Case No. 06-4046

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAKE C. PELT, et al.,

Plaintiffs/Appellees,

vs.

STATE OF UTAH,

Defendant/Appellant.

BRIEF OF APPELLANT

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION, CIVIL NO. 2:92CV639, THE HONORABLE TENA CAMPBELL, UNITED STATES DISTRICT COURT JUDGE

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ORAL ARGUMENT REQUESTED

ATTACHMENTS IN DIGITAL FORM

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Dated this 28th, day of July, 2006.

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STATEMENT OF PRIOR OR RELATED APPEALS

A. Plaintiffs' appeal of Judgment entered July 5, 1995, United States Court of Appeals for the Tenth Circuit, Nos. 95-4135 and 95-4136;

B. Plaintiffs' appeal of Order entered November 29, 2001, United States Court of Appeals for the Tenth Circuit, No. 02-4010;

C. Parker Nielson's Petition for Writ of Mandamus, In re Nielson: Matter of J. Campbell and Cassell, United States Court of Appeals for the Tenth Circuit, Pet. No. 03-4056;

D. Utah's appeal of Amended Order and Memorandum Decision, entered April 27, 2006, United States Court of Appeals for the Tenth Circuit, No. 06-4164 (motion to consolidate pending).

Case No. 06-4046

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAKE C. PELT, et al.,

Plaintiffs/Appellees,

vs.

STATE OF UTAH,

Defendant/Appellant.

BRIEF OF APPELLANT

Appellant, the State of Utah, respectfully submits this opening brief in support of its appeal from the district court's April 27, 2006, Amended Order and Memorandum Decision granting summary judgment in favor of the plaintiff class on its claim for a comprehensive accounting of a State-administered oil and gas royalty fund.

JURISDICTION

Utah appeals from an Order and Memorandum Decision entered on January 11, 2006, and amended on April 27, 2006, in the United States

District Court for the District of Utah, the Honorable Tena Campbell, District Court Judge. *See* App. 2809-33; 2837-61. Utah filed its Notice of Appeal from that order on February 10, 2006. *See* App. 2834-36.

This Court has jurisdiction in this matter under 28 U.S.C. § 1292(a)(1), which gives the courts of appeals jurisdiction over appeals from interlocutory orders of the district courts that grant injunctions or that have the practical effect of doing so. *See* Utah's Mem. Br. Re: Jurisdiction on Appeal, March 30, 2006. In addition, this Court has jurisdiction under a practical application of 28 U.S.C. § 1291, which grants jurisdiction to the courts of appeals over appeals from final decisions of the district courts. *See id.*

Finally, this Court has jurisdiction in Utah's related appeal under 28 U.S.C. § 1292(b). *See Pelt v. Utah*, Case No. 06-4164. The district court certified its order for immediate appeal on April 27, 2006. *See* App. 2837-61. Utah then petitioned this Court for permission to appeal. *See* Utah's Pet. for Permission to Appeal, May 11, 2006. This Court granted the petition on June 20, 2006. *See* Order Granting Pet. for Permission to Appeal, June 20, 2006. Utah has filed motions to consolidate the two appeals. Those motions were pending when this brief was filed.

ISSUES PRESENTED

1. Adequacy of representation when beneficiaries possess undivided equitable interest in common fund (*Sakezzie*, *Jim*, and *Bigman*)

An oil and gas royalty trust fund has been established for the benefit of San Juan County Navajos but the beneficiaries do not have individual property rights in the trust corpus. Are the plaintiff-beneficiaries precluded from raising the same claims related to the common interest in the trust that have been raised previously by other co-beneficiaries?

This issue was raised below in Defendant's Opposition to Plaintiffs' Summary Judgment Motion Re: Adequacy of Representation and Sufficiency of Prior Accountings. App. 2186-87. In its April 27, 2006, Amended Memorandum Decision and Order, the district court ruled that claim preclusion does not apply. App. 2860.

2. Adequacy of representation in properly certified class actions (*Sakezzie* and *Jim*)

Sakezzie and *Jim* were class action lawsuits brought on behalf of a class of beneficiaries that included the plaintiffs by representatives whose rights were at all times identical to the current plaintiffs'. Did the class representatives in *Sakezzie* and *Jim* adequately represent the interests of the current plaintiffs?

This issue was raised below in Defendant's Opposition to Plaintiffs'

Summary Judgment Motion Re: Adequacy of Representation and Sufficiency of Prior Accountings. App. 2185-95. In its April 27, 2006, Amended Memorandum Decision and Order, the district court ruled that claim preclusion does not apply. App. 2856-58.

3. Adequacy of representation when unnamed beneficiaries of common fund receive notice and are adequately represented (*Bigman*)

The *Bigman* case was prosecuted by beneficiaries of a common fund who shared an undivided equitable interest with all other beneficiaries. Many of the unnamed beneficiaries received actual notice of the litigation, and the plaintiffs' interests were adequately protected by the *Bigman* plaintiffs. Does the *Bigman* judgment partially preclude plaintiffs' claim for an accounting?

This issue was raised below in Defendant's Opposition to Plaintiffs' Summary Judgment Motion Re: Adequacy of Representation and Sufficiency of Prior Accountings. App. 2196-99. In its April 27, 2006, Amended Memorandum Decision and Order, the district court ruled that the Bigman *judgment has no preclusive effect because the* Bigman *plaintiffs did not have an express or implied legal relationship that made the* Bigman *plaintiffs accountable to the current plaintiffs. App. 2859-60.*

STATEMENT OF THE CASE

Nature of the case

This appeal involves an oil and gas royalty fund (sometimes referred to as the "Fund") that Utah is required by a unique federal statute to administer for the benefit of members of the Navajo Nation living in San Juan County, Utah. The plaintiffs are members of the class of Fund beneficiaries who seek a comprehensive accounting of transactions for the entire history of the Fund—nearly forty years—despite three prior lawsuits that also raised accounting claims. On appeal, Utah challenges an interlocutory order of the district court granting the class's motion for summary judgment on the preclusion issue, thereby resolving the accounting claim. A proper balancing of the interests of finality and repose against due process concerns requires that the three prior lawsuits be given preclusive effect. Utah urges this Court to reverse the ruling below.

Procedural history and disposition below

The present action began in 1992 with the filing of a complaint asserting, among other things, a claim for an accounting of the Fund. *See* App. 1297-1325. Utah filed a motion to dismiss, which was granted on the ground that the federal stature that created the fund did not create a private

right of action for breach of trust. *See* Pelt v. Utah, 104 F3.d 1534, 1537 (10th Cir. 1996) ("*Pelt I*"). This Court reversed, reasoning that "the nature of the Act's intended operation along with subsequent court cases (of which Congress was fully cognizant when it passed the 1968 Amendments) seem to indicate that the fund was to operate with trust-like rights and responsibilities—including the beneficiaries' rights to bring suit to address breaches of fiduciary duty." *Id.* at 1542 (citations omitted).

On remand in 2001, the parties filed cross-motions for summary judgment addressing their respective burdens in framing the issues on the accounting claim. *See* Doc. Nos. 731-36, 739-45, 748-49, 752-56, 758, 762-63, 767, 771, 773, 775. Following a hearing, *see* Doc. No. 776, the district court entered an order determining that

> [i]n order to meet its burden of rendering a proper accounting, each expenditure in Utah's accounting report, in addition to including identifying factors such as date, payee, amount, and purpose, must also make reference to supporting documentation which would enable the Plaintiffs to readily ascertain that the expenditure was made in furtherance of the trust.

App. 660.

The court further required that,

> [a]fter Utah produces its accounting, Plaintiffs must then form its [sic] exceptions, listing the expenditures for which Plaintiffs feel that Utah has breached its duty to oversee

> and carry out the purpose of the trust. Plaintiffs' exceptions will fall into two broad categories (1) expenditures for which Utah has violated its duty to account . . .; and (2) expenditures for which Utah has violated its fiduciary duty . . . .

App. 661.

The court stated it would "review this first category of exceptions in future cross-motions for summary judgment." App. 662. As to the second category of exceptions, the court required plaintiffs to "support each exception with evidence that the money was not spent appropriately," including testimony. App. 663.

In 2002, the parties filed cross motions for summary judgment on the question whether the three prior lawsuits related to the Fund, *Sakezzie v. Utah State Indian Affairs Commission*; *Jim v. State of Utah*; and *Bigman v. Utah Navajo Development Council, Inc.*, precluded the plaintiffs' claim that Utah must account for all transactions that have taken place during Utah's administration of the Fund. On December 20, 2002, the district court ruled that the "doctrine of res judicata bars a later suit when: '(1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involved the same cause of action; and (4) both suits involved the same parties or their privies.'" App. 1686 (citation omitted). On the first and third factors, the district court ruled in Utah's

favor, finding (1) that the *Sakezzie, Jim,* and *Bigman* cases "ended with final decisions on the merits," and (2) that "for purposes of determining res judicata, the claims in *Pelt* are identical to those alleged in *Sakezzie, Jim,* and *Bigman*." App. 1688, 1690. The proper jurisdiction of the *Sakezzie, Jim,* and *Bigman* cases has not been challenged.

Initially, the district court declined to enter summary judgment for either party on the issue of whether all suits involved the same parties or their privies. The court determined that, "'[i]n order to show privity between a non-party and a party to former litigation, the party who asserts that the matter is barred by claim preclusion must demonstrate that the nonparty's interests and rights were represented and protected in the prior action.'" App. 1693 (citation omitted). It then ruled that "[o]n the present record, the court cannot determine whether the Plaintiffs' interests were adequately represented in *Sakezzie, Jim,* and *Bigman*." App. 1694.

In 2005, the plaintiffs moved for summary judgment on the question whether the plaintiffs' interests were adequately represented in *Sakezzie, Jim,* and *Bigman*. App. 1697-1700. After briefing was complete, the district court held a hearing. *See* App. 2727-2808. The court then entered an Order and Memorandum Decision on January 11, 2006 (the "2006 Order"). App. 2809-33. The 2006 Order determined that the plaintiffs were not adequately

represented in *Sakezzie, Jim,* and *Bigman* and that res judicata, therefore, did not bar the plaintiffs' claim for an accounting covering the duration of the State's administration of the Fund. App. 2832. The court ruled that Utah must account for Fund expenditures during the entirety of its administration of the Fund and ruled that the plaintiffs have the right to challenge the adequacy of the accounting "as was set forth in [the court's] June 19, 2001 Order." *Id.*

Utah timely filed a notice of appeal within thirty days of the district court's 2006 Order. *See* App. 2834-36. This Court requested briefing on the question of appellate jurisdiction and plaintiffs filed a motion to dismiss also raising the jurisdictional issue. Following briefing by both sides, the Court, by the deputy clerk, issued an order reserving judgment on the jurisdictional issue, providing that the issue will be submitted to the panel on the merits, and ordering the parties to proceed with briefing on the merits. *See* Docket, No. 06-4064 (Order dated May 12, 2006).

In the meantime, Utah moved the district court to certify the 2006 Order for immediate appeal under 28 U.S.C. § 1292(b). The district court granted Utah's motion and amended its 2006 Order on April 27, 2006. *See* App. 2837-61. The district court determined that its ruling involved a controlling question of law about which there is substantial ground for difference of

opinion, and that an immediate appeal would hasten resolution of the litigation. Specifically, the district court found that its ruling "fully impacts adjudication of the remaining claims. . . . [I]t would be a waste of this court's and counsels' time to document and analyze decades of trust account management if on appeal the Tenth Circuit finds that the *Pelt* Plaintiffs were indeed adequately represented in the three earlier cases." Utah's Mem. Br. Re: Jurisdiction on Appeal, March 30, 2006, Ex. A.

Utah timely petitioned this Court for permission to appeal. *See* Utah's Pet. for Permission to Appeal, May 11, 2006. This Court granted Utah's petition on June 20, 2006. *See* Order Granting Permission to Appeal, June 20, 2006. Utah has filed motions, which were pending when this brief was filed, to consolidate the two appeals.

STATEMENT OF FACTS

Background

By an act of Congress passed in 1933, an area of southern Utah now known as the "Aneth Extension" was added to the Navajo Reservation. Pub. Law No. 403, 47 Stat. 1418. The statute also provided as follows:

> Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37½ per centum of the net royalties accruing therefrom derived from

> tribal leases shall be paid to the State of Utah: Provided, That said 37½ per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.

Id. (the "1933 Act").

Ultimately, oil and gas reserves were discovered on the Aneth Extension and, beginning in the late 1950s, wells began producing in paying quantities. *Pelt v. State of Utah*, 104 F.3d 1534, 1538 (10th Cir. 1996) ("*Pelt I*"), Add. C. At that time, Utah began to receive from the federal government 37½ %of the oil and gas royalties, as the statute provided. Utah created the Utah Indian Affairs Commission in 1959 to administer the resulting Fund. App. 1309. In 1967, that responsibility was transferred to a new agency, the Board of Indian Affairs. *Id.*

A year later, Congress amended the statute which created the Fund to afford Utah more flexibility in spending Fund proceeds. The amended statute provided:

> [S]aid 37½ per centum of said royalties shall be used by the State of Utah for the health, education, and general welfare of the Navajo Indians residing in San Juan County. Planning for such expenditures shall be done in cooperation with the appropriate departments, bureaus, commissions, divisions, and agencies of the United States, the State of Utah, the county of San Juan in Utah, and the Navajo Tribe, insofar as it is reasonably practicable, to accomplish the objects and purposes of this Act.

> Contribution may be made to projects and facilities within said area that are not exclusively for the benefit of the beneficiaries hereunder in proportion to the benefits to be received therefrom by said beneficiaries, as may be determined by the State of Utah through its duly authorized officers, commissions, or agencies. Annual reports of its accounts, operations, and recommendations concerning the funds received hereunder shall be made by the State of Utah, through its duly authorized officers, commissions, or agencies, to the Secretary of the Interior and to the Area Director of the Bureau of Indian Affairs for the information of said beneficiaries.

Pub. Law 90-306, 82 Stat. 121 (the "1968 Amendment").

In addition to granting additional discretion concerning how royalty funds were to be used, the 1968 Amendment changed the beneficiary class to include all Navajos living in San Juan County, Utah, and to eliminate non-Navajos living on the Aneth Extension *Pelt I*, 104 F.3d at 1539 n.4, Add. C. The United States Supreme Court upheld the 1968 Amendment. *United States v. Jim*, 409 U.S. 80, 83 (1972) (per curiam). The Court held that "Congress in 1933 did not create constitutionally protected property rights" in the beneficiaries living on the Aneth Extension. *Id.* at 82. Because the 1933 Act did not confer property "in the Fifth Amendment sense . . . no violation of the Fifth Amendment was effected" by the 1968 Amendment. *Id.*at 83.

The present action is the fourth lawsuit brought by San Juan County Navajos against Utah challenging its administration of the Fund. Each of the three prior lawsuits is discussed below.

Prior lawsuits

1. Sakezzie v. Utah State Indian Affairs Commission

The first action was *Sakezzie v. Utah State Indian Affairs Commission*, a class action filed on April 2, 1961. *See* App. 2051-58. The case was brought by Hosteen Sakezzie and Thomas Billy "in their own behalf and as representatives of and members of the class of persons who are Navajo Indians residing within the Aneth Extension of the Navajo Indian Reservation in San Juan County, Utah." App. 1298.

The complaint alleged that Utah had "refused to advise plaintiffs or any of them, or their counsel herein, the amount of [the royalty funds], the place of deposit thereof, or the uses, if any, to which said funds have been put or the uses contemplated in the expenditure of said funds." App. 1299. The complaint also alleged that "[n]o expenditures from said fund have been for the use and benefit of plaintiffs," and that the defendants "have ignored any suggestions plaintiffs have endeavored to make relative to the proper uses and investments to be made of and from said fund." Id. The complaint requested, among other things, that "defendants be required to prepare and submit [forth]with to plaintiffs an accounting of all of said 37-1/2 % fund which has come into their hands." App. 1303.

During the litigation, Utah provided answers to interrogatories containing accounting information. App. 2095-2101. The *Sakezzie* plaintiffs were also given the opportunity to inspect the defendants' books. App. 2209. After a trial was held, the district court issued an oral ruling, stating that the

> matter of accounting has been rendered moot by pretrial discovery, I believe, and also by the evidence which indicates that the agencies of the Federal Government have been receiving and paying over to the State the funds in question, leaving the problem of accountability in the area of disbursements, rather than checking receipts.

App. 761-62.

The plaintiffs then submitted proposed findings of fact and conclusions of law. In a letter to the district court judge, the Assistant Attorney General for Utah wrote:

> I would object to No. 17 and state that defendants have not given the individual plaintiffs or their counsel information concerning the extent of funds accumulated from the statutory royalties. However, they did indicate, prior to trial, to plaintiffs' counsel that he could examine their books relative to this matter; that subsequent to the filing of the complaint the defendants have furnished to plaintiffs' counsel an accounting concerning the accumulated funds.

Id. The court's written Findings of Fact ultimately stated that "in the course of this proceeding, [the defendants] have fully informed the plaintiffs of such receipts and expenditures." *Sakezzie v. Utah Indian Affairs Comm'n*, 198 F. Supp. 218, 222 (D. Utah 1961).

After the judgment was entered, the plaintiffs filed two post-judgment petitions for supplemental relief, the first on July 2, 1962. App. 763-70. That petition alleged that "Defendants have failed and refused to supply the plaintiffs and their legal counsel with any information relating to either the receipt or disbursement of the said funds since the above said Judgment." App. 765. The petition sought an order requiring the defendants to "each month, advise plaintiffs' counsel herein, in writing, all information relating to any funds received down to the date of said report, which are a part of the trust funds herein; . . . and that defendants be likewise required to make this same written monthly report showing each expenditure made from said fund." App. 767.

The petition also sought an order requiring the state to pay out of fund monies the plaintiffs' attorney fees and other litigation-related expenses. App. 766. It raised objections to Utah's plans to build particular projects using fund proceeds. App. 764-65. In addition, the plaintiffs pressed for their wishes to be given more weight when decisions regarding expenditures of Fund proceeds were made. App. 765. In particular, the plaintiffs strongly desired that the state use Fund monies to acquire "range lands and ranches through the operation of which the plaintiffs could best initially begin profitable functioning in supplying their needs." *Id.*

While the first petition was pending, Utah produced an Indian Affairs Commission Annual Report, which contained accounting information from July 1, 1961, through June 30, 1962, including statement of income, statement of assets and liabilities, expenditures, and investments. App. 107-17. On February 7, 1963, the district court entered a Memorandum of Decision which resolved the first post-judgment petition. In the Memorandum of Decision, the district court stated that "defendants have kept full and proper accounts of the funds received by them which are computed and transmitted by Federal authority." *Sakezzie v. Utah Indian Affairs Comm'n*, 215 F. Supp. 12, 18 (D. Utah 1963). However, the court ruled that Utah had not kept the beneficiaries of the fund informed and ordered Utah to make monthly accounting records available to the plaintiffs. *Id.* at 25; App. 787-90. The court further ordered Utah to implement a program of seeking input from the beneficiaries as to how Fund proceeds would be expended. App. 790. The district court declined to grant the plaintiffs' request to require Utah to purchase summer grazing lands. *Id.*

A little over a year later, the plaintiffs filed a second post-judgment petition. App. 2059-66. The second petition alleged that "Defendants have failed and refused to keep plaintiffs or their counsel notified as to the receipt and expenditure of the said trust fund. Defendants have refused to advise

plaintiffs or their counsel the amount of money being paid out of said trust fund for services and for other purposes by the defendants." App. 2061-62. However, while the petition requested compensation for funds "which the Court may find to have been expended or invested by said defendants for purposes inconsistent with the Judgments heretofore entered," the petition did not request an order of the court requiring the defendants to produce additional accounting records. App. 2065.

Instead, the petition again requested a court order providing for payment of attorney fees and other expenses, objected to specific planned projects, and renewed the previously denied request that the court order the defendants "to proceed forthwith in the acquisition of livestock ranches in the vicinity of the Aneth Extension of the Navajo Indian Reservation . . . in an endeavor to provide plaintiffs with an opportunity to creatively work in furnishing themselves with livestock meat supplies." App. 2065.

That petition was ultimately dismissed for failure to prosecute. *See* Minute Entry, June 7, 1965. App. 2067-68. The district court then granted the plaintiffs leave to file an amended petition. *See* App. 1579-80. The plaintiffs did not do so, but class counsel Milton A. Oman continued to monitor the activities of the Utah State Indian Affairs Commission. A letter from Mr. Oman to his client indicates the reason for the plaintiffs' inaction:

> I know you have urged that an additional law suit be filed and I am sure I have properly delayed doing this until improper actions of the Commission accumulated to the point where we would have good opportunity to win again before the Court. We won on both previous occasions . . . . It is very unwise to bring frequent law suits . . . . I wanted . . . to have enough items against the Indian Commission so that we could show the Court something very substantial. Also . . . [w]e can do far more good if we can get an Indian Commission which will cooperate with us than we can ever do spending money before the Court.

App. 2224.

2. Jim v. State of Utah Board of Indian Affairs

Five years after *Sakezzie* was dismissed, the beneficiaries of the Fund filed the *Jim* action. In *Jim*, named plaintiffs represented "a class consisting of approximately 1,500 Navajo and other Indians residing on the Aneth Extension of the Navajo Indian Reservation. App. 1830. The action was brought primarily to challenge the constitutionality of the 1968 Amendment, which changed the class of beneficiaries of the Fund to comprise all Navajos living in San Juan County, Utah, and to eliminate non-Navajos living on the Aneth Extension. App. 1835. The *Jim* class asserted that Congress's action "constituted a diminution of vested interests of the plaintiffs in said royalties and such elimination of other Indians residing on the Aneth Extension was an unconstitutional taking of property without due process of law." *Id.*

In addition, the *Jim* class alleged that the

> Board of Indian Affairs, and the defendants, the members of the Board of Indian Affairs, have and are, using and disbursing the said 37½ % of such royalties received by the State of Utah in breach of their fiduciary duty to plaintiffs by expending the same for the benefit of persons or parties who have no beneficial interest or other right therein and not for the benefit of plaintiffs.

App. 1835. The class sought an accounting of "all monies received from said 37½ % of net royalties up to May 17, 1968 and for the disbursement of said monies and, separately, to account for all monies received from said royalties subsequent to May 17, 1968 and all disbursements made therefrom." App. 1836.

The district court held a hearing on October 30, 1970, at which all parties were represented. App. 811. The court then entered an order certifying *Jim* as a class action. App. 810-12. The order states as follows:

> The plaintiffs having moved the court pursuant to Rule 23(c)(1), Federal Rules of Civil Procedure, for an order determining that the action is maintainable as a class action, and it appearing to the court that the class is so numerous the joinder of all members is impracticable, that there are questions of law or fact common to the class, that the claims of the plaintiffs are typical of the claims of the class, that the plaintiffs will fairly and adequately protect the interests of the class, that the defendants have acted or refuse to act on grounds generally applicable to the class, and that final injunctive relief or corresponding declaratory relief is thereby made appropriate with respect to the class, and it further appearing that the case has sufficient notoriety that no further notice to members of the class is necessary, it is ORDERED:
>
> 1. That the above entitled action is to be maintained as a class

action under Rule 23(b)(2), Federal Rules of Civil Procedure.

2. That no notice to the members of the class need be given at the present stage of the proceeding.

3. That nothing herein shall be deemed to preclude the court from making further orders during the conduct of the action with respect to the course of proceedings, notice, conditions, amendment of pleadings, and other similar procedural matters as provided in Rule 23(d), Federal Rules of Civil Procedure.

App. 811-12. Though no notice was required, attorneys communicated with the beneficiaries about the progress of *Jim* by traveling to San Juan County and speaking with groups of beneficiaries in Aneth, Oljato, Navajo Mountain, and Hatch. App. 2606.

A bench trial was held approximately one year later. "In order to accommodate witnesses, some of whom [were] old and unable to travel, hearings were held at Ol Jato [sic] on the Navajo Indian Reservation where oral and written testimony was received. Other hearings were held at which points of law were argued by respective counsel. The last hearing was held on August 23, 1971." App. 814. The district court entered its Interlocutory Decree and Order on February 17, 1972. App. 814-17. The district court held the 1968 Amendment "unconstitutional and invalid insofar as it dilutes the plaintiffs' title and ownership and changes the purposes for which such royalty funds may be expended." App. 816. Further, the district court ordered Utah to "file with the Court those monthly written reports decreed in

Sakezzie, et al vs. The Utah State Indian Affairs Commission, et al., for the periods from February 25, 1963 to May 17, 1968, and from May 17, 1968 to the present."[1] *Id.*

Utah appealed the district court's decision concerning the constitutionality of the 1968 Amendment to the United States Supreme Court, which reversed in an opinion issued November 20, 1972. App. 819-24. After remand, the district court held a hearing on January 9, 1974. App. 826-27. The hearing resulted in an order entered on February 7, 1974. *Id.* The signature line on the order indicates that it was prepared in January but was not signed by the court until February 7. *See id.* The order found that "the accounting as heretofore ordered by this Court has not been made. . . . WHEREFORE, it is hereby ORDERED that the defendants file with this Court on or before February 8, 1974, a complete, comprehensive, proper, lawful accounting showing, for two periods, to-wit, up to May 17, 1968 and from May 17, 1968 to the present." App. 827.

In compliance with the court's order, on February 7, 1974, Utah filed its Accounting of Defendant Utah Board of Indian Affairs with Regard to Receipts and Expenditures from February 25, 1963 through May 27, 1968.

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[1]The district court's order evidences its recognition of the preclusive effect of the *Sakezzie* litigation, in which the final order was entered February 25, 1963.

App. 2012-13. The next day, Assistant Attorney General Frank J. Allen filed a certification that stated as follows:

> I certify that I have this day delivered to the Offices of Jones, Waldo, Holbrook & McDonough, Attorneys for Plaintiffs, the "Accounting of Defendant Utah Board of Indian Affairs With Regard to Receipts and Expenditures from February 25, 1963 through May 17, 1968."
>
> I further certify that the materials identified in the Receipt attached hereto and which form the major portion of the Accounting were in the hands of the Plaintiffs' Attorneys from April 7, 1972 until approximately January 25, 1974, and that said materials have now been returned to said Attorneys.

App. 848.

Plaintiffs' attorneys executed a receipt that was also filed with the district court the same day. App. 850-91. It attached forty pages of accounting information, including audit reports, and stated as follows:

> Received of Vernon B. Romney, Attorney General of the State of Utah, acting by and through Allen H. Tibbals and Frank J. Allen, Special Assistants to the Attorney General, Minutes of the Meetings of the Board of Indian Affairs, commencing June 1, 1963 through November 12, 1971, together with the accounting reports from 1963 through 1971 reflecting the action the Board of Indian Affairs, and the accounting of funds in the hands of the Board of Indian Affairs, or administered by them, derived from the 37½ % royalty from Navajo Tribal Oil and Gas Leases on lands within the Anneth Extension to the Navajo Indian Reservation, and administered under the provisions of the Congressional Act of March 1, 1933, 47 Stat. 1418, and the subsequent amendment thereto by the Act of May 17, 1968, amendatory thereto, 82 Stat. 121, together with a proposed

Abstract of Minutes and Financial Statements of defendant Utah Board of Indian Affairs.

App. 850.

On the same day, the parties also filed a joint Abstract of Minutes of Financial Statements of Defendant Utah Board of Indian Affairs which was signed by attorneys for the plaintiffs. App. 829-46. The abstract provided that

> The parties have heretofore stipulated that, pending final action on defendants' appeal from the Decree and Order entered herein on February 17, 1972,[2] an abstract of minutes and financial statements of the Utah Indian Affairs Board since Feb. 25, 1963, may be filed with the court in lieu of compliance with the reporting requirements of paragraph 4 of said Decree and Order, without, however, prejudice to the Court's right to require further reporting or accounting with respect to matters involved in the case. Pursuant to the stipulation, the parties hereto stipulate to the submission of the following compendium of minutes and financial statements of the Utah Indian Affairs Board since February 25, 1963.

App. 829.

Attached to the stipulation is sixteen pages of information, including a seven-page abstract of minutes of meetings of the Indian Affairs Commission and the Board of Indian Affairs arranged topically, and four pages of financial statements covering the period from July 1, 1962, through June 30, 1969. App. 830-45. The abstracts of the meeting minutes detail the administrative

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[2]Inasmuch as the Supreme Court issued its decision on November 20, 1972, it is unclear what remained to be resolved on appeal.

organization of the agency, including employees and salaries, efforts made to keep the beneficiaries informed and to hear their suggestions for use of royalty fund monies, and projects financed with royalty funds for education, roads, health, water, and housing. App. 841. The financial statements showed annual expenditures by category and as a total, and showed the book value for each year. App. 842-45.

Approximately eighteen months later, in July 1975, a hearing was held in the case. Plaintiffs' counsel began with this statement:

> This is a case, your Honor, that was appealed to the United States Supreme Court and returned here. . . . There were two remaining items, the matter of attorneys' fees and of an accounting. *An accounting and abstract was filed with the court, and the plaintiffs do not object to that.* The plaintiffs have attempted to talk with the defendants about attorney fees but have not reached an agreement. We request that matter to be set for a hearing.

App. 894. (emphasis added).

The matter of the accounting seemingly resolved, the district court held a hearing eighteen months later on plaintiffs' request that attorney fees be paid out of the Fund. App. 899-915. Despite the statement eighteen-months earlier that "[a]n accounting and abstract was filed with the court, and the plaintiffs do not object to that," at the conclusion of the hearing, one of the plaintiffs' attorneys asked the court, "What will we do about the accounting matter?"

App. 914. The district court responded:

> I think we should pursue the accounting matter of course. I think that is the most important part of the lawsuit, really. The legal points are settled now. Let's have an accounting of what the state's been doing with the Indians' money. That's the short question that we need to go into and let's pursue it.

App. 915.

Two years later, the district court issued an order to show cause why the case should not be dismissed for failure to prosecute. App. 917. All parties appeared at the hearing and the district court entered an order of dismissal on December 24, 1978, stating that no cause was shown why the matter should not be dismissed. App. 919-20.

3. *Bigman v. Utah Navajo Development Council, Inc.*

The third lawsuit related to Utah's administration of the Fund was filed on February 7, 1977, before *Jim* was dismissed. App. 922-33. *Bigman v. UNDC* was brought by Seth Bigman and Martha Collins "as beneficiaries of an oil and gas trust fund." App. 922. The complaint alleged that the "Defendants, through bad faith and neglect, have failed to effectively account for the receipts and expenditures of the 37½ % royalty funds, and to provide an adequate accounting of the receipts and expenditures to Plaintiffs and the bulk of the beneficiaries of the fund." App. 927. The plaintiffs' fifth claim for

relief alleged that the "Defendants' failure to effectively account for the expenditures of the 37½ % oil royalty funds, and to provide an adequate accounting to Plaintiffs and the bulk of the beneficiaries constitutes a breach of fiduciary duty and a violation of 47 Stat. 1418 (1933), as amended by 82 Stat. 121 (1968), and this Court's mandate in *Sakezzie v. Utah Indian Affairs Commission*." App. 929. The plaintiffs sought "[a]n order that the Defendants account to Plaintiffs for all monies received from the 37½ % oil royalties; and separately, for the disbursement of all of said monies." *Id.* The *Bigman* lawsuit was not brought as a class action. *See* App. 922.

During the litigation, the plaintiffs reviewed documents of the UNDC, identified questionable transactions, and closely audited those transactions in a document known as the Nelson Report. App. 118-648. Follow-up to Nelson Report. The parties entered into a partial settlement on August 8, 1977, and filed a stipulated proposed Judgment and Decree, which was entered by the district court a month later. App. 982-88, 1990. The Judgment and Decree ordered the defendants, among other things, to "forthwith cause to be conducted a special examination of questionable transactions, as raised by the Plaintiffs, of the records and accounts of Defendant Utah Navajo Development Council, Inc., covering the period 1971 to the present. . . . The parties will make available to the examining person or entity all relevant

records, files, documents or data in their custody or control . . . . The examining person shall file with the Court a report, with specificity, of the findings of the examination." App. 1983. The special examination ordered by the court culminated in a document entitled, "A Management and Investigative Review of the Utah Navajo Development Council," commonly known as the "Nelson Report." App. 118-648. The report was filed with the court on December 12, 1977.

The settlement and the preparation of the Nelson Report did not conclude the litigation, however. The Judgment and Decree stated that two issues would be set for trial: first, the plaintiffs' claim that the defendants were "expending the oil royalty funds for public and governmental purposes, in violation of federal law and the precedents of this Court," and second, the plaintiffs' claim that the defendants must give Navajos preference in employment. App. 1987-88. Those issues were resolved by the district court's September 25, 1978, Memorandum Opinion. App. 946-53.

In the Memorandum Opinion, the district court disposed of the plaintiffs' claim that Utah must implement "a program of Navajo Indian preference in employment" and then identified as the remaining issue to be decided "whether defendants may lawfully expend royalty trust funds 'for public purposes and to discharge general governmental obligations due to the

beneficiaries.'" App. 949. The decision notes that

> [i]n their complaint plaintiffs alleged that the use of trust funds for the construction and operation of the Edge of the Cedars Museum and the Broken Arrow Center, for the Navajo Works Project, and for road construction and maintenance violated federal law. However, none of these uses was mentioned specifically in that portion of the consent decree that reserved issues for trial. Similarly, the stipulation of facts contains nothing concerning these uses except a statement that funds are being used for construction and maintenance of roads within the Extension. Plaintiffs' trial brief also fails to deal specifically with any of these uses. It must be recognized that the State (and consequently the defendants) have "a wide administrative discretion in determining the management and expenditure of said fund." . . . On this record the court is unable to ascertain whether the State of Utah has exceeded its authority or abused its discretion in directing the use of the funds for these purposes.

App. 951-52.

Having for many years exercised continuing jurisdiction over the enforcement of its September 8, 1977, Judgment and Decree, App. 944, the district court entered the final order in *Bigman* in December 1989. App. 1296. The order implemented an agreement under which Utah Navajo Industries was obligated to repay monies loaned to it by defendant Utah Division of Indian Affairs. App. 1196.

