UNITED STATES COURT OF FEDERAL CLAIMS

NAVAJO NATION, a federally recognized Indian Tribe; IDENTIFIABLE GROUP OF RELOCATION BENEFICIARIES, 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.	)	No. 21-1746-ZNS
UNITED STATES,	)	
Defendant.	)	

PLAINTIFFS' SUPPLEMENTAL BRIEF OPPOSING GOVERNMENT'S MOTION TO PARTIALLY DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

Plaintiffs hereby respond to this Court's November 8, 2022 Order for supplemental briefs on how certain statutes, regulations, and cases affect the government's motion to dismiss ("Motion") for Claims 2 and 3 of the Complaint, respectively regarding leasing and rights of way. *See* ECF Nos. 1, 7, 19. In sum, those authorities and related regulations support denying the Motion regarding these Claims under the Navajo-Hopi Settlement Act, Pub. L. 93-531, 88 Stat. 1712 (1974), as amended by the 1980 and 1988 Navajo and Hopi Indian Relocation Amendments Acts (altogether, the "Relocation Act"), and the Office of Navajo Hopi Indian Relocation ("OHNIR") Management Manual ("OMM"), which governs ONHIR's operations. The statutes referenced by the Court are not applicable here, but they are relevantly analogous to the Relocation Act and their implementing regulations are either likewise analogous to the OMM or expressly incorporated by reference in the OMM. Accordingly, the cited cases confirm that the Relocation Act, especially as implemented by the OMM, imposes fiduciary duties enforceable by damage claims within this Court's jurisdiction for ONHIR's leasing and rights-of-way maladministration of the "New Lands" acquired under the Relocation Act in trust for and used solely for the benefit of Plaintiffs.

QUESTIONS PRESENTED

1. How do *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), and 25 U.S.C. § 415 and 25 C.F.R. § 162 cited therein, affect the government's motion to dismiss Plaintiffs' leasing claims in Claim 2 of Plaintiffs' Complaint?

2. How do 25 U.S.C. §§ 323-325 and the discussions thereof in *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 211 (1983), affect the government's motion to dismiss Plaintiffs' rights of way claims in Claim 3 of Plaintiffs' Complaint?

BACKGROUND

Claim 2 alleges that ONHIR has failed to properly "administer" New Lands leasing under the Relocation Act and the binding OMM, which "govern[s]" ONHIR's operations, including for "powers and duties" to "issue leases" expressly incorporated by reference in the Relocation Act. *See, e.g.*, Compl. ¶¶ 31-35, 59-68; 25 U.S.C. §§ 740d-10(h), 740d-11(c)(2)(A) (incorporating Pub. L. 99-190, 99 Stat. 1185, 1236 (1985)); 25 C.F.R. § 700.219(a); *id.* § 700.701(b) (defining "New Lands"). In particular, ONHIR has improvidently and impermissibly (1) not maintained required records, (2) occupied and allowed others to occupy lands without leases, (3) allowed nonuse for long periods, (4) acted as lessor without authority, (5) allowed land uses without the approval of Plaintiff Navajo Nation ("Nation"), and (6) leased lands below fair market rent. Compl. ¶¶ 69-98. In turn, Claim 3 alleges that ONHIR has maladministered New Lands rights of way under the Relocation Act and the OMM prescriptions, as well as incorporated rights-of-way duties from and regulations of the U.S. Bureau of Indian Affairs ("BIA"), by improperly (1) failing to maintain records required to protect Plaintiffs' interests, and (2) allowing rights of way without the Nation's consent and without fair market consideration or written waiver thereof. *Id.* ¶¶ 99-110; 25 U.S.C. §§ 740d-10(h), 740d-11(c)(2)(A); OMM § 1810.22 at 1 (incorporating 25 C.F.R. pt. 169).

In its Motion to Dismiss, Defendant relevantly argues that "the leasing and rights-of-way claims should be dismissed because Plaintiffs fail to identify a money-mandating statutory or regulatory trust duty." Mot. at 27-36. Defendant contends that no law creates any duty that supports the claims and that the OMM is not law and creates no duties. *See id.* After briefing and oral argument, ECF Nos. 12, 15, 18, the Court ordered supplemental briefing on "additional authority . . . that seems to be directly applicable to the government's motion as it pertains to Plaintiffs' leasing and rights of way claims." ECF No. 19 at 1.

