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

PLAINTIFFS' POST-TRIAL REPLY BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

Plaintiffs' allotted lands sit in a broken system. The allotment framework was enforced as a "mighty pulverizing engine to break up tribal mass." Theodore Roosevelt, First Annual Message (Dec. 3, 1901). As a result of allotment, "individual Indians became beneficiaries of the trust lands, but lost the right to sell, lease, or burden the property without the federal government's approval." *Cobell v. Norton* ("*Cobell VI*"), 240 F.3d 1081, 1088 (D.C. Cir. 2001). Defendant thus bears "moral obligations of the highest order and trust" in its relationships with Indians and its conduct "should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). Instead, Defendant delivered operational dysfunction, depredations, self-declared "exemptions" from trust obligations, and pervasive violations of federal regulations.

Defendant's brief reflects the same disarray. Rather than prove that it met the highest standards demanded of a fiduciary—akin to that of guardian/ward in the Indian trust construct—the government's case is pockmarked by a conspicuous absence of documentary proof required by regulations and operational manuals, its usual team of pliant Texas oilmen/experts, and the failure to meet the functional, day-to-day duties that reside in the interstices between the four corners of statutes and regulations and the overriding, exacting trust obligations owed to the Plaintiffs. *See, e.g.*, *Jicarilla Apache Nation v. United States,* 100 Fed. Cl. 726, 736–38 (2011) (collecting and analyzing cases that apply common law trust principles to "flesh-out" general trust duties owed by a fiduciary). Plaintiffs furnished evidence, cohesion, and science; Defendant offered theories without law, assurances without proof, omissions without explanation, and fictional geology and petroleum engineering that defy physics. Put directly, going on two centuries after enactment of the General Allotment Act, this case is another example of Defendant's failure to honor a trust doctrine that "is one of the cornerstones of Indian law." Cohen's Handbook of Federal Indian Law § 5.04[3][a] at 412 (Nell Jessup et al. eds. 2012).

ARGUMENT

I. DEFENDANT MATERIALLY MISSTATES THE STANDARD OF REVIEW.

Defendant's analysis is flawed at the outset: Defendant argues that its conduct is adjudged by an abuse of discretion or lesser standard (Def.'s Post-Trial Br. at 6–8, ECF No. 365)—without acknowledging the standard against which its conduct is necessarily first measured. Courts do not make the same error. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., concurring in part, dissenting in part), *adopted as majority opinion*, 782 F.2d 855 (10th Cir. 1986) (*en banc*) (the United States cannot "escape [the role] of trustee" by claiming that courts must defer to its delegated authority) (citing *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982)).

This case does not involve quarrels over competing courses of action that individually met the highest fiduciary standard applicable to Defendant; rather, this case addresses the rampant failures to meet the fiduciary standard in the first instance. Defendant's "moral obligation" finds root in Defendant's duties under unambiguous statutes and regulations to "ensure that Indian mineral owners desiring to have their resources developed are assured that they will be developed in a manner that maximizes their best economic interests . . . ." 25 C.F.R. §§ 212.1(a), 212.3. *Accord Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987). As *Cobell VI* explains, while there may be some room for governmental discretion *within* the exacting standard required of a fiduciary, Defendant's conduct is always measured *against* that standard. 240 F.3d at 1099. The lynchpin inquiry is whether Defendant met the highest and most exacting of fiduciary duties. Whether Defendant met those standards is not subject to an abuse of discretion or lesser standard.

II. PLAINTIFFS PROVED DEFENDANT'S LIABILITY FOR DRAINAGE.

A. Defendant Committed Overriding Errors in Its Drainage Analysis.

First, addressing drainage required that Defendant accurately define it. Defendant argued at trial that drainage is the *production* of migrated (drained) hydrocarbons by an offending well. Tr. 1656:1–

1658:9. Accordingly, Defendant's experts failed to properly define drainage, even though this Court clearly cited the applicable federal definitory regulation (43 C.F.R. § 3160.0-5) in the September 9, 2022 Opinion and Order (ECF No. 207) at 10 n.4. By improperly qualifying that drainage requires that migrated hydrocarbons be actually produced by an offending well, Defendant ignored the basic fact that drained hydrocarbons will not defy physics and migrate back to an area of higher pressure. In plain terms, Defendant used a false starting point, then built upon its own error by using a volumetric approach that similarly focused on production, rather than the drainage of hydrocarbons due to pressure depletion.

