No. 24-6578

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFERY POWERS, et al.

Plaintiffs-Appellees,

v.

DENNIS RICHARD MCDONOUGH, et al.

Defendants-Appellees

BRIDGELAND RESOURCES, LLC

Appellant-Intervenor Plaintiff

Appeal from United States District Court
Central District of California, Case No. 2:22-cv-08357-DOC-KS
Hon. David O. Carter

APPELLANT-INTERVENOR PLAINTIFF BRIDGELAND RESOURCES, LLC'S REPLY BRIEF

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INTRODUCTION

Unable to defend the district court's decision and injunction against Bridgeland in light of the undisputed facts found by the district court, Plaintiffs instead attack a strawman built on unsupported, false assertions of fact and law. For example, Plaintiffs disingenuously characterize the Revocable License as a "land use agreement." Ans. Br. at 9. It is not. Not a single inch of VA land is used under the Revocable License, and not a single inch of VA land would be available for veteran housing (or anything else) if the Revocable License is terminated. Plaintiffs next claim the Revocable License "provides oil drilling and production services," which (they claim) is somehow prohibited under the Leasing Act. Ans. Br. at 8. It does not. The Revocable License merely provides a subsurface pass-through right. *See* 3-ER-497:13–22. Plaintiffs further assert the veterans' royalties impermissibly "pass through the VA." Ans. Br. at 9. They do not. It is undisputed that the royalties are paid directly to a local veterans charity, the DAV-LA. *See* 1-ER-68. Remarkably, Plaintiffs go so far as to falsely claim the Revocable License "deplet[es] revenues . . . at the expense of veterans" and "reduce[s] the available future volume of oil." Ans. Br. at 15. It does not. It is again *undisputed* that the oil produced under the Revocable License belongs to private parties, not the government or veterans. *See* 1-ER-100 (finding No. 120). Indeed, only by

terminating the Revocable License, as Plaintiffs seek, are the veterans' revenues "depleted," since they would no longer receive the royalty (or anything else).

But even if the district court correctly determined that the Revocable License violates the Leasing Act (it does not) and is therefore invalid (it is not), the remedy for that purported wrong is the termination of the Revocable License—not an injunction prohibiting all slant drilling on the WLA Grounds, regardless of Bridgeland's current and future rights granted by the U.S. government or by operation of law (none of which were challenged by Plaintiffs).

Plaintiffs attempt to sidestep the undeniable overbreadth, and jurisdictional absence, of the Modified Injunction by asserting that Bridgeland only "may" have the right to continue operating Sawtelle-2 (the slant-drilled well at issue) without the Revocable License. Ans. Br. at 13. But that concedes the point. If, as the Plaintiffs concede, Bridgeland may have the legal right to operate Sawtelle-2 even without the Revocable License, then the district court cannot issue an injunction prohibiting all slant drilling, regardless of Bridgeland's other legal rights. The only issue before the district court, and thus the full scope of the alleged "wrong" the court had jurisdiction to remedy, was the validity of the Revocable License. The district court therefore erred by purporting to enjoin *all* slant drilling, rather than resolving the actual claim presented.

The judgment as to Bridgeland should be reversed, and the Modified Injunction should be vacated.

ARGUMENT

A. The Revocable License Complies with the Leasing Act

The district court misconstrued the Leasing Act by applying a "predominant purpose" test that appears nowhere in the Act. Op. Br. at 36-37. Plaintiffs ignore, and thereby concede, this point. *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) ("[A]n appellee waives any argument it fails to raise in its answering brief.").

Plaintiffs instead contend that the Revocable License violates the plain meaning of the Leasing Act because "a license to drill oil is not 'a lease to provide services that principally benefit veterans.'" Ans. Br. at 7. Plaintiffs are wrong, both as a matter of fact and law.

As a matter of undisputed fact, the Revocable License is not a "license to drill oil"—it is license to pass through the subsurface to reach private oil deposits, using wells Bridgeland separately has rights to produce. *See* 1-ER-68; 1-ER-100 (finding No. 120); 3-ER-497:13–22. The Revocable License does not authorize Bridgeland "to drill oil" on VA land, or otherwise.

