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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

JAKE C. PELT, et al.,	:	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: UTAH'S DUTY TO ACCOUNT FOR OIL AND GAS REVENUES** (Doc. # 1074)
Plaintiffs,	:	
vs.	:	
STATE OF UTAH,	:	Case No. 2:92-CV-639 C
Defendant.	:	Judge Tena Campbell
	:	Mag. Judge Sam Alba

PLAINTIFFS, by and through counsel, hereby submit this Memorandum in Support of their Motion for Partial Summary Judgment Re Utah's Duty to Account for Oil and Gas Lease Revenues Due the Trust ("Motion"). Through their Motion, Plaintiffs seek an order finding and declaring that as trustee of the Navajo Trust Fund ("NTF"), Utah must fully and accurately account for all revenue due the NTF under the terms of relevant oil and gas leases.

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STATEMENT OF UNDISPUTED FACTS

This brief addresses the narrow issue of whether Utah, as Trustee of the Navajo Trust Fund ("NTF"), must account for or verify lease revenues due the NTF beyond simply acknowledging receipt of checks from the federal government. The undisputed facts relevant to this issue are as follows:

Parties & Trust Fund

1. By Act of Congress, Utah is trustee of the Navajo Trust Fund ("NTF"). Act of March 1, 1933, 47 Stat. 1418 ("1933 Act"), as amended by Public Law 90-066, 82 Stat. 121 (1968) ("1968 Act"); *see also*, Order and Mem. Decision at 3 (Jan. 11, 2006) (Doc. 1017) ("2006 Order").

2. Plaintiffs, a group of Navajo Indians and other statutorily specified Indians residing in San Juan County, Utah, are the beneficiaries of the NTF. *See* 1933 Act, as amended by 1968 Act; 2006 Order at 3.

3. Plaintiffs ("Beneficiaries") and those whom they represent are largely impoverished and isolated from modern services and utilities. *See Sakezzie v. Utah Indian Affairs Comm'n*, 198 F. Supp. 218, 220-22 (D. Utah 1961) ("*Sakezzi I*"); *Sakezzie v. Utah Indian Affairs Comm'n*, 215 F. Supp 12, 22 (D. Utah 1963) ("*Sakezzi II")*. They are also largely uneducated and without opportunity for employment other than traditional livestock herding. *See id.*

4. The NTF corpus is comprised of 37½% of royalties derived from the Navajo Nation's oil and gas leases for exploration, development, and production of hydrocarbon substances in a specifically defined portion of the Navajo Nation within the State of Utah ("NTF wells"). 1933 Act, as amended by 1968 Act; *Pelt v. Utah*, 104 F.3d 1534, 1544 (10th Cir. 1996).

5. The term "royalties," as used in this context, necessarily includes all amounts due under the relevant leases, including funds derived from: (1) bonuses paid to acquire leases, *see* 30 U.S.C. § 1715, 25 C.F.R. § 211.40, and BIA Standard Lease Form 5-157 at § 1, attached hereto as Exhibit A[1]; (2) annual advance lease rental payments, *see* 30 U.S.C. § 1715, 25 C.F.R. § 211.41(a), and Exhibit A at § 3(c); (3) penalties for incidents of non-compliance, *see* 30 U.S.C. § 1715, and 25 C.F.R. § 211.55(a); (4) interest on late payments, *see* 30 U.S.C. §§ 1715, 1721, and 25 C.F.R. § 211.55(e); (5) any economic benefit resulting from payment in kind, when elected by the lessor, *see generally*, United States Government Accountability Office, Testimony Before the Committee on Natural Resources, U.S. House of Representatives, Royalties Collection: Ongoing Problems with Interior's Efforts to Ensure a Fair Return for Taxpayers Require Attention (Mar. 2007) (discussing value of royalties in kind); and (6) royalties due on hydrocarbon substances produced and saved pursuant to the terms of the relevant mineral leases and statutes and regulations under which such leases are authorized, *see, e.g.,* 30 U.S.C. § 1715, 25 C.F.R. § 211.41(c), and Exhibit A at § 3(c).

6. Utah itself has successfully argued that the 1933 Act requires payment of more than bare royalties, on account of the 1933 Act's "legislative history [which] states that the [Act] provides for the 'disposition of *any revenue* arising from oil and gas which might be discovered in the area.'" *Utah v. Lujan*, No. 92-C-376G, Complaint at ¶ 43(a) (emphasis added) (quoting H.R. Rep. No. 1883, 72d Cong., 2d Sess. 2 (1933); S. Rep. No. 1199, 72d Cong., 2d Sess. 2 (1933)),

[1] Most leases for production of oil and gas on Indian lands are prepared using BIA Standard Mineral Lease Form 5-157. Thus, the terms and conditions of Form 5-157 and its predecessor form form the bases for the proper determination of all sums due to the NTF. These lease terms and conditions are reflected in the requirements of federal statutes, rules, and regulations governing mineral production on Indian lands.

attached hereto as Exhibit B; *Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995) (adopting Utah's argument on appeal of *Utah v. Lujan*, and noting that the NTF was "entitled to 37½% of all oil and gas royalties or *revenues paid to the Navajo Nation from any oil and gas production.* . . . on [the relevant lands]."") (emphasis in original).

7. In this litigation, the Beneficiaries seek a complete and accurate accounting from Utah containing detailed information on income, expenses, disbursements, and investments of the NTF sufficient to permit the trust beneficiaries to be properly informed about the accurate balance of the NTF and all revenue and disbursements thereto. Verified Compl. at 18-19, ¶ 43.

8. This motion for summary judgment concerns the income or revenue portion of that accounting.

Collection of NTF Lease Revenues

9. Through the years, the NTF leases produced significant quantities of oil and gas and substantial sums of money were generated from the relevant leases. *See, e.g.*, *Sakezzi I* at 219.

10. The Federal government, as trustee of the lands of the Navajo Nation on which the NTF leases were located, supervised, regulated, and collected revenue generated under such leases. *See generally*, *Babbitt*, 53 F.3d 1145; Commission on Fiscal Accountability of the Nation's Energy Resources, Fiscal Accountability of the Nation's Energy Resources (Jan. 1982) (hereinafter the "Linowes Report")[2].

[2] The Commission was chaired by the distinguished David F. Linowes and is thus commonly referred to as the "Linowes Commission." For the same reason, its report is referred to as the "Linowes Report."

11. Pursuant to the 1933 Act, as amended by the 1968 Act, the Federal government then paid Utah, as trustee of the NTF, a purported 37 ½% of such revenue. *See generally*, *Babbitt*, 53 F.3d 1145.

12. On information and belief, Utah simply accepted whatever payment the federal government made to the NTF without ensuring that the payment was in fact 37½% of the revenue due or even 37½% of the revenue in fact collected.

History of Federal Agency Oversight

13. During the time period relevant here, several agencies within the United States Department of Interior have been responsible for supervising mineral production on Indian land, collecting lease revenue from producers and payors, and paying lease revenue to states, tribes, and individual Indian allottees. *See* Linowes Report at 7.