Second, Messrs. Payne and Reynolds failed to identify the potential offending wells that they analyzed for drainage. Indeed, Mr. Payne excluded every well that was subject to a communitization agreement ("CA") in which any Plaintiff had any fraction of an interest. Tr. 1720:4–9. Notably, Mr. Payne admitted on cross-examination that this approach excluded wells that he knew to be offending from any drainage analysis. Tr. 1795:13 ("we know they're draining."); Tr. 1719:18–19 ("of course, it's draining reserves from the Birdbear tract, of course it is."). Defendant's approach flatly violated the definition of drainage set forth in regulations and the 1999 Interim Drainage Manual. JX-092 at BRDESI0878401.[1] Mr. Payne compounded his error by also excluding additional wells for unspecified "other reasons" (Tr. 1793:17–22) and proffered a demonstrative exhibit entitled "Potential Drainage Volumes." Tr. 1753:1–9, 1754:2–9. However, that demonstrative exhibit showed four *tracts*

[1] To exacerbate Defendant's evidentiary gap, only four CAs were admitted into evidence. *See* JX-065, JX-088, JX-091, PX-1628. PX-1628 underscores the depth of the problem, since Plaintiffs cumulatively owned 80% of a drained tract, but only 2.5% of the adjacent tract is subject to a CA. Defendant claims that JX-065 negates drainage because the CA abuts Tract M2255. However, Tract M2255 is not subject to a CA, so the minerals drained from under M2255 are being paid to other people over one mile from Plaintiffs' tract. Defendant also backdated CAs and allowed oil company operators to self-certify CAs, hold expired in leases in a CA, and drill only one well in a spacing pattern in order to keep a nonproducing CA in place. Tr. 1823:25–1824:3; 1946:9–25; 1947:6–1948:1; PX-364. Mr. Ollila ignored Plaintiffs' complaints about such abuses. PX-432; Tr. 176:9–180:12.

that suffered drainage, but not what offending *wells* had caused the damage. Even in its brief, Defendant focuses upon only two tracts, without any identification of the offending wells. Def.'s Br. at 13–16. It seems that Defendant attempted to obfuscate and artificially eliminate offending wells, rather than clarify its own theories.

Third, even after Defendant failed to correctly define drainage, and consider and identify potential offending wells, it further failed to apply a proper scientific drainage analysis. At this point, a fundamental disconnect is apparent between Defendant's employees, on the one hand, and its experts on the other. For example, Mr. Laborda testified that oil company operators monitor pressure data. Tr. 1206:12–22. He even descriptively testified how the physics of pressure depletion in the Bakken would drain a reservoir half a continent away under certain conditions. Tr. 1202:21–1203:5. Contrary to the basic physics noted by its employees, Defendant nonetheless now argues that Plaintiffs showed a "preoccupation" with "red herring" pressure data because "nothing requires BLM to obtain (or use) such data." Def.'s Br. at 10.[2] Mr. Payne stretched this premise a step farther and argued that oil company operators don't maintain pressure data. Tr. 1807:5–6. Given the supposed absence of pressure data, Mr. Payne conducted a volumetric approach because that's "where the data does exist." Tr. 1808:1–6.

However, cracks appear in even the most rehearsed testimony. During his direct examination, Mr. Payne let slip that "[w]e have horizontal wells that have produced for years and years, ***and the companies have gone down beside these wells and measured pressures***." Tr. 1751:25–1752:2 (emphasis added). Without evidence, he then testified about original and "reduced pressure" areas.

