IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NAVAJO NATION, a federally recognized Indian Tribe; IDENTIFIABLE GROUP OF RELOCATION BENEFICIARES, consisting of "Navajo families residing on Hopi-partitioned lands as of December 22, 1974[,]" per Public Law 93-531, § 11(h), 88 Stat. 1712, 1716 (1974), as amended and previously codified at 25 U.S.C. § 640d-10(h), Plaintiffs, v. THE UNITED STATES, Defendant.	Case No. 1:21-cv-1746-ZNS Judge Zachary N. Somers

THE UNITED STATES' REPLY BRIEF IN SUPPORT OF ITS MOTION TO PARTIALLY DISMISS PLAINTIFFS' COMPLAINT

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Under the Navajo and Hopi Land Settlement Act (Settlement Act), 25 U.S.C. § 640d-10(a), and as Plaintiffs themselves assert, the United States "expressly" holds the "New Lands" in trust for Plaintiff Navajo Nation, "not individual Indians." Compl. ¶ 161. As explained in the United States' Memorandum Supporting its Motion to Partially Dismiss Plaintiffs' Complaint (ECF No. 7) ("U.S. Mem."), the other Plaintiffs in this suit (the Relocatees) lack a protectable property interest in the New Lands or their revenue. Plaintiffs' response (ECF No. 12) ("Pls.' Resp.") fails to rebut the United States' argument. Accordingly, the Relocatees' claims must be dismissed for lack of standing. The Relocatees also do not constitute an "identifiable group;" thus, they cannot invoke the Indian Tucker Act, 28 U.S.C. § 1505, as a basis for jurisdiction.

Plaintiff Navajo Nation also agrees that its previous Tribal trust settlement limits its claims to the period after August 26, 2014. Pls.' Resp. at 14. Yet the Complaint alleges that many of the harms or violations at issue in this case occurred prior to August 2014. All of the Nation's claims that pre-date August 26, 2014, or are based on harms or violations before that date, should be dismissed. In other words, the Nation's case can only be about, at most, actions or inactions occurring after August 26, 2014.

Plaintiffs bear the burden to demonstrate that their claims are based on a money-mandating legal duty imposed upon the United States by a constitutional, statutory, or regulatory provision. *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 290 (2009). In its memorandum, the United States explained that the Court lacks jurisdiction over Plaintiffs' Claims 2 and 3 because Plaintiffs fail to identify any treaty, constitutional provision, statute, or regulation that creates an enforceable money-mandating duty regarding leasing and rights-of-way on the New Lands. Plaintiffs have no persuasive answer to the United States' argument that the Settlement Act simply

does not address leasing or rights-of-way, nor are there regulations for leasing or rights-of-way on the New Lands. Plaintiffs also cannot rely on the Office of Navajo and Hopi Indian Relocation's (ONHIR) management manual to confer jurisdiction on the Court of Federal Claims. Hence, Claims 2 and 3 should be dismissed.

Finally, Claim 1 should be dismissed with respect to Plaintiffs' request for trespass damages and penalties against the United States, along with any additional requests for trespass damages. The grazing regulations at issue make trespassers liable *to* the United States. Plaintiffs cannot show that the United States is required to pursue penalties against *itself*, or how it could do so, logically speaking. And Plaintiffs' broad request for equitable relief should be dismissed because this Court does not possess jurisdiction to provide this type of relief.

Argument

I. This Court should dismiss all of the Relocatees' claims.

A. The Relocatees lack standing to bring claims based on the alleged mismanagement of the Navajo Nation's Tribal property or New Lands revenue.

The United States' opening brief demonstrated that the Relocatees lack standing to bring any claims. U.S. Mem. at 10–14. Although Plaintiffs attempt to refute the United States' argument, they cannot change the fact that this action is based on the alleged mismanagement of *Tribal* property. As individual Tribal members, the Relocatees cannot show that they have a legally enforceable interest in the Navajo Nation's Tribal property. Nor can they show that the Settlement Act provides them with any rights to New Lands revenue.

Plaintiffs fall short of showing that the Relocatees suffered an injury in fact because that which has allegedly been mismanaged does not belong to the Relocatees.

