their leases. App. Exs. 15, 16. These claims are supported by, among other things, the BLM's own analysis prior to the 2007 lease auction in which it concluded that an allottee would benefit financially from a lease that provided a higher royalty rate and lower per-acre bonus. App. Ex. 32. Despite this analysis, the BLM still offered Plaintiffs' mineral interests for auction shortly thereafter and accepted leases with lower royalty rates. *See* App. Ex. 31 (Plaintiffs' Lease for Tract 1744, dated November 14, 2007, including a $450 per acre lease bonus and 18% royalty rate). As the BLM analyzed in their Internal Memorandum, this per-acre bonus and royalty rate was not in Plaintiffs' best interest. App. Ex. 32. Defendant breached the fiduciary duties that it owed to Plaintiffs in the negotiation and approval of Plaintiffs' leases based on its own internal analysis of what lease terms are in Plaintiffs' best interest. Based on this breach, Defendant's motion for summary judgment on Count 2 must be denied.

Finally, Defendant's claim that Plaintiffs "proffer no competent evidence of irregularities" regarding Defendant's valuation of oil and gas is refuted by Defendant's failure to provide the underlying valuation data in contravention of its regulatory duties. Indeed, operator lessees must "make available sales, volume, and transportation data for production . . . to ONRR, Indian representatives, or other authorized persons." 30 CFR § 1206.64; *see also* 25 CFR § 211.46 ("Lessees shall keep a full and correct account of all operations" and "[b]ooks and records shall be available for inspection…"). Plaintiffs requested this information from Defendant, but Defendant did not provide important information. Akinboyewa Decl. ¶¶ 20-23. In other words, Defendant had fiduciary duties to require lessees fulfill their obligation to maintain critical records, provide them to Defendant, and—similar to the duty to account that any trustee has and as established in a different context in *Cobell*—produce that data in this litigation. Defendant is not entitled to summary judgment on a claim where it has breached its fiduciary duties to obtain and produce the very evidence at issue.

B. Count 4: Defendant Breached its Trust Duties by Disbursing Funds from Plaintiffs' IIM Accounts Without Notice or an Opportunity for Hearing.

As explained in Plaintiffs' Motion for Summary Judgment (Dkt. 177), Defendant has allowed operators to improperly withdraw and disburse money from Plaintiffs' IIM accounts without providing Plaintiffs notice or opportunity for a hearing in direct violation of Plaintiffs' due process rights under the Fifth Amendment. *See Kennerly v. United States*, 721 F.2d 1252, 1256 (9th Cir. 1983).

Failing to protect Plaintiffs' due process rights is a "violation [that] indicated a breach of fiduciary responsibilities." *Id.* at 1254. For these reasons and the reasons explained in Plaintiffs' Motion for Summary Judgment, Defendant's motion for summary judgment on Count 4 must be denied.

C. Count 6: Defendant Breached its Trust Duties by Allowing the Lessees to Illegally Deduct Transportation Costs.

Defendant must develop "enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States and Indian lessors and those inuring to the benefit of States." 30 U.S.C. § 1701(b)(3). As trustee, Defendant has a duty to ensure collection of certain rents, royalties, and other payments pursuant to the terms of Plaintiffs' leases. 30 CFR § 1201.100. Indeed, Defendant admits it has oil and gas royalty trust responsibilities that are "governed by" a robust set of "statute[s], regulations, and well-documented policies and procedures." XMSJ at 23-26. Defendant's failure to collect amounts due under the leases is a breach of its fiduciary duties to Plaintiffs.

All of Plaintiffs' leases contain the same or similar material language defining the value of the royalty that is to be paid to Plaintiffs under the terms of the leases:

> … [T]ogether with a royalty of [eighteen percent (18%)] of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free. During the period of supervision, *"value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor.* The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value.

App. Ex. 31 (emphasis added). Plaintiffs' leases are commonly referred to in the oil and gas industry as "gross proceeds" leases. *Newfield Expl. Co. v. State ex rel. N.D. Bd. of Univ. & Sch. Lands*, 931 N.W.2d

478, 480. "Gross Proceeds" "indicates a lessor's royalty is calculated based on the total amount received for the product without deductions for making the product marketable. *Id.* (citation omitted).