As a matter of law, the Revocable License complies with the Leasing Act because Bridgeland "provide[s] services that principally benefit veterans." The

term "principally benefit veterans" is defined by the Act to mean services "provided exclusively to veterans" or "designed for the particular needs of veterans," and excluding services that merely generate revenue for the VA. West Los Angeles Leasing Act of 2016, Pub. L. No. 114-226 ("Leasing Act") § 2(l). Although Plaintiffs ignore it, the Revocable License meets these requirements: The Revocable License provides medical transportation services exclusively to veterans, designed for their needs to get to medical appointments on or around the WLA Grounds, and it does not generate revenue for the VA. *See* 8-ER-1989–91; 1-ER-68; Leasing Act § 2(l). That the Revocable License also authorizes Bridgeland to pass-through the subsurface of an area of the WLA Grounds that Bridgeland undisputedly has the surface right to occupy anyway, is immaterial.

Taken to its logical end point, Plaintiffs' interpretation of the Leasing Act requires that the only permissible leases are those under which third parties provide services to veterans without receiving any benefit in return. That cannot be correct. Indeed, it would destroy the entire purpose of the Act as no such leases would exist. Here, Bridgeland provides transportation services to veterans, in exchange for a *subsurface pass-through* right that costs veterans, and the VA, *nothing*.

Plaintiffs' argument (as adopted by the district court), attempts to rewrite the Leasing Act to create a new "predominant purpose" requirement. No such

requirement exists in the statute. Instead, the Leasing Act imposes a "predominant *focus*" requirement, *but only on leases with the Regents of the University of California*. Indeed, the VA may enter into leases with the Regents only "if . . . the provision of services to veterans is the *predominant focus* of the activities of the Regents at the Campus." Leasing Act § 2(b)(3) (emphasis added). Thus, the plain text of the statute demonstrates that Congress knew how to impose additional requirements on third-party leases under the Act, and chose to do so only in narrow circumstances (specifically, as to leases with Regents, which utilizes a significant portion of the WLA Grounds for a baseball stadium).

It is undisputed that Bridgeland's Revocable License falls under a different section of the Act—Section 2(b)(2), which has no "predominant focus" requirement. The omission is deliberate. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Here, the Act imposes a "predominant focus" requirement on leases with the Regents under Section 2(b)(3), but not on leases with other third parties, like Bridgeland, under Section 2(b)(2). Plainly, then, Congress, did not intend to impose a predominant purpose or focus requirement on the Revocable License, and the district court was wrong to conclude otherwise.

Plaintiffs further contend that Bridgeland's "commercial activities" should be considered in determining whether the Revocable License principally benefits veterans.[1] Ans. Br. at 8. Bridgeland does not disagree. Bridgeland's commercial activities on the WLA Grounds (occupying the WLA Drill Site to produce oil and gas under separate, unchallenged agreements) will continue unimpeded if the Revocable License is terminated. The only commercial activity the Revocable License enables is the right to pass through the subsurface of the WLA Grounds to produce privately owned oil (3-ER-497:13–22; 1-ER-100 (finding No. 120)), which Bridgeland may do even without the Revocable License, via separate agreement with the BLM, as Plaintiffs concede (Ans. Br. at 13) (admitting "Bridgeland correctly states in its papers that 'BLM *may* allow Bridgeland to operate wells passing beneath the WLA Grounds'"). The Revocable License thus principally benefits veterans because without it, Bridgeland may continue its commercial activities without paying the veterans' royalty. Terminating the Revocable License eliminates the royalty in exchange for nothing.

Plaintiffs mischaracterize Bridgeland's position by claiming that Bridgeland "appears to agree with the District Court with respect to the land use agreements

[1] Plaintiffs say the opposite elsewhere, claiming it is "legally irrelevant" that Bridgeland loses money on its commercial activities when oil is below $60-65 per barrel while still being required to pay the veterans' royalty at all times. Ans. Br. at 10-11.

with *all other* entities besides itself." Ans. Br. at 12 n.2. Bridgeland does not take a position on those agreements. But, to be clear, the other agreements Plaintiffs have challenged are for *surface* land that might otherwise be used for veteran housing. The Revocable License is fundamentally different: it grants only *subsurface pass-through rights* without depriving the VA of a single inch of land (for veteran housing or any other use). *See* 1-ER-68; 1-ER-100 (finding No. 120); 3-ER-497:13–22.

