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

WILLIAM S. FLETCHER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CASE NO: 02-CV-427 GFK-PJC**
	)	
	)	**CLASS ACTION**
THE UNITED STATES OF AMERICA, et al.,	)	
	)	
	)	
Federal Defendants,	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

Plaintiffs William S. Fletcher and Charles A. Pratt (herein the "Plaintiffs"), individual Indians who hold headrights in the Osage Mineral Estate, by and through counsel, hereby submit this Response in Opposition to the Federal Defendants' Motion to Dismiss [Dkt. No. 1126] (herein the "Defendants' Motion"). Plaintiffs' claims are legally cognizable and withstand judicial scrutiny.

This Brief first provides a brief background, then the standard of review, and then addresses the United States' legal arguments by showing that: 1) this Court has jurisdiction over this matter; 2) the Plaintiff's claims are specific; 3) the Plaintiffs are entitled to an accounting; and 4) the Defendant's Motion is nothing new and is merely a impermissible collateral attack on the Court's prior orders. In opposition to the Defendants' Motion, Plaintiffs respectfully state as follows:

BACKGROUND

Plaintiffs are Osage Indians who receive "Section 4 Royalty Payments."[1] Section 4 Royalty Payments are distributed from a segregated fund that is derived from the monies resulting from the development of the Osage Mineral Estate. As set forth more fully in Plaintiffs' Third Amended Complaint, the Federal Defendants' various and cumulative breaches of these trust responsibilities have diluted the Plaintiffs' interests as well as the interests of other rightful recipients of Section 4 Royalty Payments.

This putative class action[2] arises out of the Defendants' wrongful actions (collectively, the "Federal Defendants"), which features the Defendants' failure to account under federal law, *inter alia*, 25 U.S.C. §§ 162a, 4011 & 4044, for their distribution of Section 4 Royalty Payments.

---

[1] "Section 4 Royalty Payments" are quarterly distributions of income from royalties segregated from the profits resulting from the exploitation of the Osage Mineral Estate pursuant to Section 4 of the 1906 Act of Congress, Act of June 28, 1906, ch. 3572, 34 Stat 539 § 4.

[2] The Plaintiffs intend to re-file their Motion for Class Certification shortly after filing this response brief. The Plaintiffs maintain that this case is appropriate for class treatment of the Plaintiff's accounting claims for a number of reasons. First, each and every Indian who receives Section 4 Royalty payments has an identical claim for an accounting. Second, the completion of an accounting for even one of the recipients of Section 4 Royalty payments would require at least a reconciliation of the payments to all others. Finally, there are known to be, based in the United States records, more than 1,000 such potential claims for an accounting and it makes absolutely no sense to waste the Court's or the Defendants' resources on a multiplicity of cases when just this one case will resolve all the claims. The Plaintiffs also intend to file a motion to bifurcate the case, placing the accounting in the first phase of the litigation. The Plaintiffs maintain that after an accounting is completed, the parties and the Court can fashion the appropriate relief to restore the trust in accordance with the results of the accounting.

The segregated funds that are used to make the Section 4 Royalty Payments are Indian trust assets. The United States' contention that these funds are not subject to a trust responsibility conveniently and incorrectly ignores both law and fact. For instance, the 1906 Act, § 4, ¶ 2 states that the payments are to be made of these monies "in the same manner and at the same time" as "other moneys held in trust for the Osages by the United States . . . ." (emphasis added). Congress' consistent treatment of these monies as "trust funds" and being "subject to such trust and supervision" is found in the plain language of federal statutes specifically relating to the subject matter of this lawsuit:

- Congress consistently and repeatedly used the term "trust funds" to refer to these monies. *See* Act of April 18, 1912, 37 Stat. 86-87 at §§ 5 & 8; Act of March 3, 1921, 41 Stat. 1249 at § 4; Act of February 27, 1925, 43 Stat. 1008 at § 1; and the Act of June 24, 1938, sec. 3, 52 Stat. 1034 § 1.
- Congress consistently and repeatedly determined that the trust supervision of these monies would continue, ultimately extending the trust in perpetuity. *See* Act of March 2, 1929, 45 Stat. 1478 § 1;[3] Act of June 24,

[3] "The lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage, Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trust and supervision until January 1,1959, unless otherwise provided by Act of Congress."

See Act of March 2, 1929, 45 Stat. 1478 § 1 (emphasis added).

