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' MOTION TO PARTIALLY DISMISS PLAINTIFFS' COMPLAINT

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THE UNITED STATES' MOTION TO PARTIALLY DISMISS PLAINTIFFS' COMPLAINT

Pursuant to Rule 12(b)(1) and (b)(6) of the Rules of the United States Court of Federal Claims (RCFC), Defendant, the United States, moves to partially dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Specifically, the United States requests that: Plaintiff Identifiable Group of Relocation Beneficiaries' claims be dismissed in their entirety; Plaintiff Navajo Nation's claims accruing before August 26, 2014 be dismissed and the Nation's remaining claims limited to the period after August 26, 2014; Claims 2 and 3 be dismissed in their entirety; Claim 1 be dismissed with respect to its request for trespass damages and penalties against the United States, along with any additional requests for trespass damages; and Plaintiffs' request for equitable relief be dismissed. A memorandum in support of this motion follows.

Introduction

The Navajo and Hopi Land Settlement Act (Settlement Act) authorized the partition of disputed lands between the Navajo Nation and Hopi Tribe. The Act, as amended, requires the United States to take up to 400,000 acres of land, referred to as the "New Lands," into trust to add to the Navajo Reservation. 25 U.S.C. § 640d-10. The Plaintiffs in this suit include the Navajo Nation and Navajo families—known as Relocatees—that at the time of the Settlement Act's enactment had been residing on lands later partitioned to the Hopi.

Plaintiffs' Complaint contains six breach of trust claims alleging that the United States mismanaged the New Lands and revenue from the New Lands. They seek to recover $40 million in monetary damages and to compel the United States to take certain actions regarding the New Lands. Because Plaintiffs' Complaint contains numerous deficiencies, the United States moves for partial dismissal of the Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

First, the Relocatees' claims should be dismissed because they lack an essential element to support jurisdiction: a protectable interest in Tribal property. The Supreme Court has long recognized that Tribal property interests belong to the Native American Tribe, itself, rather than to any individual Tribal members. Here, as directed by the Settlement Act—and as Plaintiffs allege—the New Lands "are expressly held in trust for the Nation," Compl. ¶ 161, not the Relocatees. Similarly, the Settlement Act does not create any individual property rights to the revenue from the New Lands. And the Relocatees cannot bring a claim as an "identifiable

group" under the Indian Tucker Act, because they are Navajo citizens and the Nation represents their interests.

Second, the Navajo Nation is not entitled to a double recovery on claims for which it has already been compensated. The Navajo Nation waived and released many of its present claims in a 2014 settlement between the Nation and the United States. Claim preclusion and the doctrines of waiver and release bar the Nation from relitigating these claims.

Third, Plaintiffs' leasing and rights-of-way claims (Claims 2 and 3) fail for want of a specific money-mandating provision. The Settlement Act, 25 U.S.C. § 640d-10(h), generally instructs that the New Lands "shall be administered" and "used solely for the benefit" of the Relocatees. This is not the sort of "specific" duty regarding leasing or rights-of-way that the Supreme Court and this Court have said could give rise to a breach-of-trust action against the United States under the Tucker Act. The Settlement Act contains certain specific monetary relocation benefits (not at issue here). Otherwise, however, this Court, its predecessor, and the Federal Circuit have previously concluded that the Settlement Act is not money-mandating. The same reasoning applies here. And Plaintiffs do not provide any other authority that establishes jurisdiction for their leasing and rights-of-way claims.

Finally, Plaintiffs identify no authority to support two types of relief sought in the Complaint. Plaintiffs cannot seek trespass damages and penalties from the United States. The regulations Plaintiffs cite make trespassers liable *to* the United

States—they do not give Plaintiffs a claim *against* the United States. Plaintiffs also ask the Court to order the United States to take several specific actions regarding the administration and use of the New Lands and income from the New Lands. But the Court lacks jurisdiction over Plaintiffs' broad claim for equitable relief because it is not "incident of and collateral to" a money judgment. 28 U.S.C. § 1491(a)(2).

Consequently, the Relocatees' claims should be dismissed because they lack standing and, even if they have standing, they cannot invoke the Indian Tucker Act as a basis for jurisdiction. The Nation's claims accruing before August 26, 2014 should be dismissed and its remaining claims should be limited to the period after that date due to the Nation's waiver and release in the 2014 settlement. Plaintiffs' Claims 2 and 3 should be dismissed in their entirety because they are not based on a money-mandating provision in the law. Claim 1 should be dismissed with respect to its request for trespass damages and penalties against the United States, along with any additional requests for trespass damages. And Plaintiffs' request for equitable relief should be dismissed because no such remedy exists at law.

Background

I. The Navajo-Hopi Land Settlement Act of 1974

In 1974, after decades of failed efforts at joint use by members of the Navajo Nation and Hopi Tribe of certain lands in northern Arizona held in trust by the United States and known as the "Joint Use Area" or "JUA," Congress authorized the judicial partition of lands through the Settlement Act, formerly codified as

amended at 25 U.S.C. §§ 640d to 640d-31.[1] *See generally Clinton v. Babbitt*, 180 F.3d 1081, 1084 (9th Cir. 1999). The District Court for the District of Arizona partitioned the lands in 1977, allocating approximately 900,000 acres to each Tribe. The U.S Court of Appeals for the Ninth Circuit approved the partition in *Sekaquaptewa v. MacDonald*, 626 F.2d 113 (9th Cir. 1980). The Settlement Act required Tribal members residing on the JUA to relocate from lands partitioned to the other Tribe.

Separately, the Settlement Act, as amended in 1980 (Pub. L. No. 96-305), directed the Secretary of the Interior to take up to 400,000 acres of land into trust to add to the Navajo Reservation. 25 U.S.C. § 640d-10; Compl. ¶ 25.[2] The bulk of the New Lands are in northeast Arizona contiguous with the Nation's original Reservation. Compl. ¶ 27. However, other portions of the New Lands are spread throughout Arizona and New Mexico. *Id.* ¶ 30. Plaintiffs' Complaint concerns the New Lands and revenue from the New Lands, *id.* ¶ 1, not the partitioned lands.

Through further amendments to the Settlement Act (Pub. L. No. 100-666), Congress created the Navajo Rehabilitation Trust Fund, which is managed by the Navajo Nation. Compl. ¶¶ 113, 140; 25 U.S.C. § 640d-30. The fund is essentially a

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[1] Effective September 1, 2016, the Office of the Law Revision Counsel omitted these provisions from Title 25 from the U.S. Code because they have special and not general application. The full text of 25 U.S.C. § 640d (as codified in 2012, and which has not been amended) is attached as Ex. 1.

[2] For purposes of this Rule 12 motion, the United States cites Plaintiffs' Complaint for applicable background. However, in the event the Court denies this motion and the case proceeds, the United States reserves the right to challenge the validity of any of Plaintiffs' allegations.

loan from the federal government to the Navajo Nation that is to be paid back from the surface and mineral estates of the New Lands located in New Mexico. 25 U.S.C. § 640d-30. Thus, the Settlement Act requires that certain revenue from the New Lands in New Mexico be deposited in the fund. *Id.*; Compl. ¶ 113.