Despite this clear language, Defendant has allowed operators to deduct the costs for transportation, processing, compliance, non-refundable rent, and interest as cash disbursements from Plaintiffs' IIM accounts. This is undisputed. *See* Dkt. 178-5, Chavarria Rpt. at 15-16.

"Generally, if a trustee fails to collect rents which he should collect he may be held liable for such a breach of duty." *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227, 233 (1985). Defendant breached its fiduciary duty by allowing operators to deduct transportation and processing costs in violation of the terms of the lease. Because there is a genuine dispute of material fact as to the extent and amount of transportation, processing, compliance, non-refundable rent, and interest deductions that Defendant has allowed operators to take as disbursements from Plaintiffs' IIM accounts, summary judgment must be denied on Count 6.

D. Count 7: Defendant Breached its Trust Duties by Approving Communitization Agreements Without Plaintiffs' Consent.

Defendant argues that it is entitled to summary judgment because communitization agreements are not "agreements" and not subject to the requirements of the FBMLA. *See* XMSJ at 30.

The FBMLA in relevant part states:

> (a)(2)(A) IN GENERAL -- The Secretary may approve any mineral lease *or agreement* that affects individually owned Indian land, if –
>
> (i) the owners of a majority of the undivided interest in the Indian land that is the subject of the mineral lease *or agreement (including any interest covered by a lease or agreement executed by the Secretary under paragraph (3))* consent to the lease or agreement; and
>
> (ii) the Secretary determines that approving the lease <u>or agreement</u> is in the best interest of the Indian owners of the Indian land.

Pub. L. 105-188, 112 Stat. 620, § 1(a)(2)(A) (emphasis added). The FBMLA is clear and unambiguous: Defendant may approve "an agreement that affects individually owned Indian land" *only* if the Indian owners consent to the agreement. Despite this clear and unambiguous language, Defendant argues –

without citing to any authority – that communitization agreements are not "agreements" under the FBMLA.

Defendant also argues that approval from a majority of land owners is not required under 25 CFR § 212.28. This regulation, however, directly conflicts with the FBMLA. "[W]hen a statute and a regulation are in conflict, the statute 'renders the regulation which is in conflict with it void and unenforceable.'" *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1156 (10th Cir 2019).

Defendant has not produced any evidence that it obtained approval from the majority of land interest owners prior to approving the communitization agreements. Because Defendant has not produced any records or notices provided to land interest owners, the amount of Plaintiffs' damages is a genuine dispute of material fact and Defendant's motion for summary judgment must be denied.

IV. THE COURT SHOULD DISREGARD DEFENDANT'S REQUEST FOR AN OPPORTUNITY TO BRIEF EXHAUSTION PRINCIPLES.

Finally, the Court should deny Defendant's request for "an opportunity to brief the Court on whether any of the remaining claims should be dismissed or deferred." XMSJ at 33. Defendant's request is vague, premature, and meritless. Defendant has not moved to dismiss any Count based on "exhaustion principles," and it is unclear exactly what Defendant seeks from the Court at the summary judgment stage. To the extent Defendant seeks to dismiss or defer any Counts based on "prudential exhaustion or primary jurisdiction," Plaintiffs of course reserve all rights to refute such arguments. For now, it suffices to point out the irony that Defendant, more than five years after this lawsuit was filed, mention the *possibility* of raising exhaustion arguments that are designed to "promot[e] judicial efficiency." *Id.* Moreover, the cases cited by Defendant do not help its cause. *See, e.g., Fredericks v. United States*, 125 Fed. Cl. 404, 411-12 (2016) (deferring claims based on "prudential exhaustion" only because plaintiffs were pursuing administrative appeals on issues that could impact claims).

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant does not dispute that Plaintiffs were deprived of funds to which they were entitled, received no notice of their due process rights as required by *Kennerly v. United States*, and provided no hearing on "adjustments" to funds in their IIM accounts. Instead, Defendant attempts to rely on a single purported factual distinction: whether the funds were deposited into the IIM accounts and then removed or whether ". . . deductions were made against payments that the lessees would otherwise make in the current month." XMSJ at 37. In other words, Defendant admits the deductions were made with no *Kennerly* notice either before or after the deposits were made. This is a distinction without a difference and does not create a material issue of fact.