1938, sec. 3, 52 Stat. 1034;[4] Act of August 28, 1957, 71 Stat. 471; and the Act of October 21, 1978, 92 Stat. 1660.[5]

- Congress has repeatedly and consistently restricted the alienation of the Section 4 Royalty Payments, subject to trust supervision by the Defendants. *See* Act of April 18, 1912, 37 Stat. 86-87 §§ 5, 7, 8 & 9; Act of February 27 1925, § 5; 43 Stat. 1008 §§ 1, 4, 5, 6, & 7; Act of May 29, 1928, 45 Stat. 883; Act of March 2, 1929, 45 Stat. 1478; Act of February 5, 1948, 62 Stat. 18; Act of September 1, 1950, 64 Stat. 572; Act of October 21, 1978, 92 Stat. 1660; and the Act of Oct. 30, 1984, 98 Stat. 3163.

In accord with this statutory authority, this Court and the Court of Claims have noted that the Section 4 Royalty payments are a trust fund held and maintained by the United States. *See* March 31, 2009 Order [Dkt. No. 79] at 8 and n. 9 (citing *Osage Nation v. United States*, 57 Fed. Cl. 392 (2003) (citing 34 Stat. 539, 544 §§ 4(1) and 4(2))). The United States' argument that its Section 4 Royalty Payments to the Plaintiffs and the putative class are not subject to trust duties is ludicrous.

By Order of this Court, the Federal Defendants were to answer or otherwise respond to the Plaintiffs' Third Amended Complaint by May 11, 2011. *See* Docket No. 1125. Instead of responding, the Federal Defendants filed a Motion to Dismiss the

[4] Same provision, extending the trust supervision until 1984.

[5] This act extended the trust supervision "in perpetuity."

Plaintiffs' claims.[6] This is yet another attempt by the Federal Defendants to avoid answering for their unlawful conduct.[7] Plaintiffs hereby respectfully submit this response in opposition of the Defendants' Motion, and ask that the Defendants' Motion be denied, and that the Defendants be ordered to answer the Third Amended Complaint.

STANDARD OF REVIEW

In considering a motion to dismiss, the court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff[s]." *See Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (quoting *David v. City & County of Denver,* 101 F.3d 1344, 1352 (10th Cir. 1996)). The allegations must be sufficient enough to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007). In interpreting the Supreme Court's holding in *Bell Atlantic*, the Tenth Circuit has held that a court "should look to the specific allegation in the complaint to determine whether they plausibly support a legal claim for relief." *Alvardado*, 493 F.3d 1215 at n.2 (citing *Iqbal v. Hasty*, 490 F.3d 143 (2nd Cir. 2007) (interpreting *Bell Atlantic* and *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197 (2007))). In other words, the Plaintiffs need not prove their

---

[6] Interestingly, the Federal Defendants have never answered in the almost decade long history of this action. Nor have they accounted to anyone in the 115-year history of the Osage Mineral Estate.

[7] The Court of Claims observed in the Osage Nation case that the Federal Defendants did not always act in good faith with respect to discovery and other procedural issues in that case. The Court found that such litigation tactics "appear[ed] calculated to result in delays." *See Osage Tribe of Indians of Oklahoma v. United States*, 93 Fed. Cl. 1, 7 (Fed. Cl. 2010).

case at this time; rather, they need only allege a plausible claim for relief. Here, Plaintiffs' claims are more than plausible.

Under the Indian Canons of Construction, "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("[D]oubtful expressions of legislative intent must be resolved in favor of the Indians"). The canon further provides "for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Nat'l Labor Relations Bd. v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002) (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976)). Treaties and federal agreements with tribes should also be liberally construed to favor Indians. *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943). Ambiguous expressions in treaties and statutes are resolved in favor of the tribes and their members. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973). Additionally, the familiar "*Chevron* deference" that courts normally grant to a federal agency's interpretation of statutes it administers is applied with "muted effect" in cases involving Indians. *See Cobell v. Salazar,* 573 F.3d 808, 812 (D.C.Cir. 2009) ("*Cobell XXII*").

ARGUMENT AND AUTHORITIES

I. This Court has jurisdiction over the Plaintiffs claims.

The Plaintiffs have alleged that this Court has jurisdiction over this action pursuant to U.S. Const. Amend. V, 5 U.S.C. §§ 702 and 706, and 28 U.S.C. §§ 1343, 1346, 1361

and 1362. *See* Docket No. 985-1, Third Amended Complaint ¶ 33. The Federal Defendants incorrectly argue that the Plaintiffs have failed to identify any "final agency action" under 5 U.S.C. §§ 702 upon which to base their claim. The Federal Defendants misread both current legal precedent and Plaintiffs' Third Amended Complaint.