The Settlement Act also created a federal agency—then known as the Navajo and Hopi Indian Relocation Commission and now known as the Office of Navajo and Hopi Indian Relocation (ONHIR)—to administer the New Lands until relocation is complete. 25 U.S.C. §§ 640d-10(h); 640d-11.[3] Although the Department of the Interior administers most Tribal trust land, ONHIR is responsible for administering grazing permits, leases, and rights-of-way on the New Lands. *Id.* § 640d-11(c)(2)(A); Compl. ¶ 100. ONHIR has promulgated regulations that govern grazing on the New Lands. *See* 25 C.F.R. §§ 700.701-731. ONHIR has not promulgated regulations regarding leasing or rights-of-way on the New Lands.

In 2009, ONHIR established and began operating a 64,000-acre ranch on the New Lands, called the Padres Mesa Demonstration Ranch. Compl. ¶ 29. The purpose of the ranch is to teach Relocatees and other Native Americans sustainable cattle ranching, range management, and modern livestock marketing. *Id.* ¶ 49 (noting ONHIR's "outreach with New Lands ranchers"); ONHIR's Management

[3] ONHIR is an independent Federal agency within the Executive Branch. Under the Settlement Act, ONHIR will cease to exist when the President of the United States determines that ONHIR's functions have been fully discharged. 25 U.S.C. § 640d-11(f).

Manual, § 1800, #1870.[4] In a 2018 opinion, the U.S. Government Accountability Office concluded, in part, that ONHIR has statutory authority to operate the Padres Mesa Demonstration Ranch but lacks authority to retain or obligate revenue from the sale of cattle on the ranch. GAO September 17, 2020 Opinion B-329446 at 2. ONHIR, however, contends that GAO's finding on revenue from cattle sales is legally incorrect. *See* GAO July 29, 2021 Opinion B-332596 at 2-3 (summarizing ONHIR's position).

II. Previous trust mismanagement litigation

Fifteen years ago, the Navajo Nation was among more than 100 Tribes that sued the United States in what were coined "Tribal trust cases." Those cases sought an accounting of federally-managed monetary and non-monetary Tribal trust resources and, in some cases, monetary compensation for the alleged mismanagement.

The Navajo Nation sued the United States in this Court for breach of fiduciary duties. *Navajo Nation v. United States*, Case No. 06-945-FMA, ECF No. 1. The Nation, like many other Tribes, settled their Tribal trust case. *See* Dep't of Justice Press Release 14-1046 (Sept. 26, 2014) (attached for the Court's convenience as Ex. 2).[5] The settlement agreement between the Nation and the United States

[4] ONHIR's manual is available at https://www.onhir.gov/assets/documents/mangement-manual/ONHIR-Management-Manual.pdf (last visited on Dec. 20, 2021).

[5] Available at https://www.justice.gov/opa/pr/attorney-general-holder-secretary-jewell-announce-554-million-settlement-tribal-trust (last visited on Dec. 20, 2021).

became effective August 26, 2014. Compl. ¶ 157; *Navajo Nation,* Settlement Agreement Between the Navajo Nation and the United States (*Navajo* Settlement) ¶ 16, attached as Ex. 3. The Nation received $554 million and waived and released claims—including a portion of those in its present Complaint—related to the United States' management of the Nation's monetary and non-monetary trust assets and resources. Compl. ¶ 157; *Navajo* Settlement ¶ 4. This Court dismissed the Nation's case with prejudice pursuant to the stipulation of the parties. *Navajo Nation*, ECF No. 174.

III. The present litigation

In 2021, Plaintiffs filed their Complaint in this Court, seeking monetary damages and a remand for asserted mismanagement of the New Lands and revenue from the New Lands. Compl. ¶ 1. Plaintiffs include the Navajo Nation and over 4,000 Navajo families residing on Hopi Partitioned Lands as of December 22, 1974 (the Relocatees). *Id.* Plaintiffs state that the Relocatees are represented by ten Navajo citizens identified in the Complaint. *Id.* ¶ 19.

Plaintiffs' Claim 1 concerns the use of the New Lands for livestock grazing and seeks compensation for unauthorized grazing and lost revenues. *Id.* ¶¶ 38-58. Claim 2 alleges that ONHIR has failed to properly manage or issue leases on the New Lands. *Id.* ¶¶ 59-98. Claim 3 asserts that ONHIR did not properly administer rights-of-way on the New Lands. *Id.* ¶¶ 99-111. Claim 4 is for alleged failure to promptly collect, deposit, administer, and account for New Lands revenue. *Id.* ¶¶ 112-134. Claim 5 concerns ONHIR's alleged unauthorized expenditures of New

Lands revenue, which Plaintiffs allege is trust money belonging to them. *Id.* ¶¶ 135-144. Claim 6 refers to the United States' alleged failure to promptly invest, earn interest on, and maximize returns from New Lands revenue. *Id.* ¶¶ 145-152.

Plaintiffs request $40 million in damages and also seek an order mandating that the United States take specific actions regarding the administration and use of the New Lands and income from the New Lands and other equitable relief. *Id.*, Request for Relief, 2.

Legal Standards

I. Rule 12(b)(1): Dismissal for lack of subject matter jurisdiction

The United States seeks dismissal of the Relocatees' claims, Claims 2 and 3, and Plaintiffs' request for equitable relief pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 502 (2003) (quoting *United States v. Mitchell* ("*Mitchell II*") 463 U.S. 206, 212 (1983)). Jurisdiction must be established before the court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject-matter jurisdiction unless it is affirmatively indicated by the record; therefore, it is plaintiffs' responsibility to allege facts sufficient to establish the court's subject-matter jurisdiction. *Renne v. Geary*, 501 U.S. 312, 316 (1991); *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("[I]t is settled that a

party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction." (citations omitted)).

Plaintiffs bear the burden of proving by a preponderance of the evidence the facts sufficient to establish that the Court possesses subject matter jurisdiction. *Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). The Court may look to evidence outside of the pleadings and inquire into jurisdictional facts to determine the existence of subject matter jurisdiction. *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). In doing so, the Court may examine relevant evidence to decide any factual disputes. *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999). Plaintiffs cannot rely solely on factual allegations in the Complaint but must bring forth relevant adequate proof to establish jurisdiction. *See McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936).

II. Rule 12(b)(6): Failure to state a claim

The United States also seeks dismissal of the Nation's pre-August 26, 2014 claims and dismissal of Plaintiffs' request for trespass damages and penalties pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. To state a claim, Plaintiffs' Complaint must allege facts showing that they are entitled to relief. RCFC 8(a). *See Huntington Promotional & Supply, LLC v. United States*, 114 Fed. Cl. 760, 766 (2014) (the complaint must "state a claim to relief that is plausible on its face") (internal quotations omitted)). Plaintiffs' obligation to provide supporting factual allegations requires more than labels and

conclusions; a formulaic recitation of a cause of action is not sufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

This Court may consider claim preclusion and affirmative defenses (such as waiver) by way of a Rule 12(b)(6) motion to dismiss. *See Bowers Inv. Co. LLC, v. United States*, 695 F.3d 1380, 1383–84 (Fed. Cir. 2012); *Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 12 (1st Cir. 2004). In evaluating such defenses, this Court is not limited to the pleadings. *Larson v. United States*, 89 Fed. Cl. 363, 382-83 (2009).