Defendant tacitly concedes that if the funds were removed from the IIM accounts without notice or hearing as required by *Kennerly*, that would be a due process violation and Plaintiffs would be entitled to reimbursement of those funds. There is no serious argument to be made otherwise.

Defendant argues that the funds were deducted *before* the deposits were made, then futilely claims it is an issue of fact as to when the funds were taken. However, whether the funds were taken before or after the deposits were made is IIMaterial. Plaintiffs have a constitutionally protected property interest in the royalties from their mineral leases. Deducting amounts before making deposits violates due process principles, just like making cash disbursements after the funds are deposited.

Either way, there is no question that Defendant deprived Plaintiffs of their property rights without the due process required by the Fifth and Fourteenth Amendments of the United States Constitution. Therefore, Plaintiffs are entitled to summary judgment for the $17,690,149 removed from the accounts prior to November 30, 2017 and to an accounting in aid of judgment to determine the amounts Plaintiffs have been deprived of since that date.

ARGUMENT

I. WHETHER PLAINTIFFS' FUNDS WERE DEDUCTED BEFORE OR AFTER DEPOSITING THEM INTO THE IIM IS NOT A MATERIAL FACT.

A. Plaintiffs Are Entitled To Summary Judgment Because Funds Were Disbursed From Their IIM Accounts.

Plaintiffs' interest in their IIM accounts is a property interest subject to due process protection. *Kennerly v. United States*, 721 F.2d 1252, 1257 (9th Cir. 1983). Here, there is no dispute that Defendant failed to provide or even seek the protections required by procedural due process. Defendant admits it made deductions before making deposits to Plaintiffs' IIM accounts. Whether the funds were deducted from the IIM accounts before or after depositing them, Plaintiffs are entitled to summary judgment.

The record demonstrates conclusively that the funds were placed in the IIM accounts and then removed. The SOPs are the only statement of account in the record. It is undisputed that the SOPs show $17 million in "cash disbursements" removed from Plaintiffs' accounts before November 30, 2017. Plts.' Mot. for Summ. J., at 3, Dkt. 177; App. Ex. 24, Kidd. Rpt. at 8-9; Dkt. 178-5, Chavarria Rpt., at 14 n. 22. Cash cannot be disbursed from an account unless it is first deposited there. As Mr. Chavarria, Defendant's accounting expert admits, there is no place in the accounting world where the term "disbursement" means something other than a movement of funds out of an account. App. Ex. 36 at 130:15-19. It is undisputed that the cash disbursements were taken without the required *Kennerly* notice and opportunity for a hearing. Plaintiffs are entitled to summary judgment.

B. Plaintiffs Are Entitled To Summary Judgment Even If The Funds Were Disbursed Before Deposit.

Plaintiffs have a property interest in their royalties. *Kennerly*, 721 F.2d at 1257. So if deductions were taken before being deposited, with no notice or opportunity to test the validity of the deductions, it is a taking in violation of Plaintiffs' due process rights.

Here, there is no dispute that Plaintiffs have a legitimate claim of entitlement to the royalties from their mineral leases. Defendant admits as much stating the "deductions were made against payments that the lessees would otherwise make in the current month." XMSJ at 37. Further, Defendant admits that "operators are required to make royalty payments within the month following the sale of the oil or gas." *Id.* at 36. In some cases, the operators make estimated payments and adjust the payments in subsequent months. *Id.* The Supreme Court has held in situations analogous to the one in this case that seizure of goods or the garnishment of wages to ensure debt repayment prior to judgment violates the due process absent an opportunity for a hearing prior to the seizure or garnishment. *Kennerly*, 721 F.2d at 1257-58 (citing *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969)) Here, as in those circumstances, Plaintiffs have a right to a hearing to test the validity of deductions made before they actually received the payments.