Generally, lack of final agency action divests the court of power to review agency action under the Administrative Procedure Act (herein the "APA"). However, there is an exception when "plaintiffs claim that a governmental action was unlawfully withheld or unreasonably delayed." *See Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("*Cobell VI*").[8] "[W]here an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review." *Id*. at 1095 (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987)) (internal quotation omitted); *see also* 5 U.S.C. § 551(13) (including "failure to act" under the definition of "agency action").

Courts have consistently held that the federal government's failure to account to trust beneficiaries constitutes "final agency action." *See Cobell VI*, 240 F.3d at 1095 ("federal government has been under an obligation to discharge the fiduciary duties owed to [Indian] trust beneficiaries for decades."); *Otoe-Missouria Tribe of Oklahoma v. Kempthorne*, 2008 WL 5205191 (W.D. Okla. Dec. 12, 2008) ("Plaintiff is entitled to pursue this action under [5 U.S.C.] § 706(1), as Plaintiff may compel the Federal

[8] The *Cobell* litigation is quite similar to this action – both cases involve individual Indians seeking to compel the United States under the same federal statutes to account for the United States' management and distribution of trust funds, with underlying claims

Defendants to perform the discrete activity of accounting for the funds held in trust as required under § 4044.") (attached as Exhibit 1).

Plaintiffs have alleged that they have not received an accounting as required under federal law. *See* Third Amended Complaint at ¶¶ 46-49, 59. Paragraph 59 of Plaintiffs' Third Amended Complaint sets out nine distinct duties the Federal Defendants have failed to fulfill:

(a). accounted to Plaintiffs for distributions under the 1906 act, § 4;

(b). provided an audit to the Plaintiffs for distributions under the 1906 act, § 4;

(c). provided adequate systems for accounting for and reporting trust fund balances in the funds segregated for payments under Section 4 of the 1906 Act;

(d). provided adequate controls over receipts and disbursements for payments under Section 4 of the 1906 Act;

(e). provided periodic, timely reconciliations to assure the accuracy of amount paid under Section 4 of the 1906 Act;

(f). determined accurate cash balances of payments under Section 4 of the 1906 Act;

(g). prepared or supplied the Plaintiffs with periodic statements of their portion of the payments under Section 4 of the 1906 Act or the account performance and with balances of their account of the segregated funds which shall, pursuant to federal law (25 U.S.C. § 162a), be available on a daily basis;

(h). established consistent, written policies and procedures for the management and accounting of the segregated fund or payments made pursuant to section 4 of the 1906 Act; and/or

> (i). provided adequate staffing, supervision and training for trust fund management

Third Amended Complaint at ¶ 59.

In addition, Plaintiffs assert that "the Federal Defendants, during the pendency of this lawsuit, have acted, ***or failed to act***, in ways that are not in accordance with law and are contrary to the Plaintiffs' statutorily guaranteed rights." Third Amended Complaint at ¶ 63 (emphasis added). The Federal Defendants' assertion that Plaintiffs' have failed to describe "final agency action" such that this Court lacks jurisdiction over Plaintiffs' claims is without merit.

The Federal Defendants conveniently turn a blind eye to these allegations. The Federal Defendants simply and incorrectly assert that the Plaintiffs "have failed to identify a final agency action." Defendants' Motion at p. 7. The Federal Defendants make no allegations as to how their multiple failures to act are not "final agency actions" pursuant to the law. *See Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("*Cobell VI*"); *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987).

Moreover, Plaintiffs need not rely solely upon 5 U.S.C. § 702 for jurisdiction before this court. The "Appropriations Acts"[9] independently waive the Federal

---

[9] The term "Appropriations Acts" refers to a series of acts passed by Congress waiving the United States' sovereign immunity and deferring accrual of potential claims until an Indian beneficiary receives a meaningful accounting. *Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 364 F.3d 1339 (Fed. Cir. 2004). The most recent appropriations act provides:

> [N]otwithstanding any other provision of law, *the statute of limitations shall not commence to run on any claim*, including any claim in litigation pending on the date of the enactment of

Defendants immunity to permit the Plaintiffs to compel an accounting. *Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) ("Statutes that toll the statute of limitations, resurrect an untimely claim, defer the accrual of a cause of action, or otherwise affect the time during which a claimant may sue the Government also are considered a waiver of sovereign immunity.") (citing *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed.Cir. 2003)). The Federal Defendants have never accounted to the Plaintiffs for the funds held in trust, even after the Plaintiffs' requests. As such, this court has jurisdiction, at least, over the Plaintiffs' claim for an accounting, as well as any equitable claim to make the Plaintiffs whole for any loss such an accounting reveals.

