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

WILLIAM S. FLETCHER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 02-CV-427-GKF-PJC**
	)	
THE UNITED STATES OF AMERICA, et al.,	)	
	)	
Federal Defendants,	)	
	)	
and	)	
	)	
ALADDIN PETROLEUM CORP., et al.,	)	
	)	
Defendants,	)	

FEDERAL DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

Pursuant to Rules 12(b)(1), 12(b)(6), and 12(e) of the Federal Rules of Civil Procedure, LCvR7.2, and the Order dated April 5, 2011 [Docket No. 1125], Federal Defendants, the United States of America, the Department of the Interior, Kenneth Salazar (in his official capacity as Secretary of the Interior), the Bureau of Indian Affairs, and Larry[1/] EchoHawk (in his official capacity as Assistant Secretary – Indian Affairs, United States Department of the Interior), hereby move for dismissal of Plaintiffs' Third Amended Complaint [Docket No. 985].

ARGUMENT

Plaintiffs' Third Amended Complaint seeks to challenge the distributions of Osage mineral royalties by the Federal Defendants to the other defendants in this case (the "Individual

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[1/] Federal Defendants note that the Court's ECF database reflects Plaintiffs' error in naming "Walter Echohawk." Larry EchoHawk is in fact "the Assistant Secretary of the Interior – Indian Affairs." Cf. Third Amended Complaint [Docket No. 985] at caption and ¶ 1.

Defendants"). These payments are made on a quarterly basis to the owners of Osage headrights. These Osage headrights, when originally created and allotted in 1906, were originally owned by the then-existing members of the Osage Tribe (now known as the Osage Nation). Over time, these headrights were passed on by the wills of these original headright owners (or by intestate succession), and subsequent transfers have also occurred. Plaintiffs now seek to challenge the fact that several Osage headrights have been passed on to the Individual Defendants, who are (or are at least alleged to be) non-Indians. Plaintiffs seek to strip these headrights from the Individual Defendants and have these headrights declared to be the property of Plaintiffs' proposed class (which has not yet been certified, and in some as yet undefined allocation among that class).[2/] With respect to the Federal Defendants, Plaintiffs seek a similar declaratory judgment that these headrights belong to Plaintiffs' proposed class, in some manner of allocation among that class, such that all future headright payments would be made in a manner consistent with the declaratory judgment.[3/]

Because Plaintiffs' claims against Federal Defendants challenge agency action (or the lack thereof) under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., this action should

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[2/] Plaintiffs' motion for class certification [Docket No. 984] has been denied. See Minute Sheet for hearing on Dec. 10, 2010 [Docket No. 1082]; Transcript of hearing on Dec. 10, 2010 [Docket No. 1112] (also noting Plaintiffs will have to "refile [thei]r motion"). To date, Plaintiffs have made no further attempt to seek any class certification.

[3/] Federal Defendants do not understand Plaintiffs to be seeking any money from Federal Defendants, other than through a declaratory judgment to provide future payment of certain headrights now held by individual and/or corporate defendants to the plaintiff class. To the extent that Plaintiffs are seeking to recover any past headright payments, Federal Defendants understand Plaintiffs to be seeking this from the appropriate individual and/or corporate defendants. If, however, any party asserts that any such past funds come from Federal Defendants, a crossclaim may be appropriate.

proceed as an appeal in accordance with Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994), and its progeny. Rather than wait for the compilation and digitization of the administrative record, however, in order to enhance judicial efficiency in this potentially large and unwieldy case, Federal Defendants suggest first narrowing or eliminating this case through this motion to dismiss. See Kane County Utah v. Salazar, 562 F.3d 1077, 1086 (10th Cir. 2009) ("Olenhouse aside, case law firmly establishes that APA-based claims can, if appropriate, be summarily dismissed").

Indeed, in light of this Court's recent decision on the motion to dismiss filed by Individual Defendant Ben T. Benedum, dismissal of the remainder of this case is particularly appropriate. See Opinion and Order dated March 31, 2011 (the "Opinion") [Docket No. 1122]; see also Docket Nos. 995, 996, 1052, and 1053 (briefing on Benedum's motion); Docket No. 1054 (Federal Defendants noting that the Benedum motion to dismiss should be considered together with any similar motions to dismiss filed by the other defendants).