Argument

I. The Relocatees' claims should be dismissed.

The Relocatees do not have standing to seek damages based on interests that are held by the Navajo Nation. The Court also lacks jurisdiction over the Relocatees' claims under the Indian Tucker Act, 28 U.S.C. § 1505.

A. The Relocatees lack standing to bring their claims.

Plaintiffs' breach of trust claims concern the New Lands and revenue from the New Lands. The United States expressly holds the New Lands for the benefit of the Navajo Nation, not the Relocatees. The Settlement Act also does not provide the Relocatees with an interest in New Lands revenue. Indeed, Plaintiffs assert that the Navajo Nation—rather than the Relocatees—controls New Lands revenue. Hence, the Relocatees lack standing to assert their claims.

Standing is a threshold jurisdictional issue. *See Steel Co.*, 523 U.S. at 102–104. As the party invoking federal jurisdiction, Plaintiffs bear the burden of

establishing standing. *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002). The Court of Federal Claims applies the same standing requirements as Article III courts. *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009). In order to demonstrate Article III standing, Plaintiffs must show three elements. First, Plaintiffs "must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). Second, Plaintiffs' injuries must be traceable to the defendant's actions. *Id.* Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks and citation omitted).

It is well-established that Tribal property interests are secured to the Native American Tribe itself, rather than to individual Tribal members. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979). In keeping with this principle, the U.S. Court of Claims explained that "individual Indians do not hold vested severable interests in unallotted Tribal lands and monies as tenants in common." *Short v. United States*, 12 Cl. Ct. 36, 42 (1987) (citations omitted). *See also Holt v. Comm'r of Internal Revenue*, 364 F.2d 38, 41 (8th Cir. 1966) ("No individual Indian has title or an enforceable right in Tribal property.").

Accordingly, when a Tribe is the direct trust beneficiary, individual Tribal

members lack the protectable interest necessary to bring mismanagement claims. *Hoopa Valley Tribe v. United States*, 597 Fed. Cir. 1278, 1284 (Fed. Cir. 2010) (because plaintiffs had no individual entitlement to settlement fund, they were not injured by its distribution); *see also Osage Tribe of Okla. v. United State*s, 85 Fed. Cl. 162, 171-72 (2008); *Fletcher v. United States*, 151 Fed. Cl. 487, 496-97 (2020). Even when the ultimate distribution of Tribal funds will be placed to the credit of a group of Tribal members, which the Settlement Act did not stipulate, this does not create a legal right enforceable in the action. *See Chippewa Cree Tribe of Rocky Boy's Reservation v. United States*, 73 Fed. Cl. 154, 163 (2006) (distribution of a judgement award with a detailed plan for distribution of funds to individuals "did not create individual claims against the United States for mismanagement during the time the funds were held in common").

The Relocatees assert that they have been injured by the United States' alleged mismanagement of grazing, leasing, and rights-of-way on the New Lands. Compl. ¶¶ 38-111. The Settlement Act, however, requires the United States to accept title of up to 400,000 acres of lands "in trust for the benefit of the Navajo Tribe as part of the Navajo Reservation." 25 U.S.C. § 640d-10(a). Pursuant to the statute, the United States holds legal title to the New Lands in trust for the benefit of the Navajo Nation, not the Relocatees. *Id.*; Compl. ¶¶ 1, 5, 21, 25, 26, 31, 161. Under the Settlement Act, the New Lands are to be used for the benefit of the Relocatees. 25 U.S.C. § 640d-10(h). But as Plaintiffs acknowledge, the New Lands "are expressly held in trust for the Nation, not individual Indians." Compl. ¶ 161

(citing 25 U.S.C. § 640d-10(a)). The Relocatees do not hold a beneficial interest in any land taken into trust under the Settlement Act. The Navajo Nation is the "sole beneficial owner of land transferred or acquired by the United States in trust" for the Nation pursuant to the Settlement Act. *Id.* ¶ 1 (internal quotation marks omitted). Because the Settlement Act makes the Navajo Nation the direct trust beneficiary, the Relocatees lack standing to seek damages based on mismanagement of the New Lands.

Nor does the Settlement Act create any vested individual rights to New Lands revenue for the Relocatees. *See* Compl. ¶¶ 112-152 (alleging mismanagement of New Lands revenue). With one exception, the Settlement Act does not address or specify who should receive revenue from the New Lands. That limited exception provides that the net income derived by the Navajo Nation from the mineral and surface estate revenue from the New Lands in New Mexico should be deposited in the Navajo Rehabilitation Trust Fund. 25 U.S.C. § 640d-30(b). But the Relocatees do not have a beneficial interest in that fund. Instead, the fund is managed by the Navajo Nation, Compl. ¶ 140, and "shall be available to the Navajo Tribe" for certain rehabilitation and improvement purposes. 25 U.S.C. § 640d-30(d). The Fund terminates, upon petition by the Navajo Nation, when the Secretary of the Interior determines that the goals of the Fund have been met and the United States has been reimbursed. *Id.* § 640d-30(f).

Even if New Lands revenue could be considered communal "[t]he distribution of communal assets . . . does not create an individual right on the part of the

beneficiary where the tribe is 'the channel or conduit through which reimbursement is to flow.'" *Chippewa Cree*, 73 Fed. Cl. at 160 (quoting *Hebah v. United States*, 428 F.2d 1334, 1337–38 (Ct. Cl. 1970)). Thus, even if communal, the Relocatees do not have "individual claims against the United States for mismanagement [of New Lands revenue] during the time the funds were held in common." *Id.* at 163.

Here, Plaintiffs emphasize Tribal control over New Lands revenue. Plaintiffs acknowledge that the revenue in the Navajo Rehabilitation Trust Fund is managed by the Nation. Compl. ¶ 140. And for all other New Lands revenue, Plaintiffs contend that disbursements can only be made if they are approved by the Navajo Nation and accompanied by a resolution from the Tribal governing body. *Id.* Because the Settlement Act does not provide the Relocatees with any individual rights to New Lands revenue, the Relocatees lack standing to assert their revenue claims.

B. The Relocatees are not an identifiable group under the Indian Tucker Act.

Even if the Relocatees had standing, they may not invoke the Indian Tucker Act as a basis for jurisdiction. To bring a claim under the Indian Tucker Act, the Relocatees must show that they are an "identifiable group" pursuant to 28 U.S.C. § 1505. But the Relocatees cannot meet this standard because they are Navajo citizens and are represented by the Nation.

The Indian Tucker Act is a jurisdictional statute that authorizes the Court of Federal Claims to hear claims against the United States brought by "any tribe, band or other identifiable group of American Indians." 28 U.S.C. § 1505. It confers

a waiver of sovereign immunity for "Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe.'" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (quoting 28 U.S.C. § 1505).