Finally, Plaintiffs falsely assert that the Revocable License violates the Leasing Act because it somehow generates revenue for the VA. Ans. Br. at 9 (asserting that revenues "pass[ing] through the VA to the non-profit" is "exactly what happens"). Again, Plaintiffs brazenly misstate the undisputed facts. As the district court correctly found, the veterans' royalty provided by the Revocable License is paid "to the Los Angeles Chapter of Disabled American Veterans," not to the VA. *See* 1-ER-68; *see also* 8-ER-1989–91.[2] Thus, the Revocable License in

[2] Plaintiffs claim it is "noteworthy" the Federal Defendants failed to appeal the order voiding the Revocable License. Ans. Br. at 10. This is misleading. The Federal Defendants *did* appeal the district court's overbroad injunction precluding the government from entering into new agreements with Bridgeland and others. *See* No. 24-6576, Br. for Appellants, Dkt. 58.1, at pgs. 63-67. In any event, the Federal Defendants appealed many issues and presumably focused on issues most important to the government. That is why Bridgeland intervened in this case.

no way generates revenue for the VA; instead, it provides transportation services for veterans through a partnership with a local charity serving disabled veterans.

B. The Revocable License Is "One-Sided" In Favor of Veterans

Plaintiffs argue that Bridgeland's interpretation of the Leasing Act countenances "*any* lease for *any* purpose . . . if there are *any* services provided that principally benefit veterans." Ans. Br. at 8. Not so.

If anything, the Revocable License is one-sided *in favor of veterans*. This is because the only thing the VA and veterans give up is a *subsurface pass-through right*—not land, not oil, not housing, or anything else. *See* Op. Br. at 23. For giving up this de minimis right, veterans receive $75,000-$125,000 annually for transportation services. 1-ER-100 (finding No. 122). This deal is the most "generous" an industry expert[3] had seen in his "entire career." 3-ER-501:20–23. It is especially generous since Bridgeland *loses money* when oil falls below $60-$65 per barrel, even though Bridgeland must continue to pay the royalty. *See* 3-ER-545:22–546:8; 3-ER-544:21–545:8. There was no contrary evidence. This is not, as Plaintiffs claim, a "miniscule" benefit to veterans. Ans. Br. at 9.

Plaintiffs also contend that Bridgeland's interpretation would hypothetically "countenance" leases paying "1.5%, 1%, .5%, or even .001%." Ans. Br. at 8. But

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[3] The expert's name is Robert Rainbolt, but Plaintiffs call him Robert *Reinholt*. Ans. Br. at 13-14.

the Leasing Act does not entitle third parties to unilaterally contract with the VA. The Secretary continues to have discretion to negotiate and reject leases, since he "may" (not "must") carry out qualifying leases. Leasing Act § 2. The VA's mission is to "fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors."[4] There is no evidence that in carrying out this mission, the Secretary would entertain a deal paying the veterans a "0.001%" royalty, as Plaintiffs claim hyperbolically.[5]

Instead, all evidence presented in the district court supports the conclusion that the Secretary exercised his discretion to enter into a highly beneficial, "generous" deal for veterans. Neither Plaintiffs nor the district court are entitled to second-guess that discretion. Indeed, the Leasing Act expressly provides that it shall not be "construed as a limitation" on the Secretary's authority "to enter into other agreements . . . authorized by law and not inconsistent" with the Act. Leasing Act § 2(k).

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[4] About the Department; U.S. Department of Veterans Affairs (last updated Feb. 5, 2025); https://department.va.gov/about/.

[5] Plaintiffs contend that "Congress's intent was just the opposite" of Bridgeland's argument. Ans. Br. at 14. Plaintiffs fail to cite anything for this point, waiving it. Plaintiffs also fail to address, and thus concede, that Congress adopted the VA's interpretation of the Revocable License when Congress amended the Leasing Act in 2021 without making changes to invalidate it. *See* Op. Br. 44-45.

C. <u>BLM's Ability to Authorize Sawtelle-2 Shows the Revocable License Principally Benefits Veterans</u>

Plaintiffs concede that BLM may authorize Bridgeland to operate wells passing through the subsurface of the WLA Grounds, such as Sawtelle-2. Ans. Br. at 13. Plaintiffs dismiss this fact as "irrelevant," but it is not. BLM's authorization of Sawtelle-2, which BLM *undisputedly* may do, makes the Revocable License legally unnecessary to Bridgeland. Either way—with or without the Revocable License—Bridgeland may continue operating Sawtelle-2. Op. Br. at 24-27. As such, the only effect of the Revocable License is to fund transportation services for veterans. If the Revocable License is eliminated, Bridgeland's operations and use of the WLA Grounds continue unchanged, while the veterans lose their royalty. Thus, the Revocable License *necessarily* principally benefits veterans. There is no contrary evidence. The absurd result Plaintiffs seek—depriving veterans of their royalty for nothing—is not mandated by the Leasing Act.