The Opinion now makes plain that the Third Amended Complaint must be dismissed against all the Individual Defendants, not just Mr. Benedum.[4] That is because Plaintiffs' "overarching legal argument," Opinion at 9 -- that "a non-Indian cannot hold legal or equitable title to a headright," id. at 8 -- has been rejected, and Plaintiffs have no better basis to state a claim against any other Individual Defendant than they had against Mr. Benedum. Because the Third Amended Complaint is thus insufficient to strip the Individual Defendants of their right to receive quarterly distributions of Osage trust income, see id. at 3, the corresponding claims against Federal Defendants must

[4] The Individual Defendants have until June 1, 2011, to make and develop this and any other arguments they may wish to make. See Order dated April 5, 2011 [Docket No. 1125].

likewise be dismissed. To the extent that Plaintiffs have any remaining claim against Federal Defendants for an accounting, such a claim may also be dismissed as ownership of a headright does not create a trust relationship between headright holders and Federal Defendants. Thus, this case can properly be resolved through this motion to dismiss (in conjunction with motions to dismiss filed by the remaining Individual Defendants).

I. THE OPINION REQUIRES DISMISSAL OF ALL PARTS OF THE THIRD AMENDED COMPLAINT BASED ON PLAINTIFFS' "OVERARCHING LEGAL ARGUMENT"

Plaintiffs' "overarching legal argument" is that "a non-Indian cannot hold legal or equitable title to a headright" and, on this basis, Plaintiffs sought to strip the Individual Defendants "of the right to receive quarterly distribution of Osage trust income." Opinion at 3, 8, 9. This "overarching legal argument" has now been "rejected." Id. at 9. The immediate consequence of this rejection was to allow one of the Individual Defendants -- Ben T. Benedum -- to be dismissed. Id. at 10. The broader natural consequences of this rejection are similar dismissals for all remaining Individual Defendants and at least the bulk of the claim or claims against Federal Defendants.

Plaintiffs certainly have no better basis to state a claim against any other Individual Defendant than they had against Mr. Benedum. As this Court has made clear, "Plaintiffs have merely alleged a speculative claim." Opinion at 9. Although this holding was made with regard to Mr. Benedum and his motion to dismiss, it applies equally to the entirety of Plaintiffs' Third Amended Complaint. Nothing in the Third Amended Complaint meets Plaintiffs' burden of pleading sufficient factual allegations to show that any of the Individual Defendants are not entitled to their headright interests. See id.

For this same reason, Plaintiffs' Third Amended Complaint fails to state any claim against Federal Defendants for having paid the Individual Defendants consistent with the headrights they possess. Any claim in the Third Amended Complaint that Federal Defendants have paid the wrong persons or entities, or that they have improperly approved the transfer of a headright, is simply "a speculative claim." Opinion at 9.[5/] Thus, at least the bulk of Plaintiffs' claim against Federal Defendants must likewise be dismissed.

Indeed, dismissal with respect to the Federal Defendants is required for an even more fundamental reason -- under Rule 12(b)(1) due to the lack of jurisdiction. Jurisdiction is asserted here under Section 702 of the APA, 5 U.S.C. § 702. See Fletcher v. United States, 160 Fed. Appx. 792, 795 (10th Cir. 2005). 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).[6/] Section 704 of the APA provides that agency action is judicially reviewable in

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[5/] Presumably, this is the purported basis for Plaintiffs' takings claim. See Opinion at 3; Third Amended Complaint at ¶ 58. Notably, a party challenging governmental action as an unconstitutional taking "bears a substantial burden." Eastern Enters. v. Apfel, 524 U.S. 498, 523 (1998). Here, Plaintiffs do not come even close to meeting that burden. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Plaintiffs do not even allege that Federal Defendants have taken any headrights for "public use," and Plaintiffs have entirely failed to explain how the recognition of private transfers that ultimately began with the original 2,229 Osage Indians on the roll established by the 1906 Act, and ultimately ended with the Individual Defendants, could otherwise be considered a taking. In any event, as noted herein, Plaintiffs have failed to adequately plead the specifics of any possible "taking," and the claim may be dismissed on that basis as well.

[6/] "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); see also id. at § 702 (discussing "a claim that an agency or an officer or employee thereof acted or failed to act . . ."). Each of these specific categories of decisions are (continued...)