> this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 111-88, 123 Stat. 2904 (2009) (emphasis added). Since 1991, Congress has each year passed similar language protecting both tribal and individual Indian claims. *See* Pub. L. No. 102-154, 105 Stat. 990 (1991); Pub. L. 102-381, 106 Stat. 1374 (1992); Pub. L. No. 103-138, 107 Stat. 1379 (1993); Pub. L. No. 103-332, 108 Stat. 2499 (1994); Pub. L. No. 104-134, 110 Stat. 1321 (1996); Pub. L. No. 104-208, 110 Stat. 3009 (1996); Pub. L. No. 105-83, 111 Stat. 1543 (1997); Pub. L. No. 105-277, 112 Stat. 2681 (1998); Pub. L. No. 106-113, 113 Stat. 1501 (1999); Pub. L. No. 106-291, 114 Stat. 922 (2000); Pub. L. No. 107-63, 115 Stat. 414 (2001); Pub. L. No. 108-7, 117 Stat. 11 (2003); Pub. L. No. 108-108, 117 Stat. 1241 (2003); Pub. L. No. 108-447, 118 Stat. 2809 (2004); Pub. L. No. 109-54, 119 Stat. 499 (2005); Pub. L. No. 110-161, 121 Stat. 1844 (2007) Pub. L. No. 111-88, 123 Stat. 2904 (2009).

II. Plaintiffs' Claims are legally sufficient as to the Federal Defendants.[10]

The Federal Defendants attempt to equate themselves with the hundreds of Individual Defendants this court recently dismissed.[11] *See* May 16, 2011 Order [Dkt. No. 1143]. The Federal Defendants incorrectly argue that the Plaintiffs' claims against the Individual Defendants are tied to the Plaintiffs' claims against the Federal Defendants. This is but another effort by the Federal Defendants to avoid answering for their wrongful and unlawful conduct.

This Court dismissed the hundreds of Individual Defendants after finding that Plaintiffs' claims against the Individual Defendants specifically, were "speculative." *See* March 31, 2011 Order [Dkt. No. 1122]; May 16, 2011 Order. This Court rightfully noted, "that perhaps, after an accounting has been completed, plaintiffs will be able to show that [the Individual Defendants are] not entitled to [their] headright interest[s]." The Plaintiffs' "speculative claims" against the Individual Defendants were a result of the Federal Defendants' failure to account, one of the Plaintiffs claims here.[12]

---

[10] Plaintiffs have made additional claims, other than for an accounting, specifically against the Federal Defendants for the Federal Defendants' wrongful and unlawful actions. The Federal Defendants make no challenges to the plausibility of these other claims.

[11] In the Defendants' Motion, the Federal Defendants' argued that all Individual Defendants should be dismissed for the same reasons this Court dismissed Defendant Benedum. As this Court has already dismissed the Individual Defendants, the Federal Defendants' argument on this point is moot and Plaintiffs will not address the argument here. *See* May 16, 2011 Order.

[12] In fact, this is precisely the reason why Congress required the Federal Government to account to Indian beneficiaries in the Appropriations Acts. Simply put, "without an accounting, it is impossible to know who is owed what. The best any trust

The Tenth Circuit has held that a court "should look to the specific allegation in the complaint to determine whether they plausibly support a legal claim for relief." *Alvardado*, 493 F.3d at n.2 (interpreting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007)).

