

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA**

**WILLIAM S. FLETCHER, CHARLES A. PRATT,  
JUANITA W. WEST, CORA JEAN JECH, BETTY  
WOODY, Individually, and on behalf of themselves  
and all others similarly situated,**

**Plaintiffs,**

**v.**

**THE UNITED STATES OF AMERICA; THE  
DEPARTMENT OF THE INTERIOR; DIRK  
KEMPTHORNE, Secretary of the Interior; THE  
BUREAU OF INDIAN AFFAIRS; Assistant  
Secretary of the Interior - Indian Affairs,**

**Defendants.**

**Case No. 02-CV-427(K)(M)**

**CLASS ACTION  
ATTORNEY LIEN**

**PLAINTIFFS' COMBINED MOTION FOR PARTIAL SUMMARY JUDGMENT  
AND BRIEF IN SUPPORT**

**MOTION FOR PARTIAL SUMMARY JUDGMENT**

Come now the Plaintiffs and seek and order from this Court granting partial summary judgment against the Defendants in this action, requiring the Defendants to account to them and the putative class for the federal management, control and disbursement of funds from the Osage Annuity Fund pursuant to Fed. R. Civ. P. 56 (c) and (d) and LCvR 65.1. Summary judgment is appropriate in this matter because there is not, nor can there be, a dispute as to whether the Defendants owe such an accounting to the Plaintiffs and the Class Members as a matter of federal law. Moreover, there can be no dispute that the Defendants have not provided such an accounting at any time in the past.

**INTRODUCTION**

The Plaintiffs are persons entitled to receive distributions from a special, segregated fund overseen by the Defendants. The Plaintiffs are concerned and have substantial reason to believe



that the Defendants currently are and have been for some time paying a portion of these funds to persons who are not entitled to receive them, and the same Defendants are not paying funds to others who are entitled to receive them. As an initial step in resolving this dispute, once and for all, the Plaintiffs are seeking an accounting of the Defendants' management and distribution of these funds.

In other federal lawsuits, the Defendants have been sued by nearly 100 different Indian tribes in various courts throughout the United States. Thirty seven of these cases are pending in the United States District Court for the District of Columbia. In those cases, the tribes each seek, in different ways, an order requiring the Defendants to account, *inter alia*, for the proper distribution to the proper persons of funds residing in "Tribal Trust Accounts" – accounts maintained by the Defendants for the benefit of an Indian Tribe. In an older and more developed action, the Defendants were sued in a certified class action by Eloise Cobell and others. The "*Cobell* litigation" as that case is known, has resulted in the Defendants being ordered to account to every owner of an "Individual Indian Money account" (or an "IIM account") for the maintenance and distribution of funds from such accounts. Currently, the *Cobell* Litigation is scheduled for Trial in October 2007 before the United States District Court for the District of Columbia on the question of how the Defendants will account for the management of IIM accounts.

In the instant case, Mr. Fletcher and the other proposed Class Representatives are simply asking this Court to order relief similar to what the Defendants have offered to provide 37 tribes in relation to the Tribal Trust Accounts and to what the United States District Court for the District of Columbia in the *Cobell* Litigation has already required relating to IIM accounts. While it is true that the Defendants and the various Plaintiffs in this case and the others likely



have differing opinions on how the United States must account, a resolution of this matter must start either with the Defendants' agreement to account to the Plaintiffs, or an order compelling the Defendants to do so. Because the Defendants have not been willing to provide such an accounting to the Plaintiffs in this case, an order granting the relief requested in this motion is necessary, appropriate, and legally and practically justified.

The Plaintiffs' requested accounting is necessary because the fund as to which the Plaintiffs seek an accounting is neither a Tribal Trust Account, nor is it an IIM account. Therefore, neither the Tribal Trust accounting, nor the *Cobell* accounting will address the management of the segregated fund at issue in this case. Specifically, the Plaintiffs seek in this case an accounting of royalty payments distributed from a segregated fund (herein the "Osage Annuity Fund") pursuant to An Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory and for Other Purposes, 34 Stat. 539 (June 25, 1906) (hereinafter "1906 Act") and the network of later statutes and regulations. *See* Complaint at 2, 4, 11-12. The Plaintiffs have not sought money damages but instead seek an accounting, and the equitable restoration, *inter alia*, of those funds that were wrongfully distributed by the Defendants. *See id* at 4.

