No. 23-3864

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES HALVERSON, as Personal Representative of the fee estate of Jack Halverson,

Plaintiff–Appellant,

v.

DEBRA HAALAND, Secretary of the Interior,

Defendant–Appellee.

Appeal from the United States District Court for the District of Montana,
Billings Division
Civil Case No. 1:22-cv-00076-SPW
Honorable Magistrate Susan P. Waters

PLAINTIFF-APPELLANT'S REPLY BRIEF

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INTRODUCTION

In *Cobell v. Norton*, 240 F. 3d 1081 (D.C. Cir.), the Court defined the fiduciary duty that should have guided the Bureau of Indian Affairs ("BIA") in all of its dealings with the Estate of Jack Halverson (hereafter, "Jack").

> The Secretary has an "overriding duty ... to deal fairly with Indians." *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). This duty necessarily constrains the Secretary's discretion. When faced with several policy choices, an administrator is generally allowed to select any reasonable option. Yet this is not the case when acting as a fiduciary for Indian beneficiaries as "stricter standards apply to federal agencies when administering Indian programs." *Jicarilla*, 728 F.2d at 1567.
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> Summarizing federal case law on fiduciary obligations owed to Indian tribes, the Tenth Circuit concluded that where "the Secretary is obligated to act as a fiduciary ... his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." Id. at 1563. The federal government has "charged itself with moral obligations of the highest responsibility and trust" in its relationships with Indians, and its conduct "should therefore be judged by the most exacting fiduciary standards." (citation omitted).

Cobell v. Norton, 240 F. 3d at 1099.

The BIA breached its duty of trust to Jack when it agreed to partition his 86.42% interest in Allotment 1809 by granting him the sole interest in 690.54 acres, but then filed a deed which granted him only an "undivided" interest (still in common ownership) and conveyed only "13/162" or 55.41 acres. The District Court's denial of Plaintiff' Motion for Summary Judgment was based on the

erroneous conclusion that BIA had performed the VSA. The District Court disregarded the undisputed factual record.

In its Answering Brief, the BIA does not dispute the following critical facts:

- In 2015, Jack filed a Petition for Partition of Allotment 1809 with the BIA. ER-40, ER-83-91. Jack's Petition sought to partition his 86.42% interest in Allotment 1809 "containing 799 acres" by dividing the parcel into two blocks – a west block that would contain Jack's severed, partitioned acres and an east block that would contain the joint interests of all other owners, including the lone fee interest. ER-83-89. This was illustrated in a map attached to the Petition (also called the "Application"). ER-89.

- The BIA required Jack to obtain a federally-approved surveyor's Certificate of Survey ("COS") (ER-40, ER-97-99), a document which the BIA conceded "controls the partition of [Halverson's] majority interest." Doc. 20, p. 3.

- As requested in Jack's Petition, the 2016 COS divided the total acreage, establishing one parcel which was precisely equal to Jack's interest (690.54 acres) and another parcel which was precisely equal to the common interest of the remaining landowners and contained the remaining (108.52 acres). Critically, the COS left the entire small fee estate within the 108.52 acres. ER-99.

- BIA concedes no owner in 1809 was shorted in the COS calculation, and the COS was BIA's decision about where everyone's acres would be after partition. Doc. 49, Estate's SUF 87-89.

- The BIA agreed to grant Jack's Petition for Partition. ER-4. The parties then filed a Joint Notice of Settlement and Verified Declaration of Partition of Allotment 1809 (the "VSA"). ER-106-110.

- In the VSA, the parties represented (and BIA Rocky Mountain Regional Director Susan Messerly swore under penalty of perjury):

    1. That this matter has settled "*with the Regional Director/BIA declaring that it shall grant the partition of Allotment 1809*" (emphasis added), and

2. that the Regional Director and BIA "*declare that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted*" (emphasis added).

- The BIA then promised to prepare and record all documents needed to complete the partition. ER-106-110.

- The BIA created and recorded a deed which on its face did not partition the property at all, because it leaves the land "undivided" (still in common ownership) and conveyed only "13/162" or 55.41 acres of Jack's 690.54 acres:

An undivided 13/162 Trust interest in and to the following described land:

SURFACE ONLY: Lot 3, Lot 4, S½NW¼, N½SW¼, SW¼SW¼, of Sec. 3, Lot 1, Lot 2, Lot 3, S½NE¼, SE¼, SE¼NW¼, of Sec. 4, T. 2 S., R. 27 E., containing 690.54 acres, more or less. (METES AND BOUNDS: Certificate of Survey No. 202 43614: Located in the NW¼SE¼ of Section 3 Labeled Tract A containing 11.48 acres.)

ER-103.