Even though *Bigman* was not a class action, the case was discussed in chapter meetings, including Aneth, Mexican Water, Navajo Mountain, Oljato, Red Mesa, and Teec Nos Pos chapter meetings. App. 1826-27, 960-62, 967-78,

983-92, 997-1003, 1008-17, 1022-30, 1035-52, 1057-76, 1081-1103, 1108-11, 1116-29, 1134-56, 1163-76. During the March 6, 1977, meeting of fifty beneficiaries at the Aneth Chapter, one month after *Bigman* was filed, plaintiffs' attorneys explained that the complaint

> revolves around the 37½ % oil royalty in accordance with the 1968 amendment to the 1933 rulings. The 1968 rulings covers that the royalty be used for the education, health and general welfare of Navajo residents in San Juan County, Utah. The complaint speculates that the royalty fund is mismanaged in a way not fulfilling the trust money, by using the money for personal gaines [sic] and hiring through nepotism, mismanaging of the matching fund, construction of the Edge of the Cedar Museum and Broken Arrow Center in Blanding, mismanagement on road maintenance on the Reservation, funding of the Navajo Works Program project foreman and annual report on the expenditures of royalty fund not made knows as prescript in the 1968 amendment.
>
> The complaint requests that careful management be considered, that complete expenditures of the royalty be made known and that if there are any mismanagement made that the penalty be awarded justly.
>
> . . . .
>
> The President went over the motion and second. The supporting votes of 46 in favor and 0 opposed that the Chapter support the findings of the court.

App. 968-69.

In the Oljato Chapter meeting held February 17, 1977, just after *Bigman* was filed, plaintiffs' attorneys personally explained

> why and what the objectives of this lawsuit against UNDC is for. Mr. Yazzie briefly stress [sic] to the people that the main purpose for the lawsuit is to investigate the UDIA and

> U.N.D.C. funds to see if the funds is misuse in any way. Also Mr. Cleal Bradford has used the UNDC funds to start his own business in Blanding, Utah. Also vehicles purchased by UNDC. Funds is used for personal reason. Also if there is any evidence or if someone is guilty of misuing the funds he will be forced to pay back the money that was misused. Also in the future the U.N.D.C. funds will closely be accounted for and reported back to the people.

App. 1040.

Similarly, the minutes of the November 27, 1977, meeting of the Red Mesa Chapter state: "Utah Navajo Development Council have a law suit, which is under review and investigation still continued at the present time, for organization not functioning under what it should be providing or purposes." App. 1124-29. Minutes from a meeting held less than one month later state: "Utah Navajo Development Council Lawsuit, will or still under continued investigation at the present time. The investigator will give their reports and will inform the chapter, probably within a month." App. 1136. Similarly, in a January 25, 1978, Mexican Water Chapter meeting, "Tulley Lameman, executive director of the program [Utah Navajo Development Council] explain [sic] . . . the Lawsuit→why the Lawsuit came about." App. 1023. Red Mesa Chapter members were informed when settlement negotiations were taking place, App. 1144-45, and Teec Nos Pos Chapter members were informed that Roger Nelson "had done investigation and compiled report." App. 1155.

The present action

In 1992, three years after *Bigman* was dismissed, the plaintiffs filed their complaint in this action. The plaintiffs allege that Utah is obligated to provide an accounting "of all monies received by Defendant in relation to oil and gas produced from the portion of the Navajo Nation in San Juan County, Utah, said accounting never having been provided during the fifty-nine (59) years during which Defendant has administered funds pursuant to the 1933 Act." *See id.* The complaint asks the district court to "[o]rder Defendant to forthwith perform a detailed accounting of all receipts, expenditures and transactions associated with all oil and gas produced since 1933 from the portion of the Navajo Nation lying in San Juan County, Utah." *Id.* By its 2006 Order, the district court has done so.

SUMMARY OF ARGUMENT

The plaintiffs' claim for a comprehensive accounting of Fund transactions is partially precluded because it was raised and decided in three prior lawsuits, *Sakezzie*, *Jim*, and *Bigman*. The current plaintiffs were adequately represented in the three prior lawsuits because the lawsuits were all brought by beneficiaries of the Fund whose interests at all times were identical to the

plaintiffs' interests. Moreover, none of the beneficiaries, including the plaintiffs in the current case, possess individual property rights in the Fund. Applying claim preclusion to prevent the redetermination of a common right litigated by adequate representatives of the current plaintiffs does not offend due process. Accordingly, *Sakezzie*, *Jim*, and *Bigman* should all be given preclusive effect.

Sakezzie and *Jim* provided additional due process protections because they were certified as class actions. The class representatives in those cases, whose interests were perfectly aligned with the current plaintiffs, were adequate representatives of the current plaintiffs. The burden is on the plaintiffs, who wish to attack the finality of the class action judgments, to prove that they were inadequately represented. However, it is not appropriate for a court to determine on collateral attack whether it agrees with the manner in which the class representatives or their counsel prosecuted the claim for an accounting. Instead, because the class representatives and the current plaintiffs shared a strong identity of interests, the current plaintiffs are bound by the judgments entered in *Sakezzie* and *Jim*. *Jim*'s finality is in no way impaired by the absence of formal notice and opt-out rights when the class was properly certified under Rule 23(b)(2), which leaves such matters to the certifying court's discretion.

The Plaintiffs likewise have the burden to prove that they were not adequately represented in *Bigman*. As in *Sakezzie* and *Jim*, the plaintiffs in *Bigman* were beneficiaries of the Fund whose interests were identical to the plaintiffs. Many of the unnamed beneficiaries received notice of the *Bigman* lawsuit. Further, the *Bigman* plaintiffs adequately represented the current plaintiffs' interests in obtaining an accounting of the Fund transactions. Therefore, the judgment entered in *Bigman* is binding upon the current plaintiffs, though *Bigman* was not certified as a class action.

ARGUMENT

1. The plaintiffs were adequately represented in *Sakezzie*, *Jim*, and *Bigman*

Standard of Review

"The application of res judicata is a question of law which [this Court] review[s] *de novo*." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005); *accord* *Wilkes v. Wyoming Dept. of Employment*, 314 F.3d 501, 503 (10th Cir. 2002); *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240 (10th Cir. 2002). This Court also conducts *de novo* review of a district court's orders granting or denying summary judgment. *United States v. Colorado*, 990 F.2d

1565, 1574 (10th Cir. 1993). Accordingly, the Court reviews the order on appeal "from the perspective of the district court at the time it made its ruling, ordinarily limiting [its] review to the materials adequately brought to the attention of the district court by the parties." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998).

Discussion

Utah has been in litigation related to the Fund almost continuously since 1961. It is now defending the fourth lawsuit. In the last forty-five years, significant judicial resources have been expended. In addition, Utah taxpayers have paid as the State has litigated issues related to the Fund three times in district court, twice before this Court, and once before the United States Supreme Court.

Now, in the current lawsuit, Utah has been ordered to provide the same relief in the form of an accounting that it provided in *Sakezzie*, *Jim*, and *Bigman*. The result is, of course, that Utah is now exposed to the same potential liability that it has successfully defended against three times before. While Utah would have been bound by a finding of liability in any one of the three prior cases, the district court has allowed the plaintiffs to escape the usual result of a final judgment on the merits–claim preclusion. But if

judgments regarding the rights of all beneficiaries of the Fund are not binding, the same claims will be raised again and again until the desired result is obtained. In this way, litigation over ever-aging evidence assumes immortality, squandering resources and prejudicing the State's ability to prepare a defense.

"'[A] public body should not be required to defend repeatedly against the *same* charge of improper conduct if it has been vindicated in an action brought by a person or group who validly and fairly represent those whose rights are alleged to have been infringed.'" *Los Angeles Unified Sch. Dist. v. Los Angeles Branch NAACP*, 714 F.2d 935, 943 (9th Cir. 1983) (citation omitted). Instead, because the beneficiaries have identical interests in the Fund, every individual beneficiary should be bound by the judgments entered in prior cases even if he was not a party. The unitary nature of the beneficiaries' interest guarantees that the interests of any named beneficiary will always be "'so closely aligned with his interests as to be his virtual representative.' . . . In essence, this is a finding that the two parties are in privity." *Tyus v. Schoemehl*, 93 F.3d 449, 454-55 (8th Cir.1996) (citations omitted).

Whether due process allows absent beneficiaries to be bound by the judgments entered in *Sakezzie*, *Jim*, and *Bigman* must be determined in light

of the actual interest at stake. In this unique arena, due process concerns are reduced because the plaintiffs do not possess an interest that is protected by the due process clause. This is because the beneficiaries do not hold a Fifth Amendment property right in the trust corpus.

The 1968 Amendment to the 1933 Act added a large number of Navajos to the beneficiary class and eliminated non-Navajo Indians. The second of the three prior lawsuits, *Jim*, was brought primarily to determine whether the 1968 Amendment was constitutional. The issue was ultimately decided by the United States Supreme Court. The Court ruled that the trust corpus created by the 1933 Act was "for the common use and equal benefit" of all of the beneficiaries. *Jim*, 409 U.S. at 82, Add. C. However, "Congress in 1933 did not create constitutionally protected property rights" in the beneficiaries. *Id.* Ultimately, the Court held: "As no 'property,' in a Fifth Amendment sense, was conferred upon residents of the Aneth Extension by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation." *Id.* at 83.

Because the beneficiaries do not hold individual (or even collective) property rights, their claims related to the Fund are in the nature of an action to vindicate a public right, such as a taxpayer suit. A claim brought by one beneficiary will necessarily determine the rights of all beneficiaries. At the

very least, "due process concerns are lessened" in such a case which "challenges a 'public action that has only an indirect impact on [a party's] interests.'" *Tyus*, 93 F.3d at 456. For this reason, "virtual representation . . . is particularly appropriate for public law issues." *Id.*

In *Tyus v. Schoemehl*, the Eighth Circuit addressed a repeat attempt to vindicate a public right similar to case at bar. In subsequent suits, separate sets of plaintiffs each argued that new aldermanic boundaries drawn in St. Louis diluted the African American vote. The court noted that the plaintiffs in the later suit did not allege "that they have been denied the individual right to vote. Rather, they allege that the strength of the black vote in general has been diluted." 93 F.3d at 457. The fact that the plaintiffs raised only a common interest proved dispositive. The court held: "Because the plaintiffs do not allege that they 'have a different private right not shared in common with the public,' . . . the plaintiffs raise an issue of public law, and thus the due process concerns attendant with a broad application of preclusion are lessened. . . . Further, given the public nature of this case, if we held preclusion inapplicable, this case could 'assume immortality,' . . . and fence-sitting would be encouraged." *Id.*

Such is the case here. Far from being "mere 'strangers' to one another," *Richards v. Jefferson County*, 517 U.S. 793, 802 (1996), the *Pelt* plaintiffs, the

named plaintiffs in *Sakezzie*, *Jim*, and *Bigman*, and every other member of the Navajo Tribe residing in San Juan County, Utah, are co-beneficiaries of the Fund. They share an indivisible, collective interest in the trust corpus. Because the interest is common rather personal, litigation relating to the Fund necessarily decides every beneficiary's rights.[3] Over the years, the beneficiaries have acted zealously to protect and expand their interests and have been informed as to the progress of all litigation related to the Fund.[4]

More than an identity of interests, the beneficiaries share a unity of interests. Because of this uncommonly absolute community of interests, the district court erred when it held that "[t]he fact that the plaintiffs in both cases had the same status (that is, beneficiaries of the same fund) is not enough." App. 2859. All of the beneficiaries, including the *Pelt* plaintiffs, are in privity with the plaintiffs in all three prior cases.[5] As such, due process is

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[3] For this reason, the district court's statement that "there is no evidence that the *Bigman* plaintiffs and their counsel were working on anyone's behalf other than theirs," overlooks the reality of the interest at issue in *Bigman*. App. 2859.

[4] The record reveals that each chapter was informed of the *Bigman* litigation. The plaintiffs' attorneys visited with the beneficiaries to explain the lawsuit to them. App. 1826-27, 960-62, 967-78, 983-92, 997-1003, 1008-17, 1022-30, 1035-52, 1057-76, 1081-1103, 1108-11, 1116-29, 1134-56, 1163-76.

[5] The expansion of the beneficiary class effected by the 1968 Amendment does not alter this result. The new beneficiaries merely acceded to pre-determined rights, as if they were successors in interest. *See* Lowell

not offended when preclusion is applied to prevent the beneficiaries from relitigating claims that have already been raised and resolved.[6]

2. The plaintiffs did not bear their burden to prove inadequate representation in *Sakezzie* and *Jim*

Standard of Review

See Standard of Review, *supra* at 33.

Discussion

This Court has held that, "as a general matter [collateral] attacks [on class action judgments] should not be encouraged. The policy behind the class

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Staats Mining Co., Inc. v. Philadelphia Elec. Co., Inc., 878 F.2d 1271, 1280 (10th Cir. 1989) (observing that predecessors and successors in interest are in privity). Rule 23 accommodates changes to class membership. The actual membership of a class certified under 23(b)(2) "need not . . . be precisely delimited." *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004). "In fact, many courts have found Rule 23(b)(2) well suited for cases where the composition of a class is not readily ascertainable; for instance, in a case where plaintiffs attempt to bring suit on behalf of a shifting prison population," *id.*, or a beneficiary class into which new members are continually being born and which Congress may, in its discretion, enlarge or retract.

[6] In practical terms, the plaintiffs should be precluded from seeking an accounting of Fund transactions that occurred during the time periods at issue in *Sakezzie*, *Jim*, and *Bigman*, or through December 1989, the date the *Bigman* court entered the last order in that case.

action device is, of course, to facilitate the final determination of numerous claims in one suit. This policy is not furthered by allowing subsequent collateral attacks by class members." *Garcia v. Board of Educ.*, 573 F.2d 676, 679 (10th Cir. 1978). Moreover, relitigation of issues places defendants "in the difficult position of having to go through complex litigation a second time against parties that would have participated in the judgment had it been favorable to them." *In re Four Seasons Sec. Laws Litig.*, 502 F.2d 834, 843 (10th Cir. 1974). Accordingly, the party who wishes to attack the judgment has the burden to prove inadequate representation. *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973).

A. The burden to prove inadequate representation rests with the plaintiffs

Generally, "[r]es judicata is an affirmative defense on which the defendant has the burden to set forth facts sufficient to satisfy the elements." *Nwosun v. General Mills Rest. Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997). But the plaintiffs in this case have mounted a collateral attack on three judgments, two of which, *Sakezzie* and *Jim*, were entered in class actions. Accordingly, the plaintiffs bear the burden to prove inadequate representation as an element of their claims.

This Court held in *Garcia* that a "collateral attack on a class action judgment by unnamed members of the class is *impermissible* when the class members were adequately represented." 573 F.2d at 680 (emphasis added). In *Gonzales*, the Fifth Circuit held that "generally the class will be bound unless *the party attacking the judgment* can show that the class was inadequately represented." 474 F.2d at 75 (emphasis added); *see* *Brown v. Ticor*, 982 F.2d 386, 390-91 (9th Cir. 1992) (holding that *party attacking judgment* must show inadequate representation); *Yankton Sioux Tribe v. Gambler's Supply, Inc.*, 925 F. Supp. 658, 667 (D. S.D. 1996) (holding that party attacking judgment had failed to demonstrate inadequate representation where it presented no evidence to support argument). Proof of inadequate representation, therefore, is a prerequisite to the plaintiffs' ability to maintain their claims at all.[7]

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[7]*Pedrina v. Chun*, relied upon by the district court, does not involve a collateral attack on a class action judgment or raise the issue of inadequate representation. 97 F.3d 1296, 1298 (9th Cir. 1996). Though it purports to place the burden of proving adequate representation on the party seeking to enforce the judgment, *Pedrina* actually supports Utah's position. The plaintiffs in that case did not argue lack of privity. *Pedrina*, 97 F.3d at 1302. Nevertheless, the court gratuitously noted in conclusory fashion that most of the plaintiffs were also plaintiffs in the earlier action, and that all of the plaintiffs were "similarly situated and their interests were given due consideration in the earlier proceedings." *Id.* The *Pedrina* court so ruled even though the earlier action had been dismissed for failure to prosecute. *Id.* at 1302-03.

Requiring the plaintiffs to prove that their interests were inadequately represented in *Sakezzie* and *Jim* is consistent with the important policies served by the doctrine of res judicata. "Res judicata is "'a rule of fundamental and substantial justice'" that enforces the public policy that there be an *end* to litigation. . . . By preventing repetitious litigation, application of res judicata avoids unnecessary expense and vexation for parties, conserves judicial resources, and encourages reliance on judicial action." *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1009 (10th Cir. 1990).

However, the district court erroneously placed the burden of proving inadequate representation on the State. The court held that Utah, "which has raised the affirmative defense of claim preclusion, has the burden to establish that privity, or adequacy of representation, existed in the cases of *Sakezzie*, *Jim*, and *Bigman*." App. 2852. As support for this statement, the district court referenced an order it entered on December 20, 2002. *Id.* In that order, the district court rejected Utah's argument to the contrary, stating that "circuits agree that adequacy or [sic] representation is a factor of privity, and it is well settled that establishing privity is the defendant's burden." App. 1693 n.18. As shown above, this is incorrect. The burden was the plaintiffs' and they failed to meet it.

B. Adequate representation is determined by examining the identity of interests between class representatives and absent class members

This Court has held that "[t]he question of adequate representation can best be resolved by determining whether the interests of those who would attack the judgment were vigorously pursued and protected in the class action by qualified counsel." *Garcia*, 573 F.2d at 680. Vigorous pursuit and protection of absent class members' interests depends upon an identity of interests between the named plaintiffs and the absent class members. *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1058 (5th Cir. 1979) ("In determining the adequacy of representation, it should be considered whether any antagonism exists between the interests of the plaintiffs and those of the remainder of the class.").

Class representatives with interests identical to those of the class members have an incentive to litigate that ensures class claims will be vigorously protected and pursued. The proper focus of this Court's inquiry, therefore, is on whether the class representatives in *Sakezzie* and *Jim* had an interest in pursuing a claim for an accounting against the State sufficiently similar to the current plaintiffs' interest in pursuing the same claim.

A court should not focus on whether decisions made by class counsel in the prior litigation were, in the court's view, appropriate to a full and adequate

resolution of a claim. As the Ninth Circuit held, "It is not necessary for [the court] to agree with either the manner in which [a claim] was litigated or with the final result of the litigation. The important fact is that it was litigated." *Los Angeles Unified Sch. Dist.*, 714 F.2d at 941. To limit res judicata "to those issues adjudged after the fact to have been fully and adequately litigated would be to endow . . . cases with everlasting life. This [a court] should not do. . . . 'There must be finality in the law.'" *Id* at 944-45.

Second-guessing the manner in which a claim was litigated is especially inappropriate when the facts before the district court do not paint a clear picture. As this Court held in a similar context, participation in such "speculative gymnastics . . . would be doing disservice to the policy considerations res judicata protects." *Nwosun*, 124 F.3d at 1258 (holding that party could not bring subsequent action to raise state law claims that could have been raised in prior federal action despite uncertainty as to whether federal court in first action would have exercised jurisdiction over state law claims).

Accordingly, even a class representative's decision to abandon a claim is not *per se* inconsistent with adequate representation. In the context of negotiating a settlement, the Second Circuit has held that

> [p]laintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief. Plaintiffs' authority to release claims is limited by the 'identical factual predicate' and 'adequacy of representation' doctrines. Together, these legal constructs allow plaintiffs to release claims that share the same integral facts as settled claims, provided that the released claims are adequately represented prior to settlement. Adequate representation of a particular claim is established mainly by showing an alignment of interests between class members, not by proving vigorous pursuit of that claim.

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 106-07 (2nd Cir. 2005).

The *Wal-Mart* case teaches that compromise is not inadequate representation even when certain claims are waived, so long as the waived claims do not disproportionately impact certain members of the class. 396 F.3d at 113. Vigorous pursuit of every claim is not required. In fact, since "claim preclusion . . . precludes the parties or their privies from relitigating claims that were *or could have been* raised in that action," *United States v. Lacey*, 982 F.2d 410, 411 (10th Cir. 1992), it is clear that the failure to raise or pursue a claim alone does not remove the finality of a judgment. And to reiterate, when evaluating a claim of inadequate representation, it is not appropriate for a court to determine whether it agrees with the litigation decision of the class representatives or their counsel. *Los Angeles Unified Sch. Dist.*, 714 F.2d at 941.

A proper focus on the adequacy of the class representatives' representation, applying the appropriate burden of proof, demonstrates that the *Pelt* plaintiffs cannot show that they were inadequately represented in either *Sakezzie* or *Jim*. The *Sakezzie* class representatives successfully prosecuted their claim for an accounting. The State produced accounting documents to the plaintiffs during the litigation. App. 106-17, 2096-2101; *Sakezzie*, 198 F. Supp. at 222, Add. A. Later, via a post-judgment petition, the plaintiffs secured additional accounting records as well as an order requiring Utah to provide monthly accountings. App. 106-17, 764-70; *Sakezzie*, 215 F. Supp. at 18, Add. B.

The plaintiffs also filed a second petition, but that petition did not affirmatively seek additional accounting documents. App. 2065. Instead, the petition sought payment of attorney fees out of the Fund, objected to specific projects toward which the State intended to expend Fund monies, and renewed a once-denied request that the court order Utah to acquire livestock ranches for the plaintiffs' benefit. *Id.*

The second petition, which had little to do with the plaintiffs' efforts to secure accounting documents in any event, was ultimately dismissed for failure to prosecute. App. 2070-73. However, the 1968 Oman letter indicates that both the plaintiffs' representative and their attorney remained engaged

in a continuing effort to protect the interests of the beneficiaries. App. 2222-25.

In *Jim*, it appears that by 1978, after eight years of litigation, the plaintiffs had determined that no outstanding issues remained to be tried. App. 919-20. At the time of dismissal, the plaintiffs had achieved the objectives of the litigation. They had tested the constitutionality of the expansion of the beneficiary class under the 1968 Amendment, taking their cause all the way to the United States Supreme Court. *Jim*, 409 U.S. 80 (1972), Add. C. They had also received an accounting from the State that they had represented to the court was acceptable. App. 893-97. Far from demonstrating inadequate representation, their decision not to pursue litigation any longer was likely sound. This is especially true where legal fees were paid out of the Fund itself. App. 904, 913-14.

In neither case do the facts demonstrate that the waiver of claims disproportionately impacted certain members of the class. In fact, there is no evidence that a conflict of interest of any kind developed between the class representatives in *Sakezzie* or *Jim* and absent class members that might have eroded the representatives' incentive to litigate and left the absent class members without adequate representation. *Gonzales*, 747 F.2d at 76. In fact, in this case, the beneficiaries' interests are more than closely aligned; they

are identical and inseparable. The plaintiffs failed to carry their burden to prove inadequate representation.

C. The district court erroneously conducted a qualitative evaluation of class counsel's performance in *Sakezzie* and *Jim*

Guided by its interpretation of the Fifth Circuit's decision in Gonzales, 474 F.2d 67, the district court erroneously attempted to divine from the limited available documents whether the plaintiffs in this case were adequately represented in *Sakezzie* and *Jim* with respect to the accounting claims. But *Gonzales* does not require the district court to engage in speculative gymnastics. Nwosun, 124 F.3d at 1258.

Gonzales questioned the preclusive effect of a prior class action which challenged the constitutionality of a Texas statute under which drivers' licenses and registration were suspended without a hearing. 747 F.2d at 69-70. In the prior class action, a three-judge panel had ruled that the Texas statute was unconstitutional but had granted retrospective relief *only* to the class representative. Id. at 71. The members themselves merely received prospective relief. Id. The class representative did not appeal. Id.

On collateral attack, the Fifth Circuit held that the judgment did not have preclusive effect because the class members had not been adequately

represented. *Id.* at 76. The court held:

> [The class representative], through his attorney, vigorously represented the class until he obtained individual relief. The problem is that he was representing approximately 150,000 other persons, who, although having had their licenses and registration receipts suspended without due process, were denied any relief by the three-judge court's prospective only application of its decision. So long as an appeal from this decision could not be characterized as patently meritless or frivolous, [the class representative] should have prosecuted an appeal. Otherwise, it cannot be said that he vigorously and tenaciously protected the interests of the class he was purporting to represent, or that all members of the class had been afforded due process of law by having a full day in court.

Id. at 76.

When the three-judge panel awarded different relief to the class representative than to the class members, a conflict of interest arose. The class representative's failure to protect those interests, which were now different from his own, rendered his representation inadequate. The district court's summary of *Gonzales* fails to recognize the dispositive nature of the conflict of interest created by the nature of the relief awarded by the panel. The district court stated, "the *Gonzales* court held that although the *counsel's* representation of the plaintiffs was 'more than adequate up to the time the three-judge court entered its final order on remand,' the representative's failure to appeal the decision rendered the representation inadequate." App. 2855 (emphasis added). The *Gonzales* court, however, did not focus on

counsel's representation but on the *class representative's* conduct of the litigation after a conflict of interest arose.[8]

D. The manner in which the *Jim* class was certified comported with the Federal Rules of Civil Procedure and was constitutionally adequate

In declining to give preclusive effect to the judgment entered in *Jim*, the district court took issue with the *Jim* court's failure to provide opt-out rights to would-be class members and its judgment that the case had "sufficient notoriety that no further notice to the class is necessary . . . at the present stage in the proceeding." App. 811-12. The district court erred, however, in holding the *Jim* class certification to a higher standard than that required by Rule 23.

In 1970, as today, Rule 23 of the Federal Rules of Civil Procedure described three types of cases that may be appropriate for class certification. Fed. R. Civ. P. 23(b); *accord* Fed. R. Civ. P. 23(b) (1966). *Jim* was certified

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[8] In fact, in a later case, Kemp v. Birmingham News Co., 608 F.2d 1049 (5th Cir. 1979), *rev'd on other grounds* by Southmark Properties v. Charles House Corp., 742 F.2d 862, 871 n.12 (5th Cir. 1984), the Fifth Circuit rejected a class member's collateral attack on a prior class action judgment. The class member relied on *Gonzales* to argue that the class representative was inadequate because he provided insufficient notice of a pending consent decree. *Id.* at 1054. Emphasizing that the class representative in *Gonzales* had received a more favorable result than any member of the class, the *Kemp* court held, "[b]ecause Kemp received the same relief as all other members of the class, *Gonzales* is inapplicable." *Id.*

under subsection (b)(2). App. 812. That subsection provides that

> An action may be maintained as a class action if the prerequisites of subsection (a) are satisfied [numerosity, commonality, typicality, and fair and adequate representation], and in addition . . . the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2) (1966).

The rule also contains notice and opt-out requirements, but only for class actions certified under subsection (b)(3).[9] The rule does not contain notice or opt-out requirements for classes certified under subsections (b)(1) and (b)(2). In (b)(1) and (b)(2) class actions, the question of notice is left to the discretion of the district court. The rule provides that the court

> *may* make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of

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[9]For subsection (b)(3) class action, the rule requires:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date . . . .

Fed. R. Civ. P. 23(c)(2).

> the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

Fed. R. Civ. P. 23(d) (1966) (emphasis added).

"[C]lass actions maintained pursuant to Rule 23(b)(2) do not require individual notice and are subject only to the notice requirements of Rule 23(d) of the Federal Rules of Civil Procedure. Under Rule 23(d), 'notice may be given in such manner as the court may direct.'" *Marcus v. Kansas Dep't of Revenue*, 206 F.R.D. 509, 513 (D. Kan. 2002) (citation omitted); *In re Four Seasons Sec. Laws Litig.*, 502 F.2d at 842 n.9.

When *Jim* was certified, the district found that "the case has sufficient notoriety that no further notice to the members of the class is necessary . . . at the present stage of the proceeding." App. 811-12. While the record does not reveal why the *Jim* court considered the action to be notorious, it also does not indicate that the court abused its discretion under Rule 23(d) in electing not to order that notice be given to class members at the inception of the case. Moreover, the record supports the conclusion that class members had actual notice of the *Jim* action. The plaintiffs' attorneys discussed the case at chapter meetings held in Aneth, Oljato, Navajo Mountain, and Hatch. App. 2606. Further, the evidentiary phase of the first *Jim* trial was held on the

reservation. App. 814-17. The district court erred in holding the *Jim* class certification to a higher standard than required by Rule 23.

E. Conclusion

The district court erred both in placing the burden of proof to show adequate representation on Utah and in qualitatively evaluating the litigation decisions of the class representatives and their counsel. The decision to waive claims does not constitute inadequate representation and the facts do not otherwise make out the plaintiffs' claim that they were inadequately represented.[10] The district court should have ruled that the plaintiffs failed to carry their burden and, hence, a collateral attack on the *Sakezzie* and *Jim* judgments is impermissible.

3. The plaintiffs received notice of, and their interests were adequately represented in, the *Bigman* litigation

Standard of Review

See Standard of Review, *supra*, at 33.

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[10] Interestingly, the district court so found in its December 20, 2002, Order. The court ruled that "Plaintiffs have not established that the representation in *Sakezzie*, *Jim*, and *Bigman* was inadequate. App. 1694.

Discussion

Even though the *Bigman* lawsuit was not a class action, it should be accorded preclusive effect. Like the two previous cases, *Bigman* was brought by beneficiaries of the Fund who alleged that the State had breached its fiduciary duty by failing to account for Fund expenditures. As set forth above, all beneficiaries of the Fund have identical, common interests in the Fund. *See* Point 1, *supra* at 33. They do not possess individual property interests. Far from being "mere 'strangers' to one another . . . ." *Richards*, 517 U.S. at 802, the beneficiaries are in privity with one another. *Tyus*, 93 F.3d at 454-55.

Accordingly, the district court erred when it determined that *Bigman* could not be given preclusive effect unless there existed a legal relationship or other form of accountability between the *Bigman* plaintiffs and the *Pelt* plaintiffs. App. 2859. Because the beneficiaries are in privity, every beneficiary should be bound by the judgments entered in prior cases, even those that were not maintained as class actions.

Consistent with the policies protected by the doctrine of res judicata, the plaintiffs, who are attacking a final judgment on the merits, must prove that they were inadequately represented in *Bigman*. *Yankton Sioux Tribe*, 925 F. Supp. at 667; *cf.* *Gonzales*, 474 F.2d at 75; *Brown*, 982 F.2d at 390-91. They

failed to meet their burden because the facts of record demonstrate that the plaintiffs were adequately represented.

First, the beneficiaries had actual notice of the *Bigman* lawsuit. Each chapter was informed of the litigation. The case was discussed in chapter meetings, including Aneth, Mexican Water, Navajo Mountain, Oljato, Red Mesa, and Teec Nos Pos chapter meetings. App. 1826-27, 960-62, 967-78, 983-92, 997-1003, 1008-17, 1022-30, 1035-52, 1057-76, 1081-1103, 1108-11, 1116-29, 1134-56, 1163-76. The plaintiffs' attorneys visited with the beneficiaries to explain the lawsuit to them. App. 968-69, 1040; *see also* App. 1124-29, 1126, 1023, 1144-45, 1155.

Second, the *Bigman* plaintiffs adequately protected the plaintiffs' interest in obtaining an accounting of Fund proceeds. During the litigation, the plaintiffs reviewed documents of the UNDC, identified questionable transactions, and closely audited those transactions. App. 118-648, 650-56, 2410-36. The parties entered into a partial settlement and the district court entered a Judgment and Decree that ordered the defendants to "forthwith cause to be conducted a special examination of questionable transactions, as raised by the Plaintiffs, of the records and accounts of Defendant Utah Navajo Development Council, Inc., covering the period 1971 to the present." App. 1983, 1990.

The special examination ordered by the court culminated in a document entitled, "A Management and Investigative Review of the Utah Navajo Development Council," commonly known as the "Nelson Report." App. 118-648, 650-56. Though the *Bigman* plaintiffs focused their efforts on UNDC rather than on the State, such a strategic decision should not be second-guessed by this Court and does not constitute inadequate representation. *Los Angeles Unified Sch. Dist.*, 714 F.2d at 941; *Wal-Mart Stores*, 396 F.3d at 106-07.

In its opinion in the current case, the district court emphasized the *Bigman* court's statement, contained in the summary holdings section of a Memorandum Opinion, that "[t]he court declines to determine the lawfulness of specific expenditures of the funds due to the absence of any evidentiary basis for doing so." App. 952, 2850. However, the *Bigman* court's statement necessarily refers to the dearth of evidence in the trial briefs to support the plaintiffs' claim that the expenditure of Fund proceeds to construct the Edge of the Cedars Museum and the Broken Arrow Center, for the Navajo Works Project, and for road construction and maintenance, violated federal law. But the fact that the plaintiffs did not submit evidence deemed relevant by the court should not be construed to mean that the plaintiffs had not received such information from the defendants.

As co-beneficiaries of the same trust fund, the interests of the *Pelt* plaintiffs are identical to the interests of the *Bigman* plaintiffs. The two groups of plaintiffs are in privity. In addition, the attorneys for the plaintiffs in *Bigman* visited Navajo chapter meetings and explained the nature of the lawsuit to many of the beneficiaries. Further, the *Bigman* plaintiffs, though they were not class representatives, adequately represented the current plaintiffs' interest in seeking an accounting of Fund transactions. As such, due process is not offended when preclusion is applied to prevent the beneficiaries from relitigating claims that were raised in *Bigman*. The current plaintiffs failed to establish that they were inadequately represented in *Bigman*. The district court's refusal to apply the doctrine of virtual representation in this unique case was error.

CONCLUSION

The plaintiffs' claim for a comprehensive accounting of Fund transactions offends the important policies protected by the doctrine of res judicata. The claim has been raised and decided in three prior lawsuits, *Sakezzie*, *Jim*, and *Bigman*. The current plaintiffs were adequately represented in all three because the plaintiffs in those cases, co-beneficiaries with the current plaintiffs of the same Fund, possessed an interest in the Fund which not only

was identical to the plaintiffs' interest, but was a common interest rather than an individual property interest.

