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

WILLIAM S. FLETCHER, et alia,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 02-CV-427(K)(M)**
	)	
THE UNITED STATES OF AMERICA, et alia,	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS

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STATEMENT OF THE CASE

On May 31, 2002, the original seven Plaintiffs filed their Complaint in this action. The original Complaint challenged both the voting process for officials of the Osage Tribe, a federally recognized Tribe, as well as the federal government's alleged unlawful acts in overseeing the Osage headrights system and in permitting a number of headrights to be alienated to persons who were not of Osage tribal blood. In that original Complaint, Plaintiffs alleged that the Defendants had breached their trust responsibilities, deprived the Plaintiffs of property without due process, took administrative action not in accordance with law and deprived the Plaintiffs of other constitutional rights.

This Court has previously dismissed those claims in the original Complaint that concern voting rights in the government of the Osage Tribe, and Plaintiffs' did not appeal from that ruling. See Docket # 13. Plaintiffs did appeal the Court's dismissal of their deprivation of property and breach of trust claims. On the Plaintiffs' appeal, the Court of Appeals remanded the case to this Court for a determination of whether the Osage Tribe (or Tribal Council) is a necessary and indispensable party under Fed. R. Civ. P. 19 as to those remaining claims. Fletcher v. United States, 160 Fed. Appx. 792 (10th Cir. 2005). Those claims were based on the Defendants' alleged erroneous interpretation of the Act of June 28, 1906, Pub. L. No. 59-321, 34 Stat. 539 ("the 1906 Osage Act"), as amended, and the consequential failure to safeguard the Osage mineral allotments or "headrights" from alienation to certain non-Osages. Fletcher v. United States, 160 Fed. Appx. 792 (10th Cir. 2005).

After remand of this case by the Court of Appeals, Plaintiffs filed an Amended Complaint (docket # 24). Plaintiffs now comprise a putative class of "all Osage Indians who

lawfully receive distributions of trust property from the Osage Mineral Estate as determined and calculated by the Defendants, as trustee, pursuant to the 1906 Act § 4 (as amended)." See ¶ 36 of the First Amended Complaint. Importantly, Plaintiffs apparently no longer challenge the alienation of mineral interests (a.k.a., so called "headrights") to non-Osages; rather, they seek to recast their claim as a challenge, not to headrights ownership or alienation *per se*, but to the Defendants' distribution of pro-rata quarterly payments pursuant to section 4 of the 1906 Osage Act to certain recipients who are not Osage Indians. See First Amended Complaint at ¶¶ 2, 5, 6, 14, 15, 18, 19, 24, 28, 29, 34, 38, & 39. Plaintiffs also challenge the Defendants' alleged failure to account for the quarterly distributions as allegedly required under federal law, including 25 U.S.C. § 4011. Id. at ¶ ¶ 2, 17, 25, 30, & 35.

BACKGROUND

In the latter half of the 19th Century, Congress authorized a reservation for the Osage Nation in what now comprises Osage County, Oklahoma. Act of June 5, 1872, 17 Stat. 228. Substantial oil and gas was discovered on the reservation at the turn of the twentieth century. In 1906, Congress enacted a complex statute "to divide the tribe's communal estate equally in severalty among its members with certain restrictions and reservations." Adams v. Osage Tribe of Indians, 59 F.2d 653, 654 (10th Cir. 1932). In brief, the 1906 Act:

1. Defined the legal membership of the tribe to consist of all living Osage Indians who were on the Secretary of the Interior's 1906 roll for the tribe, plus their children born before July 1, 1907;
2. Allotted a certain amount of surface land in the Osage Reservation to the tribal members;

3. Provided that the tribe retained all mineral rights to the entire reservation in undivided ownership; and

4. Provided for the distribution of royalties from development of mineral resources to each of the enrollees. Such shares in the royalties are called "headright shares".[1/]

S. Rep. No. 108-343 at 2 (2004). See also Akers v. Hodel, 871 F.2d 924, 929-930 (10th Cir. 1989)(reciting basic provisions of the 1906 Osage Act, as amended). An Osage headright passes to the heirs, devisees, and assigns of owners, subject to certain restraints on alienation set out in the 1906 Osage Act and its amendments. Felix Cohen, Handbook of Federal Indian Law § 4.07(1)(d)(ii) (2005 ed.).[2/] Exhibit 3 at 312-19.

Additionally, the reservation of the mineral estate to the Osage Tribe has been extended from time to time and was last extended in perpetuity by the Act of October 21, 1978, Pub. L. No. 95-469, 92 Stat. 1660. Thus the remainder interest in a headright to the Osage subsurface

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[1/]Congress has also confirmed this characterization of the Osage headright scheme several times. See § 8 of the Act of October 21, 1978, Pub. L. No. 95-469, 92 Stat. 1660, 1663 (1978 Osage Act), which defines a headright as "any individual right to share in the Osage mineral estate", including those rights "owned by a person not of Indian blood." See also § 11 of the Act of Oct. 30, 1984, Pub. L. No. 98-605, 98 Stat. 3163, 3166 ("Osage Tribe Technical Corrections Act of 1984"), which provides that for purposes of that Act, "the term 'headright' means any right of any person to share in the royalties, rents, sales, or bonuses arising from the Osage mineral estate."

[2/]See also Felix Cohen, Handbook of Federal Indian Law at pp. 446-455 (1942 ed.), at pp. 788-797 (1982 ed.), and § 4.07(1)(d) at pp. 309-319 (2005 ed.)(and the references cited therein). See Exhibits 1, 2 & 3 respectively (relevant excerpts from Handbooks). This treatise has long been recognized by Congress, the Supreme Court and Court of Appeals as an authoritative treatment of federal Indian law as regards the Osage Nation and property. See e.g. 25 U.S.C. § 1341(a)(2), West v. Okla. Tax Comm'n, 334 U.S. 717, 720 (1948) (citing Cohen to explain "history and nature" of Osage allotment laws, including headrights), and Fletcher v. United States, 116 F.3d 1315, 1319, 1328 (10th Cir. 1997).

mineral estate upon expiration of the trust period no longer exists, and the sole remaining benefit of a headright is the right to receive the quarterly per capita distributions. "Per capita shares of tribal income accruing to Osage Indians holding certificates of competency or to non-Osage headright owners are fully distributed in quarterly payments." Exhibit 2 at 795.[3/]

SUMMARY OF ARGUMENT

Plaintiffs' First Amended Complaint seeks to challenge the federal Defendants' administration of Osage mineral royalties and their distribution on a quarterly basis to the owners of Osage headrights. Before the Court addresses such claims, it should find that joinder of the Osage Tribe and the owners of Osage headrights to this action is necessary, as proceeding in their absence would threaten their interest in the quarterly distribution of Osage headrights payments, including mineral royalties. Joinder of these parties is not feasible, and thus the Court should dismiss this case.