Applying the *Alvarado* standard, the Plaintiffs have alleged that the Defendants have failed to account. *See* Plaintiffs' Third Amended Complaint at ¶¶ 46-49, 59 and *supra* at 7 to 8. The Plaintiff's complaint is more than plausible, as restated by the D.C. Circuit Court:

> The plaintiffs are entitled to an accounting under the statute. 25 U.S.C. § 4011(a). The district court sitting in equity must do everything it can to ensure that Interior provides them an equitable accounting. The district court's holding of impossibility contradicts the requirement of an equitable accounting-one that makes most efficient use of limited government resources. Given the realities of congressional appropriations, it would be inequitable for Interior to throw up its hands and stop the accounting. This is what the district court declared Interior should do in Cobell XX, leading to the money judgment of Cobell XXI. That judgment was substantial, but **without an accounting, it is impossible to know who is owed what. The best any trust beneficiary could hope for would be a government check in an arbitrary amount**. Even if this did justice for the class, it would be inaccurate and unfair to an unknown number of individual trust beneficiaries. There will be uncertainty in any accounting for this trust. Interior's job is to minimize that uncertainty with a finite budget. Equity requires the courts to assure that Interior provides the best accounting it can.

See Cobell v. Salazar, 573 F.3d 808, 813 (D.C. Cir. 2009).

Moreover, and substantively, the accounting the Federal Defendants are required to provide must be "meaningful." The phrase "meaningful accounting" is a term of art.

---

beneficiary could hope for would be a government check in an arbitrary amount." *See Cobell v. Salazar*, 573 F.3d 808, 813 (D.C. Cir. 2009).

It means something more than "simple notice." *See Chippewa Cree Tribe, et al. v. U.S.*, 69 Fed. Cl. 639, 664 (Fed. Cl. 2006). It is "not some kind of Procrustean bed that may be stretched or shrunk to fit available resources." *Cobell v. Kempthorne*, 532 F.Supp.2d 37, 90 (D.D.C. 2008) (ruling that the Department of Interior's proposed plan to account to individual Indians would "not contain sufficient information for the beneficiary readily to ascertain whether the trust has been faithfully carried out.") (*Cobell XX*). "[T]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." *See* Restatement (3d) of Trusts § 173. At a minimum, it means "information sufficient to alert the beneficiar[ies] to possible losses." *Chippewa Cree*, 69 Fed. Cl. At 664.

In the face of this authority, and knowing that it must provide a meaningful accounting, the United States makes the illogical and legally unsupportable argument that the "balance statement" on each headright owner's check and statements of deposit fulfills the Federal Defendants' duty to account. *See* Defendants' Motion at p. 11. As stated above, the accounting from the Federal Government must be "meaningful" in that it contains at least "information sufficient to alert the beneficiar[ies] to possible losses." *Chippewa Cree*, 69 Fed. Cl. At 664. The "balance statements" and statements of deposit which the United States calls its "accounting" fail to even approach this standard, and instead leave the Plaintiffs "at best" with "a government check in an arbitrary amount."[13]

[13] The Defendants' insistence on providing little or no information to the Plaintiffs raises serious concerns for the Plaintiffs relating to the facts which the Defendants appear to be willing to go to any lengths to conceal. One would assume that if the Defendants had faithfully implemented their trust duties in the administration of the

III. Plaintiffs' are entitled to an accounting under Federal Law as beneficiaries of royalties from the Osage Mineral Estate.

The Federal Defendants' argue, incorrectly, that Plaintiffs are not "beneficiaries" of the Osage Mineral Estate.[14] Defendants' misconstrue Plaintiffs' statement that they have "no claim against the Osage Nation or the Osage Mineral Estate itself." *See* Def. Motion at 10.[15] Furthering its illogical argument, the Defendants' misapply *Osage Tribe v. United States*, 85 Fed.Cl. 163 (2008),[16] asserting that the Osage Tribe is the only

---

payments of Section 4 Royalty Payments, there would be little resistance from the Defendants to account to the Plaintiffs for what it has done. Instead, the Defendants seem willing to adopt unsupportable legal positions in the hope of sheltering the information that only they know – and that only they have ever known – from the scrutiny of this Court.

[14] Surprisingly, this is inapposite to the Federal Defendants arguments in *Osage Nation v. United States*. In *Osage Nation*, the Federal Defendants argued that the Federal Government's mismanagement of the Osage Mineral Estate was best brought by the individual headright holders because "wealth is transferred to [headright holders] and away from the Tribe." Defendants' Reply to Pl. Corrected Response to Motion to Dismiss and Brief in Support, Exhibit 2 at 16.

[15] The Plaintiffs also dispute the Federal Defendants' assertion that the "Osage Nation has chosen to voluntarily dismiss" its claim for an accounting in the case now pending in the Federal District Court for the District of Columbia. Defendants' Motion at 13. The accounting claim remains very much alive in a parallel case brought by the Osage Nation in the Court of Federal Claims, which is referred to herein as "*Osage Nation*." Regardless, pursuant to the law of the captioned case, the Osage Nation's choice of forum for its accounting claim simply is not relevant.