The Plaintiffs and Class Representatives at this time do not propose a plan for how the Defendants must account, but instead propose that the Court order the parties to meet in this judicial district to confer and determine whether agreement can be had on the scope and process of such an accounting, and report their agreement or differences to the Court in a limited time frame, perhaps thirty to forty five days after an accounting is ordered by this Court. While the parties may not agree on the scope and timing for such an accounting, it is likely that many accounting issues will not be in dispute between the parties, particularly because the accounting



that is sought in this case is limited in nature. To the extent the parties confer, the issues to be resolved as it relates to the nature and scope of the required accounting would very likely be substantially narrowed.

### **CONCISE STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. In 1906, Congress passed a law permitting development of the oil and gas deposits comprising the mineral estate located on the tribal land of the Osage Tribe. *See* An Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory and for Other Purposes, 34 Stat. 539 (June 25, 1906) (attached as Exhibit A).

2. Section 4 of the 1906 Act imposed a trust whereby the royalties received by the United States from the production of minerals by third parties on the Osage Mineral Estate, *after* deducting and withholding some portion of the Osage Mineral Estate for Osage Tribal purposes, were to be segregated into a separate fund to be distributed to Osage Indians. *See* Exhibit A.

3. The royalties generated by the Osage mineral estate are paid directly to the United States government. The United States government places the mineral royalty money in a Tribal Trust Account, from which a certain portion of the funds is paid to the Osage tribe directly and the remainder of those funds is placed into a different and segregated trust fund, the Osage Annuity Fund. From this Osage Annuity Fund, the royalties are then paid to the Osage headright holders.

4. The Osage Annuity Fund is neither a tribal trust account nor an Individual Indian Money account. *See* Felix S. Cohen, *Federal Indian Law* at 630-31, 790 (Michie 1982).

5. On August 10, 2007, Ross Swimmer, the Special Trustee for American Indians in the United States Department of the Interior filed in the United States District Court for the District of Columbia a Declaration in Support of Defendant's Motion for Voluntary Remand



(hereinafter “Ross Swimmer’s Declaration) in numerous civil actions. *See* Declaration of Ross O. Swimmer In Support of Defendant’s Motion for Voluntary Remand, attached as Exhibit B.

6. Ross Swimmer’s declaration requested “a voluntary remand and associated stay of the tribal trust accounting and trust mismanagement litigation” to allow the Department of Interior to create a plan for the accounting of Indian trust accounts. *See* Exhibit B at 4.

7. Ross Swimmer’s declaration indicates that “Interior will make a number of factual, technical, fiscal, legal, and policy determinations.” *Id.* (emphasis added).

8. The Department of Interior utilizes many different and “specialized policies, regulations, business systems and forms for handling trust funds and maintaining and reporting” the account records. *Id.* at 5-6.

9. The Osage Annuity Fund was not part of the Tribal Reconciliation Project.

10. During the Tribal Reconciliation Project, “agreed-upon procedures for the tribal trust fund accounts” were conducted resulting in a “transaction by transaction account statements . . . for tribal trust fund accounts for the July 1, 1972 (Fiscal Year 1973), to September 30, 1995 (Fiscal Year 1995) period[.]”. *See* Exhibit B at 7.

11. Ross Swimmer, as the Special Trustee for American Indians, is responsible for “monitoring a ‘fair and accurate accounting’ of the trust accounts.” *Id.* at 8-9 (citing 25 U.S.C. § 4043(b) (emphasis added)).

12. The Office of Historical Trust Accounting, working with the Inter-Tribal Monitoring Association, “has produced a draft methodology that proposes to test disbursements, evaluate investments and assess the completeness of tribal trust accounts.” *Id.* at 12 (emphasis added).



13. Ross Swimmer has affirmed his personal commitment “to ensuring that Interior provides tribes with historical accountings” pursuant to law. *Id.* at 13.