Here, Plaintiffs' allegations fail to establish that the Relocatees have a property interest in the New Lands. Plaintiffs' response acknowledges—as it must—that the United States "has acquired in trust for *the Nation* about 376,000 acres of land in Arizona and New Mexico that are referred to as the New Lands." Pls.' Resp. at 2 (citations omitted) (emphasis added). The Settlement Act requires the New Lands to be held in trust "as a part of the Navajo Reservation." 25 U.S.C. § 640d-10(a). As stated in the Complaint, the New Lands "are expressly held in trust for the Nation, not individual Indians." Compl. ¶ 161 (citing 25 U.S.C. § 640d-10(a)). Similarly, Plaintiffs' allegations do not establish that the Relocatees have any individual property rights to the revenue from the New Lands. The Act states that the net income derived by the Navajo Nation from the mineral and surface estate revenue from the New Lands in New Mexico shall be deposited in the Navajo Rehabilitation Trust Fund. 25 U.S.C. § 640d-30(b). The Nation manages that Fund. Compl. ¶ 140. Otherwise, the Settlement Act does not address revenue from the New Lands.

In Plaintiffs' view, the Relocatees have standing because they allege that the United States has "deprived them of their proper 'sole' beneficial use of and revenue from the New Lands." Pls.' Resp. at 7. But Plaintiffs' gloss on 25 U.S.C. § 640d-10(h) does not reflect that the Settlement Act actually directs ONHIR to administer the New Lands "solely for the benefit" of the Relocatees. Section § 640d-10(h) does not state that the Relocatees have *sole use* of the New Lands and their revenues. In any event, Plaintiffs' broad, conclusory statements are insufficient to establish standing. *Cf. Ute Indian Tribe of Uintah and Ouray Indian Reservation v. United States*, 145 Fed. Cl. 609, 624 (2019) (the Tribe failed to meet its jurisdictional burden because it offered conclusions without any statutory analysis). Indeed, contrary to Plaintiffs' conclusory

assertion, § 640d-10(h)'s language does not establish that Congress gave the Relocatees an ownership interest. This provision does not modify or override the mandatory trust acquisition instructions in § 640d-10(a). And it does not specify how New Lands revenue should be distributed. Unlike § 640d-10(a), which directs that the New Lands are held "in trust for the benefit of the Navajo Tribe as part of the Navajo Reservation," § 640d-10(h) does not render the Relocatees trust beneficiaries. A contrary interpretation would create conflict within the statute, with the Relocatees being the "sole" beneficiary of the New Lands, which are, according to the statute's plain language, held in trust for the benefit of the Nation. *See also* Compl. ¶ 5 (the Nation is the "sole beneficial owner" of the New Lands); *cf. Sekaquaptewa v. MacDonald*, 591 F.2d 1289, 1292 (9th Cir.1979) ("Congress did not intend that individual tribal members be allowed to participate in" intertribal suit involving land under § 640d-7).

Plaintiffs' reliance on *Fredericks v. United States* (Pls.' Resp. at 6–8), does not show that the Relocatees can allege an injury in fact. In *Fredericks*, there was no dispute that the plaintiffs (heirs to their father's estate) had "property rights." 125 Fed. Cl. 404, 412 (2016) (noting plaintiffs held a reversionary interest). Instead, the standing analysis turned on *when* such rights vested. *Id.* at 412–14. Here, the Relocatees' standing claim is based on Tribal property in which they have no legally protected interest. Plaintiffs' resort to common law trust cases (Pls.' Resp. at 7–8) also offers little to support the Relocatees' standing because "trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S 162, 165 (2011).

The Federal Circuit's recent decision in *Fletcher v. United States*, 26 F.4th 1314 (Fed. Cir. 2022) does little to help the Relocatees. The statute at issue in *Fletcher*, the

Osage Allotment Act of 1906, directs Interior to distribute royalties from the Osage Mineral Estate on a pro rata basis to Osage Tribal members whose names were recorded on an official roll. Pub. L. No. 59-321, 34 Stat. 539 as amended, § 4. And the *Fletcher* plaintiffs are owners of "headrights"—personal property rights entitling them to a share of proceeds from the Mineral Estate. 26 F.4th at 1318. By sharp contrast, the Settlement Act does not provide for any pro rata distribution of New Lands revenue; it does not provide the Relocatees with any property rights regarding New Lands revenue; and (besides deposits in the Navajo Rehabilitation Trust Fund) it does not address New Lands revenue. What is more, Plaintiffs' Complaint emphasizes Tribal control over New Lands revenue, Compl. ¶ 140, and nothing in their response suggests otherwise.

Lastly, the United States certainly rejects Plaintiffs' conclusory assertion that, in 2009, ONHIR acknowledged that if certain duties under the Settlement Act are not complied with regarding the New Lands, the Relocatees would be able to successfully litigate their rights under the Act. Compl. ¶ 37; Pls.' Resp. at 8. More importantly, ONHIR's statements cannot create Article III standing for the Relocatees, where none exists. *McKinney v. U.S. Dep't of Treasury*, 799 F.2d 1544, 1549 (Fed. Cir. 1986) (courts must ensure that litigants satisfy the "requirements of Article III" and those "who do not possess Article III standing may not litigate in the courts of the United States"). At bottom, Congress did not direct the United States to hold legal title to the New Lands in trust for the benefit of the Relocatees. *See, e.g.*, Compl. ¶ 5 (the Nation is the "sole beneficial owner" of the New Lands). Nor does § 640d-10(h) or anything else in the Settlement Act give the Relocatees a legally protected interest in the revenue from the New Lands. Consequently, the Relocatees lack standing.

