IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ROGER BIRDBEAR, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	No. 16-75L Honorable Elaine D. Kaplan

UNITED STATES POST-TRIAL BRIEF

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INTRODUCTION

After eight years of litigation and 10 days of trial, the evidence shows that the government met any money-mandating duty owed to the Birdbear Plaintiffs and no damages are due.

First, the government has not breached any money-mandating trust duties. Even now, Plaintiffs fail to articulate the specific statutory or regulatory duties they allege the government has breached. Instead, Plaintiffs point to a handful of documents and rely extensively on testimony from a single, long-retired BLM witness. But the law requires a showing that the government failed to comply with specific duties set forth in a statute or regulation. And the evidence shows that the relevant offices followed the applicable regulations and guidance.

Second, there is no basis for damages. While damages are relevant only if the Court finds a breach of a money-mandating duty, the evidence presented by the Parties shows (even assuming a breach) there is no basis for anything but *de minimis* damages. For the diligence and flaring claims, no damages are due. For Count 3, the government's experts found a potential for a small amount of drainage. But in all claims, Plaintiffs' proposed damages are not based on sound methodologies and result in amounts that are orders of magnitude too high. These asserted damages cannot qualify as compensatory damages within the limits on the Court's jurisdiction.

Third—ignoring that equitable relief is outside the Court's jurisdiction—there has been no unfairness to Plaintiffs. The evidence shows that BLM went above and beyond what the rules required—and what the agency did for other allottees—in performing studies and responding to Plaintiffs' questions. Plaintiffs' royalties tell a similar story. They made millions of dollars during the Bakken oil boom, despite arguing that the government let their trust property "fall into

ruin on its watch." *Compare* US-332 (stating precise amount earned between 2007 and May 2023, which Plaintiffs have stated is confidential) *with* ECF No. 364 ("Pl. Br") at 1.

Despite all this, Plaintiffs ask this Court to order another massive payday, including payments for resources for which they have already been paid or can expect to be paid in the future. For instance, Plaintiffs

- Ask to be paid for drainage when they are being paid for the same resources through communitization agreements;
- Ask to be paid for drainage when the same resources are being produced from another tract they own and for which they receive royalties;
- Ask to be paid for hypothetical diligence volumes when the resources remain on their tracts and could later be produced for royalty payments;
- Ask to be paid for vented and flared gas when BLM is separately determining whether such payments are required so that Plaintiffs have been paid or will be paid in the future as warranted;
- Ask to be paid even after giving away the tracts at issue.

After eight years, Plaintiffs have been fully and fairly heard. The evidence shows (i) there has been no breach of any money-mandating duty; (ii) even if there were a breach, there is no basis for damages beyond *de minimis* damages for drainage; and (iii) there is no unfairness to Plaintiffs. The United States respectfully requests a finding of no liability on all three counts and that judgment be entered in favor of Defendant.

APPLICABLE LEGAL PRINCIPLES

I. Legal Standard For Proving A Breach Of Fiduciary Duties

A. The burden of proving jurisdiction and breach rests with Plaintiffs

Plaintiffs bear the burden of establishing subject-matter jurisdiction by a preponderance of the evidence. *Inter-Tribal Council of Ariz., Inc. v. United States*, 956 F.3d 1328, 1337-38 (Fed. Cir. 2020). The burden to prove a breach of trust rests with Plaintiffs. *United States v.*

Navajo Nation, 537 U.S. 488, 506 (2003) ("*Navajo I*"); *Confederated Tribes of the Warm Springs Rsrv. of Or. v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001) ("*Warm Springs*").

B. Plaintiffs must show a specific, substantive source of law establishing a duty, and that source of law must mandate damages for breach

Plaintiffs assert that jurisdiction exists in this case under the Tucker Act, 28 U.S.C. § 1491. ECF No. 147 ("Third Am. Compl.") ¶ 14. The Tucker Act does not create substantive rights enforceable against the United States for money damages. *United States v. Navajo Nation,* 556 U.S. 287, 290 (2009) ("*Navajo II*"); *Birdbear v. United States*, 162 Fed. Cl. 225 (2022), ECF No. 207 ("SJ Decision") at 5. Thus, Plaintiffs must establish, among other things, a money-mandating legal duty imposed on the United States by some other constitutional, statutory, or regulatory provision. *Navajo II*, 556 U.S. at 290-91.

This Court only has jurisdiction over claims if Plaintiffs can show "a rights-creating source of substantive law that 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *See* SJ Decision at 5 (quoting *Navajo I,* 537 U.S. at 503). The Supreme Court has held that two hurdles must be cleared before a tribe can invoke jurisdiction under the Tucker Act for a non-contract claim.[1] SJ Decision at 5.

"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); SJ Decision at 5. "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). *Accord*

[1] While the relevant Supreme Court cases involved tribes as plaintiffs, the same analysis applies to trust claims brought by individuals. *See Ramona Two Shields v. United States*, 820 F.3d 1324, 1332 (Fed. Cir. 2016).

Menominee Indian Tribe of Wisc. v. United States, 577 U.S. 250, 258 (2016) ("We do not question the 'general trust relationship between the United States and the Indian tribes,' but any specific obligations the Government may have under that relationship are 'governed by statutes rather than the common law.'") (quoting *Jicarilla*, 56 U.S. at 165). "[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*. Instead, the "threshold" showing must be based on "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that establish "*specific* fiduciary or other duties" that the government has allegedly failed to fulfill. *Navajo I*, 537 U.S. at 506 (emphasis added). "When the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . neither the Government's control over [Indian assets] nor common-law trust principles matter." *Jicarilla,* 564 U.S. at 177 (internal quotations and citations omitted).

Second, and only after a plaintiff 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 (quoting *Navajo I*, 537 U.S. at 506); SJ Decision at 5-6. This second requirement reflects the understanding that jurisdiction cannot depend 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. This Court has

explained that the statute or regulation need not explicitly provide for damages, but that it is sufficient if the source of law is "reasonably amenable to the reading that it mandates a right of recovery in damages." SJ Decision at 6 (quoting *White Mountain Apache*, 537 U.S. at 473).

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. Discretionary schemes are money-mandating only if (1) they provide "clear standards for paying" money to recipients; (2) they state the "precise amounts" that must be paid; or (3) as interpreted, they compel payment on satisfaction of certain conditions. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364-65 (Fed. Cir. 2005) (citation omitted).

In short, the government "owes judicially enforceable duties to a tribe only to the extent it expressly accepts those responsibilities" through specific language in a treaty, statute, or regulation. *Arizona v. Navajo Nation*, 599 U.S. 555, 563-64 (2023) (internal citations omitted).

At summary judgment, this Court concluded that:

> Plaintiffs have alleged the violations of *specific fiduciary obligations imposed by statute and regulation*. . . . [The Court] further finds that the comprehensive control the Secretary exercises over mineral leasing, coupled with the trust language found in the relevant statutes and regulations, gives rise to an inference that *damages are available for the violation of those specific obligations*.

SJ Decision at 17 (emphasis added). The specific fiduciary duties imposed by statute and regulation are required to satisfy step 1 of the jurisdictional test. *Navajo I*, 537 U.S. at 506. Without such a duty, the overall control the government exercises is immaterial. *See Arizona v.*

Navajo Nation, 599 U.S. at 568.[2] Even if a trust relationship exists, "any specific obligations the Government may have under that relationship are 'governed by statute rather than the common law.'" *Menominee Indian Tribe*, 577 U.S. at 258 (quoting *Jicarilla*, 564 U.S. at 165); *Arizona v. Navajo Nation,* 599 U.S. at 566.

C. To prove a breach, Plaintiffs must show the government's actions were unreasonable or an abuse of discretion

The nature of the trust duty—which, again, arises from statutes and regulations—informs what standard of review applies. Here the duties require the exercise of government judgment, making the standard for breach of those duties a question of whether Interior acted reasonably or abused its discretion. This flows both from circuit case law on government trust duties and the general case law on trustees.

Federal Circuit case law establishes that review of the United States' trust duties matches the review of all Executive Branch obligations: the arbitrary, capricious, abuse of discretion, or contrary to law standard. As explained by the Court of Claims:

> It should be added that the standard by which Interior's action are to be judicially tested is, not the court's or plaintiffs' own view of the preferable conduct, but the normal standard for government fiduciaries-were their actions in good faith and within the realm of acceptable discretion, or were they arbitrary, capricious, in abuse of discretion, or contrary to law?

Mitchell v. United States, 664 F.2d 265, 274 (Ct. Cl. 1981); *see also Duncan v. United States*, 667 F.2d 36, 45 (Ct. Cl. 1981) (subsequent case adopting *Mitchell* standard); *Duke v. Dep't of Air Force*, 230 Ct. Cl. 977, 979 (Ct. Cl. 1982) ("The statute does not provide any right to recover

[2] The United States maintains that control is also not relevant to the question of whether a provision is money-mandating in breach. That question instead focuses on an interpretation of the statutory or regulatory provision at issue. *See Eastport S.S. Corp.*, 372 F.2d at 1007. But we recognize that the Court also based its summary judgment conclusion on the language in the statute and regulations.

money damages from the United States nor does it give any authority to the court to exercise the discretion involved or to review the exercise of discretion by the agency head *absent a manifest abuse of discretion not present here*.") (emphasis added). The Federal Circuit later upheld a decision finding that there could be no breach unless "the available evidence indicates that the United States lacked any reasonable basis" for the decision at issue. *Fort Mojave Indian Tribe v. United States,* No. 95–5014, 1995 WL 495536, at *2 (Fed. Cir. Aug. 18, 1995).

Though we do not concede that common law fiduciary standards apply here, courts also use the abuse of discretion standard in describing the responsibility of non-government trustees. *See* Restatement (Third) of Trusts, § 87 (2007) ("When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion."). The Restatement comment elaborates that a

> court will not interfere with a trustee's exercise of a discretionary power (or decision not to exercise the power) when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties. . . . Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.

Id., at cmt. b; *see also W. Shoshone Identifiable Grp. by Yomba Shoshone Tribe v. United States,* 143 Fed. Cl. 545, 603 (Fed. Cl. 2019) (discussing this Restatement provision); *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006) (the standard of judicial review applied to fiduciaries in the exercise of discretionary judgments is abuse of discretion). As the Supreme Court has explained: "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) (citing Restatement (Second) of Trusts § 187 (1959)). Thus, "a deferential standard of review [is] appropriate when a trustee exercises discretionary powers." *Id*. The Supreme Court has made

clear in recent cases that the government in Indian trust cases is acting solely as a sovereign, rather than a private trustee. *See Arizona v. Navajo Nation,* 599 U.S. at 565-66. But while the common law reflected in the Restatement is not directly applicable, it reinforces the logic of the abuse of discretion standard here.

In sum, when evaluating the United States' discharge of the statutory and regulatory trust obligations at issue, this Court should not substitute its judgment (or Plaintiffs' judgment) for the decisions made by Interior at the time. That "better" decisions may have been made with perfect hindsight is irrelevant. Nor would it matter if the decision's effects turned out to be different than those reasonably anticipated at the time of the decision. The inquiry is whether those decisions that were actually made by Interior, given the information available at the time, were an abuse of discretion. If they were not, then there was no breach of the trust duty.

II. Legal Standard For Proving Damages

Should Plaintiffs prove one or more breaches of trust by the United States, the Court will have to determine appropriate damages. In Indian breach of trust cases, "[t]he test should always be that of proximate causation by a proven breach of trust." *Duncan*, 667 F.2d at 141. Plaintiffs must show that their claimed damages reflect what would have happened "but for" the United States' breach. *See, e.g.*, *Cheyenne-Arapaho*, 512 F.2d at 1396 (damages for failure to invest funds outside of Treasury to be "the difference between what interest defendant paid for the funds and the maximum the funds could have legally and practically earned if properly invested outside"). Further, the Tucker Act only allows recovery of compensatory damages—an amount necessary to give the plaintiff the value of what was lost. *See Testan*, 424 U.S. at 400 (claim under the Tucker Act must be for money damages that "can fairly be interpreted as mandating *compensation* by the Federal Government for the damages sustained.") (emphasis added)

(internal citations omitted). "[C]ourts attempt to place the beneficiary in the position in which it would have been absent a breach." *Warm Springs*, 248 F.3d at 1371.