Despite having admitted these facts, the BIA continues to argue that it has no obligation to grant Jack precisely what he asked for – a partition of Allotment 1809 such that the Estate would have exclusive title to the 690.54 acres. This, despite the fact that it twice promised, under penalty of perjury in the VSA to grant Jack what he had requested: "Regional Director and BIA . . . declare that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted". ER-106. [1]

[1] In her deposition, Messerly confirmed that Jack was entitled to a deed for 690.54 acres from BIA. Doc. 49, Pl's SUF 91. Likewise, BIA employee Salway

Both in the District Court and before this Court, the BIA has failed to identify *any facts* to support its position that it should not have been required to do what it promised to do. [2] For this reason, the Court of Appeals should reverse the District Court and enter an order that the BIA is directed to file and record the deeds (ER-18-20 and ER-21-22) necessary to correct the improper deeds filed by the BIA.

Turning to the BIA's Answering Brief, its first argument is that the Federal Courts have no subject matter jurisdiction to make the BIA do what it promised to do. It raises a new jurisdictional argument which was not raised before the District Court and largely ignores the basis upon which the District Court found that it had subject matter jurisdiction.

The BIA's second argument is that, despite the existence of its fiduciary duty to Jack, and despite its clear promise to partition Jack's 86.42% interest (690.54 acres) in Allotment 1809, the BIA has no obligation to do so. These arguments are considered in turn.

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testified that if BIA conveyed something less than 690.54 acres to Jack, it was holding back some of Jack's federal trust asset. Doc. 49, Pl's SUF 49-50.

[2] In fact, the BIA does not even bother to address the fact that the BIA made contradictory statements under oath, stating in the Salway Declaration that the deed it filed "convey[ed] 690.54 acres of Allotment 1809 to the Estate of Jack Halverson," (Doc. 20.1, ¶ 7), but admitting in the depositions of Salway and Messerly that the deed conveyed only 55.41 acres. ER-63-70 and ER-72; ER-79-82 and ER-96.

ARGUMENT

I. The Federal Courts Have Jurisdiction to Decide This Case.

In the District Court, the BIA sought dismissal of Jack's case, arguing that the United States did not have subject matter jurisdiction. Its principal argument was that Jack's action should have been brought under the Quiet Title Act, 28 U.S.C §2409a ("QTA"), and that the District Court had no jurisdiction under the QTA to resolve disputes concerning Indian trust lands. SER-408. The District Court rejected that argument, finding that "the QTA does not apply to Plaintiff's claims". ER-54.

The District Court did not end its analysis there. Having noted earlier in its opinion that, "[d]efendant does not address Plaintiff's other bases for jurisdiction" (ER-45), it considered those bases. It held that Jack had stated a breach of trust action against the Defendant based upon: (1) the trust relationship which exists between the United Stated and Indian tribes; (2) the fiduciary duty which arises from that relationship; (3) the Defendant's exclusive power to partition Jack's land, and (4) its alleged failure to exercise that power by dealing fairly with Jack. ER-56-57. Citing *Cobell v. Norton,* 240 F.3d 1081, 1108 (D.C. Cir. 2001), the District Court concluded that Defendant's alleged failure to deal fairly with Jack and to preserve his assets "gives rise to a breach of trust action, which Plaintiff properly rooted in a writ of mandamus". ER-57.

Having failed to convince the District Court to construe Jack's claim as one under the QTA -- so that it could argue that this is a claim over which the Court has no jurisdiction -- the BIA has abandoned that argument on appeal. Instead, it argues on pages 20 – 24 of its Answering Brief that Jack's claim must now be construed as "essentially a contract action" seeking specific performance, and then argues the Federal Courts have no jurisdiction over contract actions seeking specific performance. A cynical person might begin to see a pattern here.

Parties, of course, have options to frame their cases in various ways. Jack might have pled a claim for breach of contract action seeking specific performance, but he did not do that. Instead, he pled a claim for breach of trust arising from BIA's failure to issue the deeds required to accomplish the partition which BIA promised when it declared "as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted". The BIA cannot ignore the claim actually was pled and argued, set up the straw man of a breach of contract claim, knock down the straw man and then declare there is no jurisdiction.

The BIA's new jurisdictional argument must be analyzed under the standards which would have applied in the District Court. Subject matter jurisdiction either exists or it doesn't depending upon the facts and claims *actually* pled.

> To invoke a federal court's subject-matter jurisdiction, a plaintiff needs to provide only "a short and plain statement of the grounds for the court's jurisdiction." Fed.R.Civ.P. 8(a)(1). The plaintiff must allege facts, not mere legal conclusions, in compliance with the pleading standards established by *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). *See Harris v. Rand,* 682 F.3d 846, 850–51 (9th Cir. 2012). Assuming compliance with those standards, the plaintiff's factual allegations will ordinarily be accepted as true unless challenged by the defendant. *See* 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1363, at 107 (3d ed.2004).

Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir.), cert. denied, 574 U.S. 934 (2014).