Moreover, *Sakezzie* and *Jim* were certified as class actions, providing additional due process protections to the current plaintiffs, who were (or whose predecessors in interest were) members of both classes. The *Jim* court did not err in electing not to extend notice and opt-out rights to members of a class that was certified under Rule 23(b)(2). Further, the class representatives in those cases, whose interests were perfectly aligned with the current plaintiffs', were adequate representatives. The plaintiffs failed to carry their burden to prove that they were inadequately represented in those cases. The Plaintiffs likewise have the burden to prove that they were not adequately represented in *Bigman*, though *Bigman* was not certified as a class action.

For these reasons, Utah urges this Court to reverse the district court's grant of summary judgment permitting the plaintiffs to press their claim for an accounting of Fund transactions from the date the Fund first received royalties. Utah asks this Court, instead, to rule that the plaintiffs may not seek an accounting of Fund transactions that occurred before December 1989, the date the *Bigman* court entered its final order.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 10th Cir. R. 28(C)(4), Utah hereby requests oral argument. Utah believes that oral argument is necessary to fully address the unique and complex issues, voluminous record, and extensive history presented by this case.

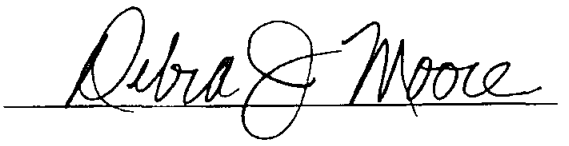
RESPECTFULLY SUBMITTED this 28th day of July, 2006.

Debra J. Moore
Philip S. Lott
Reha Deal
Assistant Utah Attorneys General
Attorneys for Appellant, State of Utah

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2006, I submitted by electronic mail an electronic copy of the foregoing Brief to the Clerk of the United States Court of Appeals for the Tenth Circuit, and to counsel for Appellees.

As a Digital Submitter, I certify that the Digital Form of the Brief meets the requirements of this Court's Emergency General Order 5 filed October 20, 2004, as amended, in that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form is an exact copy of the written document to be filed with the Clerk, and the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, McAfee VirusScan Enterprise, Version 8.0.1. and, according to the program, is free of viruses.



ADDENDUM A

United States District Court D. Utah, Central Division.
Hosteen SAKEZZIE and Thomas Billy, in their own behalf and as representatives of and members of the class of persons who are Navajo Indians residing within the Aneth Extension of the Navajo Indian Reservation in San Juan County, Utah, Plaintiffs,
v.
UTAH INDIAN AFFAIRS COMMISSION and its members, Beverly S. Clendenin, Chairman, Harold Drake and Don Smith, members of said Commission, Defendants.
No. C-55-61.

Aug. 25, 1961.

Action by Indians against the state Indian affairs commission and its members for a declaratory judgment concerning the expenditure of royalties from oil production on an Indian reservation extension. The District Court, Christenson, J., held that the federal statute providing that a percentage of the net royalties should be paid to and expended by the state in building and maintaining roads across such extension did not permit the commission to expend funds for building a portion of a hard-surface road outside the extension boundaries.

Decree in accordance with opinion.

West Headnotes

[1] **Indians 209 ⚿16.10(2)**

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
(Formerly 209k16(7))
Federal statute providing that royalties accruing from oil and gas production on Indian reservation extension should be expended by state for Indians residing thereon and state statute implementing federal statute required state Indian affairs commission to expend funds for Indians residing on extension, not all Indians on reservation, and funds could not be used for state, federal, or public purposes or to discharge general governmental duties to Indians. Act Mar. 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

[2] **Indians 209 ⚿27(6)**

209 Indians
209k27 Actions
209k27(6) k. Pleading and Evidence. Most Cited Cases
State Indian affairs commission had wide administrative discretion in determining management and expenditure of oil and gas royalties which resulted from production on Indian reservation extension and were payable to state, and resident Indians complaining of expenditures of such funds by commission had burden of proof, in absence of patently unauthorized acts. Act Mar. 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

[3] **Indians 209 ⚿27(6)**

209 Indians
209k27 Actions
209k27(6) k. Pleading and Evidence. Most Cited Cases
Evidence failed to establish impropriety of state's expenditure of oil and gas lease royalties, which were for benefit of Indians residing on reservation extension, to pipe water to hospital available to such Indians and others, to construct airport connecting road and replace washed-out reservoir dam in area, to pay rent owed by state Indian affairs commission, salaries and wages of commissioners and commission employees, travel expenses of commissioners, and printing, telephone, and incidental expenses, and to locate springs within extension and determine how to improve quality and utility of such waters. Act Mar. 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

[4] Indians 209 ⚿16.10(2)

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
(Formerly 209k16(7))
Federal statute providing that royalties accruing from Indian reservation extension for production of oil and gas should be paid to and expended by state in building and maintaining roads across such extension did not permit state Indian affairs commission to expend such funds for building portion of hard-surface road outside extension boundaries. Act Mar. 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

[5] Indians 209 ⚿16.10(2)

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
(Formerly 209k16(7))
Federal statute permitting expenditure by state of royalties accruing from Indian reservation extension oil and gas production for benefit of Indians residing thereon permitted state Indian affairs commission to exercise its discretion as to whether an expenditure should be made to provide summer range for resident Indians. Act Mar. 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

***219** Milton A. Oman, Oman & Saperstein, Salt Lake City, Utah, for plaintiffs.
Ronald N. Boyce, Asst. Atty. Gen. of Utah, for defendants.

CHRISTENSON, District Judge.
This case was tried to the Court without a jury on May 31 and June 1 and 2, 1961. Plaintiffs appeared in person and by their attorney Milton A. Oman. Defendants appeared by Ronald N. Boyce, Assistant Attorney General for the State of Utah. The case having been submitted for decision and the Court having announced in open court its tentative views, and now being fully advised, the Court now makes and enters the following

Findings of Fact.

1. The plaintiffs are residents and citizens of the State of Utah, residing on the 'Aneth Extension' of the Navajo Indian Reservation, in San Juan County, State of Utah. This action arises under the laws of the United States. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

2. In 1933 the Congress of the United States enacted a statute dated March 1 of that year, being Public Law No. 403, 47 Stat. 1418, which added an area within the State of Utah as the 'Aneth Extension' to the north end of the existing Navajo Indian Reservation. After particularly describing this addition, the statute provided that the land was 'permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon.' The statute contained also the following further pertinent provisions:

'* * * Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37 1/2 per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: Provided, that said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in Section 1 hereof, or for the benefit of the Indians residing therein.'

This statute continues in full force and effect.

3. Since the enactment of the above-mentioned statute, and particularly during the last ten years or so, oil and gas in substantial quantities have been discovered within this area, and substantial sums of money have been earned, and are currently being earned, as net royalties from the production and sale of this oil and gas.

4. In 1959 the State of Utah enacted a statute to implement the above-mentioned Federal statute. See

Chapter 22, Title 63, U.C.A.1953. Thereafter, the *220 Governor of the State of Utah appointed a commission of three persons, who are the individual defendants in this case, which commission was created by the State statute to administer the funds in question. This commission is known as the Utah State Indian Affairs Commission, and is also a defendant herein. Under its appointment and pursuant to the State statute it has the duty to manage and expend the said 37 1/2 per cent fund for the purposes and under the terms and conditions provided in the Federal act above mentioned, there being no conflict between the Federal and State statutes. Substantial sums of money have been paid to the defendant commission as the 37 1/2 per cent fund from oil and gas royalties, the money already received totaling approximately $3,000,000.

5. Plaintiffs and those whom they represent live on the Aneth Extension in an arid desert in which no permanent live-streams of water exist and in which there are only small and widely separated springs for the use of the inhabitants and their livestock. The families there usually consist of the parents and an average of six children. The average income per family is approximately $240 per year, which is earned almost entirely from the few head of livestock which they own and graze upon these desert lands. The livestock owned averages about twenty-five sheep and ten cattle per family. This number of livestock reasonably requires more forage than is available on the lands occupied by plaintiffs and those whom they represent. Their range is suitable only as winter range, and there is no proper summer range within the Aneth Extension. They have been herdsmen from time immemorial and are adept in the care of livestock. Precipitation in this area is insufficient for the production of cultivated crops and practically no possibilities exist for irrigation water.

Plaintiffs and those whom they represent live in mud hogans with dirt floors and with no utilities. They exist under common conditions of malnutrition and in such poverty as, measured by white man's standards, amount to abject and extreme want. They do not live in towns or communities, but rather their hogans are widely separated from each other, and they graze their livestock on land surrounding their hogans. The diet of these Indians consists primarily of meat which they secure from the animals which remain in their herds after they have sold what is deemed essential to provide funds for the other urgent necessities of life.

The Extension is divided into two disconnected segments. The one, referred to as the Ol Jato area, is located between the Arizona State Line and the San Juan River and lies westerly from the town of Mexican Hat, Utah, to the Colorado River. It is about 85 miles by road west of the other area, which is known as the Montezuma Creek portion of the said Extension. Only Navajo Indians live within the Montezuma Creek area, and Navajo Indians make up about 90 per cent of the population of the Ol Jato area, the remainder being Piutes.

6. The defendants heretofore have expended and have claimed the right to expend from the said 37 1/2 per cent fund coming into their hands the following amounts for the following purposes:

(a) About $78,000 to pipe water from the lands upon which plaintiffs and those represented by them live within that segment of the Aneth Extension known as Ol Jato portion, into a parcel of patented lands owned by a white man which expenditure was for the purpose of improving an existing water system serving a Seventh-Day Adventist Hospital which is available to the Indians who live in the Ol Jato area and which also is available to all other persons in that area, including Indian people who are no part of the plaintiff group. (b) Twenty-seven thousand dollars paid to O. Frost Black, a white man of Blanding, Utah, for the construction of an airport and connecting road and for the replacement of a washed-out reservoir dam located in a wash in the Ol Jato area. *221 (c) Two thousand one hundred twenty-five dollars paid to the Utah State Land Board as rent for office space. (d) Salaries and wages to Commissioners, defendants herein, and to commission employees, in the amount of $7,750. (e) Travel expenses of the defendants in the amount of $3,990. (f) Printing, telephone and incidental expenses in the amount of $347.

7. The defendants are about to expend, and claim the right to expend, additional money from said 37 1/2 per cent fund in the following amounts and for the

following purposes and will do so unless the Court otherwise determines and directs:

(a) One hundred twenty-five thousand dollars to be given to the United States Public Health Department for the purpose of locating the isolated springs within the Aneth Extension and for the purpose of determining what may be done to improve the quality and utilization of these waters. (b) Five hundred thousand dollars to build a portion of a hard-surface road connecting the towns of Blanding, Utah, and Shiprock, New Mexico, said portion lying outside the boundaries of said Extension.

8. Plaintiffs have, through counsel, requested defendants to expend part of the said funds for the purchase of summer range and ranches to be used to expand and increase the livestock operations of plaintiffs and of those they represent and to 'round out' a year-long livestock operation. It is proposed that the present range be used for winter grazing and the purchased high-elevation ranges be used for summer grazing, and that purchased ranches he used also to produce feed and forage to supplement and protect the integrated livestock operation. Defendants, thus far, have declined to make such a purchase because they have not been convinced that the Indians could profitably operate such properties and by reason of opposition on the part of various white men to activities of Indians outside of the present reservation.

9. Defendants have caused a field representative of the Indians Affairs Commission to be assigned to the area with a view to ascertaining the needs of plaintiffs and those represented by them and to investigate and cooperate in the execution of projects for their benefit. The defendants from time to time have visited the area in order to better enable them to administer said funds. The defendants have consulted at the Aneth Chapter House with Indians who reside in the Aneth Extension, and have made contact with members of the Tribal Council of the Navajo Indian Tribe, including its Chief, Paul Jones, and with members of the United States Bureau of Indian Affairs so as better to determine in what manner the expenditure of funds could be made. In addition, prior to the time the Utah State Indian Affairs Commission was created, a study of conditions in the area and the desires and needs of those residing therein was made and submitted to the Governor of the State of Utah, which study has been relied upon to some extent by the defendants in making expenditures from said fund. But the defendants have taken no effective steps to ascertain the particular identity of plaintiffs and those represented by them and have made no census of them, and have made no adequate study of their area, their living conditions, or their needs; and defendants have taken no adequate and effective steps to ascertain the desires and ideas of those for whose benefit the said fund was specifically intended. The defendants have placed excessive reliance upon Tribal officers whereas the fund was not intended for the benefit of the Navajo Tribe as a whole and the interest of the tribe as a whole in some respects has been in conflict with those of the Indians residing upon the Aneth Extension. One meeting of Indians on the Aneth Extension was arranged by officials of the Navajo Tribe, but defendants were not in a position to know whether any of *222 plaintiffs or those represented by them were present or had been invited. A written petition was drafted at this meeting which was forwarded to the defendants, purporting to contain an approval or request for defendants to expend the funds substantially in the manner in which they had been expended and in accordance with the plans of the defendants, but there was no showing that the purported signatures were those of the Indians having an interest in said funds, or that any of the persons named thereon were members of plaintiffs' group.

10. Representations have been made to plaintiffs and those whom they represent purporting to be the views of the defendants that said funds could be expended only for roads and school tuition; and the view and policy of the Commission has been uncertain as to whether the expenditure of money from said fund should be for the exclusive benefit of Indians settled on the Extension or whether it might be sufficient if such expenditures were for the primary or the substantial benefit of said Indians. As late as the trial the argument has been advanced by defendants that any expenditure by them from said fund would be justifiable so long as it benefited the Indians resident upon said Extension, even though it were intended to, and did, benefit others primarily.

11. Plaintiffs and those represented by them are without adequate opportunity in the area in which they live to creatively occupy themselves because of the type of country in which they are confined and the primitive nature of its settlement. There is much idleness among them, although considerable manpower is available for the type of tasks for which they are suited. They are able to do manual labor and to handle livestock and horses and many of them are able to operate automobiles, trucks, tractors and other motor-driven equipment. Defendants have made no requirement that those resident upon the Extension be employed whenever possible in projects financed from said fund although they have had the policy of employing Navajo Indians when considered feasible by their representatives actively supervising the projects.

12. Defendants have not kept the plaintiffs and those represented by them reasonably informed concerning the amounts received in said fund and as to expenditures from said fund; but in the course of this proceeding have fully informed the plaintiffs of such receipts and expenditures.

13. Plaintiffs have questioned the policy, conduct, acts and omissions of defendants as set out in paragraphs 6 to 12, inclusive, hereinabove. An actual controversy exists between the parties concerning the rights and duties of the parties in the respects mentioned, the resolution of which directly involves the laws of the United States. It is especially desirable and important that such controversy be resolved by appropriate declaratory judgment in view of the peculiar circumstances of this case, the sensitive Federal-State relationships involved, and the extreme needs of the beneficiaries referred to in the Federal statute. The action, position and contention of the defendants, moreover, constitute in a sense claims to the funds in question which are adverse to the rights and interests of plaintiffs and those whom they represent and which should be resolved by Court decree, as far as the State of Utah may be concerned, pursuant to the provisions of 78-11-9, Utah Code Annotated, 1953, providing consent for suits against the State to determine adverse claims to specific property.

14. With respect to the expenditures mentioned in paragraph 6(a) and 6(b) above, the Court finds that in addition to the hospital mentioned, upon the patented land to which the pipeline leads there is a dude ranch operated by the owner of the land; that the airport and dam mentioned were built in the vicinity of the above-mentioned dude ranch and near a trading post operated by a white man; that these circumstances raise questions concerning the expenditures *223 mentioned, but that such expenditures may reasonably have been considered to be for the benefit of the Indians residing on said Extension within the contemplation of said Federal statute and that the evidence is insufficient to establish that such expenditures were not made in good faith for said purpose; that the waters to be saved by the dam were intended solely for the use of said Indians and that the airport was intended primarily to make said area available for the servicing of said Indians. The expenditures referred to in paragraph 6(c) to (d), inclusive, have not been questioned by plaintiffs.

15. The payment of $125,000 to the United States Public Health Service for the location of springs within the Aneth Extension and the determination of what may be done to improve the quality and utilization of these waters, are matters that reasonably could be deemed to be for the exclusive benefit of said Indians residing on the lands in question and this commitment was determined upon by the defendants in good faith for the purpose contemplated by the act.

16. Roads are constructed within and adjacent to the Extension and generally adequate to meet the present and foreseeable future needs of plaintiffs. The developing oil field is entirely within the Montezuma Creek portion and in this particular area roads are so numerous as to operate to the disadvantage of the Indian residents by reason of the incessant oil field traffic, resultant dust which destroys forage and the encroaching web of roads between the approximately 350 producing wells. A hard-surface road extends around the north end of the Montezuma Creek area from Shiprock, New Mexico, northerly into the Colorado communities of Cortez, Dolores, and Dove Creek, thence westerly into the Utah communities of Monticello, Blanding, Bluff, Mexican Hat and into and across a portion of the Ol Jato portion of the Extension. A hard-surface road extends southeasterly from the

town of Blanding, Utah, to the existing and developing oil field and into the west portion of the Montezuma Creek area. The resident Indians travel on foot, by horseback or by pick-up truck over existing roads which, except for flash floods or unusual emergencies, are generally adequate for their purposes, and which could be suitably improved for their purposes by a relatively small portion of the proposed expenditure for roads. A hard surface road as proposed from the vicinity of Montezuma Creek through Aneth to the Colorado line would be of some benefit to the Indians resident on the Extension but not in proportion to the proposed expenditure, and would be of primary benefit to tourists, white persons within and without the area, business interests and the public in general. Moreover, the present proposal of the defendants calls for substantial expenditures for connecting road purposes outside of the Extension.

17. The defendants have not foreclosed in their deliberation the possibility of acquiring summer range and ranches as proposed by the plaintiffs, but up to this time have permitted considerations other than the best interests of the particular Indians residing upon the Extension to becloud this consideration. The question of whether such venture would be financially profitable has largely and perhaps inordinately preempted the ideas of defendants. It is practical for the defendants to more adequately ascertain and determine the needs and desires of the designated beneficiaries of the said fund. The defendants have acted in good faith and within the limits of good faith a rather wide discretion is proper and essential but only within the purposes and requirements of the Federal Statute. Said fund can be more beneficially and properly administered as contemplated by the Federal and State statutes upon proper ascertainment by defendants of the needs and desires of the resident Navajos and the recognition and clarification of standards and objectives for the administration and expenditure of said fund.

***224** From the foregoing Findings of Fact the Court now makes and enters the following

Conclusions of Law.

1. That the Court has jurisdiction of the subject matter of this action and of the persons of the parties and the authority and obligation to adjudicate and declare the rights and duties of the respective parties with respect to said 37 1/2 per cent fund and to determine any claims of the defendants thereto which may be adverse to the rights and interests of the plaintiffs and those whom they represent. That except as this decree may be implemented by supplemental proceedings in the manner provided by law, (pursuant to 28 U.S.C. 2202) and without prejudice thereto, injunctive action is not necessary or warranted, and the Court has no jurisdiction or cause to enter charging orders or other money judgment against the defendants.

[1] 2. That the duty of the defendants both under Federal and State law, between which there is no conflict in this respect, is to receive, administer and expend the said 37 1/2 per cent fund for the benefit of the Navajo Indians residing on said Aneth Extension and such other Indians resident thereon at the time as the Secretary of the Interior has seen fit to settle thereon, all of whom are equitable beneficiaries of said fund. That said fund is not a public fund, and that it may not be used for State, Federal or public purposes or to discharge general governmental duties to the plaintiffs and those represented by them, who are citizens of the State of Utah and the United States of America and entitled to the rights and privileges of such citizenship.

[2] 3. That within the limitations of the said Federal Act of March 1, 1933, 47 Stat. 1418, the defendants of necessity must have, and do have, a wide administrative discretion in determining the management and expenditure of said fund. That in view of such discretion reposed in the administrative agencies and processes of the State by the Federal statute, the burden of proof in the absence of patently unauthorized acts or omissions is upon those questioning the exercise thereof and in this case the plaintiffs have had the burden of proof.

[3] 4. That the plaintiffs have failed to sustain their burden of proof with respect to questions raised concerning expenditures referred to in paragraphs 6 and 7(a) of the foregoing findings of fact.

5. That in the management and disbursement of said fund the defendants not only have the duty to refrain from utilizing said funds for unauthorized purposes, but they have the duty to reasonably expend said fund for authorized purposes, they being not merely conservators charged with the profitable investment or safeguarding of said fund, but rather administrators charged with the making of beneficial expenditures from said fund to assist the beneficiaries referred to in the Federal statute. That while the conservation or profitable investment of portions of said fund may be within the discretion of the defendants under various circumstances, its conservation or profitable maintenance contrary to the interests of the beneficiaries is not authorized as ends in and of themselves. Nor do the statutes contemplate the administration of the fund to fulfill the general duties of government owing to the plaintiffs and those they represent in common with all other citizens.

6. In administering the fund the defendants occupy a position of trust and confidence toward the Indian beneficiaries, and their conduct should be determined and judged by exacting fiduciary standards within the trust and discretion which Congress saw fit to repose in the agencies of the State in carrying out the purposes of the Federal Act. That in addition to general principles of reasonable care, honesty, good faith and loyalty, incumbent upon defendants are the duties of making or withholding expenditures from said fund with the motivating purpose and intent to assist or benefit the beneficiaries identified in the statute and without regard to the interests or desires of other persons, agencies or groups except as those reasonably *225 and necessarily would be considered in the management and expenditure of funds by a private trustee or owner thereof, or as might be mandatorily required by the laws or public policy of the State, but that so long as the exclusive motivating purpose of an expenditure from said fund is to aid and benefit the said beneficiaries, and the defendants act with reasonable care, honesty, good faith and loyalty to that end, the fact that it may also benefit others incidentally will not impeach the decision.

[4] 7. That the payment of tuition in white schools of the children of Indians resident upon said Extension and the maintenance of roads across the lands described in the Federal statute, although mentioned therein as specific authorized uses, are not the only authorized expenditures from the fund for the benefit of said Indians, the defendants enjoying a wide discretion in providing other benefits. But, with respect to the provision for roads, the specifications of the statute have a limiting effect upon the powers of the defendants, in that the intent of Congress is clear that expenditure for roads must be limited to those within the Extension. This view reasonably explains the specific language employed by the Congress to the effect that the roads for which expenditures may be made shall be 'across the lands described in section 1 hereof.' It this were not intended as a limitation Congress would have authorized in terms the building or maintenance of roads generally so long as this was for the benefit of the Indian beneficiaries, and would have placed the construction and maintenance of roads on the same basis as the powers of the defendants to do other things for the benefit of the Indians. There was, indeed, good reason for this distinction as to roads, for it is apparent that the State has general public duties with respect to the construction and maintenance of highway and road systems throughout the State of Utah, and that while Congress was willing to assume that the expenditures from the fund for roads within the Extension would not unduly involve a conflict of interest that could not be properly resolved in the administration of the fund, this authority and the possible conflicts that would be involved otherwise were not intended to extend beyond the boundaries of the Extension in respect to roads. In any event, in view of the evidence, it is concluded that expenditures for the proposed road would not be such as to be for the benefit of those specified in the Federal statute and within its contemplation.

[5] 8. That provision of summer range as suggested by plaintiffs would be an authorized expenditure from the fund should this be accomplished and administered equitably for the benefit of the beneficiaries designated in the statute; but whether this expenditure should be made is, under the evidence, a question for the exercise of the defendants' discretion within principles hereinbefore defined.

9. That the determination of the needs and desires of the beneficiaries should not be dependent upon the views of officers or members of the Navajo Indian Tribe as a whole, although these views may be considered as among those that may throw light upon defendants' duties, together with other circumstances and views. It is necessary to bear in mind that the tribe as a whole is not the designated beneficiary of this fund and that its interests and views may in some respects be in conflict with the more pertinent interests and views of the beneficiaries. The Tribe also has responsibilities to its members, including the beneficiaries of said fund, but said fund is not intended, and may not be used, for general tribal purposes. That the proper administration of said fund requires an effective canvas, expression and consideration, of the views of the beneficiaries. That in the execution of projects financed by the fund in question, the spirit and intent of the statute commends the utilization of the services of beneficiaries to the fullest extent practicable and consistent with sound administration. That the proper administration and expenditure of said fund makes desirable the ***226** availability to the beneficiaries and their representatives of reasonably accurate, complete and current information concerning the receipts expenditures and projects of the defendants. That beyond the mere legal right to this information or its availability from other sources, proper understanding and cooperation probably will be advanced, the effective expression and consideration of views and suggestions will be promoted in harmony with the statute and the policy of the Federal government towards the Indians, and the administration of the fund will be more in keeping with such statutes and policy if an affirmative program to this end is carried out by the defendants.

10. That the Court, pursuant to 28 U.S.C. 2201, should declare the rights, duties and legal relations of the parties in accordance with the foregoing conclusions of law.

11. That no costs should be awarded herein.

Counsel for plaintiffs is hereby directed to submit a form of decree in accordance herewith for execution by the Court.

D.C.Utah 1961.
Sakezzie v. Utah Indian Affairs Commission
198 F.Supp. 218

END OF DOCUMENT

ADDENDUM B

H

United States District Court D. Utah, Central Division.
Hosteen SAKEZZIE and Thomas Billy, in their own behalf and as members of the class of persons who are Navajo Indians residing within the Aneth Extension of the Navajo Indian Reservation in San Juan County, Utah, Plaintiffs,
v.
The UTAH STATE INDIAN AFFAIRS COMMISSION and Its Members, Beverly S. Clendenin, Chairman, Harold Drake and Don Smith, Defendants.
No. C 55-61.

Feb. 7, 1963.

Proceeding on petition for supplemental relief following a prior declaratory judgment, 198 F.Supp. 218. concerning the proper expenditure by state commission of royalties from reservation land. The District Court, Christensen, J., held that the members of the commission administering the fund were obliged not only to administer it but also to furnish the Indians, as beneficiaries of the trust, with adequate information concerning its administration and to seek out their advice and consultation before coming to determinations as to expenditures of the funds.

Judgment accordingly.

West Headnotes

[1] Indians 209 ⚿16.10(2)

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
(Formerly 209k16(7))
Statutory provisions that royalties from Indian lands be expended in the tuition of Indian children, for the building or maintenance of roads, or for the benefit of Indians residing on the reservation must be considered homogeneous and do not give state Indian Affairs Commission authority to expend such funds for projects which do not benefit the Indians. Act March 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

[2] Indians 209 ⚿16.10(2)

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
(Formerly 209k16(7))
In order to expend money for roads on Indian land from state administered fund created by royalties from the Indian land, it is not required that the road be built expressly for the benefit of the Indians, and expenditure for road is within state commission's broad powers even though the Indians may not be exclusively or even primarily benefited thereby. Act March 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

[3] Indians 209 ⚿16.10(2)

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
(Formerly 209k16(7))
Construction of road on Indian land intended primarily for benefit of Indians resident thereon was properly undertaken out of funds from state administered fund created by royalties taken from the Indian land. Act March 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

[4] Indians 209 ⚿16.10(2)

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
(Formerly 209k16(7))

Within statutory provision that royalties from Indian lands be expended in the "tuition" of Indian children, "tuition" includes necessary or incidental expenses, such as books, board and room, and traveling expenses, to be determined within the reasonable discretion of state commission administering the royalty fund. Act March 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

[5] **Indians 209 ⚿6.3(1)**

209 Indians
209k6.1 Protection of Persons and Personal Rights
209k6.3 Constitutional and Statutory Provisions
209k6.3(1) k. In General. Most Cited Cases
(Formerly 209k6(2), 209k6)

In interpreting ambiguous statutes with reference to Indians, a liberal interpretation in favor of the Indians should be indulged, even though a meaning not currently common must be applied to harmonize the context or to more fully advance the policy and objectives of legislation.

[6] **Indians 209 ⚿16.10(2)**

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
(Formerly 209k16(7))

Expenditure of $70,000 by state commission administering royalty fund realized from Indian land for the construction of a medical clinic was proper even though clinic was not built exclusively or even primarily for the benefit of the Indians residing on the reservation where the Indians would benefit to the extent of the commission's contribution. Act March 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

[7] **Indians 209 ⚿16.10(2)**

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
(Formerly 209k16(7))

Members of state commission administering royalty fund realized from Indian land for benefit of Indians resident thereon were required to make reasonably available to the Indians adequate information concerning the administration of the trust and to seek out the advice and consultation of the Indians before coming to determine expenditures. Act March 1, 1933, 47 Stat. 1418; U.C.A.1953, 63-22-1 et seq.

[8] **Indians 209 ⚿27(1)**

209 Indians
209k27 Actions
209k27(1) k. Rights of Action. Most Cited Cases

Indians 209 ⚿27(8)

209 Indians
209k27 Actions
209k27(8) k. Costs. Most Cited Cases

Indian beneficiaries of state administered royalty fund created by royalties from the Indian reservation properly brought declaratory judgment action and supplementary proceedings to prevent unauthorized use of funds by state commission and were entitled to an award of $20,000 attorneys' fees together with taxable costs.

*13 Milton A. Oman, Salt Lake City, Utah, for plaintiffs.
Ronald N. Boyce, Asst. Atty. Gen., of Utah, Salt Lake City, Utah, for defendants.

CHRISTENSEN, District Judge.
MEMORANDUM DECISION

This case in its present post-judgment phase presents further problems in relation to the defendant Commission's statutory duty with reference to a fund entrusted to the State of Utah by Congress from oil royalties from leased land in the so-called Aneth Extension of the Navajo Indian Reservation on condition that it be expended for designated purposes 'or for the benefit of the Indians residing therein'. Public Law No. 403, 47 Stat. 1418; Chapter 22, Title 63, Utah Code Annotated, 1953.[FN1]

The plaintiffs, pursuant to 28 U.S.C.A. § 2202,[FN2] have petitioned for supplemental relief based upon the declaratory judgment entered by this court on August 25, 1961.[FN3] No appeal was taken by either party from this judgment.

*14 It is alleged in the petition that defendants have violated the provisions and declarations of the judgment by:

(a) Failing to use the fund for the direct benefit of the Indian beneficiaries and by threatening to utilize the fund to discharge general governmental or tribal duties.

(b) Being about to expend approximately $300,000 for the construction of a segment of public road extending between Ship Rock, New Mexico and Blanding, Utah, which could be of only remote, if any, benefit to the Indian beneficiaries.

(c) Refusing to invest a portion of such fund in range lands and ranches to make possible year-round livestock operations of the Indian beneficiaries.

(d) Failing to ascertain and give consideration to the views of the beneficiaries in determining the use of the fund.

(e) Refusing to furnish to plaintiffs and their counsel information concerning the receipt and disbursement of the fund.

(f) Refusing to initiate an affirmative program for the benefit of plaintiffs in harmony with the judgment.

The petition asserts that injunctive relief reasonably is necessary to secure compliance by the defendants and that a bond should be required to indemnify the plaintiffs from further losses. Costs, expenses and attorneys' fees from the fund also are sought. In addition to these specific remedies, plaintiffs pray for general relief, and in their brief have added the demand that the individual defendants be required to reimburse the fund for all disbursements since the entry of the judgment.

The defendants' answer puts in issue these allegations and demands, although not questioning the binding effect of the judgment and the findings of fact upon which it was based.

Conclusions of law in conformity with which the judgment entered are reported in 198 F.Supp., beginning at 224. Since the judgment itself has not been reported, some of its main provisions are summarized:

The judgment determined that it is the duty of the defendant Commission to expend the Aneth Extension fund for the benefit of the Indians residing upon the Extension; that as to them the Commission and its members occupy the position of a trustee, and that they owe to the plaintiffs and those they represent, as distinguished from the Navajo officers or tribe in general, the duty to exercise reasonable care, good faith and loyalty, in accordance with exacting fiduciary standards, within the trust and discretion Congress saw fit to repose in the agencies of the State in carrying out the purposes of the Federal Act; that payment of tuition and the construction and maintenance of roads across Extension lands are not the only authorized expenditure of funds for the benefit of the Indians residing in the Extension lands and that the defendants have a wide discretion to provide other benefits; that there is no authority to expend funds for roads outside of the Aneth Extension; that in the management and disbursement of said fund the defendants not only have the duty to refrain from utilizing it for unauthorized purposes but to reasonably expend it for authorized purposes, they being not merely conservators charged with its profitable investment and safeguarding but rather administrators charged with the making of beneficial expenditures from the fund to assist the beneficiaries referred to in the Federal statute, and that the defendants had the duty to ascertain, and at least to consider the views of the beneficiaries concerning expenditures from the fund and to make reasonably accurate, complete and current information available to them.

I deemed some of the expenditures theretofore made, and the refusal to consider other expenditures, on the part of the Commission, somewhat questionable. But holding plaintiffs strictly to their burden of proof, and in deference to the Commission's wide discretion, all

*15 but the most substantial of the expenditures were approved. This was done with confidence that clarification by declaratory judgment of the Commission's duties, some of which obviously it had misapprehended, would obviate further difficulty.

It was determined, however, that a proposed expenditure of $500,000 for a hard surface road from the vicinity of Montezuma Creek in the Extension, through Aneth and thence to the Colorado line, was not authorized. The defendants' tentative commitment for financing such a project thereupon was abandoned.

Since the judgment, however, the defendants have committed, but have not yet disbursed, the sum of $175,000 for the construction of a segment of paved road (now complete) traversing a portion of the Extension in the vicinity of Montezuma Creek. The cost for this segment has been computed reasonably with relation to only the portion of the road which traverses the Aneth Extension. But the new road comprises a part of the larger system contemplated by the prior project. Contrary to the present contention of plaintiffs, it was not determined in the main case that such segment, as distinguished from the larger project initially proposed, would not be properly for the benefit of the Indians,[FN4] and that question is still open.

The defendants say that the construction of the segment of the road in question will be of some benefit to the Indians residing within the Aneth Extension by providing a part of the only properly engineered road south through the Aneth extension to the Navajo Tribal Subagency at Ship Rock, New Mexico, and the Navajo Chapterhouse used by the plaintiffs in common with other Navajos at Aneth, Utah. This is largely true. And the road moreover generally will facilitate travel and promote tourism in the Extension. The latter considerations will be of only remote benefit to the Indians residing in the Extension. Under the arrangements made by the defendants with the State Highway Department the maintenance of the road will be assumed by the State of Utah, thus relieving the defendant Commission from maintenance charges which they can incur under the statute in proper cases.