14. Prior to 1983, the Bureau of Indian Affairs ("BIA"), the Bureau of Land Management ("BLM"), and the U.S. Geological Survey ("USGS") were primarily responsible for supervising and enforcing the terms of the oil and gas leases at issue and collecting for, *inter alia*, payment to Utah as Plaintiffs' trustee, Plaintiffs' 37 ½% revenue share. *Id*.

15. After 1983, the Mineral Management Service ("MMS") was created to largely replace the USGS with respect to many aspects of the lease enforcement matters discussed herein. *See* Secretarial Order No. 3071 (Jan. 19, 1982) (establishing MMS and transferring USGS responsibilities to MMS).

Longstanding Federal Failure to Collect Accurate Revenues

16. Starting in the 1950s and continuing for at least the next forty years, the federal government was heavily criticized by many of its own internal organizations for its failure to collect accurate revenue from oil and gas leases on federal and Indian lands. These criticisms were published in official reports and testimony accessible to the public. *Infra* at ¶¶ 17-57.

17. In 1959, the General Accounting Office (hereinafter the"GAO")—the investigative arm of Congress whose responsibility it is to oversee federal programs—reported substantial delay in the complete and accurate computation and collection of sums due under Indian and federal oil and gas leases, failure to verify onshore fluid mineral production (oil and gas), failure to insure proper performance by lessors and payors of all terms under federal and Indian oil and gas leases, failure to properly verify relevant lease production and payment information, and failure to otherwise properly audit such leases. United States Comptroller General, "Report to Congress: Review and Supervision of Oil and Gas Operations and Production on Government and Indian Lands," at 4 (Dec. 1959).

18. In 1964, the GAO reported that serious deficiencies identified in its 1959 report had not been adequately remedied. United States Comptroller General, "Report to Congress: Certain Deficiencies in Financial Management of Oil and Gas Activities," at 1 (Aug. 1964).

19. In 1970, Ward C. Holbrook, then Executive Director of the Utah Department of Social Services that administered the NTF, wrote to the Utah Board of Indian Affairs to express concerns about the federal government's collection and payment of NTF lease revenues. Letter from Ward C. Holbrook, Executive Director of Department of Social Services for the State of

Utah, to John S. Boyden[3], Chairman of the Utah Board of Indian Affairs (Aug. 13, 1970), attached hereto as Exhibit C.

20. He pointed out that he could not "tell where the money heretofore received came from," that the payments were "irregular," that Utah had not received any payment for more than a year, and that "substantial losses" had likely occurred. *Id.*

21. Mr. Holbrook also sent a letter to the Commissioner of Indian Affairs of the United States Department of the Interior expressing the same concerns and demanding a statement of the NTF account. Letter from Ward C. Holbrook, Executive Director of Department of Social Services for the State of Utah, to Louis R. Bruce, Commissioner of Indian Affairs, United States Department of Interior (Aug. 11, 1970), attached hereto as Exhibit D.

22. The Beneficiaries do not know whether the State of Utah received a response to this demand or otherwise followed up with the federal government regarding its concerns.

23. In 1972, the GAO again reported significant deficiencies in determining value, allowances, and quantities relevant to oil and gas lease revenue computation. United States Comptroller General, "Report to Congress: More Specific Policies and Procedures Needed for Determining Royalties on Oil from Leased Federal Land," 139-40 (Feb. 1972).

24. Just three years later, the Department of Interior's own Office of Audit and Investigation reported that Interior was not meeting its obligations to ensure that lease terms were enforced, royalty payments were maximized, collections were promptly made, and Indian leases

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[3] John S. Boyden was an experienced Indian law attorney who represented the Hopi. While representing the Hopi, Boyden engaged in double dealing to the serious detriment of the tribe. *See generally*, Tim Folger, A Thirsty Nation, Onearth, Fall 2004, p.2, available at http://www.nrdc.org/onearth/04fal/blackmesa2.asp.

were diligently managed. Department of Interior, Office of Audit and Investigation, "Review of Royalty Accounting System for Onshore Oil and Gas Leases," at 12 (June 1975).

25. The next year, the GAO again reported on the federal government's failure to inspect wells, enforce lease terms, timely collect royalties, and post-audit Indian oil and gas lease production and payment. United States Comptroller General, "Report to Senate Committee on Interior and Insular Affairs: Indian Natural Resources– Part II: Coal, Oil, and Gas, Better Management Can Improve Development and Increase Indian Income and Employment," at 28-38 (Mar. 1976).

26. Three years later, the GAO identified similar problems: "the [United States Geological] Survey is not collecting all that is owed by the oil and gas industry because the Survey's accounting and collection procedures are inadequate to identify all royalties due. In addition, $359 million of the payments received in 1977 were past due." United States Comptroller General, "Report to Congress: Oil and Gas Royalty Collections—Serious Financial Management Problems Need Congressional Attention," at cover (Apr. 1979).

27. Just three years later, the GAO reported that "problems not only persist but have become worse," and that "possibly hundreds of millions of dollars in royalties due from Federal Government and Indian leases are not being collected annually." United States Comptroller General, "Report to Congress: Oil and Gas Royalty Collections—Longstanding Problems Costing Millions," at cover (Oct. 29, 1981).

28. In 1981, the Secretary of the Interior chartered the Commission on Fiscal Accountability of the Nation's Energy Resources Commission[4], to prepare a report "advis[ing] the Secretary of the Interior concerning the accountability for revenues generated from minerals activity on Federal and Indian lands. . . [and] [e]xamin[ing] the allegations of waste and loss of minerals royalty revenues due the Federal government, States, and Indian tribes." Linowes Report at Appendix A.

29. Between August and December of 1981, the Linowes Commission heard testimony from a variety of state, tribal, and industry representatives. *Id.* at Appendix B.

30. Several representatives from the State of Utah appeared before the Commission, including the Chairman of the Utah State Tax Commission, as well as one of its Commissioners and its Internal Auditor. *Id.*

31. Utah representatives testified that in 1980 or 1981, Utah first discovered that both the State of Utah and the federal government had miserably failed to monitor oil and gas production on federal and Indian lands within Utah:

> When the news broke of [the problems with federal supervision of the oil and gas industry] a few months ago, we decided to investigate our own departmental practices and polices. We found that the accusing finger that pointed at the Department of Interior also pointed equally at us . . . In short, the job simply wasn't getting done. We had been just as guilty of neglect in administering this program as the Department of Interior and we also found that the only difference between the two agencies was that some of the Interior Department employees had reported these events while our own employees were not even aware of the problem.

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[4] As previously noted, the Commission was chaired by David F. Linowes and is thus referred to herein as the "Linowes Commission." For the same reason, its report is referred to as the "Linowes Report."

David L. Duncan, Chariman, Utah State Tax Commission, "State of Utah's [Prepared] Testimony Before the Commission on Fiscal Accountability of the Nation's Energy Resources, Denver, Colorado (Nov. 19, 1981)" at 1-2, attached hereto as Exhibit E.

32. Utah further testified that upon discovering these failures, it took immediate action:

> Our next step was to use our present audit staff to make some test audits for oil and gas production along with the regular audits for other state taxes. This approach is just getting started but the first few days of audit work produced $100,000 dollars of additional royalty income from state fee and federal lands.