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); see also Chemical Weapons Working Group, Inc. v. U.S. 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.[7/]

"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

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[6/] (...continued)
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).

[7/] Claims of breach of fiduciary duty and raising constitutional issues brought by Indians against the United States are equally subject to the finality and agency action requirements of the APA. E.g., Cobell v. Kempthorne, 455 F.3d 301, 304 (D.C. Cir. 2006) (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."); Gallo Cattle Co. v. U.S. Dep't of Agric., 159 F.3d 1194, 1197-98 (9th Cir. 1998) (constitutional claims subject to statutory standing requirements of APA section 704).

APA. Instead, "Plaintiffs have merely alleged a speculative claim." Opinion at 9. 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. U.S. 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)").

Because Plaintiffs have failed to identify a final agency action with sufficient specificity as the focus for judicial review in this action, the Court should dismiss this action for lack of jurisdiction. Indeed, 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, see Olenhouse, 42 F.3d 1560, making this case particularly ripe to "be summarily dismissed." Kane County, 562 F.3d at 1086. Furthermore, it is not until Plaintiffs' provide a sufficiently specific agency focus that Federal Defendants or this Court can evaluate other possible defenses, such as the application of the statute of limitations at 28 U.S.C. § 2401. See Opinion and Order dated March 31, 2009 [Docket no. 79] at 12 ("Until such time as plaintiffs specifically identify the agency actions or inactions they challenge, the court cannot conclusively determine whether the complaint has been filed within the applicable period of limitations"). Similarly, until Plaintiffs' provide sufficiently specific allegations, it is not possible to fully evaluate whether the Osage Nation is a necessary and indispensable party under Rule 19. The Osage Nation now owns some headrights, and it is not yet possible to determine whether Plaintiffs' allegations of wrongful agency action might encompass allowing the Osage Nation to obtain these headrights. Nor is it possible to determine whether the Osage Nation belongs within Plaintiffs' currently ill-defined proposed class.

Moreover, because Plaintiffs have repeatedly failed to sufficiently specify any challenged agency actions or inactions, even after repeated requirements, see Docket No.79 (dismissing Plaintiffs' First Amended Complaint and requiring the Second Amended Complaint to "identify[] with specificity the challenged agency action and/or inactions"); Docket Nos. 213; 231 at 16, 27, 48; and 972 (dismissing Plaintiffs' Second Amended Complaint for failing to adequately specify the agency actions being challenged), dismissal may also be proper under Rule 12(e). See also Campaign for Restoration & Regulation of Hemp v. City of Portland, 141 F.3d 1174 (Table), 1998 WL 115789 (9th Cir. 1998) (dismissing an amended complaint, with prejudice, for failing to comply with the Court's order to correct the pleading defect requiring the amendment).

II. ANY REMAINING PORTION OF THE THIRD AMENDED COMPLAINT SHOULD SIMILARLY BE DISMISSED

The only possible portion of Plaintiffs' claim against Federal Defendants that might remain after the Opinion is their claim for an accounting. However, Plaintiffs cannot state a claim for an accounting, as ownership of a headright does not create a trust relationship between headright holders and Federal Defendants.

As both Plaintiffs and this Court have recognized, "the Osage mineral estate was placed 'in trust for the tribe'." Opinion at 8 (quoting Osage Nation v. Irby, 597 F.3d 1117, 1120 (10th Cir. 2010)); see also Third Amended Complaint at ¶ 7 (similar). Headrights, by contrast (but like the surface estate), "have already been allotted." Jech v. United States, No. 09-cv-818-TCH-TLW (N.D. Okla. Feb. 28, 2011) (Report and Recommendation [Docket No. 57] at 9); id. (March 31, 2011) (Order [Docket No. 60]) ("[T]he Report (Doc. 57) is affirmed and adopted as the Order of the

Court") (copies of these documents are attached hereto, for convenience, as Attachments 1 and 2).[8/] See also Chouteau v. Commissioner, 38 F.2d 976, 978-979 (10th Cir. 1930) (addressing situation where a non-Indian received both allotted surface land and a headright interest, and treating both similarly -- she "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."). Plaintiffs are fully aware of the importance of this distinction. See Third Amended Complaint at ¶ 5 (calling "allotment" a "primary device of the assimilation policy" and "a mighty pulverizing engine to break up the tribal mass") (internal quotations and citation omitted). Accordingly, headrights are simply "a property right." Opinion at 8 (quoting In re Irwin, 60 F.2d 495, 497 (10th Cir. 1932)); 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); Jech, No. 09-cv-818-TCH-TLW (N.D. Okla. March 14, 2011) (Plaintiffs' Objection to Report and Recommendation [Docket No. 58] at 1) ("Plaintiffs own headrights, which are real property interests in the right to receive mineral revenue distributions from production of the Mineral Estate").