B. The Relocatees are not an identifiable group of Indians.

The Relocatees also do not qualify as an "identifiable group" for Indian Tucker Act jurisdiction, 28 U.S.C. § 1505. U.S. Mem. at 14–16. The United States' opening brief pointed out that claimant groups have qualified as identifiable groups when they cannot sue as a Tribe or where there is no existing Tribal organization to represent their claims. *Id.* at 15–16.[1] The Relocatees do not fall into these categories. Rather, they are Navajo citizens and any interests they have in this case are represented by the Navajo Nation. Therefore, they may not invoke the Indian Tucker Act as a basis for jurisdiction.

Plaintiffs fail to establish that the Relocatees constitute an "identifiable group" under § 1505. Plaintiffs focus on one sentence in *Chippewa I* to argue that all that matters is "whether the claimant group can be identified and have a common claim." Pls.' Resp. at 11 (quoting *Chippewa I*, 69 Fed. Cl. at 673) (internal quotation marks omitted). But Plaintiffs fail to acknowledge that the full quotation goes on to explain that, because "the Pembina Indians are *no longer organized* as a band, the question *then* is whether members, or descendants of members of the Pembina Band as it existed and was recognized at the time of the 1863 treaty, can be identified." *Chippewa I*, 69 Fed. Cl. at 673 (discussing why the Indian Claims Commission concluded the Pembina Indians could bring suit) (emphasis added). Plaintiffs also rely on a subsequent ruling in *Chippewa* that examined whether the per capita distribution of judgment funds to the Pembina descendants precluded their recognition as an "identifiable group," concluding that it did not. Pls.' Resp. at 11, 14; *Chippewa Cree Tribe of the Rocky Boy's Reservation*

[1] Citing *Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States ("Chippewa I")*, 69 Fed. Cl. 639, 673-74 (2006); *Wolfchild v. United States*, 62 Fed. Cl. 521, 539-40 (2004); *Snoqualmie Tribe of Indians v. United States*, 372 F.2d 951, 956–57 (1967).

v. United States ("Chippewa II"), 73 Fed. Cl. 154 (2006). *See also W. Shoshone Identifiable Grp. by Yomba Shoshone Tribe v. United States*, 143 Fed. Cl. 545, 591–93 (2019) (a per capita distribution plan did not affect any of the plaintiffs' interests in judgment funds).

This case is different. Unlike the Pembina descendants, the Relocatees have an existing Tribal organization—Plaintiff Navajo Nation—to represent their claims. Further, the Relocatees do not have an entitlement to judgment funds awarded by the Indian Claims Commission (or its successors) to an identifiable group. The Navajo Nation states that it "does not represent" the Relocatees. Pls.' Resp. at 12. But the Nation does not establish *why* it cannot represent the Relocatees' interests as its citizens in adjudicating, for example, alleged mismanagement of land that Plaintiffs, themselves, allege is held in trust for the Nation (not the Relocatees). The Nation is the "sole beneficial owner" of the New Lands, Compl. ¶ 5, and can adequately represent any interests the Relocatees might have. Because the Relocatees have not shown that they are an "identifiable group" under § 1505, they cannot rely on the Indian Tucker Act as a basis for jurisdiction.

II. The Navajo Nation's Tribal trust settlement waived any of the Nation's claims deriving from alleged harms or violations occurring before August 26, 2014.

The United States' opening brief contended that the Navajo Nation waived and released many of its present claims in a 2014 settlement between the Nation and the United States. U.S. Mem. at 17–27. Plaintiffs agree that the Nation "cannot assert claims which predate its 2014 settlement." Pls.' Resp. at 14. As the United States previously explained, the Complaint alleges that many of the harms or violations in question occurred prior to August 2014. U.S. Mem. at 25–26. Plaintiffs make no attempt to

address this argument. Pls.' Resp. at 14–15. The Court should dismiss any of the portions of the Nation's claims that are based on alleged harms or violations that occurred before August 26, 2014. Those of the Nation's claims that proceed—and assuming other threshold requirements for justiciability are met—must be limited to alleged actions or inactions occurring after August 26, 2014.[2]

III. This Court should dismiss Claims 2 and 3 because Plaintiffs have not identified a money-mandating statutory duty that could support jurisdiction.