[2] Defendant is again wrong on the law. It matters not whether a specific statute or regulation specifically spells out the requirement that Defendant obtain pressure data. *Cobell VI,* 240 F.3d at 1100 (finding "unsustainable" the argument that the government's duties were limited to those specifically identified by the American Indian Trust Fund Management Reform Act). *See also United States v. Mitchell* ("*Mitchell II*")*,* 463 U.S. 206, 225 (1983) (holding that the existence of a "general trust relationship" imposes "distinctive obligation[s]" in addition to those established by statute).

Tr. 1752:2–5. Defense counsel immediately moved off the issue, but the point had been made: Mr. Payne, like Defendant's former employees, knows that oil company operators keep pressure data.[3] Consequently, the false theory that multi-billion-dollar oil companies don't maintain pressure data resulted in Mr. Payne's EUR "tank" analysis. However, such a calculation is used to "calculate recoverable oil." Tr. 1728:12–13. Like Mr. Reynolds, Mr. Payne thus incorrectly focused upon the ultimate recovery of oil, not from whence the oil drained.

B. Mr. Akinboyewa's Testimony Stands in Clear and Favorable Contrast to Defendant's Conflicting Approach to Drainage.

While Defendant ineffectually attacked Mr. Akinboyewa from multiple angles, it is striking how often Messrs. Payne and Reynolds admitted that they agreed with his work. Mr. Payne, for example, admitted that he was tasked to respond only to "certain areas" of Mr. Akinboyewa's analysis. Tr. 1695:25–1696:5. He nevertheless agreed with Mr. Akinboyewa's assessment of the relevant study area (Tr. 1712:12–21) (admitting those areas were "fine in terms of an area to evaluate"); he admitted that his own decline curve analyses did not differ from Mr. Akinboyewa (Tr. 1727:5–11) ("there really were no material differences") (Tr. 1808:15) ("He did a great job on that"); he agreed with Mr. Akinboyewa's EURs and cumulative production calculations (Tr. 1727:5–11); he examined Mr. Akinboyewa's flow equations (Tr. 1807:9–13); he checked Mr. Akinboyewa's work (Tr. 1808:3–4) ("We did the same work Mr. Akinboyewa did, we check the equations"); he testified that "[t]hat's what Mr. Akinboyewa did – we did it as well. Our numbers are not much different than his . . . ." Tr. 1808:12. Indeed, he even calculated a *higher* drainage percentage than Mr. Akinboyewa on one offending well. Tr. 1747:9–14. ("we're in general agreement on that calculation, but we use . . . actually

[3] Defendant makes its own problems worse by arguing that Mr. Akinboyewa admitted that pressure data does not exist (Def.'s Br. at 22) and that replicating pressure data would cost in the millions. In reality, Mr. Akinboyewa testified that Defendant did not produce pressure data, despite Plaintiffs' repeated requests. Moreover, the Hess Corporation already spent millions to conduct a drainage study in the Bakken—a study that Defendant first introduced, but then misinterpreted and now does not like due to its confirmation of early drainage thousands of feet away from a well.

a slightly larger number than him.").

In reality, the difference between Payne/Reynolds and Mr. Akinboyewa rests with the distinction between a flow analysis that measures drainage (Mr. Akinboyewa) and a tank calculation that measures ultimate production but not the source of hydrocarbons (Payne/Reynolds). Mr. Akinboyewa and Mr. Payne agree that the Bakken is a "pressure depletion reservoir" (Tr. 1731:13–15), meaning that once hydrocarbons are removed from an area, the pressure around the wellbore decreases and hydrocarbons will migrate there from higher pressure areas. Drainage is not contained within a geometric coffin (as established by the Hess Paper), nor is it limited to the propped fractures (as established by, among other evidence, the Headington Study and Hess). To get to its result-driven conclusion, Defendant failed to perform a flow equation, and resorted to a facile explanation that the Bakken and Three Forks reserves are separate reservoirs, except when hydraulically fractured. Defendant presented no science and no study (peer reviewed or otherwise) in that regard.