If Plaintiffs establish a breach of trust, an evidentiary presumption attaches to the Court's damages inquiry. "[O]nce the beneficiary has shown a breach of the trustee's duty and a resulting loss, the risk of uncertainty as to the amount of loss falls on the trustee." *Id*. This evidentiary presumption for uncertainty, however, is still governed by Fed. R. Evid. 301:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

The evidentiary presumption for damages resulting from breach of trust does not relieve Plaintiffs of the burden of proof on causation and the amount of damages. *Id*.

ARGUMENT

As detailed below, the evidence at trial shows there has been no breach of a money-mandating fiduciary duty for the three counts at issue, making no damages due. Even if the Court does find a breach, the evidence shows that the damages are, at most, *de minimis*.

I. Count 3: Drainage

A. Plaintiffs failed to prove that the United States breached any money-mandating fiduciary duties regarding drainage

1. Plaintiffs do not point to any specific money-mandating fiduciary duty they allege has been breached

Plaintiffs must identify a specific money-mandating fiduciary duty imposed by a statute or regulation to satisfy the threshold jurisdictional test. Plaintiffs' post-trial brief, however, only discusses drainage in vague generalities, not specific statutes and duties. Because they have not presented evidence of a violation of any "specific, applicable, trust-creating statute or regulation," Plaintiffs' drainage claim should be rejected. *See Navajo II*, 556 U.S. at 302.

Rather than specific breaches, Plaintiffs rely on a rundown of alleged grievances relating to potential drainage. For example, Plaintiffs claim that BLM failed to create and maintain drainage files. But Plaintiffs fail to identify the legal requirement to do so *and* ignore the trial evidence that BLM did maintain those files. Indeed, Plaintiffs themselves introduced drainage files into evidence and elicited testimony about them. *See* Tr. 348:8-350:15 (Mr. Ollila discussing the drainage case file for Tract 1969); PX-348 (example of a drainage case file). Nor do Plaintiffs explain how a failure to maintain a file would be money-mandating in breach.

Plaintiffs also elicited hours of testimony about "pressure data" and the United States' alleged failure to obtain pressure data from operators. *See, e.g.*, Tr. 583:7-10, 584:5-15, 590:1-13, 591:23-592:6, 644:22-645:2, 722:2-9, 736:18-23 (all Akinboyewa). This preoccupation with "pressure" and "pressure data" at trial (continuing in their post-trial brief) is a red herring because nothing requires BLM to obtain (or use) such data. To support their alleged breach, Plaintiffs rely only on 43 C.F.R. § 3162.1(b), which gives BLM site and record inspection rights, and the Indian Diligent Development Manual, which lists factors BLM *might* use to compute a well's estimated ultimate recovery, including pressure history. The Manual recognizes that not all the factors are required or necessary, explaining that the "method of analysis will be determined by the parameters available." *See* PX-109.0026. And as the petroleum geologist Todd Reynolds testified, obtaining pressure data is not standard practice or easily achievable. Tr. 1591:9-13 ("It's very hard to get pressure data out within the reservoir, and even the pressure data that's being reported at the surface on the well is not the same kind of pressure data that you would need" to do certain kinds of modeling). Finally, even setting aside the lack of a duty to collect the data, Plaintiffs also fail to explain how a supposed "failure to collect information prevented [the government] from fulfilling its fiduciary obligations regarding drainage," or how

such a failure would be money-mandating in breach. *See* ECF No. 281 (denying Plaintiffs' motion in limine seeking to exclude evidence about pressure data); *see also* ECF No. 257 (United States' brief explaining BLM is under no affirmative obligation to collect specific pressure data).

Plaintiffs' breach arguments boil down to vague allegations that the United States violated a fiduciary duty to "prevent and compensate for drainage." *See* Pl. Br. at 12. This falls far short of the "specific, applicable, trust-creating statute or regulation" required by the law. *See Navajo II*, 556 U.S. at 302. This failure alone is sufficient to rule against Plaintiffs on Count 3.

2. The United States followed the statutes, regulations, and agency policies to monitor for and prevent drainage

The evidence shows that BLM met any fiduciary duties that may exist over drainage because it consistently followed agency policies to monitor and investigate potential drainage on Plaintiffs' tracts.[3] As the Court has noted, the regulations require lessees to protect against drainage and BLM to enforce lessees' obligations. *See* SJ Decision at 10-11 (citing 43 C.F.R. § 3161.2). BLM did just that as explained below and in Subsection 3.

Mr. Ollila, one of several petroleum engineers and other BLM employees tasked with carrying out the drainage program during the relevant timeframe, testified about the steps BLM followed for all wells, including wells that could potentially pose a drainage risk for Plaintiffs' tracts. First, BLM would identify all new wells as soon as they were drilled in the Bakken. Tr. 334:8-21. BLM then performed an administrative review of the new well to determine whether

[3] In a recurring pattern, Plaintiffs cite a single email to argue that "BLM 'shut down' the drainage program" for at least two years, while ignoring the whole of the evidence. *See* Pl. Br. at 12. The documents show that no such shutdown occurred. The email Plaintiffs rely on was written in March 2013, but Mr. Wunder completed his comprehensive review of the Birdbear tracts the preceding month (after several months of work). *See* JX-127.

there was a potential for that well to drain resources from another tract. Tr. 334:24-335:15. The administrative review process involved analyzing initial well production, well location and distance from other tracts, and whether a protective well had been drilled. *Id.* BLM would close potential drainage reviews if a potentially draining well was thousands of feet away from another tract's lease line. Tr. 335:11-337:5. Rather than indicate a breach of duty, as Plaintiffs allege, BLM's application of a "cutoff" of 3,000 or 1,500 feet was a common-sense approach to investigating drainage in the Bakken. As Mr. Ollila testified, BLM "did not see any drainage 1,500 feet out from the wellbore" (Tr. 337:3-5)–a conclusion supported by the United States' experts as well. *See* Tr. 1611:6-1612:1 (Reynolds), 1751:3-1752:9 (Payne).[4]

After the administrative review, if BLM determined that there was potential for a well to drain resources from a neighboring tract, BLM would "immediately send a 60-day demand letter to the . . . lessee." Tr. 337:10-11 (Ollila). The undisputed trial evidence shows that BLM sent these 60-day demand letters to the lessees of Plaintiffs' tracts. *See, e.g.*, Tr. 350:3-352:14 (Ollila). The demand letter would identify the potential draining well, remind lessees of their obligations to protect tracts from drainage, and seek additional supporting information. *Id.*; Tr. 338:1-9 (Ollila). Importantly, BLM would then perform its own technical and economic reviews of potential drainage, not rely solely on the operators. Tr. 410:12-411:11, 412:5-413:4 (Wunder). The technical review would involve a volumetric analysis, discussed in more detail in Subsection B.3 below, and the economic review would determine whether a protective well would be economic for the lessee. Tr. 1134:18-1135:14 (Akinboyewa). Each of these steps is laid out in

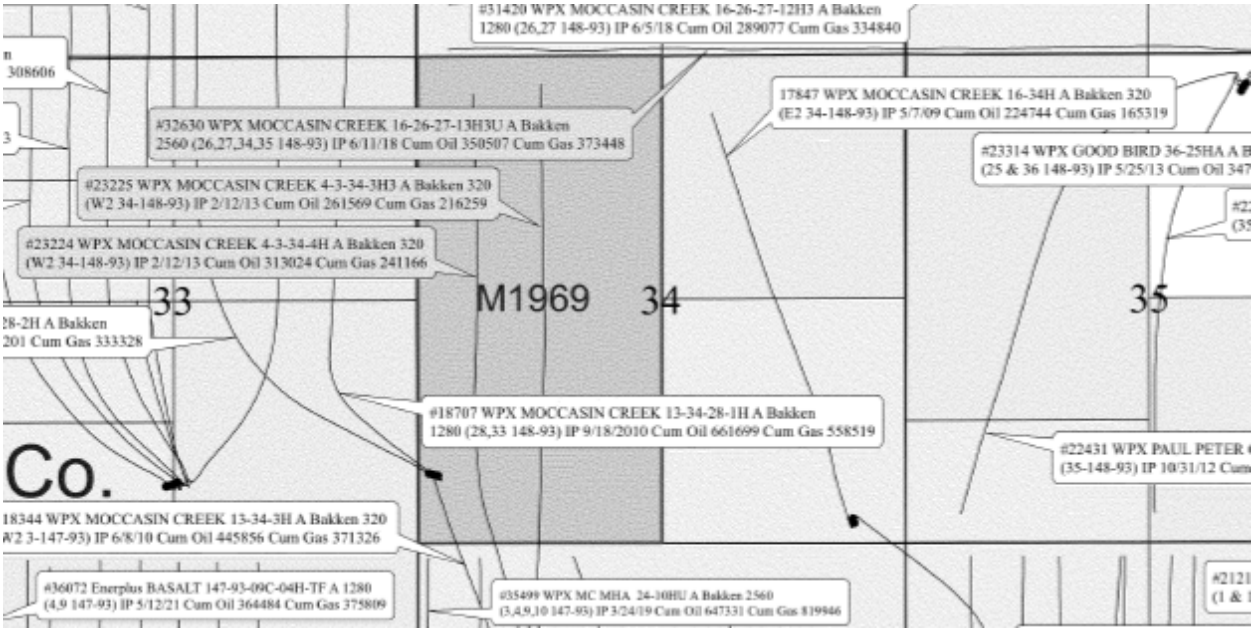
[4] Plaintiffs' expert Mr. Akinboyewa incorrectly believed that BLM had a 500-foot cutoff for potential drainage wells, Tr. 641:2-3, which is unsupported by any evidence and contradicted by testimony from BLM employees like Mr. Ollila. This mistake is emblematic of Mr. Akinboyewa's failure to understand and fairly evaluate BLM's drainage review process.

the 1999 Drainage Manual, which BLM followed with regard to all of Plaintiffs' tracts. Tr. 359:15-17 (Ollila); JX-92; *see also* Tr. 1250:9-1252:15 (Mr. Laborda giving an overview of BLM's drainage review process). In fact, the drainage report written by BLM geologist Jack Wunder was chosen as an exemplary review in BLM's updated 2015 drainage manual because of the report's adherence to BLM's technical review process and the agency's drainage protection responsibilities. JX-127; Tr. 548:10-549:10 (Wunder).

3. Tracts 1969 and 710A demonstrate how the United States met any trust obligations regarding drainage

The Court heard evidence about two particular tracts throughout much of the trial: Tracts 1969 and 710A. The Wunder drainage report concluded that "there may be *potential* for drainage" of those two tracts. JX-127 (emphasis added). Rather than demonstrate a breach of a fiduciary duty, however, BLM's investigation of potential drainage from these two tracts (and the ultimate resolution of these situations) shows BLM meeting its obligations to ensure drainage is addressed.