A. The Settlement Act does not create an applicable specific, money-mandating duty regarding leasing or rights-of-way.

First, the Settlement Act's lands administration provision, § 640d-10(h), lacks the specific rights-creating or duty-imposing terms to support Tucker Act jurisdiction for Plaintiffs' Claims 2 and 3. Though Plaintiffs primarily hang their breach of trust claim on § 640d-10(h), Pls.' Resp. at 19–26, this provision states only that the New Lands "shall be administered by" ONHIR and "used solely for the benefit" of the Relocatees. § 640d-10(h). It gives ONHIR authority for "final planning decisions regarding the development" of the New Lands. *Id.* This sparse language is hardly the "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that the Supreme Court requires to support Tucker Act jurisdiction. *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 506 (2003). Section 640d-10(h) does not instruct ONHIR to

[2] To the extent clarification is necessary, the United States did not argue that the Nation's Tribal trust settlement waived and released the Relocatees' claims. *See, e.g.*, U.S. Mem. at 17. However, if the Court concludes that the Relocatees' claims can proceed, the United States has reserved the right to challenge the validity of any of Plaintiffs' allegations, *id.* at n.2, including Plaintiffs' assertion that the *Cobell* class action settlement did not waive the Relocatees' current claims, Compl. ¶¶ 160–61.

undertake leasing or rights-of-way on the New Lands, nor does it provide any specific guidance on these issues. Indeed, it does not even mention leasing or rights-of-way.

In Plaintiffs' view, § 640d-10(h) is "purposely broad" and imposes a "multifaceted fiduciary duty." Pls.' Resp. at 23; *id.* at 21 (ONHIR's legal duties "implicitly encompass" leases and rights-of-way). In essence, Plaintiffs ask the Court to *infer* from § 640d-10(h) that ONHIR has a duty to: prevent the occupation of New Lands properties without a lease, lease New Lands, obtain fair market value for rent and rights-of-way, seek consent from the Nation, and maintain records. Compl., ¶¶ 59–111. But this argument is not consistent with Supreme Court precedent, because "[t]he Government assumes Indian trust responsibilities only to the extent it *expressly* accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177 (emphasis added).

The Supreme Court has specified that "[w]hen Congress provides specific statutory obligations, [the Court] will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated." *Id.* at 185. In *Jicarilla*, the Court rejected the argument that a statute can impose binding trust obligations other than those explicitly stated, finding that doing so "would vitiate Congress' specification of narrowly defined" obligations. *Id.* The Federal Circuit also readily applies this principle and requires plaintiffs to identify specific statutory obligations related to their claims. *Two Shields v. United States*, 820 F.3d 1324, 1332–33 (Fed. Cir. 2016); *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015) (language indicating that land would be held "in trust" "does not establish any particular fiduciary duty to manage water resources on the land"). The Court therefore should not infer from § 640d-10(h) that ONHIR has specific duties regarding leasing or rights-of-way. Rather,

the Court should require Plaintiffs to identify an explicit statutory provision that establishes these particular fiduciary duties. Plaintiffs cannot do this.

Second, Plaintiffs fail to identify any other provisions of the Settlement Act that specifically establish the alleged duties underpinning their leasing and rights-of-way claims. Plaintiffs argue that § 640d-10(h) must be read together with the provision, § 640d-11(c)(2)(A), that transferred the "powers and duties" relating to relocation from Interior to ONHIR. Pls' Resp. at 20–21. The transfer of authority means that, as Plaintiffs acknowledge, ONHIR "*may*"—but is not required to—"issue leases and rights-of-way for housing and related facilities" on the New Lands. Pls.' Resp. at 20 (quoting Pub. L. No. 99-190, 99 Stat. 1185, 1236 (1985)) (emphasis added). This does not salvage Plaintiffs' claims. When the statute's plain language is discretionary, it does not establish a specific and enforceable duty. *Wolfchild v. United States*, 731 F.3d 1280, 1289 (Fed. Cir. 2013). Plaintiffs never grapple with this concept. For example, the Federal Circuit concluded that "the mere authority to generate leasing revenues does not carry with it any obligation to do so." *Id.* (Interior would not have violated the statutes if it "opted not to generate any leasing (or other) proceeds at all"). This Court reached a similar conclusion regarding discretionary language in the Settlement Act's § 640d-7(e), finding that the Act's use of "authorized" and "any or all" left payment of legal fees to Interior's discretion, thus not triggering Tucker Act jurisdiction. *Hopi Tribe v. United States*, 55 Fed. Cl. 81, 87–92 (2002). In the same way, "the amount of discretion left" to ONHIR supports a finding that the Settlement Act "does not satisfy the first part of the jurisdictional analysis." *White Mountain Apache v. United States*, 157 Fed. Cl. 303, 314 (2021). In any event, § 640d-11(c)(2)(A) does not touch on the duties Plaintiffs assert here. Plaintiffs' breach of trust allegations in Claims 2 and 3 are primarily based on

commercial facilities and related rights-of-way, not housing. *See e.g.,* Compl., ¶¶ 60-61; 106. Plaintiffs identify no mandatory language in the statute or elsewhere requiring ONHIR to take such actions.[3]