Members of a currently-existing Tribe are not an identifiable group for purposes of the Indian Tucker Act. *Osage Tribe of Okla.*, 85 Fed. Cl. at 166-68. For example, the Court of Federal Claims previously held that the Osage headright holders were not an "identifiable group of American Indians." *Id.* at 167–68. The court explained that the relationship between a Tribe and the Tribal members is akin to the relationship between the United States and its citizens, where the United States is presumed to adequately represent its citizens' interests. *Id.* Because the headright holders were members of the plaintiff Osage Tribe, they were represented by the Tribe and were not able to sue as an identifiable group. *Id.*

In contrast, plaintiffs qualify as an identifiable group if they cannot sue as a Tribe or where there is no existing Tribal organization to represent their claims. *See Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 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). For example, descendants of the Pembina Band of Chippewa Indians established jurisdiction as an identifiable group because the Tribe had ceased to exist and they were not represented by any other plaintiffs in the case. *Chippewa Cree Tribe of the Rocky Boy's Reservation*, 69 Fed. Cl. at 673-74. In another case, the lineal

descendants of the loyal Mdewakanton were an identifiable group because they had severed Tribal relations and could not sue as a Tribe, and their interests were not represented by other Tribes in the litigation. *Wolfchild*, 62 Fed. Cl. at 539-40.

The Relocatees describe themselves as an identifiable group and assert jurisdiction under the Indian Tucker Act. Compl. ¶¶ 4, 6-8.[6] But the Relocatees are different from the claimant groups who were able to sue as identifiable groups. They are Navajo citizens, *Id.* ¶ 11-14, 19, and are represented by Plaintiff Navajo Nation. Plaintiffs contend that the Relocatees have an interest in this matter that is separate from the Navajo Nation. *Id.* ¶ 8. Yet the Navajo Nation also brings claims challenging the government's management of the New Lands and New Lands revenue, and the Nation represents the Relocatees' interests here as its constituents. The Navajo Nation adequately represents any interests that the Relocatees may have, because the Nation and the Relocatees "share an interest in maximizing the damages for the breach of trust duties alleged in this action." *Osage Tribe of Okla.*, 85 Fed. Cl. at 172; *see also Round Valley Indian Tribes v. United States*, 102 Fed. Cl. 634, 636 (2011) (Tribal members were adequately represented by the plaintiff Tribe). Because the Relocatees are not a Tribe, band, or other identifiable group of American Indians, this Court lacks jurisdiction over their claims under 28 U.S.C. § 1505.

[6] The Relocatees do not sue as class representatives, *id.* ¶ 19, nor did Plaintiffs style the Complaint as a class action.

II. The Navajo Nation's claims accruing prior to its Tribal trust settlement should be dismissed.

In its prior Tribal trust litigation, the Navajo Nation settled and waived its claims against the United States based on harms occurring before August 26, 2014. The Nation seeks to litigate these claims again, but claim preclusion and the doctrines of waiver and release block it from doing so. Accordingly, the portions of the Nation's claims (Claims 1-6) accruing before August 26, 2014 should be dismissed and the Nation's remaining claims should be limited to the period after that date.

Claim preclusion protects litigants from the "burden of relitigating an identical issue with the same party or his privy" and it promotes "judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 (1979). "The general concept of claim preclusion is that when a final judgment is rendered on the merits, another action may not be maintained between the parties on the same claim, and defenses that were raised or could have been raised in that action are extinguished." *Hallco Mfg. Co. v. Foster*, 256 F.3d 1290, 1294–95 (Fed. Cir. 2001) (internal quotation marks omitted). "Accordingly, a second suit will be barred by claim preclusion if: (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first." *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362–63 (Fed. Cir. 2000) (citing *Parklane,* 439 U.S. at 326 n. 5). A settlement agreement is a final judgment on the merits for the

purposes of a claim preclusion analysis. *Ford-Clifton* v. *Dept. of Veteran Affairs*, 661 F.3d 655, 660 (Fed. Cir. 2011).

The interpretation of settlement agreements is a matter of law. *Mays v. United States Postal Serv.*, 995 F.2d 1056, 1059 (Fed. Cir. 1993). Settlements to which the government is a party are interpreted according to federal law. *Prudential Ins. Cos. of Am. v. United States*, 801 F.2d 1295, 1298 (Fed. Cir. 1986). Parties entering into a settlement agreement must "expressly reserve in the agreement any rights that they wish to maintain beyond the date of the settlement agreement." *Augustine Med., Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1373 (Fed. Cir. 1999). Any exclusions from a waiver or release must be "explicit" and "manifest" in the agreement itself. *Id.* (quoting *United States v. William Cramp & Sons Ship & Engine Bldg.*, 206 U.S. 118, 128 (1907); *Johnson, Drake & Piper, Inc. v. United States*, 531 F. 3d 1037, 1047 (Ct. Cl. 1976)). If the language of a settlement clearly bars future claims, the plain language governs. *King v. Dep't of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997).

The Navajo Nation litigated claims regarding the United States' management of its trust funds and non-monetary trust assets or trust resources in this Court. As Plaintiffs explain, "the Nation entered into a settlement agreement with the United States effective August 26, 2014, which waived any claims for it before that date . . . ." Compl. ¶ 157. Specifically, in exchange for $554 million, the Navajo Nation waived and released:

> *any and all* claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, *known or unknown*, regardless of legal

> theory, for any damages or any equitable or specific relief, that are based on the harms or violations occurring before [August 26, 2014] and that relate to the United States' management or accounting of Navajo's trust funds or Navajo's non-monetary trust assets or trust resources.

Navajo Settlement ¶ 4 (emphasis added).

Each of the Navajo Nation's claims (Claims 1-6) are based, in part, on harms occurring before August 26, 2014. Partial dismissal is warranted because the claims in this case (1) relate to the United States' management of the Nation's non-monetary trust assets or trust resources (the New Lands); (2) management or accounting of the Nation's alleged trust funds; and (3) rest on alleged harms or violations that partially predate, and were covered by the *Navajo* Settlement.

A. Claim preclusion bars the Navajo Nation from relitigating claims that it raised or could have raised in its Tribal trust litigation.

All elements necessary for claim preclusion are met here. First, the Nation's prior Tribal trust case and the present one involve the same parties. Second, there was a final judgment on the merits. *Ford-Clifton*, 661 F.3d at 660. The *Navajo* Tribal trust litigation ended with a consent settlement, wherein the Navajo Nation waived all claims related to the management of its trust funds and non-monetary trust assets prior to August 26, 2014. Compl. ¶ 157; *Navajo* Settlement ¶ 4; *Navajo Nation*, ECF No. 174 (dismissal of case). This settlement, and dismissal of the case with prejudice, therefore acts as a final judgment.

Third, the present Complaint is based on the same set of transactional facts as *Navajo*. "[A] common set of transactional facts is to be identified pragmatically."

Jet, Inc., 223 F.3d at 1363 (internal quotation marks omitted). "[R]egardless of shared forms of relief or theories of liability, two suits share the same operative facts when the facts that are relevant and material to *some* theory of liability are the same in each." *Lower Brule Sioux Tribe v. United States*, 102 Fed. Cl. 421, 424 (2011)).