C. Defendant Introduced Studies that Negated the Opinions of Defense Experts.

Defendant similarly relied upon and even introduced studies that expose defense errors. For example, Defendant introduced the Hess Paper (JX-124) as part of the Payne/Reynolds report. Properly understood, the report eviscerated Defendant's contentions regarding drainage. Hess literally stated that pressure depletion takes place thousands of feet from a horizontal wellbore in the Bakken and well within the precise timeframe in this case. *Id.* To the same end, even Defendant's attempt to superimpose a geometric drainage "box" or "coffin" onto the Hess diagram (demonstrative exhibit 8), showed pressure depletion extending well beyond Defendant's superficial drainage area. Indeed, those superimposed areas further obliterated the concept that drainage can't occur outside of Defendant's arbitrary "minimal" (Tr. 1696:24–1697:4) drainage cutoff from the heel and toe of a well. *Id.* The contradictions proven by the Hess data were of such magnitude that Mr. Payne was forced to ignore Defendant's own previous reliance upon the Hess Paper and dismiss it as "a model that [Mr.

Akinboyewa] likes that suggests that, but that's not data." Tr. 1751:19–20. Defense experts applied the same transactional approach in their use of the Headington Study, which Messrs. Payne and Reynolds used at trial as alleged support for their theories that the migration of hydrocarbons in the Bakken cannot occur with hydraulic fracturing. To the contrary, the Headington Study documented substantial production of hydrocarbons without fracturing in a much lower pressure environment than originally estimated on Plaintiffs' tracts, again supporting Mr. Akinboyewa's application of science to the facts. Tr. 1958:20–1960:25.

D. Defendant Contemporaneously Verified Its Collective Lack of Knowledge Regarding Drainage During the Bakken Oil Boom.

Mr. Ollila (a supervisory-level employee now minimized by Defendant as an unnamed "single, long-retired BLM witness") (Def.'s Br. at 1) wrote repeatedly in 2013 that Plaintiffs could not be compensated for drainage due to the doctrine of capture. PX-324 at 1 ("the offending operator has NO obligation to compensate the mineral owner for oil drained") (emphasis in original). This statement bespeaks critical errors on multiple levels. First, the very basis of compensatory royalties is to pay allottees for drainage. JX-092 at BRDESI0599030 (stating that an offending oil company operator can be required to "pay compensatory royalty" to allottees). Second, Mr. Ollila's belief that the doctrine of "capture" (PX-324) governed the Bakken wells violates the trust obligation to prevent drainage from allottee tracts. Therefore, Defendant not only fails to presently acknowledge essential concepts of drainage, but exhibited a similar (or worse) misunderstanding at an operational level during the Bakken oil boom.

III. PLAINTIFFS PROVED DEFENDANT'S LIABILITY FOR FAILURE TO DILIGENTLY DEVELOP.

Mr. Akinboyewa meticulously documented and disclosed pervasive failures to diligently protect and develop sixteen (16) of Plaintiffs' tracts. *See* Pls.' Post-Trial Br. at 23–30. He created detailed maps in each instance, including minute detail regarding facts such as the dates of initial

production by offending wells. Based upon that analysis, he computed how many and when wells should have been drilled and what level of production would have occurred had Defendant not violated its trust duties (based upon historic production profiles of adjacent drilling). Moreover, cross-examination revealed no contradictions, conceptual gaps, or admissions.

Defendant's diligent development "analysis" stands in stark and unfavorable contrast. Defendant's direct examination of Mr. Payne only cursorily addressed diligent development. *See* Tr. 1757–78. Moreover, it was not simply the brevity of the summary that was instructive, but its superficial nature. Contrary to Mr. Akinboyewa, Mr. Payne did not present a detailed tract-by-tract analysis. Instead, he defaulted to generalities without proof:

- He mentioned rig and crew availability, without citing any data about how many rigs or crews were available for drilling. Tr. 1761:12–17;

- He complained that Mr. Akinboyewa did not identify the precise location within each tract where a well should have been drilled (Tr. 1761:22–1762:14), yet omitted the fact that Mr. Akinboyewa comprehensively explained how many wells should have been apportioned to each of the sixteen (16) tracts;