It thus must be concluded on the basis of the facts heretofore found and the evidence introduced in the supplemental proceedings that the segment of road in question would benefit the plaintiffs and those whom they represent substantially, but not exclusively or even primarily. It is also plain from the evidence that the motivating purpose of the Commission in constructing this road was not solely to benefit the Indians.

*16 The plaintiffs argue that the prior determination with reference to roads established as the law of the case that roads within the Aneth Extension had to be for the exclusive benefit of the Indians residing there. It is true that the court indicated generally with reference to expenditures by the Commission that the motivating intention in order to justify the expenditure had to be to benefit the Indians, but the specific holding with regard to the proposed expenditure for the Montezuma Road was that a road lying both within and outside the Extension was not shown to be sufficiently for the benefit of the Indians as to be justified. The court's oral pronouncement consistent with the more general written conclusion on the point (TR. Jan. 12, 1961 hearing, pp. 16-17) indicated that effect must be accorded the statutory authorization for the construction of roads within the Extension.[FN5]

I conclude that expenditures for roads are in a category different under the statute from that of other expenditures which expressly must be for the benefit of the Indians. Congress has indicated that the construction of roads on the Aneth Extension is at least generally speaking a legitimate purpose of expenditures from the fund. And the burden thus is considerably heavier upon the plaintiffs with reference to such an expenditure to show that the Commission abused its discretion.

[1] The defendants on the other hand, would have it determined that the last clause of the authorization does not operate to limit at all the expenditure for roads to projects of benefit to the Indians. I consider this conclusion too broad. I cannot believe that Congress, in view of conflicts of interest, intended with respect to roads to give unlimited power to the State to spend money for roads in the Extension having no relationship to the welfare of the Indians. The three types of expenditures must be considered homogeneous despite

their disjunctive form in view of the limitations of the last clause, and the policy and objectives of the legislation.[FN6] Any reasonable doubts should be resolved in favor of protection*17 for the Indians. [FN7] Were it not for this latter principle peculiarly applicable here, the ordinary rules would support the position of the defendants.[FN8]

[2] I conclude that the commitment for the road in the vicinity of Montezuma Creek on the Aneth Extension is highly questionable but in the amount and under the circumstances involved here must be deemed within the broad powers of the Commission in reference to roads on the Extension.

[3] In addition to the last mentioned segment of road the defendants have contributed from the fund for the construction of another road on Extension lands in the Navajo Mountain area the sum of $44,000. The construction of this road is established by the evidence to have been intended, and to be, primarily for the benefit of the Indians resident upon the Extension, and thus authorized.

The defendants have expended inconsequential sums to send Indian children residing on the Aneth Extension to white schools. While the propriety of these expenditures is not sharply at issue both sides have raised questions concerning the meaning of the term 'tuition' as used in the statute.

[4] The expenditures made in connection with school costs to date have been justified. But the defendants have suggested that the power to expend money for 'tuition' of Indians in white schools may be restricted to the payment of enrollment charges assessed by the schools. I am of the opinion that the meaning of the term in context is also broad enough to encompass charges necessary or incidental to attendance, such as for books, board and room and traveling expense,[FN9] within the reasonable discretion of the Commission.

It is to be noted that the statute does not say such funds may be expended only 'for tuition' but that they shall be expended 'in the tuition' of Indian children in white schools; or, paraphrasing one dictionary meaning of the term, 'in the care, and instruction of Indian children in white schools'.

[5] In interpreting ambiguous statutes with reference to Indians, a liberal interpretation in favor of the Indians should be indulged, even though a meaning not currently common must be applied to harmonize the context or to more fully advance the policy and objectives of the legislation. Ash Sheep Co. v. United States, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507.

[6] The Commission has committed approximately $70,000 toward the construction by the Seventh Day Adventists of a medical clinic in the vicinity of Navajo Mountain, in order to provide minor medical treatment and facilities for the Indians residing in the Aneth Extension and other Indians and persons in the vicinity. While such medical facility is not exclusively, or even primarily, intended for the benefit of the Indians residing upon the Aneth Extension, it is a highly desirable and necessary one for such Indians, as demonstrated by the evidence in the case. The total cost of the construction and maintenance of this facility and the furnishing, installation and maintenance of the *18 equipment essential for its operation far exceeds the commitment of funds by the Commission. It fairly may be said that the purpose of the Commission's contribution was to benefit the plaintiffs and those they represent, who separately could not be furnished by such a limited expenditure the facilities that are now available to them in connection with other persons. This expenditure properly may be considered for the primary benefit of the Indians residing on the Extension to the extent of the Commission's contribution. American Nat. Bank, etc., v. American Baptist Home M. Soc., 106 F.2d 192 (2 Cir., 1939).

[7] The defendants have kept full and proper accounts of the funds received by them which are computed and transmitted by Federal authority. They, however, have demonstrated remarkable unconcern about keeping the beneficiaries of the fund informed of accretions to said fund, about disbursements and commitments therefrom and about plans with respect to future expenditures, have failed to do what was convenient and reasonably within their power to advise the beneficiaries concerning these and other matters and have often ignored without justification or excuse requests and

inquiries by the Indians or their representatives.

No effective canvass of sentiment among the Indians directly interested in the fund has been made with regard to future commitments or projects. The defendants have relied principally upon the views of their field representative, a white business man and property owner from Blanding, which is a community having direct interest in road work within the reservation, and upon one of the defendants herein who is a member of the Navajo Tribal Council. [FN10]

While in the conclusions and judgment heretofore entered the court perhaps with excessive circumspection endeavored only gently to indicate the duty of the defendant State officials with regard to the furnishing of information to the plaintiffs, nonetheless it was made clear that they have an affirmative duty not only to make reasonably available to the plaintiffs adequate information concerning the administration of the trust, but to seek out their advice and consultation before coming to determinations as to expenditures of trust funds.[FN11] It is clear to the court that the defendants ***19** have not discharged their duty in that respect. Their performance toward the Indians has been niggardly, reluctant and at times almost defiant; and it is no answer to say that the information could be ferreted out from their records by the plaintiffs.[FN12]

The plaintiffs are largely unschooled and untrained and it is apparent from the evidence that their legal representative has done much of the work he has done on their behalf on credit. Ordinary business responses even as to him do not seem to have been forthcoming. The defendants retain an administrative assistant and legal adviser, presumably for the benefit of the Indians, they have a field representative and they employ two clerical assistants at the Capitol. The Commission members themselves have adequate trust funds for such travel or additional assistance as might be necessary to considerately administer the fund. It does not seem unreasonable, indeed it seems essential, to recognize that a program for the affirmative disclosure of available information as to the plaintiffs is indispensable for the proper discharge of the defendants' trust and that no reason whatever appears why the defendants, particularly after the entry of the prior judgment, should have failed so utterly to carry out the affirmative spirit and letter of their obligation in the respects mentioned. I think much of the misunderstanding that has resulted in and prolonged this litigation must be ascribed to the attitude of the Commission.

The plaintiffs and those they represent, in line with the judgment declaring it to be the duty of the defendant Commission to adopt an affirmative program for the benefit of the beneficiaries of the trust, have suggested a series of projects for improving the economic condition of the beneficiaries of the trust.[FN13] In an effort to facilitate the execution of such a program they have organized themselves into a Utah corporation known as the Kayielli Navajo Co-Operative Association. They have suggested that summer range be acquired for their livestock and that the livestock herds be increased to permit profitable and economic operations; that consideration be given to the establishment of a modern game bird hatchery on Montezuma Creek; that caterpillar tractors and other equipment be acquired for the purpose of constructing livestock watering dams and reservoirs, for the construction of contours and other suitable range improvement work; and for the maintenance of the Indian roads to meet their limited needs; that Indian men be trained in the operation of such equipment; that suitable meeting facilities be established and that other constructive uses of the trust fund be made.

It is not the court's province to pass upon such further proposals except to see that the views of the Indians be given proper consideration. But the Commission's***20** objections that some or all of such projects would involve administrative problems does not seem determinative against their consideration, since one of the reasons the Commission was appointed with continuing authority to employ assistance was to provide for varying administrative problems. The objection that the amount of the trust funds committed for the benefit of the Indians within the Aneth Extension is excessively large so that some wider distribution of the funds should be accomplished seems inconsistent with the idea that there are no resources with which to meet limited administrative problems on the small scale contemplated by the

present statute.

Be this as it may, the explanation of the Commission during the first hearing that there had been insufficient time to fully explore and consider the possibilities of such projects has become more or less moot. The evidence now shows without dispute that the Commission from shortly after the entry of the declaratory judgment actively has sponsored legislation to extend the benefits of the fund to other Indians,[FN14] and that pending final action on this legislation it has assumed to suspend any judgment or activity with regard to an affirmative program for the benefit of the Indians and declined to consider expenditures that might otherwise appear to them for the benefit of the Indians. The court concludes that the defendants are failing in accordance with the judgment to consider in good faith expenditures for the benefit of the Indians residing in the Extension.

I, of course, do not question the right of the Commission or the defendants as individuals to respond to any inquiries from the members of The Congress or any State agency, or any other agency State or Federal, or to make available to any member or committee or agency ***21** their views with regard to needed legislation or any other subject. I leave any personal question in relation to a trustee's voluntary sponsorship of legislation contrary to the interests of the present beneficiaries of the fund to the individuals concerned. However, I do not believe that the defendants as trustees or as administrators of that fund have the right, contrary to the declaratory judgment, to suspend or abandon their duties pending the possibility of enacting legislation which might reduce the interest of the plaintiffs as beneficiaries of the fund even apart from constitutional questions that might be involved.[FN15]

[8] The court finds that the plaintiffs in order to protect said fund for the purposes for which it was intended, and in order to prevent the unauthorized use of the fund by the defendants, justifiably brought the original action herein and have justifiably brought these supplemental proceedings; and that in the protection of the fund they have reasonably incurred attorneys' fees in the sum of $20,000, which are reasonable attorneys' fees for the services of attorneys for the plaintiffs herein to date, together with taxable costs herein. If the Indians are deprived of legal representation or the means to employ and to cooperate with attorneys, not only their own interests as beneficiaries, but the fund itself will be in jeopardy and its purpose frustrated. These are found to be reasonable charges against the fund and it is concluded that this court has jurisdiction to order and direct their payment from said fund.

The defendants contend that costs cannot be awarded against the State and that no other relief would be appropriate in these proceedings because it would go beyond the pleadings.[FN16] They say that Section 2202 is limited to the granting of coercive relief on issues and evidence presented in the main case, or incidental thereto, and may not extend to the receipt of 'new issues and controversies not properly before the court'.

Suffice it to say that the relief to be granted herein, including the award of costs and attorneys' fees[FN17] is believed to ***22** be clearly within the power and duty of the court.[FN18]

In general the situation of the Navajo Indians is a sad and difficult one. Even when the policies of the government toward them have been benevolent and have been administered with an understanding and compassionate hand, limitation of funds, facilities, time and other considerations frequently have rendered efforts still inadequate to cope with ages-old disease, ignorance and want. To the extent that the administration of Indian affairs is not benevolent and understanding, the plight of the Indians becomes doubly pitiable.

The Navajos living on the Aneth Extension particularly live in abject poverty and want.[FN19] They are confined largely to an arid desert wasteland, almost unusable for their livestock during hot weather. Adjoining the reservation however, are higher ranges and ranches, available for purchase, which seem to offer suitable summer range for livestock upon which the Indians so desperately depend. The defendant Commission has for its primary justification, purpose and function, the administration and expenditure of a very substantial fund provided by Congress for the benefit of these very Indians.

The defendants Commissioners occupy an enviable position, in contrast with numerous other administrators whose humanitarian desires too frequently are handicapped by lack of available funds or power. They have at their disposal for the benefit of the Indians whom they are committed to help, a fund of several million dollars. At the end of the last fiscal year, July 1, 1961 to June 30, 1962, the net amount of the fund was $3,525,086.83. Income of the fund during that year was $576,066.84. Their interest and duty are not impracticably diffused over large areas or among numerous beneficiaries but focus upon a relatively small area and a limited number of beneficiaries. These beneficiaries are needful of help. They are not seeking handouts but ask only for basic economic and cultural assistance to enable them better to safeguard their health and to provide food and shelter for themselves and their children.

A final decree of court has confirmed not only the wide discretion of the Commission to extend help, but their duty to do so. And the court, to encourage compliance with such duty without subjecting state officials to undue restrictions, used precatory but nonetheless definite language to indicate methods by which the statutory duty of the Commission could be carried out appropriately. These included the maintenance of closer liaison and more sympathetic contact with the beneficiaries for whom the fund was to be administered, and a program to keep them better informed and to obtain their views concerning projects designed to assist them.

If there were ever a humanitarian dream come true, if there were ever an opportunity for proof in this country *23 that when Indians have been treated shabbily by government it is because of practical limitations rather than mere niggardliness, the situation of the Commission would seem to present them. Yet by rather clear proof in these supplemental proceedings it is shown that since the entry of the judgment the Commission has pursued largely its former course, having insufficient regard for the interests of the plaintiffs and those whom they represent as distinguished from others. Among other things, it has declined to exercise its judgment under the laws governing its functions; it has suspended the consideration of projects which could be most beneficial to those designated by the present federal and state laws, pending an effort on its part to effect a dilution of plaintiffs' rights.[FN20] The Commission has permitted itself to be influenced in this respect by interests out of harmony with its own duty, contrary to the declaratory judgment.[FN21]

The Federal and State statutes in general and this situation in particular raise delicate problems of division of powers, conflicting interest, and procedures. Perhaps the pending legislation has special merit in seeking to place the State Commission more closely in touch with the policies of the Department of the Interior and its commissioner of Indian Affairs; and the present case seems to raise a question why the entire administration of the fund should not be turned over to the regular Federal agency. The latter, however, is a matter wholly within the competence of Congress. The present situation with which this court is confronted, notwithstanding the difficulties under the present law, seems to require on the part of the defendants greater heed to the spirit as well as the letter of the statute in question and other Federal laws in pari materia with it, a mere appropriate observance of the interests of the plaintiffs and a more suitable regard for the declaratory judgment of this court. Particularly is this so, since we are here not concerned with any incursion in fields ordinarily reserved to unconditional state discretion but with a matter peculiarly within Federal competence except for the delegation of conditional power to the State, and since the judgment has become final without any complaint concerning its provisions.

Being constrained to say this much beyond the somewhat abstentious comments contained in my original decision, which it now appears were not sufficiently emphatic to accomplish an adequate compliance,[FN22] it remains to direct such supplemental order as appears reasonably necessary, feasible and within my power, to render the declaratory judgment more *24 effective, but which yet does not project the court into areas where it has no business to be.

It is concluded that the court by supplemental order and decree should:

1. Direct and order the defendants to proceed in good faith to exercise their discretion in administering and expending said fund in harmony with the principles and law hereinbefore declared, until, if at all, the said statute has been changed by Act of The Congress.

2. Direct and order the defendants to make available to the plaintiffs and to those whom they represent, through their counsel and other representatives designated by them monthly written reports showing the amount of said fund, new increments, administrative expenses charged against the fund, other expenditures or disbursements from the fund, commitments against the fund whether tentative or permanent but not expended, and a description of the projects which may involve future expenditures or disbursements from said fund which are under investigation or consideration by the Commission and concerning which the views of persons or agencies other than the defendant Commission or its members or staff are being received or sought.

3. Direct and order the defendants with all considerate speed to institute and carry out an effective program for the canvassing of the needs, desires and recommendations of the Indians resident upon said Extension with reference to expenditures from said fund and to make no further substantial expenditures or commitments therefrom until this is done except for reasonable administrative expenses, the tuitioning of Indian children residing upon said Extension in white schools, and emergency requirements; and as a part of said program to call meetings of said Indians residing upon the Extension of which reasonable notice in advance shall be given, for the purpose of which the services of qualified and reputable interpreters shall be available, and at which the Commission members or their representatives shall furnish comprehensive information concerning the administration of said fund and the problems, plans and policies of the Commission to the extent that they have been formulated or are under investigation, and at which meetings the Indians resident upon said Extension shall be afforded reasonable opportunity to ask questions and to receive explanations, and shall be permitted reasonably, to report to the Commission their views, recommendations, needs and desires with reference to said fund.

4. Direct and order the defendants to pay from said fund to plaintiffs for the use and benefit of their attorney as attorney's fees and expenses the sum of $20,000 (subject to such adjustment among plaintiffs and their counsel for attorney's fees advanced as may be reasonably agreed upon or subsequently approved by the court), and to direct that in addition there be paid by defendants from said fund the taxable costs.

5. Except as hereinabove mentioned, to deny injunctive relief to plaintiffs with reference to the expenditures or commitment referred to specifically in the foregoing findings.

The court's findings of fact and conclusions of law in the supplemental proceedings are deemed sufficiently indicated in this memorandum decision to satisfy the requirements of Rule 52, F.R.Civ.P. Counsel for the plaintiffs is hereby directed to prepare and serve within a period of ten days a proposed judgment in harmony with the foregoing conclusions, which will be settled by the court on a regular motion day, February 20, 1963.

FN1. The significant provision of both enactments is that 37 1/2% Of the net royalties accruing from the lands added to the Navajo Reservation by the Federal Act, which land we shall hereafter refer to as the 'Aneth Extension' or the 'Extension' shall be expended by the State of Utah 'in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in Section 1 hereof (Aneth Extension), or for the benefit of the Indians residing therein. * * *'

FN2. '2202. Further Relief. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party where rights have been determined by such judgment.'

FN3. The findings of fact and the conclusions of law in conformity with which judgment was entered are reported in Sakezzie v. Utah

Indian Affairs Commission, D.C. Utah, 198 F.Supp. 218 (1961).

FN4. The court found among other things that 'The resident Indians travel on foot, by horseback or by pickup truck over existing roads which except for flash floods or unusual emergencies are generally adequate for their purposes, and which could be suitably improved for their purposes by a relatively small portion of the proposed expenditure for roads. A hard surface road as proposed from the vicinity of Montezuma Creek through Aneth to the Colorado line would be of some benefit to the Indians resident on the Extension but not in proportion to the proposed expenditure ($500,000) and would be of primary benefit to tourists, white persons within and without the area, business interests and the public in general. Moreover, the present proposal of the defendants calls for substantial expenditures for connecting road purposes outside of the Extension.' It was concluded that '* * * the State has general public duties with respect to the construction and maintenance of highway and road systems throughout the State of Utah and that while Congress was willing to assume that the expenditures from the fund for roads within the Extension would not unduly involve a conflict of interest that could not properly be resolved in the administration of the fund, this authority and the possible conflicts that would be involved otherwise were not intended to extend beyond the boundaries of the Extension in respect to roads. In any event, in view of the evidence, it is concluded that expenditures for the proposed road would not be such as to be for the benefit of those specified in the Federal statute and within its contemplation.'

FN5. At that time I said: 'We come finally to the tentatively committed funds for the construction of a road off the Aneth Extension. A further reference to the statute shows that * * * the expenditure of these funds is expressly authorized * * * in the building or maintenance of roads across the land 'described in Section 1 hereof'. Ordinarily it might well be concluded that the limitation of the power to spend for road purposes for roads across lands described in Section 1 * * * would simply be to relieve the State of any concern that they couldn't spend for roads across the Indian land. That would be taken for granted, and they wouldn't even have to have the determined benefits. Congress has established by law that that would be for the benefit of the Indians. And that would seem in a way a fair interpretation, leaving for determination of the Commission whether roads across other areas would be * * * But considering that these funds are in the nature of trust funds, that the State has the primary obligation on the part of all citizens of providing a system of public roads in connection with the Federal government, it well could have been the intent of Congress to limit the expenditure of funds for road purposes to these particular lands * * * If you get beyond these particular lands, then the duty of the State and the allocation and balance of that duty would lead to a morass of difficulty and would involve a real conflict of interest which would be avoided should the language of the Federal statute be given force, that is, that expenditures for road purposes are to be limited to the development of roads on the Aneth Extension * * * The problem is not free from doubt. But even though I should be in error with regard to this, I do not think that the evidence justifies a finding that connecting roads would be so for the benefit of the Indians involved here, as far as they are constructed off the Aneth Extension, as to be within the contemplation of the Federal Act.'

FN6. Sutherland Statutory Construction, 3rd Ed. § 4923, note 3; Union Ins. Co. v. United States, 6 Wall (73 U.S.) 759, 18 L.Ed. 879 (1867); State ex rel. v. Hooker, 22 Okl. 712, 98 P. 964 (1908); Marteney v. United States, 216 F.2d 760 (10 Cir., 1954).

FN7. Ash Sheep Co. v. United States, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507; United States v. Hallam, 304 F.2d 620 (10 Cir., 1962), citing Squire v. Copoeman, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883.

FN8. Sutherland Statutory Construction, 3rd Ed. § 4923. supra. Thus, in the construction of the Pennsylvania Clear Streams Act the court held that the use of 'or' between clauses prevented the second clause from acting as a limitation upon the first.

FN9. Webster's New International Dictionary, Second Edition, Unabridged defines tuition as '(1) protection; care, custody; esp., the care of a tutor or guardian over a pupil or ward; guardianship, now rare (2) the act or profession of teaching; the services of a teacher or teachers; instruction, as to give or seek tuition in latin; the fees for tuition; * * * (3) the price or payment for instruction * * *'

FN10. The declaratory judgment provided among other things that in the administering of the fund defendants occupy a position of trust and confidence toward the Indian beneficiaries and their conduct should be determined and judged by exacting fiduciary standards within the trust and discretion which Congress saw fit to repose in the agencies of the State in carrying out the purposes of Federal Acts; that in addition to general principles of reasonable care, honesty, good faith and loyalty incumbent upon the defendants, they owed the duty of making or withholding expenditures from said fund with the motivating purpose and intent to assist or benefit the beneficiaries identified in the statute and without regard to the interests or desires of other persons, agencies or groups, except as those reasonably and necessarily would be considered in the management and expenditure of funds by private trustee or owners thereof or as might be mandatorily required by the laws or public policy of the State. The declaratory judgment further declared that the proper administration of said fund requires an effective canvass, expression and consideration of the views of the beneficiaries; and the proper administration and expenditure of said fund makes desirable the availability to the beneficiaries and their representatives of reasonably accurate, complete and current information concerning the receipts, expenditures and projects of the defendants.

FN11. This duty is declared in the judgment and seems one inherent in the responsibilities of a Commission charge to act for the benefit of persons who, while wards of the government in a sense, cannot be considered as infants, incompetents or other persons acting under similar disabilities. It is interesting in this connection to note that Congress in setting up comprehensive legislation to guide the expenditure of gas royalties in Executive Order Indian Reservations, which with other similar statutes may be deemed in pari materia with the one in question, provided that the fund should be used for certain administrative expenses and for the use and benefit of the tribe of Indians for whose benefit the reservation was created, 'Provided, that said Indians, or their Tribal Council, shall be consulted in regard to the expenditure of such money * * *' The statute with which we are concerned does not make the entire Navajo Tribe beneficiaries and hence, by analogy, those residing on the Aneth Extension should be consulted.

FN12. The chairman of the Commission, despite the declaratory judgment to the contrary, persisted at the supplemental hearing in his view that the Commission had no duty to keep the Indians informed of the expenditure of these funds beyond permitting them to examine personally the State records. He said 'We haven't rendered an accounting to anyone except the State records.'

FN13. It has been recognized in another context that the general congressional intent is

to lodge with the responsible agency the power to adopt long range programs for Indian beneficiaries of trust funds which cannot be accomplished by disconnected efforts. Lane v. Morrison, 246 U.S. 214, 38 S.Ct. 252, 62 L.Ed. 674 (1918). But the discretion to adopt long range programs should not be permitted in line with defendants' argument to justify no program at all pending some possibility of further legislative enactment.

FN14. Senator Wallace F. Bennett, whose dedication to the legitimate interests of the Indians cannot be doubted, introduced the bill in question, S. 2384. It may be inferred from the record that this bill was initially introduced at the suggestion of Navajo Tribe Officers or the defendant Commission or both; but in any event it is apparent that Senator Bennett was not advised at the time of the viewpoint of the plaintiffs herein, since in a letter to the chairman of the Indian Affairs Sub-Committee he state that the bill was 'non-controversial'.

In a letter dated June 21, 1962, to Congressman David S. King, and apparently unsolicited by him, and signed by 'State Indian Affairs Commission by Frank J. Allen, Administrative Assistant' it is stated: 'Early in the session the subject bill was introduced to amend the act of March 1, 1933 * * * by permitting the state to use the royalty funds for the benefit of all the Navajo Indians on the reservation in Utah and would remove the restrictions upon the manner in which the money might be beneficially used.

'We feel the passage of this Bill is very much in the interest of the Navajo people in Utah because the lands added by the 1933 Act in the area north of the San Juan River have no settlements upon them and there are very few people who could be said to reside therein. There are settlements in the 1933 addition below the river but this area is very sparsely populated. Further, the language of the 1933 act seems to limit educational benefits to the payment of tuition * * *

'The Navajo Tribe has requested that we advise you of our conviction that this proposed amendment could be conducive of a more fruitful employment of the royalty funds by the State of Utah. There are presently very few beneficiaries (estimates are as low as 2,000) of this four million dollar fund.

'We should very much appreciate any assistance you can give in effecting the passage of S. 2384 in this session. You will doubtlessly receive additional communication on this subject from representatives of the Navajo Tribe in the near future.'

On June 26, 1962, Congressman Petersen acknowledged what apparently was a similar letter to him from Mr. Allen, the Congressman, letter being addressed to Mr. Allen as 'Administrative Assistant, State Indian Affairs Commission.'

On November 23, 1962 Senator Bennett wrote Mr. Allen stating that he 'would be happy to re-introduce the bill on which you wrote No. 21.' It is apparent from this letter that Mr. Allen was still pressing the matter, rather than merely being called on for comments.

FN15. McGee v. Mathis, 4 Wall 143, 71 U.S. 143, 18 L.Ed. 314.

FN16. The complaint in the main action alleged among other things that the plaintiffs were concerned that unless an order defining what may or may not be done with the fund is made the same will be expended and reduced without any material advantage to the plaintiffs and that a substantial part will be used to divert the benefit to persons not of plaintiffs' class and will place plaintiffs in the condition in which they lived prior to the time the fund came into existence. It was prayed among other things that the rights and legal relationship of the parties with respect to the fund be declared; that the plaintiffs be kept advised of receipts, expenditures and projects; that temporary restraints be entered as against expenditures from the fund and that such other, further or different relief as appeared to the court meet and equitable be granted.

FN17. The argument that this court assumed jurisdiction pursuant to Section 78-11-9 Utah Code Annotated, 1953, thus precluding the award of costs against the State of Utah, overlooks the fact that the Federal question jurisdiction pursuant to 28 U.S.C. § 1331 is involved, the State statute being involved only

against the possibility of the State claiming an interest in the fund in question and asserting sovereign immunity. The State has claimed no such interest and has not asserted sovereign immunity. No award of either costs or attorney's fees is made as against the State or anyone else other than out of the fund, in which the State claims no interest, and which has been held to be a trust fund for the benefit of the plaintiffs and those whom they represent. These funds do not belong to the State of Utah nor are they public funds anymore than the lands involved in Ash Sheep Co. v. United States, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507, supra, were public lands. See also Hanson v. United States, 153 F.2d 162 (10 Cir., 1946); 28 U.S.C.A. § 1331 as interpreted in Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70. See also Williams v. Clinton, 83 F.2d 143 (10 Cir., 1936); and Hanson v. Hoffman, 113 F.2d 780 (10 Cir., 1940), and United States v. Pierce, 235 F.2d 885 (9 Cir., 1956), cf. Viles v. Symes, 129 F.2d 828 (10 Cir., 1942), and State of Utah v. United States, 304 F.2d 23 (10 Cir., 1962). See also Anno.- Costs and Fees- Trust Litigation, 9 A.L.R.2d 1132; cf. Duchesne County v. State Tax Commission, 104 Utah 365, 140 P.2d 335 (1943).

FN18. Security Insurance Company of New Haven v. White, 236 F.2d 215, (10 Cir., 1956); cf. Edward B. Marks M. Corp. v. Charles K. Harris M. P. Co., 255 F.2d 518 (2 Cir., 1958); The State of Indiana et al. v. Springfield Township in Franklin County, 6 Ind. 83. See also 16 Am. Jur., Declaratory Judgments, § 78, pp. 342-343; Annotation 101 A.L.R. 689, and Lowe v. Harmon, 167 Or. 128, 115 P.2d 297 (Ore.1941).

FN19. The court found in the main action: 'Plaintiffs and those whom they represent live in mud hogans with dirt floors and with no utilities. They exist under common conditions of malnutrition and in such poverty as, measured by white men's standards, amount to abject and extreme want. They do not live in towns or communities, but rather their hogans are widely separated from each other, and they graze their livestock on land surrounding their hogans. The diet of these Indians consists primarily of meat which they secure from the animals which remain in their herds after they have sold what is deemed essential to provide funds for the other urgent necessities of life.'

FN20. The Secretary of the Commission testified that 'as long as there is a possibility of amendment we would have to see what the outcome was before we go ahead.' The chairman indicated that he accepted the statement of the head of the Navajo Tribal Council that it would be better to wait until it could be determined whether the expenditure of the fund could be for the benefit of all of the Navajos in San Juan County.

FN21. The judgment declared: 'That the determination of the needs and desires of the beneficiaries should not be dependent upon the views of officers or members of the Navajo Indian Tribe as a whole, although these views may be considered as among those that may throw light upon defendants' duties, together with these circumstances and views. It is necessary to bear in mind that the tribe as a whole is not the designated beneficiary of this fund and that its interests and views may in some respects be in conflict with the more pertinent interests and views of the beneficiaries. The tribe also has responsibilities to its members, including the beneficiaries of the fund, but said fund is not intended, and may not be used, for general tribal purposes.'

FN22. Perhaps of some little significance, but only as a sidelight in view of similar but more solid indications of the necessity of further relief, is the statement which it was testified Mr. Hurst, Field Representative of the defendant Commission, made to some of the Indians who call his attention to the

> declaratory judgment that he 'didn't pay any attention to a small court'. Mr. Hurst when he took the stand, either through oversight or design, failed to deny that he made such a statement.

D.C.Utah 1963.
Sakezzie v. Utah State Indian Affairs Commission
215 F.Supp. 12

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ADDENDUM C

H
Briefs and Other Related Documents

Supreme Court of the United States
UNITED STATES
v.
James JIM et al.
UTAH et al.
v.
James JIM et al.
Nos. 71-1509 and 71-1612.

Nov. 20, 1972.
Rehearings Denied Jan. 8, 1973.

See 409 U.S. 1118, 93 S.Ct. 893, 894.

A class action was brought on behalf of certain Indians seeking, inter alia, a declaration that a certain statute was an unconstitutional taking of property without just compensation. From a judgment of the United States District Court for the District of Utah, the United States appealed. The Supreme Court held that the 1933 Congressional Act adding certain lands in Utah to the Navajo Reservation and providing that if mineral resources should be produced 37 1/2% of net royalties should be paid to the state to be expended in tuition of Indian children in white schools, and providing by implication that remaining 62 1/2% of royalties should go to the Navajo tribe did not create constitutionally protected property rights, and hence 1968 Act which directed the state to expend the 37 1/2% of royalties 'for the health, education, and general welfare of the Navajo Indians residing in San Juan county,' which expanded the pool of beneficiaries substantially, was not an unconstitutional taking of property without just compensation.

Reversed.

Mr. Justice Douglas dissented and filed opinion.

West Headnotes

[1] Indians 209 ⚿10

209 Indians
209k9 Lands
209k10 k. Title and Rights to Indian Lands in General. Most Cited Cases
Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for common use and equal benefit of all the members.

[2] Eminent Domain 148 ⚿2.43

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.43 k. Indians. Most Cited Cases
(Formerly 148k2(1.1), 148k2(1))

Indians 209 ⚿12

209 Indians
209k9 Lands
209k12 k. Reservations or Grants to Indian Nations or Tribes. Most Cited Cases
The 1933 Congressional Act adding certain lands in Utah to the Navajo Reservation and providing that if mineral resources should be produced 37 1/2 % of net royalties should be paid to the state to be expended in tuition of Indian children in white schools, and providing by implication that remaining 62 1/2 % of royalties should go to the Navajo tribe did not create constitutionally protected property rights, and hence 1968 Act which directed the state to expend the 37 1/2 % of royalties "for the health, education, and general welfare of the Navajo Indians residing in San Juan county," which expanded the pool of beneficiaries substantially, was not an unconstitutional taking of property without just compensation. Act May 17, 1968, 82 Stat. 121; U.S.C.A.Const. Amend. 5.

****262 *80** PER CURIAM.

The motion of the Navajo Tribe of Indians for leave to file a brief as amicus Curiae in No. 71-1509, is granted.

These cases are here on appeal from a judgment of the District Court for the District of Utah that declared an Act of Congress to be unconstitutional. Jurisdiction in this Court is conferred by 28 U.S.C. ss 1252 and 2101(a).

In 1933, the Congress withdrew certain lands in Utah, known as the 'Aneth Extension,' from the public domain and added them to the Navajo Reservation. Though no oil or gas was believed to be located on these lands, it was provided that should such mineral resources be produced in commercial quantities, '37 1/2 per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: Provided, That said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children ***81** in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.' 47 Stat. 1418. The remaining 62 1/2% of the royalties generated by any such tribal mineral leases were, by implication, to go to the Navajo tribe.

After the passage of the Act, oil and gas were discovered on the Aneth Extension, and royalties were divided pursuant to the statute. The State of Utah created an Indian Affairs Commission to manage and expend the funds received by the State under the Act. As time went on, the language of the 1933 Act came to create administrative problems regarding the expenditure of the funds channeled through the State. A report of the Senate Committee on Interior and Insular Affairs noted in 1967 that the word 'tuition' in the 1933 Act had created uncertainty as to the breadth of the educational program the State was authorized to finance from the royalty funds. The report also noted a difficulty in discerning precisely who was properly a beneficiary of the funds, since 'many Navajo families do not live permanently within the lands set aside in 1933, but move back and forth between this area and other locations.' S.Rep.No.710, 90th Cong., 1st Sess., 2 (1967).