When subject matter jurisdiction is challenged via a Rule 12(b)(1) Motion to Dismiss, the challenge may be either "facial or factual". *Safe Air for Everyone v. Meyer*, 373 F. 3d 1035, 1039 (9th Cir. 2004), cert. denied, 544 U.S. 1018 (2005). A facial attack challenges the sufficiency of the facts alleged on the face of the complaint, accepting such assertions as true and drawing all reasonable inferences in favor of the plaintiff. *Safe Air, Id.* In a factual attack, the defendant "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction". *Id.* In such cases, a court may review facts outside the complaint, and the party asserting the existence of subject matter jurisdiction must demonstrate there is evidence "to satisfy its burden of establishing subject matter jurisdiction". *Id.*

At this stage of the proceedings, the Court of Appeals has before it a copious factual record as a result of multiple motions filed and considered by the District

Court. But to address BIA's jurisdictional argument, it need go no further than to consider the facts which are admitted in the Introduction, *supra.*

As to BIA's new jurisdictional argument, it does not cite, and Jack has not located, any case which states a District Court should ignore the facts and legal theories actually pled, and instead analyze whether it has subject matter jurisdiction by analyzing potential claims which were never pled. To the contrary, the law is laser-focused on facts which are alleged (or which are brought forth from outside the complaint) and the theories actually pursued. *Safe Air, Id.*

It is well-settled that, if a court has subject matter jurisdiction over one claim that has been pled, it has subject matter jurisdiction over the case. *See, e.g. Doe BP v. City of Tempe,* 2021 WL 2587892, * 2 (D. Ariz. 2021) (original jurisdiction over one claim allows supplemental jurisdiction over all claims which are part of the same case or controversy). The BIA cannot ignore the claim that was pled, over which the District Court found jurisdiction, by presenting a new, hypothetical theory over which it argues the Court has no jurisdiction. This argument did not work when the District Court rejected the BIA's efforts to recast Jack's claim as a Quiet Title Act case, and it should not work here. It is immaterial to the issue of subject matter jurisdiction in *this* case whether a Federal Court would or would not have jurisdiction over a contract claim seeking specific performance, had one actually been pled.

On pages 24-26 of its Answering Brief, the BIA does finally address the breach of trust theory Jack actually pled. But it does not directly address or dispute the basis of the District Court's holding that it has subject matter jurisdiction to adjudicate this claim.

A Federal Court has jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States". 28 U.S.C. § 1331. Further, the Mandamus Act grants district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiffs". 28 U.S.C. § 1361.

The existence of a trust relationship between the United States and Jack cannot be seriously disputed. As articulated in *Cobell*, 240 F.3d at 1098:

> "[T]he law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.' " *Lincoln v. Vigil,* 508 U.S. 182, 194, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993) (quoting *United States v. Cherokee Nation of Oklahoma,* 480 U.S. 700, 707, 107 S.Ct. 1487, 94 L.Ed.2d 704 (1987)). In the leading case on Indian trust responsibilities, *United States v. Mitchell* ("*Mitchell II*"), the Supreme Court was clear:
>
> A fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).
>
> 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (citing Restatement (Second) of Trusts § 2, cmt. h (1959)).

See, also, Lincoln v. Virgil, 508 U.S. 182, 194 (1993), *quoting United States v. Cherokee Nation of Okla*., 480 U.S. 700, 707 (1987)("[T]he law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity'").

Under what is commonly referred to as the Mitchell doctrine, "[t]o create an actionable fiduciary duty of the federal government toward Indian tribes, a statute must give the government pervasive control over the resource at issue". *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 922 (9th Cir. 2008), cert. denied, 556 U.S. 1235 (2009).

The District Court, relying on analogous facts from White *Mountain Apache Tribe v. United States*, 537 U.S. 465 (2003), held that an actionable fiduciary duty exists under the facts of this case. ER-56. It correctly held that the United States holds Jack's land in trust for his benefit, as an Indian. Id. It next held that the BIA has the requisite "pervasive control" over both the land and the specific disposition requested, because it has the exclusive power to partition that property. ER-57.

Finally, the District Court noted that the BIA exercised its statutory power under 25 U.S.C §378 to address the requested partition "to 'cause' Plaintiff's land to be partitioned and new deeds to be issued," and that it had a duty to do so fairly and "to preserve the assets at issue". ER-57. Because the nub of Jack's claim is the BIA's failure to actually partition the property and convey the promised 690.54

acres, the District Court held it had jurisdiction to hear this mandamus action. ER-57.

Instead of arguing that the District Court's analysis is incorrect, the BIA simultaneously questions the existence of any trust relationship or duty (ER-25), but then acknowledges it "exercised trust authority" in connection with the partition as issue. ER-26. The BIA is simply wrong as to the existence of a trust/fiduciary duty. The duty exists. The admission that it exercised its trust authority falls squarely within the District Court's jurisdictional rationale that the BIA had the requisite pervasive authority over the resource in question and a trust duty to exercise that authority fairly.