Id. at 3-4.

33. Utah suggested several steps for improving the federal government's management of mineral royalties including provision of detailed production reports, timely remittance of royalty payments to the states, and penalties for late payment. *Id.* at 5.

34. Utah further suggested that states take responsibility for auditing production records from oil and gas leases on federal and Indian land within their own territories. *Id.* at 6.

35. Finally, Utah reported that although it had in the past been complacent in the federal government's underpayment of royalties, it would no longer do so:

> [W]e go laughingly to the bank and just accept prima facie that [a federal royalty payment is] an accurate amount. There's not been any real reason to examine that and all of a sudden it gets into the limelight. So only recently have we begun to examine this. Rather than going with hat in hand to whoever writes that check and say thank you very much, we're now going to say, "is that the right amount?"

"Transcript of Proceedings Before the Commission on Fiscal Accountability of the Nation's Energy Resources, Thursday, November 19, 1981 and Friday, November 20, 1981," at 135, attached hereto as Exhibit F.

36. In its final report, the Linowes Commission explained that "the oil and gas industry is not paying all the royalties it rightly owes," "the government's royalty record keeping for Federal and Indian oil and gas leases is in disarray," "the exact amount of underpayment is unknown. . . [but it is likely that] hundreds of millions of dollars due the U.S. Treasury, the States, and Indian tribes are going uncollected every year." Linowes Report at xv.

37. The problem, the report explained, was that "[i]n effect, the oil and gas companies [we]re on an honor system to compute and pay royalties fully and accurately," *id.* at 44, and the government lacked adequate controls to prevent fraud within that system, *see generally id.* at 15.

38. The report described outright oil thefts, *id.* at 26-33, as well as pervasive under-reporting of production volume and quality by producers, *id.* at 16-18.

39. It explained that the government could not prevent these violations because it did not verify data from oil and gas companies, its records were so unreliable that it often did not know which companies had paid royalties and which had not, late payments were common, leases were seldom audited or critically reviewed, and penalties for underpayment were rarely imposed. *Id.* at 15.

40. It stated that "[t]en percent is often given as a rough estimate of the underpayment of oil and gas royalties." *Id.* at 16.

41. Before the Linowes Commission, one federal official testified: "I have talked with no one who has looked, even in a cursory way, at the present accounting system who does not agree that substantial royalties are going uncollected. It certainly was our experience every time we looked at an individual case that we found major inadequacies. In almost every instance, the findings resulted in additional royalty monies being collected." *Id.* at 18.

42. After the Linowes Report, problems persisted. *See Infra* ¶¶ 43-46, 48-49, and 51-57.

43. For instance, in 1982, the GAO reported that although the Department of Interior was attempting to correct longstanding deficiencies, "the [then] current royalty accounting system [wa]s totally inadequate to effectively manage the collection of billions of dollars of royalties due from Federal and Indian leases," U.S. Comptroller General, "Oil and Gas Royalty Accounting—Improvements Have Been Initiated But Continued Emphasis is Needed to Ensure Success" (Apr. 1982) at Appendix I, pp. 10-11.

44. In 1984, the House Committee on Interior and Insular Affairs reported that many of the historical problems outlined in previous reports "not only persist[ed], but ha[d] become worse in some areas," and that there were still "numerous problems within the royalty management program which adversely affect[ed] the MMS's ability to manage efficiently and effectively the collection and accounting of federal mineral royalties." Staff of H. Comm. on Interior and Insular Affairs, 98th Cong., 2d Sess., "Federal Minerals Royalty Management 8 (Comm. Print 1984)," at 2 .

45. It reported failure to collect interest, inadequate reports, failure to perform on-site production verification, inordinate delay, poor communication, and failure to reconcile account balances, among other problems. *Id.* at 2-6.

46. It reported one tribe's comment that MMS receipts could not be reconciled with production documents, unexplained withdrawals from the tribe's MMS account occurred without notice, and MMS refused to provide information it was legally required to provide. *Id.* at 39.

47. In February 1984, the Western Governors' Association sent a letter, signed by then Utah State Governor Scott Matheson to the Secretary of the Interior lamenting: (1) the many royalty accounting problems documented since 1959; (2) the millions of dollars of underpaid royalties; and (3) the many wells that were producing oil, but from which no royalties were paid. *Id*. at 179-81.

48. The following year, the House of Representatives's Committee on Government Operations issued a report entitled: "Indian Oil and Gas Royalty Payment: Problems Persist," which reported that with regard to royalty accounting there were many "instances in which Interior ha[d] failed to aggressively carry out its trust responsibilities." H. Comm. on Government Operations, "Indian Oil and Gas Royalty Payment: Problems Persist," H.R. Rep. No. 99-214 (1985) at 9.

49. It explained that the few audits that did occur uniformly uncovered thousands of dollars of unpaid royalties, *id.* at 13-15, that it had no confidence in the government's ability to collect such unpaid royalties, *id.* at 18, and that despite decades of criticism and recommendations contained in numerous government reports, serious problems with Interior's management of and accounting for oil produced on Indian lands continued, *id.* at 20.

50. On information and belief:[5] (1) from the early 1980s to the present Utah has actively participated in the State Tribal Royalty Accounting Committee ("STRAC"); (2) STRAC is an organization designed to oversee the federal government's continuing attempt to improve its

[5] The Beneficiaries have sought documentation of Utah's participation in STRAC though a FOIA request submitted on August 2, 2007, a copy of which is attached hereto as Exhibit G. A response to that request has not yet been received. After the response is received, the Beneficiaries will supplement this memorandum with proof of the statements made herein on information and belief.

management of the Nation's mineral resources; (3) through the years, STRAC examined and commented on various ongoing problems with federal royalty collection.

51. In 1986, the United States Department of Interior's Office of Inspector General issued an audit report concluding that: (1) "BLM management has not adequately supported the program [of inspection and enforcement with regard to oil production on federal and Indian lands ("I&E")]"; (2) "Far fewer I&E inspections are performed than should be performed"; (3) "BLM cannot provide reasonable assurance that inaccurate reporting of production and/or sales is not occurring"; and, (4) "BLM cannot ensure that oil is not being improperly removed from Federal and Indian lease sites." Department of Interior, Office of Inspector General, "Audit Report: Review of Bureau of Land Management's Inspection and Enforcement Program (June 1986)" at 3.

52. The next year, the GAO reported that problems persisted with regard to valuation, accounting for collections and distributions, verifying production, and auditing leases. United States Gov't Accounting Office, GAO/T-AFMD-87-10, Testimony at 2 (Apr. 1987).

53. The most excoriating review of accounting for royalties from Indian land since the Linowes Report may have come in the 1989 Report of the Special Committee on Investigations of the Select Committee on Indian Affairs of the United States Senate. That report chronicled numerous and egregious examples of oil being stolen out from under the nose of BIA officials, *e.g.* S. Rep. No. 100-50 at 5-6, 11-12, 105-17 (1989).