ARGUMENT

I. *BROWN*'S ANALYSIS OF *MITCHELL II* AND THE BIA LEASING PROGRAM SUPPORT DENYING THE MOTION TO DISMISS FOR LEASING CLAIMS UNDER THE RELOCATION ACT AND THE OMM, BUT WITHOUT LIMITING CLAIMS TO SPECIFIC STATUTORY OR REGULATION REQUIREMENTS.

Like the BIA commercial leasing program analyzed in *Brown*, the Relocation Act and OMM provisions which prescribe and govern ONHIR's New Lands leasing program establish enforceable federal control. They also establish supervision and specific, affirmative fiduciary duties. ONHIR's administration of New Lands leasing therefore must comply with federal trust duties to Plaintiffs and is enforceable in this Court for damages. However, contrary to *Brown*, breach of trust claims are not limited to violation of specific statutory or regulatory requirements.

A. *Brown* Aptly Rejected Excess Asserted Requirements for Jurisdiction Under *Mitchell II* and *Navajo Tribe* and Held that 25 U.S.C. § 415 and 25 C.F.R. Part 162 Impose Enforceable Federal Fiduciary Duties Over Indian Leasing.

In *Brown*, individual Indians with beneficial interests in allotted lands held in trust for them (allotees) alleged that BIA violated fiduciary duties under 25 U.S.C. Section 415(a) and 25 C.F.R. Part 162, resulting in lost lease profits and inability to realize land's potential value. *Brown*, 86 F.3d at 1556-57. The allottees alleged that the BIA "breached its fiduciary duty . . . by failing (1) to compel the lessees to fulfill their reporting and payment responsibilities under the lease, or (2) to cancel the lease in a timely manner once the lease violations were uncovered." *Id. Brown* held that the BIA "commercial leasing program does . . . impose an enforceable fiduciary duty on the government under the 'control' portion of *Mitchell II*'s 'control or supervision' test." *Brown*, 86 F.3d at 1561; *see Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe of Indians v. United States* ("*Navajo Tribe*"), 624 F.2d 981, 987 (Ct. Cl. 1980)).

For this, *Brown* made a series of general and specific points. First, the "control or supervision" test that *Mitchell II* adopted from *Navajo Tribe* is disjunctive and does not require

that control or supervision be "nearly complete[,]" "extensive[,]" "'significant,' 'comprehensive,' 'pervasive,' or 'elaborate[,]'" "by heaping on modifiers" as the government asserted. *Brown*, 86 F.3d at 1560, 1561 & n.9. Second, *Navajo Tribe* "rejected the government's contention that 'no fiduciary obligation can arise unless there is an express provision of a treaty, agreement, executive order or statute creating such a trust relationship.'" *Id.* at 1560 n.7 (quoting *Navajo Tribe*, 624 F.2d at 987). Third, the interpretation of governing statutes and regulations "'is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.'" *Id*. at 1561 (quoting *Mitchell II*, 463 U.S. at 225). Therefore, the test is only if the United States rather than relevant Indians has control or supervision over the relevant program, *id.*, albeit based on specific statutory or regulatory prescriptions that bear the hallmarks of a conventional fiduciary relationship, *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009).

Applying that test to the BIA leasing program, *Brown* held that the allotees did "not control the leasing of their lands. First, they can only grant those leases of which the Secretary [of the Interior] approves." 86 F.3d at 1561 (citing 25 U.S.C. § 415(a)). "Second, they can grant leases only on terms and forms that the Secretary dictates." *Id.* at 1562 (citing 25 U.S.C. § 415(a); 25 C.F.R. § 162.5(a)) "Third, an allottee cannot cancel a lease without the Secretary's prior approval . . . . Fourth, the Secretary can cancel a lease without the allottee-lessor's consent." *Id.* (citing 25 C.F.R. § 162.14). Fifth, these features of those leases "must, of course, be understood against the backdrop created by 25 U.S.C. § 177, the most general prohibition on conveyances of interests in Indian lands[.]" *Id.* In sum, BIA has "control over the entry into, terms of, and exit from leasing[,]" which is not "mere oversight" because that control is "a necessary prerequisite to the execution of a valid and binding lease." *Id.* All this was reinforced by implementing regulations and supported liability for federal breach of fiduciary duties. *Id.* at 1562-63 (reviewing provisions).