The Court of Appeals should reject the BIA's new jurisdictional argument, and conclude that the District Court correctly held it had jurisdiction to consider Jack's breach of trust claim.

II. Relief Under the Mandamus Act is Proper in This Case.

On pages 27 – 37 of its Brief, the BIA argues that the Court should affirm the Order denying Summary Judgment to the Estate (ER-23-38), because Jack has failed to establish a right to mandamus relief. Its argument is, in essence, twofold. First, BIA claims its obligation to partition Allotment 1809 such that the Estate would have exclusive title to the 690.54 acres is not so clear, certain and nondiscretionary as to require an order to compel the issuance of the deeds to effect that agreed-upon

partition. Second, it claims it has no power under 25 U.S.C. §378 to do what it agreed to do in the VSA. These arguments are considered in turn.

A. The Undisputed Facts Demonstrate That Mandamus Relief is Appropriate.

On pages 27 – 30, the BIA argues Jack cannot state a claim for mandamus relief. The parties agree with respect to the applicable mandamus standard. Mandamus relief is available:

> only if (1) the claim is clear and certain; (2) the official's or agency's 'duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt'; and (3) no other adequate remedy is available.

Plaskett v. Wormuth, 18 F.4th 1072, 1081 (9th Cir. 2021)(citations omitted). Further, a party must be legally entitled to the relief sought for a claim to be "clear and certain". *Lowry v. Barnart*, 329 F. 3d 1019, 1021 (9th Cir. 2003).

The BIA does not claim Jack has some other adequate remedy. [3] This action is the only means Jack has to require the BIA to issue and record the deeds it agreed to issue and record when it granted Jack's Petition for Partition. So, the third element of mandamus relief has been established.

The clarity and certainty of Jack's claim is likewise established. In 2015, Jack filed his Petition for Partition of Allotment 1809 with the BIA. ER-40, ER-83-91.

[3] Ironically, in its efforts to undermine subject matter jurisdiction, the BIA has identified two alternative remedies which, had they been pled, would not have worked.

What he requested is clear from the face of the document. He sought to partition his 86.42% interest in Allotment 1809 "containing 799 acres" by dividing the parcel into two blocks – a west block that would contain Jack's severed, partitioned acres and an east block that would contain the joint interests of all other owners, including the lone fee interest. ER-83-89.

An action for a partition seeks a very specific sort of relief. A "partition" is "[t]he dividing of lands held by coparceners, or tenants in common, into distinct portions, so that they may hold them severalty. And in a less technical sense, any division of real property resulting in individual ownerships of the interests of each." Black's Law Dictionary, p. 1008 (Fifth Ed. 1979). It is not a division of real property such that the owners are left with an undivided interest in the property. *Kravik v. Lewis,* 213 Mont. 448, 454, 691 P. 2d 1373, 1376 (1984) (rejecting claims that partition action should result in an undivided interest in the property, because a partition action "has been traditionally recognized as a means by which cotenants, unwilling and incapable of managing property jointly, sever their interests and exercise independent control over the resulting parcels"). So the nature of the relief sought in this case is clear and certain.

The precise property to be partitioned and transferred to Jack was likewise clear and certain. The BIA specifically required Jack to obtain a federally-approved surveyor's Certificate of Survey ("COS") (ER-40, ER-97-99), a document which the

BIA conceded "controls the partition of [Halverson's] majority interest." Doc. 20, p. 3. The COS contained very detailed legal descriptions and boundaries for both Jack's acres and the acres of the remaining property owners after the partition. ER-99. Critically, the COS left the entire small fee estate within the 108.52 acres. ER-99. BIA agreed to the 2021 VSA knowing the 2016 COS described the two severed parcels, with precision:

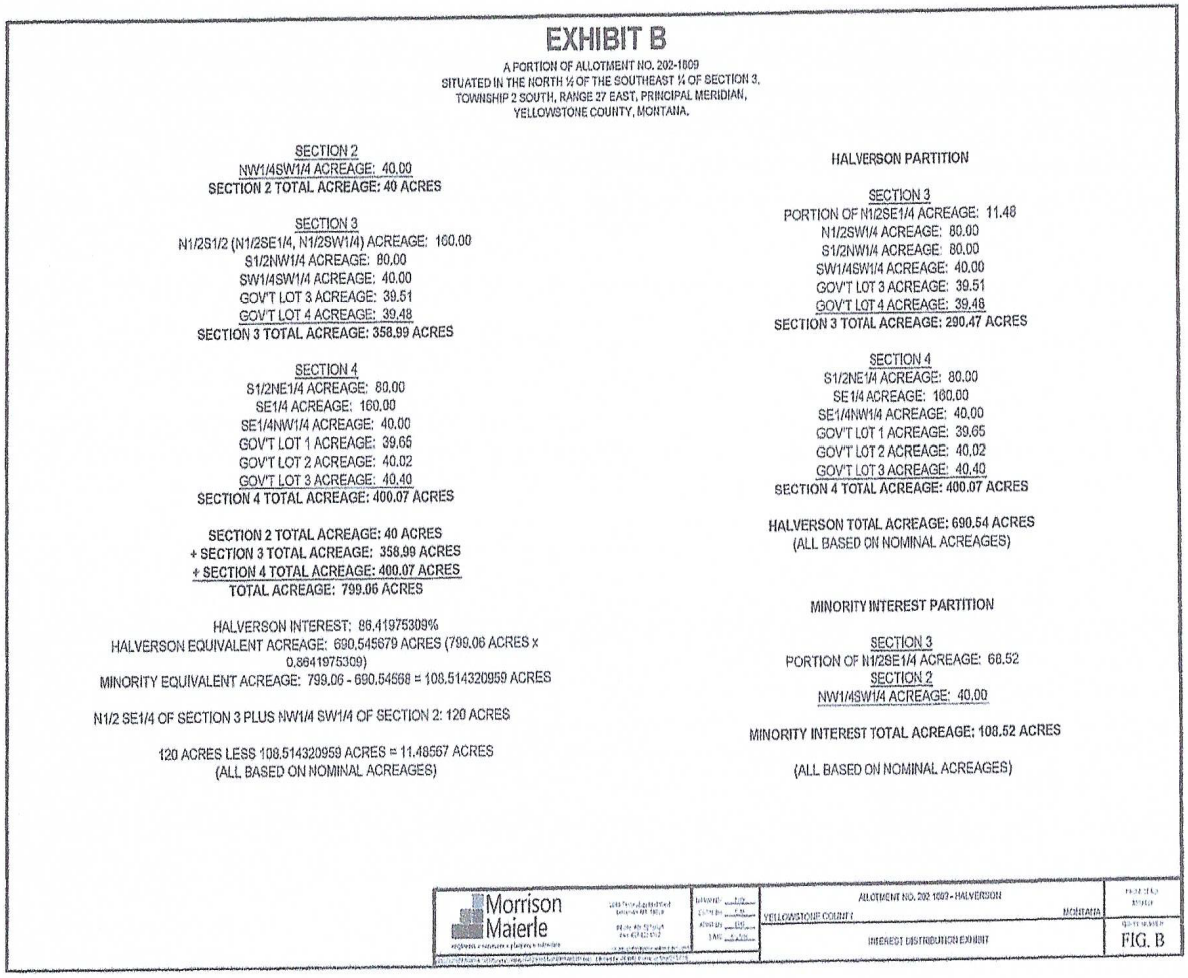

EXHIBIT B

A PORTION OF ALLOTMENT NO. 202-1609
SITUATED IN THE NORTH ½ OF THE SOUTHEAST ¼ OF SECTION 3,
TOWNSHIP 2 SOUTH, RANGE 27 EAST, PRINCIPAL MERIDIAN,
YELLOWSTONE COUNTY, MONTANA.

SECTION 2
NW1/4SW1/4 ACREAGE: 40.00
SECTION 2 TOTAL ACREAGE: 40 ACRES

SECTION 3
N1/2S1/2 (N1/2SE1/4, N1/2SW1/4) ACREAGE: 160.00
S1/2NW1/4 ACREAGE: 80.00
SW1/4SW1/4 ACREAGE: 40.00
GOV'T LOT 3 ACREAGE: 39.51
GOV'T LOT 4 ACREAGE: 39.48
SECTION 3 TOTAL ACREAGE: 358.99 ACRES

SECTION 4
S1/2NE1/4 ACREAGE: 80.00
SE1/4 ACREAGE: 160.00
SE1/4NW1/4 ACREAGE: 40.00
GOV'T LOT 1 ACREAGE: 39.65
GOV'T LOT 2 ACREAGE: 40.02
GOV'T LOT 3 ACREAGE: 40.40
SECTION 4 TOTAL ACREAGE: 400.07 ACRES

SECTION 2 TOTAL ACREAGE: 40 ACRES
+ SECTION 3 TOTAL ACREAGE: 358.99 ACRES
+ SECTION 4 TOTAL ACREAGE: 400.07 ACRES
TOTAL ACREAGE: 799.06 ACRES

HALVERSON INTEREST: 86.41975309%
HALVERSON EQUIVALENT ACREAGE: 690.545679 ACRES (799.06 ACRES x 0.8641975309)
MINORITY EQUIVALENT ACREAGE: 799.06 - 690.54568 = 108.514320959 ACRES