54. The report noted:

> In every area it touches, the BIA is plagued by mismanagement. That is not to say that the Committee did not encounter many hard-working and talented individuals at BIA. Rather, the inability of so many good people to have a real impact only underscores the terminal sickness of the institution itself.

Id. at 8.

55. It continued:

> Most tellingly, the [investigators'] findings were the result of but a few months' work with limited manpower and resources. If the [investigators] could uncover, in a short time, such a widespread pattern of fraud affecting American Indians, why has the Department of the Interior, charged with the responsibility to protect Indian natural resources, failed to do likewise? The answer is a familiar one: American Indians again have placed their trust in federal entities, seemingly mobilized and watchful, but in reality dormant and impotent.

Id. at 113.

56. Finally, it concluded:

> In 1907 the Secretary of the Interior wrote President Theodore Roosevelt concerning efforts to address exploitation of Indian natural resources by various oil companies in Oklahoma. The Secretary's concerns matched the findings of the Special Committee with uncanny similarity:
>
> > "[S]topping the monopolistic greed and commercial tyranny which has characterized the acts of certain operators in both Oklahoma and the Indian territory, whose conduct is deliberately violating their contracts or leases, and in shamefully disregarding the rules and regulations of the Department, has cost both the Indian lessor and the independent operator millions of dollars . . . ."
>
> More than 80 years later, the greed of some segments of corporate America and incompetence within the Department of the Interior continue to deprive American Indians of much-needed revenues from natural resources. Untold millions have been lost over the years while the federal governments sits idly by.

Id. at 140.

57. In a 1990 report, the Secretary of the Interior, as required by the Federal Managers Financial Integrity Act of 1982 (P.L. 97-255), identified as two of the four "most critical" weaknesses in the Department of the Interior: (a) "The existence of significant financial, environmental and safety related material weaknesses within the Bureau of Indian Affairs"; and (b) "Deficiencies in the inspection and enforcement of on-shore mineral leases, mineral lease drainage programs and Indian mineral lease diligence standards in the Bureau of Land Management." United States Department of the Interior, Secretary's Annual Statement and Report to the President and the Congress (Dec. 1990) at 4.

58. In 1991, John E. Powless, then Director, Utah Division of Indian Affairs, expressed great concern that income to the NTF was not being properly documented:

> Since I have been in this position, I have received [quarterly] royalty checks from the [Federal] Bureau of Indian Affairs, usually in excess of $300,000. These checks do not contain backup statements indicating how the Bureau of Indian Affairs (BIA) arrived at the royalty payment figure. I have no idea if the [NTF] is receiving the amount of royalty payment which it is entitled to, because there is no statement indicating what the production figures are for oil and natural gas.

Letter from John E. Powless, Director, Utah Division of Indian Affairs, to M. Kirk Green, Director State of Utah Business & Economic Development (Jan. 25, 1991) at 3, attached hereto as Exhibit H.

59. Powless explained that he had "request[ed] that the BIA send statements on the royalty payments which indicate how they calculated the royalty payment, and what the royalty payment represents for each quarter in terms of the number of barrels of oil produced, and the number of cubic feet of natural gas which ha[d] been taken [from the NTF wells]." *Id.* at 3.[6]

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[6] It is worth noting that at least since the passage of the Federal Oil and Gas Royalty (continued...)

60. In his letter, Powless indicated that he had not yet received such a statement but that he was "going to continue to pursue these issues until [he was] satisfied that [the State of Utah] ha[d] lived up to [its] trust responsibilities to the beneficiaries and obtained a full accounting of what [wa]s going on in [the] oil field. *Id.* at 4.

61. The Beneficiaries believe that the State of Utah never received such a detailed accounting but only a list of royalty payments actually made. *See* Letter from Thomas Martin, Acting Assistant Area Director of the United States Department of the Interior, Bureau of Indian Affairs to Larry W. Richardson, Chief Deputy State Treasurer (Aug. 28, 1991) (enclosing list of royalty payments made), attached hereto as Exhibit I.

62. In 1992, the State of Utah, as trustee of the NTF, successfully brought suit against the Federal government seeking 37 ½% of unpaid revenues generated by oil and gas production on land covered by the 1933 Act. *See generally* Exhibit B; *Babbitt*, 53 F.3d at 1150.

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[6](...continued)
Management Act of 1982, if not before due to otherwise applicable statutory and lease terms, the payments and the explanations of payments that must accompany each payment were due monthly, no later than the month after the month of production. 30 U.S.C. §§ 1714-15.

INTRODUCTION

As trustee of the NTF, Utah must completely and accurately account for income, expenses, investments, and disbursements of the NTF. Utah's accounting must contain sufficient information to allow the Beneficiaries to readily ascertain whether Utah faithfully fulfilled its duties under the terms of the trust. One of Utah's trustee duties was to verify that payments made to the trust by the federal government accurately reflected all sums to which the NTF was entitled under the terms of the relevant oil and gas leases. This specific duty arises from Utah's general duty to take and keep control of trust property, as well as its duty to exercise reasonable care. Indeed, failure to verify the accuracy of payments from the federal government to the NTF is patently unreasonable in light of Utah's longstanding and specific knowledge of the federal government's serious and decades-long failures to adequately oversee Indian leases and collect all revenues due thereunder. Utah's revenue accounting, therefore, must contain lease terms, production volumes, production quality, pricing, and other information necessary for the Beneficiaries to determine whether Utah faithfully fulfilled its duty to verify the accuracy of payments to the NTF.

ARGUMENT

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Zwygart v. Bd. of County Comm'rs of Jefferson County, Kansas*, 483 F.3d 1086, 1090 (10th Cir. 2007) (internal quotation marks omitted). When the material facts are not in dispute "and the only issue remaining is one of law, the Court may appropriately decide [a case] on summary judgment." *Westland Holdings, Inc. v. Lay*, 462 F.3d 1228, 1231 (10th Cir. 2006). In this case, the material facts are not in dispute. The only question is a legal one—whether Utah's income accounting must contain information

necessary to verify that Utah fulfilled its duty to collect all revenue due the NTF. As explained in more detail below, the answer to this question is *yes*. The Beneficiaries, therefore, are entitled to partial summary judgment finding and declaring that Utah's revenue accounting must contain that information.

I. AN ACCOUNTING IS INCOMPLETE UNLESS IT CONTAINS ACCURATE AND COMPLETE INFORMATION ABOUT TRUST INCOME, EXPENSES, INVESTMENTS, AND DISBURSEMENTS.