Plaintiffs' retort is that Bridgeland would not be "fighting so hard" if the Revocable License were truly unnecessary or valueless. Ans. Br. at 11. Bridgeland is defending the Revocable License for two reasons. First, Bridgeland prefers to keep the Revocable License in place because "prudent operator" practice is to obtain consent of the surface owner (here, the VA). 3-ER-496:5–11. This minimizes the potential for disputes with the VA over Bridgeland's rights. Second,

the district court's overbroad injunction goes far beyond simply invalidating the Revocable License, thereby requiring Bridgeland to appeal it.

It is easy to see why Bridgeland is "fighting so hard" to defend its interests. If Bridgeland had failed to intervene in this case (and educate the parties and the court about Bridgeland's separate, undisputed rights to occupy the WLA Drill Site), the district court presumably would have *evicted* Bridgeland from the drill site (without any legal basis to do so) as it did to other third parties who failed to intervene promptly.

D. <u>Veterans Have "Vastly Superior Interests" Over Other Royalty Holders</u>

Plaintiffs falsely claim that the other parties receiving revenues from the Sawtelle-2 well—Bridgeland, PCEC, and hundreds of private royalty owners who own the oil produced—"enjoy vastly superior interests" over veterans. Ans. Br. at 11.[6] Not so. The veterans receive the *single largest* royalty for Sawtelle-2, even though they give up neither oil nor surface land. *See* 8-ER-2027–34 (royalty deck for Sawtelle-2 well).

[6] Plaintiffs claim that Bridgeland "omitted from its papers" the fact that other entities receive revenues from the Sawtelle-2 well. Ans. Br. at 11. This is false. *See* Op. Br. at 48-49 (explaining that Bridgeland must "pay approximately 18% of the revenue to other royalty holders (on top of the 2.5% veterans' royalty)" and shares "the remaining approximately 79%" with PCEC "out of which they pay all costs of operating").

After Bridgeland and PCEC, which pay all costs of production from their share of revenues, the ten largest royalties are:

DAV-LA (i.e., the veterans)	2.5%
Nail Bay Royalties LLC	1.5%
Santa Monica Boulevard	1.306708%
DWP File P 68670	0.692991%
Elsa S Dunlap Living Trust	0.24787%
EFC Minerals LLC	0.23999%
New World Comm Group Inc	0.213892%
WWT9 Owner LLC	0.202819%
Chevron USA	0.196211%
Gate King Partners	0.194221%

Id.[7] The next 471 royalties are progressively smaller *fractions of a percent*. The smallest 100 royalties are between 0.004375% and 0.00153%. *Id.* Thus, Plaintiffs have it backwards: the veterans and the DAV-LA (who have no property interest in the oil produced) have the "vastly superior" interests under the Revocable License.

E. The District Court's Incorrect Fact Findings Were Not Mere "Musings"

Plaintiffs dismiss the district court's incorrect factual findings as "musings" uncoupled from its analysis. Ans. Br. at 12. The district court's words refute this, and each finding was contrary to the evidence and clear error.

First, the district court stated that the DAV-LA provides transportation because "the VA has leased much of its land to third parties" and "so few veterans

[7] The royalty deck is available in a native Excel file that enables royalties to be sorted numerically. The native Excel file was produced to Plaintiffs' counsel prior to trial (Bridgeland_002753-68). Bridgeland will make the Excel file available to this Court upon request.

live on the campus." 1-ER-69. The district court then found that veterans are "better served by housing than a drilling license for an oil company," upon which the court based its holding that the Revocable License "does not principally benefit veterans." *Id.* But the Revocable License does not "lease . . . land" from the VA, and Bridgeland has nothing to do with the VA's housing policies. The district court's holding was without evidence and based on false premises.

Second, the district court incorrectly found that 97.5% of revenues are "retained" by private parties and that private parties "make over $6 million [] per year." 1-ER-69. These statements are contrary to evidence that the 97.5% is *revenues*, not profits, from which Bridgeland (i) pays all royalty holders (3-ER-540:9–11), (ii) pays all costs of production (3-ER-544:21–24), and (iii) loses money unless oil is at least $60-65 (3-ER-545:22–546:8). The district court's incorrect findings are the basis for the district court's holding that the Revocable License "violates the VA's fiduciary duty" because it "does not principally benefit veterans." 1-ER-69. These were not mere "musings."