N1/2 SE1/4 OF SECTION 3 PLUS NW1/4 SW1/4 OF SECTION 2: 120 ACRES

120 ACRES LESS 108.514320959 ACRES = 11.48567 ACRES
(ALL BASED ON NOMINAL ACREAGES)

HALVERSON PARTITION

SECTION 3
PORTION OF N1/2SE1/4 ACREAGE: 11.48
N1/2SW1/4 ACREAGE: 80.00
S1/2NW1/4 ACREAGE: 80.00
SW1/4SW1/4 ACREAGE: 40.00
GOV'T LOT 3 ACREAGE: 39.51
GOV'T LOT 4 ACREAGE: 39.48
SECTION 3 TOTAL ACREAGE: 290.47 ACRES

SECTION 4
S1/2NE1/4 ACREAGE: 80.00
SE1/4 ACREAGE: 160.00
SE1/4NW1/4 ACREAGE: 40.00
GOV'T LOT 1 ACREAGE: 39.65
GOV'T LOT 2 ACREAGE: 40.02
GOV'T LOT 3 ACREAGE: 40.40
SECTION 4 TOTAL ACREAGE: 400.07 ACRES

HALVERSON TOTAL ACREAGE: 690.54 ACRES
(ALL BASED ON NOMINAL ACREAGES)

MINORITY INTEREST PARTITION

SECTION 3
PORTION OF N1/2SE1/4 ACREAGE: 68.52
SECTION 2
NW1/4SW1/4 ACREAGE: 40.00

MINORITY INTEREST TOTAL ACREAGE: 108.52 ACRES

(ALL BASED ON NOMINAL ACREAGES)

Morrison Maierle

ALLOTMENT NO. 202-1609 - HALVERSON
YELLOWSTONE COUNTY MONTANA
INTEREST DISTRIBUTION EXHIBIT
FIG. B

The fact that the BIA agreed to grant Jack's Petition for Partition is clear and certain. ER-4. The parties filed the "VSA" (ER-106-110) in which the parties represented, and BIA Rocky Mountain Regional Director Susan Messerly swore under penalty of perjury:

- That this matter has settled "*with the Regional Director/BIA declaring that it shall grant the partition of Allotment 1809*" (emphasis added), and
- that the Regional Director and BIA "*declare that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted*" (emphasis added).

The fact that the BIA understood its obligations to prepare and record the deeds needed to complete the partition is likewise clear and certain. ER-106-110. Indeed, the parties agreed to a specific process by which this would happen. They agreed:

> 3. that all documents to complete the partition are being filed and would be recorded as follows:
>
> a. all documents needed to complete the partition and conveyances of title shall be delivered by the Regional Director to counsel for the Estate of Jack J. Halverson for review and approval by January 15, 2022;
>
> b. on or before January 17, 2022, all documents necessary to complete partition and convey title for the majority interest in Allotment 1809 to the Estate of Jack Halverson, shall be recorded by the agency

and conformed copies shall be provided by email to counsel for the Estate;

c. on or before January 20, 2022 all documents necessary to convey and/or distribute title from the Estate of Jack J. Halverson to his heir shall be completed and recorded by the agency, conformed copies shall be provided by email to counsel for the Estate.

ER-106-107.

Finally, the fact that the BIA did not do what it promised is clear and certain. Instead of creating documents so that Jack would have exclusive title to the 690.54 acres, it created and recorded a deed which conveyed an "undivided 13/162" interest (or 55.41 acres of Jack's 690.54 acres):

An undivided 13/162 Trust interest in and to the following described land:

SURFACE ONLY: Lot 3, Lot 4, S½NW¼, N½SW¼, SW¼SW¼, of Sec. 3, Lot 1, Lot 2, Lot 3, S½NE¼, SE¼, SE¼NW¼, of Sec. 4, T. 2 S., R. 27 E., containing 690.54 acres, more or less. (METES AND BOUNDS: Certificate of Survey No. 202 43614: Located in the NW¼SE¼ of Section 3 Labeled Tract A containing 11.48 acres.)

ER-103. Thus, the first element of a mandamus action – a clear and certain claim – is established.

That leaves the second element; that "the official's or agency's 'duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt.'" *Plaskett v. Wormuth,* 18 F.4th at 1081. The BIA's duty to comply with the clear terms of the VSA is a fiduciary duty grounded in the trust relationship between the United States and tribal members. That duty has particular application where the BIA is exercising its control over property held in trust for tribal members:

> The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship. "[A] fiduciary relationship necessarily arises when the Government assumes ... elaborate control over forests and property belonging to Indians." *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 225, 103 S. Ct. 2961, 77 L.Ed.2d 580 (1983).

Cobell, 240 F.3d at 1086. As the District Court held, "Defendant has the exclusive power to partition Plaintiff's land because of its status as trust land, further conferring onto Defendant 'pervasive control' over both the resource and the specific disposition here". (*citing Marceau*, 540 F. 3d at 922). ER-57.