The duty to account is fundamental in trust law because it allows both the trust beneficiaries and the trustee to monitor compliance with the obligations of the trust. *See* Restatement (Third) of Trusts § 82 cmt. d (2007). A complete trustee accounting has four primary components—income, expenses, disbursements, and investments—which together demonstrate "what property came into [the trustee's] hands, what has passed out, and what remains therein." *McCormick v. McCormick*, 455 N.E.2d 103, 109 (Ill. App. Ct. 1983) (internal quotation marks omitted). This brief addresses the income portion of Utah's accounting.[7] A second brief, being filed this same day, addresses the investment portion. This Court's August 23, 2007 Order

[7] Understandably, income accounting was not addressed in *Minnesota Chippewa v. United States*, 14 Cl. Ct. 116 (1987) because that opinion came out of a limited *disbursements* trial. *See Minnesota Chippewa*, 14 Cl. Ct. at 120 (referring to matter before the court as "accounting for disbursements"). That does not mean, however, that income accounting is not required here. As this Court recognized in its recent opinion, the 1987 *Minnesota Chippewa* opinion concerned only trust *disbursements*. *See generally*, Order and Mem. Op. at 17 (Aug. 23, 2007) (Doc. 1073). In *Minnesota Chippewa*, the income issues were addressed in separate proceedings which were ultimately settled before a written opinion was issued. The sheer value of those settlements for just one of the parties to that case, *viz.*, the Red Lake Band of Chippewa Indians—$27,105,000 in 1997, *Red Lake Band of Chippewa Indians v. United States*, No. 189-A and 189-B, Order Directing Payment of Judgment (Sept. 3, 1997), attached hereto as Exhibit J, and $53,500,000 in 2001, *Red Lake Band of Chippewa Indians v. United States*, No. 189-C, Judgment (Jan. 16, 2001), attached hereto as Exhibit K—demonstrates that there is a sound factual as well as a legal basis for holding a trustee responsible for failing to ensure that the trust receives all income to which it is entitled.

addressed the disbursement component. *See generally*, Order and Mem. Dec. (Aug. 23, 2007) (Doc. 1073) ("2007 Order"). Expenses have not been separately addressed but generally fall within the duty to account for all disbursements.

II. UTAH'S INCOME ACCOUNTING MUST ALLOW THE BENEFICIARIES TO DETERMINE WHETHER UTAH COLLECTED ALL REVENUE DUE THE TRUST.

As this Court has repeatedly recognized, a trustee's accounting must contain enough information that the beneficiary can determine whether the duties of the trustee have been faithfully carried out. *E.g.*, 2007 Order at 18. As explained in Sections III and IV below, Utah had a duty to ensure that the NTF received all revenue to which it was entitled under the 1933 Act, both as a function of its duty to take control of trust property, and as a function of its duty to exercise reasonable care. As explained in Section V herein, to determine whether Utah fulfilled that duty, the Beneficiaries must know, among other things, the relevant lease terms, dates of production and payment, production volume, production quality, and pricing information. Utah's income accounting, therefore, must contain all such information.

III. UTAH WAS REQUIRED TO VERIFY THE ACCURACY AND COMPLETENESS OF REVENUES PAID TO THE TRUST AS PART OF ITS DUTY TO TAKE AND KEEP CONTROL OF TRUST PROPERTY.

A trustee is obligated "to take reasonable steps to take and keep control of the trust property." Restatement (Second) of Trusts § 175 (1959); *see also* George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 583 at 348-50 (rev'd 2nd ed. 1980) (hereinafter "Bogert") (describing duty to take possession as "a primary obligation of the trustee toward the beneficiary").

The trustee has a duty to take and keep control of trust property even when that property is intangible, like a right to money owed. For instance, if the trust property includes uncollected sales invoices, the trustee must keep records of such invoices and insure timely and accurate collection thereon. *See generally*, *Navajo Tribe of Indians v. United States*, 9 Ct. Cl. 336, 435-40 (1986) (assessing damages for failure to keep records of and collect unpaid invoices). If the trust property is real estate, the trustee must not only take control of the physical property, but also must assure that all rents are appropriately collected. *See Navajo Tribe of Indians v. United States*, 9 Ct. Cl. 227, 233 (1985) (relying on G. Bogert, The Law of Trusts and Trustees, § 799 (2d ed. 1981)).

Here, the trust property is 37 ½% of revenue generated pursuant to certain specified oil and gas leases. *Pelt*, 104 F.3d at 1544 (describing trust *res* as "royalties"); *Babbitt*, 53 F.3d at 1150 (citing with approval district court's determination that NTF was "entitled to 37 ½% of all oil and gas royalties or *revenues paid to the Navajo Nation from any oil and gas production.* . . . on [the relevant lands]."") (emphasis in original). Such revenue, in fact, includes (1) bonuses paid to acquire leases, *see* 30 U.S.C. § 1715, 25 C.F.R. § 211.40; and Exhibit A at § 1; (2) annual advance lease rental payments, *see* 30 U.S.C. § 1715, 25 C.F.R. § 211.41(a), and Exhibit A at § 3(c); (3) penalties for incidents of non-compliance, *see* 30 U.S.C. § 1715, and 25 C.F.R. § 211.55(a); (4) interest on late payments, *see* 30 U.S.C. §§ 1715, 1721, and 25 C.F.R. § 211.55(e); (5) any economic benefit resulting from payment in kind, *see generally*, United States Government Accountability Office, "Testimony Before the Committee on Natural Resources, U.S. House of Representatives, Royalties Collection: Ongoing Problems with Interior's Efforts to Ensure a Fair Return for Taxpayers Require Attention (Mar. 2007)" (discussing value of royalties in kind); and

(6) royalties due on hydrocarbon substances produced and saved pursuant to the terms of the relevant mineral leases and authorizing statutes and regulations, *see* 30 U.S.C. § 1715, 25 C.F.R. § 211.41(c), and Exhibit A at § 3(c).

A. Among Other Things, Utah's Income Accounting Must Contain Appropriate and Accurate Information Concerning Requirements of Lease Terms, Payment Records, Production, Pricing, and Quality Information, etc., So That the Beneficiaries Can Readily Determine Whether Utah Fulfilled its Duty to Verify Completeness and Accuracy of Lease Revenues Received.

To know whether Utah accurately collected lease revenues due the NTF, the Beneficiaries need more than a record of amounts actually received. To determine whether Utah collected the NTF's 37 ½% of bonuses, annual advance lease rental payments, penalties, and interest, the Beneficiaries need to know the fact of, the amount of, and the dates of payments made, as required under the applicable terms of the underlying leases.

To determine whether Utah collected the NTF's 37 ½% of royalties, the Beneficiaries need information on production quantity, production quality, pricing, and allowances. "[A] royalty is "a right to oil and gas in place that entitles its owner to a specified fraction, in kind or in value, of the total production from the property, free of expense of development and operation." *Osage Tribe of Indians v. United States*, 68 Fed. Cl. 322, 326 (2005) (internal quotation marks omitted). In most Indian leases, the royalty due is also dependent on the value of production as determined in part by the economic remuneration received for the production by the lessee/producer but also in comparison to the highest price paid or offered for like or similar production contemporaneous in time from the field or area. Exhibit A at § 3(c). Thus, the royalties due on the leases here cannot be verified without such information. As trustee, Utah should have collected this information and assured its accurate and complete verification in connection with its verification of payments. In

order for the Beneficiaries to determine whether Utah fulfilled this duty, detailed information as discussed above must be included in Utah's income accounting.