B. Prior and Later Cases Preclude *Brown* from Limiting Fiduciary Duties to Specific Statutes and Regulations.

After concluding that jurisdiction existed for leasing claims there, *Brown* in dicta addressed the possible merits in one point that contravened *Mitchell II* and is precluded by *Navajo Tribe* as well as *United States v. White Mountain Apache Tribe* ("*White Mountain*"), 537 U.S. 465 (2003), and *United States v. Jicarilla Apache Nation* ("*Jicarilla*"), 564 U.S. 162 (2011). For this, *Brown* aptly acknowledged that "'statutes and regulations . . . define the contours of the United States' fiduciary responsibilities.'" 86 F.3d at 1563 (quoting *Mitchell II*, 463 U.S. at 224). *Brown* also fairly found that that no valid claim can contend that the government must "'go contrary to'" controlling regulations and leases to fulfill alleged fiduciary obligations. *Id.* (quoting *Pawnee v. United States*, 830 F.2d 187, 191 (Fed. Cir. 1987)). However, *Brown* also asserted that "where no specific statutory requirement or regulation is alleged to have been breached . . . , the money claim against the government must fail." *Id.* That point was wrong then and it is more untenable now.

Mitchell II affirmed jurisdiction over claims for alleged breaches of trusts. *Mitchell II*, 463 U.S. at 211, 228. Those included claims that the government had "failed to obtain a fair market value for timber sold" and "failed to develop a proper system of roads and easements for timber operations[.]" *Id.* at 210. But nothing in the governing statutes or regulations specifically mandated those actions. *See id.* at 209, 219-23. Likewise, *Navajo Tribe* rejected the argument that "the trust relationship is limited by the precise terms" of the "treaty, agreement, executive order or statute creating such a trust relationship[.]" *Navajo Tribe*, 624 F.2d at 987. In particular, the *Navajo Tribe* rejection of that contention entailed stating the specific "control or supervision" test that *Mitchell II* adopted. *Compare Navajo Tribe*, 624 F.2d at 987 *with Mitchell II*, 463 U.S. at 225. *Mitchell II* and *Navajo Tribe* therefore preclude *Brown*'s later contrary requirement for breach of "specific" statutes or regulations. Indeed, *Navajo Tribe* imposes issue preclusion here for that previously,

finally decided, identical issue that the United States had a full and fair opportunity to litigate there. *See Jones v. United States*, 846 F.3d 1343, 1361 (Fed. Cir. 2017).

Subsequent decisions also confirm that federal trust duties to Indians are not so limited. *White Mountain* affirmed jurisdiction over a claim to "act reasonably to preserve" trust property even though the relevant law only provided that the property be held in trust subject to a federal right to use any parts of it "'for administrative or school purposes for as long as they are needed for the purpose.'" *White Mountain*, 537 U.S. at 469, 471 (citation omitted). *White Mountain* rejected the contention that there was "not a word in . . . the only substantive source of law on which the Tribe relie[d] . . . that suggests the existence of such a mandate." *Id.* at 476-77. That was because so-limiting trust duties would wrongly "read the trust relation out of Indian Tucker Act analysis" and "leave *Mitchell II* a wrongly decided case," *id.* at 477. More recently, *Jicarilla* reaffirmed that "[w]e have looked to common-law . . . to determine the scope of liability that Congress has imposed." 564 U.S. at 177. As this Court subsequently and emphatically held, a phalanx of precedent have held that fiduciary duties enforceable in this Court need not be spelled out specifically in statutes or regulations. *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 735-38 (2011) (discussing cases); Pls.' Resp. to Mot. to Dismiss, ECF No. 12, at 26-27 (citing same). Accordingly, any further assertion of this "zombie" argument that a "litany of courts" have rejected would impermissibly ignore the government's distinctive obligation to protect Indian Nations. *Cherokee Nation v. U.S. Dep't of the Interior*, 531 F. Supp. 3d 87, 98 (D.D.C. 2021).

C. The Relocation Act's Specific Administrative and Broad Leasing Duties Implemented by the OMM Establish Federal Control and Supervision with Fiduciary Duties for All the New Lands Leasing Maladministration Claims.