Plaintiffs also attach importance to ONHIR's authority for New Lands planning and development, arguing that it "reinforces legally exclusive federal control" and confirms that ONHIR has duties that "implicitly encompass" leases and rights-of-way. Pls.' Resp. at 21. Plaintiffs suggest that three of the Act's provisions, §§ 640d-10(a), 640d-10(h), and 640d-11(c)(2)(A), establish sufficient governmental control, such that the Court can infer additional trust duties on ONHIR. *Id.* But again, step one of the jurisdictional test requires that Plaintiffs identify statutory or regulatory provisions that *expressly* create a duty. "The Supreme Court has made clear that '[t]he Federal Government's liability cannot be premised on control alone.'" *Hopi Tribe*, 782 F.3d at 670 (quoting *Navajo II,* 556 U.S. at 301); *Jicarilla*, 564 U.S. at 177 (when "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . neither the Government's control over [Indian assets] nor common-law trust principles matter") (internal quotation marks omitted). So, even if ONHIR has control over planning decisions for New Lands development, this is not sufficient to establish a specific fiduciary obligation regarding leasing and rights-of-way.

[3] Plaintiffs also cite legislative history stating that the Act was amended to transfer this authority from Interior to ONHIR "out of concerns that the development of the new lands not be unnecessarily slowed down" and that it be done in conformity with language (that ultimately was removed in the 1988 amendments to the Act) regarding the acquisition of housing, community facilities, and services for Relocatees. H.R. Rep. No. 100-1032, at 9 (1988) . But this legislative history reveals nothing specific about whether ONHIR has a *duty* regarding leases and rights-of-ways on the New Lands.

Third, Plaintiffs have not identified any judicial decisions concluding that a statutory instruction to simply "administer" lands created a specific duty satisfying the first step of the jurisdictional test. Plaintiffs assert that this case is like *Mitchell II* and its progeny. Pls.' Resp. at 24. But the Settlement Act provisions Plaintiffs cite differ significantly from the statutes and regulations that required Interior to manage Tribal timber resources in *Mitchell II*. There, the Supreme Court found that specific fiduciary duties arose from the statutory and regulatory scheme granting Interior a "pervasive" role in

> virtually every aspect of forest management including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source.

United States v. Mitchell ("Mitchell II"), 463 U.S. 206, 219–20 (1983). Plaintiffs have presented nothing even close to that here. A better comparison is *Mitchell I*. In that case, the Court concluded that the General Allotment Act, which required land be held in "trust for the sole use and benefit" of specific Indians did "not impose any duty upon the Government to manage timber resources." *United States v. Mitchell ("Mitchell I")*, 445 U.S. 535, 540–42 (1980). Likewise, the Settlement Act does not impose any duty upon ONHIR regarding leasing and rights-of-way.

Fourth, even if §§ 640d-10(a), 640d-10(h), and 640d-11(c)(2)(A) could clear the first hurdle for Tucker Act jurisdiction, they fall at the second. None of these statutory sections contain an express provision for monetary relief, nor do they contemplate monetary relief. "When Congress intended to mandate payment [under the Settlement Act], it clearly set out the requirements controlling the government's responsibilities

toward the cost of relocation." *Hopi Tribe*, 55 Fed. Cl. at 89. It did not do so in the Settlement Act provisions relied upon by Plaintiffs, nor can these provisions be "fairly interpreted as mandating compensation by the Federal Government." *Begay v. United States*, 865 F.2d 230, 231 (Fed. Cir. 1988).

Citing *Mitchell II*, Plaintiffs argue that § 640d-10(h) can be fairly interpreted as mandating compensation. Pls.' Resp. at 22–23. Yet the differences between *Mitchell II* and the Settlement Act's lands administration provision illustrate precisely why that is not so. In *Mitchell II*, the Court recognized that Interior was required (by statute and regulation) to manage the tribal timber resources "so as to generate proceeds for the Indians." 463 U.S. at 227. The entire point of proceeds, of course, is monetary. The Court reasoned that it "would be anomalous to conclude that these 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 were not performed." *Id.* In other words, the fair interpretation of monetary compensation arose from the Court's conclusion that the Indian timber statutes and regulations were aimed at managing the asset to generate proceeds for Indians.