14. Interior sought remand in the tribal trust accounting cases “so that it may further consider, and act upon, the implications of certain recent factual and policy developments, particularly with respect to the *Cobell* litigation . . . and the anticipated impacts of the many new tribal suits filed in December 2006.” *Id.* at 13. Furthermore, Interior wished to “apply the tribal accounting expertise it has developed as a result of the 2002-2006 accounting-related work with the earliest tribal trust plaintiffs, the insights gained from its 2004-06 consultations on the Regulatory Initiative, and other factors . . . to prepare its fully-articulated explanations of the features of an historic accounting for tribes that it deems compliant with law.” *Id.*

15. Ross Swimmer indicates that Interior will “prepare an accounting plan and accompanying record.” *Id.* at 14. Factors that will be considered when preparing the plan include whether or how to: conduct cost-benefit analysis; assure accuracy in the accounting; determine necessary documentation; the degree of detail of accounting information provided to tribes; inclusion or exclusion of tribal IIM accounts; start and finish dates; account for non-monetary assets; sequence accountings; and other things. *Id.* at 14-15.

### **SUMMARY JUDGMENT STANDARD**

When no genuine issue exists as to any material fact, the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Partial summary judgment is permitted under Fed. R. Civ. P. 56(d). The existence of factual dispute will not defeat an otherwise properly supported summary judgment motion because “the requirement is that there be no genuine issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed.



2d 202 (1986). The substantive law applicable to the claimed causes of action will identify the material facts. *Id.* A Judge must examine the evidence in the light most favorable to non-movant and draw all justifiable inferences in his favor. *Id.* at 255.

A proper summary judgment motion, demonstrating the absence of a genuine issue of material fact, requires the non-moving party go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories and admissions on file, and demonstrate the existence of specific facts showing a genuine issue for trial. *Celotex*, 477 U.S. at 324. The evidence must be significantly probative to support the claims. *Anderson*, 477 U.S. at 248-49. In this case there can be no dispute that the Defendants have not accounted to the Plaintiffs for the management and distribution of the segregated fund, and that federal law obligates the Defendants to provide such an accounting. There can be no dispute that the Plaintiffs are entitled, as a matter of federal law, to the relief requested herein.

## **ARGUMENT AND AUTHORITIES**

### **I. The Creation of the Trust Relationship**

In its nascent form, Chief Justice Marshall stated that the relationship between Indians and the United States government “resembles that of ward to his guardian.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 5 Pet. 1, 8 L. Ed. 25 (1831). Indeed, all of the Plaintiffs are technically wards of the United States respecting the assets at issue, and some of the Plaintiffs are so-called “full-blood” Osage Indians, with special trust duties extending from the Defendants to them in relation to the federal administration of their assets. As the doctrine of the federal trust responsibility has developed over time, the United States Supreme Court and other courts have more closely defined the relationship and imposed fiduciary standards on the federal government. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 255, 103 S. Ct. 2961, 77 L. Ed. 2d



580 (1983)(“*Mitchell I*”); *Navajo Nation v. United States*, Case No. 2006-5059, (Fed. Cir. Op. dated Sept. 13, 2007, not yet published, but attached hereto as Exhibit C) (herein “*Navajo VI*”).

The Supreme Court has found that the federal government

has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards.

*Seminole Nation v. United States*, 316 U.S. 286, 296-97, 62 S. Ct. 1049, 86 L. Ed. 1777 (1941). *Mitchell II* further refined the law, and provides, *inter alia*, that a network of federal statutes and regulations – analogous to the statutes and regulations in this case – create and define the United States’ fiduciary relationship where such obligations can be “fairly interpreted.” *Mitchell II*, 463 U.S. at 224. The Federal Circuit very recently interpreted a number of recent Indian trust cases, including *Mitchell II*; *United States v. Navajo Nation*, 537 U.S. 488 (2003) (“*Navajo III*”); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); and *United States v. Mitchell*, 445 U.S. 535 (1980) (“*Mitchell I*”). The Federal Circuit held that “[T]he government cannot assume comprehensive control of the [Navajo] Nation’s coal, as it did [there], and disclaim liability for exercising such control.” *Navajo VI* at 14. And in a number of cases, Courts have universally decided that the United States owes a duty to account to Indians for the management of their funds and assets. *See, e.g., Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1247 (N.D. Cal. 1973). Indeed, it is unsurprising that courts hold that the United States must account to Indians for the federal management of their assets since that requirement is affirmatively set forth in federal statutes. *See, e.g., 25 U.S.C §§ 162a and 4011.*



Beyond the requirement to account, the Plaintiffs have significant concerns relating to the United States' fidelity to statutory limitations in the distribution of the "segregated funds" to them and others. The 1906 Act provides

"[t]hat the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided . . . shall be placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided.