B. Utah's Argument That Blind Acceptance of All Federal Lease Revenue Payments Satisfied Utah's Trust Duty is Erroneous.

Utah argues that its position *vis a vis* the NTF was essentially that of a conduit, whose only duty with regard to trust income was to accept, unquestioningly, royalty checks from the federal government. Utah asserts that it had no duty to ensure that the amounts submitted were in fact 37 ½% of the lease revenue due or collected under the relevant oil and gas leases. *See generally*, Utah's Factual Analysis of Plaintiffs' Examples from Utah's Initial, Revised and Supplemental Accountings (Mar. 21, 2001) (Doc. 745). This is inconsistent with the 1933 Act, legal precedent, and Utah's own conduct.

First, Utah's argument is inconsistent with the Court of Claims' recent decision in *Osage v. United States*, 68 Fed. Cl. 322 (2005). In *Osage*, the trustee argued that its only duty with regard to oil and gas royalties was to timely deposit royalties it actually received. *Id.* at 327. The Court rejected this argument because under the terms of the trust, the trustee had a duty to collect all moneys "due or that became due," not simply "all deposits received." *Id.* at 328. It explained:

> The court agrees with the defendant that it has a specific duty to deposit royalties that are paid. . . . However, [the trustee] does not simply stand as a teller behind a bank counter and accept whatever is placed before him by a depositor. [The trustee's] duty is not discharged by mechanically crediting the account holder with whatever amounts are paid in. The plain language of the statute makes clear that [the trustee's] duty is to hold in trust the moneys contractually owed, ("due and . . . that may become due"), to the Tribe, 134 Stat. at 544, not merely whatever amount is deposited by the Tribe's lessees. Defendant's duty necessarily includes verification that the royalty paid is the amount contractually owed under the terms of the lease.

Id. at 327-28.

Here, as in *Osage*, the trustee is required to do more than simply "accept deposits." Here, Utah is directed to collect 37 ½% of the revenues derived from certain tribal leases. Under *Osage*, therefore, Utah is required to determine whether the amounts paid are in fact the full amounts due and owing to the Trust.

Utah characterizes its duty to collect trust income as entirely passive—to receive royalty checks and deposit them. *See generally*, Utah's Factual Analysis of Plaintiffs' Examples from Utah's Initial, Revised and Supplemental Accountings (Mar. 21, 2001) (Doc. 745). Utah claims that it has no duty to determine whether payments are in fact 37 ½% of the lease revenue due or even 37 ½% of the lease revenue collected. *Id.*

As the trust beneficiaries in *Osage* successfully argued, this argument is absurd. *Osage v. United States*, No. 00-169L, Pl. Osage Nation's Opp. to Def.'s Mot. to Dismiss, In Part, Pl.'s Tranche One Claims at 24-25 (Sept. 20, 2005). Under this theory, if a lessee who was obligated to pay a royalty of $1000 paid only one penny, the trustee's sole duty would be to deposit that penny into the trust. Under this theory the Trustee would have no duty to make any effort to inquire into the correct amount due and to collect the remaining $999.99. *See id.* In fact, under this theory, the trustee would have no obligation to investigate that lessee even if no royalty payment was made at all. *Id.*

Utah seems to see itself as a bank clerk or escrow agent who asks no questions about what is being given to him or not given to him but merely accepts whatever deposit happens to be made. As both the Tenth Circuit Court of Appeals and this Court have clearly recognized, however, Utah is more than a bank clerk or escrow agent. Utah is a fiduciary trustee with all of the attendant rights and responsibilities. *See generally*, *Pelt*, 104 F.3d at 1544; 2006 Order; 2007 Order.

In other contexts, Utah has recognized and embraced the same trustee duties that it seeks to avoid in this case. For instance, in the early 1990s, Utah successfully brought suit against the federal government to collect revenues from oil and gas production due the NTF. *See generally*, *Babbit*, 53 F.3d 1145. While Utah lost before the Interior Board of Indian Appeals, it pursued its case to the Tenth Circuit and ultimately prevailed. *See id.* Even though Utah is now arguing that it has no duty at all to accurately and completely determine lease revenue due and to collect such lease revenue, in 1995, it was prosecuting an action seeking unpaid lease revenue pursuant to its responsibility as trustee of the NTF. The Court should not allow Utah to selectively decide when it will perform its responsibilities as trustee of the NTF.

IV. UTAH WAS REQUIRED TO VERIFY THE ACCURACY OF REVENUES PAID TO THE TRUST AS PART OF ITS DUTY TO EXERCISE REASONABLE CARE.

Utah had a duty to exercise reasonable care, *see* Restatement (Third) of Trusts § 77 (2007) (trustee must exercise "reasonable care, skill, and caution"); Restatement (Second) of Trusts § 174 (1959) (trustee must "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property"); Bogert § 541 at 167 (trustee must "manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs."). This includes a duty to take action upon discovery of bad conduct by other trustees, like the United States here. Bogert § 588 at 388 ("It is the duty of one trustee to protect the trust estate from any misfeasance by his cotrustee, upon being made aware of the intended act." (internal quotation marks omitted)).

A. As Part of its Duty to Exercise Reasonable Care, Utah Had a Duty to Be Knowledgeable Regarding the Oil and Gas Industry and to Use Any Knowledge it Had in Furtherance of the Interests of the NTF.

As trustee, Utah was obligated to become familiar with the oil and gas industry and the federal governments' role within that industry. *See generally*, Restatement (Third) of Trusts § 77 cmt. b (2007) (duty of care will "ordinarily involve . . . obtaining relevant information about such matters as the contents and resources of the trust estate and the circumstances and requirements of the trust and its beneficiaries); Restatement (Second) of Trusts § 174, cmt. c (1959) ("[The trustee] does not use proper care unless he acquaints himself with the terms of the trust and with the nature and circumstances of the trust property.").

Any knowledge or skill that Utah gained through this process or otherwise should have been used to further the interests of the NTF. Restatement (Third) of Trusts § 77, cmt. e (2007) ([I]f the trustee actually possesses a degree of skill greater than that of an individual of ordinary intelligence . . . , the trustee has a duty to make use of that skill, and is ordinarily liable for a loss that results from failure to do so."); Restatement (Second) of Trusts § 174, cmt. a ("[I]f the trustee has a greater degree of skill than that of a man of ordinary prudence, he is liable for a loss resulting from the failure to use such skill as he has."); Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts (4th ed.) § 174 at p. 470 ("It may be. . . that a particular trustee has greater skill or more facilities than those of the ordinary prudent man. . . [i]f he is in a position to do better than the ordinary man, it is not enough to do what the ordinary man would do.").

B. For Many Years, Utah Knew That the Federal Government Was Failing to Collect All Revenues Properly Due the NTF.

Publicly available government reports in 1959 and 1964, clearly articulated the profound and continuing failure of the federal government to collect all revenues due and owing under oil and gas leases on federal and Indian lands. In 1959, GAO reported substantial delay in billing,

inadequate collection, failure to reconcile accounts, and absence of audit procedures. Statement of Undisputed Facts ("SOF"), *supra* at ¶ 17. Five years later, it reported that those deficiencies had not been adequately remedied. *Id.* at ¶ 18. As Trustee, Utah should have been aware of these reports.