This exacting fiduciary duty imposed upon the BIA must, at a bare minimum, require the BIA to simply do what it agreed to do when it unequivocally declared, under penalty of perjury, "that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 **is proper and is approved and granted**". (emphasis added). The proper, approved and granted Petition required the BIA to simply execute and file deeds sufficient to transfer the partitioned, undivided 690.54 acres clearly delineated in the BIA-ordered COS to Jack – no more and certainly no less.

This Court should hold that Jack has met the mandamus standards and is entitled to relief under the Mandamus Act. It should reverse the District Court's Order denying summary judgment and remand the case with clear directions that the BIA is directed to file and record the corrective deeds (ER-18-20 and ER-21-22).

B. The BIA Has the Power Under 25 U.S.C. § 378 to Issue the Deeds it Promised to Issue; More importantly, it Has the Duty Under its Trust Obligation Not to Renege on its Promise and Obstruct the Approved Partition.

On pages 30 – 37, the BIA takes the position that it cannot legally do precisely what it promised Jack it would do. If, as the BIA now argues, it has no authority under the law to grant Jack's Petition, one has to ask -- why did the BIA sign the VSA granting the requested partition and then have the BIA's Rocky Mountain Regional Director swear under penalty of perjury:

> that the Regional Director and BIA "*declare that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and granted*" (emphasis added).

ER-106. What else could the BIA possibly have meant when it declared the granting of the Petition was proper "as a matter of law", other than it had the legal authority to grant the requested partition?

The relevant portion of 25 U.S.C § 378, provides that "[i]f the Secretary of the Interior shall find that any inherited trust allotments are capable of partition to the advantage of the heirs, he may cause such lands to be partitioned among them . ..". The BIA is the agency charged to consider requests to partition property under 25 U.S.C § 378. In doing so, BIA's own internal orders require it to respect its trust obligations to protect individual Indian lands, and to work with individual trial members in a manner that protects both trust lands and restricted fee lands.

A 2014 U.S. Secretary of the Interior Order 3335, entitled "Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries," (Doc. 22) states:

> The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights.

Id, §3(a).

> Principle 5: Work with … individual Indian beneficiaries to avoid or resolve conflicts to the maximum extent possible in a manner that accommodates and protects trust and restricted fee lands… …
>
> Principle 7: When circumstances warrant, seek advice from the Office of the Solicitor to ensure that decisions impacting… individual Indian beneficiaries are consistent with the trust responsibility.
>
> *Id, p. 5.*

In 1981, the Solicitor for the Department of Interior issued a letter, concluding that 25 U.S.C § 378 also allows partition of tribal lands acquired by purchase. ER-111-112. In doing so, the Solicitor warned against a strict literal reading of the statute which would defeat its intent, noting the following:

> I do not read the statute in such a limited fashion. The transfer of the beneficial interests in Indian Trust lands from one Indian to another is a fairly common practice, and such a crabbed reading of the statute would prevent administrative partition if a single heir, among many owning undivided interests in allotted trust land, were to convey this interest to another.

ER-112.

And it bears repeating that the District Court, in denying the BIA's Motion to Dismiss, held that the "Defendant [BIA] exercised her discretionary authority under the partition statute, 25 U.S.C § 378, to 'cause' Plaintiff's land to be partitioned and new deeds to be issued". ER-57. Thus, the District Court concluded the BIA was authorized by statute to do what it promised to do in the VSA, and that in exercising it authority, it was "bound to deal fairly" with Jack.

What the BIA promised to do cannot be seriously disputed. The partition that Jack requested was the segregation of the property into two parcels. Consistent with Jack's Petition, the BIA-required COS divided the approximately 799 acres and established one parcel which was Jack's exclusive interest and contained 690.54 acres (86.42% of Allotment 1809) and another parcel which was the common interest of the remaining landowners and contained the remaining 108.52 acres (13.58% of Allotment 1809), leaving the entire small fee estate within the 108.52 acres. ER-99.

The BIA argues it cannot do what it promised to do because a small portion of the property was held as a fee interest. There is no case in any jurisdiction which holds that the BIA cannot partition trust property held by tribal members, where a small fraction of the petitioned property is held in fee, and the fee estate remains in an undivided parcel, here the 108.53 acres. Consistent with the BIA's own internal orders, the statute which grants the authority to partition "inherited trust allotments"

(which the Solicitor expanded to include acquired trust property), should not be construed so narrowly as to preclude the partition of trust property where partition includes a small fee interest, the integrity of which is not disturbed with respect any other party.

The BIA also ignores that portion of 25 U.S.C § 378, which authorizes partition where the property is "capable of partition to the advantage of the heirs". Having an undivided interest in the severed 690.54 acres is obviously beneficial to Jack. But severing Allotment 1809 as Jack requested is equally beneficial, if not more beneficial, to the remaining parties. The BIA separately appraised the two parcels which would exist post-partition. ER-92-95. The Estate's 690.54 severed acres were appraised at $600.00 per acre, while the 108.52 acres in the remainder held by the other landowners as cotenants were appraised at $1,375.00 per acre. ER-92, ER-94. Lest there be any doubt that the partition advantaged all landowners, Susan Messerly, the Regional Director for the BIA's Rocky Mountain Region, testified that Jack's requested partition was in the best interests of both Jack and the other owners. ER-62.