- He argued that Plaintiffs could not hold oil company operators to a standard of technology that supposedly "didn't exist" (Tr. 1762:19–1763:6), and ignored the facts that Mr. Akinboyewa verified and disclosed regarding the extent and timing of development on adjacent tracts, matching the technology and actual development of the study times;

- He declared that CAs "have got to be honored" (Tr. 1763:23–1764:3), yet failed to follow BLM's own requirements (addressed *supra*) and failed to honor the rule that CAs must maximize the benefit to Indian mineral owners;

- He testified to the unremarkable premises that it gets cold in North Dakota and that there may be storms or weather events, but then admitted that production goes on "24/7/365." Tr. 1764:13–15; and

- He cited the prudent operator rule, but ignored the most obvious evidence: oil company operators voluntarily drilled every well on surrounding tracts. Obviously, self-interested multi-billion dollar companies would only drill wells they expect to be paying wells.

Mr. Payne's testimony is not an analysis; rather, it is listing of hypothetical problems without proof that any problem existed. At trial, Mr. Ollila similarly omitted a tract-by-tract analysis.

It is too late for Defendant to cure this analytical defect. For example, it argues that the Bakken boom was "unprecedented" (Def.'s Br. at 28), yet avoids the fact that trust violations at Fort Berthold Reservation continued *for years*. Moreover, Defendant specifically conceded that it would not attempt to introduce evidence that its failures were due to a lack of resources. ECF No. 256 at 1–2. If Defendant wanted to now introduce this consideration into the case, it would have been well for Defendant to heed reports and caselaw that document the lack of attention and funding devoted to indigenous people. *See, e.g.*, A Quiet Crisis, U.S. Commission on Civil Rights (2003); Broken Promises: Continuing Federal Funding Shortfall for Native Americans, U.S. Commission on Civil Rights (2018).

Defendant displayed the same evidentiary deficiencies at trial. For example, Plaintiffs methodically proved that the North Dakota Field Office ("NDFO") abandoned its obligations for diligent development and even declared an "exemption," as revealed by testimony and internal documents. Nevertheless, Defendant elicited little to nothing more from Mr. Ollila than his general recitation of what BLM was required to do and his bare testimony that BLM did so. Defendant complicated its own predicament through the testimony of Pascual Laborda. Defendant never identified Mr. Laborda as a potential witness, yet elicited testimony that he saw supposed physical diligent development files (Tr. 1217:8–1218:11) and drafted a report that NDFO's record maintenance existed and was compliant. *Id.* Nevertheless, Defendant still did not produce any diligent development files relating to a tract owned by Plaintiffs, nor did it produce Mr. Laborda's supposed written reports regarding NDFO's alleged compliance. Indeed, Defendant was so desperate for proof that it attempted to produce a diligence file of a tribal-owned tract. Tr. 1496:21–1498:13. Mr. Laborda did not work closely with Mr. Ollila, did not work at NDFO, and had retired by late 2013. Tr. 1184:2–24; 1240:15–20. Clearly, Defendant recognized the problems established through Mr. Ollila and sought

to have Mr. Laborda retroactively patch the holes. Not only did he fail to do so, but he denied that he had ever talked to defense counsel in preparation for trial. Tr. 1272:9–11. Defendant's counsel was thus forced to correct this inaccuracy. Tr. 1289:4–12. Mr. Laborda's testimony was prepared and scripted, yet still resulted in admissions and the failure to produce proof and alleged documentation.

IV. PLAINTIFFS PROVED DEFENDANT'S LIABILITY REGARDING VENTING AND FLARING.

It is undisputed that Defendant allowed flaring and venting of gas, despite warnings and calculations from at least one employee of the massive volume of assets that literally dissipated into the air. Tr. 1319:19–1320:10; PX-152. In its brief, Defendant tepidly responds that Defendant is "working through" flaring applications (Def.'s Br. at 38) and that "the agency's rules allow operators to flare gas" subject to a retroactive determination of whether royalties are due. *Id.* at 39. Neither assertion suffices to sidestep liability for a saleable and forever lost asset.