[16] The Federal Defendants also incorrectly assert that the Court of Claims found Plaintiffs "do not have an interest which the substantive law recognizes" as it relates to this case. *Osage Tribe*, 85 Fed. Cl. at 170. As stated herein, the *Osage Tribe* case dealt with funds coming into the Osage Mineral Estate. As such, the Osage Tribe was the entity with the interest in the action. However, here, where the Plaintiffs' are challenging the management of funds going out of the Osage Mineral Estate, the Plaintiffs' are the group with the interest in the management of trust distributions.

beneficiary of the Osage Mineral Estate. Moreover, this Court has effectively decided these issues already. *See* March 31, 2009 Order at 10-11.[17]

Moreover, the United States' position in this case is diametrically opposed to the position that it took in the *Osage Nation* case. Specifically, and after setting out its view on this issue for three pages, the United States argued in *Osage Nation*, "Any claims for royalties, therefore, must be brought by the true owners of such claims, the headright owners themselves." *See* United States Motion to Dismiss the *Osage Nation* Case, Exhibit 3 at 30.[18]

In both the *Osage Nation* case and in this litigation, the United States makes too much of its position. Instead, and as this Court and the Court of Federal Claims correctly noted, Section 4 of the 1906 Act created a trust fund for the Tribe and obligates the United States to hold mineral royalties in trust for ***members of the Osage tribe*** as shown by the authorized roll of membership, or to their heirs. *See* March 31, 2009 Order at 8; *Osage Nation v. United States*, 57 Fed. Cl. 392 (2003) (citing 34 Stat. 539, 544 §§ 4(1)

---

[17] "In other words, the Osage Nation's interest in the tribal trust funds ends at the at the point of distribution, except to the extent that it owns headrights like other headright holders. The claims in this case focus on headright distributions only, not the Osage Nation tribal trust fund." *See* March 31, 2009 Order at 10-11 (footnote omitted, which accurately recited that the Federal Court of Claims already found that the United States committed 6 different breaches of trust with respect to the collection of royalties, but "did not address any issues relating to improper disbursements from that fund to owners of headrights.")

[18] While the United States supplied the Court with other pleadings from the Osage Nation case, it conveniently omitted its own writing on the subject – writing which calls the veracity of its argument here into question.

and 4(2)) (emphasis added).[19] "Congress chose to ***administer*** the Osage mineral estate by assigning headrights" to the then members of the Osage tribe, and allowed those headrights to transfer to the individuals heirs. *See* March 31, 2011 Order at 8 (emphasis added).

Since the enactment of the 1906 Act, the Federal Defendants have administered the Osage Mineral Estate by distributing Section 4 Royalty Payments to whom they believe to be trust beneficiaries, which have come to be known as "headright" owners. In essence, the United States uses a headright to identify the trust beneficiaries.

In *Osage Tribe*, the Tribe brought a claim for failing to account for the mismanagement of funds coming ***into*** the Osage Mineral Estate. *Id*. at 165. The Plaintiffs' claim is against the Federal Defendants for failing to account for the mismanagement of funds coming ***out of*** the Osage Mineral Estate through the segregated fund. The different cases (*Osage* versus this case) are dealing with different Federal trust duties.

This Court recognized this distinction in its March 31, 2009 Order. *See* March 31, 2009 Order at 9-11 (describing the difference between *Osage Tribe* and the instant action). As stated above, the Federal Defendants have used headrights to identify

---

[19] Surprisingly, the Federal Defendants attempt to rely on *Chouteau v. Commissioner*, 38 F.2d 976 (10th Cir. 1930), to illogically argue that the Plaintiffs are not trust beneficiaries of the Osage Mineral Estate. The 10th Circuit in *Chouteau* recognized that the Osage Mineral Estate was put in trust for not only the Osage Tribe, but the tribe's members. *Id*. at 978 ("The mineral reserves under the lands are held in trust by the United States for the tribe ***and its members***, and are being developed under its control and direction as an instrumentality for the best interests and advancement of the ***members of the tribe*** . . .") (emphasis added).

beneficiaries. Pursuant to Federal law, the Federal Defendants owe the Plaintiffs', and all other Indian[20] headright owners, the duty to account.