This case should also be dismissed because Plaintiffs have failed to properly invoke this Court's jurisdiction under the Administrative Procedure Act by challenging specific final agency actions as the focus for judicial review. Further, even should Plaintiffs narrow their challenge to recent quarterly headrights distributions of Osage mineral royalties, Plaintiffs' claim is time barred by operation of the statute of limitations in 28 U.S.C. § 2401(a) because their claim challenges a long standing scheme for handling the Osage quarterly headrights distributions

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[3/]Defendants, in this brief, refer to the quarterly payments as "headrights" payments or distributions because of the established connection between ownership of a headright and the quarterly payment under Section 4 of the 1906 Osage Act. Plaintiffs, in their First Amended Complaint, refer to "Section 4 Royalty Payments." See First Amended Complaint ¶ 3, n. 2. We understand the Plaintiffs to be referring to the same set of payments, thought they challenge the nexus between the payments and ownership of a headright.

placed into operation decades ago.

ARGUMENT

I. The Osage Tribe and Other Owners of Osage Headrights Who Receive Quarterly Distributions of Osage Trust Funds Are Necessary and Indispensable Parties to this Action, Whose Lack of Joinder Requires Dismissal of this Case.

Plaintiffs' voting and franchise extension claims have previously been dismissed for failure to join the Osage Tribe as a necessary and indispensable party. See Docket # 13 and see also Fletcher, 116 F.3d at 1333, n.36 (dismissal of prior case). Likewise, the remaining claims in this case also ought to be dismissed for failing to join the Osage Tribe as well as the non-Osage owners of headrights, as necessary and indispensable parties.

The joinder analysis set forth in Rule 19 of the Federal Rules of Civil Procedure provides a three step process for determining whether an action should be dismissed for failure to join a purportedly indispensable party. Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 997 (10th Cir. 2001). Application of these steps leads to the conclusion here that dismissal is appropriate and required.

First, the court must determine whether the absent person is "necessary." A person is necessary if he satisfies any of the criteria in Fed. R. Civ. P. 19(a). As discussed in detail below, the Osage Tribe is a necessary party to this case because the Tribe claims a central role as the tribal overseer of the Osage mineral estate and trust funds, including the funds at issue in this case, and is asserting such claims in separately filed actions presently pending in other federal courts. Further, the owners of Osage headrights who are not included within Plaintiffs' putative class may well be affected by a decision in this case affecting their right to receive periodic distributions from the Osage trust fund.

If the absent person is necessary, the court must then determine whether joinder is "feasible." See Fed. R. Civ. P. 19(a)-(b). In the instant case, joinder of the Osage Tribe is not feasible because the Osage Tribe possesses sovereign immunity to joinder. See Fletcher, 116 F.3d at 1324. Furthermore, Plaintiffs have not sought to join the other non-Osage headrights owners and recipients of quarterly distributions to this action, nor even named them pursuant to Fed. R. Civ. P. 19(c), thus permitting the inference that joinder is not feasible.

Finally, if joinder is not feasible, the court must decide whether the absent person is "indispensable," i.e., whether in "equity and good conscience" the action can continue in his absence. Citizen Potawatomi Nation, 248 F.3d at 997. In the present case, consideration of the relevant factors compels the conclusion that the Osage Tribe is an indispensable party to this action. Because the indispensable party cannot be joined, and consistent with the "strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity," the Court should dismiss this case. See Davis v. United States, 192 F.3d 951, 960-61 (10th Cir. 1999) and Citizen Potawatomi Nation, 248 F.3d at 1001.

Further, given Plaintiffs' goal of reforming the Osage headrights system and the quarterly distributions, the other headrights owners are also indispensable parties to this case, and the Court is obliged under Rule 19 to dismiss this case should they not be joined.

A. The Osage Tribe Is a Necessary Party Because the Osage Tribe Claims an Interest Related to the Quarterly Headrights Payments and the Trust Account from Which They Are Made and Is Pursuing its Claimed Interest in Two Separate Lawsuits, Raising the Possibility of Inconsistent Obligations for the United States.

An absent party is necessary to a suit if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence

> may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). The plain language of Rule 19(a)(2) does not require the absent party to actually possess an "interest," nor does it call for the Court to determine the merits of the absent party's interest; it only requires the movant to show that the absent party "claims an interest relating to the subject of the action." Davis, 192 F.3d at 957-58.

In this case, the subject of the action is the United States' disbursement of the royalties derived from the Osage mineral estate via the quarterly headrights payment required by section 4 of the 1906 Osage Act. Plaintiffs may not argue that the Osage Tribe does not claim an interest in the quarterly headrights payments from the Osage mineral estate because the Tribe has in fact asserted such an interest in its own parallel litigation challenging the United States' management of the Osage trust funds now pending in two other federal courts.

In Osage Nation v. United States, 57 Fed. Cl. 392 (2003), the Court of Federal Claims held that the Osage Nation had legal standing to prosecute claims for alleged mismanagement of the Osage trust funds by virtue of its position as beneficiary of the trust fund mandated by the 1906 Osage Act out of which the United States makes the quarterly headright payments required by that Act. In Osage Nation v. United States, No. 00cv169 (Fed. Cl. filed Mar. 31, 2000), presently pending before the Court of Federal Claims, the Tribe argued successfully that it (and not the headrights holders) was the direct beneficiary of the trust created by the 1906 Osage Act. Osage Nation, 57 Fed. Cl. at 395. In finding that the Tribe had standing to assert claims of breach of trust for mismanagement of, and failure to account for, the trust fund created by § 4 of the 1906 Osage Act, the Court of Federal Claims found that the United States credited the Osage

mineral royalties to a trust fund account maintained by the United States for the benefit of the Tribe, where the funds remained on deposit until the next quarterly distribution to the headrights owners. The Court also found that the United States administered the quarterly per capita distribution to the headrights owners from this tribal trust fund. Osage Nation, 57 Fed. Cl. at 395.[4/]

A review of the Osage Tribe's complaint in case 00cv169 confirms that the Tribe indisputably claims an interest in the subject matter of this action because the Complaint, as the jurisdictional basis for its claims before the CFC, cites to the very same sections 3 and 4 of the 1906 Osage Act relied on by Plaintiffs here. See Exhibit 4, Complaint in Osage Nation v. United States, No. 00cv169 (Fed. Cl. filed Mar. 31, 2000), ¶¶ 6 & 8.