First, Defendant was conspicuously unable to introduce any proof that Plaintiffs have been compensated for flared and vented gas—or even that Defendant had or intended to "work[] through" any flaring applications with respect to Plaintiffs' tracts. At trial, defense expert Ronnie Martin testified that he had seen a BLM "report" that showed that venting and flaring had been approved as necessary on Plaintiffs' tracts. Tr. 1896:5–1897:25. In reality, however, he admitted that he received a never-produced spreadsheet from the Department of Justice without any underlying proof. Tr. 1897:9–25.

Second, Defendant's reliance upon BLM's proposed rule on Waste Prevention is instructive, but in Plaintiffs' favor. This regulation was adopted the same day that Defendant filed its brief. However, the regulation does not state that it is retroactive in application and the presumption exists that it is not. *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1362 (Fed. Cir. 2005). Moreover, a more thorough reading of the proposed rule materially favors Plaintiffs. Among other things, the proposed rule provides that:

> In choosing from among reasonable regulatory alternatives for Indian mineral development, the ***BLM is obligated to adopt the alternative that is in the best interest of the Tribe and individual Indian mineral owners***.

87 Fed. Reg. 73,588, 73,593 (Nov. 30, 2022) (emphasis added). Consequently, even if Defendant had somehow otherwise met its fiduciary obligations, it was still required to adopt (among fiduciary compliant alternatives) the one that best served Plaintiffs' interests.

V. DEFENDANT MISSTATES THE LAW REGARDING SUCCESSORS-IN-INTEREST.

Defendant continues to argue that Plaintiff Nelson Birdbear cannot recover damages, since he transferred his interests in allotted tracts to his son, Robert, after this lawsuit commenced. Def.'s Br. at 42–43. Defendant then seizes upon its theory to portray it as among the supposed "pitfalls" to awarding damages "for future oil production." *Id.* at 45. Defendant is wrong on the law. RCFC 25(c) provides: "If an interest is transferred, ***the action may be continued by or against the original party*** unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3)." (Emphasis added.) Therefore, unless Defendant moved to substitute Robert Birdbear as a party, the fact that Nelson Birdbear's interest was transferred does not matter for purposes of continuing to litigate the action or awarding damages. *See U.S Sec. & Exch. Comm'n v. Collector's Coffee Inc.*, 451 F. Supp. 3d 294, 297 (S.D.N.Y. 2020) (holding that the purpose of Rule 25(c) is to allow a case to continue even when an interest changes hands without requiring a new suit because the successor is bound by a judgment against its predecessor); *Froning's, Inc. v. Johnston Feed Serv., Inc.*, 568 F.2d 108, 110 (8th Cir. 1978).

VI. A MONEY-MANDATING OBLIGATION EXISTS WITH RESPECT TO EACH CLAIM.

Defendant attempts to reargue the summary judgment motion and concludes that a money-mandating duty does not exist regarding each claim. However, this Court addressed those same arguments in its summary judgment order and found money-mandating duties. As this Court noted

in its summary judgment order, the regulatory framework for the management of mineral resources in this case "is very similar to the one that governed timber resources in *Mitchell II*." ECF No. 207 at 15. The United States Supreme Court was clear in *Mitchell II*: Defendant's pervasive trust obligations "can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." 463 U.S. at 226. This reasoning is unassailable in light of the purpose of 25 C.F.R. Part 212—ensuring that Indian mineral owners are assured that their resources will be developed to maximize their economic interests. Under the similar reasoning of *United States v. Navajo Nation*, comprehensive control over mineral resources may support a finding of fiduciary duties and, if so, "then trust principles (including any principles premised on 'control') could play a role in 'inferring that the trust obligation [is] enforceable by damages.'" 556 U.S. 287, 301 (2009) (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473, 477 (2003))g. Here, Defendant concedes the existence of fiduciary obligations and Plaintiffs cited specific statutes, regulations, precedent, and common law to establish a money-mandating obligation with respect to Defendant's plenary authority over drainage, diligent development, and venting and flaring. Defendant does not cite *Mitchell II* and has not identified any caselaw or regulation to the contrary.