Indeed, the lack of a trust relationship between Federal Defendants and any of the headright holders (including Plaintiffs in their capacity as headright holders) is made clear enough by

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[8/] Ms. Jech was a former named Plaintiff in this case, and all of the plaintiffs in Jech are members of the proposed class in both Plaintiffs' most recent motion for class certification and as described in the Third Amended Complaint. Compare Third Amended Complaint at ¶ 68 with Jech, No. 09-cv-818-TCH-TLW (N.D. Okla. Feb. 28, 2011) (Docket No. 57 at 2). To the extent that Plaintiffs here disagree with the plaintiffs in Jech, several additional class certification issues may be raised, including whether the remaining named Plaintiffs here are typical or otherwise adequate representatives for the class.

Plaintiffs' admission that they have "no claim against the Osage Nation or the Osage Mineral Estate itself" and no "dispute regarding the amounts which the Osage Nation has obtained from the Osage Mineral Estate." Third Amended Complaint at ¶ 30; see also Opinion and Order dated March 31, 2009 [Docket no. 79] at 10-11 ("The claims in this case focus on headright distributions only, not the Osage Nation tribal trust fund"). Presumably, that is because they believe that they have no legal basis to make such a claim. That is certainly the ruling of the Court of Federal Claims. See Osage Tribe v. United States, 85 Fed. Cl. 162, 170 (2008) (holding that the Osage Indian headright holders who proposed to intervene in that case "do not have an interest which the substantive law recognizes as belonging to or being owned by them") (internal quotations and brackets omitted).[9] And it is inconsistent with a claim of a trust relationship (unless they believe, in contrast to the Nation, that there is no claim with respect to the size of "the Osage Mineral Estate itself").

Regardless, Plaintiffs' Third Amended Complaint certainly does not provide the basis for any trust claim, such as an accounting obligation to Plaintiffs. The Third Amended Complaint merely recites "25 U.S.C. §§ 162a and 4011." Third Amended Complaint at ¶ 54. Although both sections provide for certain trust duties or responsibilities when there is a trust relationship, neither

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[9] The Court of Federal Claims case is ongoing, and remains subject to appeal on several issues, including the issue of standing. Were headrights trust property (and, thus, headright holders trust beneficiaries), this statement by the Court of Federal Claims could not be defended, because a trust relationship would have provided a clear source of legal interest. Importantly, however, the United States' standing arguments to the contrary in that case are not an argument that the United States has a trust relationship with any parties in this case by virtue of their headright ownership. The United States' standing arguments in the Court of Federal Claims were based on the standing concept of "real party in interest" that were not tied to trust law concepts. While headrights may not be as freely alienable as the surface estate, that is effectively a difference in the so-called "bundle of sticks" associated with each of those property rights.

creates a trust relationship between the United States and Plaintiffs as headright holders. Indeed, 25 U.S.C. § 162a is explicitly limited to "tribal funds."

Moreover, even if 25 U.S.C. §§ 162a and 4011 did apply here, they would be of little use to Plaintiffs. As noted above, the fundamental problem with the Third Amended Complaint is that "Plaintiffs have merely alleged a speculative claim." Opinion at 9. As the Court recognized, the requested accounting appears to merely be a crutch used by Plaintiff to help them meet their burden of proof -- "that perhaps, after an accounting has been completed, plaintiffs will be able to show that Benedum is not entitled to his headright interest" (or, with respect to any other Individual Defendants, that they are not entitled to their headright interests). Id. Just as Plaintiffs were not allowed to reverse the burden of pleading onto Mr. Benedum, id., they should likewise not be allowed to shift that burden onto Federal Defendants. Plaintiffs, as plaintiffs, should be required to shoulder the burden of determining whether any current headright ownership is improper (consistent with the Opinion). In this context, Plaintiffs' claim for an accounting is nothing more than a diversion, as 25 U.S.C. §§ 162a and 4011 do not help Plaintiffs in this regard. See 25 U.S.C. § 162a(d)(5) (providing for an account holder to receive only "statements of their account performance and with balances of their account") (emphasis added). Indeed, consistent with Rule 11 and Plaintiffs' statements that their claims do not extend to the amounts collected by the trust fund (only its distribution), it does not seem possible for Plaintiffs to make any claim that they have not received an accounting of the balances of their account." 25 U.S.C. § 162a(d)(5) (emphasis added). Their "balances" are stated each quarter in their headright checks or statements of deposit. What Plaintiffs appear to desire is something akin to a title search, and not of their headrights, but of those