Indeed, the Osage Tribe has taken positions showing that it is a necessary and indispensable party to the breach of trust and funds mismanagement claims Plaintiffs assert here. The Osage Tribe argued that it is uniquely charged with a "direct role in policing the tribal trust account from which mineral estate and other income from Osage tribal assets are paid. . . . With this action [in the CFC], the Tribe seeks to fulfill its proper role." See e.g. Exhibit 5, Plaintiff Osage Tribe's Post-Argument Brief on Motion to Dismiss, filed May 29, 2003, at 4 ("Post Argument Brief"). The Tribe also argues that "[a]n action by headrights holders, or groups of headrights holders, could lead to inconsistent results, delay, and unnecessary costs to the Tribe, the headrights holders, and the even [sic] the United States." Id. at. 4. Its argument

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[4/]The United States reserves its rights to appeal from the Court of Federal Claims' ruling and does not stipulate to those findings merely by reciting them here. The United States' reservation of its right to challenge the CFC's decision is immaterial to the issue presented, which is whether the Tribe claims an interest relating to the subject of the action, not whether the United States concedes the Tribe's interest.

culminates with the assertions that "the headrights holders are not the real parties in interest" and "the substantive right to sue for mismanagement of Osage trust funds is [sic] the Osage Tribe." Id. at 7-8. And, most importantly, the Tribe asserts that "the Osage Tribe would have to be an indispensable party to any litigation brought by headrights holders."[5/] Id. at 8 (emphasis added).

The Osage Tribe has also filed an action (Osage Tribe v. United States, No. 04cv283 (D.D.C. filed Feb. 20, 2004), which is presently pending before the District Court for the District of Columbia. See Exhibit 6, Complaint in Osage Tribe v. United States, No. 04cv283 (D.D.C. filed Feb. 20, 2004). In that case, the Osage Tribe, in a similar fashion to Plaintiffs here, seeks an accounting, *inter alia*, of the trust fund created under the 1906 Osage Act and the "allocation and disposal of such assets," as well as a declaration of trust duties. See, e.g, Exhibit 6, ¶ 23. Also like Plaintiffs here, the Tribe rests its accounting claim on the United States' alleged violation of 25 U.S.C. § 4011. Compare Exhibit 6, ¶ 21 with Plaintiffs' First Amended Complaint at ¶ 25.

The foregoing description of the Osage Tribe's pending two cases against the United States demonstrates that the Tribe is a necessary party to the instant case. Regardless of whether the United States opposes the Tribe, for purposes of analysis under Rule 19 the Tribe claims a non-frivolous interest in the trust fund created by § 4 of the 1906 Osage Act and the quarterly disbursements the United States makes from that trust account.

Both the Plaintiffs' putative class and the Osage Tribe seek judicial review and an accounting of the same quarterly headrights payments. Plaintiffs' also seek a "reformation" of

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[5/]It is notable that Plaintiffs cite 28 U.S.C. § 1362 as one of the bases for this Court's jurisdiction. That statute is limited to "civil actions, brought by any Indian tribe" and not class actions of tribal members opposing Tribal joinder in their claims.

the "trust funds ... found to be due and owing to them". See Amended Complaint, ¶ 3 of the Prayer for Relief. Plaintiffs seek an infusion of money from the United States to redress the inadequate payments they claim resulted from the allegedly improper quarterly headrights payments made to non-Osages. Likewise, the Osage Tribe seeks damages for as-yet unspecified mismanagement of the mineral royalties and the trust created by section 4 of the 1906 Osage Act. Obviously, the pendency of this case and the Tribe's two cases - with plainly similar claims and relief sought - exposes the United States and federal defendants here to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the [Tribe's] claimed interest." Fed. R. Civ. P. 19(a)(2)(ii). On the basis of Rule 19(a)(2)(ii) alone, the Court should find the Osage Tribe a necessary party to this action.

B. The Absence of the Osage Tribe from this Case Will Prevent this Court from Affording Complete Relief.

Further, the Tribe's absence from the instant case raises the possibility that this Court will be unable to afford the complete relief sought by both parties here, and will impair the Osage Tribe's ability to protect its claimed interest in the Osage trust funds, thus satisfying the requirements of Rule 19(a)(1) and 19(a)(2)(I). Assuming *arguendo* that the Plaintiffs and Osage Tribe were entitled to any relief, the legal question the Plaintiffs raise regarding the 1906 Osage Act may well be decided differently by this Court than the District Court for the District of Columbia, should it "issue a declaration delineating the trust duties that the United States, as trustee, owes the Osage Tribe," as sought by the Tribe there. Exhibit 6 at 13 (Prayer #1). Such inconsistent results would certainly complicate this Court's ability to award either the complete relief sought by Plaintiffs or a countervailing judgment of dismissal declaring Plaintiffs' claims without merit (as would be sought by the Defendants), for if this Court cannot resolve the

controversy over the proper handling of the quarterly headrights payments it necessarily cannot afford complete relief.

Plaintiffs also seek an accounting of (at least) the quarterly distribution. The Tribe also seeks an accounting of its trust funds. In a real sense, these two accountings would result in overlapping analysis of the same transactions in Interior's ledger (especially to the extent Plaintiffs seek an accounting of any quarterly disbursements from a tribal trust account), and thus would necessarily need to be consistent. Thus the prospect that a different Court might also control the contents of the United States' accounting to the Tribe will affect this Court's control of any accounting to the Plaintiffs here.

Perhaps more importantly, such a limit on the Court's ability to compel an accounting would affect this Court's ability to mandate "a reformation of the Plaintiffs and Class Members trust funds relating to the SECTION 4 ROYALTY PAYMENTS found to be due and owing to them, after an accounting" as sought by Plaintiffs. First Amended Complaint at 12 (Prayer #3). This particular prayer for relief requests the payment of money. Should damages be awarded to the Tribe for its claims of funds mismanagement (whatever those claims, as yet undefined, might eventually wind up to be), such funds may well flow to the Plaintiffs by operation of Section Four, First, of the 1906 Osage Act (directing disposition of "all moneys found to be due to said Osage Tribe of Indians on claims against the United States."). Such payment to the Tribe for the ultimate benefit of the individual members of the Tribe would need to be factored into any monetary relief ordered by this Court, especially were there any prospect of double recovery.