1906 Act § 4 (emphasis added). This provision creates a trust relationship between the United States and the Osage Indians. "All the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary" (the individual Osage Indians), and a trust corpus (the Osage Annuity Fund). *Mitchell II*, 463 U.S. at 225.

The provisos of the 1906 Act subsequent to this paragraph call for certain amounts of the royalties to be set aside for schools and an emergency fund. *See* Exhibit A at § 4. The phrase "other moneys held in trust for the Osages by the United States" in the 1906 Act refers to the opening paragraph of Section 4 of the 1906 Act, which provides:

That all funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided:

The language of the 1906 Act, later revisions to the 1906 Act and regulations adopted thereunder create fiduciary duties for which the United States must account to the Plaintiffs.<sup>1</sup> Among those

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<sup>1</sup> The 1906 Act provision terminating the trust relationship twenty-five years after January 1, 1907 was amended numerous times to extend the existence of the trust relationship.



duties is paying the funds of the Osage Annuity Fund only to those legally entitled to receive money from the Osage Annuity Fund, and in the right amount, as well as the proper collection and distribution of interest earned while the account remains undistributed, but after the fund is segregated.<sup>2</sup> The provision of the 1906 Act relating to mineral lease royalties specifically refers to this trust relationship and provides that all funds derived from mineral leases on allotted lands, except for certain enumerated exceptions, were to be treated as trust funds for the benefit of individual Osage Indians – the Plaintiffs and the proposed class.

## **II. The Federal Defendants are Required to Account to the Plaintiffs for their Fidelity in the Management and Distribution of the Osage Annuity Fund**

The requirement of an accounting in this case arises from statutory authority. *See* 25 U.S.C. § 4011; 25 U.S.C. § 162a; 1906 Act, 34 Stat. 539. It is the duty of the Secretary of Interior to:

account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title.

25 U.S.C. § 4011.

Section 162a(d) of Title 25 lists some of the trust account responsibilities of the Secretary:

The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

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*See* An Act relating to the tribal and individual affairs of the Osage Indians of Oklahoma, 45 Stat. 1478 (March. 2, 1929) (extended until April 8, 1958); An Act Relating to the tribal and individual affairs of the Osage Indians of Oklahoma, 52 Stat, 1034 (June 24, 1938) (extending until January 1, 1984); An Act to amend certain laws relating to the Osage Tribe of Oklahoma, and for other purposes, 92 Stat. 1660, (Oct. 21, 1978) (extending in perpetuity). The trust relationship continues to this day.

<sup>2</sup> These issues are illustrative of the scope of accounting, and are not meant as an exhaustive list. Plaintiffs reserve the right to propose a full range of issues that an accounting of the Osage Annuity Account must address.



- (1) *Providing adequate systems for accounting for and reporting trust fund balances.*
- (2) Providing adequate controls over receipts and disbursements.
- (3) *Providing periodic, timely reconciliations to assure the accuracy of accounts.*
- (4) Determining accurate cash balances.
- (5) *Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.*
- (6) Establishing consistent, written policies and procedures for trust fund management and accounting.
- (7) Providing adequate staffing, supervision, and training for trust fund management and accounting.
- (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

(Emphasis added).

The duty to account to Indians for the United States' management of the assets is a continuing and affirmative duty. *See, e.g., Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1247 (N.D. Cal. 1973) (citing Restatement (Second) of Trusts, § 172).

### **III. The Osage Annuity Fund is Neither a Tribal Trust Account nor an Individual Indian Money Account and an Order by This Court is Necessary to Secure an Accounting for the Beneficiaries of Said Account**

The 1906 Act requires the segregation and distribution to the plaintiffs and class members of

all the funds of the Osage tribe of Indians, and all the moneys due or that may hereafter be found to be due . . . , and all moneys that may be received from the sale of their lands in Kansas . . . , and all moneys found to be due . . . on claims against the United States, after proper expenses are paid[.]