In contrast, § 640d-10(h) indicates only that the New Lands "shall be administered by" ONHIR and "used solely for the benefit" of the Relocatees. Plaintiffs offer a strained journey from the verb "administer" to a money-mandating duty. Pls.' Resp. at 22–23. But the statutory language can just as easily be read to mean ONHIR is to manage the New Lands in a way that preserves them for the use of the Relocatees, or to manage them in whatever way ONHIR decides would benefit the Relocatees. Regardless, however, it is Plaintiffs' burden to show a specific and money-mandating fiduciary duty. *Navajo II*, 556 U.S. at 290–91. Section 640d-10(h) does not fit the bill.

The Settlement Act does not create specific fiduciary duties with respect to leasing or rights-of-way on the New Lands, nor can it fairly be read to permit monetary compensation for any breach of the general duty it does create. *See Begay v. United States*, 16 Cl. Ct. 107, 123–24 (1987) (finding plaintiffs' claims under the Settlement Act not analogous to the compensable economic benefits in *Mitchell II*), *aff'd* 865 F.2d 230 (Fed. Cir. 1988).[4]

B. ONHIR's management manual does not create enforceable fiduciary duties.

Although Plaintiffs contend that the Settlement Act "alone" provides jurisdiction for their leasing and rights-of-way claims, Pls.' Resp. at 26, they also turn to ONHIR's management manual for support. *See id.* at 26–30. ONHIR's manual, however, is for agency guidance only and does not have the force of a treaty, statute, or regulation. Thus, Plaintiffs cannot rely on it to confer jurisdiction on the Court of Federal Claims. U.S. Mem. at 34–35; *Anderson v. United States*, 85 Fed. Cl. 532, 543 (2009) (agency policy manual "cannot be used as a money-mandating source of law to confer jurisdiction").

Contrary to Plaintiffs' assertion, ONHIR's management manual does not have the binding force and effect of law. Plaintiffs cite the four-part test set forth in *Hamlet v. United States*, used to determine, for purposes of Tucker Act jurisdiction, whether a manual or handbook was intended to have the force and effect of law. Pls.' Resp. at 27 (citing 63 F.3d 1097, 1105 (Fed. Cir. 1995)). "In *Hamlet*, the Federal Circuit set the bar

[4] The United States also analyzed each of the other alleged sources of fiduciary duty identified in the Complaint and explained how none provided jurisdiction for Plaintiffs' claims. *See* U.S. Mem. at 33–34. Plaintiffs do not appear to contend that the Non-Intercourse Act and Federal Records Act are money-mandating. Pls.' Resp. at 24–25.

high for good reason." *Tidewater Contractors, Inc. v. United States*, 131 Fed. Cl. 372, 398 (2017). Such materials only qualify if: (1) the promulgating agency was vested with the authority to create such a manual; (2) the promulgating agency conformed to all procedural requirements, if any, in promulgating the manual; (3) the promulgating agency intended the provision to establish a binding rule; and (4) the provision does not contravene a statute. *Hamlet*, 63 F.3d at 1105. "The burden is a heavy one and not easily met." *Tidewater Contractors, Inc.*, 131 Fed. Cl. at 398. In *Hamlet*, the Federal Circuit concluded that an agency personnel manual was not entitled to the force and effect of law. 63 F.3d at 1106–07. A similar result was reached in another decision cited by Plaintiffs, *Tidewater Contractors, Inc.* Pls.' Resp. at 27; *see* 131 Fed. Cl. at 395 (agency field materials manual was developed to provide guidance and did not qualify as a binding agency directive); *see also Farrell v. Dep't of Interior*, 314 F.3d 584, 592 (Fed. Cir. 2002) (appendix to agency manual was intended as a guide, not a "binding norm"); *Jay Cashman, Inc. v. United States*, 88 Fed. Cl. 297, 304 (2009) (agency manual "was intended merely to serve as a form of non-binding guidance").