And the converse of the foregoing analysis holds true for the Osage Tribe. Any disposition of this case on its merits, regardless of the outcome, may well affect the Osage

Tribe's separate claims regarding the management and disbursement of the Osage trust funds. Accordingly, given the potential complications posed by the Tribe's pursuit of its own cases, the Court is bound to find the Osage Tribe a necessary party to this case under both Rule 19(a)(1) and 19(a)(2)(I).

C. This Action Should Be Dismissed Because the Osage Tribe Is an Indispensable Party Who Will Not Be Joined to this Action.

After determining that the Tribe is a necessary party to this action, Rule 19 requires analysis of whether joinder of the Tribe is feasible, and (if joinder is not feasible) whether the Tribe is indispensable to this litigation or whether the case could proceed without it. In determining indispensability, the Court is to consider:

> [I]n a practical and equitable manner the following factors: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; [and] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. This list of factors is not, however, exclusive.

Davis ex rel. Davis v. U.S., 343 F.3d 1282, 1289 (10th Cir. 2003)(internal quotes and citations omitted).

Joinder of the Osage Tribe is not feasible because the Tribe possesses sovereign immunity to joinder. It is the law of this Circuit that the Osage Tribe and its Tribal Council possess tribal sovereign immunity and that Plaintiffs may not bring suit against the Tribe or join it to this action unless the Tribe affirmatively and explicitly waives its sovereign immunity. Fletcher, 116 F.3d at 1333 n. 36.

Proceeding to the question of whether the Tribe is indispensable to the case, courts have routinely dismissed actions pursuant to Rule 19 on the basis of the indispensability of an Indian

tribe when coupled with its sovereign immunity. See e.g. Enterprise Mgmt. Consultants, Inc. v. United States, 883 F.2d 890, 893-94 (10th Cir. 1989), Jicarilla Apache Tribe v. Hodel, 821 F.2d 537, 540 (10th Cir. 1987), Tewa Tesuque v. Morton, 498 F.2d 240, 243 (10th Cir. 1974), McLendon v. United States, 885 F.2d 627, 629-30 (9th Cir. 1989). The Tribe has stated that it is indispensable to resolution of the claims pled in this case. See Exhibit 5, Post Argument Brief at 8-9. Accordingly, the analysis under Rule 19(b) leads to the conclusion that this case should be dismissed.

1. Prejudice to the Tribe or Parties.

The interest of the Tribe in the quarterly Osage Headrights distributions may not be discounted on the basis that the assertions lack merit. Davis, 343 F.3d at 1291. As detailed above, the Tribe claims a stake in the distribution of Osage trust funds and mineral royalties such that it is a necessary party to this case both on the Tribe's own account and also to safeguard the federal Defendants from the prejudice arising from potentially inconsistent obligations in distributing the quarterly headrights payments. Because the Tribe and federal Defendants have interests that could be prejudiced were this case to proceed without the joinder of the Tribe, this factor weighs in favor of finding the Tribe to be indispensable.

2. Whether Potential Prejudice Can Be Lessened or Avoided.

This Court is also not in a position to lessen the potential prejudice to the Osage Tribe or federal Defendants insofar as the Court lacks jurisdiction over the Tribe in order to ensure that the Tribe's claims and those of the Plaintiffs here seeking an accounting and a dispositive reading of the 1906 Osage Act do not overlap and are resolved in a consistent fashion. As detailed above in Section I.B., the pendency of the Tribe's own claims regarding Osage trust

fund management and its demand for both damages and prospective relief raises a question about whether this Court could effectively and finally resolve Plaintiffs' claim without considering the actions of separate courts. Each separate form of relief Plaintiffs seek could potentially conflict with the decision of another court. This factor necessarily weighs in favor of a finding of indispensability.

3. Whether an Adequate Judgment Can Be Entered in the Absence of the Tribe.

The "public stake in seeing disputes resolved by wholes, whenever possible" will not be served by entering a judgment in favor of only the Plaintiffs in this case without binding the Tribe, for such a judgment could and would, as explained above, lead to further litigation and risk inconsistent judgments and legal rulings. Davis, 343 F.3d at 1292-93, citing Provident Tradesmens Bank and Trust Co. v. Patterson, 390 U.S. 102, 111 (1968). There is no good or equitable reason to place the United States, as defendant, in the position of having to prove its case twice, or to reconcile potentially conflicting judgments. This factor weighs in favor of a finding of indispensability.

4. Availability of an Adequate Remedy in Another Forum/Balancing the Factors.

Plaintiffs plainly have an adequate remedy were this case not to proceed. First, Plaintiffs are Osage tribal members who are free to seek to align the Tribe behind the claims and remedies pursued in this case, rather than attempting to proceed in lieu of the Tribe.[6/] Setting aside the

[6/]In the event Plaintiffs were not full Osage tribal members before, they now have the rights of tribal members by enactment of the Reaffirmation of Certain Rights of the Osage Tribe, Pub. L. No. 108-431, 118 Stat. 2609, and the actions of the Tribe in reconstituting its government subsequent to passage of that Act.

meritless nature of Plaintiffs' claims, Plaintiffs have an adequate remedy in the vehicle of the Osage Tribe's separate lawsuits described above (to the extent such claims are not already being advanced). And as the Tribe has argued in its own suit, any recovery by the Tribe in damages from the United States will, by operation of § 4 of 1906 Osage Act, be distributed to the headright holders in due course. See Exhibit 5, Post Argument Brief at 9.

With regard to balancing the Rule 19(b) factors, tribal immunity is itself a public policy that weighs in favor of dismissal of this suit. Davis, 343 F.3d at 1293. Also important is the fact that Plaintiffs ignored their obligation under Rule 19(c) to advance resolution of the joinder issue by stating the names of other necessary parties in its Amended Complaint, notwithstanding the instruction of the Court of Appeals and these Plaintiffs' prior experience with the very same issues of joinder of the Tribe in prior cases and phases of this litigation. Plaintiffs will no doubt argue that there are no necessary parties; but should the Court find its way to balancing the Rule 19(b) factors it will necessarily have rejected Plaintiffs' position. Accordingly, it is permissible to resolve this issue in favor of dismissal. See generally 7 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1625 (2006). All of the specified factors weigh in favor of dismissal, and the Court should dismiss the case for failure to join the Osage Tribe and other headrights owners as indispensable parties.

D. All Owners of Osage Headrights are Necessary and Indispensable Parties to This Action.

In addition to the Osage Tribe, all the owners of Osage headrights - as recipients of the quarterly distribution - should be joined to this case, or the case dismissed.