To make the administration of these funds more flexible and to spread the benefits of the royalties more broadly among the Navajo community, the Congress enacted a statute in 1968 that directed the State to expend the 37 1/2% of royalties 'for the health, education, and general welfare of the Navajo Indians residing in San Juan County.' 82 Stat. 121. This statutory change expanded the pool of beneficiaries substantially, and a class action was brought on behalf of the residents of the Aneth Extension, seeking inter alia a declaration that the statute was an unconstitutional taking of property without just compensation. The District Court concluded that the ***82** 1933 Act vested certain property rights in the plaintiffs, and held the ****263** 1968 Act, with its changed pool of beneficiaries, to be unconstitutional.[FN1]

FN1. The decision of the District Court is unreported.

[1] The judgment of the District Court is in error. Congress in 1933 did not create constitutionally protected property rights in the appellees. The Aneth Extension was added to a tribal reservation, and the leases which give rise to mineral royalties are tribal leases. It is settled that '(w)hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.' Cherokee Nation v. Hitchcock, 187 U.S. 294, 307, 23 S.Ct. 115, 120, 47 L.Ed. 183; Delaware Indians v. Cherokee Nation, 193 U.S. 127, 136, 24 S.Ct. 342, 345, 48 L.Ed. 646. To be sure, the 1933 Act established a pattern of distribution which benefited the appellees more than other Indians on the Navajo Reservation.[FN2] But it was well within the power of Congress to alter that distributional scheme.[FN3] In Gritts v. Fisher, 224 U.S. 640, 32 S.Ct. 580, 56 L.Ed. 928, this Court approved a congressional enlargement of the pool of Indians who were to benefit from a distribution of tribal property. There, too, an earlier statute had established a more limited entitlement.

FN2. While the 1933 Act remained in effect, the District Court properly insisted that the Utah State Indian Affairs Commission comply

with the statutory formula for disbursements. See Sakezzie v. Utah Indian Affairs Comm'n, 198 F.Supp. 218 (declaratory judgment); 215 F.Supp. 12 (supplemental relief).

FN3. We intimate no view as to the rights a tribe might have if Congress were to deprive it of the value of mineral royalties generated by tribal lands.

'But it is said that the act of 1902 contemplated that they (the beneficiaries under the first enactment) alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt *83 such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly-born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when 'it is only an act of Congress, and can have no greater effect.' . . . It was but an exertion of the administrative control of the government over the tribal property of tribal Indians. and was subject to change by Congress . . ..' Id., at 648, 32 S.Ct. 580, 583.

[2] Congress has not deprived the Navajo of the benefits of mineral deposits on their tribal lands. It has merely chosen to re-allocate the 37 1/2% of royalties which flow through the State in a more efficient and equitable manner. This was well within the power of Congress to do. As no 'property,' in a Fifth Amendment sense, was conferred upon residents of the Aneth Extension by the 1933 Act, no violation of the Fifth Amendment was effected by the 1968 legislation. The judgment of the District Court is reversed.

Reversed.

Mr. Justice DOUGLAS, dissenting.

Plaintiffs below are a class of Indians with a membership of 1,500. They are a mixture of Navajo and Piute and live in an area of the Navajo Reservation called the Aneth Extension, made part of that reservation in a 1933 Act of Congress. 47 Stat. 1418. In 1968 Congress amended that Act, 82 Stat. 121, and the District Court for the District of Utah declared the amendment unconstitutional.

Prior to 1933 the Extension was part of the public lands of the United States. The area was occupied by the direct ancestors of the appellees.

*84 The Indians in the Aneth Extension number about 1,500 people who are **264 primitive Navajos with some mixture of Piute blood. See Sakezzie v. Utah Indian Affairs Comm'n, 198 F.Supp. 218, 220. They live in a remote and relatively inaccessible area with an average annual income per family of $240. Ibid. The Aneth Extension is in San Juan County and the 1933 Act stated: '(N)o further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county'.

The white man was unconcerned about this domain until oil was discovered; and then he became quite active. By June 30, 1970, the royalties owing the Aneth Extension Indians had increased to $7,039,022.32. Of this, $78,000 was used to pipe water from the Aneth Extension to the adjoining lands of a white man, an 'improvement' that only incidentally aided the resident Indians. Another $27,000 of Indian funds was spent for the construction of an airport and connecting road, which substantially benefited a white man's private dude ranch operation. Some $10,000 or more was expended for administrative purposes by Utah. 198 F.Supp., at 221. When this suit was started, additional expenditures were about to be made: $175,000 to a federal agency to locate isolated water springs on the Aneth Extension and $500,000 to build a hard-surfaced road outside the boundaries of the Extension.

These primitive Navajos wanted the money used to purchase high-elevation ranges where they might have summer grazing for the livestock and thus realize a round-the-year livestock operation. Judge Christensen found that members of the Aneth Extension were the sole beneficiaries of the fund and that it should be administered with their wishes in mind.

*85 But there are tensions and conflicts between these

primitive Navajos who live on the Aneth Extension and other members of the tribe who live elsewhere. 198 F.Supp., at 221.

The State Commission did not comply with the District Court's order but sponsored legislation to extend the benefits of the fund to other Indians. [FN1] Judge Christensen ruled again that the fund was solely for the benefit of members of the Aneth Extension. Sakezzie v. Utah State Indian Affairs Comm'n, 215 F.Supp. 12. Neither opinion was appealed. But the State Commission promoted legislation to extend the benefits of the 1933 Act to other Indians. Id., at 20.

FN1. The Act admitting Utah to the Union provided:
'That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States'. 28 Stat. 108.

The problems the Commission had in administering the fund reached Congress and in 1968 the contested amendment was passed. 82 Stat. 121. This amendment indicates that money must be used by the State of Utah 'for the health, education, and general welfare of the Navajo Indians residing in San Juan County' and that 'Contribution may be made to projects and facilities within said area that are not exclusively for the benefits of the beneficiaries hereunder in proportion to the benefits to be received therefrom by said beneficiaries, as may be determined by the State of Utah . . ..' Ibid., (Emphasis added.)

The 1933 Act gave title to the land and right to the fund, not to the tribe of the Navajo, but to the Aneth *86 community.[FN2] I do not believe that under the **265 circumstances of this case Congress had the power to expand the class of beneficiaries to include the whole tribe.

FN2. That Act (47 Stat. 1418), after describing the Aneth Extension by metes and bounds, provided that those public lands 'be, and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: Provided, That no further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county under the Act of July 4, 1884 (23 Stat. 96; U.S.C., title 43, sec. 190). Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37 1/2 per centum of the net royalties accuring therefrom derived from tribal leases shall be paid to the State of Utah: Provided, That said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.'

The occupants of the Extension have been a separate community for many generations. Their claim of right by continuous possession precedes the transfer of title by the United States Government. Congress made provision for the Secretary of the Interior to place other tribes on the land and, if he did, their claim would be based on territory, not membership. Since the rights were vested in those who lived on the Aneth Extension, I do not see how they can be extended to outsiders.

In Gritts v. Fisher, 224 U.S. 640, 32 S.Ct. 580, 56 L.Ed. 928, the Court upheld the power of Congress to expand the beneficiaries of certain Indian land to the children of those who already enjoyed those rights. Here the expansion is not limited to those of the same blood line. But, more important, Congress had a different legal relation to the Cherokees than it does to the appellees. '(T)he members of this tribe were wards of the United

States, which was fully empowered, whenever it seemed wise to do so, to assume full control ***87** over them and their affairs, to determine who were such members, to allot and distribute the tribal lands and funds . . ..' Id., at 642, 32 S.Ct., at 581. The 1933 Act states that the lands 'are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon'. 47 Stat. 1418. That would seem to freeze the existing legal rights in that area of the Aneth Extension to the inhabitants. The legal effect seems like a disclaimer on the part of the United States of any right in either the land or the minerals. It is difficult for me to see how Congress has power to change the scheme without payment of just compensation. After all, Indians are beneficiaries of the Due Process Clause of the Fifth Amendment. United States v. Creek Nation, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331; Shoshone Tribe of Indians v. United States, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360. They too are people, not sheep or cattle that can be given or denied whatever their overseer decrees.

Indians are also beneficiaries of the Just Compensation Clause of the Fifth Amendment. Chippewa Indians of Minnesota v. United States, 305 U.S. 479, 59 S.Ct. 313, 83 L.Ed. 300; United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219; Sioux Tribe of Indians v. United States, 316 U.S. 317, 62 S.Ct. 1095, 86 L.Ed. 1501. When there is a taking of Indian lands, the compensation must take into account the mineral rights which are part of the lands. United States v. Shoshone Tribe of Indians, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1213. What then constitutes a taking? The majority finds no taking because ownership already existed in the Navajo tribe. The 1933 Act states, however, that all lands are 'hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon', 47 Stat. 1418. That Act plainly indicates that only those residing on that tract, not the tribe as a whole, were the beneficiaries.

***88** If the royalty granted by the 1933 Act had been to the Standard Oil Co. or any other producer of oil, no one would dare ****266** say that the royalty could be assigned by a subsequent Congress to an oil consortium without payment of just compensation. Whenever we have made grants of public lands or interests therein to Indians the Court has held that the fact that Indians are wards and the United States a guardian does not make the Indian title defeasible. The Court in Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113, 39 S.Ct. 185, 186, 63 L.Ed. 504, held that if the United States were allowed to take lands from Indians, '(t)hat would not be an exercise of guardianship, but an act of confiscation.'

In United States v. Creek Nation, 295 U.S., at 109-110, 55 S.Ct., at 684, the Court said:
'The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming an obligation to render, just compensation for them . . ..'

The present cases are close to Shoshone Tribe of Indians v. United States, 299 U.S. 476, 57 S.Ct. 244, where Congress repeatedly put Arapahoes on Shoshone lands acquired under a treaty. This Court, speaking through Mr. Justice Cardozo, allowed damages to the Shoshones:
'Confusion is likely to result from speaking of the wrong to the Shoshones as a destruction of their ***89** title. Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. . . . What those incidents are, it is needless to consider now. . . . The right of occupancy is the primary one to which the incidents attach and division of the right with strangers is an appropriation of the land pro tanto, in substance, if not in form.' Id., at 496, 57 S.Ct., at 251.

And quoting from United States v. Cook, 19 Wall. 591, 22 L.Ed. 210, Mr. Justice Cardozo added, 'The right of

the Indians to the occupancy of the lands pledged to them may be one of occupancy only, but it is 'as sacred as that of the United States to the fee.'' Id., at 497, 57 S.Ct., at 252.

What power remains in Congress after the express purpose of the Act 'permanently (to) withdraw' the lands from disposal?

Public lands are usually subject to disposition by patent and upon its issuance, control over the transaction ceases and the patent can only be set aside by judicial proceedings in the courts. Michigan Land & Lumber Co. v. Rust, 168 U.S. 589, 18 S.Ct. 208, 42 L.Ed. 591; Moore v. Robbins, 96 U.S. 530, 24 L.Ed. 848. Thus, when Congress passed legislation giving public lands to the railroads, it was considered a contract which could not be broken by Congress when it sought to use the lands as a water-power site, Payne v. Central Pacific R. Co., 255 U.S. 228, 41 S.Ct. 314, 65 L.Ed. 598, nor could the Secretary reclaim the property. United States v. Northern Pacific R. Co., 256 U.S. 51, 41 S.Ct. 439, 65 L.Ed. 825; Santa Fe Pacific R. Co. v. Fall, 259 U.S. 197, 199, 42 S.Ct. 466, 467, 66 L.Ed. 896. An entryman on a homestead claim does not achieve title until certain time and work conditions are met. 43 U.S.C. ss 161-165. Yet, during this period he has the right to exclusive possession and use, unless the patent was secured by fraud. Patents *90 are not issued in oil and gas exploration but leases are. 30 U.S.C. s 226. But that fact does not affect the power to cancel the leases. That can only be done by a failure of the lessee to comply with the lease, the statute, and regulations.**267 30 U.S.C. s 188. Pan American Petroleum Corp. v. Pierson, 10 Cir., 284 F.2d 649.

Until lands are patented, title remains in the United States. Yet even before a patent issues the claims are valid against the United States if there has been a discovery of mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met.' Best v. Humboldt Mining Co., 371 U.S. 334, 336, 83 S.Ct. 379, 382, 9 L.Ed.2d 350.

The devices for doing the Indians in, when it comes to royalties in gas or oil lands, are numerous. See White v. Sinclair Prairie Oil Co., 10 Cir., 139 F.2d 103. But the owners of oil and gas interests (whether those interests be legal or equitable) normally have an interest separate and apart from the land where the oil and gas are discovered. See Lane v. Hughes, Tex.Civ.App., 228 S.W.2d 986; 3 E. Kuntz, Oil and Gas, cc. 38 and 42 (1967); V. Kulp, Oil and Gas Rights s 10-36 et seq. (1954). It is strange law, indeed, when the guardian (the United States) is allowed to do in the wards (the Indians) by depriving them of their equitable interest in the oil royalties which had been granted or by reducing their share of the royalties granted.

The problems of this case are typical of those that have plagued the Indians from the beginning. We should put the cases down for oral argument to make certain that these primitive Navajos receive the full benefit of the law.

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U. S. v. Jim
409 U.S. 80, 93 S.Ct. 261, 34 L.Ed.2d 282

Briefs and Other Related Documents (Back to top)

- 1972 WL 136457 (Appellate Brief) Appellees' Motion to Affirm and Brief in Support Thereof (Oct. 21, 1972) Original Image of this Document (PDF)
- 1972 WL 136463 (Appellate Brief) Appellees' Motion to Affirm and Brief in Support Thereof (Oct. 04, 1972) Original Image of this Document (PDF)
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- 1971 WL 134338 (Appellate Brief) Reply of the State of Utah, et al., Appellants, to Appellees Motion to Affirm Decree and Brief in Support Thereof (Jan. 01, 1971) Original Image of this Document (PDF)

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ADDENDUM D

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United States Court of Appeals,Tenth Circuit.
Jake C. PELT, Dan Benally, Jim Benally, Helen Cly, and Fred Johnson for themselves and on behalf of a class of persons consisting of all Navajo Indians residing in San Juan County, Utah, including a sub-class of persons consisting of all other Indians the Secretary of the Interior saw fit to settle on lands described in the 1933 Act prior to May 17, 1968,
Plaintiffs-Appellants,
andthe Navajo Nation, Intervenor-Appellant,
v.
STATE OF UTAH, Defendant-Appellee.
Nos. 95-4135, 95-4136.

Dec. 31, 1996.

Navajo residents of county in which Aneth Extension to Navajo Reservation was located brought state court action challenging administration by State of Utah of oil and gas royalty fund established by 1933 Act, as amended in 1968, adding Extension to Reservation. State removed action and moved to dismiss. Residents sought partial summary judgment on Eleventh Amendment grounds and moved for remand to state court. State waived immunity. Navajo Nation filed complaint in intervention. The United States District Court for the District of Utah, David Sam, J., dismissed for failure to state cause of action. Residents and Nation appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) 1933 Act, as amended, created discretionary trust for benefit of Navajos residing in county, thus granting implied right of action to beneficiaries to complain of state's breach of fiduciary duty, and (2) Nation lacked ownership interest in fund and thus could not stand in place of United States to enforce 1933 Act in favor of residents.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Statutes 361 ⚿215

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k215 k. Contemporary Circumstances. Most Cited Cases
In ascertaining Congress' intent in enacting statute, court may examine circumstances surrounding problems that Congress was addressing.

[2] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Standard of review from dismissal of complaint for failure to state cause of action for which relief may be granted is de novo.

[3] Federal Civil Procedure 170A ⚿1773

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)3 Pleading, Defects In, in General
170Ak1773 k. Clear or Certain Nature of Insufficiency. Most Cited Cases
Dismissal for failure to state a cause of action is inappropriate unless plaintiff can prove no set of facts in support of his claims to entitle him to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] Federal Courts 170B ⚿763.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on

Nature of Decision Appealed from
170Bk763.1 k. In General. Most Cited Cases
Court of Appeals owes no deference to district court's ruling in dismissing complaint for failure to state a cause of action, and thus scrutinizes complaint from same perspective as district court. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[5] Federal Civil Procedure 170A ⚿1771

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)3 Pleading, Defects In, in General
170Ak1771 k. In General. Most Cited Cases
Granting motion to dismiss for failure to state cause of action must be cautiously studied, not only to effectuate spirit of liberal rules of pleading but also to protect interests of justice. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[6] Action 13 ⚿3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
Cort test of whether party has implied right of action requires determination of whether statute creates federal right in favor of party, whether there is any explicit or implicit legislative intent favoring creation or denial of right, whether right is consistent with legislative scheme and its underlying purposes, and whether cause of action is one traditionally relegated to state law in area that is basically of state concern, making it inappropriate to infer cause of action based solely on federal law; test examines whether right of action necessarily and logically flows from statute at issue and whether that right would unduly implicate federalism concerns by impinging upon state's police powers.

[7] Indians 209 ⚿16.10(2)

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
1933 Act adding Aneth Extension to Navajo Reservation, which reserved 37 1/2 % of any oil and gas royalties derived therefrom to be expended by State of Utah for benefit of Extension's residents, was enacted for special benefit of Aneth Navajos and thus created federal right in their favor, which was not curtailed by 1968 amendment expanding class of beneficiaries to include all Navajo residents of county. Act of March 1, 1933, § 1 et seq., 47 Stat. 1418 as amended.

[8] Statutes 361 ⚿181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 ⚿217.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative History in General. Most Cited Cases
Legislative intent can be divined as well from examination of legislative design as from legislative history.

[9] Trusts 390 ⚿247

390 Trusts
390IV Management and Disposal of Trust Property
390k245 Actions Between, By, or Against Trustees
390k247 k. Right of Action by Beneficiary. Most Cited Cases
No title is necessary to have equitable cause of action as beneficiary of trust fund, as beneficiary's interest extends only so far as is within settlor's intention. Restatement (Second) of Trusts § 128.

[10] Action 13 ⚿3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
By transferring property from United States government to state of Utah and limiting state's discretion by defined set of priorities on behalf of defined set of beneficiaries, 1933 Act, which diverted to state 37 1/2 % of oil and gas royalties from Aneth Extension to Navajo Reservation and required that fund be expended for tuition of Indian children, construction of roads across Extension, or benefit of its Indian residents, created structure like that of common-law trust, implying beneficiaries' cause of action against state in event of breach, even though term "trust" did not appear in Act. Act of March 1, 1933, § 1 et seq., 47 Stat. 1418 as amended; Restatement (Second) of Trusts § 2.

[11] Federal Courts 170B ⚿266.1

170B Federal Courts
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
170BIV(A) In General
170Bk266 Waiver of Immunity
170Bk266.1 k. In General. Most Cited Cases

Indians 209 ⚿27(1)

209 Indians
209k27 Actions
209k27(1) k. Rights of Action. Most Cited Cases

States 360 ⚿4.16(3)

360 States
360I Political Status and Relations
360I(A) In General
360k4.16 Powers of United States and Infringement on State Powers
360k4.16(3) k. Surrender of State Sovereignty and Coercion of State. Most Cited Cases
"Clear statement rule," that federal encroachment upon state's sovereignty may be made only by clear statement of congressional intent to do so, applied in contexts of Tenth and Eleventh Amendments, neither of which presented live controversy, and thus did not preclude Court of Appeals' finding that Navajo residents of San Juan County, Utah, had cause of action against state for breach of fiduciary duty with respect to disbursement of oil and gas royalty fund, where state affirmatively waived Eleventh Amendment immunity in defense of its removal of action and issue of whether 1933 Act creating fund violated Tenth Amendment was not addressed by district court. U.S.C.A. Const.Amends. 10, 11; Act of March 1, 1933, § 1 et seq., 47 Stat. 1418 as amended.

[12] Action 13 ⚿3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
Statutory scheme and legislative history of 1933 Act, which added Aneth Extension to Navajo Reservation and reserved portion of royalty fund from tribal oil and gas leases for benefit of residents of extension, together with subsequent legislative acquiescence in fund beneficiaries' right of action in 1968 amendment, in which Congress took cognizance of prior caselaw that found trust relationship, ordered state to account to beneficiaries, and did not restrict availability of cause of action for breach of trust, supported finding that Act, as amended, created implied right of action in fund beneficiaries for breach of trust. Act of March 1, 1933, § 1 et seq., 47 Stat. 1418 as amended.

[13] Action 13 ⚿3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
Even though trust law ordinarily was state concern, federal statute creating oil and gas royalty fund to be administered by State of Utah on behalf of Navajo beneficiaries concerned care of Native Americans, a uniquely federal question, and it therefore was not inappropriate to infer cause of action for breach of

fiduciary duty based solely on federal law. Act of March 1, 1933, § 1 et seq., 47 Stat. 1418 as amended.

[14] Indians 209 ⇐16.10(2)

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
1933 Act adding Aneth Extension to Navajo Reservation, which reserved to State of Utah a portion of any oil and gas royalties accruing therefrom to be administered for benefit of Aneth Navajos, as amended in 1968 to extend benefits to all Navajos within San Juan County, created discretionary trust for benefit of San Juan Navajos with state as trustee and royalty fund as res and, thus, class action on behalf of all Navajo residents of county against state for breach of fiduciary duty stated claim upon which relief could be granted. Act of March 1, 1933, § 1 et seq., 47 Stat. 1418 as amended.

[15] Indians 209 ⇐16.10(2)

209 Indians
209k9 Lands
209k16.10 Mineral Rights and Management
209k16.10(2) k. Leases. Most Cited Cases
Navajo Nation lacked federal common-law claim against State of Utah for mismanagement of percentage of oil and gas royalties generated by Aneth Extension to Navajo Reservation, as Nation never possessed ownership interest in such proceeds, where Congress reserved portion of oil and gas revenues, transferring ownership interest in them to State of Utah to hold as trustee for benefit of Aneth Extension Navajos, when it added federal public lands to Reservation. Act of March 1, 1933, § 1 et seq., 47 Stat. 1418 as amended.

[16] Indians 209 ⇐27(1)

209 Indians
209k27 Actions
209k27(1) k. Rights of Action. Most Cited Cases
Statute granting federal district courts original jurisdiction of civil actions brought by Indian tribes under laws of United States did not give Navajo Nation the right to challenge, on grounds that jurisdictional statute allowed Nation to assert any claim that United States could raise on its behalf, administration by State of Utah of oil and gas royalty fund on behalf of Navajo residents of San Juan County under 1933 Act, as amended, which added Aneth Extension to Navajo Reservation and established fund for benefit of San Juan Navajos, as there was no action that United States could bring on behalf of Nation with respect to fund, where Nation's right under 1933 Act was limited to role in planning expenditures on behalf of beneficiaries. 28 U.S.C.A. § 1362; Act of March 1, 1933, § 1 et seq., 47 Stat. 1418 as amended.

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Lois J. Schiffer, Assistant Attorney General, (Edward J. of Justice, Washington DC, on the brief), for United States of America as amicus curiae.

Before BALDOCK, HOLLOWAY, and MURPHY, Circuit Judges.
BALDOCK, Circuit Judge.
In these appeals, we must determine whether An Act to Permanently Set Aside Certain Lands in Utah as an Addition to the Navajo Indian Reservation, and for Other Purposes, 47 Stat. 1418 (1933), *as amended by* Pub.L. No. 90-306, 82 Stat. 121 (1968) (hereinafter "the 1933 Act"),[FN1] implied a cause of action for breach of fiduciary duty. Jake C. Pelt, Dan Benally, Jim Benally, Helen Cly, and Fred Johnson (hereinafter "Plaintiffs"), beneficiaries of a government fund created by the 1933 Act, assert that the district court erred by

dismissing their complaint against Defendant State of Utah. The Navajo Nation (hereinafter "Tribe") claims that the district court also erred in dismissing its complaint in intervention. The district court dismissed Plaintiffs' and the Tribe's complaints pursuant to Rule 12(b)(6), holding that they failed to state a claim upon which relief could be granted. Plaintiffs argue that the 1933 Act created a trust and a private cause of action in favor of the beneficiaries and that the district court erred by utilizing the "clear statement" rule in dismissing the complaint.[FN2] The Tribe asserts that it does have its own cause of action and that it may stand in the place of the United States to enforce the 1933 Act. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FN1. The Act's relevant portion states:

> Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37 1/2 per cent of the net royalties accruing therefrom derived by tribal leases shall be paid to the State of Utah: Provided, That said 37 1/2 per cent of said royalties shall be expended by the State of Utah for the health, education, and general welfare of the Navajo Indians residing in San Juan County. Planning for such expenditures shall be done in cooperation with the appropriate departments, bureaus, commissions, divisions, and agencies of the United States, the State of Utah, the County of San Juan in Utah, and the Navajo Tribe, insofar as it is reasonably practicable, to accomplish the objects and the purposes of this Act. Contribution may be made to projects and facilities within said area that are not exclusively for the benefits of the beneficiaries hereunder in proportion to the benefits received therefrom by said beneficiaries, as may be determined by the State of Utah through its duly authorized officers, commissions, and agencies.
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> An Act to Permanently Set Aside Certain Lands in Utah as an Addition to the Navajo Indian Reservation, and for Other Purposes, 47 Stat. 1418 (1933), *as amended by* Pub.L. No. 90-306, 82 Stat. 121 (1968).

FN2. Plaintiffs and the Tribe also argue that based on three previous cases, *United States v. Jim*, 409 U.S. 80, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972), *Bigman v. Utah Development Corp.*, No. C-77-0031 (D.Utah Sept. 25, 1977), and *Sakezzie v. Utah Indian Affairs Comm'n*, 198 F.Supp. 218 (D.Utah 1961) *supp. op.* 215 F.Supp. 12 (1963), collateral estoppel and res judicata preclude the State's litigation of the questions of whether a right of action exists and in whom any cause resides. As to Plaintiffs, it is unnecessary for us to decide this question in light of our holding today. As to the Tribe, there is a total lack of identity of issues as none of the previous suits involved the question of tribal standing to enforce rights under the 1933 Act. Thus, application of collateral estoppel would be inappropriate. *Corp.*, 46 F.3d 975, 978 (10th Cir.1995) (explaining that "collateral estoppel requires an identity of issues raised in successive proceedings and the determination of these issues by a valid final judgment to which such determination was essential").

I.

[1] We must determine the allocation of rights and responsibilities arising from the Act of March 1, 1933, 47 Stat. 1418 (1933) *as amended by* Pub.L. No. 90-306, 82 Stat. 121 (1968), which added a portion of land called the Aneth Extension to the Navajo Reservation. The crux of the dispute concerns Congress'***1538** intention in passing these laws. In ascertaining Congress' intent, it is helpful to examine the circumstances surrounding the problems that Congress was addressing. *See Commissioner v. Engle*, 464 U.S. 206, 217, 104 S.Ct. 597, 604, 78 L.Ed.2d 420 (1984) ("The circumstances of the enactment of particular legislation may be particularly relevant" to the interpretation of a statute). We thus begin with a brief look at the history of the Navajo Tribe and its dealings with the United States of America.

Although the subject of some disagreement, we know that Athapaskan speaking people, the predecessors of the Apache and the Navajo tribes, arrived in the Southwest sometime after the eleventh century A.D. 10 *Handbook of North American Indians* 508 (Alfonso Oritz ed.1983). The Navajo immigration to the Southwest was not in the manner of a mass movement, but rather was a piecemeal journey by smaller groups. Ruth M. Underhill, *The Navajos* 12-13 (1956). The Navajos' predecessors had led a nomadic life of hunting and fishing. *Id.* at 5-6. By the late eighteenth century, the Navajos had established a society which relied heavily on sheepherding for sustenance. *Id.* at 59-60. Thus, the members traveled and lived in small clan-oriented groups. *Id.* At the time of the United States' entry into the Southwest in the 1840s, the Navajo culture was characterized by a scattered settlement pattern and lacked any centralized form of tribal government. Aubrey W. Williams, Jr., *Navajo Political Process* 4 (1970). In 1864, United States' conflicts with the Navajo people had culminated in the decision to relocate them to Bosque Redondo in the New Mexico territory, away from their homelands. Gerald Thompson, *The Army and the Navajo* 27 (1976). By March of 1865, over 9,000 Navajos had been relocated by Kit Carson and were forced to live communally at Bosque Redondo, *Handbook, supra,* at 51, thus fostering a sense of tribal unity in the Navajos who were there. Thompson, *supra,* at 164. However, a number of Navajo clans refused to be relocated and fled north into areas in present-day Utah; one such area is the Aneth Extension. *Addition to the Western Navajo Indian Reservation: Hearings on S. 3782 Before the Committee on Indian Affairs,* 71st Cong., 2d Sess. 2, 13 (1930); *see also Handbook, supra,* at 514. This varied history has led to an alleged divergence in the interests of the residents of the Aneth Extension and the Tribe. In fact, until the 1933 Act was passed, the majority of residents of Aneth had never lived on the Navajo Reservation. *Hearings on S. 3782, supra,* at 13.

In 1930, a bill was introduced in the Senate to add the Aneth Extension to the Navajo Reservation. The bill provided that 37 1/2 % of any net oil and gas royalties accruing from the Aneth Extension be paid to Utah "Provided, That ... said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the [Aneth Extension], or for the benefit of the Indians residing therein." 47 Stat. 1418. Notable royalties first began to be generated from these lands in the 1950s. *Sakezzie* 198 F.Supp. 218, 219-20 (D.Utah 1961) *supp. op.* 215 F.Supp. 12 (1963). Soon after the beginning of major oil and gas production in these areas, disputes began to arise as to what purposes the fund monies should be applied. *See generally id.* These disagreements culminated in a lawsuit commenced by the beneficiaries of the fund against the Utah Indian Affairs Commission, Utah's administrative body responsible for the fund. *Id.* at 219. In *Sakezzie,* the beneficiaries challenged a number of spending decisions made by the commission. *Id.* at 220-23. Ultimately, the District Court for Utah rendered a decision wherein it required the State to make an accounting of the funds and their expenditure and construed the statute so as to restrict certain uses of the fund and expand the availability of other uses. *See id.* at 225-26. In partial response to these past disputes, the 1933 Act was amended in 1968 [FN3] to address three perceived problems:

> FN3. The 1968 Act stated that the 1933 Act: is amended by deleting all of that part of the last proviso of said section 1 after the word "Utah" and inserting in lieu thereof: for the health, education, and general welfare of the Navajo Indians residing in San Juan County. Planning for such expenditures shall be done in cooperation with the appropriate departments, bureaus, commissions, divisions, and agencies of the United States, the State of Utah, the County of San Juan in Utah, and the Navajo Tribe, insofar as it is reasonably practicable, to accomplish the objects and the purposes of this Act. Contribution may be made to projects and facilities within said area that are not exclusively for the benefits of the beneficiaries hereunder in proportion to the benefits received therefrom by said beneficiaries, as may be determined by the State of Utah through its duly authorized officers, commissions, and agencies. An

> annual report of its accounts, operations, and recommendations concerning the funds received hereunder shall be made by the State of Utah through its duly authorized officers, commissions, or agencies, to the Secretary of the Interior and to the area director of the Bureau of Indian Affairs for the information of said beneficiaries.
> Pub.L. No. 90-306, 82 Stat. 121 (1968) (hereinafter "1968 Amendment").

*1539 First, differences in interpretation of the word "tuition" in the statute have resulted in litigation which leaves the commission in doubt as to how broad an educational program it may administer, especially in areas not now covered by federal school aid legislation. Second, road construction is difficult to plan when the roads under construction may be built only within rather narrowly defined areas. Third, many Navajo families do not permanently reside within the lands set aside in 1933, but move back and forth between this area and other locations. The 1933 Act requires that [Navajos] be 'residents' in order to qualify for help in the expenditure of the commission's funds, thus disqualifying a number of Indians from the commission programs....
S.Rep. No. 710, 90th Cong., 1st Sess. 2 (1967). In response to the passage of the 1968 Amendment, a number of fund beneficiaries [FN4] brought suit claiming that the 1968 Amendment, because it expanded the group of beneficiaries, unconstitutionally deprived them of property without compensation. *United States v. Jim*, 409 U.S. 80, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972) (per curiam). The Supreme Court, in *Jim*, held that these beneficiaries had no vested property interest and thus no property within the Fifth Amendment. In 1978, the beneficiaries brought suit in *Bigman v. Utah Navajo Dev. Council, Inc.*, No. C-77-0031 (D.Utah Sept. 25, 1978), alleging misuse of trust funds. This case terminated in a consent decree requiring an accounting of the funds spent. Finally, in 1992, Plaintiffs brought the present suit in order to once again challenge the manner of disbursement and handling of trust funds. With this background in mind, we turn to the resolution of the case at bar.

FN4. Under the 1933 Act, the beneficiary class was comprised of Navajo residents of the Aneth Extension, a small parcel of land lying within San Juan County. The 1968 Amendment expanded this class to include all Navajo residents of San Juan County.

II.

In June 1992, Plaintiffs filed a verified complaint in Utah state court alleging that the State had breached various fiduciary duties during its administration of the San Juan County Navajo royalty fund. The State then removed the case to federal district court and filed a motion to dismiss the complaint pursuant to Rules 12(b)(6) and 12(b)(7). The motion asserted that Plaintiffs did not have a private cause of action, did not have standing to bring this action, and that Plaintiffs had failed to join indispensable parties, namely, the United States and the Navajo Tribe. Plaintiffs responded by filing a motion for partial summary judgment on the same issues. Subsequently, Plaintiffs filed a motion to remand to state court for lack of jurisdiction claiming that the Eleventh Amendment barred the litigation of this monetary damages suit in the federal courts. The State responded by affirmatively waiving its Eleventh Amendment immunity in this case. After briefing was concluded on the motions for summary judgment and to dismiss, the district court ordered Plaintiffs to invite the United States and Navajo Tribe to intervene. The United States declined to intervene,[FN5] but the Navajo Nation Tribe filed a complaint in intervention to which the State responded with a motion to dismiss on the same grounds as were raised in its motion to dismiss Plaintiffs' complaint. At the ***1540** conclusion of briefing, the district court ruled that neither Plaintiffs nor Tribe had a cause of action against the State. Plaintiffs and the Tribe then took this appeal.