Two cases involve the same set of operative facts when "in each action, the courts must consider the government's management and administration of plaintiff's trust by reviewing the government's alleged failure to maintain records and account for plaintiff's trust property." *Ak-Chin Indian Cmty. v. United States*, 80 Fed. Cl. 305, 319 (2008). The *Ak-Chin* court rejected the argument that different trust duties—such as the duty to account and the duty to invest and deposit trust funds—resulted in different sets of transactional facts. *Id.* "The nature of Indian trust cases and the government's trust responsibility owed to Indian tribes does not lend itself to a simple delineation or separation of operative facts as they pertain to the government's various duties owed to Indian tribes." *Id.* The court found, therefore, that because both cases would involve "considering any existing records related to the government's collection, handling, and investment of the Community's trust funds and property," they arose from the same operative facts. *Id.* Other Court of Federal Claims cases have held similarly.[7]

[7] *See, e.g.*, *Wyandot Nation of Kansas v. United States*, 115 Fed. Cl. 595, 601(2014); *Lower Brule Sioux*, 102 Fed. Cl. at 425–26; *Prairie Band of Potawatomi Indians v. United States*, 101 Fed. Cl. 632, 636–37 (2011); *Iowa Tribe of Kan. & Neb. v. United States*, 101 Fed. Cl. 481, 484 (2011); *Winnebago Tribe of Nebraska v. United States*, 101 Fed. Cl. 229, 233–34 (2011); *Omaha Tribe of Neb. v. United States*, 102 Fed. Cl.

This case and *Navajo* arise from the same set of factual allegations. *See Ammex*, 334 F.3d at 1056. Both cases allege that the United States mismanaged the Nation's trust funds and its non-monetary trust assets, such as its trust lands, and that this mismanagement resulted in economic loss to the Nation and its trust assets. *See Navajo*, ECF No. 1, Compl. ¶ 1; *Navajo* Settlement at 1; Compl. ¶ 1. The Nation sought damages from the United States for breach of fiduciary duty in the mismanagement of its trust assets, *Navajo* Compl. ¶¶ 35-3, and Plaintiffs' Complaint makes the same allegations, Compl. ¶¶ 57-58, 97-98, 110-111, 133-134, 143-144, 151-152. The trust corpus is the same. In addition, Plaintiffs rely partially upon the same sources of law to support their assertion of fiduciary duty as *Navajo*. *See* Compl. ¶¶ 130, 140, 146-49; *Navajo* Compl. ¶ 5.d., e. Plaintiffs may allege different breaches of fiduciary duty from those asserted in *Navajo*, but they "all spring from the same set of facts." *Wyandot Nation*, 115 Fed. Cl. at 599; *see also Passamaquoddy Tribe*, 82 Fed. Cl. at 284–85 (noting that "it is of no consequence that plaintiff styles its suits to focus on different trust duties, when the proof of breach of each of those purportedly distinct duties will necessarily require review of the same facts").

The situation here is the same as in *Ak-Chin*: the Court would need to review the same records relating to the United States' alleged mismanagement of

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377, 382–90 (2011); *Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256, 284–85 (2008). These suits involved 28 U.S.C. § 1500, but the Supreme Court has noted that "[c]oncentrating on operative facts is also consistent with the doctrine of claim preclusion. . . ." *United States v. Tohono O'Odham*, 563 U.S. 307, 315 (2011).

the Navajo Nation's trust funds and non-monetary trust assets that were at issue in *Navajo*. The two cases are therefore based on the same set of operative facts and claim preclusion prevents the Nation from returning to this Court to request additional damages based on a new theory of mismanagement arising from these facts. Thus, the Nation's claims (Claims 1-6) should be limited to the period after August 26, 2014.

B. The Navajo Nation waived any claims occurring before August 26, 2014.

Even if claim preclusion does not temporally limit the Nation's claims, the *Navajo* Settlement's plain language makes clear that the Nation waived its present claims if those claims are based on harms or violations occurring before August 26, 2014. *See* Compl. ¶ 157 ("the Nation entered into a settlement agreement with the United States effective August 26, 2014, which waived any claims for it before that date . . . .").

The stipulations in the *Navajo* Settlement are very broad and plainly cover the types of claims at issue in the Complaint. *Navajo* Settlement ¶ 4 (waiving "any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever"). *See Augustine Medical, Inc.*, 194 F.3d at 1372 (general language such as "any and all manner of action or actions" has consistently been held to waive "all claims based upon events occurring prior to the date of release") (quoting *Johnson, Drake & Piper, Inc.*, 531 F. 2d at 1047)); *Shoshone-Bannock Tribes v. Bernhardt*, 486 F. Supp. 3d 61, 65 (D.D.C. 2020) (broad waiver language in Tribal trust settlement unambiguously waived Tribe's right-of-way claims).

The waiver in the *Navajo* Settlement applies to the types of claims Plaintiffs bring here because the waiver covers all claims that "relate to" the United States' management of the Nation's "non-monetary trust assets or trust resources." *Navajo* Settlement ¶ 4. The Complaint alleges that the New Lands are held in trust for the Nation. Compl. ¶¶ 1, 5, 21, 25, 26, 31, 161. Claims 1-3 then assert that the United States has in some way failed to manage the New Lands. *Id.* ¶¶ 38-111 (alleging mismanagement of grazing, leasing, and rights-of-way on the New Lands). Thus, each of these claims "relate to" the federal government's "management" of the Nation's "non-monetary trust assets or trust resources"—its trust land. *Navajo* Settlement ¶ 4.

Take, for example, Claim 1, in which Plaintiffs seek compensation for alleged unauthorized grazing and trespass on New Lands, and contend that they have been deprived of revenue that should have been earned from grazing permits. Compl. ¶¶ 38-58. That claim plainly relates to management of the Nation's trust resources. Indeed, the *Navajo* Settlement even listed, as an example of waived claims, any claims that the United States failed to "preserve, protect, safeguard, or maintain Navajo's non-monetary trust assets or trust resources," "prevent trespass," "enforce the terms of any permits," "make Navajo's non-monetary trust assets or trust resources productive," and "improperly or inappropriately . . . used" such assets or resources. *Navajo* Settlement ¶ 4.b.1, 4, 7, 8, 10.

The same is true for Claims 2 and 3, Plaintiffs' breach of trust claims for New Lands leasing (Compl. ¶¶ 59-98) and rights-of-way (*Id.* ¶¶ 99-111). Those claims

arise from ONHIR's alleged failure to keep a full inventory of leases on New Lands, obtain leases from occupants on New Lands, ensure that the Navajo Nation concurred with leases and that payments are made to the Nation, require fair market value for leases and rights-of-way, and obtain additional revenue from leasing and administering rights-of-way on the New Lands. The *Navajo* Settlement again explicitly listed as an example of waived claims those alleging that the federal government had failed to "manage . . . leases of Navajo's trust lands, easements across Navajo's trust lands, and other grants to third parties of authority to use Navajo's trust lands." *Navajo* Settlement ¶ 4.b.6. The *Navajo* Settlement further waived any claims that the United States failed to "record or collect … rents, fees, or royalties," "report" or "provide information about its actions or decisions relating to, or prepare an accounting of Navajo's non-monetary trust assets or trust resources," "make" such assets or resources "productive," and "permitted the[ir] misuse." *Id.* ¶ 4.b.1, 3, 5, 9.