The BIA cites 25 C.F.R. §125.33 for the proposition that the BIA ability to partition "trust land" does not by implication include any ability to address an interest held in fee. The BIA's conclusion does not follow. Its trust obligation to preserve all of Jack's 690.54 acres is primary. The fee land is not conveyed to anyone

or anywhere; it remains within Allotment 1809, and its value would double as a result of the partition. Indeed, it was the BIA which directed that the fee interest remain in the 108.52 acres in Allotment 1809, first by ordering the COS in which the fee interest was placed into the 108.52 acres, and then stating under penalty of perjury that the partition was "as a matter of law and fact" . . . "proper and is approved and granted."

One has to wonder why the BIA is struggling so hard not to do what it promised to do and what it had a fiduciary duty to do. The BIA does not dispute that it has admitted in this case that the Estate is entitled to 690.54 acres. This admission was noted by the District Court in its Order denying the BIA's Motion to Dismiss:

> Because Defendant agrees that Plaintiff is entitled to 690.54 acres, the Court does not need to consider Plaintiff's allegation that Defendant determined he was entitled to only 652.21 acres.

ER-52. It does not dispute that the BIA-ordered Certificate of Survey divided the total acreage, establishing one parcel which was Jack's interest (690.54 acres) and another parcel which was the common interest of the remaining landowners (including the small fee interest). ER-99. And as has been noted, *ad nauseum*, the BIA does not dispute that the BIA Rocky Mountain Regional Director Susan Messerly swore under penalty of perjury that "it shall grant the partition of Allotment 1809" and that the BIA "declare[d] that as a matter of law and fact the Application of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and

granted". ER 106. Indeed, at this point, BIA is harming all the Allotment 1809 owners' best interests by *not* partitioning as Jack sought, and it is acting in a way that no landowner sought and the law does not require.

The statute which allows for partitions has to be considered in light of the BIA's trust duty to Jack. The trust relationship between the United States and tribal members is sacrosanct. The BIA's actions and its current arguments simply cannot be squared with its duty to discharge its fiduciary duty to Jack in good faith. Agreeing to grant Jack's Petition and to allocate to him 690.54 acres, but then issuing a deed which conveys only an "undivided" 55.41 acres, falls well short of meeting the BIA's Trust responsibilities. Simply put, the BIA had the power to do what it promised to do – it just didn't do it.

CONCLUSION

What Jack Halverson sought from the BIA is clear. He filed a Petition for Partition in which he very explicitly asked that his 86.42% interest in the 799 acres in Allotment 1809 be *partitioned*. A partition is the severance of the cotenants' interests in real property (in this case 690.54 acres), such that the severing party receives independent control over his or her severed parcel.

What the BIA agreed to do is equally clear. The Estate and the BIA entered into a binding settlement agreement by which the BIA unequivocally stated: "the Regional Director and BIA…declare that as a matter of law and fact the Application

of Jack J. Halverson for Partition of Allotment 1809 is proper and is approved and **granted**." (emphasis added). By granting a Petition to Partition Jack's 690.54 acres, the BIA had a duty to issue deeds doing just that.

It is painfully clear that the BIA did not do what it promised to do. It did not execute and record a deed to implement a partitioned conveyance of 690.54 acres to Jack. The critical first deed conveyed to Jack an undivided interest in only 55.41. This is an inexcusable breach of the BIA's trust obligation to Jack.

In the District Court, the Estate's first Motion for Summary Judgment sought enforcement of the settlement agreement by requiring that BIA (1) record a deed partitioning and conveying 690.54 acres in Allotment 1809 from the United States as trust holder to the Estate of Jack Halverson in trust, and (2) record a fee patent deed conveying 690.54 acres from the United States as trust holder of the Estate of Jack Halverson to Jack's heir. The District Court's Order was in error because the BIA's deed did not partition the property conveyed to the Jack at all, leaving the Estate in a cotenancy, and it did not convey the 690.54 acres which the Court found Jack was entitled to receive.

Jack respectfully requests that the Court reverse the District Court's Orders (ER-8-17 and ER-23-38) and enter an order that the BIA is directed to file and record the deeds (ER-18-20 and ER-21-22) necessary to correct the improper deeds filed by the BIA. Additionally, the case should be remanded to the District Court for an

award of attorneys' fees as is required in a mandamus action. 28 U.S.C. § 2412 (d)(1)(A).

DATED this 4th day of September, 2024.

CRIST, KROGH, ALKE & NORD, PLLC

By: /s/ John G. Crist
John G. Crist

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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