VII. PLAINTIFFS PROVED THE STARTING-POINT AMOUNT OF DAMAGES AND THE AVAILABILITY OF NON-MONETARY RELIEF.

Before consideration of the full trust corpus, the categories and starting-point dollar amounts sought by Plaintiffs are:

DAMAGES TYPE	Historical Under-payments	Interest	Future Under-payments	Discount to Present Value	TOTAL
Failure to Diligently Develop (PX-531C)	$32,508,267	$16,711,248	$16,655,279	($9,273,966)	$56,600,829
Drainage (PX-531B)	$1,406,686	$576,773	$252,395	($123,802)	$2,112,052
Unauthorized Venting and Flaring (PX-531D)	$246,151	$93,104			$339,256
	TOTAL				**$59,052,137**

Accounting in aid of judgment, expert fees, costs, and attorney's fees: TBD

Three related points bear emphasis. ***First,*** Defendant argues that interest is unrecoverable. Def.'s Br. at 46. While 28 U.S.C. § 2516 indeed requires that interest against the United States be allowed "under a contract or Act of Congress," such a basis exists in this case. In *Shoshone Indian Tribe of Wind River Rsrv. v. United States*, the Federal Circuit identified several statutes and regulations that support an award of prejudgment interest. *See* 364 F.3d 1339, 1353–54 (Fed. Cir. 2004). The *Shoshone* court specifically referred to 25 C.F.R. § 211.40 and 25 U.S.C. §§ 161a, 161b, and 162a as creating "a definitive requirement that the Government credit [the plaintiffs'] trust accounts with [their] sand and gravel proceeds and earn interest on those trust funds." *Id.* at 1354. Likewise, these very same[4] statutes and regulations require that Defendant credit Plaintiffs' trust accounts with its mineral proceeds and earn interest thereon. *See, e.g.*, 25 U.S.C. § 161a(b). Defendant's breaches resulted in a lesser amount of these proceeds being deposited in Plaintiffs' trust accounts and therefore less interest earned.

Second, Defendant repeats its arguments that Plaintiffs have not been damaged because hydrocarbons are still in the ground and Plaintiffs "can expect to be paid in the future." Def.'s Br. at 2. The failings of this approach are manifest. It is inconceivable even in theory to argue that Plaintiffs' resources are maximized by waiting a literally indeterminate period for Defendant to decide whether to maximize development and protect against drainage. The time for Defendant to fulfill its obligations was at immediate hand during the Bakken oil boom and it never enforced its ability to order drilling, compensatory royalties, or lease forfeitures. Moreover, Plaintiffs do not seek damages for future breaches. Def.'s Br. at 45. Rather, Plaintiffs seek future damages that were caused by prior total breaches. Even the primary case cited by Defendant, *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369 (Fed. Cir. 2005), supports Plaintiffs' position. *Id.* at 1376 ("Future damages could have been awarded had Indiana Michigan claimed total breach); *Osage Tribe v. United States*, 75 Fed. Cl. 462, 461

[4] 25 C.F.R. § 212.40 applies to allotted Indian lands. It simply provides: "The provisions of § 211.40 of this subchapter are applicable to leases under this part." Therefore, if section 211.40 (which applies to tribal lands) supports an award of interest, section 212.40 does as well.

(2007) ("Defendant cannot escape liability for breach in failing to properly manage the trust by arguing that it was required to disburse the funds, an act it was incapable of accomplishing due to its initial breach."); *Yankee Atomic Elec. Co. v. United States*, No. 98-126C, 2004 WL 1535688, at *3 (Fed. Cl. June 28, 2004)("[d]amages for future breach are distinguishable from future damages from DOE's prior breach here.") (citing *Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1066 (Fed. Cir. 2002)).