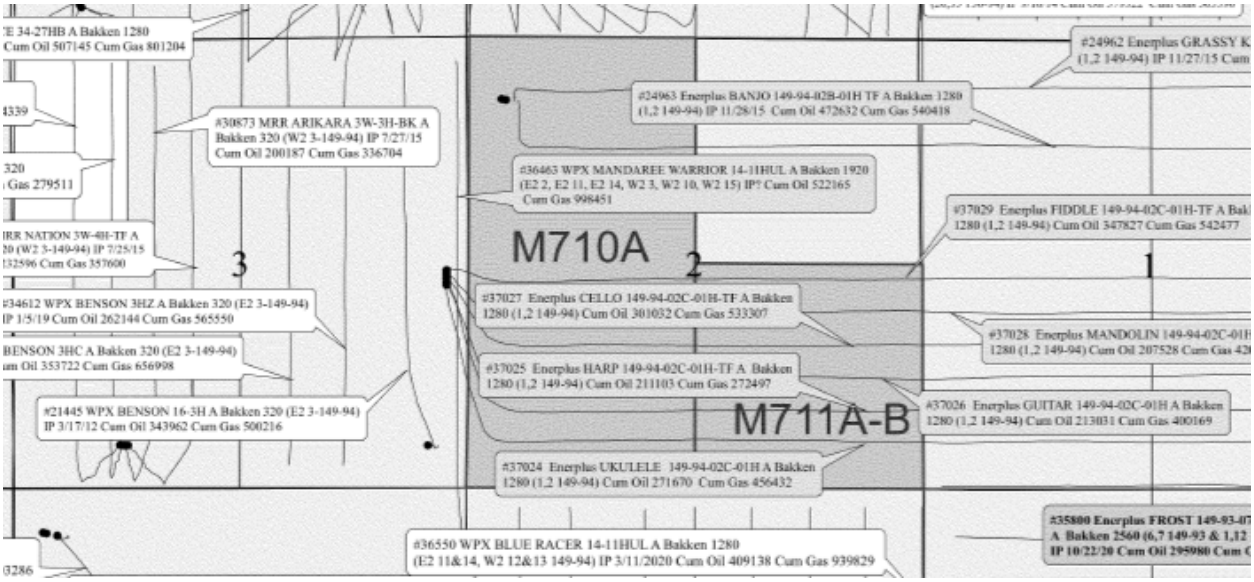
a. Tract 1969



The figure above is an excerpt of PX-564, a map of Tract 1969 prepared by Mr. Akinboyewa. Consistent with agency policies and procedures, BLM opened a drainage case for Tract 1969 in 2010, shortly after wells were drilled in nearby tracts in 2009 and 2010. US-600 (drainage case file with preliminary analysis date of August 10, 2010). BLM then sent at least one 60-day demand letter to the lessee, dated November 4, 2010. US-600. BLM petroleum engineers also performed multiple rounds of technical reviews for Tract 1969 to understand the potential for drainage (*see, e.g.*, US-600.6-600.9), culminating in the thorough, extra-detailed report prepared by Mr. Wunder specifically in response to Mr. Birdbear's requests. *See* JX-127.

On February 6, 2013, Mr. Wunder concluded that there was potential for drainage at some point in the future and recommended that BLM "take appropriate action" to ensure Tract 1969 is "protected from potential drainage." JX-127.0005. Less than one week later, *two protective wells began production on Plaintiffs' Tract 1969*. *See* PX-564 (map above showing two Birdbear wells with initial production dates of February 12, 2013). This was a more than reasonable implementation of BLM's regulatory responsibilities.

b. Tract 710A



The evidence tells a similar story for Tract 710A (shown above in an excerpt of PX-562). In 2012, a well to the west of Tract 710A began production (Well No. 21445 above). Less than a year later, in February 2013, Mr. Wunder completed his thorough review of the potential for drainage of Tract 710A. JX-127. As with Tract 1969, Mr. Wunder's report concluded that there was a potential for drainage sometime in the future and recommended that BLM "take appropriate action" to ensure Tract 710A is "protected from potential drainage." JX-127.0005. BLM then sent multiple demand letters to the lessee. Tr. 351:1-9 (Ollila). When the lessee responded that it did not believe drainage was taking place, BLM again followed up, asking the lessee "to either drill a protective well or provide . . . more information that would preclude drainage." *Id.* When the lessee submitted applications for permits to drill ("APDs") protective wells on Tract 710A, the agencies approved the APDs and once again went back to the lessee, this time asking the lessee to move the wells up in their drilling schedule and drill them faster

than originally planned.[5] *Id.* Two wells began production on Tract 710A in 2015. *See* PX-562.

c. Conclusion on Tracts 1969 and 710A

Plaintiffs rely heavily on these two tracts in their drainage claim. But rather than show a breach of any fiduciary duty in, BLM's drainage review process (as well as the actual wells that were drilled and produced on Plaintiffs' tracts at the conclusion of the review process) demonstrates that BLM followed the relevant statutes, regulations, and agency policies in carrying out its drainage prevention obligations.

B. Plaintiffs did not prove any damages resulting from drainage

1. The Court should disregard all of Mr. Akinboyewa's drainage opinions

Even if the Court were to find a breach of some drainage-related money-mandating duty, Plaintiffs' drainage claim still fails because they cannot prove any damages resulting from alleged drainage. *See Warm Springs*, 248 F.3d at 1371 (to meet burden of proof, Plaintiffs must show "a breach of the trustee's duty *and a resulting loss.*") (emphasis added).

Plaintiffs rely solely on the opinions of Mr. Akinboyewa in an effort to prove the existence of drainage and its extent. After Mr. Akinboyewa testified at trial, the United States renewed its *Daubert* motion to exclude his testimony on the drainage percentages and volumes he chose for his offending wells. *See* ECF No. 334. The Court should grant the United States' motion to exclude his testimony for all the reasons explained in support of the motion. But even if the Court declines to formally exclude his testimony, the Court should still completely disregard Mr. Akinboyewa's drainage opinions as unreliable and not credible. His testimony at

[5] Plaintiffs incorrectly claim in their post-trial brief that Mr. Ollila referred to the time for approval of these APDs as an "oops." *See* Pl. Br. at 19. But Mr. Ollila testified that the "oops" he included in an internal email referred to not realizing an APD had already been submitted, not to some supposed delay in the process. Tr. 305:15-16 ("The oops was telling Enerplus to submit an APD when they had already submitted it.").

trial fails to provide any methodology for calculating specific drainage percentages, much less a methodology that can be reliably applied and evaluated. Mr. Akinboyewa presented very specific conclusions about well-by-well drainage percentages for wells surrounding Plaintiffs' tracts, but neither the United States nor the Court knows what calculations Mr. Akinboyewa performed; which inputs he used and why; or whether he accurately performed those calculations on over 40 wells.

Plaintiffs' brief claims that Mr. Akinboyewa somehow used fluid flow equations to arrive at his drainage percentages. *See* Pl. Br. at 31. At trial, he testified to specific percentages: for example, a drainage percentage of 3% for Well No. 36261. *See* Tr. 1007:18-1008:15. But there is still no evidence of: (i) what inputs Mr. Akinboyewa chose for the variables in a fluid flow equation; (ii) why he chose those inputs; (iii) what the calculated value is; (iv) how that calculated value then led to a drainage percentage; and (v) whether Mr. Akinboyewa correctly performed the math without mistakes.[6]

Mr. Akinboyewa testified that even slight differences in the inputs for certain variables can make a major difference in the ultimate conclusion. *See* Tr. 721:7-20 (discussing the BLM's choice of values for porosity and "the significance of saying 8 percent porosity or 10 percent porosity"). If Mr. Akinboyewa used fluid flow equations as part of his calculations, then the exact values chosen for each well would be critical to verifying whether he reliably applied his

[6] Plaintiffs can't cure this glaring hole at the center of Mr. Akinboyewa's testimony with references to "examples of BLM records and operators' well files containing the relevant variables" for things like permeability and formation volume factor. *See* Pl. Br. at 31. Example values, untethered to any specific well or drainage calculation, are not the same as the values Mr. Akinboyewa supposedly chose and applied to reach his ultimate conclusions about drainage volumes. And the references to general example values chosen by BLM and operators are especially irrelevant given that Mr. Akinboyewa consistently criticized BLM's choice of values in performing drainage analyses.

methodology. *See* Tr. 921:10 ("DeltaP is a very critical variable."). The numbers used for variables such as delta P, permeability, and thickness would directly affect any conclusions about drainage percentages.

Apart from the fatal black-box problem at the heart of his opinions, Mr. Akinboyewa's credibility as an expert is also suspect. Mr. Akinboyewa was an unlicensed petroleum engineering research assistant at the time of his original 2018 analysis and 2019 rebuttal analysis. Tr. 1159:18-21, 1161:1-1162:13. When pressed about his lack of licensure in 2018 on cross-examination, Mr. Akinboyewa deflected to the experience of Dr. Craig Van Kirk, who did not provide any evidence or opinion testimony in the case. *Id*. Also undercutting Mr. Akinboyewa's credibility and experience as a petroleum engineer is the fact that, since 2017, over half of his work as a petroleum engineer has been work dedicated solely to this case. Tr. 1162:14-1163:6.

There are additional reasons Mr. Akinboyewa's drainage analysis is flawed, discussed in Subsections B.4 and B.5 below. His flimsy drainage testimony and analyses, especially about drainage damages, cannot support the entire weight of Plaintiffs' drainage claim. Even Plaintiffs seem to recognize the weakness of the drainage analysis: they devote 12 pages to Mr. Akinboyewa's diligence work, including a tract-by-tract recitation of his findings. *See* Pl. Br. at 19-31. Meanwhile, his drainage analysis merits a single, cursory paragraph. *Id*. at 31-32.

The Court can and should disregard Mr. Akinboyewa's drainage opinions.

2. Drainage areas are limited because of the geological characteristics of the Bakken reservoir

Unlike Plaintiffs, BLM and the United States' experts apply geological expertise and real-world experience to their evaluation of the drainage areas of Bakken wells. BLM employee Mr. Wunder and the United States' litigation expert Mr. Reynolds are both experienced geologists, and both discussed the unique geological features of the Bakken reservoir that affect

the horizontal extent of drainage areas.

First, the Bakken petroleum system is an extremely tight reservoir with low permeability. Tr. 1565:10-1566:12 (Reynolds); *see also* Tr. 1123:17-24 (Mr. Akinboyewa conceding the low permeability in the Bakken). Mr. Reynolds explained that this low permeability means that a well will produce nearly zero oil without being fracture stimulated, demonstrating that a drainage area will typically only extend to the outer limits of the fracture stimulation. *See* Tr. 1572:8-73:18 (Reynolds). The effective propped volume of these fractures typically extend only about 500 feet on either side of the wells. Tr. 1555:21-23 (Reynolds).[7]

Second, Mr. Reynolds explained that there is "communication" between the Bakken and Three Forks zones two miles underground. *See* Tr. 1581:20-1582:14. This means that a well drilled in the Bakken can fracture stimulate and produce oil from the Three Forks and vice versa. Tr. 1576:14-24 (Reynolds); *see also* Tr. 1121:6-12 (concession by Mr. Akinboyewa on cross that the two zones can be in communication). This matters because the thickness of the producing zones directly impacts the lateral extent of the drainage area. Tr. 1733:10-1734:2 (Mr. Payne explaining that a 2,000 square foot one-story house will have twice the footprint of a 2,000 square foot two-story house).

Finally, Mr. Reynolds identified the natural "azimuth" or diagonal orientation of fractures in the Bakken. Tr. 1586:20-1587:16.

Each of these geologic concepts were incorporated into Mr. Payne and Mr. Reynolds' drainage analyses to make those calculations more accurate–and each of these geologic concepts

[7] This approximate 500-foot drainage radius is supported by the 2020 Hess paper discussed at length by the parties' experts at trial. *See* US-308. For that study, Hess drilled a vertical well about 1,000 feet from a horizontal well that had been in production for ten years. That vertical well showed virgin (not depleted) reservoir pressure, demonstrating that drainage did not extend out to that 1,000 foot mark. *See* US-308.0022; Tr. 1607:13-1609:22 (Reynolds).

were ignored by Plaintiffs and not incorporated by Mr. Akinboyewa.

3. The volumetric approach taken by BLM and the United States' experts is an appropriate and accurate method for measuring potential drainage

BLM's 1999 drainage guidance describes a four-step process for assessing and measuring potential drainage. *See* JX-92.0020-21. BLM and the government's trial experts followed this approach. Mr. Akinboyewa admitted he did not (Tr. 1062:12-20) and in fact criticized the BLM manuals and guidance for having "a lot of wrongful technical things" (Tr. 689:5-22).