FN5. Although the United States declined to intervene, it did file an amicus brief in support of Plaintiffs.

III.

This case presents the question of whether Plaintiffs, the Tribe, or both have a cause of action for breach of duty against the State under the 1933 Act and federal common law trust principles. *Cf.* *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (utilizing common law trust principles in the resolution of federal Indian issues). If that cause of action exists, the next question is: what rights are to be vindicated by the cause. In addition, the Tribe presents us with the question of whether it may bring a cause of action in the stead of the United States under 28 U.S.C. § 1362.[FN6] As the availability of a cause to each appellant is a distinct question, we will discuss the dismissal of Plaintiffs' complaint first and then proceed to resolve the question with respect to the Tribe. Finally, we will address the State's contentions [FN7] as appropriate.

FN6. This is a federal jurisdictional statute which states: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362.

FN7. The State asserts as an alternative basis for dismissal that the 1933 Act violates the Tenth Amendment. If the Act were determined to violate the Tenth Amendment, there would remain a serious question whether the State is accountable for funds previously received. As a consequence of these ramifications, the State's Tenth Amendment theory arguably necessitates a cross-appeal for this court to address the issue at this time. *See* *Morely Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191, 193, 57 S.Ct. 325, 327-28, 328-29, 81 L.Ed. 593 (1937); *University of Maryland v. Peat Marwick, Main & Co.*, 923 F.2d 265, 277 (3rd Cir.1991); *but see* *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480-81, 96 S.Ct. 2158, 2159, 48 L.Ed.2d 784 (1976). We, accordingly, choose not to address either the difficult issue of whether the claim is properly before us at this time or the complexities of the substantive Tenth Amendment question because the district court has not yet dealt with this matter. We see substantial benefit to the district court first addressing the Tenth Amendment issue and thus remand this question for further development of the issues inherently involved in such a weighty claim. *See* *Singleton v. Wulff*, 428 U.S. 106, 120-21, 96 S.Ct. 2868, 2877-78, 49 L.Ed.2d 826 (1976).
The State also cited throughout its brief and in its submissions of supplemental authority several Eleventh Amendment cases. While we note that the State is correct in its assertions that the Indian Commerce Clause does not empower Congress to abrogate the states' Eleventh Amendment immunity from suit, *see* *Seminole Tribe v. Florida*, 517 U.S. 44, ----, 116 S.Ct. 1114, 1119, 134 L.Ed.2d 252 (1996), these arguments are not pertinent to the case at bar as the State chose to waive its Eleventh Amendment immunity in order to obtain a federal forum. *See* *Johns v. Stewart*, 57 F.3d 1544, 1553 (10th Cir.1995) (noting that a state may expressly waive its Eleventh Amendment immunity and consent to federal jurisdiction).

IV.

[2][3][4][5] Our standard of review from a dismissal of a complaint for failure to state a cause of action is de novo. *See* *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 870 (10th Cir.1992). Under Rule 12(b)(6), dismissal is inappropriate unless the plaintiff can prove no set of facts in support of his claims to entitle him to relief. *See* *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir.1986). Moreover, we owe no deference to the district court's ruling. *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539-40 (10th Cir.1992). Thus, we scrutinize the complaint from the same perspective as the district court. *Boise City Farmers Coop. v. Palmer*, 780 F.2d 860, 866 (10th Cir.1985). The granting of a motion to dismiss "must be cautiously studied, not only

to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Morgan*, 792 F.2d at 978 (citation omitted). Cognizant of this standard, we proceed to the merits.

V.

A. The Individual Plaintiffs

Whether Plaintiffs have a cause of action against the State for breach of fiduciary duty is a matter of statutory interpretation and application of federal common law. We must determine whether Congress intended to create trust-like rights and responsibilities when ***1541** it passed the 1933 Act and how it intended to alter that structure when it passed the 1968 Amendment.

The State claims that Plaintiffs have neither an express nor an implied right of action under the 1933 Act. Therefore, the State asserts, Plaintiffs cannot enforce the terms of the Act. The district court agreed and, utilizing the implied right of action test from *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), along with an analysis of Native-American and common-law trust jurisprudence, ruled that Plaintiffs did not have a private right of action. We note that the statute does not affirmatively delineate the enforcement mechanisms available under it. Accordingly, we proceed directly to the gravamen: Is an implied right of action created under this statute?

[6] We perceive the issues of whether the 1933 Act and the 1968 Amendment create a common-law trust and whether there is an implied right of action as interrelated and interdependent and thus analyze the question utilizing *Cort* and its teachings.[FN8] In *Cort*, the Supreme Court set forth a four-part test to be used in determining whether a party has an implied right of action. A court must determine (1) whether the statute creates a federal right in favor of the plaintiff; (2) whether there is any legislative intent, either explicit or implicit, favoring the creation or the denial of the right; (3) whether the right is consistent with the legislative scheme and its underlying purposes; and (4) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law. *Id.* at 78, 95 S.Ct. at 2087-88. This test examines whether a right of action necessarily and logically flows from the statute at issue and whether that right would unduly implicate federalism concerns by impinging upon a state's police powers.

FN8. While we note that the Supreme Court has essentially unified *Cort* 's analysis into a single question, *see Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 100 S.Ct. 242, 245-46, 62 L.Ed.2d 146 (1979) (framing inquiry as a quest to determine whether Congress intended to create the private remedy), we find that *Cort* 's analysis is still very instructive in answering this penultimate question.

1.

[7] In applying *Cort* 's first query, we conclude that the 1933 Act and the subsequent 1968 Amendment were for Plaintiffs' benefit. The 1933 Act added the Aneth Extension to the Navajo Reservation. Contemporaneous with that grant, the statute specifically reserved the 37 1/2 % royalty fund from the Tribal lease income and dedicated it to the benefit of the Navajos who resided in the Aneth Extension. *See State of Utah v. Babbitt*, 53 F.3d 1145, 1149 (10th Cir.1995) (noting Congress' clear intent that oil and gas development on the Aneth Extension benefit San Juan Navajos). During the committee proceedings in 1930 considering the predecessor of the bill that was finally passed in 1933, there was discussion of the unique heritage of the Navajos who resided on the Aneth Extension and the divergence of their interests with the Tribe as a whole. *See Hearings on S. 3782, supra,* at 2, 13. Moreover, the 1933 Congress and Utah's Governor were cognizant of the Aneth residents' separation from the Tribe and wished to provide for these individuals. *See Hearings on S. 391 Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 90th Cong., 1st Sess. 10 (1967).

In 1961, the district court in *Sakezzie v. Utah Indian Affairs Comm'n*, 198 F.Supp. 218 (D.Utah 1961) noted many of these same concerns. The court found that "the fund was not intended for the benefit of the Navajo Tribe as a whole and the interest of the Tribe as a whole in some respects has been in conflict with those of the Indians residing upon the Aneth Extension." *Id.* at 221. Two years later the court reiterated these findings in *Sakezzie v. Utah State Indian Affairs Commission*, 215 F.Supp. 12 (D.Utah 1963). Although Congress knew of these decisions and the previous history, it made no effort to hinder the beneficiaries' right of action when it passed the 1968 Amendment. *See* Pub.L. No. 90-306 (lacking any affirmative withdrawal of beneficiaries' right of action). True, Congress did expand the class ***1542** of beneficiaries; however, this expansion provided benefits to more people, it didn't curtail the rights of the current beneficiaries under the Act. *See United States v. Jim*, 409 U.S. 80, 93 S.Ct. 261, 34 L.Ed.2d 282 (1972) (per curiam) (holding that the 1933 Act beneficiaries were not deprived of property in a Fifth Amendment sense by expansion of beneficiary class).

A major part of the 1933 Act was the setting aside of a fund for the benefit of the residents of the extension. In light of the Act's history, it can hardly be argued that the Aneth Navajos were not one of the primary beneficiaries of the Act. *See Babbitt*, 53 F.3d at 1149. Congress was quite aware of the plight of these clans and their separation from the Tribe as a whole, *Hearings on S. 3782, supra,* at 13, and, through the acts, addressed those concerns. Therefore, we hold that the fund beneficiaries were "one of the class for whose especial benefit the [1933 Act] was enacted." *Cort*, 422 U.S. at 78, 95 S.Ct. at 2088.

2.

[8] The second inquiry under *Cort* is whether there is any evidence of legislative intent, either explicit or implicit, to create the right. *Cort*, 422 U.S. at 78, 95 S.Ct. at 2087-88. As legislative intent can be divined from an examination of legislative design, *see Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1001-02, 108 L.Ed.2d 132 (1990), as well as from the legislative history, we will analyze the Act under the third prong of *Cort*-whether the right is consistent with the legislative scheme and purpose-in tandem with the second prong.

There is very little contemporaneous legislative history of the 1933 Act indicating whether Congress intended to create a right of action. However, the nature of the Act's intended operation along with subsequent court cases (of which Congress was fully cognizant when it passed the 1968 Amendments, *see, e.g., Hearings on S. 2535 Before the Sub-Comm. on Indian Affairs of Comm. on Interior and Insular Affairs,* 89th Cong., 2d Sess. 16 (1966); *Hearings on S. 391 Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs,* 90th Cong., 1st Sess. 97 (1967)) seem to indicate that the fund was to operate with trust-like rights and responsibilities-including the beneficiaries' rights to bring suit to address breaches of fiduciary duty.

[9] The 1933 Act affects four parties: the United States, the Navajo Tribe, the Navajo residents of the Aneth Extension, and the State of Utah. The law adds the Aneth Extension to the Navajo Reservation and gas royalties from production on the land. The Tribe therefore received the benefit of added territory and 62 1/2 % of the oil and gas royalties resulting from production of oil and gas on the land. However, the 1933 Act grants the Tribe no control or interest in the 37 1/2 % of the royalties that are to be expended by Utah for the benefit of the Navajo Indians residing in the San Juan County. [FN9]

FN9. This finding is not inconsistent with *Jim* and its holding that the fund beneficiaries do not have a constitutional property interest in the fund. The *Jim* Court noted that "*[w]hatever title the Indians have* is in the tribe." *Jim*, 409 U.S. at 82, 93 S.Ct. at 262-63 (emphasis added). *Jim* did not say that the Tribe had any interest in the 37 1/2 % fund. Moreover, no title is necessary for the San Juan Navajos to have an equitable cause of action as beneficiaries of the fund. *Cf.* Restatement (Second) of Trusts § 128 (1959)

(noting that beneficiaries' interest extends only so far as is within the settlor's intention). Of course, the Tribe's rights to the land of the Aneth Extension and the 62 1/2 % remainder are not at issue in this case.

[10] The second effect of the law, the creation of the relationship between the State and the residents of the Aneth Extension, is where the crucial question in this matter lies. In this part of the law, it appears Congress created a common-law trust-like structure. The Restatement of Trusts explains that, "A trust ... is a fiduciary relationship with respect to property, subjecting the person by whom title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." Restatement (Second) of Trusts § 2 (1959). The 1933 Act diverts the 37 1/2 % of the oil and gas royalties from the Aneth Extension to the State of Utah, "Provided, That said 37 1/2 per cent of the royalties shall be expended by the ***1543** State of Utah in the tuition of Indian children in white schools and/or in the building and maintenance of roads across [the Aneth Extension], or for the benefit of the Indians residing therein." 47 Stat. 1418. Although far from being clearly drafted, we can ascertain that there was property to be transferred from the United States government to Utah (the 37 1/2 % of royalties), there was a definite set of priorities set forth by which Utah's discretion was limited (tuition of Indian children, road construction, the benefit of the Indians), and, finally, there was a set of beneficiaries (the Navajo residents of the Aneth Extension). This framework closely tracks the definition of a trust. *Cf.* *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 588-89 (10th Cir.1992) (noting that the elements of a common-law trust are a trustee, beneficiary, and corpus), *cert. denied*, 507 U.S. 1004, 113 S.Ct. 1643, 123 L.Ed.2d 265 (1993). If in fact the 1933 Act creates a trust-like relationship, it is logical that the beneficiaries would have a cause of action against the State in the event of a breach of that trust. *Cf.* *United States v. Mitchell*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (finding where pervasive control is vested in the government over Native-American assets for their benefit, a right may lie in the beneficiaries to bring suit to address waste notwithstanding the lack of the term "trust" in the authorizing document).

[11] The State claims that the "clear statement rule," a concept with its roots in Eleventh Amendment jurisprudence which dictates that encroachments upon a state's sovereignty can only be made by a clear statement of congressional intent to do so, precludes a finding of a cause of action in favor of Plaintiffs. In support of this claim, the State cites several cases which apply the clear statement rule in the context of determining whether a federal statute has abrogated a state's Eleventh Amendment immunity. *See* *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (holding suit for damages by tribe against state barred by the Eleventh Amendment); *Dellmuth v. Muth*, 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989) (holding only clear statement of abrogation of states' Eleventh Amendment immunity is effectual); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) (noting abrogation of states' Eleventh Amendment immunity requires a clear statement). Utah also cites authority which discusses the clear statement rule in the context of the Tenth Amendment. *See* Laurence Tribe, *American Constitutional Law* §§ 5-8, 5-20 (2d ed. 1988). *See also* *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). The State has not shown that the clear statement rule has been applied in a context other than the Tenth and Eleventh amendments-neither of which is a live controversy in the present case. Any argument that the Act violates the Tenth Amendment will not be addressed on this appeal, *see supra* note 7, and the State affirmatively waived its Eleventh Amendment immunity. Accordingly, any argument premised upon the clear statement rule must fail.

[12] Perhaps the most compelling basis for Plaintiffs' suit is legislative acquiescence. After the Aneth Extension had begun to generate royalties in the late 1950's, a group of the beneficiaries of this fund filed suit to enjoin certain expenditures from the fund. *See* *Sakezzie v. Utah Indian Affairs Comm'n*, 198 F.Supp. 218, 221 (D.Utah 1961), *supp. op.* 215 F.Supp. 12 (D.Utah 1963). In *Sakezzie*, the district court ruled that, "In administering the fund [Utah] occup[ies] a

position of trust and confidence toward the Indian beneficiaries, and their conduct should be determined and judged by exacting fiduciary standards within the trust and discretion which Congress saw fit to repose in the agencies of the State in carrying out the purposes of the Federal Act." *Sakezzie*, 198 F.Supp. at 224. Furthermore, the court noted Utah's failure to provide proper accounting of funds. *Id.* at 221-22. Accordingly, the court restricted the purposes for which Utah could expend the fund and required an accounting to the beneficiaries. *Id.* at 225-26. It was in response to these rulings that Congress passed the 1968 Amendment.

The State claims that by passing the 1968 Amendments, Congress expressed its displeasure with the holdings in *Sakezzie* and ***1544** overruled the case entirely. The State is correct that the Congressional intent was to expand the reach of the 1933 Act as compared with the *Sakezzie* court's interpretation. The 1968 Amendment clearly expanded the group of beneficiaries and the purposes for which the fund could be expended in response to the district court's interpretations, which were viewed as overly restrictive. *See* S.Rep. No. 391, 90th Cong., 1st Sess. 2 (1967). *See also Hearings on S. 391 Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 90th Cong., 1st Sess. 19, 21(1967). However, the 1968 Amendment also partially codified *Sakezzie* by requiring Utah's yearly submission of a report for the information of the beneficiaries. *Compare* Pub.L. No. 90-306 (1968) *with Sakezzie*, 198 F.Supp. at 226. Obviously, Congress considered *Sakezzie* and its ramifications when it passed the 1968 Amendment. *See, e.g., Hearings on S.* 391, supra, at 4, 17-18, 21-22. Yet, in no way did Congress attempt to restrict the beneficiaries' access to the courts to redress breaches of trust. *See* Pub.L. No. 90-306, 82 Stat. 121 (1968). We can only conclude that Congress was cognizant of the previous cases and implicitly approved of the cause of action by failing to restrict it in the 1968 Act. *Cf. Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60, 73, 78, 112 S.Ct. 1028, 1037, 1039, 117 L.Ed.2d 208 (1992) (noting implicit approval of remedy when, with cognizance of prior case law, Congress fails to limit its availability when amending an act).

In summary, the statutory scheme, the legislative history, and the subsequent legislative acquiescence, all support the finding of a trust relationship. Accordingly, we hold that the second and third prongs of the *Cort* test favor Plaintiffs' cause of action.

3.

[13] The fourth prong of the *Cort* test asks whether the right is one that is traditionally a state concern and therefore inappropriate for a federal cause of action. *Cort*, 422 U.S. at 78, 95 S.Ct. at 2087-88. The State argues that trust law is ordinarily the concern of states and thus is an inappropriate area for a federal cause of action. However, in making this argument, the State misapprehends the true nature of the matters at issue. The overriding legal area implicated in this case is the care of Native Americans-a uniquely federal question. *See, e.g., Mitchell*, 463 U.S. 206, 103 S.Ct. 2961; *Babbitt*, 53 F.3d 1145. The State's argument on this issue must fail. We find that this case involves an area of law not within the purview of the states, but rather one that is solidly within the federal realm.

[14] We hold that Congress intended to create a discretionary trust for the benefit of the San Juan Navajos with the State of Utah as trustee and the 37 1/2 % royalties as the *res*. Accordingly, the beneficiaries do, insofar as they assert a breach of fiduciary duty, state a claim upon which relief can be granted. Thus, the district court improperly dismissed Plaintiffs' complaint.

Having found the existence of a fiduciary relationship between the State and Plaintiffs, we note two factors for the district court's consideration on remand. The first is that this discretionary trust provides the state with great latitude in its decision-making processes.[FN10] Secondly, the statute provides that the funds shall be expended for the "the health, education, and general welfare of the Navajo Indians residing in San Juan County." Pub.L. No. 90-306, 82 Stat. 121.

FN10. Scott and Fratcher note that, "The beneficiary [of a discretionary trust] cannot

> obtain the assistance of the court to control the exercise of the trustee's discretion except to prevent an abuse by the trustee of his discretionary power[,] ... the court will not interfere unless he acts dishonestly or from an improper motive or fails to use his judgment." 2 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 128.3 (4th ed. 1987). *Cf.* Restatement (Second) of Trusts § 199 (1959) (outlining equitable remedies available to the beneficiaries of a trust).

B. The Tribe

We now turn to the dismissal of the Tribe's complaint. The Tribe proffers two bases for a cause of action in its favor. The first argument is that the original title to the lands from whence the oil and gas royalties flow is in the Tribe and thus the Tribe has a right to bring suit against the State for the mismanagement of these funds. The second ***1545** argument is that pursuant to 28 U.S.C. § 1362, the Tribe may "stand in the shoes" of the United States government and litigate any claim that the United States could. We hold that both of the Tribe's asserted bases for a cause of action must fail and thus affirm the district court's dismissal of the Tribe's complaint.

[15] Contrary to the Tribe's claim, we do not believe that the Navajo Nation has any ownership interest in the 37 1/2 % of the royalties generated by the Aneth Extension. We note that prior to the addition of these lands to the Navajo Reservation, these lands were public lands. *See Babbitt,* 53 F.3d at 1147, 47 Stat. 1418. Contemporaneous with adding these lands to the reservation, Congress chose to reserve a portion of any oil and gas revenues. Congress then transferred the ownership interest in these proceeds to the State of Utah to hold as trustee for the benefit of the Aneth Extension Navajos. Therefore, since the Tribe never possessed an ownership interest in these proceeds, *see* Pub.L. No. 90-306, 82 Stat. 121, the Tribe could not have a federal common-law claim based on its ownership interest.[FN11]

> FN11. The Tribe also argues that it must have an ownership interest because were it not for its leases, the funds would not exist. While it may be true that the Tribe could choose to not allow oil and gas production on its lands and thus cut off the trust fund's source of revenue, the fact remains that the United States reserved a 37 1/2 % portion "[s]hould oil or gas be produced in paying quantities." 47 Stat. 1418 (1933).

[16] Citing *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), the Tribe also claims that 28 U.S.C. § 1362 grants the Tribe the right to assert any claim or prosecute any cause which the United States could bring as the trustee of the tribes. While it is true that *Moe* could be read as granting to the Indian tribes the right to raise a claim that the United States could raise on the tribe's behalf, this argument misapprehends whose cause of action is at issue in this case. The United States could likely bring a suit to vindicate *the rights of the Navajos in San Juan County,* but there would be no action which the United States could bring on the behalf of the Navajo Tribe, at least not with respect to the trust fund. The Tribe's right under this statute is purely limited to one of involvement in planning, no more. *See* Pub.L. No. 90-306, 82 Stat. 121. To whatever extent 28 U.S.C. § 1362 authorizes the Tribe to step into the shoes of the United States, the right being enforced must be one that the United States could vindicate on the behalf of the Tribe. *Cf. Blatchford,* 501 U.S. at 784, 111 S.Ct. at 2583-84. The fact that the trust's beneficiaries are Navajos is not sufficient to vest a right in the Tribe. Accordingly, the Tribe cannot step into the shoes of the United States to attempt to prosecute a suit in favor of the San Juan County beneficiaries. The district court's dismissal of the Tribe's complaint was proper.[FN12]

> FN12. While the Tribe's complaint is properly dismissed, we do not hold that the Tribe may never have a cause of action under the Act. The Act clearly dictates that "Planning for such expenditures [from the fund] *shall* be done in cooperation with ... the Navajo Tribe, insofar as is practicable to accomplish the objects and purposes of this Act." Pub.L.

> No. 90-306, 82 Stat. 121 (1968) (emphasis added). Insomuch as it is necessary to vindicate the Tribe's right to participation in planning, we note the possible existence of a cause of action, but we do not reach that issue.

The district court's dismissal of Plaintiffs' complaint is reversed and remanded for proceedings consistent with this opinion. The district court's dismissal of the Tribe's complaint is affirmed.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

C.A.10 (Utah),1996.
Pelt v. State of Utah
104 F.3d 1534

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ADDENDUM E

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JAKE C. PELT, et al., Plaintiffs, vs. STATE OF UTAH, Defendant.	ORDER Case No. 2:92-CV-639C

In 1933, the federal government established the Navajo Trust Fund, whereby 37.5% of royalties derived from exploitation of oil and gas deposits under the Navajo Reservation's Aneth Extension would be paid to the State of Utah, provided that such funds be expended for the health, education, and general welfare of the Indians residing in the Aneth Extension. Congress later amended the beneficiary class to include all Navajo Indians residing in San Juan County, Utah. See An Act To Permanently Set Aside Certain Lands In Utah As An Addition To The Navajo Reservation, And For Other Purposes, 47 Stat. 1418 (1933), amended by Pub. L. No. 90-306, 82 Stat. 121 (1968) (hereinafter "1933 Act"); see also Pelt v. Utah, 104 F.3d 1534, 1538-39 (10th Cir. 1996). Plaintiffs Jake C. Pelt et al. ("Plaintiffs"), members of the beneficiary class, have brought this suit for an equitable accounting from Defendant State of Utah ("Utah"), the trustee of the Navajo Trust Fund.

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This matter is before the court on the parties' cross-motions for summary judgment relating to accounting burdens of proof and procedure. The facts are set forth in the parties' pleadings and past orders of the court and will not be repeated except as necessary to explain the court's decision. The court has considered the arguments of counsel presented at a June 13, 2001 hearing, along with the memoranda filed by the parties, and finds as follows.

I. Burdens relating to Utah's accounting

When Congress establishes a trust relationship, the courts should infer, unless the statute directs otherwise, that the trust relationship will be governed by the common law of trusts. See NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981), cited in Cobell v. Norton, 240 F.3d 1081, 1099 (D.C. Cir. 2001). The parties in this case agree that the court must look to traditional principles of trust law to determine accounting burdens.

It is an established principle of trust law that a trustee has the burden of producing an accounting, a report of all items of property, income, and expenses, at the request of the beneficiary. See G.G. BOGERT AND G.T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES (hereinafter "BOGERT ON TRUSTS") § 961, at 3 (Rev. 2d ed. 1983); RESTATEMENT (SECOND) OF TRUSTS (hereinafter "RESTATEMENT") § 172 cmt. c., § 382 cmt. e (1959); accord Niles v. Otto, 106 F.3d 1456, 1461 (9th Cir. 1997) (common law "places the burden on one acting as a fiduciary to explain all transactions taken on the principal's behalf"); White Mountain Apache Tribe of Arizona v. United States, 26 Cl.Ct. 446, 448 (1992); In re Johnson, 518 F.2d 246, 253 (10th Cir. 1975) ("[T]he burden was on the trustee to justify his account and to show the propriety of his expenditure."); Blackfeet and Gros Ventre Tribes v. United States, 34 Ind.Cl.Comm. 122, 144

(1974) ("The defendant's duty in accounting cases is to reveal what it did with the plaintiff's money."); Chisholm v. House, 183 F.2d 698, 703 (10th Cir. 1950) ("[T]he duty rested upon the trustees to account, and the burden was upon them or their sureties to establish the correctness thereof; to disclose fully and fairly the nature of each and every challenged transaction, and to satisfy the court that the administration of the trust was in accordance with the provisions of the trust instrument and the honor and integrity of a fiduciary."). As part of its accounting duty, it is incumbent upon the trustee to keep vouchers and other supporting documentation to prove that its accounting is accurate. See RESTATEMENT § 172 cmt. b; BOGERT ON TRUSTS § 962, at 19. Placing this initial accounting burden on the trustee is consistent with public policy considerations: the trustee is more likely than the beneficiaries to have access to trust documentation, and this reinforces the substantive policies behind fiduciary law by ensuring that trustees will perform their obligations with care. See Niles, 106 F.3d at 1462; White Mountain Apache Tribe, 26 Cl. Ct. at 448, citing Sioux Tribe of Indians v. United States, 105 Ct. Cl. 725, 801-02 (1946).

Although the parties agree that Utah is required to produce an accounting, they have disagreed about what constitutes a proper accounting. The general standard, as set out by the Indian Claims Commission in Blackfeet and Gros Ventre Tribes of Indians v. United States, 32 Ind.Cl.Comm. 65 (1973), is that "the trustee's report must contain sufficient information for the beneficiary to readily ascertain whether the trust has been faithfully carried out." Id. at 87; accord White Mountain Apache, 26 Ct.Cl. at 449 (citing Blackfeet for same). In Indian trust fund accounting cases, there are two approaches through which a trustee can meet this burden. The first method, adopted by the Indian Claims Commission in Blackfeet, "had defendant go forward

and present its report, explaining the methodology behind the preparation of the report. Next, the tribe set forth its exceptions . . ." White Mountain Apache, 26 Cl.Ct. at 449, citing Blackfeet, 32 Ind.Cl.Comm. at 68. In the second method, adopted by the Court of Claims in Minnesota Chippewa Tribe v. United States, 14 Cl.Ct. 116 (1987), "[d]efendant was required to key expense items to vouchers and supporting documentation, including the archival materials such as authorities, workpapers, and correspondence. These analyses were presented to the tribe, thereby enabling the tribe to form exceptions." White Mountain Apache, 26 Cl.Ct. at 449, citing Minnesota Chippewa, 14 Cl.Ct. at 120. Plaintiffs contend that Utah should be required to key supporting documentation to justify each of its expenditures, as laid out in the Minnesota Chippewa approach. At the hearing, counsel for Utah conceded that Utah's accountings had been prepared with the requirements of the Minnesota Chippewa method in mind.

Accordingly, the Minnesota Chippewa approach will govern Utah's duty to account in this case. In order to meet its burden of rendering a proper accounting, each expenditure in Utah's accounting report, in addition to including identifying factors such as date, payee, amount, and purpose, must also make reference to supporting documentation which would enable the Plaintiffs to readily ascertain that the expenditure was made in furtherance of the trust. Although this supporting documentation will typically take the form of vouchers, receipts, checks, workpapers, meeting minutes, correspondence, or internal agency memoranda, it may also be in other forms such as witness affidavits or even testimony. The court does not now hold whether Utah must present any specific quantum of supporting documentation or other evidence for each expenditure in order to fulfill its duty to account – this issue will be decided either on an item-by-item basis or

in later orders of the court.

Plaintiffs argue that many of the entries in Utah's accounting fail to conform to this standard, and that the court should hold that Utah has violated its duty to account with regard to those expenditures. It is true that Utah has already had the opportunity to produce Initial, Revised, and Supplemental versions of its accounting. But Utah cannot be expected to have abided in the past by an accounting standard that is just now being established by the court. Furthermore, "[i]t is proper for a court to allow the government 'the opportunity to cure the breaches of trust declared' by the court." Cobell, 240 F.3d at 1108-09, quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979). The court therefore denies Plaintiffs' request to hold Utah liable for alleged accounting failures at this stage of the proceedings.

II. Burdens relating to Plaintiffs' exceptions

After Utah produces its accounting, Plaintiffs must then form its exceptions, listing the expenditures for which Plaintiffs feel that Utah has breached its duty to oversee and carry out the purpose of the trust. See, e.g., Minnesota Chippewa, 14 Ct.Cl. at 122; Blackfeet, 32 Ind.Cl.Comm. at 85. Plaintiffs' exceptions will fall into two broad categories: (1) expenditures for which Utah has violated its duty to account (e.g. no supporting documentation, or supporting documentation is not sufficient to show the purpose of the expenditure, etc.); and (2) expenditures for which Utah has violated its fiduciary duty (e.g. documentation suggests that expenditure did not benefit members of the beneficiary class, etc.).

As to the first category of exceptions, Plaintiffs shall explain the reason for each exception succintly, but with sufficient explanation to permit the court and Utah to understand the claimed

deficiency. The Plaintiffs need not, however, support each of these exceptions with evidence of their own. The court will review this first category of exceptions in future cross-motions for summary judgment. "As to the trustee who fails to keep proper records of his trust, it is usually stated that 'all presumptions are against him on his accounting, or that all doubts on the accounting are resolved against him. . . . The same rule applies in Indian accounting cases." White Mountain Apache, 26 Cl.Ct. at 449, citing Menominee Tribe v. United States, 118 Ct.Cl. 290, 326-27 (1951). If the trustee

> claims that he made payments to creditors or beneficiaries, these disbursements are disputed, and the trustee has no written evidence to substantiate his position due to a faulty record system, the court will tend to disallow this item. Had the trustee performed his duty by taking receipts or vouchers, he could have made a clear case for the disbursements. His failure to present such evidence casts suspicion on the claim and renders the court unwilling to hold that he has borne the burden of proving the payment by a preponderance of the evidence.

Bogert on Trusts § 92, at 23; accord Cafritz v. Corporation Audit Co., 60 F.Supp. 627, 632 (D. D.C. 1945) ("When a fiduciary is under a duty to account and he fails to do so the only inference to be drawn is that he could not satisfactorily explain the transaction without an admission of guilt."). Should the court find that Utah has not produced "sufficient information for the beneficiary to readily ascertain whether the trust has been faithfully carried out" with regard to certain expenditures, Blackfeet, 32 Ind.Cl.Comm. at 87, Utah will be held to have violated its duty to account for those expenditures. See American Indians on Maricopa-AK Chin v. United States, 667 F.2d 980, 1004-05 (Ct.Cl. 1981) (awarding damages to Indian plaintiffs for government trustee's prolonged failure to produce supporting documents to justify accounting expenditures); Navajo Tribe of Indians v. United States, 9 Cl.Ct. 336, 439 (1986) (same); Pueblo

of San Ildefonso v. United States, 35 Fed.Cl. 777, 795 (1996) (holding government trustee liable for failure to account for collections).

For the second category of exceptions (where Utah has fulfilled its accounting burden but where there is a question of whether the money was spent for the beneficiaries' benefit), Plaintiffs must not only explain the reason for each exception but must support each exception with evidence that the money was not spent appropriately. "These reports carry with them a presumption of correctness, and it is plaintiff's burden to raise exceptions to the accounting reports." White Mountain Apache, 26 Cl.Ct. 449, citing Minnesota Chippewa, 14 Cl.Ct. at 121-22. "If the plaintiff challenges a disbursement with evidence to show that the expenditure was improper, or points to expenditures improper on their face, plaintiff has met its burden of going forward with the evidence." Id. at 122 (emphasis added). Plaintiffs' evidence of spending impropriety may come from documents in Utah's accounting itself, other documentary evidence, or witness affidavits or testimony.

III. Briefing requested by court

The court will next rule on the issue of which years Utah is obligated to account for Navajo Trust Fund expenditures. While Plaintiffs have requested an accounting detailing trust activities dating back to the 1950s, Utah asserts that accountings performed during past Navajo Trust Fund cases satisfied Utah's accounting obligation with regard to certain years. This issue must be resolved before Utah submits its final accounting and Plaintiffs submit their final exceptions, because the court's determination of what years are relevant to the accounting in this case will affect the scope of the accounting that Utah must perform. Accordingly, Utah is

instructed to submit a memorandum on this issue within thirty days of receipt of this order. Plaintiffs shall submit their opposition memorandum within twenty days of receipt of Utah's memorandum, and Utah shall submit its reply memorandum within ten days of receipt of Plaintiff's opposition memorandum.

Another issue disputed by the parties is Utah's accounting burden with regards to trust moneys handled by the Utah Board of Indian Affairs ("UBIA") and its predecessors which were payed out to either the Utah Navajo Development Council ("UNDC") or to the Utah Navajo Industries ("UNI"). Utah asserts that its accounting obligation is satisfied if it proves that the money was in fact paid out to UNDC or UNI, whereas Plaintiffs contend that Utah must identify the ultimate beneficiary of these expenditures. After the court has made a ruling on what years Utah must account for, the court will schedule a status conference to discuss whether the UNDC/UNI issue should also be briefed before the submission of Utah's final accounting.