1. The Absence of the Non-Osage Owners of Osage Headrights Will Impair Their Ability to Protect Their Interest in the Distribution of Funds from the

Osage Mineral Estate.

The headrights owners not embraced within Plaintiffs' putative class, but who presently receive a quarterly headrights distribution from the Osage mineral estate (including the Tribe itself as a headright owner), are necessary parties to the present suit given Plaintiffs' goal of stripping from a headright (or at least the headrights of non-class members) the long acknowledged right (and indeed sole remaining incidence of ownership in a headright) to receive a quarterly distribution of the Osage trust income.

In establishing the headright shares in the distribution of funds from the Osage Mineral estate, the 1906 Osage Act essentially created a restricted tenancy in common in the persons on the 1906 roll and their heirs, devisees, and assigns. Exhibit 5 § 4.07(1)(d)(ii), at 311-13, see also Estate of Shelton v. Oklahoma Tax Comm'n, 544 P.2d 495, 497-98 (Okla.1975)(headright, as an interest in unaccrued royalties from mineral interests, is an interest in real property). If an action would terminate a person's interest in property, such party is generally a necessary party. See 7 WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1621 n.15-19 & n.33 (2006); See also Kansas City Royalty Co. v. Thoroughbred Assocs., L.L.C., 215 F.R.D. 628, 635-36 (D. Kan. 2003)(potential loss of royalty revenues sufficient to make parties indispensable); Pit River Home & Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1099 (9th Cir. 1994)(tribal group necessary party as a competing claimant to beneficial interest in trust property); Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1458(9th Cir. 1994)(tribe necessary party to claim challenging Interior decision to escheat property to tribe). Likewise, an instrument may not be cancelled by a Court unless all parties to the instrument are before the Court. Tewa Tesuque v. Morton, 360 F. Supp. 452 (D. N.M. 1973), aff'd 498 F.2d 240 (10th Cir. 1974). Further, though the United

States does not hold headrights or quarterly distributions in trust for non-Indians, "conflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence." Wichita and Affiliated Tribes of Okla. v. Hodel , 788 F.2d 765, 774, (D.C. Cir. 1986), citing Williams v. Bankhead, 86 U.S. 563, 570-71 (1874); Russell v. Clark's Executors, 11 U.S. (7 Cranch) 69, 98-99 (1812); see generally 3A Moore's Federal Practice ¶ 19.08 at 19-165 (1984), and cases cited therein ("Where the purpose of the suit is the disposition of a fund, a trust, or an estate to which there are several claimants, all of the claimants are generally indispensable.")

Although the Osage headrights system is somewhat anomalous, the Plaintiffs' central challenge is to the lawfulness of the federal defendants' distribution of mineral royalties to anyone other than the putative plaintiffs' class, including some as-yet-unspecified set of the non-Osage headrights owners. Were Plaintiffs here to prevail, these headrights owners would lose their interest in future (and perhaps past) quarterly distributions, whether that right is framed as a property right, royalty interest, or other interest. Hence, they are necessary parties to this action.

2. Joinder of Non-Osage Headrights Owners is Not Feasible

Plaintiffs were obliged by Fed. R. Civ. P. 19(c) to have listed in their Amended Complaint the names of all necessary parties and the reasons, if any, for their nonjoinder. Notwithstanding the Court of Appeals' instructions on this issue as regards joinder of the Osage Tribe (and the prior dismissal of other claims on joinder grounds), the Plaintiffs' Amended Complaint does not contain any allegations regarding joinder of any person, notwithstanding that they seek a "reformation" of the class of persons entitled to receive quarterly headrights

payments. Based on Plaintiffs' failure to comply with Fed. R. Civ. P. 19(c), the Court may infer that joinder of the non-Osage headrights owners is infeasible. Poling v. K. Hovnanian Enterprises, 99 F. Supp.2d 502, 517 n.16 (D. N.J. 2000)(failure under Fed. R. Civ. P. 19(c) to name trustees and beneficiaries gave rise to inference that joinder was infeasible) and Stevens v. Loomis, 334 F.2d 775, 776 n.1 (1st Cir 1964)(failure to join other beneficiaries in breach of trust action led to adverse inference under Rule 19(c)). In the alternative, under Rule 19(a), the Court should order Plaintiffs to make such persons parties to this action and seek to effect service of process on them. Until such parties are joined, it is fair to conclude that joinder is not feasible.

3. The Other Recipients of the Quarterly Headrights Distributions Are Indispensable Parties Because Plaintiffs Seek the Exclusive Right to Quarterly Headrights Distributions to the Inevitable Detriment of Other Headrights Owners.

The four factors to be considered under Rule 19(b) in determining whether a party is indispensable require a review of the same factors that dictate a conclusion under Rule 19(a) that the non-Osage recipients of the quarterly headrights distribution are necessary parties. As with the analysis under Rule 19(a), those factors lead to the conclusion that this action ought to be dismissed.

The first consideration is the extent to which a judgment rendered in the person's absence might be prejudicial to the person or those already parties. In this case Plaintiffs seek to capture for themselves a greater share (or indeed all) of the Osage headrights quarterly distributions of the mineral estate revenues. This goal is a zero sum proposition insofar as the federal Defendants will not then distribute such funds to the non-Osage persons necessarily found ineligible to receive such distributions. Thus, a decision in this case may be prejudicial to those non-Osage owners of headrights who would otherwise receive a quarterly distribution. Further,

it would not be speculation to conclude that such persons might then file suit against federal Defendants in a separate suit (without joining plaintiffs) and seek their own more favorable judicial determination of this issue.

The second consideration is the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided. In this case, the Court may not lessen the prejudice (should Plaintiffs prevail) by restricting its remedies to the federal Defendants because it is the actions of the federal Defendants in distributing the quarterly headrights payments (or in denying payment) would invariably affect the non-Osage headrights owners. The interest of the federal Defendants and non-Osage headrights owners are not precisely aligned due to the fact that the United States' interest is in properly administering the law and defending Interior's interpretation of applicable law, while that of the headrights owners is presumably in protecting their right to future quarterly distributions.

The third consideration is whether a judgment rendered in the person's absence will be adequate. While a judgment in plaintiffs' favor may be superficially adequate to them, such a judgment would not resolve the legal issue presented as far as the non-Osage headrights owners are concerned, who would be free to collaterally challenge such a result seeking an order binding the United States to a contrary outcome. As such, this action amounts to litigation over a common fund, contract or instrument, and based on the cases cited above in section I.D.1., all the parties with rights to such property ought to be joined to the action, or the action should be dismissed.