BLM petroleum engineers and the United States' experts followed these steps for evaluating drainage: The first step is to "[u]se the geologic and engineering data and information available . . . to compute the Estimated Ultimate Recovery (EUR) attributable to the draining well." JX-92.0020. Step two is to "determine the drained volume and estimate the probable drainage area and configuration." JX-92.0021. This step in particular was rejected by Mr. Akinboyewa, who did not calculate any drainage area and criticized the "buffers" calculated by BLM, even though the drainage guidance requires that approach. Tr. 740:3-7. Step three is to apply the drainage configuration and "establish if the drainage area of a well intersects a property boundary." JX-92.0021. The fourth and final step is to apply a drainage factor, the "percentage of a draining well's production attributable to the drained jurisdictional lease." *Id.*

Both BLM and the United States' litigation experts carried out a "volumetric" approach that is consistent with the four steps in the 1999 drainage guidance.[8] *See* Tr. 1724:18-1726:3 (Mr. Payne describing his four steps to evaluate drainage, consistent with the 1999 drainage guidance). Essentially, petroleum engineers like Mr. Payne are able to predict a well's estimated

[8] At one point in his testimony, Mr. Akinboyewa suggested that BLM's drainage analyses were actually better and more accurate than the United States' experts' analyses, because of perceived flaws in the experts' approach. Tr. 1172:4-9.

ultimate recovery (known as the EUR) at the end of the well's life using widely accepted decline curve methodology. *See* Tr. 588:20-23 (Mr. Akinboyewa explaining that he also used decline curve analysis to calculate EUR). With a well's EUR, you can then use a volumetric equation, with values chosen for different variables such as thickness, porosity, oil saturation, and recovery factor, to calculate a drainage area for that well. Tr. 1728:12-1729:22 (Payne). The drainage area can be converted into a shape and placed on top of a well using mapping software. Tr. 1740:9-20 (Payne). If the drainage area transects the boundary of a neighboring tract, this indicates that the subject well could *potentially* drain resources by the end of its production life. Even Mr. Akinboyewa admits that the volumetric approach can be a good method in certain circumstances. Tr. 722:4-9.

Mr. Payne described this process in detail in his testimony. Importantly, he also explained how he chose tract-specific values to perform volumetric calculations for each of the alleged offending wells so he could be confident in his well-by-well drainage area results. Tr. 1737:9-1739:19. Mr. Payne and Mr. Reynolds also compared their drainage area results to real-world data and other academic resources, including papers prepared by Hess and discussed at trial, to confirm that their conclusions were accurate and reliable. *See* Tr. 1742:2-13 (Payne), 1576:14-1580:19 (Mr. Reynolds explaining his well-to-well communication study, which confirms his and Mr. Payne's approach).[9]

In response, Plaintiffs criticize the volumetric approach laid out in the drainage manual and pursue an ill-defined method relying on pressure data. Plaintiffs' favorite example of a

[9] Mr. Akinboyewa makes the unserious accusation that Mr. Payne and Mr. Reynolds are being "intentionally deceitful" in their presentation of the data, including the Hess papers. Tr. 1096:20-24. The trial testimony of the United States' experts speaks for itself, as does the fact that Plaintiffs' brief does not allege deceit by the government's experts.

supposedly flawed volumetric drainage calculation does not support a breach of trust or damages. The "Gerald Hale" well was a recurring theme through trial, with Mr. Akinboyewa criticizing BLM's volumetric calculations for that well's potential drainage area. *See* Tr. 730:3-32:1. Mr. Akinboyewa looked at the well's actual production to argue the BLM underestimated its EUR and thus its drainage area. As Mr. Akinboyewa acknowledges, sometimes EURs can fluctuate over time as more production data shows that a well is performing better or worse than expected. *See* Tr. 735:21-25. For the Gerald Hale well, real-world production was better than modeling expected when BLM originally calculated its EUR in 2013. So, as of 2022, the well had produced a similar volume to what BLM predicted its total lifetime production would be. Tr. 1079:10-1080:17 (Akinboyewa). Because the volumes are similar, the drainage area as of 2022 will be similar to what BLM calculated, meaning that the Gerald Hale well was not yet draining any resources from the Birdbear tract. Most importantly, by 2022, three wells had been drilled, negating the potential for future drainage from the Gerald Hale well. Tr. 1080:18-20, 1082:21-1083:4 (Akinboyewa).

Rather than apply a volumetric approach, Mr. Akinboyewa focuses almost exclusively on pressure, relying on a fluid flow method that requires data he does not have. He testified that "pressure data" and "pressure depletion" are "key" to determining drainage using fluid flow. Tr. 1093:2-12. But he then claims he never received the necessary pressure data to perform drainage calculations. Tr. 806:24-807:1 ("[N]o data was provided that was valuable to this analysis to really calculate drainage."); *see also* Tr. 1074:5-7. The United States' experts agree with Mr. Akinboyewa about the lack of pressure data, with Mr. Payne explaining that the pressure data

simply does not exist. Tr. 1805:2-11.[10]

Faced with a lack of pressure data, Mr. Akinboyewa simply complains about this lack of data while forging ahead with his unsupported analyses and arbitrary assumptions. And if Mr. Akinboyewa did perform fluid flow calculations (despite conceding that he was missing "key" pressure data), Plaintiffs have not presented any evidence of how those calculations were performed or what they might show.

The volumetric approach adopted by BLM engineers and the United States' litigation experts aligns with agency guidance and is the best use of the available data to reliably calculate a potential drainage area. Tr. 1858:14-19 (Mr. Payne: the volumetric method is "the method where all the data was available" and that it "answers the question" of potential drainage).

4. Plaintiffs do not account for communitization agreements or claimed Birdbear drainage wells

Plaintiffs ignore several complicating factors in pursuing their drainage volumes. These failures to account for real world conditions mean Mr. Akinboyewa's proposed drainage volumes include volumes where Plaintiffs are already being paid.

First, Mr. Akinboyewa ignored communitization agreements. Several witnesses testified about communitization agreements, which allow for sharing royalties from a well's production across multiple leases. *See, e.g.*, Tr. 343:3-10 (Ollila). Communitization agreements not only

[10] Plaintiffs claimed that "Mr. Akinboyewa and Mr. Laborda both testified at length that operators will always keep and monitor pressure data." Pl. Br. at 37. But the question to Mr. Laborda asked about "things that like" and was not specific to pressure data. Tr. 1205:16-1206:22. His answer appeared to relate to "monitoring that *production*." *Id*. (emphasis added).

Mr. Akinboyewa himself concedes that an operator (or BLM) would have to spend "$10 million to collect a pressure measurement every hundred feet in the real world." Tr. 1095:8-9. As explained by Mr. Payne and Mr. Reynolds, Mr. Akinboyewa relies almost exclusively on modeled (not measured) pressure data to support his opinions. Tr. 1590:2-1591:13 (Reynolds); *see also* Tr. 1094:5-1096:1 (Akinboyewa).

address drainage (because a lessor would receive royalties from a potentially draining well, *see* Tr. 343:16-20), they are also a necessity in the Bakken. Many wells drilled in this area are directionally drilled and at least two miles long, so by definition those wells will travel through multiple tracts. Tr. 1084:8-15 (Akinboyewa). Mr. Akinboyewa completely ignored communitization agreements and did not factor them into his analysis. Thus, he claimed drainage volumes from wells that were covered under a communitization agreement that *already provides for royalties to the Birdbears*. *See* Tr. 1087:8-1088:4 (Akinboyewa); *see also* Tr. 1719:8-1720:9 (Mr. Payne explaining why he did not include wells covered by communitization agreements in his analysis). This flaw presents an obvious double-recovery.

Mr. Akinboyewa's analysis includes a second type of double-recovery. He conceded on cross-examination that he claims drainage volumes *from Birdbear wells that he claims are draining from other Birdbear tracts*. *See* Tr. 1092:7-13 (conceding that his analysis included "wells on Birdbear tracts on both sides of a lease line draining resources from each other"); *see also* PX-569 (map of the relevant tract showing the Birdbear wells).

These illogical double-recovery examples undermine Mr. Akinboyewa's conclusions, even putting aside the other flaws already discussed.

5. Plaintiffs do not account for Birdbear wells that may be draining other tracts

Plaintiffs' theory of drainage involves massive drainage areas that extend thousands of feet out from the wellbore. Tr. 886:20-22 (Mr. Akinboyewa: drainage extends 2,000 feet from a well). If Plaintiff's drainage theories were true, then many Birdbear wells would be draining resources from non-Plaintiff tracts. *See* Tr. 1125:9-1127:3 (Mr. Akinboyewa conceding that possibility). Mr. Akinboyewa's analysis does not attempt to account for this Plaintiff-benefitting drainage by subtracting it or debiting it from his alleged drainage volumes and damages. Tr.

1127:7-13. This incongruity shows the artificiality and ad-hoc nature of Plaintiffs' claim against BLM for drainage.

And it is another, more subtle, form of double-payment. If the Court adopts Mr. Akinboyewa's volumes, Plaintiffs will be paid for the resources he claims are drained *from* Plaintiffs' tracts. But Plaintiffs will also be paid for resources that, under Mr. Akinboyewa's theories, are being drained *to* Plaintiffs' tracts and for which a portion of the royalties would be due to third-parties if Plaintiffs are correct.

II. Count 8: Diligent Development

A. Plaintiffs failed to prove that the United States breached any money-mandating fiduciary duties regarding diligent development of their tracts

1. Plaintiffs do not point to any specific money-mandating fiduciary duty they allege has been breached

As with their drainage claim, Plaintiffs' diligent development claim fails because they do not articulate a specific breach of a money-mandating statutory or regulatory trust duty.

Plaintiffs' complaint focuses on allegations that the United States "allowed operators to deviate from existing drilling schedules" and favored development of other allotments over Plaintiffs' tracts. Third Am. Compl. ¶ 86, 87. But Plaintiffs seem to have abandoned that theory at trial and have not pursued it in their post-trial brief.

Instead, Plaintiffs rely on generalities and false inferences. To support their claim that the United States has violated a trust duty to require diligent development of their tracts, they point to a single retired BLM employee's inability to recall whether he had received a specific training on trust obligations. *See* Pl. Br. at 9. But Plaintiffs do not identify a statutory or regulatory provision that requires such training, nor explain how breach of such a duty would be money-mandating. Similarly, Plaintiffs misleadingly argue that Mr. Ollila "couldn't say for sure"

whether BLM published a diligent development manual. But again, Plaintiffs do not link the supposed to failure to any statutory or regulatory money-mandating duty. In any event, on questioning from Plaintiffs' counsel, Mr. Ollila confirmed that they had a copy of the manual at the North Dakota Field Office, that he "regularly refer[red] to it," knew it well at the time of his employment, and considered it important in performing his trust obligations. Tr. 81:3-15.

Plaintiffs also continue to rely on a completely unsupported allegation—without any link to a money-mandating duty—that BLM did not maintain diligence review files, despite the Court having already rejected this argument. *Compare* Pl. Br. at 12 ("Defendant notably failed to produce any such files related to the Plaintiffs' tracts while this case . . . has been pending.") *with* ECF No. 359 at 2 (Court order: "Plaintiffs have failed to show that they requested the production of diligence case files during discovery."). And BLM witnesses consistently testified that diligence review files were prepared and maintained. Tr. 113:4-10 (Ollila), 1267:8-11 (Laborda), 1494:22-25 (Bagley).

Finally, and again without identifying a statutory or regulatory money-mandating duty that BLM breached, Plaintiffs maintain that BLM stopped doing diligence reviews for a time during the boom, based on a single undated spreadsheet and a single word document sent via email in the context of a staffing and hiring decision. *See* Pl. Br. at 3-6 (citing PX-423 and PX-189). But these documents are not definitive and cannot overcome the consistent testimony from the relevant BLM employees that diligence reviews continued throughout the relevant period.