Plaintiffs' remaining claims fare no better. The Complaint alleges that Arizona New Lands revenue should be deposited in a federally held trust account and that New Mexico New Lands income should be deposited in the Navajo Rehabilitation Trust Fund. Compl. ¶¶ 116-19; 127-131; 137; 150; 161. And, in Claims 4-6, Plaintiffs contend that the United States mismanaged or failed to account for New Lands revenue. *Id.* ¶¶ 112-52. These claims "relate to" the United

States' "management or accounting" of Plaintiffs' alleged trust funds.[8] *Navajo* Settlement ¶ 4. For example, Claim 4 stems from the United States' alleged failure to promptly collect, deposit, administer, and account for New Lands revenue. But the *Navajo* Settlement waived any claims that the United States failed to "collect . . . rents, fees, or royalties," "deposit monies into trust funds . . . in a proper and timely manner," and any obligation "to provide a historical accounting or reconciliation of Navajo's trust funds." *Id.* ¶ 4.a, b.3, c.3. Claim 5 concerns ONHIR's alleged unauthorized expenditures of New Lands revenue, but the *Navajo* Settlement released the United States from any claim that it "disbursed monies without proper authorization." *Id.* ¶ 4.c.4. And the *Navajo* Settlement waived any claims, like those alleged in Claim 6, that the United States failed to "invest tribal income in a timely manner" and "obtain an appropriate return on invested funds." *Id.* ¶ 4.c.1, 2.

The Complaint also alleges that many of the harms or violations in question occurred prior to August 2014. Much of Claim 1 concerns ONHIR's alleged unauthorized grazing and trespass at Padres Mesa Ranch, Compl. ¶¶ 49-52, but Plaintiffs concede that ONHIR has used the ranch in this way since 2009. *Id.* ¶ 29. In Claim 2, Plaintiffs challenge the New Lands leasing records for businesses

[8] The United States does not concede that all revenue from the New Lands is trust income. But, for purposes of this motion to dismiss, the United States accepts Plaintiffs' allegation that such revenue is trust income as true. *See, e.g. Toro v. United States*, 126 Fed. Cl. 60, 62 (2016), *aff'd*, 684 F. App'x 969 (Fed. Cir. 2017). If the revenue from the New Lands is not trust income, there would be no basis for a breach of trust claim in the first place.

operating as early as 1985. *Id.* ¶ 75. Plaintiffs also challenge ONHIR's alleged failure to obtain leases at properties in 2005 and 2011 and at Padres Mesa Ranch, *id.* ¶¶ 74-76; to ensure that the Nation concurred with leases in 2006 and 2012, *id.* ¶¶ 85-86; and to require fair market value for three leases entered into before August 2014, *id.* ¶¶ 92-94. Similarly, the harms alleged in Claim 3 concern rights-of way approved by ONHIR between 1990 and 2008. *Id.* ¶¶ 106-108. Plaintiffs' New Lands revenue claims also reference revenue from Padres Mesa Ranch, *id.* at ¶¶ 127, 141, leases that pre-date 2014, *id.* ¶¶ at 129-130, and speak generally about revenue from the New Lands, most of which were acquired in trust long before 2014. *Id.* ¶ 27 ("[a]bout 352,000 acres of the New Lands were acquired in trust in 1987").

Such claims fall within the *Navajo* Settlement Agreement's temporal scope. *Navajo* Settlement ¶ 4. The Nation contends that at most, it received notice of its potential claims regarding the New Lands and resulting revenue in 2018. Compl. ¶ 156. Notably, the waiver and release does not require that a claim actually accrued, in the sense that the Nation had notice of the claim, before August 2014. *Navajo* Settlement ¶ 4 (waiving claims "known or unknown"). And Plaintiffs concede that the Settlement Agreement waived any claims the Nation had prior to August 26, 2014. Compl. ¶ 157. In sum, the Nation's pre-August 26, 2014 breach of trust claims were settled in the *Navajo* litigation, whether they were known or unknown. When the Nation was compensated for its non-monetary trust asset and trust fund mismanagement claims, it waived, released, and forever discharged the United

States from liability for those claims. The Nation cannot re-litigate these waived claims and they should be dismissed.

III. The leasing and rights-of-way claims should be dismissed because Plaintiffs fail to identify a money-mandating statutory or regulatory trust duty.

Plaintiffs' leasing and rights-of-way claims (Claims 2 and 3) should also be dismissed because they fail to identify a money-mandating duty that the United States owes to Plaintiffs, which is required to trigger the Court's jurisdiction under the Tucker Act.

A. Plaintiffs must establish a money-mandating duty to support Tucker Act jurisdiction for their claims.

Plaintiffs assert that jurisdiction exists in this case under the Tucker Act, 28 U.S.C. §1491 and the Indian Tucker Act, 28 U.S.C. § 1505. Compl. ¶¶ 2-4. As explained above, the Indian Tucker Act does not provide a basis for this Court's jurisdiction because the Relocatees are not an "identifiable group" for purposes of jurisdiction under § 1505. *See, e.g.*, *Osage Tribe of Okla.*, 85 Fed. Cl. at 166-68. In any event, the Indian Tucker Act provides essentially the same access to relief as the Tucker Act, 28 U.S.C. § 1491(a)(1). *White Mountain Apache Tribe*, 537 U.S. at 472 (citing 28 U.S.C. § 1505). But, neither the Tucker Act nor the Indian Tucker Act creates substantive rights enforceable against the United States for money damages. *United States v. Navajo Nation,* 556 U.S. 287, 290 (2009) ("*Navajo II*"). In addition to invoking the two acts, Plaintiffs have to establish, among other things, a money-mandating legal duty imposed upon the United States by some other constitutional, statutory, or regulatory provision. *Id.* at 290-91.

The Supreme Court has held that there are "two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act" for a non-contract claim. *Id.* at 290. "First, the tribe 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" *Id.* (quoting *Navajo I,* 537 U.S. at 506). "The 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). "[A]n Indian tribe must identify statutes or regulations that both impose a specific obligation on the United States and bear[] the hallmarks of a conventional fiduciary relationship." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (citation and quotation marks omitted). "[A] statute or regulation that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty." *Id.* (citation omitted). Thus, the analysis must "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo II*, 556 U.S. at 301 (internal quotation marks omitted).

Second, and only after a Tribe identifies a substantive source of law, "the court must then determine whether the relevant source of law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Navajo II*, 556 U.S. at 290–91 (quoting *Navajo I*, 537 U.S. at 506). This second showing reflects the understanding that jurisdiction cannot be premised on the asserted violation of regulations that do

not specifically authorize awards of money damages. *United States v. Testan*, 424 U.S. 392, 400–01 (1976) (citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)); *see Navajo I*, 537 U.S. at 503, 506. To be money-mandating in breach, "the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *Eastport S.S. Corp.*, 372 F.2d at 1007. A statute is not money-mandating where "it does not specify the amount to be paid or the basis for determining such account." *Perri v. United States*, 340 F.3d 1337, 1342 (Fed. Cir. 2003). "Unless the statute requires the payment of money damages, there has been no waiver of the government's sovereign immunity from liability for such damages, and the Court of Federal Claims [does] not have jurisdiction to entertain the claim." *Id.* at 1340-41.