At least as of August 1970, Utah knew that there were serious problems with collection of revenues due the NTF. Ward C. Holbrook, then Executive Director of the Utah Department of Social Services that administered the Navajo Trust Fund, wrote to the Utah Board of Indian Affairs to express his concerns about the federal government's collection and payment of NTF lease revenues. *Id.* at ¶ 19. He pointed out that he could not "tell where the money heretofore received came from," that the payments were "irregular," that Utah had not received any payment for more than a year, and that "substantial losses" had likely occurred. *Id.* at ¶ 20. Mr. Holbrook also sent a letter to the Commissioner of Indian Affairs in the United States Department of the Interior expressing the same concerns and demanding a statement of the account. *Id.* at ¶ 21. The Beneficiaries do not know whether the State of Utah received a response to this demand or otherwise followed up with the federal government regarding its concerns. *Id.* at ¶ 22.

For at least the next twenty years, various federal entities issued reports detailing the federal government's profound and continuing failure to adequately manage oil and gas leases on federal and Indian lands. In 1972, GAO reported significant deficiencies in determining value, allowances, and quantities. *Id.* at ¶ 23. Three years later, Department of Interior's Office of Audit and Investigation reported that Interior was not meeting its obligations to ensure that lease terms were enforced, royalty payments were maximized, collections were promptly made, and Indian

leases were diligently managed. *Id.* at ¶ 24. GAO issued similar reports in 1976, 1979, and 1981. *Id.* at ¶¶ 25, 26, 27. Utah should have been aware of these reports and their contents.

In 1981, the Secretary of the Interior chartered the Linowes Commission to prepare a report "advis[ing] the Secretary of the Interior concerning the accountability for revenues generated from minerals activity on Federal and Indian lands. . . [and] [e]xamin[ing] the allegations of waste and loss of minerals royalty revenues due the Federal government, States, and Indian tribes." Linowes Report at Appendix A. Several representatives from the State of Utah appeared before the Commission, including the Chairman of the Utah State Tax Commission, as well as one of its Commissioners and its Internal Auditor. *Id.* Utah representatives testified that in 1980 or 1981, Utah first discovered that both the State of Utah and the Federal government had miserably failed to monitor oil and gas production on Federal and Indian lands within Utah:

> When the news broke of [the federal failure to adequately collect lease revenue] a few months ago, we decided to investigate our own departmental practices and polices. We found that the accusing finger that pointed at the Department of Interior also pointed equally at us . . . In short, the job simply wasn't getting done. We had been just as guilty of neglect in administering this program as the Department of Interior and we also found that the only difference between the two agencies was that some of the Interior Department employees had reported these events while our own employees were not even aware of the problem.

David L. Duncan, Chariman Utah State Tax Commission, "State of Utah's [Prepared] Testimony Before the Commission on Fiscal Accountability of the Nation's Energy Resources, Denver, Colorado (Nov. 19, 1981)" at 1-2.

Utah further testified that upon discovering these failures, it took immediate action:

> Our next step was to use our present audit staff to make some test audits for oil and gas production along with the regular audits for other state taxes. This approach is just getting started but the first few days of audit work produced $100,000 dollars of additional royalty income from state fee and federal lands.

Id. at 3-4. Utah suggested several steps for improving the federal government's management of mineral leases including provision of detailed production reports, timely remittance of royalty payments to the states, and penalties for late payment. *Id.* at 5. It further suggested that states take responsibility for auditing production records from oil and gas leases on federal and Indian land within their own territories. *Id.* at 6. Finally, Utah reported that although it had in the past been complacent in the federal government's underpayment of lease revenue, it would no longer do so:

> [W]e go laughingly to the bank and just accept prima facie that [a federal royalty payment is] an accurate amount. There's not been any real reason to examine that and all of a sudden it gets into the limelight. So only recently have we begun to examine this. Rather than going with hat in hand to whoever writes that check and say thank you very much, we're now going to say, "is that the right amount?"

Id. at 135.

In its final report, the Linowes Commission explained that "the oil and gas industry is not paying all the royalties it rightly owes," "the government's royalty record keeping for Federal and Indian oil and gas leases is in disarray," "the exact amount of underpayment is unknown. . . [but it is likely that] hundreds of millions of dollars due the United States Treasury, the States, and Indian tribes are going uncollected every year." Linowes Report at xv. The problem, the report explained, was that "[i]n effect, the oil and gas companies [we]re on an honor system to compute and pay royalties fully and accurately," *id.* at 44, and the government lacked adequate controls to prevent fraud within that system, *see generally*, *id.* at 15. The report described outright oil thefts, *id.* at 26-33, as well as pervasive under-reporting of production volume and quality by producers, *id.* at 16-18. It explained that the federal government could not prevent these violations because it did not verify data from oil and gas companies, its records were so unreliable that it often did not

know which companies had paid royalties and which had not, late payments were common, leases were seldom audited or critically reviewed, and penalties for underpayment were rarely imposed. *Id.* at 15. It stated that "[t]en percent is often given as a rough estimate of the underpayment of oil and gas royalties." *Id.* at 16.

Before the Linowes Commission, one federal official testified: "I have talked with no one who has looked, even in a cursory way, at the present accounting system who does not agree that substantial royalties are going uncollected. It certainly was our experience every time we looked at an individual case that we found major inadequacies. In almost every instance, the findings resulted in additional royalty monies being collected." *Id.* at 18.

After the Linowes Report, problems persisted and were discussed in publicly available government reports. SOF at ¶ 42. In 1982, the GAO reported that although the Department of Interior was attempting to correct longstanding deficiencies, "the [then] current royalty accounting system [wa]s totally inadequate to effectively manage the collection of billions of dollars of royalties due from Federal and Indian leases," *Id.* at ¶ 43, and two years later, the House Committee on Interior and Insular Affairs reported that many of the problems "not only persist[ed], but ha[d] become worse," *id.* at ¶ 44.

Utah responded to these problems. For instance, in 1984, the Western Governors' Association sent a letter, signed by then Utah State Governor Scott Matheson, to the Secretary of the Interior lamenting: (1) the many royalty accounting problems documented since 1959; (2) the millions of dollars of underpaid royalties; (3) the many wells that were producing oil, but from which no royalties were paid; and (4) late royalty payments that cost states and tribes hundreds of thousands of dollars in lost interest. *Id.* at ¶ 47. Utah also actively participated in the State Tribal

Royalty Accounting Committee ("STRAC"), an organization designed to oversee the federal government's continuing attempt to improve its management of the Nation's mineral resources. *Id.* at ¶ 50.

Throughout this time, government reports continued to expose the federal government's inability to adequately collect lease revenues for oil and gas production on federal and Indian lands. In 1985, the House of Representatives's Committee on Government Operations issued a report concluding that with regard to royalty accounting there were many "instances in which Interior ha[d] failed to aggressively carry out its trust responsibilities," that the few audits that did occur uniformly uncovered thousands of dollars of unpaid royalties, and that it had no confidence in the government's ability to collect such unpaid royalties. SOF at ¶¶ 48-49. The following year, the United States Department of Interior's Office of Inspector General issued an audit report reaching similar conclusions, *id.* at ¶ 51, and one year later, the GAO did so as well, *id.* at ¶ 52.