Mr. Ollila testified about the field office's use of a spreadsheet or spreadsheets as a tool to help perform diligent development reviews. Tr. 115:7-116:6. Plaintiffs questioned him about a single undated version or draft of this electronic spreadsheet (PX-189). As Mr. Ollila testified, he did not know when the copy of the spreadsheet was made; the spreadsheet did not "look . . .

complete" to him because he knew "he reviewed a lot of cases after" 2001; and the dates in the spreadsheet were generally incorrect because "there's something missing there." Tr. 131:17-134:2, 362:6-19. Similarly, Plaintiffs make much of a single word document (PX-423) without an author, without operative dates, and without context. Mr. Laborda supervised the field office and testified that he was unaware of any exemption from diligence requirements and would have expected to know about it. Tr. 1278:3-1279:12. Mr. Laborda testified that "they would never be exempt. I mean, that would be a big issue. I mean, at that stage, I would be talking to the manager directly about that." Tr. 1290:2-13.

2. The United States followed the statutes, regulations, and agency policies to ensure diligent development of Plaintiffs' tracts

The evidence shows that the United States met any trust obligations regarding the diligent development of Plaintiffs' tracts. The Court has found that BLM "has a specific fiduciary obligation to ensure that lessees exhibit reasonable diligence in their development of mineral resources." *See* SJ Decision at 13 (citing 43 C.F.R. § 3161.2). As explained in this Subsection A, BLM took the appropriate steps to ensure diligence in the circumstances of the Bakken boom.

Mr. Ollila testified that during his time at the North Dakota Field Office, BLM "monitored every producing, allotted, or tribal lease that had production to see . . . if there was additional wells that should be drilled on that tract." Tr. 359:21-24. He further explained:

> We would look at the expected economics of the wells that were already drilled and other wells that were around there. We would look at the allowed wells in the spacing order to see if there's more wells that were allowed. And that was a major two factors. And we would also take into consideration other factors such as drilling – drilling plans, APDs being approved or not approved, things like that.

Tr. 360:2-9. In his role as BLM petroleum engineer at the Field Office, Mr. Ollila would personally send out demand letters to operators for every case where a tract was not fully developed. Tr. 362:24-25. The letters would include the lease number, location, and spacing, and

would demand the lessee's plan for protecting that tract. Tr. 363:3-11.

Mr. Ollila testified that he would personally perform these diligent development reviews on a yearly basis. Tr. 361:16-18. And his supervisor in the BLM State Office, Mr. Laborda, corroborated this account. Until he retired in 2013, Mr. Laborda performed annual reviews of the diligence program at the North Dakota Field Office:

> A: . . . [The Field Office has] a drainage database and they also have an Indian diligence database. And so that's how they track. And when I did my reviews, say prior to 2013, I would actually go out there to the individual office and I would verify what they had in those databases, drainage or diligence, and I would write a report.
>
> Q: Would you actually, when you did that due diligence, let's say for the North Dakota Field Office, verify whether they had diligence review files?
>
> A: Oh, yes. And they do. Every producing lease is required to have a diligence file. . .
>
> ***
>
> [When the diligent development] guidance first came out, we basically committed to doing diligence reviews on a yearly basis, and that's why I did those annual review reports at each of the offices.

Tr. 1217:8-1218:6, 1261:2-19.

BLM's frequent diligent development reviews, along with the 60-day demand letters sent to lessees of tracts that were not yet fully developed, demonstrate that the United States followed the statutes, regulations, and agency policies to ensure that lessees showed "reasonable diligence" on Plaintiffs' tracts. *See* SJ Decision at 13.

3. The evidence shows that operators were drilling wells on the reservation as fast as they could during the relevant timeframe

Even putting aside Plaintiffs' failure to ground their claim in any breach of a specific regulatory or statutory duty, Plaintiffs perceived delay in development ignores reality. The Court heard consistent testimony throughout trial detailing the historic oil boom and the fast-paced drilling activity that began in North Dakota around 2009. The boom was unprecedented: Mr.

Bagley testified that he had never seen anything like it in four decades at BLM, while Mr. Hunt testified it was the largest oil and gas boom in the United States since at least the 1960s. Tr. 1488:13-1490:25 (Bagley), 1350:22-1351:24 (Hunt). One effect of the boom is that operators were drilling wells as fast as they could during the relevant timeframe, undercutting Plaintiffs' argument that wells should have been drilled faster.

In short, the reservation's capacity for well drilling was maxed out—from drillings rigs, to roads, to hotel rooms. Mr. Ollila testified that there were a limited number of drilling rigs in North Dakota, and lessees would have to contract with drilling rigs "many, many months, maybe even over a year in some cases" before being able to actually begin the drilling process. Tr. 360:24-361:3. The United States' petroleum engineering expert, Mr. Payne, explained: "[Y]ou couldn't just go grab a rig . . . . And same thing with the frac crews. Many companies had frac crews tied up for months to years in advance. So those things have to be planned for. You can't just summon them, you know, be out there tomorrow." Tr. 1761:12-17. Mr. Bagley echoed this conclusion, testifying that there were over 200 rigs operating in the area and it was impossible to get more. Tr. 1495:16-1496:20. The same was true for infrastructure generally, with hotel and road capacity also limiting how fast drilling could occur. *Id*.

This reality provided the backdrop for Mr. Ollila's 2013 email to Mr. Wunder, explaining that the companies were being as diligent as they possibly could be in that timeframe because they were "drilling wells as fast as they can get approved permits and/or as fast as they can get rigs on the locations." PX-313. In short, BLM confirmed that the operators were acting with "reasonable diligence" given the circumstances.

4. BLM does not have the power to drill and place wells anywhere at any time

Plaintiffs' diligent development claim is based on the faulty premise that BLM can magically drill and place wells at any time and at any location, and that some statute or regulation requires BLM to work that magic. Plaintiffs' post-trial brief, Plaintiffs' counsel's questioning during trial, and especially Mr. Akinboyewa's testimony all demonstrate this fundamental misconception about BLM's role and authority:

> And you can determine, okay, as a petroleum engineer for BLM, *when would I place a well on a tract*? And that's how my diligent development work was done. Tr. 852.3-5 (emphasis added).

> *The BLM has control of when and where wells are drilled*. And thus, if I'm the petroleum engineer for the BLM, if my of the plaintiffs' tract [sic] is running across a section line, it doesn't stop me from drilling a well through the tract and creating production from the tract. These things do not stop my development plan, so to speak. Tr. 883:25-884:5 (emphasis added).

Mr. Akinboyewa and Plaintiffs seem to believe that BLM is omnipotent when it comes to the drilling of wells. Not so. If BLM determined that a tract was not fully developed, it could (and often did) send a demand letter to the lessee explaining that the tract was not yet fully developed and demanding the lessee present plans for development or present evidence that a well cannot be economically drilled. *See* Tr. 1262:1-7 (Laborda). At the end of the process, BLM could require that the lessee take action, which can include drilling a well or relinquishing the lease, among other options. *See* PX-109.0010-12. But BLM cannot drill a well itself or force an operator to immediately drill a well in any specific location. *See id*. at PX-109.0012 (noting lessee appeal rights); Tr. 1262:1-9 (Laborda).

The evidence shows that BLM met any trust duties to monitor producing leases, determine whether leases were fully developed, and follow up with lessees to ensure that they exhibit reasonable diligence in the development of mineral resources.

B. Plaintiffs failed to prove any damages resulting from alleged lack of diligent development of their tracts

1. Mr. Akinboyewa applies an arbitrary, ad-hoc, results-driven approach to calculating his alleged diligent development volumes

Like his drainage opinions, the Court should disregard Mr. Akinboyewa's diligent development analysis for being arbitrary, unsupported, and ad-hoc.

As explained above, Mr. Akinboyewa approached his analysis assuming BLM petroleum engineers had God-like powers to place wells wherever they wanted. *See* Tr. 852:3-5. His testimony demonstrates that he then looked at maps of each of the tracts and placed wells in an entirely ad-hoc manner, with the full benefit of hindsight. On direct, when asked to explain why he made his diligent development determinations with respect to specific tracts, he answered in generalities. *See, e.g.*, Tr. 812:3-813:6 (explaining that he counted the wells around Tracts 710A and 711A-B and came to his conclusion). In the end, Mr. Akinboyewa's process can be summed up in his own words on cross: "I looked at the development pattern through the dates of all the wells popping in around the tract and determined, in January, as the petroleum engineer, I would put a well in January 2013, a couple wells there." Tr. 1150:23-1151:2. This superficial process is completely untethered from any regulations or established BLM duties; it is simply an academic exercise of sprinkling wells on a map. Plaintiffs' brief promises that Mr. Akinboyewa used the same method "required by statutes, regulations, and manuals" but never cites a single source for the actual analysis he performed. *See* Pl. Br. at 19 (heading).

Plaintiffs' post-trial brief tries to cobble together a coherent description of Mr. Akinboyewa's supposed diligent development process. *See* Pl. Br. at 20-23 (describing an "eight-step approach"). This newly-minted "eight-step" approach is inconsistent with his declaration describing his diligent development process just a few months earlier. *See* ECF No.

245-1 at 10-11 (describing his diligent development methodology in four steps and not mentioning certain concepts included in Plaintiffs' brief).

In truth, Mr. Akinboyewa's diligent development approach is arbitrary and unsupported, and it significantly shifted in 2023 when he added many more diligent development tracts and wells to his calculations. In his initial drainage analysis, he used a "208-acre drainage value in determining the number of wells to be assigned to some Plaintiffs' Tracts." *Id.* at 13. This means that for a typical 320-acre tract, Mr. Akinboyewa would assign the volume from 1.5 diligent development wells (approximately 320 divided by 208). *See* Tr. 1770:16-23; ECF No. 245-1 at 13-14. In 2023, he updated his diligent development numbers and mostly abandoned that approach, assigning many more diligent development wells per 320 acres. *See, e.g.*, Tr. 1775:24-1776:3 (Mr. Payne summarizing Mr. Akinboyewa's conclusion that six or seven wells should have been drilled on a single tract). He added new tracts that existed in 2018 and applied start dates to new hypothetical wells back in 2013. *See* Tr. 1776:16-1777:9 (Payne). And his claimed diligent development volumes roughly doubled from his 2018 to 2023 analyses. *See* PX-587. There is no consistent methodology to these shifting numbers.

Mr. Akinboyewa further demonstrated the arbitrary nature of his analysis during cross-examination. He explained that he placed some wells to be protective wells for drainage, and he placed other wells as diligent development wells. Tr. 1149:17-1151:21. But even though these are two distinct justifications for hypothetical wells, nowhere is that distinction explained or justified. Tr. 1149:17-1151:21 ("In other cases, it is not as clear, but – because I don't say this additional well is a diligent development well.").

Plaintiffs' entire diligent development damages claim hinges on Mr. Akinboyewa's testimony. His faulty analysis is insufficient for Plaintiffs to meet their burden of proof.