B. Plaintiffs fail to identify a money-mandating statutory or regulatory trust duty for Claims 2 and 3.

Here, Plaintiffs allege the United States breached its fiduciary duties in: (1) allowing occupation of New Lands properties without a lease, failing to lease New Lands, obtain fair market value for rent, seek consent from the Nation, or maintain records; and (2) failing to obtain fair market value for rights-of way, seek consent from the Nation, or maintain records. Compl., ¶¶ 59-111.

The problem for Plaintiffs is that the Settlement Act does not contain any specific fiduciary or other duty regarding leasing or rights-of-way. Indeed, this Court, its predecessor, and the Federal Circuit have examined the Settlement Act and found that, other than certain specific relocation benefits, the Act is not money-

mandating. Similarly, none of Plaintiffs' other authorities establish a specific money-mandating duty in support of their claims.

1. The Settlement Act creates no duty that supports Plaintiffs' claims.

Plaintiffs' primary hook for the United States' alleged duties can be found in one provision of the Settlement Act, 25 U.S.C. § 640d-10(h). Compl. ¶¶ 21, 31, 32, 60, 67, 100. This provision provides that the New Lands "shall be administered by" ONHIR and "used solely for the benefit" of the Relocatees until relocation is complete. But the vague mandate in § 640d-10(h) does not establish any "specific fiduciary or other dut[y,]" regarding leasing and rights-of-way on the New Lands. *Navajo I*, 537 U.S. at 506.

Instead, Plaintiffs' claim here is on par with claims as to which the Supreme Court found that the statutes invoked by Tribes did not establish the requisite specific fiduciary duty to allow claims to proceed. For example, in *Mitchell I,* the Supreme Court addressed the question of whether the General Allotment Act, which authorized the Secretary to allot land to each Indian residing on a reservation, and to hold the land in trust for them, provided a waiver of sovereign immunity supporting Tucker Act jurisdiction. *United States v. Mitchell*, 445 U.S. 535, 540-41 (1980). The Court held that the General Allotment Act created only a limited trust relationship between the United States and the allottees, and "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* at 542. *See also Navajo I*, 537 U.S. at 501 (statute requiring Interior to approve mineral leases on

reservation lands was insufficient, in part, because it prescribed no other specific duties).

The U.S. Court of Claims reached a similar conclusion, when it examined the Settlement Act in *Begay v. United States*. 16 Cl. Ct. 107 (1987), *aff'd*, 865 F.2d 230 (Fed. Cir. 1988). In *Begay*, several relocatees brought an action against the government under § 640d-12(c) (relocation plan) and § 640d-14(b)(2) (purchase of replacement dwellings) for damages they allegedly suffered from their relocation. The court explained "it is only a special, very pervasive trust relationship, based on a statute(s), which can give rise to a claim that is cognizable in this court." *Id.* at 124. But the court found that Congress did not intend to create this sort of trust relationship by enacting § 640d-12(c), nor did Congress spell out the duties of such a trust relationship. *Id.* at 126. The court also concluded that there was no broad trust duty under § 640d-14. *Id.* ("The section can hardly be read as creating an all encompassing trust duty, like that found in *Mitchell II* . . . ."). Instead, the court found that the United States had a limited duty to provide a fixed amount of benefits to be paid under § 640d-14. *Id.* Likewise, in this case, § 640d-10(h) is insufficient to satisfy the jurisdictional requirement that the Settlement Act impose the specific leasing and rights-of-way duties that the United States is alleged to have failed to perform.

Plaintiffs also rely on the fact that ONHIR "*may* issue leases and rights-of-way for housing and related facilities" on the New Lands. Pub. L. No. 99-190, 99 Stat. 1185, 1236 (1985) (authority previously held by Interior, which has now been

transferred to ONHIR) (emphasis added); Compl. ¶¶ 60, 100. But Plaintiffs are wrong to imply that this requires ONHIR to take any specific actions regarding leasing or rights-of-way on the New Lands. ONHIR has authority to take certain actions, but the statute does not *require* any actions. Such discretionary language cannot form the basis of a specific and enforceable duty. *Hopi Tribe v. United States*, 55 Fed. Cl. 81, 89 (2002) (because the Settlement Act makes reimbursement of legal fees discretionary, § 640d-7(e) is not money-mandating). *See also Wolfchild v. United States*, 731 F.3d 1280, 1289 (Fed. Cir. 2013) ("The Secretary's authority to act [as provided in statute] does not support inference of the asserted duty to act (enforceable by a suit for money damages.").

Further, although Plaintiffs cite to 25 U.S.C. §§ 640d-10(h) (lands administration), 640d-11(a) (ONHIR's establishment), and 640d-11(c) (transfer of powers, duties, and appropriated funds from ONHIR's predecessor and Interior to ONHIR), Plaintiffs do not establish that those sections would be money-mandating. Compl. ¶¶ 60, 67, 100. "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. In *Begay*, the Court of Claims held that money-mandating benefits under the Act include payments for "purchasing the relocatees' property, § 640d-14(a); replacement dwellings, § 640d-14(b)(2); moving expenses, § 640d-14(b)(1) and relocation bonuses, § 640d-13(b)." *Begay*, 16 Cl. Ct. at 121. Other than those specific relocation benefits provided for in §§ 640d-13 and 14 (which Plaintiffs do not

cite), as the Federal Circuit explained, the Settlement Act cannot be "fairly interpreted as mandating compensation by the Federal Government." *Begay,* 865 F.2d at 231. Plaintiffs therefore fail to establish a money-mandating duty for their claims under the Settlement Act.

2. No other statutory authority creates any such duty.

Plaintiffs rely on other statutes, but none provide jurisdiction for Plaintiffs' claims. Plaintiffs cite the Non-Intercourse Act, Compl. ¶ 79, but the Supreme Court has long held that this statute does not apply to the United States. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960) ("[Section] 177 is not applicable to the sovereign United States"). And the Non-Intercourse Act does not set forth any specific, mandatory fiduciary duties with respect to the United States. *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1373 (Fed. Cir. 2001). The Act creates a discretionary general trust relationship that permits, although does not require, enforcement of its provisions by the Executive Branch. *See Inupiat Cmty. of the Arctic Slope v. United States*, 680 F.2d 122, 131 (Ct. Cl. 1982) (discussing § 177 and finding "[t]here is nothing here that waives sovereign immunity").

Plaintiffs also reference the Federal Records Act. Compl. ¶¶ 74, 107. But as a statute of general applicability, it does not set forth specific fiduciary duties, let alone money-mandating ones. *See White Mountain Apache v. United States*, No. 17-359C, 2021 WL 5983806 *10 (Fed. Cl. Dec. 16, 2021) (statute of general applicability did not establish a fiduciary relationship between the government and Tribe).