belonging to others, so that they can "show that [a headright holder] is not entitled to his headright interest." Opinion at 9. But 25 U.S.C. §§ 162a and 4011 do not provide for any such thing.

Furthermore, to the extent that Plaintiffs are allowed to bring a trust claim here, such as their claim for an accounting, the issue of whether the Osage Nation is a necessary and indispensable party would again be raised. As noted above, the Osage Nation is a trust beneficiary, and there is some form of trust relationship between the United States and the Osage Nation. Thus, to the extent that Plaintiffs here are now allowed to bring trust claims, the Osage Nation could be a necessary and indispensable party to such claims.[10/] See 3A Moore's Federal Practice ¶ 19.08 at 19-165 (1984) ("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"); see also Osage Nation v. United States, No. 00-cv-169 (Fed. Cl. June 2, 2003) (Plaintiff Osage Tribe's Post-Argument Brief on Motion to Dismiss [Docket No. 102] at 8) (Osage Nation arguing that "the Osage Tribe would have to be an indispensable party to any litigation brought by headrights holders") (emphasis added) (The Osage Nation's brief was filed on May 29, 2003, but not accepted by the Court for filing until June 2, 2003, see Docket No. 101 -- copies of that case's docket nos. 101 and 102 are attached hereto as Attachments 3 and 4).[11/] Indeed, the Osage Nation has already filed an action for an accounting. See

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[10/] It is notable that Plaintiffs cite 28 U.S.C. § 1362 as one of the bases for this Court's jurisdiction. Third Amended Complaint at ¶ 33. That statute is limited to "civil actions, brought by any Indian tribe" and not proposed class actions of tribal members actually opposing tribal joinder in their claims.

[11/] As noted above, the United States reserves its rights to appeal from the Court of Federal Claims' rulings and does not concede any agreement merely by reciting from that case here. The United States' reservation of its right to challenge the CFC's decisions is immaterial to the necessary and indispensable party issue, which turns on whether the Tribe "claims an interest relating to the subject of the action," not whether the United States concedes the Tribe's interest. Fed. R. Civ. P. (continued...)

Osage Tribe v. United States, No. 04-cv-283 (D.D.C. filed Feb. 20, 2004). The Osage Nation has chosen to voluntarily dismiss that action, see id. at Docket No. 68 (Aug. 26, 2010), but that does not mean that it would not be a necessary and indispensable party to any accounting action Plaintiffs here might bring.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 2nd day of May, 2011.

IGNACIA S. MORENO
Assistant Attorney General

/s/ *Joseph H. Kim*
JOSEPH H. KIM, IL Bar #6243249
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, D.C. 20044-0663
Tel: (202) 305-0207
Fax: (202) 353-2021
joseph.kim@usdoj.gov

THOMAS SCOTT WOODWARD
United States Attorney
PHIL PINNELL
Assistant United States Attorney
Northern District of Oklahoma
110 West 7th St., Suite 300
Tulsa, OK 74119
Tel: (918) 382-2700
Fax: (918) 560-7938

11/ (...continued)
19(a)(2); see also Davis v. United States, 192 F.3d 951, 957-59 (10th Cir. 1999).

Attorneys for Federal Defendants

OF COUNSEL:

ALAN R. WOODCOCK
Field Solicitor
U.S. Department of the Interior
Office of the Field Solicitor
Tulsa Field Solicitor's Office
7906 East 33rd Street
Tulsa, OK 74145

CERTIFICATE OF SERVICE

I hereby certify on the 2nd 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 ECF registrants.