DATED this 19 day of June, 2001.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

tsi

United States District Court
for the
District of Utah
June 21, 2001

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:92-cv-00639

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ADDENDUM F

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JAKE C. PELT, et al., Plaintiffs, vs. STATE OF UTAH, Defendant.	ORDER Case No. 2:92-CV-639TC

Introduction

In 1933, the federal government established the Navajo Trust Fund ("the Fund"), whereby 37.5% of royalties derived from exploitation of oil and gas deposits under the Navajo Reservation's Aneth Extension[1] would be paid to the State of Utah. The funds were to be spent for the health, education, and general welfare of the Native Americans who reside in the Aneth Extension. Congress later amended the beneficiary class to include all Navajo Indians residing in San Juan County, Utah. See An Act To Permanently Set Aside Certain Lands In Utah As An Addition To The Navajo Reservation, And For Other Purposes, 47 Stat. 1418 (1933), amended by Pub. L. No. 90-306, 82 Stat. 121 (1968) (hereinafter "1933 Act" or "the 1968 amendment");

[1]The Aneth Extension is the ancestral home of Navajo Indians and other Native Americans. The Aneth Extension was annexed to the Navajo Reservation in 1933.

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see also Pelt v. Utah, 104 F.3d 1534, 1538-39 (10th Cir. 1996). Plaintiffs Jake C. Pelt et al. ("Pelt" or "Plaintiffs"), and members of the beneficiary class, have brought this suit for an equitable accounting from Defendant State of Utah ("Utah"), the trustee of the Fund. Pelt seeks an equitable accounting to establish whether Utah actually received all the income to which it was statutorily entitled and whether Fund expenditures have been for the use and benefit of the Plaintiff class.

This matter is now before the court on the following motions: (1) Pelt's motion for summary judgment claiming that no accounting was conducted in the prior accounting cases; and (2) the parties' cross motions for partial summary judgment on the preclusive effect of Sakezzie v. Utah State Indian Affairs Commission, et al., ("Sakezzie"), Jim v. State of Utah et al., ("Jim"), and Bigman v. Utah Navajo Development Council, Inc, et al. ("Bigman").[2]

Analysis

Plaintiffs filed this action alleging that Utah breached its fiduciary duty to the Plaintiff class when it allegedly mismanaged the Fund. Plaintiffs request an equitable accounting of receipts and expenditures. Before Pelt was filed, three cases–Sakezzie, Jim, and Bigman–were filed against Utah, or it agents. The Complaints in these earlier cases also prayed for equitable accountings of Fund receipts and expenditures for time periods now at issue in Pelt.

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[2]Utah's administration of the Fund has been marked by multiple lawsuits and years of litigation. In Sakezzie, Jim, and Bigman, plaintiffs asked for accountings of revenues and expenditures from the Fund. Plaintiffs in Sakezzie and Bigman also sought restitution and damages for funds which they claimed were wrongfully expended by Utah in breach of its fiduciary duty to the beneficiaries of the Fund. See infra.

I. The Three Cases

A. *Sakezzie v. Utah State Indian Affairs Commission, et al.*

The Sakezzie complaint was filed on April 2, 1961, on behalf of the named plaintiffs and "as representatives of the class of persons who are Navajo Indians residing within the Aneth Extension of the Navajo Indian Reservation in San Juan County, Utah." (Sakezzie Complaint, p. 1, Def.'s Statement of Undisputed Material Facts, Ex. 1.) Plaintiffs requested an accounting of all Fund monies and alleged that none of the expenditures had been for their use and benefit.[3] (Id. at p. 2, ¶7, p. 6 ¶2.) The case was tried to the court without a jury on June 12, 1961. The Honorable A. Sherman Christensen gave an oral opinion in which he concluded that there was no reason to question the Fund disbursements made for administrative services, salaries, travel, or current expenses. (Oral Opinion of the Court, June 12, 1961, p. 14, Def.'s Statement of Undisputed Material Facts, Ex. 3.) He also found that the Commissioner's[4] decision concerning expenditures must be accepted and respected as being within the Commissioner's "wide discretion in determining the nature of such expenditures, with which discretion the court cannot interfere." (Id. p. 11, 14-15.) Judge Christensen entered written Findings of Fact and Conclusions of Law on August 25, 1961, and ruled that Utah had "fully informed" the plaintiffs

[3]The Sakezzie complaint stated: "Plaintiffs. . . allege that considerable money. . . have [sic] been earned from said royalties. . . [and] Defendants have refused to advise plaintiffs as to any of said expenditures. No expenditures from said fund have been for the use and benefit of plaintiffs. . . That defendants be required to prepare and submit. . . to plaintiffs an accounting of all of said 37-1/2% fund. . . ." See Sakezzie complaint p. 2 ¶ 7.

[4]*Commissioner of the Utah State Indian Affairs Commission.*

regarding the receipts and expenditures from the Fund. See Sakezzie v. Utah State Indian Affairs Commission, et al., 198 F. Supp. 218 (D. Utah. 1961) ("Sakezzie I").

A year later, on July 2, 1962, plaintiffs filed a petition with the court for a supplemental proceeding in which they requested monthly reports of receipts and expenditures as well as a judgment against the individual defendants for any funds determined to have been expended inappropriately. ("Sakezzie II") (Plaintiffs' Petition, July 2, 1962, p. 2-5, Def.'s Statement of Undisputed Material Facts, Ex. 4.) The court entered a Memorandum of Decision on February 7, 1963, and again approved specific expenditures from the Fund. Sakezzie v. Utah State Indian Affairs Commission, et al., 215 F. Supp. 12 (D. Utah 1963). However, on February 25, 1963, the court denied injunctive or any other relief with regard to the expenditures referred to specifically in the its decision. (Supplemental Judgment and Decree, February 25, 1963 at p. 3, Def.'s Statement of Undisputed Material Facts, Ex. 8.)

B. *Jim v. State of Utah et al.*

Jim was filed as a class action on February 7, 1970. Named plaintiffs were members of a class consisting of approximately 1,500 Navajo and other Indians residing on the Aneth Extension of the Navajo Reservation. (Jim Complaint, p. 1 ¶4, Def.'s Statement of Undisputed Material Facts, Ex. 9.) While the main focus of the Jim case was the constitutionality of the 1968 amendment, which expanded the beneficiary class,[5] the Complaint also alleged that Utah

[5]See Introduction, p. 1, supra.

had breached its fiduciary duty by expending funds on non-beneficiaries.[6] (See Id. p. 6 ¶13.) Plaintiffs' prayer for relief requested an accounting of monies received from royalties and for disburdenments. (Id. at p. 7 ¶3.)

The Honorable Willis Ritter certified the class as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) on December 30, 1970. (Court Order, p. 2, Def.'s Statement of Undisputed Material Facts, Ex. 11.) The case was tried without a jury and Judge Ritter entered an Interlocutory Decree and Order on February 7, 1972, declaring the 1968 amendment unconstitutional and ordering Utah to file the monthly reports which had previously been ordered in Sakezzie. (Interlocutory Decree and Order, p. 3, ¶ 4, Def.'s Statement of Undisputed Material Facts, Ex. 12.) Judge Ritter deferred entering a final judgment until the accounting was completed. (Id. at p. 3, ¶¶ 5-6.)

The case was appealed to the United States Supreme Court, which reversed Judge Ritter's finding that the 1968 amendment was unconstitutional. See United States v. Jim et al., 409 U.S. 80 (1972). On remand, Judge Ritter ordered the defendants to file with the court "a complete, comprehensive, proper, lawful accounting . . . , for two periods, . . . up to May 17, 1968 and from May 17, 1968 to [February 1974]. . . ." (Order, February 7, 1974, p. 2, Def.'s Statement of Undisputed Material Facts, Ex. 14.)

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[6]The Jim complaint stated: "Plaintiffs . . . allege. . . that the [defendants] . . . are, [sic] using and disbursing the said 37 1/2% of such royalties received by the state of Utah in breach of their fiduciary duty to plaintiffs by expending the same for the benefit of persons. . . who have no beneficial interest or other right therein and not for the benefit of plaintiffs. . . Plaintiffs pray for. . . an order. . . that defendants . . . account for all monies received from said 37 1/2% of net royalties . . . and for disbursements of said monies. . . ." See Jim complaint p. 6, ¶ 13, p. 7 ¶ 3.

During a hearing on July 14, 1975, plaintiffs' counsel informed the court that an "[a]n accounting and abstract was filed with the court, and the plaintiffs do not object to that." (Transcript of Proceedings, July 14, 1975, p. 2, Def.'s Statement of Undisputed Material Facts, Ex. 18.) At a subsequent hearing on May 25, 1976, Judge Ritter again ordered an accounting after the parties indicated that one had yet to be completed. (Transcript of Hearing, May 25, 1976, p. 13-14, 16-17, Def.'s Statement of Undisputed Material Facts, Ex. 19.)

No further action was taken on the case until the Honorable Bruce Jenkins held a hearing on December 29, 1978, on the court's order to show cause why the case should not be dismissed for failure to prosecute. After hearing arguments from counsel, and with no cause having been shown why the action should not be dismissed, Judge Jenkins ordered the case dismissed. (Order of Dismissal, December 29, 1978, Def.'s Statement of Undisputed Material Facts, Ex. 21.)

C. *Bigman v. Utah Navajo Development Council, Inc, et al.*

The Bigman case was filed on February 7, 1977, by Seth Bigman and Martha Collins against the Utah Navajo Development Council ("UNDC"), its executive director and board members, and the Utah Board of Indian Affairs, its executive director and individual board members. (Bigman Complaint, p. 1, Def.'s Statement of Undisputed Material Facts, Ex. 22.) The Bigman case was not filed as a class action but was "an action by Navajo Indians as beneficiaries of an oil royalty trust fund seeking to preserve and protect the fund from defalcations and misexpenditures." (Id. p.1.) Plaintiffs in Bigman alleged that defendants had breached their fiduciary duty (id. p. 8, ¶ 26), and requested an accounting and recovery of all

money which had been wrongfully expended from the Fund.[7] (Id. p. 9, ¶13.)

On August 8, 1977, the parties settled the case. (Stipulation of Parties, Def.'s Statement of Undisputed Material Facts, Ex. 23.) The settlement provided for a review of questionable transactions, a review of UNDC's accounting and management practices, and a review of the medical clinics at Montezuma Creek, Mexican Hat, and Navajo Mountain. (Judgment and Decree, p. 2-3 ¶¶ 3-4, p. 4 ¶5, p. 6, Def.'s Statement of Undisputed Material Facts, Ex. 24.) In compliance with the stipulated judgment and decree, the parties retained Dr. Roger Nelson to review the questioned transactions, the accounting and management practices of UNDC, and the operation and management of the medical clinics. Dr. Nelson filed his report with the court on December 12, 1977. (Def.'s Statement of Undisputed Material Facts, Ex. 72.)

Two remaining issues[8] were decided by the Honorable Aldon Anderson without trial on September 25, 1978. On the issue of whether the defendants were required to implement a program of Navajo Indian preference in employment practices and hiring, Judge Anderson ruled that the employment practices question did not present a justiciable controversy. (Memorandum

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[7]The Bigman complaint stated: "This is an action by Navajo Indians as beneficiaries of an oil royalty trust fund, seeking to preserve and protect the fund from defalcations and misexpenditures. . . . Plaintiffs re-allege. . . Defendants' failure to effectively account for the expenditures of the 37 1/2% oil royalty funds, and to provide an adequate accounting to Plaintiffs and the bulk of the beneficiaries constitutes a breach of fiduciary duty. . . ." Bigman complaint, p.1, 8 ¶ 26.

[8]The remaining issues were: (1) whether the Fund could be used to discharge general governmental obligations; and (2) whether the defendants were required to implement a program of Navajo Indian preference in employment practices and hiring in the administration and expenditures of the Fund.

Opinion, September 25, 1978, p. 7, Def.'s Statement of Undisputed Material Facts, Ex. 25.) On the second issue of whether the defendants were authorized to expend royalty funds for general government obligations, Judge Anderson held that defendants were so authorized. (Id.) However, Judge Anderson declined to determine the lawfulness of specific expenditures of the funds. (Id.)

Judge Anderson issued a Judgment and Decree on December 5, 1984, based upon the parties' stipulation, declaring that the court retained continuing jurisdiction, but that it was not limiting the plaintiffs' or other beneficiaries' "right to seek relief from violations of the law in the administration and expenditures of the oil royalty trust funds as may occur subsequent to the filing of this decree." (Stipulation of Parties, November 29, 1984; Def.'s Statement of Undisputed Material Facts, Ex. 74; Judgment and Decree, December 5, 1984, Def.'s Statement of Undisputed Material Facts, Ex. 75.) On December 15, 1989, the court exercised its continuing jurisdiction and, pursuant to a stipulation between the parties, approved a loan payback agreement. (Stipulation December 15, 1989, with attached Loan Payback Agreement, Def.'s Statement of Undisputed Material Facts, Ex. 76; Order, December 15, 1989, Def.'s Statement of Undisputed Material Facts, Ex. 77.)

II. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating

that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). In applying this standard, the court must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1552 (10th Cir. 1997).

Once the moving party has carried its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)); see also Gonzales v. Millers Cas. Ins. Co., 923 F.2d 1417, 1419 (10th Cir. 1991). The non-moving party must set forth specific facts showing a genuine issue for trial; mere allegations and references to the pleadings will not suffice. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

III. Are Plaintiffs' Claims Barred by the Doctrine of Claim Preclusion?

The fundamental doctrine of res judicata is that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Yankton Sioux Tribe v. Gambler's Supply, Inc. 925 F. Supp 658, 662-663 (D. S.D. 1996) (citations and internal quotations omitted). "Both res judicata and collateral estoppel[9] 'relieve parties of the cost and vexation of multiple lawsuits, conserve

[9]Issue preclusion and claim preclusion are sometimes grouped under the single doctrine of res judicata. Allen v. McCurry, 449 U.S. 90, 94 n. 5 (1980). Application of res judicata or claim preclusion requires the same parties or their privies, and the same cause of action. Montana

judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" Id. at 663 (citations omitted). The doctrine of res judicata bars a later suit when:

> (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involved the same cause of action; and (4) both suits involved the same parties or their privies. . . .[10]

Id. (citing Lovell v. Mixon, 719 F.2d 1373, 1376 (8th Cir.1983); EPA v. City of Green Forest, 921 F.2d 1394, 1403 (8th Cir.1990); Headley v. Bacon, 828 F.2d 1272, 1275 (8th Cir.1987)). Furthermore, res judicata "is an affirmative defense on which the defendant has the burden to set forth facts sufficient to satisfy the elements." Nwosun v. General Mills Restaurant, 124 F.3d 1255, 1257 (10th Cir. 1997). Finally, "the res judicata effect of a prior judgment is a question of law." Id. (citing Royal Ins. Co. of Amer. v. Quinn-L Capital Corp., 3 F.3d 877, 888 (5th Cir.1993); NAACP v. Hunt, 891 F.2d 1555, 1560 (11th Cir.1990)).

A. Did Sakezzie, Jim, and Bigman End in Final Decisions on the Merits?

A final judgment is one which disposes of all claims raised in the litigation. See Bohn v. Park City Group, Inc., 94 F.3d 1457, 1459 (10th Cir. 1996). Applying this standard, Sakezzie, Jim, and Bigman ended in final judgments on the merits.

In Sakezzie, both the original complaint and the petition for a supplemental proceeding

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v. United States, 440 U.S. 147, 153 (1979). "Under collateral estoppel [or issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Id.

[10]The parties do not dispute that the courts in Sakezzie, Jim, and Bigman had jurisdiction to hear the cases.

were tried to a court without a jury. Both ended with a written opinion by the court, which conclusively determined the issues raised by the plaintiff class.

In Jim, Judge Jenkins' Order of Dismissal on December 29, 1978, was a final judgment on the merits. The court's Order expressly stated that because plaintiffs did not provide good cause for why the action should not be dismissed for failure to prosecute, the case was dismissed. Federal Rule of Civil Procedure 41(b) states:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. P. 41(b). The Order provided that "the within action and all matters therein, including the matter of attorney's fees, is hereby dismissed and the clerk is directed to close the file." (See Order of Dismissal, December 29, 1978, Def.'s Statement of Undisputed Material Facts, Ex. 21.)

In Bigman, the stipulated orders signed by Judge Anderson in 1977, 1984, and 1989 and the court's opinion dated September 25, 1978, all qualify as final judgments on the merits for purposes of claim preclusion. The parties in Bigman reached a court-approved settlement on all of the claims but two when Judge Anderson granted the stipulated order on August 8, 1977. Similarly, the stipulated judgements entered on December 5, 1984, and December 15, 1989, conclusively resolved the claims brought before the court. Court-approved settlements or consent decrees are considered final judgments for purposes of claim preclusion. In Re

Medomak Canning v. Bayside Enterprise, Inc., 922 F.2d 895, 900 (1st Cir. 1990) ("Generally, a court-approved settlement receives the same res judicata effect as a litigated judgment. . . ."); see also Nash County Bd. of Educ., 640 F.2d at 487.

Judge Anderson's decision on September 8, 1977, regarding the two remaining issues[11] was a final judgment because it settled the rights of the parties and disposed of all of the remaining issues in controversy.[12] Although Judge Anderson refused to determine the lawfulness of specific expenditures, the order is final.[13]

Sakezzie, Jim, and Bigman ended with final decisions on the merits, and therefore, Utah has met its burden on this element.

B. Did Sakezzie, Jim, and Bigman Involve Identical Causes of Action as Those in the Present Suit?

The Tenth Circuit "has adopted the transactional approach of the Restatement (Second) of Judgments in determining what constitutes identity of the causes of action" Yapp v. Excel Corp.,

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[11]See supra note 8.

[12]See supra note 8 and accompanying text.

[13]Plaintiffs make several arguments disputing whether the cases were final judgment on the merits. These arguments are not persuasive. In particular, the court notes that although Plaintiffs contend that the courts in the earlier cases retained continuing jurisdiction, this does not deprive an order of its finality. The Restatement (Second) of Judgments §13, Comment c states that:

> A judgment concluding an action is not deprived of finality for purposes of res judicata by reason of the fact that it grants or denies continuing relief, that is, requires the defendant, or holds that the defendant may not be required, to perform acts over a period of time.

RESTATEMENT (SECOND) OF JUDGMENTS §13 CMT. C.

186 F.3d 1222, 1227 (10th Cir. 1999) (citations omitted). "The transactional approach provides that a claim arising out of the same 'transaction, or series of connected transactions' as a previous suit, which concluded in a valid and final judgment, will be precluded." Id. (quoting Restatement (Second) of Judgments § 24 (1982)). "Under this approach, a cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation." Nwosun, 124 F.3d at 1257. "The transactional test has been rearticulated by courts in a variety of ways, most of which focus upon whether the two suits are both based upon a discrete and unitary factual occurrence." Yapp, 186 F.3d at 1227. "Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." National Labor Relations Bd. v. United Technologies Corp., 706 F.2d 1254, 1260 (2nd Cir. 1983). Finally, the Tenth Circuit noted that "[i]t is immaterial that the legal basis for the relief sought in the two complaints is different; it is the occurrence from which the claims arose that is central to the 'cause of action' analysis." Nwosun, 124 F.3d at 1257.

Applying the requirements from Yapp and Nwosun, it is evident that the causes of action pled in Sakezzie, Jim, and Bigman are almost identical to those alleged in Pelt. The three previous cases alleged a breach of fiduciary duty and requested accountings based on allegations

of Utah's mismanagement of the Funds.[14] Similarly, here, Plaintiffs allege a breach of fiduciary duty and seek an accounting for the entire time period Utah has been operating the Fund, including the time periods addressed in Sakezzie, Jim and Bigman.[15] Accordingly, because the claims and legal theories alleged in each complaint arose out of the same transactions or occurrence that Plaintiffs in Pelt relied upon, for purposes of determining res judicata, the claims in Pelt are identical to those alleged in Sakezzie, Jim and Bigman.[16] See Nwosun, 124 F.3d at

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[14]The Sakezzie complaint reads: "Plaintiffs. . . allege that considerable money. . . have [sic] been earned from said royalties. . . [and] Defendants have refused to advise plaintiffs as to any of said expenditures. No expenditures from said fund have been for the use and benefit of plaintiffs. . . That defendants be required to prepare and submit. . . to plaintiffs an accounting of all of said 37-1/2% fund. . . ." See Sakezzie complaint p. 2, ¶¶ 5, 7, p. 6 ¶ 2.

The Jim complaint alleged Plaintiffs are "using and disbursing the said 37 1/2% of such royalties received by the state of Utah in breach of their fiduciary duty to plaintiffs by expending the same for the benefit of persons. . . who have no beneficial interest or other right therein and not for the benefit of plaintiffs. . . Plaintiffs pray for. . . an order. . . that defendants . . . account for all monies received from said 37 1/2% of net royalties . . . and for disbursements of said monies. . . ." See Jim complaint p. 6 ¶ 13, p.7 ¶3.

The Bigman complaint described its purpose as: "This is an action by Navajo Indians as beneficiaries of an oil royalty trust fund, seeking to preserve and protect the fund from defalcations and misexpenditures. . . . Plaintiffs re-allege. . . Defendants' failure to effectively account for the expenditures of the 37 1/2% oil royalty funds, and to provide an adequate accounting to Plaintiffs and the bulk of the beneficiaries constitutes a breach of fiduciary duty. . . ." Bigman complaint, p.1, 8 ¶ 26.

[15]The Pelt complaint states: "This is an action by Navajo Indians. . . seeking an order compelling Defendant to render a complete and detailed accounting of the Utah Navajo Trust Fund, and damages stemming from the state's mismanagement of said Trust Fund. . . The injuries suffered by Plaintiffs were caused by Defendant's breach of trust, squandering of Trust assets. . . ." See Pelt complaint, p. 2.

[16]The fact that Plaintiffs now are asking for a more detailed accounting than previous plaintiffs, or that they are using a different approach in handling their claims does not alter that the transactions involved are identical in all cases. As stated above, the transactional approach merely requires that the court determine if the claims arise out of the same transaction. See

1257 ("Under this approach, a cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation."). Utah has met its burden on this element.

C. Did Sakezzie, Jim, and Bigman Involve the Same Parties or Their Privities?

"Privity is essentially the concept of legal similarity–who are the parties and whether they are legally identical." Yankton Sioux Tribe, 925 F. Supp. at 664. The United States Supreme Court has stated that "[i]dentity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different; and parties nominally different may be, in legal effect, the same." Id (quoting Chicago, R.I & P. Ry. v. Schendel, 270 U.S. 611, 620 (1926) (citations omitted) (emphasis added)). The Tenth Circuit articulates privity as encompassing the

> "familiar doctrine ... that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by the parties who are present."

Yapp, 186 F.3d at 1227 ("The transactional approach provides that a claim arising out of the same 'transaction, or series of connected transactions' as a previous suit, which concluded in a valid and final judgment, will be precluded.").

Furthermore, Plaintiffs argue that the Bigman litigation concerned the manner in which the trust was administered and did not go to the fundamental issue addressed in Pelt–whether the trustees honored their fiduciary duties in the transactions on behalf of the trust and whether Utah is responsible for transactions which were obviously improper. However, the transactional approach does not look at the results obtained or the theory raised, but rather looks to whether the two cases involve the same transactions, events or occurrences. See id.

Villagrana v. Graham, 2001 WL 670934 *3 (quoting Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) (privity will be found only where the interests of the non-party were adequately represented in the earlier action)). See also Yankton Sioux Tribe, 925 F. Supp. at 664 ("Although there is no strict test for privity, the linchpin is whether the non-party was adequately represented in the original action."); Meza v. General Battery Corp., 908 F.2d 1262, 1266 (5th Cir. 1990) (same)[17]; Sanders Confectionary Prod. v. Heller Financial, Inc., 973 F.2d 474, 481 (6th Cir. 1992) (same); Pedrina v. Chun, 97 F.3d 1296, 1302 (9th Cir. 1996) (same).

The court in Los Angeles Unified School District v. Los Angeles Branch NAACP stated that:

> [t]hough the plaintiffs in the instant action are not the same persons as those who instituted [the earlier action], that action was brought to vindicate the rights of all minority school children and parents affected by the actions and policies of the. . . Board. There is a strong community of interest between the [earlier class] and the Bronson plaintiffs and both actions sought relief on behalf of the same large group of black citizens. For the purposes of [preclusion] we do not consider the plaintiffs in the present action to be "strangers" to the [earlier] litigation.

714 F.2d 935, 943 (9th Cir. 1983) (quoting Bronson v. Board of Education, 525 F.2d 344, 349 (6th Cir. 1975)). Importantly, in deciding whether the parties were identical, the court concluded that the interest of the subsequent parties "were well represented." Id.

In determining whether a party was adequately represented in the prior proceeding, the

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[17]The Fifth Circuit has held:

> [P]rivity exists in just three narrowly-defined circumstances: (1) where the non-party is the successor in interest to a party's interest in property; (2) where the non-party controlled the prior litigation; and (3) where the non- party's interests were adequately represented by a party to the original suit.

Meza, 908 F.2d at 1266.

Tenth Circuit has found that "[t]he question of adequate representation can best be resolved by determining whether the interests of those who would attack the judgment were vigorously pursued and protected in the class action by qualified counsel." See Garcia v. Bd. of Education, S.D. No. 1, Denver, Colorado, 573 F.2d 676, 680 (10th Cir. 1978) (citations omitted).

The law is clear in the Tenth Circuit, and elsewhere, that adequate representation is central to the question of privity. It is also clear that Utah has the burden to establish privity. See e.g., Nwosun, 124 F.3d at 1257 (claim preclusion "is an affirmative defense on which the defendant has the burden to set forth facts sufficient to satisfy the elements."). The Ninth Circuit decision in Pedrina v. Chun supports this reasoning:

> In order to show privity between a non-party and a party to former litigation, the party who asserts that the matter is barred by claim preclusion must demonstrate that the nonparty's interests and rights were represented and protected in the prior action.

Pedrina, 97 F.3d at 1301-02.[18]

Finally, in the Tenth Circuit, the issue of privity is a question of fact. Lowell Staats Mining Co., Inc. v. Philadelphia Electric Co., 878 F.2d 1271, 1276 (10th Cir. 1989)

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[18]Citing Yankton Sioux, Utah contends that Plaintiffs had the burden of proof to establish adequacy of representation. Specifically, Utah relies on the district court's finding in Yankton Sioux "that the burden of proving *in* adequacy of representation rests with the intervener." 925 F. Supp. at 666 (citations omitted) (emphasis in the original). In making this finding, the court analogized the burden to establish adequacy of representation in res judicata cases with the burden applied for intervention or joinder. See id. at 665 ("Adequacy of representation is generally discussed in relation to intervention or joinder, . . . and the analogy is appropriate to the issue of adequate representation in this matter."). The court is not persuaded by this reasoning. As stated supra, circuits agree that adequacy or representation is a factor of privity, and it is well settled that establishing privity is the defendant's burden. Furthermore, the Ninth Circuit decision in Pedrina directly contradicts Utah's contention. See 97 F.3d at 1301-02.

("determination of identity between litigants for the purpose of establishing privity is a factual question, and the District Court should not be reversed unless its determination is clearly erroneous.") c.f. Matter of L & S Indus., Inc., 989 F.2d 929, 932 (7th Cir.1993) ("There is a split of authority as to whether privity is a question of law or fact.").

On the present record, the court cannot determine whether the Plaintiffs' interests were adequately represented in Sakezzie, Jim, and Bigman. In its brief and at the hearing, Utah only argued that Pelt failed to establish inadequacy of representation; it never affirmatively argued that the representation in the prior cases was adequate, nor did it offer any direct or circumstantial evidence of adequate representation. Therefore, without providing any evidence of adequate representation, Utah fails to meet its burden to establish that the parties in Sakezzie, Jim, and Bigman were in privity with Pelt. And, because privity has not been established, Utah has not met its burden of proving the elements of res judicata. Accordingly, Utah's motion for partial summary judgment on the preclusive effect of Sakezzie, Jim, and Bigman is DENIED.

But similarly, Plaintiffs have not established that the representation in Sakezzie, Jim, and Bigman was inadequate. As stated above, privity is a factual issue, and because material facts are in dispute on whether the representation in prior litigation was adequate, Plaintiffs' motion for partial summary judgment on the preclusive effect of Sakezzie, Jim, and Bigman is also DENIED.

IV. Was There Accounting in Sakezzie, Jim, and Bigman?

Pelt contends that there was no accounting in Sakezzie, Jim, and Bigman. Because material facts are in dispute on whether defendants provided equitable accountings of Fund

expenditures and receipts in these cases, Plaintiffs' motion claiming that no accounting was conducted in Sakezzie, Jim, and Bigman is DENIED. This issue will be decided when the preclusive effects of the Sakezzie, Jim, and Bigman is determined.

Order

Utah's motion for partial summary judgment on the preclusive effect of Sakezzie, Jim, and Bigman is DENIED. Plaintiffs' motion for partial summary judgment on the preclusive effect of Sakezzie, Jim, and Bigman is DENIED. Plaintiffs' motion claiming that no accounting was conducted in Sakezzie, Jim, and Bigman is DENIED.

IT IS SO ORDERED.

DATED this 19 day of December, 2002.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

alt

United States District Court
for the
District of Utah
December 20, 2002

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:92-cv-00639

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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ADDENDUM G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JAKE C. PELT, ET AL., FOR THEMSELVES AND FOR AND ON BEHALF OF A CLASS OF PERSONS consisting of all Navajo Indians residing in San Juan County, Utah, including a sub-class of persons consisting of all other Indians the Secretary of Interior saw fit to settle on lands described in the 1933 Act [47 Stat. 1418] prior to May 17, 1968, Plaintiffs, vs. STATE OF UTAH, Defendant.	AMENDED ORDER AND MEMORANDUM DECISION Case No. 2:92-CV-639 TC

In this class action brought by beneficiaries of the Navajo Trust Fund, the court is currently faced with the issue of the scope of an equitable accounting that the Plaintiffs seek from the Fund trustee, Defendant State of Utah. The parties agree that an accounting is due, but they disagree on the years and extent of the accounting. In particular, the State of Utah raises the affirmative defense of res judicata (i.e., claim preclusion), contending that a significant portion of the Plaintiffs' accounting claim is barred by the preclusive effect of three earlier cases addressing Utah's management of the Fund: Sakezzie v. Utah State Indian Affairs Commission ("Sakezzie") (filed in 1961), Jim v. State of Utah ("Jim") (filed in 1970), and Bigman v. Utah Navajo

Development Council, Inc. ("Bigman") (filed in 1977).

This matter comes before the court on Plaintiffs's motion for summary judgment asking the court to reject the State's defense. (See Plaintiffs' Summ. J. Mot. re: Adequacy of Representation and Sufficiency of Prior Accountings (Docket No. 970).) Also pending before the court are three motions to strike:

1. "Defendant's Objection and Motion to Exclude or Limit Plaintiffs' Purported Expert Testimony" (Docket No. 982);

2. "Plaintiffs' Motion to Strike Declarations (Blake & Larson)" (Docket No. 991); and

3. "Plaintiffs' Objection and Motion to Limit Testimony of Harold Christensen" (Docket No. 995).

The central issue raised in the Plaintiffs' summary judgment motion is whether the Plaintiffs, who were not named parties in the three cases, were adequately represented in the three cases so that they are bound by the judgments in Sakezzie, Jim, and Bigman. The Plaintiffs contend that they were not adequately represented and so are not bound.

For the reasons set forth below, the court holds that the Plaintiffs are not bound by the judgments in Sakezzie, Jim, or Bigman.

PROCEDURAL AND FACTUAL BACKGROUND[1]

In 1933, the federal government established the Navajo Trust Fund, from which 37.5% of royalties derived from exploitation of oil and gas deposits under the Navajo Reservation's Aneth Extension[2] would be paid to the State of Utah, providing that such funds be spent for the health, education, and general welfare of the Indians residing in the Aneth Extension. Congress later amended the beneficiary class to include all Navajo Indians living in San Juan County, Utah. See An Act to Permanently Set Aside Certain Lands In Utah As An Addition To The Navajo Reservation, And For Other Purposes, 47 Stat. 1418 (1933), amended by Pub. L. No. 90-306, 82 Stat. 121 (1968) (hereinafter "1933 Act"); see also Pelt v. Utah, 104 F.3d 1534, 1538-39 (10th Cir. 1996).

Plaintiffs Jake C. Pelt and other named individuals ("Plaintiffs"), members of the beneficiary class, have brought this suit for an equitable accounting from Utah, the trustee of the Navajo Trust Fund. They allege that Utah breached its fiduciary duty to the Plaintiff class when it allegedly mismanaged the Fund.

On December 20, 2002, the court issued an Order[3] denying the parties' cross motions for summary judgment on the preclusive effect of Sakezzie, Jim, and Bigman. In that 2002 Order, the court addressed whether the Plaintiffs were barred by the doctrine of res judicata from asserting claims for accounting for the years covered by the three suits.

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[1]The facts are taken from the record before the court, which does not contain a genuine issue of material fact.

[2]The Aneth Extension (the ancestral home of Navajo Indians and other Native Americans) was added to the Navajo Reservation in 1933.

[3]Docket No. 898.

According to the doctrine of res judicata, a later suit is barred by an earlier suit when (1) the earlier suit resulted in a final judgment on the merits, (2) the earlier suit involved the same cause of action raised in the later suit, and (3) the parties in the later suit and the earlier suit were the same or in privity with each other. King v. Union Oil Co. of Cal., 117 F.3d 443, 445 (10th Cir. 1997). In the court's 2002 Order, the court held that the first and second element of the res judicata requirements had been established, but the court held that it could not rule on the last element—whether the plaintiffs in the suits at issue are in privity with each other. As explained more fully below, the question of privity involves the question of whether the Pelt plaintiffs were adequately represented by the plaintiffs in Sakezzie, Jim, and Bigman. And that is the central issue raised in the motion for summary judgment before the court.

The Three Cases

1. Sakezzie v. Utah State Indian Affairs Commission et al. (Case No. C-55-61 (D. Utah 1961))

The Sakezzie complaint was filed on April 2, 1961, on behalf of the named plaintiffs and "as representatives of and members of the class of persons who are Navajo Indians residing within the Aneth Extension of the Navajo Indian Reservation in San Juan County, Utah." (Sakezzie Compl. at 1 (in caption), attached as Ex. U to Pls.' Mem. Supp. Mot. Summ. J.) The Sakezzie case was a class action, but it was not certified as a class action or subject to the current (and more stringent) rules governing class actions under Federal Rule of Civil Procedure 23 (as substantially amended in 1966). See Jones v. Caddo Parish Sch. Bd., 735 F.2d 923, 924 n.1 (5th Cir. 1984) ("Rule 23 as then in effect [i.e., pre-July 1, 1966 amendment] did not provide for class certification.").