Indeed, the Act does not create a private right of action. *See Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 148-150 (1980) (no provision in the Federal Records Act expressly or impliedly confers a private right of action). Thus, claims based on the Federal Records Act are not cognizable in this Court. Accordingly, Plaintiffs cannot use the Non-Intercourse Act and Federal Records Act to identify a specific money-mandating duty in support of their claims.

3. ONHIR's Management Manual is not law and creates no duties.

Plaintiffs rely heavily on ONHIR's management manual. Compl. ¶¶ 60, 62-68, 72-74, 81, 83-87, 91, 101. But it is not a substantive source of law—a treaty, statute, or regulation—the violation of which could confer subject matter jurisdiction on the Court of Federal Claims.

Plaintiffs make much of 25 C.F.R. § 700.219(a), which states that ONHIR "shall be governed" by its management manual. Compl. ¶ 35. That regulation, however, goes on to establish that the manual is only intended to implement "policies, procedures and instructions" necessary to ONHIR's day-to-day operations and administration. *Id.* The management manual, itself, also states that it provides guidance and it is not intended to be binding. ONHIR's Management Manual at 1 ("deviations from the procedures set forth in the Manual may be made where appropriate").

ONHIR's manual is for agency guidance only. The manual was not published in the Federal Register, and does not have the force of a law or regulation. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979) ("rules of agency organization, procedure,

or practice" do not have the force of law); *Killip v. Office of Pers. Mgmt*, 991 F.2d 1564, 1569 (Fed. Cir. 1993) (even if the policy manual is considered "interpretive" of the statute at issue, it lacks the force and effect of law). As such, the manual does not provide the basis for a claim founded on an Act of Congress or implementing regulation, as required by the Tucker Act. *Anderson v. United State*s, 85 Fed. Cl. 532, 543 (2009) (The Department of Veterans Affairs Policy Manual "cannot be used as a money-mandating source of law to confer jurisdiction on this court because the Policy Manual does not have the force of law.").

Because they are cited in ONHIR's management manual, Plaintiffs also identify the Bureau of Indian Affairs' rights-of-way regulations, 25 C.F.R. § 169, as a substantive source of law upon which Claim 3 is based. Compl. ¶ 101. But these regulations govern the process for obtaining BIA approval of rights-of-way. 25 C.F.R. § 169.1(a). ONHIR, a federal agency that is separate and independent from BIA, has never promulgated its own rights-of-way regulations, and ONHIR (not BIA) possesses the powers and duties related to issuing rights-of-way on the New Lands. 25 U.S.C. § 640d-11(c)(2)(A); Compl. ¶ 100. Plaintiffs cannot co-opt BIA's regulations to provide jurisdiction for their claim.

4. Control over the New Lands imposes no money-mandating duty on the United States.

Plaintiffs also emphasize the United States' alleged "comprehensive and exclusive control over the New Lands." *See, e.g.*, Compl. ¶ 33. But Plaintiffs are wrong in implying that the United States' alleged authority and control over these lands, standing alone, creates money-mandating fiduciary obligations. "The

Federal Government's liability cannot be premised on control alone." *Navajo II*, 556 U.S. at 301. Plaintiffs cited multiple statutes and other sources as purportedly providing jurisdiction for their claims. But it is Plaintiffs' burden to demonstrate that their claims are based on "'specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Id.* (quoting *Navajo I,* 537 U.S. at 506). Because Plaintiffs have failed to identify a specific money-mandating duty in support of their claims, their leasing and rights-of-way claims (Claims 2 and 3) should be dismissed.

IV. Plaintiffs cannot seek trespass damages and penalties from supposed trespass by the United States.

Citing ONHIR's grazing regulations, Plaintiffs contend that ONHIR is subject to trespass damages and penalties because the agency failed to issue *itself* a permit for livestock grazing at Padres Mesa Demonstration Ranch. Compl. ¶¶ 50-51, 55, 57, 128, 129. But ONHIR's grazing regulations do not give Plaintiffs a claim for trespass damages and penalties against the United States.

ONHIR's grazing regulations prohibit certain acts of livestock trespass. 25 C.F.R. § 700.725. They set forth civil penalties and allow ONHIR to collect damages for property injured or destroyed from owners of trespassing livestock. *Id.* But there is nothing in the regulations that suggest that ONHIR could itself be subject to, or that Plaintiffs could be entitled to receive, the penalties and damages provided for in 25 C.F.R. § 700.725. Indeed, § 700.725(e) states, "All payments for such [livestock trespass] penalties and damages *shall be paid to [ONHIR's] Commissioner* for use as a range improvement fund." (emphasis added).

In *Shoshone Indian Tribe of Wind River Reservation, Wyoming v. United*

States, this Court explained that when "[t]he plain language of the regulation ma[de] trespassers liable to the United States," the Tribe could not seek trespass damages from the United States. 56 Fed. Cl. 614, 628 (2002). Like in *Shoshone Indian Tribe*, Plaintiffs cannot pursue trespass damages and penalties from the United States, when ONHIR's grazing regulations expressly afford that remedy to the United States. Thus, Claim 1 should be dismissed with respect to its request for trespass damages and penalties against the United States, along with any additional requests for trespass damages.

V. The Court lacks jurisdiction over Plaintiffs' claims for equitable relief.

Plaintiffs seek an order requiring the United States to take specific actions regarding the administration and use of the New Lands and income from the New Lands. Compl., Request for Relief, 2. Because the Court lacks jurisdiction to grant this type of equitable relief, this claim for relief should be dismissed.

The Court of Federal Claims lacks general jurisdiction to provide declaratory and injunctive relief. *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1294 (Fed. Cir. 1999) (the court "cannot grant nonmonetary equitable relief such as an injunction or declaratory judgment, or specific performance"). Instead, this Court's ability to award equitable relief is limited to those circumstances when such relief is "incident of and collateral to" a money judgment. 28 U.S.C. § 1491(a)(2). In such cases, the Court may "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." *Id.*

Plaintiffs' second request for relief does not fit within the categories allowed under § 1491(a)(2). Plaintiffs ask the Court to order the United States to: properly administer and use the New Lands; maintain records for the New Lands; collect, deposit in trust, and invest New Lands revenue; seek authorization from the Nation for expenditures; and pursue actions for trespass, damages, and ejectment against third parties on the New Lands. Compl., Request for Relief, 2. But this is not within the definition of "incident of and collateral to" the money judgment demanded by Plaintiffs and it has no place before the Court of Federal Claims. *Tohono O'odham Nation*, 563 U.S. at 313. *See also Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000) (reversing judgment because "the trial court strayed from the realm of legal remedies into that of equity"); *Smalls v. United States*, 87 Fed. Cl. 300, 307 (2009) (the court lacked jurisdiction over plaintiff's claim for injunctive relief seeking an order that the government take specific action).

Conclusion

The United States requests that the Relocatees' claims be dismissed for lack of standing, Claims 2 and 3 be dismissed in their entirety, and that the Nation's remaining claims be limited to the period after August 26, 2014. Further, Claim 1 should be dismissed with respect to its request for trespass damages and penalties against the United States, along with any additional requests for trespass damages, and Plaintiffs' request for equitable relief.

Respectfully submitted this 21st day of December, 2021.

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