In 1994 Congress passed legislation requiring the Department of the Interior to provide "as full and complete accounting as possible of the account holder's funds ***to the earliest possible date***." 25 U.S.C. 4044(2) (emphasis added). According to the district court in *Otoe-Missouria*, through the 1994 act, "Congress intended a reconciliation of the account to determine what the proper balance should be and to require proper accounting and reconciliation to continue into the future." *Otoe-Missouria*, 2008 WL 5205191, at *2 (W.D. Okla. Dec. 10, 2008).

Under 25 U.S.C. §162a (d), the Secretary of the Interior has several categories of information that, at a minimum, must be provided in an accounting for Indian trusts, including the funds of the Osage Mineral Estate. These categories include accounting for whether the United States is: (1) providing adequate systems for accounting for and reporting of trust fund balances; (2) providing adequate controls over receipts and disbursements; (3) providing periodic, timely reconciliations to assure accuracy of accounts; (4) determining accurate cash balances; (5) preparing and supplying the Nations with periodic statements of their account performance, including making balances of such accounts available on a daily basis; (6) establishing consistent, written policies and procedures for trust fund management and accounting; (7) providing appropriate staffing, supervision, and training for trust fund management and accounting;

[20] Pursuant to the various federal statutes, only Indians have a statutory right to an accounting. *See, e.g.*, Pub. L. No. 111-88, 123 Stat. 2904 (2009) (reproduced in footnote 6, supra).

and (8) assuring the appropriate management of the natural resources held in trust. *See* 25 U.S.C. §162a(d).

As trustee of the Osage Mineral Estate, and the segregated fund included therein, the Federal Defendants' have an affirmative duty to meaningfully account to the Plaintiffs, beneficiaries of the segregated fund. The Federal Defendants have never provided such an accounting to the Plaintiffs.

IV. The Federal Defendants' impermissibly attack this Court's March 31, 2009 Order finding that the Osage Nation is not a necessary and indispensable party to any of the Plaintiffs' claims.

This Court has previously, and correctly, held that the Osage Nation is not a necessary or indispensable party to this action. *See* March 31, 2009 Order at 11. This Court found that the Osage Nation's interest in the Osage Mineral Estate ends at the point of distribution. *Id*. at 10. At that point, the interest is that of the headright owners. This Court also found that, to the extent the Osage Nation owns headrights, its interests are aligned with those of the plaintiffs. *Id*. at 11. The Osage Nation is not a necessary and indispensable party.

The Federal Defendants seek to impermissibly attack this prior ruling by the court. In doing so, the Federal Defendants raise no new argument, no new facts, nothing whatsoever to support such an attack of this kind. The United States fails to even supply a procedural basis for its collateral attack. Instead, the United States merely repackaged its old, invalid argument in a new brief without any support for the failed position. As such, this Court's previous Order remains the law of the case and the Federal Defendants' argument must be rejected. *See Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1224 (10th

Cir. 2007) ("'[L]aw of the case doctrine dictates that prior judicial decisions on rules of law govern the same issues in subsequent phases of the same case.").

CONCLUSION

For these reasons, the Plaintiffs respectfully request that the Court deny the Defendants' Motion and order the Federal Defendants to respond to the Plaintiffs' Third Amended Complaint.

Respectfully submitted,

SNEED LANG HERROLD, P.C.

G. Steven Stidham, OBA # 8633
1700 Williams Center Tower I
One West Third Street
Tulsa, Oklahoma 74103-3522
Telephone: (918) 583-3145
Facsimile: (918) 582-0410

-and-

/s/ Dallas L.D. Strimple
Jason B. Aamodt, OBA #16974
Krystina E. Hollarn, OBA #30111
Dallas L.D. Strimple, OBA #30266
1723 S. Boston Avenue
Tulsa, Oklahoma 74119
Telephone: (918) 347-6169
Facsimile: (918) 398-0514

-and-

Amanda S. Proctor, OBA #21033
SHIELD LAW GROUP PLC
1723 S. Boston Avenue
Tulsa, Oklahoma 74119
Telephone: (800) 655-4820
Facsimile: (800) 619-2107
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify on that on this 31st day of May, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Amanda Sue Proctor
Dallas Lynn Dale Strimple
Jason Bjorn Aamodt
Joseph Hosu Kim
Krystina E. Hollarn
Phil E. Pinnell

/s/ Dallas L.D. Strimple
Dallas Lynn Dale Strimple