Third, during an October 4, 2024 "Hearing on Injunctive Relief," the district court revealed that when "balanc[ing]" what is "a principal benefit to these veterans," and ultimately deciding to void the Revocable License and enjoin all future slant drilling on the WLA Grounds, the district court was "immensely concerned" about "the health aspect of" Bridgeland's operations. 2-ER-279,

312:20–24. But, again, not only was there *no claim* even remotely related to any purported “health aspect” of Bridgeland’s operations, but there was also *no evidence* on which the district court could have based its professed immense concern. It is an abuse of discretion to grant an injunction “based on claims that Plaintiffs did not allege” and in “reliance on extra-record evidence.” *LA All. for Hum. Rts. v. Cnty. of Los Angeles*, 14 F.4th 947, 957 (9th Cir. 2021). When the district court made this statement during the Hearing on Injunctive Relief, it revealed that its unsupported conclusions about the “health aspects” of Sawtelle-2 had wrongfully formed the basis of its holding as to the legality of the Revocable License, as well as the scope of the injunctive relief the court was enacting (the Modified Injunction) to remedy that purported wrong. This was reversible error. *See id.*

F. The VA OIG’s Legal Conclusions Are Irrelevant and Wrong

Plaintiffs champion the VA OIG’s legal “findings” regarding “whether the VA was complying with” the Leasing Act. Ans. Br. at 4. These are irrelevant. It is for this Court, not the OIG, to construe and apply the Leasing Act. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 (2024) (“courts, not agencies, will decide *all* relevant questions of law”) (quotation marks omitted).

The OIG's conclusions are also plainly wrong. The OIG determined that the Revocable License was non-compliant because it was not "veteran focused." Ans. Br. at 4. There is no such requirement in the Leasing Act.

G. The Modified Injunction is Overbroad and Improper

1. Plaintiffs Concede Overbreadth

Assuming the district court correctly found the Revocable License invalid (it did not), the only appropriate injunction might be to void the Revocable License. But the district court went much further and *sua sponte* barred Bridgeland from "slant drilling" from the WLA Grounds, regardless of the source of Bridgeland's authority to slant drill.

Plaintiffs concede the injunction is overbroad by noting that Bridgeland "correctly states" BLM may authorize Bridgeland to operate slant-drilled wells passing beneath the WLA Grounds in the absence of the Revocable License. Ans. Br. at 13. If Bridgeland may do something in the absence of the Revocable License, then the district court cannot enjoin it. *See LA All. for Hum. Rts.*, 14 F.4th at 957 (A district court "only ha[s] equitable power to grant relief on the merits of the case or controversy before it, and does not have the authority to issue an injunction based on claims not pled in the complaint.") (quotation marks omitted). Thus, the Modified Injunction is undisputedly overbroad and must be vacated.

Plaintiffs' arguments otherwise are meritless.

First, Plaintiffs claim that the Modified Injunction "does remedy harm alleged," although Plaintiffs fail to cite the allegation or evidence of such harm. Ans. Br. at 15. Plaintiffs argue, without support in the record, that the harm remedied is the "depletion of revenues by and for private interests at the expense of veterans" and reduction of "the available future volume of oil." Ans. Br. at 15. There is no evidence of this harm, because it does not exist. The oil produced under the Revocable License belongs to private parties, not the veterans or the government. *See* 1-ER-68; 1-ER-100 (finding No. 120). Neither the government nor veterans have any interest in the oil or revenues generated under the Revocable License (except the 2.5% royalty that Plaintiffs seek to terminate).

To the extent Plaintiffs contend that they are harmed by the mere existence of an agreement they claim is unlawful, that alleged harm is fully remedied by voiding the agreement. *See Gill v. Whitford*, 585 U.S. 48, 73 (2018) ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.").

2. Cases Cited by Plaintiffs Are Inapplicable

Plaintiffs' cases are inapplicable. *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166 (9th Cir. 2002), stands for the unremarkable proposition that a district court can order an agency to act when required to do so by statute. There, environmental groups sued the U.S. Fish and Wildlife Service for failure to comply with a deadline in the Endangered Species Act to determine whether listing a

species as endangered was warranted. *See id.* at 1169. This Court held that the district court properly issued an injunction requiring the Service to make the mandated determinations. *See id.* at 1176-78. Nothing in this case stands for the proposition that a district court may issue an injunction neither sought by the parties nor tailored to the claims and harm alleged.