The fourth factor is whether the plaintiff will have an adequate remedy if the action is

dismissed for nonjoinder. As argued above, the Plaintiffs will have an adequate remedy by means of pursuing their claim with the Osage Tribe. For the foregoing reasons, the Court should conclude that the non-Osage headright owners are necessary and indispensable parties whose non-joinder to the action compels its dismissal.

II. The Court Lacks Jurisdiction Over This Case Because Plaintiffs Have Failed to Challenge a Specific Agency Action As Required by Sections 702 and 704 of the Administrative Procedure Act.

Defendants' original motion to dismiss argued that the Plaintiffs had not identified a valid waiver of sovereign immunity and thus this Court lacked jurisdiction over the claims. The Court of Appeals found jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (APA), to the extent it concluded that Plaintiffs did not seek money damages under the APA (as Plaintiffs then framed their case) and that this action thus met at least one of the requirements for review under APA section 702.

Notwithstanding the Court of Appeals' ruling, Plaintiffs must still comply with the other prerequisites to judicial review under the APA, or face dismissal of this case pursuant to Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction. In this case, there are at least two such requirements to be found in the agency action provisions of APA sections 702 and 704.

Section 702 of the APA provides, in pertinent part, that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (emphasis added). "Agency action" is itself defined in APA section 551 as that which "includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Each of these specific categories of decisions are themselves

defined separately in section 551. See also Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 61-64 (2004)(summarizing categories and function of APA's final agency action requirement).

Section 704 of the APA provides that agency action is judicially reviewable in two instances: when it is "made reviewable by statute" and when it constitutes "final agency action for which there is no other adequate remedy in a court." United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 549 (10th Cir 2001), citing 5 U.S.C. § 704; Chemical Weapons Working Group, Inc. v. United States Dep't of the Army, 111 F.3d 1485, 1494 (10th Cir. 1997)("Because Plaintiffs' . . . claims are not reviewable by statute, they must challenge final agency action to confer upon the district court jurisdiction under the Administrative Procedure Act."); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-83 (1990). The Plaintiffs here have not identified a statute that provides a cause of action against the United States, thus judicial review under the APA in this case must be preceded by final agency action.

It is clear also that claims of breach of fiduciary duty and raising constitutional issues brought by Indians against the United States are subject to the finality and agency action requirements of the APA. Cobell v. Kempthorne, __F.3d __, 2006 WL 1889148, *2 (D.C. Cir. 2006), explaining Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001)(For a breach of trust claim, "[w]e also looked to the APA for resolution of another jurisdictional issue, i.e., the presence of final agency action, which is a prerequisite to judicial review."), see also Gallo Cattle Co. v. United States Dep't of Agric., 159 F.3d 1194, 1197-98 (9th Cir. 1998) (constitutional claims subject to statutory standing requirements of APA section 704).

"Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists

absent a showing of proof by the party asserting federal jurisdiction." United States ex rel. Precision Co. v. Koch Indus., 971 F.2d 548, 551 (10th Cir. 1992). Thus, Plaintiffs bear the burden to plead and prove subject matter jurisdiction. See Marcus v. Kan. Dep't of Revenue, 170 F.3d 1305, 1309 (10th Cir. 1999). In the present case, Plaintiffs have not sufficiently identified the specific agency actions, let alone the final agency actions, they challenge as the prerequisites to review under the APA. It is not the Defendants' obligation to focus this case sufficiently for judicial review under the APA; that burden lies with the Plaintiffs. Colorado Farm Bureau Fed'n v. United States Forest Serv., 220 F.3d 1171, 1173 (10th Cir. 2000)("Plaintiffs have the burden of identifying specific federal conduct and explaining how it is 'final agency action' within the meaning of section 551(13).")

It is impossible to discern from the face of the First Amended Complaint the specific agency action(s) or inaction, whether final or not, that Plaintiffs challenge. Defendants could speculate, based on inference from the First Amended Complaint, that Plaintiffs intend to challenge unspecified "quarterly per capita distribution of Section 4 Royalty Payments," or perhaps a programmatic attack on "defendants' practice(s) with regard to the method used to determine statutorily proper recipients of such trust property distributions." See First Amended Complaint ¶¶ 5, 6. However, it is equally possible that Plaintiffs may choose to frame their claim as one of a failure to "perform a statutory duty to pay them money, specifically royalties from oil and gas production to which they are entitled pursuant to the 1906 statute." Fletcher, 160 Fed. Appx. at 796 (citing Cobell case founded on the undue delay provisions of the APA). All of the foregoing is a dramatic shift in target from the original Complaint before this Court and the Court of Appeals, which challenged the "defendants' failure to safeguard Osage "mineral

allotments" or headrights" from alienation. See Complaint at ¶ 2. As to all of the above, the Defendants have meritorious arguments as to why such claims must fail, especially on statute of limitations and other jurisdictional grounds; however, Defendants should not be obligated to define and defend any and all acts taken pursuant to the various Osage Acts and the Court is not authorized to engage in such an exercise.[7/]

Unless Plaintiffs identify a final agency action of their choice with sufficient specificity as the focus for judicial review in this action, the Court is obligated to dismiss this action for lack of jurisdiction. Plaintiffs' vague and conclusory assertions as to which agency action they have decided to challenge are insufficient to establish this Court's jurisdiction under the APA sections 702 and 704.

III. Plaintiffs' Claims Should Be Dismissed for Failing to Challenge an Actionable Final Agency Action Within the Statute of Limitations Established in 28 U.S.C. § 2401.

The statute of limitations at 28 U.S.C. § 2401 also presents an insurmountable jurisdictional hurdle for the Plaintiffs' claims. Smith v. Marsh, 787 F.2d 510, 512 (10th Cir. 1986)("the six-year statute of limitations in § 2401(a) applies to suits seeking nonmonetary relief through nonstatutory review of agency action.") When a plaintiff's right to sue the United States is made subject to a statute of limitations, "the limitations provision constitutes a condition on the waiver of sovereign immunity." Block v. North Dakota, 461 U.S. 273, 287 (1983); see also United States v. Mottaz, 476 U.S. 834, 841 (1986). In addition, claims by Indian persons, including breach of trust and constitutional claims, are not exempt from § 2401(a)'s application.

[7/]The lack of an agency action focus for judicial review renders it impossible for the Court or parties to comply with the administrative record and appellate review standards under the APA. Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560 (10th Cir. 1994).

Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir.1990).