In their complaint, the plaintiffs requested an accounting of all Fund monies and alleged that none of the expenditures had been for their use and benefit.

> Plaintiffs . . . allege that considerable money, exceeding two million dollars, have [sic] been earned from said royalties . . . .
>
> Plaintiffs . . . allege that considerable amounts of money have been expended by defendants, or by the officers, agents and employees of the State of Utah, from said 37-1/2% fund monies. Defendants have refused to advise plaintiffs as to any of said expenditures. No expenditures from said fund have been for the use and benefit of plaintiffs. . . .
>
> [Plaintiffs demand] [t]hat defendants be required to prepare and submit . . . to plaintiffs an accounting of all of said 37-1/2% fund . . . .

(Id. at p. 2 ¶¶ 5 & 7, and p. 6 ¶ 2.) The case was tried to the court without a jury on June 12, 1961.

The Honorable A. Sherman Christensen gave an oral opinion in which he concluded that there was no reason to question the Fund disbursements made for administrative services, salaries, travel, or current expenses. (June 12, 1961 Oral Opinion of the Court at 14, attached as Ex. 3 to Docket No. 870.)[4] He specifically stated that

> [t]he matter of accounting has been rendered moot by pretrial discovery, I believe, and also by the evidence which indicates that the agencies of the Federal Government have been receiving and paying over to the State the funds in question, leaving the problem of accountability in the area of disbursements, rather than checking of receipts.

(Id. at 18-19.) His reference to "pretrial discovery" refers to the defendants' answer to some of

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[4]The court refers to docket numbers because at least one of the parties' briefs refers to exhibits submitted earlier in the case with other pleadings. (See, e.g., Def.'s Opp'n to Pls.' Mot. For Summ. J. at p. 4 n.1 ("Rather than resubmit evidence previously submitted to the Court, defendant refers the Court to its previous filings on the issue of res judicata, incorporated herein by reference . . . .").) Accordingly, rather than giving the name of the pleading, which may be confusing to the reader, the court lists the docket number to allow for easy accessibility to the record.

the plaintiffs' interrogatories. The answer contained an abbreviated explanation of expenditures from the fund, none of which was supported by backup documentation. (See Sakezzie Defs.' Answer to Pls.' Interrogatories, attached as Ex. BB to Pls.' Mem. Supp. Mot. For Summ. J.) The court's reference to "evidence which indicates that the agencies of the Federal Government have been receiving and paying over to the State the funds in question" does not make clear to what "evidence" the court is referring, nor does the record in this case provide further explanation. Nothing in the record shows that the plaintiffs objected to the court's reliance on the answer to the interrogatory as sufficient to moot the claim for an accounting.

On August 25, 1961, Judge Christensen entered written Findings of Fact and Conclusions of Law, in which he found that the Utah defendants "have not kept the plaintiffs and those represented by them reasonably informed concerning the amounts received in said fund and as to expenditures from said fund; but in the course of this proceeding have fully informed the plaintiffs of such receipts and expenditures." Sakezzie v. Utah Indian Affairs Comm'n, 198 F. Supp. 218, 222 (D. Utah 1961) ("Sakezzie I"). The court also stated that

> the proper administration and expenditure of said fund makes desirable the availability to the beneficiaries and their representatives of reasonably accurate, complete and current information concerning the receipts[,] expenditures and projects of the defendants. That beyond the mere legal right to this information or its availability from other sources, proper understanding and cooperation probably will be advanced, the effective expression and consideration of views and suggestions will be promoted in harmony with the statute and the policy of the Federal government toward the Indians, and the administration of the fund will be more in keeping with such statutes and policy if an affirmative program to this end is carried out by the defendants.

Id. at 225-26 (emphasis added). Plaintiffs did not appeal the court's findings of fact and conclusions of law.

A year later, on July 2, 1962, plaintiffs filed a post-judgment petition with the court for supplemental relief enforcing the court's 1961 judgment and decree. In their Petition, the plaintiffs sought injunctive relief, alleging that the defendants were not complying with the court's judgment and decree.[5] Specifically, they alleged (among other things) that the defendants were refusing to provide information concerning receipts and disbursement of the fund. The plaintiffs sought monthly reports of receipts and expenditures. (See Sakezzie Pls.' July 2, 1962 Petition at 2-5, attached as Ex. 4 to Docket No. 870.)

The court issued a Memorandum of Decision on February 7, 1963, in which it reiterated that

> defendants have kept full and proper accounts of the funds received by them which are computed and transmitted by Federal authority. They, however, have demonstrated remarkable unconcern about keeping the beneficiaries of the fund informed of accretions to said fund, about disbursements and commitments therefrom and about plans with respect to future expenditures . . . .

Sakezzie v. Utah Indian Affairs Comm'n, 215 F. Supp. 12, 18 (D. Utah 1963) ("Sakezzie II"). The court further stated that its former findings of fact and conclusions of law "endeavored only gently to indicate the duty of the defendant State officials with regard to the furnishing of information to the plaintiffs. . . ." Id. But the court said

> [i]t is clear to the court that the defendants have not discharged their duty in that respect. . . . [A]nd it is no answer to say that the information could be ferreted out from their records by the plaintiffs. . . . It does not seem unreasonable, indeed it seems essential, to recognize that a program for the affirmative disclosure of available information as to the plaintiffs is indispensable for the proper discharge of the defendants' trust . . . .

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[5]The judgment was not reported, but the court's subsequent decision on the petition summarizes the judgment's main provisions. See Sakezzie v. Utah Indian Affairs Comm'n, 215 F. Supp. 12, 14 (D. Utah 1963) ("Sakezzie II").

Id. at 18-19 (emphasis added). The court ordered the defendants to provide monthly reports of receipts and expenditures to the plaintiffs. Id. at 24. (See also Sakezzie Feb. 25, 1963 Supplemental J. & Decree, attached as Ex. 8 to Docket No. 870.)

On May 12, 1964, the plaintiffs in Sakezzie filed another petition, again seeking relief from the defendants' alleged failure to comply with the court's two earlier orders. (See May 12, 1964 Sakezzie Pls.' Petition, attached as Ex. V to Pls.' Mem. Supp. Mot. For Summ. J.) The record does not show any further activity in the Sakezzie case until more than a year later, when the court held a hearing on June 7, 1965, regarding its order to show cause why the 1964 petition should not be dismissed for failure to prosecute. The Sakezzie plaintiffs' attorney did not attend, and the court dismissed the petition. (See June 7, 1965 Minute Entry in Sakezzie, attached as Ex. W to Pls.' Mem. Supp. Mot. For Summ. J.) On June 9, 1965, two days after the hearing, the Sakezzie plaintiffs' attorney filed a Motion for Reinstatement of Its Pending Petition. The court denied the motion on June 21, 1965, but granted the Sakezzie plaintiffs leave to file another petition. Despite permission to do so, the plaintiffs did not file another petition. (See Defs.' Opp'n Mem. at 7 (admitting facts set forth in Pls.' Mem. Supp. Mot. For Summ. J. at ¶¶ 30-33).) The June 9, 1965 dismissal for failure to prosecute appears to be the end of the Sakezzie suit.

2. Jim v. State of Utah et al. (Case No. C-21-70 (D. Utah 1970))

Jim was filed as a class action on February 7, 1970. The named plaintiffs were members of a class consisting of approximately 1500 Navajo and other Indians residing on the Aneth Extension of the Navajo Reservation. (See Jim Compl. at pp. 1-2 ¶ 4, attached as Ex. B to Pls.' Mem. Supp. Mot. For Summ. J.) Although the main focus of Jim was the constitutionality of the

1968 Amendment, which expanded the beneficiary class,[6] the complaint also alleged that Utah had breached its fiduciary duty by spending funds on non-beneficiaries. (Id. at p. 6 ¶ 13; Jim Am. Compl. at p. 6 ¶ 13, attached as Ex. 10 to Docket 870.) The Jim complaint contained the following allegation:

> Plaintiffs . . . allege . . . that the [defendants] . . . are using and disbursing the said 37 1/2% of such royalties received by the State of Utah in breach of their fiduciary duty to plaintiffs by expending the same for the benefit of persons . . . who have no beneficial interest or other right therein and not for the benefit of plaintiffs.

(Jim Am. Compl. at p. 6 ¶ 13.) The plaintiffs requested an accounting of monies received and spent from such royalties. (Id. at p. 7 ¶ 2 ("plaintiffs pray for . . . an order of this court that [the defendants] account for all monies received from said 37 1/2% of net royalties . . . and for the disbursement of said monies . . . .").)

On December 30, 1970, the Honorable Willis Ritter certified the case as a class action under Federal Rule of Civil Procedure 23(b)(2). (See Dec. 30, 1970 Order at 2, attached as Ex. 11 to Docket No. 870.) In the December 30, 1970 Order, Judge Ritter stated that "the case has sufficient notoriety that no further notice to members of the class is necessary . . . at the present stage of the proceeding." (Id. at 1-2.)

The case was tried without a jury and Judge Ritter entered an Interlocutory Decree and Order on February 7, 1972, declaring the 1968 amendment unconstitutional and ordering Utah to file the monthly reports which had previously been ordered in Sakezzie. (See Feb. 7, 1972 Interlocutory Decree & Order at 3 (attached as Ex. 12 to Docket No. 870) (ordering Jim

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[6]See United States v. Jim, 409 U.S. 80, 82 (1972) (holding that expansion of beneficiary class was not taking of property because beneficiaries did not have constitutionally protected property rights in the Navajo Trust Fund).

defendants to "file with the Court those monthly written reports decreed in [Sakezzie] for the periods from February 25, 1963 to May 17, 1968, and from May 17, 1968 to the present").) The court's decision regarding the 1968 amendment was appealed to the United States Supreme Court, which reversed Judge Ritter's finding that the 1968 amendment was unconstitutional. See United States v. Jim, 409 U.S. 80, 82-83 (1972).

On remand, following a January 9, 1974 hearing, Judge Ritter held that the accounting ordered in the court's February 7, 1972 Interlocutory Decree & Order had not been done and that the plaintiffs were entitled to an accounting. (Feb. 7, 1974 Order at 2, attached as Ex. Y to Pls.' Mem. Supp. Mot. For Summ. J.). Specifically, he ordered the defendants to file with the court "a complete, comprehensive, proper, lawful accounting showing, for two periods, to-wit, up to May 17, 1968 and from May 17, 1968 to the present [February 1974]" and consisting of various types of information listed in the Order. (Id.)

During a July 14, 1975 hearing, plaintiffs' counsel told the court that "[a]n accounting and abstract was filed with the court, and the plaintiffs do not object to that." (Transcript of July 14, 1975 Hearing at 2, attached as Ex. 18 to Docket No. 870.) Nothing further regarding the "accounting and abstract" was discussed at the hearing, so the transcript does not identify the documents to which the Jim plaintiffs were referring. But the record does contain an "Abstract of Minutes and Financial Statements of Defendant Utah Board of Indian Affairs" filed by the defendants on February 7, 1974, the same day the hearing was held. (See Ex. 15 to Docket No. 870.)[7] The pleading contained the following statement:

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[7]The court notes that on February 7, 1974, the Jim defendants filed what they referred to as "Accounting of Defendant Utah Board of Indian Affairs With Regard To Receipts And

> The parties have heretofore stipulated that, pending final action on defendants' appeal from the Decree and Order entered herein on February 17, 1972, an abstract of minutes and financial statemcnts of the Utah Indian Affairs Board since Feb. 25, 1963, may be filed with the court in lieu of compliance with the reporting requirements of paragraph 4 of said Decree and Order, without, however, prejudice to the Court's right to require further reporting or accounting with respect to matters involved in the case.

(Id. at 1 (emphasis added).)

At a hearing almost one year later (May 25, 1976), Judge Ritter again ordered an accounting after the parties indicated that one had yet to be completed. (See Transcript of May 25, 1976 Hearing at 13-14, 16-17, attached as Ex. 19 to Docket No. 870.) At the very end of the hearing, Judge Ritter said

> I think we should pursue the accounting matter of course. I think that is the most important part of the lawsuit, really. The legal points are settled now. Let's have an accounting of what the state's been doing with the Indians' money. That's the short question that we need to go into and let's pursue it.

(Id. at 17 (emphasis added).)

Despite Judge Ritter's edict, no further action was taken on the case until the Honorable Bruce Jenkins (who apparently inherited the case from Judge Ritter) held a hearing on December 29, 1978, on the court's order to show cause why the case should not be dismissed for failure to prosecute. After hearing arguments from counsel, and with no cause having been shown why the action should not be dismissed, Judge Jenkins ordered the case dismissed. (See Dec. 29, 1978 Order of Dismissal, attached as Ex. 21 to Docket No. 870.) Rule 41(b) of the Federal Rules of

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Expenditures From February 25, 1963 Through May 17, 1968" in response to an oral order of the court made on June 9, 1973. (See Ex. Q attached to Pls.' Mem. Supp. Mot. For Summ. J.) But this "accounting" was filed before Judge Ritter held on February 7, 1974, that no accounting had been done. (See Feb. 7, 1974 Order at 2.)

Civil Procedure, which describes the effect of an involuntary dismissal, states (as it did in 1978) that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication on the merits (i.e., is with prejudice)."

The 1978 Order of Dismissal, which did not specify that dismissal would be without prejudice, appears to be the last word on the Jim case.

3. Bigman v. Utah Navajo Development Council, Inc., et al. (Case No. C-77-31 (D. Utah 1977))

The Bigman case was filed on February 7, 1977, by Seth Bigman and Martha Collins. The case was not filed as a class action but the complaint said it was "an action by Navajo Indians as beneficiaries of an oil royalty trust fund seeking to preserve and protect the fund from defalcations and misexpenditures." (Bigman Compl. at 1, attached as Ex. C to Pls.' Mem. Supp. Mot. For Summ. J.) Indeed, counsel for the Bigman plaintiffs specifically avoided filing the matter as a class action because of tensions between the original beneficiaries and the new beneficiaries created by the 1968 amendment. (See Defs.' Opp'n Mem. at p. 18; Pls.' Mem. In Supp. Mot. For Summ. J. at ¶ 119.)

The Bigman plaintiffs alleged that the defendants had breached their fiduciary duty, and requested an accounting and recovery of all money which had been wrongfully expended from the Fund. (Bigman Compl. at p. 8 ¶ 26, p. 9 ¶ 3.) Specifically, the plaintiffs alleged:

> This is an action by Navajo Indians as beneficiaries of an oil royalty trust fund, seeking to preserve and protect the fund from defalcations and misexpenditures.
>
> . . . .
>
> Defendants' failure to effectively account for the expenditures of the 37 1/2 % oil royalty funds, and to provide an adequate accounting to Plaintiffs and the bulk of the beneficiaries constitutes a breach of fiduciary duty . . . .

(Id. at p. 1 and p. 8 ¶ 26.) The Bigman plaintiffs requested an order "that the Defendants account

to Plaintiffs for all monies received from the 37 1/2 % oil royalties; and separately, for the disbursement of all of said monics." (Id. at p. 8 ¶ 29(a).)

On August 8, 1977, seven months after the case was filed, the parties settled. (See Stipulation of the Parties, attached as Ex. J to Pls.' Mem. Supp. Mot. For Summ. J.) The settlement provided for a review of questionable transactions, a review of the Utah Navajo Development Council's (UNDC) accounting and management practices, and a review of the medical clinics at Montezuma Creek, Mexican Hat, and Navajo Mountain. (Bigman Sep. 8, 1977 Stipulated J. & Decree, attached as Ex. K to Pls.' Mem. Supp. Mot. For Summ. J.) Because thc Bigman case was not a class action suit, no official notice was provided to non-party beneficiaries concerning the proposed settlement or the court's review and acceptance of the parties' agreement. (See Defs.' Opp'n Mem. at 24; Pls.' Mem. Supp. Mot. For Summ. J. at ¶ 151.)

Based on the stipulated judgment and decree, the parties retained Dr. Roger Nelson to review the questioned transactions, the accounting and management practices of UNDC, and the operation and management of the medical clinics. Dr. Nelson filed his report with the court on December 12, 1977. (See Ex. 72 attached to Docket No. 870.) Apparently the Nelson Report, although apparently available for inspection by members of the public, was not publicly distributed.

By stipulation of the parties, two remaining issues were presented to the Honorable Aldon Anderson without trial. Those issues were articulated as follows:

> 10. Plaintiffs assert that the oil royalty trust funds are not public funds, and may not be used for public purposes, or to discharge any general governmental obligation to Plaintiffs and other Navajo beneficiaries. Plaintiffs

> further assert that Defendants are in fact expending the oil royalty funds for public and governmental purposes, in violation of federal law and the precedents of this Court. Plaintiffs further charge that these complained of expenditures have supplanted governmental benefits due Plaintiffs and other Navajo beneficiaries, and that as a result various governmental agencies and entities have withheld programs and benefits that otherwise would have been made available to Plaintiffs and other Navajo beneficiaries. The Defendants have denied these allegations. The Court shall set this controversy for trial, and issue a declaratory judgment, pursuant to 28 U.S.C. 2201, 2202.
>
> 11. Plaintiffs assert that Defendants must implement a program of Navajo Indian preference in employment practices and hiring in the administration and expenditure of the oil royalty trust fund. Defendants assert such employment preference would be unlawful. The Court shall set this controversy for trial, and issue a declaratory judgment pursuant to 28 U.S.C. 2201, 2202.

(Sep. 8, 1977 Judgment & Decree at ¶¶ 10-11, attached as Ex. K to Pls.' Mem. Supp. Mot. Summ. J.) In the Decree, the court stated that it was not limiting the plaintiffs' or other beneficiaries' "right to seek relief from violations of the law in the administration and expenditure of the oil royalty trust funds as may occur subsequent to the filing of this decree." (Id. at ¶ 13.)

On September 25, 1978, Judge Anderson issued a Memorandum Opinion addressing the issues. (See Sep. 25, 1978 Mem. Op. in Bigman v. UNDC, Case No. 77-0031.) The court determined that the preferential employment practices issue did not present a justiciable controversy, and so the court refrained from issuing a declaration. (Id. at 2-3.) The court then found that, on the record before it, the court was "unable to ascertain whether the State of Utah has exceeded its authority or abused its discretion in directing the use of the funds for [certain specified purposes]. . . . The court declines to determine the lawfulness of specific expenditures of the funds due to the absence of any evidentiary basis for doing so." (Id. at 7.)

In 1983, attorney Steven Boos took over representation of the Bigman plaintiffs,

replacing lead counsel Eric Swenson.

On December 5, 1984, Judge Anderson issued a Judgment and Decree (the court had retained continuing jurisdiction), based on the Bigman parties' stipulation, regarding the organization of the UNDC and Utah Navajo Industries, Inc. (UNI). (Dec. 5, 1984 J. & Decree, attached as Ex. 75 to Docket No. 870; Nov. 29, 1984 Stipulation of Parties, attached as Ex. 74 to Docket No. 870.)

In 1989, the Bigman court issued a Stipulation and Joint Motion and Order granting the UNI additional time to repay money it owed to the Navajo Trust Fund. (See Dec. 18, 1989 Order, attached as Ex. I to Pls.' Mem. Supp. Mot. For Summ. J.) By this time, the former Bigman plaintiffs' attorney Eric Swenson had switched sides and was representing the defendant UNDC. (See id. at 4.)

The record does not show any further court activity in the Bigman case.

ANALYSIS

Legal Standards

Summary Judgment

Federal Rule of Civil Procedure 56 permits the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The court must "examine the factual record and reasonable inferences

therefrom in the light most favorable to the party opposing summary judgment." Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990).

Burden of Proof

The State of Utah, which has raised the affirmative defense of claim preclusion, has the burden to establish that privity, or adequacy of representation, existed in the cases of Sakezzie, Jim, and Bigman. (Dec. 20, 2002 Order (Docket No. 898) at 17 (citing Nwosun v. General Mills Restaurant, 124 F.3d 1255, 1257 (10th Cir. 1997).)

Claim Preclusion: Adequacy of Representation

Constitutional due process prohibits preclusive application of an earlier judgment to a non-party unless that party was in privity with the parties in the earlier suit. Richards v. Jefferson County, Ala., 517 U.S. 793, 797 n.4 (1996). "Res judicata, or claim preclusion, precludes a party or its privies from relitigating issues that were or could have been raised in an earlier action, provided that the earlier action proceeded to a final judgment on the merits." King v. Union Oil Co. of Cal., 117 F.3d 443, 445 (10th Cir. 1997) (emphasis added). "To apply the doctrine of res judicata, three elements must exist: (1) a judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." Id. (emphasis added).

In the December 20, 2002 Order, the court found that the first and third elements have been established. (See Docket No. 898.) The issue here is whether privity existed between the

parties[8] to the suits of Sakezzie, Jim, and Bigman, and the Plaintiffs in this case.

"Privity is essentially the concept of legal similarity—who are the parties and whether they are legally identical." Yankton Sioux Tribe v. Gambler's Supply, Inc., 925 F. Supp. 658, 664 (D.S.D. 1996). In the Tenth Circuit, the issue of whether privity exists is a question of fact. Lowell Staats Mining Co., Inc. v. Philadelphia Elec. Co., 878 F.2d 1271, 1276 (10th Cir. 1989). "There is no definition of 'privity' which can be automatically applied to all cases involving the doctrines of res judicata and collateral estoppel. Privity requires, at a minimum, a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same." Id. at 1275 (emphasis added).

Because the court finds that Sakezzie and Jim were class action suits but that Bigman was not, the court divides its analysis into two parts, addressing two different legal theories presented by the State of Utah in support of its claim preclusion defense.

The class actions suits Sakezzie and Jim do not have any preclusive effect on the Pelt Plaintiffs' claims because the nonparties were not adequately represented in the earlier cases.

Privity exists if the party to the class action suit adequately represented the nonparty. See, e.g., Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) ("members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present") (emphasis added); Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation, 975 F.2d 683, 688 (10th Cir. 1992) ("where the association does adequately

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[8]There is no question that the named plaintiffs in the earlier suits were not the same as the named plaintiffs in the current suit. Accordingly, in order to establish the affirmative defense of res judicata, the Defendant must establish that the parties were in privity.

represent the interests of all members [in the earlier litigation], a court will find privity"); Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 193 F.3d 415, 423 (6th Cir. 1999) (holding that privity element of res judicata doctrine is established when non-party to earlier suit was adequately represented by party); Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390 (9th Cir. 1992) ("if the plaintiff [in the present suit] was not adequately represented in the prior action or there was a denial of due process, then the prior decision has no preclusive effect," citing Hansberry v. Lee, 311 U.S. 32 (1940)).

To determine whether a non-party was adequately represented in an earlier class action suit, the Tenth Circuit has found that "[t]he question of adequate representation can best be resolved by determining whether the interests of those who would attack the judgment were vigorously pursued and protected in the class action by qualified counsel." Garcia v. Board of Educ., Sch. Dist. No. 1, Denver, Colo., 573 F.2d 676, 680 (10th Cir. 1978). The parties disagree about how detailed the court's inquiry must be.

The Plaintiffs state that a "finding of inadequate representation may stem from the actions of the class representatives, class counsel, the court, and even counsel opposing the class" and that the court "may not shy away from 'Monday morning quarterbacking.'" (Pls.' Mem. Supp. at 47.) To support their motion, the Plaintiffs present a host of historical details about the nature of and interactions between the parties, counsel, and the judges in the cases, as well as attorney qualifications and each suit's outcome. Defendant, on the other hand, asserts that the details presented by Plaintiffs are for the most part not relevant and that "in evaluating the conduct of counsel in the prior cases, courts should focus on the incentive to litigate created by the close alignment of the interests at issue, rather than second guessing actual trial strategy." (Def.'s

Opp'n Mem. at 38.) The Defendant quotes comment f of § 42 of the Restatement 2nd of Judgments: "'Tactical mistakes or negligencc on the part of the representative are not as such sufficient to render the judgment vulnerable.'" (Id. at 39.)) According to the Defendant, "[t]he legal standard of adequacy of representation does not call for the Court to re-litigate the prior cases. It is only when the rcpresentative's management of the litigation is so grossly deficient as to be apparent to the opposing party that the prior litigation will create no justifiable reliance for future preclusion." (Id. at 40 (citing Restatement 2nd of Judgments, Ch. 4, § 42, comment f).)

The court finds the Fifth Circuit's description of the scope of the adequacy inquiry instructive:

> To answer the question whether the class representative adequately represented the class so that the judgment in the class suit will bind the absent members of the class requires a two-pronged inquiry: (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after termination of the suit, that the class representative adequately protected the interest of the class? . . . [T]he second [question] involves a review of the class representative's conduct of the entire suit—an inquiry which is not required to be made by the trial court but which is appropriate in a collateral attack on the judgment . . . .

Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973) (emphasis added). In Gonzales, the Fifth Circuit held that the "primary criterion" for determining whether there was adequate representation is "whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class. A court must view the representative's conduct of the entire litigation with this criterion as its guidepost." Id. at 75 (emphasis added). The Gonzales court held that although the counsel's representation of the plaintiffs was "more than adequate up to the time the three-judge court entered its final order on remand," the representative's failure to appeal the decision rendered the representation inadequate. Id. at 75-

76. Compare Wal-Mart Stores, Inc. v. VISA U.S.A. Inc., 396 F.3d 96, 106-07 (2d Cir. 2005) ("Adequate representation of a particular claim is established mainly by showing an alignment of interests between class members, not by proving vigorous pursuit of that claim."). But see id. at 110 ("Adequate representation is not solely an assessment of effort. Rather, an examination of the interests of the settling plaintiffs and of the Settlement's effect on those who would be bound by it [is also part of the analysis].") (emphasis added). See also Wright, Miller & Cooper, Federal Practice and Procedure 2d § 4455 ("Shared interests do not alone ensure adequate representation.").

The scope of the inquiry seems to lie somewhere between what Plaintiffs and Defendants advocate in this case. The court finds some of the details provided by the parties (e.g., the language and cultural barriers between the clients and their attorneys, the attorneys' efforts to collect attorneys' fees, and the attorneys' reputations) to be irrelevant to the analysis. But the court must, to some extent, look back in hindsight to determine whether there was actual adequate representation.

Sakezzie

Based on the record, the court finds that the Plaintiffs were not adequately represented by the Sakezzie plaintiffs. Although it is true that the parties' interests in the Fund were essentially the same, the court simply cannot find adequate representation in light of two factors. First, the Sakezzie plaintiffs did not object to the Sakezzie court's finding that the accounting claim was moot based on a summary contained in an answer to an interrogatory. Second, and more importantly, the case was dismissed by the court for failure to prosecute after an order to show cause had been issued. The Sakezzie plaintiffs took no action even though it appears that the

plaintiffs believed that the defendant had not complied with the court's orders. For example, the Sakezzie plaintiffs contended that the defendant had not complied with the court's order to provide monthly reports of receipts and expenditures to plaintiffs. See Sakezzie II, 215 F. Supp. at 19 ("It is clear to the court that the defendants have not discharged their duty" to furnish certain information to the plaintiffs in compliance with the defendant's trust duties). The Sakezzie plaintiffs' ultimate failure to follow through on an issue that they emphasized in their original complaint and two subsequent petitions is significant. For these reasons, the court holds that the Plaintiffs in this case are not bound by the judgment in Sakezzie.

Jim

The court finds that the Plaintiffs were not adequately represented by the Jim plaintiffs.

Judge Ritter certified the class under Fed. R. Civ. P. 23(b)(2), which does not have an opt-out provision. Fed. R. Civ. P. 23(b)(2), 23(c); In re: Four Seasons Sec. Laws Litig., 502 F.2d 834, 842 n.9 (10th Cir. 1974); Marcus v. Kansas Dep't of Revenue, 206 F.R.D. 509, 513 n.2 (D. Kan. 2002). He also did not require notice to members of the class, stating that "the case has sufficient notoriety that no further notice to members of the class is necessary . . . at the present stage of the proceeding." (Dec. 30, 1970 Order at 1-2, attached as Ex. 11 to Docket No. 870.) The record does not support a finding that the case's "notoriety" generated the kind of notice necessary to protect the rights of absent class members.

Later, after plaintiffs asserted that an accounting had yet to be completed, Judge Ritter emphasized the importance of the accounting (which he noted had not been accomplished as late as May 25, 1976). He said,

I think we should pursue the accounting matter of course. I think that is the most

> important part of the lawsuit, really. The legal points are settled now. Let's have an accounting of what the state's been doing with the Indians' money. That's the short question that we need to go into and let's pursue it.

(Transcript of May 25, 1976 Hearing at 17, attached as Ex. 19 to Docket No. 870 (emphasis added).) Still, the plaintiffs took no further action. As noted above, Judge Jenkins, in 1978, issued an order dismissing the case (with prejudice) for failure to prosecute (after issuing an order to show cause).

These factors do not depict a situation in which the absent class members' interests and due process rights were vigorously pursued and protected by the class representatives. Accordingly, the court finds that no privity existed between the Pelt plaintiffs and the Sakezzie plaintiffs, and so the doctrine of res judicata does not bar the Plaintiffs' claims.

No privity exists between the plaintiffs in Bigman and the plaintiffs in Pelt.

Although Bigman was not a class action, the Defendant raises the theory of virtual representation to support its position that Bigman has preclusive effect against beneficiaries of the Fund. Some courts, particularly in the Fifth Circuit, have treated certain informal relationships "as synonymous with adequate representation for res judicata purposes." Meza v. General Battery Corp., 908 F.2d 1262, 1267 (5th Cir. 1990). "In certain limited circumstances, this court has held that 'a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." Id. at 1272.

"The broadest form of this theory would preclude relitigation of any issue that had once been adequately tried by a person sharing a substantial identity of interests with a nonparty." Wright, Miller & Cooper, Federal Practice and Procedure 2d § 4457. But the Fifth Circuit in

Meza warned that the question of virtual representation should be "kept within 'strict confines.'" 908 F.2d at 1272. "Among the 'strict confines' is a requirement that there be 'an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues.'" Id. (emphasis added). See also Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 193 F.3d 415, 424 (6th Cir. 1999) (holding that virtual representation required a legal relationship in which the party in the first suit is somehow accountable to the non-party); Waddell & Reed Financial, Inc. v. Torchmark Corp., 223 F.R.D. 566, 616-17 (D. Kan. 2004) (articulating same rule under Alabama law and citing cases in various federal circuits requiring accountability before a finding of virtual representation). The Tenth Circuit has not issued an opinion addressing this relatively new theory.

- The courts focus on accountability for good reason. Fundamental rights such as due process, court access, and the right to a jury trial are threatened when a volunteer brings a lawsuit that conceivably affects the rights of nonparties. Absent some sort of legal authorization, or measure of accountability for a job poorly done, the original party is but an interloper to the succeeding parties, leaving them with little or no recourse should the original party inadequately represent broader interests.

There is no evidence in the record whatsoever of any legal relationship or other form of accountability existing between the Bigman plaintiffs and the Pelt plaintiffs. The fact that the plaintiffs in both cases had the same status (that is, beneficiaries of the same fund) is not enough to bind the Pelt plaintiffs to the judgment in Bigman. This is particularly so because Bigman was not a class action and there is no evidence that the Bigman plaintiffs and their counsel were working for anyone's behalf other than theirs. Given due process concerns (the basis of which is

well laid out in Richards v. Jefferson County, Alabama, 517 U.S. 793 (1996)), the court finds that the Pelt plaintiffs are not barred by the judgment in Bigman.

Plaintiffs' request for ruling regarding the adequacy of earlier accountings

Given the fact that the court does not bar the Plaintiffs' claims in this suit on the basis of res judicata, the Plaintiffs are working with a clean slate. That is, the court need not determine whether an accounting was rendered in each of the earlier suits, and, if so, whether each accounting was adequate.

Rather, the court will proceed as was set forth in its June 19, 2001 Order (Docket No. 778) (setting forth standard and burdens relating to Utah's accounting duty and requesting briefing of certain issues). The court notes that one of the accounting issues identified in the October 2, 2003 Joint Stipulated Case Management Plan (Docket No. 939) (whether the State of Utah is obligated to account for funds spent by the Utah Navajo Development Council (UNDC)) is set for hearing on April 27, 2006.

ORDER

For the foregoing reasons, the court ORDERS as follows:

1. Plaintiffs' Summary Judgment Motion re: Adequacy of Representation and Sufficiency of Prior Accountings is GRANTED IN PART AND DENIED IN PART as follows:

a. Plaintiffs' Summary Judgment Motion re: Adequacy of Representation is GRANTED. Plaintiffs are not precluded by the judgments in Sakezzie, Jim, or Bigman.

b. Plaintiffs' Summary Judgment Motion re: Sufficiency of Prior Accountings is DENIED AS MOOT.

2. Defendant's Objection and Motion to Exclude or Limit Plaintiffs' Purported Expert Testimony (Docket No. 982) is DENIED AS MOOT.

3. Plaintiffs' Motion to Strike Declarations (Blake & Larson) (Docket No. 991) is DENIED AS MOOT.

4. Plaintiffs' Objection and Motion to Limit Testimony of Harold Christensen (Docket No. 995) is DENIED AS MOOT.

5. The court finds that (a) this order involves a controlling question of law, (b) that a substantial ground for difference of opinion concerning the question of law exists, and (c) an immediate appeal would materially advance the disposition of the litigation. (See Mar. 14, 2006 Order & Mem. Decision (Docket No. 1035); Jan. 11, 2006 Order & Mem. Decision (Docket No. 1017).) Accordingly, under 28 U.S.C. § 1292(b), the court certifies this order for interlocutory appeal to the United States Court of Appeals for the Tenth Circuit.

DATED this 26th day of April, 2006.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

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Case No. 06-4046

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAKE C. PELT, et al.,

Plaintiffs/Appellees,

v.

STATE OF UTAH,

Defendant/Appellant

CERTIFICATE OF SERVICE

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I certify that on the 31st day of July 2006, a true and correct hard copy of the Brief of Appellant, State of Utah, along with this Certificate of Service was sent to the following persons by hand delivery:

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DATED this 31 st day of July, 2006.

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