Plaintiffs also cite *Brock v. Big Bear Mkt. No. 3*, 825 F.2d 1381, 1383 (9th Cir. 1987), for the proposition that a "pattern of repetitive violations" is a "factor[] weighing heavily in favor of granting a prospective injunction." Ans. Br. at 16. Plaintiffs argue there is a "pattern of repetitive violations" because the "OIG has twice found the lease in conflict" with the Leasing Act. *Id.* There are no findings by the district court as to the OIG's statements on the Revocable License, so it cannot justify the Modified Injunction (or anything else).[8] But this is beside the point. Plaintiffs did not allege any "repetitive violations" by Bridgeland. Plaintiffs alleged the *Federal Defendants* violated the Leasing Act, and Plaintiffs sought to enjoin the *Federal Defendants* from "executing and maintaining" the identified "*land use* agreements." 7-ER-1851 (First Am. Compl., Prayer ¶ G) (emphasis added). Bridgeland has no "land use" agreements with the VA, but even excepting

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[8] The district court cited the OIG's statements in connection with other leases with other parties, not Bridgeland's. *See, e.g.*, 1-ER-61 (describing OIG statements regarding Brentwood School's lease).

this, at most, any "violation" might justify voiding the agreements, but cannot justify the Modified Injunction broadly barring Bridgeland from "slant drilling."

Plaintiffs cite *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945), for the proposition that an injunction may bind non-parties "in privity" with defendants. That might justify binding Bridgeland to an order voiding the Revocable License, since Bridgeland is in privity with the VA. But it does not warrant the Modified Injunction to remedy harm never alleged and claims never asserted.

Plaintiffs cite *Armstrong v. Brown*, 768 F.3d 975 (9th Cir. 2014), for the proposition that a district court may *sua sponte* order injunctive relief. This, again, misses the point. The Modified Injunction is improper and overbroad because it reaches beyond the claims asserted and harms alleged, which is an abuse of discretion and without jurisdiction. Op. Br. at 51-52.

Finally, Plaintiffs cite two cases for the general proposition that courts have discretion to issue injunctions unless a statute says otherwise. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001) (holding that Controlled Substances Act limited court's discretion to consider certain defenses in crafting injunction); *Reebok Int'l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 561 (9th Cir. 1992) (holding that Lanham Act did not narrow court's authority to freeze the defendant's assets). But courts do not have *unlimited* discretion. Their

discretion is limited by the reach of their jurisdiction and the claims and issues in the case, both of which the district court far exceeded here. *See* Op. Br. at 51-55.

3. Plaintiffs Concede the District Court Failed to Make Required Factual Findings

Plaintiffs ignore that the district court failed to make required factual findings supporting an injunction, including irreparable harm, balancing the harms, public interest, and actual success on a claim justifying the Modified Injunction. *See* Op. Br. at 54-55; *see also, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). Accordingly, Plaintiffs concede this point, and the Modified Injunction should be vacated on this basis alone.

H. Plaintiffs Concede The Federal Defendants Owe No Enforceable Fiduciary Duties

Plaintiffs fail even to respond to Bridgeland's challenge to the district court's incorrect conclusion that the VA breached its fiduciary duties by entering into the Revocable License. Thus, Plaintiffs have waived any opposition to this issue. *See Dreyer*, 804 F.3d at 1277 ("[A]n appellee waives any argument it fails to raise in its answering brief."); *Kohler v. Presidio Int'l, Inc.*, 782 F.3d 1064, 1069 n.1 (9th Cir. 2015) (holding that appellee waived argument to support district court's ruling that was not raised until oral argument); *Hurry v. Fin. Indus. Regul. Auth., Inc.*, 782 F. App'x 600, 602 (9th Cir. 2019) (failure to respond to argument made by

appellant "constitutes waiver"); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007) (where appellees fail to make an argument in their answering brief, "they have waived it").

Remarkably, Plaintiffs attempt to justify their decision not to brief this issue by asserting that Plaintiffs briefed a similar issue in opposition to a separate, unconsolidated case challenging portions of the district court's orders and decisions applicable to the Federal Defendants (not Bridgeland) (appeal No. 24-6576).[9] Thus, Plaintiffs brazenly assert, they should not be required to address similar issues in two separate appeals, by separate parties. Ans. Br. at 14 n.3. That is not the law.