Under the APA, a right of action normally accrues at the time of "final agency action." Sierra Club v. Slater, 120 F.3d 623, 631 (6th Cir.1997). A limitations period ordinarily does not begin to run until the plaintiff has a "complete and present cause of action;" and a cause of action does not become "complete and present" until the plaintiff can file suit and obtain relief. Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc., 522 U.S. 192, 193 (1997), see also Sisseton-Wahpeton Sioux Tribe, 895. F.2d at 594 ("a cause of action does not accrue until the claim is 'perfected'"). In determining whether a particular agency action is final - and thus subject to judicial challenge, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Franklin v. Massachusetts, 505 U.S. 788, 797 (1992).

Here, Plaintiffs filed their Complaint on May 31, 2002. Hence their challenge is limited to final agency actions taken after May 31, 1996. Their core legal contention appears to be that "Defendants ignored the requirements of federal law constraining the trust distribution from the Section 4 Royalty Payments only to Osage Indians. By distributing Section 4 Royalty Payments from the Osage Mineral Estate to recipients who are not Osage Indians, the Defendants have frustrated the Congressional purposes" in violation of the 1906 Act § 4 (as amended). See First Amended Complaint ¶¶ 6-7. It is clear that any claim based on that legal theory is time barred.

Assuming *arguendo* that it is true as alleged (for purposes of a rule 12(b)(1) motion) that the federal defendants have made quarterly pro rata headrights distributions to all owners of Osage headrights, whether Osage Indians or not, the critical fact is that such actions plainly started prior to May 1996. Plaintiffs' own Complaint alleges that "by 1948, the term headright

became understood to mean a right to receive a distribution of royalties flowing from the Osage Mineral Estate." First Amended Complaint at ¶ 15.

This fact was well established enough that the 1982 edition of the leading Indian law treatise stated: "Per capita shares of tribal income accruing to Osage Indians holding certificates of competency or to non-Osage headright owners are fully distributed in quarterly payments." Exhibit 2 at 795 (emphasis added). Further, were this not the case, several of the amendments to the 1906 Osage Act would be essentially surplusage and of no practical effect.

For example, Section 2(a) of the 1978 Osage Act, Act of October 21, 1978, Pub. L. No. 95-496, 92 Stat.1660, extended the reservation of the Osage mineral estate to the Osage Tribe in perpetuity. As far as headright owners are concerned, that provision essentially rendered their remainder interest in allotment of the Osage mineral estate a nullity. See Section 5 of the 1906 Osage Act, 34 Stat at 544-545 (providing for mineral interest to become "the absolute property of the individual members of the Osage Tribe, according to the roll herein provided for, or their heirs" at the expiration of the trust period).

If the non-Osage headrights owners possessed no right to receive quarterly distributions of the mineral royalties (as Plaintiffs appear to argue), Congress would not have needed to enact several other provisions of the 1978 Osage Act, which restricted alienation of an Osage headright and provided rights to the Osage Tribe to purchase Osage headrights so as to limit alienation to non-Osages.[8/] See e.g. 92 Stat 1662-1663, §§ 5(7) [sic], 5(d), and 7. Section 7 of the 1978 Osage Act is particularly important in that it provides:

[8/]The provisions of the Osage Tribe of Indians Technical Corrections Act of 1984, Pub.L.No. 98-605, 98 Stat. 3163, also support this argument, as these amendments further refine the rules governing devolution of interest in Osage headrights.

> After passage of this Act a person not of Osage blood [subject to certain exceptions] . . . . is prohibited from receiving more than a life estate in an Osage headright interest owned by an Osage indian. . . . On the death of the non-Osage beneficiary or heir, [subject to certain exceptions] such Osage headright or mineral interest shall vest in the Osage Tribe and the Tribe shall pay the estate of the non-Osage beneficiary or heir the market value of such Osage headright or mineral interest. Payments under this section shall be made from Osage tribal mineral funds authorized to be expended by section 8(b) herein.

92 Stat. 1663. Further, Section 8 of the 1978 Osage Act provided:

> (a) Any individual right to share in the Osage mineral estate (commonly referred to as "headright") owned by a person not of Indian blood may not, without the approval of the Secretary of the Interior, be sold, assigned, or transferred. Sale of any such interest shall be subject to the right of the Osage Tribe to purchase it within forty-five days at the highest legitimate price offered the owner thereof (b) Prior to the time and [sic] tribal mineral income is segregated for distribution to individual headright owners, the Secretary of the Interior, at the request of the Osage Tribal Council, may direct the use of any such income for the purchase of Osage headright interests offered for sale to the Osage Tribe pursuant to this section or vested in the Osage Tribe pursuant to section 7 of this Act.

92 Stat. at 1663 (emphasis added). The quoted language above demonstrates Congressional intent that the United States continue to distribute pro rata shares of Osage mineral income to non-Osage headright owners at the same time as such payments were made to Osage tribal members who also owned headrights. However, in these sections, Congress provided a means to halt the further alienation of Osage headrights to individuals and entities outside the Tribe and tribal members. These two sections of the 1978 Osage Act have no purpose if such pro rata payments to non-Osage individuals were already unlawful, as Congress would not have needed to pass new legislation to recapture Osage headrights in Osage ownership. The legislative history of the 1978 Act confirms this conclusion, stating: “Section 7 of the bill is intended to provide a means of keeping the Osage headright or mineral interest in Osage Indian ownership. There is no similar provision in existing law with regard to the Osages.” H.R. Rep. No. 95-1459,

at. 4 (1978) (attached as Exhibit 7) and S. Rep. No. 95-1157, at 8 (1978) (attached as Exhibit 8).