*See* Exhibit A at § 4, pt. 1. The section dealing with mineral lease proceeds refers back to the procedure for the disbursement of those proceeds, found earlier in the 1906 Act. *Id.* at § 4, pt. 2. It has long been acknowledged that “Shares in the division of the tribal trust fund effected by the 1906 Act are called ‘segregated trust funds.’” *See* Felix S. Cohen, *Federal Indian Law* at 794. The Defendants admit that the Plaintiffs receive funds from only this segregated account, and



not from an Osage Tribal Trust Account. *See* Def. Reply. Br. [Docket No.65] at 11, n. 4. Federal law and the Interior Department have long maintained that the mineral income is held for the Tribe *until* it is “segregated for distribution to individual headright owners.” *Id.*

The Osage Annuity Fund is not a Tribal Trust Account, although the federal government does hold certain funds in a tribal trust account for the benefit of the Osage tribe. The funds distributed to headright holders are initially paid to the Defendants and then deposited into the Osage Tribal Trust Account, but some of these funds are later segregated into the Osage Annuity Fund prior to their disbursement to the Plaintiffs and others. *See Osage Nation v. United States*, 57 Fed. Cl. 392, 395 (2003). Moreover, the Osage Annuity Fund is held for the benefit of headright holders not for the benefit of the Osage Tribe. See 1906 Act § 4.

The Osage Annuity Fund is not an Individual Indian Money Account, either. Individual Indian Money Accounts are created administratively by the Interior Department “[w]hen money owned by an individual Indian is held in trust other than for immediate per capita payment.” *See* Felix S. Cohen, *Federal Indian Law* at 631. Money held in trust from “the proceeds of sales, leases, or other payments from allotted lands . . . is maintained as trust personalty for long periods.” *Id.* at 630. The Osage Annuity Fund contains funds derived from the Osage Mineral Reserve, and those funds are held in trust only briefly before disbursement. The Osage Annuity Fund does not contain funds derived from allotted lands and is therefore, by definition, not an Individual Indian Money Account.

The Plaintiffs are unique because the 1906 Act created a “restricted tenancy in common” interest in the Plaintiffs respecting the proceeds of the tribe’s mineral interest. *See* Felix S. Cohen, *Federal Indian Law* at 790. The Osage Annuity Fund is a trust fund holding the proceeds which are based on the ownership of a statutorily-created property interest. Because the Osage



Annuity Fund is unique in the universe of Indian trust accounts, the entry of a particularized order and continuing supervision of the accounting process is necessary in order to ensure a fair and adequate accounting is made for the Osage Annuity Fund. The Plaintiffs and Class Members are owed this accounting, which must be specifically provided for by this Court.

#### **IV. Summary Judgment is a Proper Procedure for the Resolution of this Issue**

Statutory interpretation is a question of law. The 1906 Act, as amended and implemented by regulation creates a trust duty as a matter of law. The right to an accounting is an absolute right of the beneficiary of a trust pursuant to mandatory federal law. There are no facts in controversy that prevent an accounting from being granted to plaintiffs by order of this Court. In fact, Ross Swimmer has admitted that the government has a duty to provide a fair and accurate accounting to its Indian beneficiaries, and the Plaintiffs suggest that it is a fair inference from Mr. Swimmer's declaration that the Defendants have not provided such an accounting to any Indian or any Indian tribe, yet. While Mr. Swimmer's statements are made in reference to Tribal Trust Accounts, there is no justification for not requiring the United States to account also to the Plaintiffs in this case for the special segregated fund that benefits them, and which the Defendants exclusively manage and control. *See* Exhibit B at 12.

#### **CONCLUSION**

The Plaintiffs and Class Members are entitled to a fair and adequate accounting of the unique Osage Annuity Fund. The Plaintiffs and Class Representatives ask that such an accounting be ordered by this Court. Furthermore, the Plaintiffs and Class Representatives seek an order from this Court requiring the Parties to meet and confer, in good faith and face-to-face in this judicial district, with federal officials with decision making authority present, to determine what matters of accounting can be agreed upon, and which cannot. Finally, the Plaintiffs and



Class Representatives seek an order from this Court requiring all parties to report to the Court on a date certain on whether agreement is had on the scope and nature of an accounting, and if not to provide authority for their respective positions on matters where there is not agreement.

Respectfully submitted,

**AAMODT AND WRIGHT**

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***ATTORNEYS FOR PLAINTIFFS***

Friday, September 21, 2007



**CERTIFICATE OF SERVICE**

I hereby certify that on Friday, September 21, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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