Application of *Brown* consistent with prior and subsequent governing cases confirms that the Relocation Act and the OMM establish enforceable fiduciary duties within this Court's

jurisdiction for all of Plaintiffs' New Lands leasing claims. First, the Relocation Act prescribes that the New Lands "shall be taken by the United States in trust for the benefit of the Navajo Tribe[;]" "shall be administered by" ONHIR "until relocation . . . is complete[;]" and "shall be used solely for the benefit of Navajo families residing on Hopi-partitioned lands [("HPL")] as of December 22, 1974[,]" *i.e.*, the Plaintiff Identifiable Group of Relocation Beneficiaries. 25 U.S.C. § 640d-10(h). In addition, "sole authority for final planning decisions regarding the development of [the New] lands . . . shall rest with [ONHIR] until such time as [ONHIR] has discharged [its] statutory responsibility under this subchapter." *Id.*

Repeatedly, "use of the word 'shall' means what follows is mandatory, not discretionary." *Norman v. United States*, 942 F.3d 1111, 1117 (Fed. Cir. 2019). Therefore, as in *Brown*, the Relocation Act vests the United States with categorical legal control over and "not mere oversight" for New Lands administration, planning, and development, solely for Plaintiffs' benefit. Also, as there, this imposition of the first specific, conventional, affirmative trust duty to administer establishes "the essence of a fiduciary's duty to the beneficial owner of a trust corpus." *Brown*, 86 F.3d at 1562; *see* Restatement (Third) of Trusts § 76 & cmt. b (2007). Indeed, this Relocation Act provision establishes enforceable fiduciary duties for New Lands leasing (and rights of way) without referencing that specifically, just as it establishes those duties for grazing, as ONHIR has acknowledged. *See* Compl. ¶¶ 37, 47; ECF No. 18 at 122-23 (oral argument transcript quotation).

Second, the Relocation Act reassigned to ONHIR "all powers and duties of the [BIA] derived from Public Law 99-190 (99 Stat. at 1236) that relate to the relocation of" Navajos from HPL, 25 U.S.C. § 640d-11(c)(2)(A); OMM § 1810 at 1. Those duties concern "issu[ing] leases and rights-of-way for housing and related facilities" and "services intended to be provided" on the New Lands, "including, but not limited to, water, sewers, roads, schools, and health facilities."

Pub. L. 99-190, 99 Stat. 1185, 1236, 1266 (1985). As in *Brown,* those duties "must, of course, be understood against the backdrop created by 25 U.S.C. § 177," *Brown*, 86 F.3d at 1562; *see* Pls.' Resp. to Mot., ECF No. 12, at 25 (addressing same). Also, "related facilities" have a broad scope, including business, commercial, and economic development facilities essential to developing the New Lands and mitigating the adverse impacts of relocation. *See* Compl. ¶¶ 26-28, 61; OMM § 1810 at 1; Navajo & Hopi Indian Relocation Comm'n, Report & Plan at 1, 5, 263, 265-67 (April 3, 1981), available at https://www.onhir.gov/readingroom/ (last visited Dec. 7, 2022). Pursuant to all that and ONHIR's own regulations, the OMM governs the development, approval, and execution of business, commercial, industrial, and mineral leases for the New Lands. 25 C.F.R. § 700.219(a); OMM § 1810.3; Compl. ¶ 62. As for BIA under *Brown*, ONHIR issues these leases.

Third, for all New Lands leasing, "the forms and documentation used by ONHIR for land use approvals will be similar to those used by the Bureau of Indian Affairs and the Navajo Nation on the remainder of the Navajo Indian Reservation[,]" OMM § 1810 at 1; Compl. ¶ 66. Those similar approval authorities include the same federal Indian leasing law and regulations addressed in *Brown*. *See* 25 U.S.C. § 415; 25 C.F.R. pt. 162. Analogous to those, individuals and entities that want to lease New Lands must apply to ONHIR, including submitting required information, forms, and documents "required by ONHIR[.]" OMM § 1810.3; Compl. ¶ 62. For example, to conduct a for-profit enterprise on the New Lands, an individual or entity must develop a lease with the Nation as Lessor and ONHIR as a concurring party, consult with the appropriate department of the Nation, execute the lease following the Nation's policy and procedure, and provide copies of all documents to ONHIR. OMM § 1810.325.1; Compl. ¶ 63. All that corresponds to how to obtain a lease under 25 U.S.C. Section 415. *See* 25 C.F.R. § 162.010. All this also should apply to surface use and mineral development agreements, though ONHIR has wholly administered that and much other