A fundamental constitutional principle is that some form of hearing, with notice of its availability, must occur before a person is finally deprived of a property interest. *Kennerly*, 721 F.2d at 1257 (citing *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (quotation omitted). Private property held by Indians is "not excepted from the protection guaranteed by the Constitution." *Choate v. Trapp*, 224 U.S. 665, 677 (1912). As in *Kennerly*, there was never any formal determination whether operation deductions were appropriate. Instead, Defendant accepted operators' unilateral statement of monthly deductions. This is the same type of debt collection and taking that was held to be a violation in *Kennerly*. *See* 721 F.2d at 1258 (where Defendant does not question validity of deduction due process is violated because "due process requires some opportunity be heard concerning the debt itself.").

Where deductions are taken as "adjustments" to offset against earlier payments, due process requires an opportunity to be heard concerning the validity of the deductions. *See Sniadach*, 395 U.S. at 342 (garnishment of employee's wages by creditor without notice or opportunity for hearing violated "fundamental principles of due process"). As in *Kennerly* and *Sniadach*, the amount, validity, and accuracy of the deductions made by Defendant were determined solely in reliance on third parties, without any opportunity for the Plaintiff to test the validity of the deductions. This is a violation of Plaintiffs' due process rights. *See Robinson v. Acting Billings Area Dir., BIA*, 20 IBIA 168, 168 (1991).

II. DEFENDANT CANNOT NOW ARGUE THAT DEDUCTIONS WERE VALID.

Defendant does not—and cannot—dispute the holdings from the *Robinson* and *Kennerly* decisions: that having violated Plaintiffs' rights, Defendant cannot later conduct a *Kennerly* hearing. Nevertheless, Defendant tries to conduct a *de facto Kennerly* hearing by arguing that the cash disbursements were justified as adjustments to prior royalty estimates. There is no evidence in the record, however, that the adjustments were correct. Under Defendant's theory, the operators would be entitled to deduct any amount and the Plaintiffs would have no platform to contest the validity of these deductions. This position is directly contrary to the holdings in *Kennerly* and *Robinson*.

It is too late to try to justify the deductions. Under both *Kennerly* and *Robinson*, the remedy for a due process violation resulting in a deprivation of property rights is return of the money wrongfully deducted from the account. This is not a windfall. This the constitutional remedy for being deprived of over $17 million for many years and for Defendant's violation of Plaintiffs' due process rights. In violation of its fiduciary duty as trustee to Plaintiffs, Defendant allowed third parties to deprive Plaintiffs of their royalty funds, without notice or a hearing and in violation of the United States Constitution. In short, Defendant's position is that the victims of its unconstitutional conduct, who had their property taken without a hearing, should not be entitled to recover that property. This position is contrary to common sense and, more importantly, the law set forth in *Kennerly* and *Robinson*.

In both *Kennerly* and *Robinson*, the amount owed (by Kennerly) and overpaid (to Robinson) was not contested. There, the remedy for deprivation of a due process hearing was to replace the money taken from the IIM account holder, even though the debts were valid. The purpose of remedies when Defendant violates the Constitution is multifold, including the core purpose of deterring future Government violations. If Defendant is not required to return these funds, then in the future, it could simply take money without ever providing a *Kennerly* notice and later claim the deductions were valid. If Defendant were correct, that would mean the entire *Kennerly* process is meaningless. Defendant would be free to violate the Constitution with impunity.

Further, the Government's constitutional violation was intentional. The Government in its brief goes to great lengths to provide evidence of their intent. The Government argues that taking (or withholding) the funds from Plaintiffs was consistent with the system that they always use. XMSJ at 36. They describe the system as "carefully orchestrated." *Id.* at 38. However, Defendant's position is not a justification or excuse to continue to commit constitutional violations. Claiming the violation has been occurring for years is not a defense. It is likewise irrelevant what effect applying the constitution and law to this case will have on other cases where apparently, Defendant has also violated the constitution and breached its fiduciary duties as trustee to Plaintiffs as allottees and IIM trust beneficiaries. When the system results in a breach of Defendant's trust duties to beneficiaries and a violation of trustees' constitutional rights, the victims are entitled to redress.

CONCLUSION

For the reasons stated, Plaintiffs' motion for summary judgment should be granted. Additionally, Defendant's cross-motion for summary judgment should be denied in its entirety.

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