2. *Mr. Akinboyewa's diligent development opinions must be disregarded because he fails to even consider the prudent operator rule*

Plaintiffs cannot meet their burden of proof on diligence because they presented no evidence on a critical element under BLM rules and guidance: whether prudent operators would have drilled wells on their tracts.[11] The regulations require lessees to drill wells when BLM finds they are necessary to "properly and timely [develop the tract] in *accordance with good economic operating practices*." 43 C.F.R. § 3162.2-1(b) (quoted in SJ Decision at 13) (emphasis added); *see also* 43 C.F.R. § 3162.2-5 (no obligation to take actions to protect from drainage if operator can show doing so would be uneconomic). The Indian Diligent Development manual implements this requirement by explaining that BLM is tasked assuring diligence "*consistent with the prudent operator rule*." PX-109.0005 (emphasis added). Any required well must be "economic" and must produce sufficient quantities of oil and gas to pay a reasonable profit "over and above the cost of drilling and operating the well." *Id.*

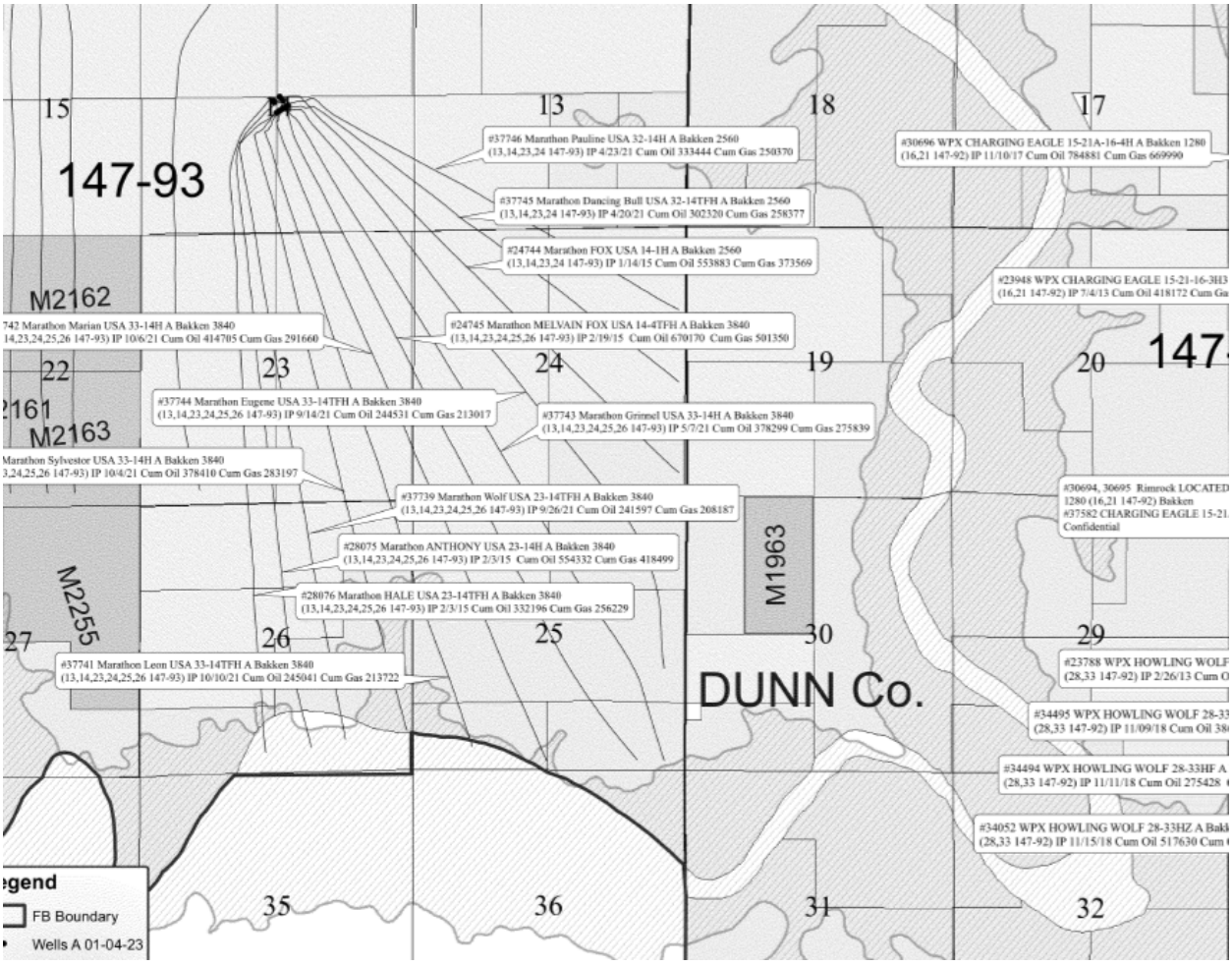
Mr. Akinboyewa presented no evidence that the hypothetical wells that he placed on Plaintiffs' tracts were economic and satisfied the prudent operator rule. He did not present any economic analysis to support his conclusions. Tr. 1137:3-7. Instead, he simply assumed that his hypothetical wells were economic because other wells in the area were being drilled around the same time as his hypothetical wells. *See* Tr. 1136:3-5 ("My diligent development wells are guaranteed all economic because wells are actually being drilled while I'm calling for mine to be drilled.").

But this assumption of economic feasibility is both incorrect and insufficient to meet

[11] Mr. Akinboyewa also confusingly claims that BLM should have required wells to perform better once in operation. Tr. 1151:23-1152:2. There is no basis in the regulations or guidance documents for this assertion.

Plaintiffs' burden of proof. As Mr. Payne testified, "[y]ou can't just look across the lease line and determine economic viability." Tr. 1765:24-25. In his career, Mr. Payne has performed the sorts of economic analyses that are necessary to plan and drill potential wells. Tr. 1759:3-8. So he knows firsthand the factors a prudent operator must consider before drilling a well. That list includes drilling and completion costs; operating expenses; drilling rig and frac material availability; well location and surface restrictions; among many others–none of which were analyzed by Mr. Akinboyewa. *See* Tr. 1759-1764 (Payne).

For example, in this context, Mr. Akinboyewa was questioned about Tract 1963 (shown in excerpt of PX-570):



A river runs to the south and east of Tract 1963, and a majority of the wells in the area extend

from two main wellpads located several miles northwest of Tract 1963. As an example of the types of considerations Mr. Akinboyewa did not incorporate into his analysis, he testified that he did not present an opinion about where his hypothetical well pads should be located or perform any sort of analysis of potential well pad locations and costs. Tr. 1140:5-12.

Tellingly, Mr. Akinboyewa recognized in his testimony that "[t]he standards that an operator would apply, a prudent operator, for economics, is not one that necessarily favors the Plaintiffs, because they may want higher rates of return, and they've demonstrated and stated that." Tr. 897:7-11. Perhaps recognizing that the prudent operator rule did not support their diligent development claim, Plaintiffs ignored the requirement in the regulations and BLM's manual and presented no evidence to overcome that threshold economic question. Their diligent development claim therefore fails.

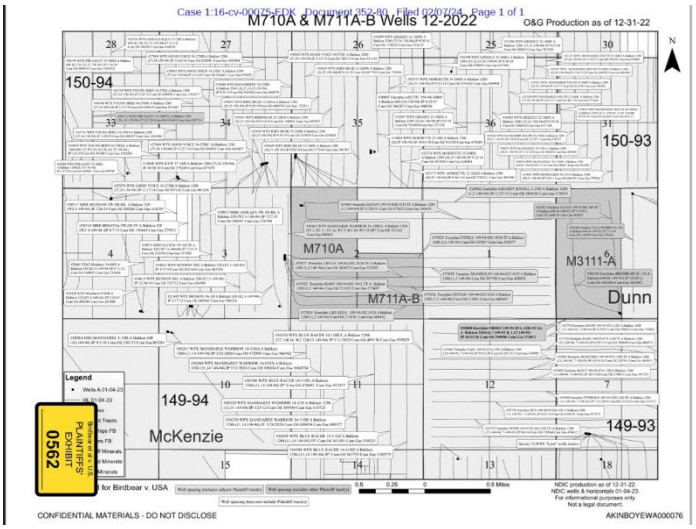
3. Plaintiffs' alleged diligent development volumes and damages are wildly inflated

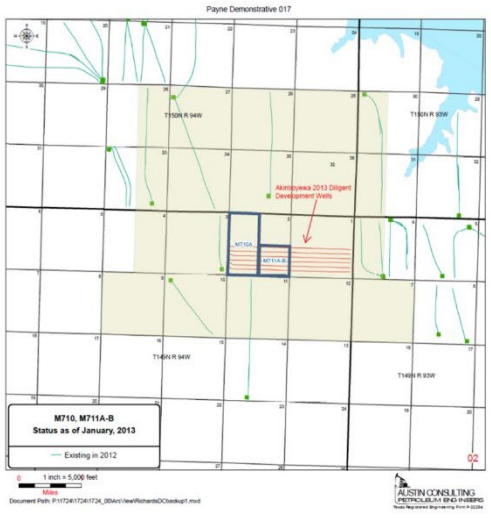
As explained above, Mr. Akinboyewa engaged in an ad-hoc, results-driven process that led to unreasonable diligent development volumes. Two specific examples demonstrate why Mr. Akinboyewa's numbers are inflated and should be rejected.

First, Mr. Akinboyewa added new tracts and new diligent development wells to his analysis in 2023. These new tracts were not originally included in 2018, but in 2023 and at trial he claims they should have been diligently developed with hypothetical wells long before 2018. *See, e.g.,* Tr. 1772:5-1773:25 (Payne). Mr. Akinboyewa claims he is not performing his analysis with the benefit of "hindsight," Tr. 1950:1-1951:1, but there is no logical explanation for arbitrarily adding new pre-2018 diligent development wells to his totals in 2023.

Second, Mr. Akinboyewa's hypothetical diligent development well conclusions strain belief when comparing the hypothetical wells to the actual development in the relevant

timeframe. For example, for Tract 710A, Mr. Akinboyewa argues that seven wells should have been drilled in 2013. The two figures below compare the 2023 map of Tract 710A (PX-562) with a 2013 map of Tract 710A, used by Mr. Payne as a demonstrative during his testimony:





Looking at the 2023 map of Tract 710A, Mr. Akinboyewa's conclusion that the Tract was due seven wells might seem reasonable; both the Birdbear tracts and the surrounding area have fairly dense development. But the vast majority of the wells in this area were drilled *after 2014*. The map on the right shows the development status of this area in 2013, with many fewer wells. So Mr. Akinboyewa's claim that BLM should have required a lessee to drill all seven diligent development Birdbear wells in 2013, at a time when hardly any wells had been completed on tracts immediately surrounding Tract 710A, approaches absurdity. *See* Tr. 1776:16-1777:9 (Mr. Payne discussing the demonstrative map and explaining this problem).

Finally, Plaintiffs never reckon with the fact that the volumes they seek damages for remain on their land and are intertwined with their drainage volumes. Because the nature of their claim is that the volumes should have been developed sooner, the diligence volumes can still be produced and result in royalties to Plaintiffs. Awarding the damages proposed by Mr. Akinboyewa and Ms. Kidd means paying Plaintiffs now for resources they will likely be paid

again for in the future. Moreover, Plaintiffs' claims for drainage and diligence are "mutually exclusive" as Plaintiffs themselves recognized in discovery, *see* Tr. 1425:2-9 (Kidd), because redressing drainage issues would affect diligence and vice versa. Once again, Plaintiffs seek duplicative recoveries from this Court.

In reality, even assuming breach of a money-mandating duty (which Plaintiffs have not shown), Plaintiffs have suffered no damages from a lack of diligent development of their tracts. As Mr. Payne testified, once one considers the prudent operator rule and the relative well density of Plaintiffs' tracts, the "best estimate is that there is no timely well issue." Tr. 1859:3-4.

III. Count 12: Flaring

A. Plaintiffs have not proven a breach of any money-mandating fiduciary duty related to flaring or venting of natural gas

As with drainage and diligence, Plaintiffs have not presented evidence of a breach of a money-mandating trust duty.

The operative complaint alleges a particular breach: that BLM stopped making determinations on whether flaring was avoidable and thus failed to enforce the regulations. Third Am. Compl. ¶ 115. The complaint alleges this failure to enforce was continuing. *Id*. ¶ 117. Plaintiffs abandoned that theory after the trial evidence showed that BLM *is* making determinations on flaring applications. *See* Tr. 1505:9-1506:16 (Bagley).