In 1989, the Report of the Special Committee on Investigations of the Select Committee on Indian Affairs of the United States Senate reported that:

> In every area it touches, the BIA is plagued by mismanagement. That is not to say that the Committee did not encounter many hard-working and talented individuals at BIA. Rather, the inability of so many good people to have a real impact only underscores the terminal sickness of the institution itself.

SOF at ¶ 54. It continued:

> Most tellingly, the [investigators'] findings were the result of but a few months' work with limited manpower and resources. If the [investigators] could uncover, in a short time, such a widespread pattern of fraud affecting American Indians, why has the Department of the Interior, charged with the responsibility to protect Indian natural resources, failed to do likewise? The answer is a familiar one: American Indians again have placed their trust in federal entities, seemingly mobilized and watchful, but in reality dormant and impotent.

Id. at ¶ 55. Finally, it concluded:

> In 1907 the Secretary of the Interior wrote President Theodore Roosevelt concerning efforts to address exploitation of Indian natural resources by various oil companies in Oklahoma. The Secretary's concerns matched the findings of the Special Committee with uncanny similarity:
>
> > "[S]topping the monopolistic greed and commercial tyranny which has characterized the acts of certain operators in both Oklahoma and the Indian territory, whose conduct is deliberately violating their contracts or leases, and in shamefully disregarding the rules and regulations of the Department, has cost both the Indian lessor and the independent operator millions of dollars . . ."
>
> More than 80 years later, the greed of some segments of corporate America and incompetence within the Department of the Interior continue to deprive American Indians of much-needed revenues from natural resources. Untold millions have been lost over the years while the federal governments sits idly by.

Id. at ¶ 56.

In a 1990 report, the Secretary of the Interior identified as two of the four "most critical" weaknesses in the Department of the Interior: (a) "The existence of significant financial, environmental and safety related material weaknesses within the Bureau of Indian Affairs"; and (b) "Deficiencies in the inspection and enforcement of on-shore mineral leases, mineral lease drainage programs and Indian mineral lease diligence standards in the Bureau of Land Management." *Id.* at ¶ 57.

In 1991, John E. Powless, then Director, Utah Division of Indian Affairs, expressed great concern that income to the NTF was not being properly documented:

> Since I have been in this position, I have received [quarterly] royalty checks from the [Federal] Bureau of Indian Affairs, usually in excess of $300,000. These checks do not contain backup statements indicating how the Bureau of Indian Affairs (BIA) arrived at the royalty payment figure. I have no idea if the [NTF] is receiving the amount of royalty payment which it is entitled to, because there is no statement indicating what the production figures are for oil and natural gas.

Id. at ¶ 58. Powless explained that he had "request[ed] that the BIA send statements on the royalty payments which indicate how they calculated the royalty payment, and what the royalty payment represents for each quarter in terms of the number of barrels of oil produced, and the number of cubic feet of natural gas which ha[d] been taken [from the NTF wells]." *Id.* at ¶ 59. He indicated that he had not yet received such a statement but that he was "going to continue to pursue these issues until [he was] satisfied that [the State of Utah] ha[d] lived up to [its] trust responsibilities to the beneficiaries and obtained a full accounting of what [wa]s going on in [the] oil field. *Id.* at ¶ 60. The Beneficiaries believe that the State of Utah never received such a detailed accounting but only a list of royalty payments actually made. *Id.* at ¶ 61.

The fact that these gross underpayments has continued to this date is illustrated by the nearly $100,000,000 payment recently made by a successor in interest to a federal and Indian oil and gas lessee in the False Claims Act case pending in Houston, Texas. *See* National Law Journal, "Oil Giant Pays $97.5M for Royalties Owed to U.S.," at p. 16 (Aug. 20, 2007), attached hereto as Exhibit L.

C. Because Utah Knew That the Federal Government Was Often Failing in its Efforts to Collect Oil and Gas Lease Revenues, as Trustee, Utah Should Have Verified that Federal Payments to the NTF Were Accurate.

As outlined above, Utah expressly knew as early as 1970, that there were problems with the federal government's collection of revenues due the NTF. While Utah recognized this, it apparently did nothing to remedy the situation. As of 1981, Utah knew that failure to manage federal and Indian oil and gas production was resulting in significant losses to those entitled to payment under the relevant leases. Before the Linowes Commission, Utah affirmatively stated that it had and would take steps to insure that such losses to the State of Utah were minimized or

eliminated. It apparently took no steps to ensure the same for the NTF. Throughout the 1980s and early 90s, Utah worked to improve federal collection of oil and gas lease revenues and to ensure that revenues paid to the State of Utah were accurate. Again, it apparently did not do the same for the NTF.

Having gained specialized knowledge with regard to oil and gas lease revenue collection, and having taken affirmative steps to protect its own interests in such revenues, Utah, as trustee, was obligated to do the same for the NTF. Specifically, in light of its specialized knowledge and skill, Utah had a duty to verify that revenues paid to Utah on behalf of the NTF by the federal government were in fact 37 ½% of all revenues due under the relevant oil and gas leases. Because Utah had a duty to verify revenues, Utah's income accounting must include the information that the Beneficiaries need to determine whether that duty was faithfully fulfilled.

CONCLUSION

For the foregoing reasons, the Beneficiaries respectfully request that this Court find and declare that Utah's revenue accounting must include all information necessary for the Beneficiaries to readily ascertain whether Utah fulfilled its duty to verify that oil and gas lease revenues paid to the NTF were in fact all of the revenues to which the NTF was entitled.

DATED this 27th day of AUGUST 2007.

ATTORNEYS FOR NAMED
PLAINTIFFS & PLAINTIFF CLASS,

/S/ Brian M. Barnard
By:_____
BRIAN M. BARNARD
JOHN PACE
ALAN TARADASH

EXHIBITS

EXHIBIT "A":	Oil and Gas Mining Lease
EXHIBIT "B":	Complaint for Declaratory Relief and Review of Agency Action
EXHIBIT "C":	Letter from Holbrook to Board of Indian Affairs, dated August 13, 1970
EXHIBIT "D":	Letter from Holbrook to Department of Interior, dated August 11, 1970
EXHIBIT "E":	Utah's Testimony on Fiscal Accountability
EXHIBIT "F":	Transcripts of Proceedings, dated November 19-20, 1981
EXHIBIT "G":	FOIA letter RE: State Tribal Royalty Audit Committee (STRAC), dated August 2, 2007
EXHIBIT "H":	Letter from Powless to State of Utah, dated January 25, 1991
EXHIBIT "I":	Letter from Martin to Utah State Treasurer, dated August 28, 1991
EXHIBIT "J":	Order Directing Payment of Judgment, Redlake v. U.S. (2001)
EXHIBIT "K":	Judgment, Redlake v. U.S. (2001)
EXHIBIT "L":	*Oil Giant Pays $97.5M for Royalties Owed to U.S.*, National Law Journal, August 20, 2007