Third, an accounting in aid of judgment is necessary and appropriate to provide accurate and prompt relief. Defendant has treated the Bakken oil field like a massive, multi-billion-dollar shoreline, with safe harbors into which it can steer any argument for any contingency. With billions of dollars passing hands and at risk, Defendant asks that Plaintiffs be satisfied with spreadsheets that the Department of Justice provided to Mr. Bagley and Mr. Martin. Plaintiffs have waited—literally—for generations for the full benefit that the law accords to them. Without verifiable data that would be uncovered by an accounting in aid of judgment—production information, pressure data, CA information, revenue verification, and similar information that Defendant is charged to obtain and keep—Plaintiffs are reduced to placing already-abused trust in Defendant and hoping for the best. An accounting in aid of judgment will allow this generation to finally know the truth.

Fourth, the risk of uncertainty regarding the precise dollar amount of damages rests with Defendant. *W. Shoshone Identifiable Grp. by Yomba Shoshone Tribe v. United States*, 143 Fed. Cl. 545, 627 (2019). The Court is permitted to draw inferences in Plaintiffs' favor. *Id.* Here, Defendant admits that Mr. Martin did a calculation for diligent development and drainage damages, although the government objected to evidence regarding its own theory. Tr. 1885:14–1888:12. When Defendant's effort to hide its damages analysis did not work at trial, Defendant now falls back on Fed. R. Evid. 301 for an unformed argument that Plaintiffs still bear the burden of proving damages with precision. Def.'s Br. at 9. This is not the law. *W. Shoshone* and similar precedent do not foist the burden back on Plaintiffs by application of Rule 301. Further, the value of minerals under Plaintiffs' tracts was not simply

$326,852,984 (Ms. Kidd's damage calculation without royalties deducted (Tr. 1380:12–24)), but would have been far higher had Defendant fulfilled its trust obligations. Therefore, the damage amounts specified above are starting points subject to an accounting and whether Defendant can meet the burden imposed upon it by *W. Shoshone*.

VIII. DEFENDANT DISCREDITABLY COMPLAINS ABOUT THE AMOUNTS PAID AND STILL OWED TO PLAINTIFFS.

At trial, Defendant presented unsubstantiated dollar amounts that purported to reflect past amounts paid to the Plaintiffs. Tr. 1465–66; DX-332. Defendant even gins together an argument that it is entitled to the equities, as though that could absolve Defendant of its abused trust obligations. Def.'s Br. at 1. While arguments regarding disputed past payments are fundamentally irrelevant and prejudicial, Plaintiffs allowed admission of the disputed evidence for an entirely different reason: the government's theory regarding "another massive payday" (Def.'s Br. at 2) forcefully proves a point that it never intended.

It would be a disservice to label the government's argument as merely ironic. The United States now complains mightily that a generation of indigenous people—whose resources helped secure the United States' energy independence—have finally received partial money from an allotment system imposed to "pulverize" Indian culture and turn land from an unownable presence into income-generating severalty. Volumes have been written about the government's raw and brutal efforts to fractionate, "assimilate," and divide Indians in just such a manner. *See* Kristin T. Ruppel, Unearthing Indian Land (2008). Defendant's argument is not only legally indiscernible, but beckons stereotypes and the resentment deducible from the testimony and writings of BLM employees whose very jobs existed to act as trustees for the Plaintiffs. Plaintiffs have considerably more to say about Defendant's tone-deaf argument, but will reserve additional comment for closing statements.

Dated: May 1, 2024

By: */s/ John J. Steffenhagen*

John J. Steffenhagen
Ryan M. Theis
Brian W. Nelson
HELLMUTH & JOHNSON, PLLC
8050 West 78th Street
Edina, MN 55439
Telephone: (952) 941-4005
Email: jsteffenhagen@hjlawfirm.com
Email: rtheis@hjlawfirm.com
Email: bwnelson@hjlawfirm.com

ATTORNEYS FOR PLAINTIFFS

Of Counsel:

Terrance W. Moore
HELLMUTH & JOHNSON, PLLC
8050 West 78th Street
Edina, MN 55439
Telephone: (952) 941-4005
Email: tmoore@hjlawfirm.com