New Lands leasing without the Nation's required consent. *See* Compl. ¶¶ 65, 73-79, 81-95. Also, the Relocation Beneficiaries have no set role whatsoever in either the prescribed process or the actual administration, but only have beneficial interests like the allottees in *Brown*. *See id.*

Finally, for non-profit leases, detailed applications are made to ONHIR's New Lands Manager, who negotiates specific lease terms and determines their durations and fees and any royalty and ONHIR Legal Counsel drafts leases, which include terms for cancellation. OMM §§ 1810.321-.323; Compl. ¶ 65. The BIA, the Nation, and others designated by ONHIR have 30 days to comment on proposed leases. OMM § 1810.323.3. Likewise, if the Nation requests ONHIR to be the Lessor, an applicant will work with ONHIR to develop the lease with the Nation as a concurring party. OMM § 1810.325.2; Compl. ¶ 64. The Nation has not requested that, though ONHIR has asserted that controlling administration under the Relocation Act. *E.g.*, Compl. ¶ 81.

In sum, under the Relocation Act and the OMM and despite ONHIR's disregard of the governing OMM, ONHIR controls and supervises all New Lands leasing per specific conventional fiduciary prescriptions. As in *Brown*, Plaintiffs here do not ultimately administer the leasing of their lands, particularly for leases that ONHIR unilaterally dictates. All that amply supports jurisdiction and liability for federal breach of fiduciary duties under ONHIR's own mandates in Claim 2. That includes all the various leasing maladministration claims, which are not limited to the specific provisions of the OMM. *See, e.g.,* Pls.' Resp. to Mot., ECF No. 12, at 22-30.

II. *MITCHELL II*'S ANALYSIS OF THE BIA RIGHTS-OF-WAY STATUTE AND REGULATIONS—THE LATTER OF WHICH IS INCORPORATED IN THE OMM—SUPPORT ENFORCEABLE FIDUCIARY DUTIES AND DENYING THE MOTION TO DISMISS FOR RELOCATION ACT RIGHTS-OF-WAY CLAIMS.

A. *Mitchell II* Held that 25 U.S.C. Sections 323-325 and 25 C.F.R. Part 169 Impose Jurisdictional Control and Enforceable Fiduciary Duties for Federal Rights of Way Across Indian Trust Lands.

Mitchell II held that allottees could assert claims for damages for "pervasive waste and

mismanagement" of timberlands, including for where BIA "failed to develop a proper system of roads and easements for timber operations . . . ." *Mitchell II*, 463 U.S. at 210-11. In assessing the rights-of-way claim, *Mitchell II* succinctly found that the United States exercised necessary "control over grants of rights-of-way on Indian lands held in trust." *Id*. at 223. First, BIA "is empowered to grant rights-of-way for all purposes across trust land, 25 U.S.C. § 323, provided that [it] obtains the consent of the tribal or individual Indian landowner, § 324, and that the Indian owners are paid appropriate compensation, § 325." *Id*. at 223. Second, the implementing regulations, 25 C.F.R. Part 169, "detail the scope of federal supervision." *Id.* That included determining and requiring payment of fair-market value compensation for distribution to Indian landowners, plus covering potential damages. *Mitchell II*, 463 U.S. at 223 (citing 25 C.F.R. §§ 169.12, 169.14 (1983)). Those regulations also specified required rights-of-way provisions, including that on termination the applicant restore land to its original condition so far as is reasonably possible. *Id*. at 223 n.28. Third, adopting and applying the "control or supervision" test from *Navajo Tribe* as noted above, *Mitchell II* affirmed that statutes and regulations established "pervasive federal control" and fiduciary duties to manage Indian rights of way for the benefit of Indians, breach of which was subject to a claim for money damages. *Id*. at 207, 225-26 & n.29.

B. The Relocation Act's Specific Administrative and Broad Rights-of-Way Duties Implemented In Part By the BIA Right-of-Way Regulations Incorporated by Reference in the OMM Establish Federal Control and Enforceable Fiduciary Duties for Plaintiffs' New Lands Rights-of-Way Maladministration Claims.