The same result is warranted here. ONHIR's manual's explicit language demonstrates that it provides general guidance and is not intended to be binding. *See* ONHIR's Management Manual at 1 ("These procedures set forth the processes generally followed by the Office."); *id.* ("In addition, since circumstances change and the Office is committed to using 'best practices' deviations from the procedures set forth in the Manual may be made where appropriate."); *see also Farrell*, 314 F.3d at 592 (agency document was non-binding because it provided a "general framework" and permitted discretion). Further, ONHIR's manual "lack[s] the procedural dressing of a binding regulation." *Jay Cashman, Inc.*, 88 Fed. Cl. at 303–04. It was neither published in the

Federal Register nor promulgated as a rule. Plaintiffs present no compelling argument that ONHIR's management manual satisfies the criteria in *Hamlet*. Plaintiffs point to 25 C.F.R. § 700.219 to argue that ONHIR intended its management manual to establish binding rules. Pls.' Resp. at 28. But that regulation confirms that ONHIR intended the manual only to provide instruction and set forth general policies and principles for the agency. 25 C.F.R. § 700.219 (a)(the manual "is the prescribed medium for publication of policies, procedures and instructions which are necessary to facilitate the day-to-day operations and administration of the Commission"). Plaintiffs also make too much of the manual's citation to the Bureau of Indian Affairs' rights-of-way regulations, 25 C.F.R. § 169. Pls.' Resp. at 29 (citing ONHIR's Management Manual, § 1810.11). Plaintiffs offer no authority to support their claim that ONHIR can incorporate a separate federal agency's regulations, without notice and comment rulemaking (and thereby create binding law), simply by referencing them in a management manual. *See Farrell*, 314 F.3d at 590 (discussing when agency polices are subject to the Administrative Procedure Act and must be published in the Federal Register as a regulation).

In sum, Plaintiffs have not identified a substantive source of law containing a specific fiduciary or other duty regarding leasing or rights-of-way on the New Lands. Plaintiffs' failure to do so is a jurisdictional deficiency that compels dismissal of Claims 2 and 3.

IV. This Court should dismiss Plaintiffs' request for trespass damages and penalties.

The Court should also dismiss Claim 1 with respect to its request for trespass damages and penalties, along with any additional requests for trespass damages,

because Plaintiffs cannot assert a Tucker Act claim for trespass penalties against the United States under 25 CFR § 700.725. U.S. Mem. at 36–37. In *Shoshone Indian Tribe of Wind River Reservation, Wyoming v. United States*, this Court determined that the United States was not subject to penalties for trespass because the relevant penalty provision made trespassers liable to the United States, and the government could not be liable to itself for trespass. 52 Fed. Cl. 614, 628 (2002) (citing 43 C.F.R. § 9239.0-7 (2001)). ONHIR's grazing trespass regulation similarly states that penalties "shall be paid to the [ONHIR] Commissioner[.]" 25 CFR § 700.725. There is no indication that the regulation was intended to be enforceable *by* the United States *against itself*. The contrary view—that the federal government can somehow pursue penalties against itself—defies logic. *See Daniel v. National Park Service*, 891 F.3d 762, 770 (9th Cir. 2018) ("The spectre of the Federal Trade Commission suing the United States, aka itself, to 'recover a civil penalty' *from itself* makes little sense.").

Even if the United States could be liable for penalties, which it cannot, ONHIR is not "required" to collect penalties, contrary to Plaintiffs' assertion. Pls.' Resp. at 32. Rather, ONHIR has the discretion to collect penalties: "the Commissioner *may* take appropriate action to collect all such penalties and damages and seek injunctive relief when appropriate." 25 CFR § 700.725 (emphasis added). Similarly, § 700.727 gives ONHIR the discretion to impound unauthorized livestock. 25 CFR § 700.727(a) ("such livestock *may* be impounded") (emphasis added). Further, if impounded livestock are sold at auction, the balance of proceeds from the sale, after costs and penalties, are paid to the owner or "credited to the United States" if unclaimed. 25 CFR § 700.727(h). ONHIR, not the Nation or the Relocatees, decides whether or not to collect penalties, 25 CFR § 700.703, and whether or not to impound and sell unauthorized livestock. 25 CFR

§ 700.727. Thus, not only could ONHIR decline to collect penalties against itself, Plaintiffs cannot impose penalties on ONHIR.

As noted above, discretionary duties are not sufficient for Tucker Act jurisdiction. *Wolfchild*, 731 F.3d at 1289. In the absence of a regulatory obligation, Plaintiffs claim that the United States is liable as a fiduciary, citing the Restatement (Third) of Trusts. Pls.' Resp. at 32. However, Plaintiffs "cannot simply rely on common law duties imposed on a trustee." *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1039–40 (Fed. Cir. 2012). Nothing in ONHIR's grazing regulations imposes an obligation on ONHIR to collect penalties against itself. In fact, Plaintiffs acknowledge that ONHIR provides a benefit by operating the Padres Mesa Ranch for "ranching and livestock marketing and demonstration of those practices to Relocatees." Compl. ¶ 29. *See also* GAO September 17, 2020 Opinion B-329446 at 6 ("[E]ncouraging and training in economically successful grazing practices [is] rationally related to reducing the economic burdens imposed by the Settlement Act.") (concluding operation of the Ranch authorized under 25 U.S.C. § 640d-25(b)).