The fact that a headright is synonymous with, and has been construed to include the right to receive trust distributions of Section 4 Royalty Payments is also evidenced by the numerous judicial opinions setting forth a definition of a headright as including a right to the quarterly payments mandated by Section 4 of the 1906 Osage Act. An Osage headright has been defined by the Courts as "[t]he right to receive the trust funds and the mineral interests [of the Osage Tribe] at the end of the trust period and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estate and the interest on trust funds." Globe Indemnity Co. v. Bruce, 81 F.2d 143, 148-151 (10th Cir. 1935)(collecting cases)(emphasis added); In Re Irwin, 60 F.2d 495, 496 (10th Cir. 1932)(" The right of the tribal members and their heirs to participate in the distribution of these funds is a headright."); Taylor v. Tayrien, 51 F.2d 884, 888 (10th Cir. 1931); Crawley v. United States ex rel. Lujan, 977 F.2d 1409, 1410 n.2 (10th Cir. 1992)("A headright is an interest in the income from oil wells held in trust for the Osage Tribe by the United States"); West v. Oklahoma Tax Comm'n, 334 U.S. 717, 719 n.2 (1948)(collecting cases defining headright); Logan v. Andrus, 457 F. Supp. 1318, 1320 n.2 (N.D. Okla. 1978); see also Exhibit 3 § 4.07(1)(d)(ii), at 311-19[9]

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[9]Cohen succinctly explains the operation of the Osage headrights system as follows:

> The most distinctive feature of the Osage scheme is the use of the 1906 Act roll as the permanent basis for per capita distributions of tribal income and property. Osage Indians born since the 1906 Act roll closed do not acquire the usual rights of persons born into an Indian tribe to share in distributions of tribal property. Rather the 1906 Act converted the right to receive tribal property distributions into a restricted tenancy in common in the persons on the 1906 roll. This right, which has come to be called an Osage headright, passes to the heirs, devisees, and

Likewise, it is beyond dispute that non-Osage individuals have shared in the quarterly distributions of trust income under section 4 of the Osage Act as "heirs, devisees, and assigns" of original Osage members and headrights owners. See Chouteau v. Commissioner, 38 F.2d 976, 978-979 (10th Cir. 1930) and Taylor v. Jones, 51 F.2d 892, 891 (10th Cir. 1931)("The Osage Acts contemplated that headrights might pass to others than members of the tribe.") The Choteau decision from the Tenth Circuit is particularly illustrative in its description of one appellants' interest in Osage mineral royalties:

> Mrs. Petit is a white woman without Indian blood. She is not a member of the Osage Tribe of Indians. She inherited from her children, who were members of the Tribe, lands that had been allotted to them under the Act of June 28, 1906. All of her gross income here involved was her pro-rata part of the income of the tribe from oil and gas leases made by said tribe with the approval of the Secretary under said Act. . . . [W]e think it clear under the ruling in Levindale Lead & Zinc Co. v. Coleman, 241 U.S. 432, 36 S.Ct. 644, 60 L.Ed. 1080, that their mother took their lands without any restrictions on its disposition. The United States has no control over her interests and she is in no sense its ward. She receives her share of the royalties and bonuses on the mineral deposits in accordance with the terms of the Act, but it is not held and paid to her on the part of the Government for her protection as its dependent ward.

Chouteau, 38 F.2d at 978-979 (emphasis added).

In In re Irwin, 60 F.2d 495 (10th Cir. 1932), the Court of Appeals held that an Osage headright owned by a non-Osage white woman, along with the appurtentant right to receive the quarterly headrights distributions, passed to a trustee in bankruptcy. As part of the basis for its decision, the Court relied on the Act of April 12, 1924, 43 Stat. 94, which permitted any person not of indian blood, to sell, assign or transfer their Osage headrights interest subject to Interior

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> assigns of owners. Most persons of Osage ancestry own no headrights, and thus receive no tribal income. Some persons own more than one headright, or own fractional shares of headrights, and some headrights are owned by non-Osages.

Id. § 4.07(1)(d)(ii), at 312-13.

Department approval.[10/] In Re Irwin, 60 F.2d at 496.

As yet another example of the fact that the alleged wrongful conduct complained of here commenced prior to 1996 is the decision in Taylor v. Tayrien, 51 F.2d 884 (10th Cir. 1931). In that decision, the Court of Appeals noted a 1928 opinion of the Comptroller General that had ruled on "whether accrued quarterly payments could be made to the receiver of a white man who had inherited an interest in a headright. Since the Act of April 12, 1924, permitted persons of non-Indian blood to transfer the interest, the Comptroller authorized the payment. But he was dealing with a white man." Taylor, 51 F.2d at 892.

All of the foregoing demonstrates beyond a doubt that the alleged wrongful practice of the federal defendants in distributing quarterly Osage headrights payments commenced well before 1996 and was known or should have been known by the Plaintiffs. Accordingly, no matter whether the agency action at issue is the federal defendants' distribution of the quarterly payment, its approval of sales or bequests of headrights to non-Osage persons (beyond a life estate), or the underlying maintenance of a roll of the original Osage allottees and their heirs, devisees and assigns of headrights (including placement of non-Indians thereon), such action occurred well before 1996 and accrued Plaintiffs' claims for purposes of the statute of limiations. These claims are now time barred.

It does not matter that the federal defendants may have made allegedly improper quarterly payments to the detriment of Plaintiffs after 1996. Plaintiffs' claim is still barred by

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[10/]This provision remained in effect until 1978, when in Section 7 of the 1978 Osage Act, Pub. L. No. 95-496, 92 Stat. at 1663, Congress imposed a restraint on the alienation of Osage headrights to a non-indian by limiting such conveyances to a life estate. Of course, this does not affect those headrights which were then (and are now) owned by entities with an essentially perpetual life, such as charitable organizations and corporations.

the plain language of section 2401, which provides that the action "shall be barred unless the complaint is filed within six years after the right of action first accrues." (Emphasis added). The statute does not stay accrual until the right of action last accrues. Because Plaintiffs could have challenged the federal defendants' actions in including non-Osages in the quarterly Osage headrights distributions prior to 1996, they may not now challenge any such similar agency actions occurring after 1996, and the Plaintiffs claims must be dismissed as time barred.[11/]

CONCLUSION

For the foregoing reasons, this Court should dismiss this action.

RESPECTFULLY SUBMITTED this _____ day of July, 2006.

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[11/]Section 2401(a) does not permit a party to de facto enlarge the time period under the statute of limitations by challenging recent agency actions which only serve to implement a decision made outside the limitations period. See e.g. Chemical Weapons Working Group, Inc., 111 F.3d at 1494-(holding agency's implementation of a final disposition that had been made years earlier was not a reviewable final agency action); Shiny Rock Min. Corp. v. U.S., 906 F.2d 1362, 1365 (9th Cir.1990); and cf. Natural Resources Defense Council v. Nuclear Regulatory Commission, 666 F.2d 595, 601 et seq. (D.C. Cir. 2001)(declining to permit indirect, "back door" challenge to regulations when direct challenge was time barred); and Vincent Murphy Chevrolet Co., Inc. v. United States, 766 F.2d 449, 452 (10th Cir. 1985)(time limits under Quiet Title Act strictly construed).

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CERTIFICATE OF SERVICE

I hereby certify on July 27, 2006 I electronically transmitted **DEFENDANTS' MEMORANDUM IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS and Exhibits 1-8** to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic filing to the following ECF registrants:

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