"[F]ailure to brief the issue results in waiver," regardless of whether the party may have briefed a similar issue in a separate case. *United States v. Ewing*, 638 F.3d 1226, 1230 (9th Cir. 2011); *see also Munden v. Stewart Title Guar. Co.*, 8 F.4th 1040, 1050 n.8 (9th Cir. 2021) (argument was waived "for failure to brief it sufficiently"). Bridgeland is entitled to a full and complete appellate record in *this*

[9] Plaintiffs wrongly claim Bridgeland "repeats" arguments by the Federal Defendants made in a separate, unconsolidated appeal. Ans. Br. at 14 n.3. Not so. Bridgeland had no access to the Federal Defendants' briefing (such that it could copy or "repeat" any such arguments) before Bridgeland's brief was filed. Instead, the Federal Defendants separately submitted their own brief in their own appeal of the district court's order as to the Federal Defendants (No. 24-6576), on the same day that Bridgeland filed its own, separate and independent brief in this appeal. Op. Br. at 55-61.

case; it is not required to scour Plaintiffs' briefing in *other* cases in search of Plaintiffs' arguments in opposition to claims by a different party, that may be somewhat applicable to Bridgeland's claims in this case, and to then reply to those arguments as if the Plaintiffs had bothered to raise them in this case (which they did not).[10]

Thus, under the long-established law of this (and every other) Circuit, Plaintiffs have waived any opposition to Bridgeland's challenge to the district court's finding that the Revocable License somehow breached the Federal Defendants' fiduciary duties (it does not), and whether Plaintiffs have standing to enforce those supposed duties (they do not). The Court's inquiry and analysis of these issues should end here.

If, however, the Court nonetheless considers Plaintiffs' arguments made in another appeal as if they were properly raised here (they were not), the Court should still conclude that: (1) Plaintiffs lack standing to enforce a charitable trust against the government; (2) the 1888 Deed did not create fiduciary duties; and (3) any purported fiduciary duties are unenforceable.

[10] Plaintiffs' disrespect for this proceeding is especially brazen given that Plaintiffs' opposition brief was only 4,067 words, and thus if Plaintiffs truly believed that their opposition argument would merely be a "cut and paste" of the arguments they raised in opposition to *another case*, Plaintiffs could have, at minimum, "cut and pasted" those arguments into their opposition brief in this case, and given Bridgeland the respect of at least changing the party names.

1. Plaintiffs Lack Standing

Plaintiffs lack standing to enforce a charitable trust against the government because the number of people intended to benefit from the donation of the WLA Grounds is large and undefined, including all veterans in the Western United States. *See* 1-ER-7–9; 4-ER-828–30 (deed). Thus, the alleged misuse of the WLA Grounds is an unenforceable injury to the community as a whole. *See Pinkert v. Schwab Charitable Fund*, 48 F.4th 1051, 1058 (9th Cir. 2022) (Bress, J., concurring in part and in the judgment) (use of charitable trust property "cannot create a 'concrete and particularized' injury in the donor, but at most one that is 'abstract,' and therefore not sufficient").

Plaintiffs contend the certified *class* is more limited and better defined, but that is irrelevant. It is the scope of the beneficiaries of the purported trust that is relevant. *See* Ronald Chester, et al., Bogert's The Law of Trusts and Trustees § 414 (July 2024) ("[N]o private citizen can sue to enforce a charitable trust merely on the ground that he believes he is within the class to be benefited.").

Plaintiffs rely on *Hooker v. Edes Home*, an appeal from the District of Columbia Superior Court, but it held that plaintiffs seeking to enforce a charitable trust must be challenging an "extraordinary measure threatening the existence of the trust." 579 A.2d 608, 615 (D.C. 1990). There is no such challenge here. Plaintiffs also cite *He Depu v. Yahoo! Inc.*, 950 F.3d 897 (D.C. Cir. 2020), a case

relying on *Hooker*. The court in *He Depu* noted that the plaintiffs met the requirement to challenge an extraordinary measure threatening the existence of a trust, because they challenged "the outright termination" of a fund. *Id.* at 906. Again, Plaintiffs bring no such challenge.

2. The 1888 Deed Did Not Create Fiduciary Duties

Plaintiffs argue, as they must, that the 1888 Deed language manifested intent to create a trust. It did not. There is no "condition" or "conditional language" written into the 1888 Deed, and Plaintiffs fail to cite any. Ans. Br. at 44-45 (No. 24-6576). The district court and the *Valentini* court made the same error. *See Valentini v. Shinseki*, 860 F. Supp. 2d 1079, 1104-05 (C.D. Cal. 2012).