Mitchell II's analysis of rights-of-way claims confirms that the Relocation Act and the OMM establish enforceable federal fiduciary duties for New Lands rights-of-way administration, especially based on the incorporated BIA rights-of-way regulations. First, as above for New Lands leasing maladministration claims, the Relocation Act mandates that the New Lands "shall be" administered, planned, and developed by ONHIR solely for the benefit of Plaintiffs with

reassigned duties over a broad range of rights of way. *See* 25 U.S.C. §§ 640d-10(h), 640d-11(c)(2)(A) (referencing Pub. L. 99-190, 99 Stat. 1236); Compl. ¶ 100. Those specific and broad prescriptions all apply equally to rights of way as to leasing, just as the duty to administer also applies to grazing. *See supra* § I(C). Those mandates also impose enforceable, supervening federal control over New Lands rights of way, in a conventional fiduciary relationship corresponding to that recognized by *Mitchell II* for the BIA right-of way statutes. *See Mitchell II*, 463 U.S. at 223.

Second, to implement those statutory directives, the OMM which governs ONHIR's operations prescribes that "'[a]pplications for rights-of-way . . . on the New Lands shall conform to the requirements of 25 CFR 169.'" Compl. ¶ 101 (quoting OMM § 1810.11); *see* 2 C.F.R. § 700.219(a). The OMM even directs applicants to "refer to those regulations for comprehensive instructions regarding various types of right-of-way applications." OMM § 1810.11. Nothing precludes ONHIR from incorporating BIA rights-of-way regulations to administer the New Lands, just as the Relocation Act incorporates by reference a prior assignment of leasing and rights powers and duties to the BIA. *Compare* OMM § 1810.11 *with* 25 U.S.C. §§ 640d-10(h), 640d-11(c)(2)(A) (referencing Pub. L. 99-190, 99 Stat. 1236). This incorporation applies the same regulations that *Mitchell II* held support enforceable fiduciary duties. *See supra* II(A).

Third, the OMM supplements the BIA rights-of-way regulations with additional prescriptions. Those include requirements for submission of relevant information to ONHIR for a right-of-way application using ONHIR's form, OMM § 1810.11, followed by review by the BIA Navajo Office, the Nation, and the local Navajo Chapter, but not the Relocation Beneficiaries, *id*. § 1810.13, and then final approval by ONHIR using ONHIR's Grant-of-Easement form for signature only by ONHIR, *id*. § 1810.14.1; Compl. ¶ 101. Also, the ONHIR New Lands Manager will attach to the grant document another ONHIR form, entitled "ONHIR Land Clearing,

Excavation and Reclamation Stipulations for Rights-of-Way[.]" OMM § 1810.14.2. "This attachment sets forth stipulations developed by the [BIA] Navajo Area Office for grantees constructing rights-of-way on the Navajo Reservation, and has been adopted by the ONHIR for ROW construction on the New Lands." *Id.* All these specific prescriptions for additional federal control augment fiduciary duties for rights-of way recognized in *Mitchell II* that also apply here.

Finally, the current incorporated BIA rights-of-way regulations were "comprehensively update[d]" in 2015 and are more detailed than those addressed by *Mitchell II* almost four decades ago. *See* BIA Rights-of-Way on Indian Land, Final Rule, 80 Fed. Reg. 72,492, 72492 (Nov. 19, 2015). This includes updated requirements for fair market value absent tribal consent, 25 C.F.R. §§ 169.110, 169.114 (2016), and specific requirements to protect the best interests of Indian landowners, *id*. § 169.124(a)(1)-(2); Compl. ¶ 104. As in *Mitchell II*, these regulations impose enforceable fiduciary duties for federal administration of rights of ways across Indian lands notwithstanding the tribal consent requirement. Compl. ¶ 105. That encompasses Plaintiffs' claims that the United States breached fiduciary duties by failing to retain relevant records necessary to protect Plaintiffs' interests and by realizing less than fair market values for rights of way without tribal consent or fair market value waiver. *Id*. ¶¶ 105-10.

CONCLUSION

For all the above reasons, the additional authorities cited by the Court support that the Court should deny Defendant's Motion to Partially Dismiss Plaintiffs' Complaint regarding Claim 2 for New Lands leasing administration and Claim 3 for New Lands rights-of-way administration.

Respectfully submitted December 8, 2022.

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