The Parties agree that NTL-4A (JX-131) provides the relevant standard. *See, e.g.*, Third Am. Compl. ¶112-114. Plaintiffs' post-trial brief states vaguely that the government violated a trust duty to "manage and compensate for venting and flaring." But the undisputed trial evidence is that BLM is taking action on multiple fronts to address flaring. First, BLM has attempted several times to update the applicable rules. *See* Tr. 1504:18-1505:2 (Bagley); Waste Prevention, Production Subject to Royalties, and Resource Conservation, 87 Fed. Reg. 73,588 (Nov. 30,

2022) (describing proposed rule and history of prior rulemakings). Second, BLM is working through the flaring applications before it. *See* Tr. 1505:9-1506:16 (Bagley). When payment to the owner is appropriate, BLM is requiring the operator to do so. *See* Tr. 1506:17-1507:6 (Bagley).

Plaintiffs appear to rely on testimony from Mr. Ollila that flared or vented gas did not satisfy the exceptions in NTL-4A. *See* Pl. Br. at 10-11. This argument relies on the wrong witness and misstates the testimony Plaintiffs elicited.[12] Mr. Ollila testified clearly that he retired in November 2017 and that flaring "was not part of my job." Tr. 31:6-8, 184:16-21. Yet Plaintiffs examined him at length on flaring and rely almost exclusively on his testimony. Even so, Mr. Ollila never "confirmed" that BLM failed to follow NTL-4A, as Plaintiffs imply. Pl. Br. at 10-11. In the very passage cited by Plaintiffs, he repeatedly said he did not know what documents and determinations would have been made and repeated that he "did not work on . . . flaring." Tr. 193:5-11. Nor is there any evidence that the government "disregarded" concerns about flaring. *Contra* Pl. Br. at 11-12. Plaintiffs correctly note that Mr. Hunt raised concerns about flaring. But no witness testified that the government disregarded those concerns.

Plaintiffs ignore the one trial witness who *does* have flaring responsibility. Mr. Bagley explained how the BLM review works and—critically—that BLM's review of flaring

[12] Plaintiffs' argument that the government failed to track how much gas was flared suffers from the same maladies. *See* Pl. Br. at 11. First, Mr. Ollila was not responsible for gas flaring. Tr. 184:16-21. He testified that he "didn't see the production reports" so his knowledge of operator reporting was just what he heard. *Id*. 208:7-13. Plaintiffs then mischaracterize his testimony. For instance, Plaintiffs state that Mr. Ollila "admitted BLM had no way to reconstruct the volume of unreported venting and flaring." Pl. Br. at 11 (citing Tr. 68:12-16). But Plaintiffs omit the next line of the transcript, when the Court requested clarification of Mr. Ollila's answer, and he testified that he does *not* believe Plaintiffs' contention is correct. Tr. 68:17-18. Mr. Ollila testified that BLM would check for missing reports and order operators to fill in any gaps. Tr. 198:21-200:8. He added that he believed the government could estimate flared amounts even if operators did not report them. Tr. 68:12-69:3. Meanwhile, Mr. Bagley testified that the operators *did* submit the necessary forms when flaring gas. Tr. 1520:12-25.

applications has occurred and is ongoing. Tr. 1505:9-1507:6. Mr. Bagley explained, as confirmed by BLM's recent rule preamble, that the agency's rules allow operators to flare gas—subject to a later BLM analysis to determine whether royalties are required. *See* Tr. 1535:12-1537:20; 87 Fed. Reg. 73,588, 73,594 (Nov. 30, 2022) (noting agency policy requiring BLM "to give an operator an opportunity to demonstrate, after the fact, that capturing the gas was not economically justified.").

Plaintiffs presented no evidence that BLM failed to follow the applicable rules. At best, Plaintiffs have a complaint that BLM is taking too long in deciding flaring applications. But such a claim could be heard only in district court under the Administrative Procedures Act. *See Allen v. United States*, No. 14-179C, 2014 WL 3767128, at *3 (Fed. Cl. July 30, 2014) (finding no jurisdiction in Court of Federal Claims for allegations "akin to those underlying a claim to 'compel agency action unlawfully withheld or unreasonably delayed'). And even if such a claim were properly before the Court, Plaintiffs have no evidence for how long BLM's alleged delay is or that it is unreasonable. Nor have Plaintiffs presented a claim that BLM's decision on any specific flaring application was in breach of any money-mandating fiduciary duty. Indeed, Plaintiffs present no specific evidence of *any* incidence of flaring.

B. Plaintiffs have no evidence of appropriate flaring damages

Even if the Court finds Plaintiffs have evidence of a compensable breach, they cannot prove damages. Plaintiffs rely on Ms. Kidd, who calculated the value of the gas flared on Plaintiffs' tracts. *See* Pl. Br. at 49. But her calculation is flawed in two respects, either of which makes it impossible for the Court to determine what damages are owed. As with drainage and diligence, using Ms. Kidd's numbers would result in Plaintiffs getting double recovery for their resources.

First, Ms. Kidd does not account for BLM's ongoing review of flaring applications. Mr. Bagley testified that BLM has reviewed and continues to review flaring applications. Where BLM finds the flaring was avoidable, the government will require the operator to pay royalties to the owner, including Plaintiffs here. *See* Tr. 1506:17-1507:6 (Bagley). Ms. Kidd never checked whether BLM had already ordered payment for flared gas on Plaintiffs' tracts. Tr. 1432:8-1433:4 (Kidd). Therefore, using Ms. Kidd's calculated damages would result in Plaintiffs (i) being paid again for royalties they have already received in some cases and (ii) being paid for royalties they will receive in the future as BLM continues its work.

Second, Plaintiffs' evidence does not account for the applicable regulations. Those rules make clear that royalties are *not* due where BLM determines the gas has been unavoidably lost. JX-131.0001. BLM makes this determination based on applications provided by the operator and determines whether the costs to gather and sell the gas are "economically justified." *Id*. at 0003-0004. Ms. Kidd never determined whether any of the flaring for which she assessed damages would be considered "unavoidable" and thus not subject to royalties.[13] Tr. 1432:8-13 (Kidd). Her testimony thus does not help the Court because she answered a different question than that posed by the rules.

IV. The Government Met Its Obligations To Plaintiffs While Doing The Same For All Allottees

The Plaintiffs in this case are just five of the thousands of allotees owning land on the Fort Berthold reservation. Plaintiffs' brief argues that a handful of internal emails shows that the government treated Plaintiffs with "disdain . . . or worse." Pl. Br. at 32. What those emails

[13] Plaintiffs suggest that Mr. Martin agreed with Ms. Kidd's volumes. Pl. Br. at 50. But Mr. Martin testified that Ms. Kidd did not fully apply the regulations to the volumes she determined. Tr. 1879:19-1882:2.

actually show, confirmed by the rest of the trial evidence, is Interior staff going above and beyond to meet the Birdbears' requests while also fufilling their duties for the other allottees.

Starting around 2007, the Bakken oil boom led to unprecedented oil and gas development on the Fort Berthold reservation. Testimony detailed the explosion of drilling and mineral production in an area that had previously experienced little development. *See*, *e.g.*, Tr. 1488:13-1490:25 (Bagley: boom meant 500% increase in BLM workload; unprecedent in his 39 years at BLM), 332:4-6 (Ollila: Bakken Boom affected workload of the NDFO to "a great degree"). Mr. Ollila testified that BLM managed "in excess of 5,000" drainage cases during this period, Tr. 332:2-3, and BLM's North Dakota Field Office employees more than doubled between 2009 and 2017, Tr. 332:19-25. During this same timeframe, BLM performed "extra reviews" on Plaintiffs' tracts "two or three times"–on top of the potential drainage situation reviews performed on every completed well in the Bakken. Tr. 352:21-23 (Ollila). These formal, extra reviews resulted in drainage analyses sent specifically to the Birdbears, noting BLM's tract-by-tract analyses and explaining BLM's conclusions that drainage was not occurring on the subject tracts. *See*, *e.g.*, JX-118 (2010 drainage review for R. Birdbear); JX-119 (2010 drainage review for N. Birdbear); JX-127 (2013 drainage review for R. Birdbear); JX-45 (2013 drainage review for N. Birdbear); JX-116 (2016 drainage review for N. Birdbear).

As even Plaintiffs' witnesses acknowledged, these extra reviews were being performed while BLM was required to carry out its fiduciary responsibilities to *all* Indian allottees, not just the Birdbears. *See* Tr. 696:4-19 (Mr. Akinboyewa testimony describing BLM's duties to all allottees). And BLM's level of effort regarding drainage protection of the Birdbear tracts was "many times higher" than what BLM did for other allottees. Tr. 358:25-359:5 (Mr. Ollila explaining "I don't remember any other allottees other than the Birdbears asking for special

reviews. So every time we did a special review of all of the tracts it was over and above the drainage review that was already conducted on the tracts.").

The emails Plaintiffs cite, while perhaps intemperate,[14] reflect BLM's efforts to respond to the Birdbears' requests without neglecting other allotees. As Mr. Ollila candidly explained at trial, he did *not* resent it when allotees asked questions, but he did get "a little bit upset when it was like the fifth, or sixth, or seventh, or eighth time. And that's just one allottee, and we had trust responsibility for the whole tribe and for all of the allottees." Tr. 310:24-311:4. In just one example of Plaintiffs' relentlessness, Roger Birdbear received the 188-page drainage review performed by Mr. Wunder around March 13, 2013. *See* JX-127. By March 15, Mr. Birdbear had already posed another question to BLM. *See* PX-324.

Nonetheless, the government responded to Mr. Birdbear's questions, often in just a matter of hours or days. *See, e.g.*, PX-320 (Mr. Wunder responding same day with information about how to obtain well logs); PX-282 (Mr. Laborda responding same day). And BLM's office was just south of the reservation in Dickinson and allottees could walk right in or ask questions by phone or email. Tr. 328:4-15 (Ollila). The agencies more than adequately served allotees during the boom, especially the Birdbears.

V. To The Extent Any Recovery Is Awarded, Compensation Should Be Adjusted To Correct For Legal Flaws In Plaintiffs' Proposed Recovery

A. Mr. Nelson Birdbear's lack of ownership precludes damages

No plaintiff can recover damages for property he does not own. Here, Nelson Birdbear transferred his ownership interests in the tracts at issue two years before trial and so is not

[14] Plaintiffs also suggest impropriety in PX-344, an internal email exchange mentioning Hooters and a strip club. Pl. Br. at 33. But Plaintiffs ignore the obvious possibility that the two colleagues were joking. And Plaintiffs showed the email to Mr. Ollila but never asked him what he meant by it. *See* Tr. 312:20-24.

entitled to damages.

Mr. Nelson Birdbear transferred his ownership interests to his son on January 10, 2022. US-601; Tr. 1466:14-1468:17 (Mann-Klager). From that point on, he received no oil and gas income—because he owned no relevant property. US-332; Tr. 1465:12-1466:13 (Mann-Klager). Plaintiffs never mention this issue in their post-trial brief. There is no dispute over the facts.

For this reason, Nelson Birdbear cannot recover any future damages. The Court's role is to "attempt to place the beneficiary in the position in which it would have been absent a breach." *Warm Springs*, 248 F.3d at 1371. Whether or not there is a breach, Nelson Birdbear would not be due future royalties because he no longer owns any relevant land. *Cf. Applegate v. United States*, 35 Fed. Cl. 406, 419 (1996) ("It is axiomatic that a party must hold a compensable property interest to recover compensation for a taking.").

Nor is there a basis to award Nelson Birdbear past damages. Plaintiffs presented evidence assuming that Nelson Birdbear owned the same tracts today that he did around 2018. Tr. 1399:5-19 (Kidd). Plaintiffs' economic expert learned during her cross-examination that assumption was incorrect. Tr. 1399:5-1400:13, 1410:8-21. Thus, her calculations "would still include" the pre-2018 ownership for each tract—even if a Plaintiff had transferred their interest. Tr. 1399:20-1400:1. Plaintiffs relied entirely on Ms. Kidd for their monetization of their claims. *See* Pl. Br. at 48-49. Ms. Kidd's testimony does not provide a basis for the Court to parse what damages would be due Nelson Birdbear before he transferred his property. The evidence does not show what Ms. Kidd calculated for damages up to January 10, 2022. Thus, Plaintiffs have a failure of proof on this point on historic damages to Nelson Birdbear on each claim.