The grantors could not have made the donation conditional, since the 1866 Act under which the government was authorized to accept the donation enabled the government "to hold or *dispose of*" (emphasis added) the property for its "sole and exclusive use." 24 U.S.C. § 111, Act of Mar. 21, 1866, ch. 21 § 5, 14 Stat. 10 (repealed 1959).

At most, the 1888 Deed manifests only a hope that the property would be used for certain purposes, as this Court previously found. *See Farquhar v. United States*, 1990 WL 121076, at *3 (9th Cir. 1990) (unpublished) ("Construing the language of the 1888 deed as creating a covenant or statement of purpose, rather than a condition, is consistent with the deed's stated purpose."). Plaintiffs dismiss

Farquhar because it did not decide whether a charitable trust was created, but that misses the point. *Farquhar* analyzed the same deed language and found no "condition" imposed on the donation, rebutting Plaintiffs' exact argument here. *See id.*

3. Any Fiduciary Duties are Unenforceable

Even if the 1888 Deed creates fiduciary duties, they are unenforceable. Plaintiffs fail to point to the requisite statutory language imposing such duties on the government. Plaintiffs argue that Congress has "twice reinforced the Government's assumption" of fiduciary duties by passing the Leasing Act and its 2021 amendment. Ans. Br. at 48 (No. 24-6576). But the VA's statutory duties are not the same as rights that may be judicially enforced by private actions. Whether fiduciary duties are created is separate from whether they are enforceable, and, here, no language "has gone farther, and provided means" to "compel the administering official or agency to observe the terms and conditions of an accepted gift." *Story v. Snyder*, 184 F.2d 454, 456 (D.C. Cir. 1950).

Plaintiffs' interpretation would transform any statute governing the use of federal land into fiduciary duties that private parties could enforce in court. That is plainly wrong.

Plaintiffs cite three cases discussing enforcement of fiduciary duties in the context of the government's relationship to Indian tribes. Each is distinguishable,

and each pre-dates the Supreme Court's recent holding that the government owes enforceable trust duties "only to the extent it expressly accepts those responsibilities." *Arizona v. Navajo Nation*, 599 U.S. 555, 564 (2023) (quotation marks omitted).

First, Plaintiffs cite *United States v. Navajo Nation*, 556 U.S. 287 (2009) (Ans. Br. at 47 (No. 24-6576)), where the Supreme Court rejected a tribe's attempt to enforce fiduciary duties against the government regarding the use of royalties from coal mining on tribal land. The Court held that the tribe failed to cite a "specific, applicable, trust-creating statute or regulation that the Government violated." *Id.* at 302. Without such express statutory language, the Court held that the government's "liability cannot be premised on control alone." *Id.* at 301. The same is true here: the VA's control and statutory obligations regarding administration of the WLA Grounds under the Leasing Act and 2021 amendment do not create enforceable duties.

Second, Plaintiffs cite *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (Ans. Br. at 48 (No. 24-6576)), but that case involved express language not present here requiring the government to manage timber sales on Indian lands for "'the needs and best interests of the Indian owner and his heirs' and that proceeds from such sales be paid to owners 'or disposed of for their benefit.'" *Id.* (citing 25 U.S.C. § 406(a)). This language, plus the "general trust relationship between the

United States and the Indian people," rendered the government potentially liable for mismanaging timber sales. *Id.* at 225. There is no similar language in the Leasing Act. Even if there were, such language could not create enforceable duties under the Supreme Court's more recent holding that the government "owes judicially enforceable duties . . . only to the extent it expressly accepts those responsibilities," which it did not do under the Leasing Act. *Arizona*, 599 U.S. at 564 (quotation marks omitted).

Finally, Plaintiffs cite a statement from the Court of Federal Claims that "where the Federal Government takes on or has control or supervision over *tribal monies or properties*, the fiduciary relationship normally exists with respect to such monies or properties[.]" *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980) (emphasis added). But this principle is applicable only "when dealing with *Indian property*[.] *Id.* The WLA Grounds is not the Plaintiffs' property.

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CONCLUSION

The judgment against Bridgeland should be reversed, and the Modified Injunction should be vacated.

DATED: March 11, 2025

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number - 24-6578

I am the attorney of record for Appellant Bridgeland Resources, LLC.

This brief contains 6,056 words excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

DATED: March 11, 2025

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