Finally, none of Plaintiffs' cited cases support trespass liability against the United States here. Pls.' Resp. at 33–34. In *United States v. White Mountain Apache Tribe*, the Tribe sued for money damages to repair and restore Fort Apache. 537 U.S. 465 (2003). The Court held that the United States was liable for damages emanating from alleged disrepair because the statute gave the government the right to use the fort for its own purposes, and the government did so. *Id.* at 475–76. Unlike in *White Mountain Apache Tribe*, Plaintiffs acknowledge that ONHIR's ranch operations benefit the Relocatees, not ONHIR. Compl. ¶ 29; *see also* GAO, B-329446 at 6. In *Navajo Tribe of Indians v. United States*, Continental Oil Company assigned its lease on reservation land to the

United States, unbeknownst to the Tribe. 364 F.2d 320 (Ct. Cl. 1966). In fact, the Tribe was unaware of Continental Oil's desire to surrender the lease. *Id.* at 323-24. The Court reasoned that the case was "somewhat analogous to that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself." *Id.* at 324. Conversely, in this case, ONHIR has been operating the Ranch not for its own gain, but to demonstrate ranching and livestock marketing practices to the Relocatees since 2009. Compl. ¶ 29. In brief, the Court should dismiss Plaintiffs' requests for trespass damages and penalties against the United States.

V. This Court should dismiss Plaintiffs' request for equitable relief.

Plaintiffs' second request for relief seeks equitable relief regarding the administration and use of the New Lands and the resulting income, but Plaintiffs fail to establish that the Court has jurisdiction to order such actions. The Court of Federal Claims does not possess jurisdiction to provide this type of declaratory and injunctive relief because Plaintiffs' request is not incident of and collateral to a money judgment as required by 28 U.S.C. § 1491(a)(2). U.S. Mem. at 37–38; *see also James v. Caldera*, 159 F.3d 573, 580-81 (Fed. Cir. 1998).

Plaintiffs' requested equitable relief is strikingly broad. *See* Compl., Request for Relief, 2. Notably, Plaintiffs do not identify any Court of Federal Claims precedent where this type of relief has been awarded. *See* Pls.' Resp. at 34–37; *id.* at 35 (citing *National Air Traffic Controllers Ass'n v. U.S.*, 160 F.3d 714, 717 (Fed. Cir. 1998) (affirming dismissal because Court of Federal Claims was not authorized to grant equitable relief)); *id.* at 36 (citing *Pueblo of San Ildefonso v. United States*, 35 Fed. Cl. 777, 803–04 (1996) (awarding only money damages)). Instead, Plaintiffs rely on decisions that apply to the Court's authorization to award equitable relief in other contexts. For example, *Alliant*

upheld the Court of Federal Claims' equitable jurisdiction over nonmonetary contract claims arising under the Contract Disputes Act of 1978. *Alliant v. Techsystems, Inc. v. United States*, 178 F.3d 1260, 1268–71 (Fed. Cir. 1999); *see also Emery Worldwide Airlines v. United States, Inc. v. United States*, 47 Fed. Cl. 461, 468 (2000). But this is not a Contract Disputes Act case. *Pueblo of Laguna* is also easily distinguished because Plaintiffs are not simply seeking a document preservation order. *Pueblo of Laguna* v. *United States*, 60 Fed. Cl. 133, 137 (2004) (finding that under RCFC 16 and related authority, the Court of Federal Claims has the power to preserve evidence). Plaintiffs also look to decisions from the Tenth Circuit and other jurisdictions. Pls.' Resp. at 36–37. But none of these cases analyzed the scope of the Court of Federal Claims' equity jurisdiction pursuant to § 1491(a)(2).

Finally, Plaintiffs suggest that the question of allowable equitable relief should be deferred. Pls.' Resp. at 37. But the scope of available remedies under § 1491(a)(2) is not dependent on further factual development of this case. *See Bevevino v. United States*, 87 Fed. Cl. 397, 406–407, 413 (2009) (dismissing plaintiff's request for declaratory relief, but finding that plaintiffs' back pay claim was within the court's jurisdiction); *Pryor v. United States*, 85 Fed. Cl. 97, 103 (2008) (even presuming one of plaintiff's claims seeks a money judgment, her claim for equitable relief cannot be entertained). Plaintiffs' second request for relief does not fall within the Court of Federal Claims' limited power to provide equitable relief, § 1491(a)(2). Because no remedy exists at law for this request, it should be dismissed.

For the reasons set forth above and in the United States' memorandum, the United States' Motion to Partially Dismiss Plaintiffs' Complaint should be granted.

Respectfully submitted this 2nd day of May, 2022.

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