If the Court finds damages are appropriate for any of Plaintiffs' claims, it should not award any recovery to Nelson Birdbear.

B. There is no basis for damages on volumes to be produced in the future

Both the applicable regulations for oil and gas production and the Supreme Court's Indian trust law precedent make clear that damages are available only for harms incurred—not potential future harms.[15]

The regulations make plain that royalties are due on oil and gas *produced* from a tract—not minerals that may be produced in the future. For instance, oil "*produced* from a Federal or Indian lease . . . is subject to royalty" and oil that "BLM determines . . . *was drained*" should be valued. *See* 30 C.F.R. § 1202.100(b)(1), 1202.100(c) (emphases added). Government expert Ronnie Martin has five decades of experience in the oil and gas industry, first with Texaco, then with a consulting firm. US-317; Tr. 1862:12-1869:9. A key part of his work was analyzing and understanding regulatory and lease terms dealing with oil and gas production. Tr. 1868:1-1869:9. He explained that the regulations were clear that oil and gas only generate royalties after production:

> Oil and gas has to be produced, it has to come out of ground and it has to be produced and used, sold, or whatever, *but royalty is due when it's produced*. There is no basis for trying to value a way to calculate the royalty for gas and oil that's still in the ground and has not come to the surface.

Tr. 1874:5-14 (emphasis added). The leases at issue say the same thing, requiring royalties on minerals "produced" from the land. *See* JX-006.0002.

Indian trust precedent requires the same conclusion. This Court's jurisdiction extends to situations where there is a breach *and* the controlling law mandates compensation "for damages sustained" as a result of the breach. *See, e.g.*, SJ Decision at 5-6; *see also Testan*, 424 U.S. at 400

[15] This argument applies only to the Plaintiffs' drainage and diligence claims. Perhaps recognizing the weakness of the concept, Plaintiffs did not seek future damages for their flaring claim.

(claim under the Tucker Act must be for compensatory damages). Even if the Court finds the government has breached a money-mandating duty, it has not breached those duties into the future. Any future drainage or diligence issues could be curtailed by future government action. For Plaintiffs' prospective damages, there is (as yet) no breach and no "damages sustained." Thus, the Court has no jurisdiction for future harms. This comports with the typical rule that a plaintiff can only recover actual damages, rather than hypothetical future damages. *See, e.g.*, *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1376-77 (Fed. Cir. 2005).

The result required by the regulations and case law makes perfect sense here—and avoids a series of pitfalls that would come with awarding damages on future production. Most obviously in this case, a party might transfer its interest in the land at issue. Nelson Birdbear has done so already, but any of the Plaintiffs could transfer their interests after the Court's decision. Awarding future damages would grant them a windfall to the extent they no longer own the land. Moreover, as Mr. Martin explained, estimates of production and pricing are necessarily imperfect as they look decades into the future. Tr. 1874:22-1875:21. For this reason, Mr. Martin testified that he has *never* seen royalties paid on future oil and gas production in his five decades in the industry. Tr. 1876:7-10.

Paying future royalties creates the risk of a double recovery. Plaintiffs ask to be paid now for drainage that *may* occur in the future and for what hypothetical diligence wells might produce in the future. But future drainage would be affected by the very diligence wells Plaintiffs are asking for: if a new well is drilled on a tract, it would reduce or eliminate drainage from that tract. So Plaintiffs would be paid for damage that never occurs. Mr. Akinboyewa conceded this dynamic in his testimony on direct:

> So in my 2023 analysis, part of that update is evaluating if the new wells that have come in would contribute to stopping drainage or not and how much it would. And

> that's part of the reviews that you would do if you were the BLM engineer to make sure you're constantly assessing the activity that's happening around these tracts to determine that drainage is being alleviated by the drilling of protective or diligent development wells . . . .

Tr. 1038:12-20. Plaintiffs' future diligence damages are even more problematic. For those claims, the resources remain in the ground, subject to future production. So Plaintiffs would get paid now and then again when the resources are ultimately produced. There is no basis for such a double recovery.

C. Interest is precluded by law

Plaintiffs should not be allowed interest in this case because there is no statutory basis for interest against the government.

As a general rule, interest is unavailable in claims against the federal government. This rule "is an aspect of the basic rule of sovereign immunity." *England v. Contel Advanced Sys., Inc.* 384 F.3d 1372, 1379 (Fed. Cir. 2004). Interest can only be recovered against the government where "the award of interest was affirmatively and separately contemplated by Congress." *Libr. of Congress v. Shaw*, 478 U.S. 310, 315 (1986); *see also White Mountain Apache Tribe of Ariz. v. United States* 20 Cl. Ct. 371, 379 (1990) ("The law is unequivocal that absent a statute expressly providing for the payment of interest, separate from a general waiver of immunity to suit, the United States is immune from an award of interest as damages."). Congress has specifically applied the no-interest rule to claims in this Court, stating that interest can only be recovered "under a contract or Act of Congress expressly providing for" it. 28 U.S.C. § 2516(a); *see also City of Wilmington v. United States*, 157 Fed. Cl. 705, 738 (2022) (applying no-interest rule based on 28 U.S.C. § 2516(a) and *Shaw*), *aff'd* 68 F.4th 1365 (Fed. Cir. 2023).

While both sides' financial experts included interest as a line item, no witness opined that interest was appropriate in this case. Plaintiffs' expert stated that she was instructed by counsel to

include a specific interest calculation and had no independent opinion as an economist on whether interest was appropriate. Tr. 1412:9-20 (Kidd). The issue is a purely legal one.

Here the law is clear that interest is not permitted. There is no express statutory provision allowing for interest. *See Shaw,* 478 U.S. at 315; *White Mountain Apache*, 20 Cl. Ct. at 379. Nor have Plaintiffs even tried to articulate a basis for assessing interest. The Court should not do so.

VI. To The Extent Any Breach Is Found, The United States Provides Proposed Damages For Each Claim

If the Court finds a breach of a money-mandating duty, this section summarizes the United States' proposal for how to assess damages. At most, Plaintiffs would be entitled to $32,078 in damages.

A. Even if the Court finds a breach, damages are only warranted for Plaintiffs' drainage claim

As discussed above, if the Court finds a breach for any of Plaintiffs' claims, the evidence does not support damages for Plaintiffs' diligence or flaring claims, and only *de minimis* damages for drainage.

For drainage, the government's trial experts concluded that there was a small amount of potential drainage from four wells. *See* Tr. 1753:1-23 (Payne); US-604. The total valuation of that potential drainage amount is $62,313 (before making adjustments described in Subsection B). Tr. 1871:11-1872:12 (Martin); US-353. As discussed in Section I.B, Plaintiffs' evidence of drainage is not compelling. If any damages are awarded, the Court should use the government's figures.

For diligence, the government's trial experts concluded that no diligence recovery was warranted. Mr. Payne concluded that the "best estimate is that there is no timely well issue." 1858:23-1859:17. Were the Court to find breach, the Court should award no damages because

Plaintiffs have not met their burden to show any additional wells are required. And Plaintiffs' evidence on diligence damages is unconvincing, as discussed in Section II.B. If, however, the Court finds some diligence recovery is appropriate, Mr. Payne calculated volumes using the "assumptions most favorable to Plaintiffs." Tr. 1858:23-1859:17. According to Mr. Martin, these volumes would equate to $665,150. Tr. 1887:25-1888:14. If the Court finds some damages are required, it should use Mr. Martin's value.

For venting and flaring, no recovery is warranted. As discussed in Section III.B, Ms. Kidd's calculations did not incorporate the requirements of the rules or the facts of past and future payments to Plaintiffs. The Court should not award damages for this claim.

B. For any damages the Court finds, it should reduce the total because certain damages are not allowed by law

Whatever the Court selects as a starting point for damages, it should reduce the total to account for those portions that are legally unavailable as discussed in Section V—sold property, future royalties, and interest.

There are three components to damages for each of Plaintiffs' claims: the volumes at issue, the monetization of those volumes, and whether to include the items discussed in Section V. As the Parties' financial experts explained, the volumes are the primary difference between them, and the monetization performed by Ms. Kidd and Mr. Martin were not otherwise materially different. *See* Tr. 1396:23-1398:1 (Kidd); 1877:13-1878:8 (Martin); Pl. Br. at 49. Thus if the Court finds that Mr. Payne's volumes were appropriate, it should use Mr. Martin's monetization, while if the Court finds that Mr. Akinboyewa's volumes were appropriate, it should use Ms. Kidd's values.

In either case, the Court should then deduct certain amounts for the reasons discussed in Section V. Both experts presented similar charts of damages, which can be adjusted as necessary.

See, e.g., Tr. 1412:21-1413:18 (Kidd). As discussed in Section V, the Court should deduct damages for Nelson Birdbear, future damages, and interest. Each of these amounts is separately set forth in the experts' charts, so can be removed. We use US-353 as an example below with highlighting added to reflect the amounts for Nelson Birdbear (highlighted in orange), future damages (blue), and interest (yellow). Incorporating each of those reductions would lower the damages calculation from $62,313 to $32,078.

Table 1
Potential Underpayments for Drainage Volumes from Existing Wells
Using Lease Royalty Rates

	Roger Birdbear	Jamie Lawrence	Nelson Birdbear	Rae Ann Williams	Thomas Birdbear	Total
Historical Period						
April 2012 - March 2018						
Principal	$24,050	$2,676	$3,317	$2,676	$2,676	$35,396
Interest[1]	3,312	541	697	541	541	5,631
Historical Total	27,361	3,217	4,015	3,217	3,217	41,027
Future Period						
April 2018 - December 2045						
Principal	30,617	1,182	1,905	1,182	1,182	36,067
Interest[1]	107	4	5	4	4	125
Discount to PV[2]	(12,878)	(417)	(777)	(417)	(417)	(14,906)
Future Total	17,847	769	1,134	769	769	21,286
Total	$45,208	$3,986	$5,148	$3,986	$3,986	$62,313

[1] Source: Office of Natural Resources Revenue (ONRR) Late Payments and UnderPayments for Indian Oil and Gas Leases.
[2] Future values are discounted using 10% per year, compounded monthly, to April 1, 2019.

C. No accounting is necessary

On the last page of their brief, Plaintiffs argue that their trial evidence is "minimum damages" and ask the Court to conduct an accounting in aid of judgment to increase their recovery. To the contrary, Plaintiffs have been fully heard and no accounting is warranted.

As an initial matter, an accounting can be had only if Plaintiffs prove a breach of trust and the accounting is necessary to assist in calculating compensatory damages. *Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 203-04 (2020). If the Court finds no breach, it need not consider Plaintiffs' accounting demand.

Even if the Court finds a breach however, there is no basis to order an accounting. For one, there is no practical need for an accounting in aid of judgment—both parties' experts have been able to calculate volumes and prevailing royalty rates. Plaintiffs argue that the government has failed to maintain records about the value of Plaintiffs' resources and that alleged failure justifies a post-trial accounting. But, as described above, there is no proof that the government failed to maintain documents, making the *Jicarilla III* case Plaintiffs cite inapposite. *See* Pl. Br. at 50. Instead, Plaintiffs' complaints about records are either situations where there was no obligation to collect documents or Plaintiffs failed to ask for them. More importantly, Plaintiffs never explain how the alleged missing documents would assist the Court in determining the appropriate amount of damages owed, particularly where the calculation of damages are not issues of receipts and distributions but matters of petroleum engineering and geology.

CONCLUSION

The United States respectfully requests that the Court rule against Plaintiffs on all counts.

Respectfully submitted,

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