I further certify that on the 2nd day of May, 2011, a true and correct copy of the above and foregoing instrument was served by U.S. Mail, postage prepaid to the following, who are not registered participants of the ECF System:

FIRST ASSEMBLY OF GOD, KALAMAZOO
c/o John Plick, CFO & SR. Associate Pastor
5550 Oakland Dr.
Portage, MI 49024

BETTY BLUE
c/o Brenda F Blue, POA
3209 Willow Dr.
Portland, TX 78374

BETTY McPHERSON
3227 Chimayo Lane
Las Vegas, NV 89122

BETTYE PASTANA
46041 Road 415 Space 146
Coarsegold, CA 93614

BRYAN CROW
4715 Lost Lake Lane
Spring, TX 777388-3838

CECIL O. WOOD, JR.
1701 Revard Ave.
Pawhuska, OK 74056

COETA WELLS
14804 E. 94th Street N.
Owasso, OK 74055

DANIEL JOHNSON
16308 Rogers Ln
Scott, AR 72142

DARRYL KLOPP
1104 Rosedale Drive
Ponca City, OK 74604

DONALD AVANCE
c/o Nicholas C. Avance, Independent Executor
1715 Calmar Dr.
Spring, TX 77386

DONNA RICHARDS
4 Reston Dr.
Fredensburg, VA 22406

GEORGIA L. KELLEY
2524 Calico St.
Las Vegas, NV 89108

GEORGIANNA SHAVER
5 Queens Court
Little Rock, AR 7221

HEDWIG WHITE
112 Central Park Ln
Evans, GA 30809-4544

HOWARD WALKER
315 E Jackson St.
Columbia City, IN 46725

JACK GIBSON
14715 148TH Ave SE
Yelm, WA 98597

JAMES TITUS
36 Ariel Way
Avon, CT 06001

JENNIFER MITCHELL
7010 Golden Rain Court
Charlotte, NC 28277

JOHN LUCAS
563 Middle Fork Rd.
Onalaska, WA 98570

JUDITH PAVELEC
46 Conlon St.
Bristol, CT 06101

JULIA HENRY
16475 Dallas Pkwy Ste 400
Addison, TX 75001-6837

LEANNA ADAMS
1504 Blackard Ln.
Ponca City, OK 74604

LEON STANSIFER
13710 US Hwy. 425 N.
Star City, AR 71667

LOUISE HALLORAN
2140 Bonnycastle Ave.
Louisville, KY 40205

LYNDA WISEMAN
607 Casey Pl.
Fredericksburg, VA 22407

MARGARET HERNDON
POB 702158
Tulsa, OK 74170-2158

MARION GOODWIN
c/o Cynthia F. Gallegos, Former Personal Representative
P.O. Box 9694
Sante Fe, NM 87504

MARSHA MUEHLING
1707 S. Jullian Blvd
Amarillo, TX 79102

MARY DOERING
P.O. Box 1806
Coarsegold, CA 93614

MARY GODFREY
137011 Pleasant Forest Dr.
Little Rock, AR 72212

MINNIE BELL HUDSON
HC 61 Box 115
Buckhorn, NM 88025

PATRICIA BRAUCHT
1103 Sweetheart Ln.
North Wales, PA 19454

ROBERT PETTUS
2314 S. Sheridan
Tulsa, OK 74129

RODNEY CROW
11284 O'Henry Rd.
Sandy, UT 84070

SAMUEL DOUGLAS
4351 W. County Rd. 785 N.
Boonville, IN 47601

SARAH TOLES
47227 Oneida Ave.
Coarsegold, CA 93614

SCOTT WEBSTER
7917 Selma Ave., Ste 210
Los Angeles, CA 90046

SHIRLEY TIGHE
c/o Anne S. Tighe
5914 W. Tucson Estates Pkwy.
Tucson, AZ 85713

STEPHEN BRAUCHT
3233 N. Virginia
Oklahoma City, OK 73118

VIRGINIA L. ROUSEY
1412 W. Fourth St.
Madera, CA 93637

WILLIAM BERNE
2132 Capstone Cir.
Herndon, VA 20170

WILLIAM KESTER
16 Mela Lane
Rancho Palos Verdes, CA 90275

WINTER D. WHITE
4490 El Dorado Pkwy., Apt. 114
McKinney, TX 75070

s/ Joseph H. Kim