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.	)	

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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 EchoHawk (in his official capacity as Assistant Secretary – Indian Affairs, United States Department of the Interior), have moved for dismissal of Plaintiffs' Third Amended Complaint [Docket No. 985]. See Docket No. 1126. This brief is submitted in reply to Plaintiffs' Response in Opposition to Federal Defendants' Motion to Dismiss and Brief in Support [Docket No. 1144] (the "Response").

ARGUMENT

Plaintiffs' Response makes several things clear. First, it is clear that the issue of Plaintiffs' purported class certification needs to be resolved. Second, it is clear that Plaintiffs have no proper claim for an accounting. Third, it is clear that any other claim Plaintiffs may purport to bring is merely speculative. Accordingly, Plaintiffs' motion for class certification should be resolved, and then this case should be dismissed as to all such plaintiffs.

I. THE ISSUE OF CERTIFICATION OF A PLAINTIFF CLASS SHOULD BE RESOLVED FIRST

Plaintiffs note that they "intend to re-file their Motion for Class Certification shortly after filing this response brief." Response at 2 n.2. To date, Plaintiffs have failed to file any such motion. Plaintiffs should be required to file for class certification, and have this matter resolved, for at least two reasons.

First, Federal Defendants have had to defend against this long-running litigation, which purports to be a class action case, and which has involved multiple attempts by Plaintiffs and their counsel to attempt to come up with a cognizable complaint. Cf. Response at 5 n.6 (Plaintiffs finding it "interesting[]" that "Federal Defendants have never [had to] answer[] in the almost decade long history of this action" when each of their three prior pleading attempts have been dismissed for various defects including failing to state a cause of action). Under these circumstances, Federal Defendants seek to obtain finality through this motion to dismiss. If Plaintiffs are allowed to limit the prejudicial effects of this case to just the two remaining named plaintiffs who are still willing to be associated with this case, Federal Defendants face the risk of further redundant litigation from other individuals from the purported class.[1/] Accordingly, Federal Defendants request that this Court first resolve this issue of plaintiff class certification, such that the entire proper class be bound by any dismissal here.

Second, this question of proper class certification needs to be resolved in order to determine if the Osage Nation is a necessary and indispensable party under Rule 19. Plaintiffs attempt to make

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[1/] Although Plaintiffs currently list only two individuals, see, e.g., Response at 1 (listing William S. Fletcher and Charles A. Pratt), and have long suggested that the list of named plaintiffs would be amended in some fashion to reflect this, rather than five individuals named in the Third Amended Complaint, no such amendment has ever been filed in this case.

much out of the fact that this Court has previously held that the Osage Nation is not a necessary and indispensable party, and that Federal Defendants cannot state with greater certitude whether the Osage Nation would in fact be a necessary and indispensable party. See Response at 18-19. But this is simply a function of Plaintiffs' failure to clearly state their claim (such as what parameters define who might be currently holding an incorrect number of headrights and how the correct number should be determined), and this is further reflected in Plaintiffs' inability so far to properly define a plaintiff class. This Court's prior order simply stated that, "[t]o the extent the Osage Nation has an interest as a headright holder in the distribution of funds, its interests are aligned with those of the plaintiffs." Opinion and Order dated March 31, 2009 [Docket No. 79] at 11. Federal Defendants assert that it is not currently clear whether the Osage Nation's interest as a headright holder is in fact currently aligned with Plaintiffs' interests. For example, to the extent that Plaintiffs seek to reallocate any of the headrights currently associated with the former (now dismissed) individual defendants, it is not clear whether Plaintiffs seek to have the Osage Nation benefit, or whether the Osage Nation might instead be harmed by a proposed transfer that seeks to avoid any rights the Osage Nation may have in such transfer. Cf. Act of October 21, 1978, Section 8(a), 92 Stat. 1660, 1663, as amended by Act of October 30, 1984, Section 2(f), 98 Stat. 3163, 3165. And, depending on Plaintiffs' precise theory, it is also possible that the Court may be required to determine whether the receipt of headrights by the Osage Nation was lawful, which would call into question the Osage Nation's very interest as a headright holder. Thus, notwithstanding this Court's pronouncement in 2009, Federal Defendants suspect that this may no longer be so clear to the Court either. Cf. Opinion and Order dated March 31, 2011 [Docket No. 1122] (Court rethinking who may be a "required party" to this action). Plaintiffs' explanation of their proposed plaintiff class should

provide greater clarity. Thus, for this additional reason, Plaintiffs should be required to re-file their motion for class certification, and this issue should then be resolved, before this case is allowed to proceed further.

II. PLAINTIFFS CLAIM FOR AN ACCOUNTING SHOULD BE DISMISSED

As Federal Defendants explained in their motion to dismiss, 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. Plaintiffs' attempts, in their Response, to argue otherwise may be easily dismissed.

At bottom, Plaintiffs' claim for an accounting appears to rest upon a fictional foundation. Plaintiffs imagine that they have funds being held in trust by Federal Defendants. According to Plaintiffs, these trust funds are held by Federal Defendants in a "segregated fund." See Response at 2, 8, 16, 18. But there is no such fund. And without any trust corpus, there can be no trust and, consequently, no duty to account.[2/]

Plaintiffs appear to confuse the fact that funds are (for a time) held in trust for the Osage Nation with the fact that such funds are then (by statute) segregated out of that trust fund to be distributed to headright holders such as Plaintiffs. Cf. Response at 2 n.1, 3, 8 (discussing funds being "segregated" for distribution to headright holders); id. at 2, 8, 14 n.16, 15 n.17, 16 (more generally discussing the distribution of trust funds to headright holders). Indeed, it makes no difference here whether the trust funds, before their distribution, are also held in trust for headright holders (or some subset thereof). Cf. id. at 15 (citing Opinion and Order dated March 31, 2009 at

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[2/] The lack of any clear trust fund or trust relationship is a significant difference between this case and cases cited by Plaintiffs such as Cobell. Cf. Response at 7 n.8.

8 and Osage Nation v. United States, 57 Fed. Cl. 392 (2003)).[3] As Plaintiffs themselves admit, "[t]he claims in this case focus on headright distributions only." Id. at 15 n.17 (quoting Opinion and Order dated March 31, 2009 at 10).

It is this singular focus in this case "on headright distributions only" that is fatal to Plaintiffs' claim for an accounting here. Headright distributions are a statutory duty, not a trust duty. Indeed, the Supreme Court has recently cautioned against confusing other relationships with trust relationships. "There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them." United States v. Jicarilla Apache Nation, 564 U.S. __, 2011 WL 2297786 *8 n.4 (June 13, 2011) (citation omitted). Moreover, the mere act of distribution provides nothing to account for. Indeed, this instantaneous and somewhat metaphysical event may simply be thought of as the act that takes the funds out of trust. There is no longer any fund, or account holding such funds, but simply a payment that leaves nothing left to be held in trust for Plaintiffs.[4]

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[3] Plaintiffs references to this portion of the Court's prior opinion and the Court of Federal Claims opinion are generally unhelpful in this regard. That portion of the Opinion and Order dated March 31, 2009 simply summarizes the related case in the Court of Federal Claims between the Osage Nation and the United States. A review of that case makes clear that that court has never granted any headright holder (other than the Osage Nation itself) any ability to participate in that case, and is thus unhelpful to any claim by Plaintiffs here to any trust relationship.

[4] To be sure, a distribution may result in funds being held in trust in an Individual Indian Money (IIM) account but, even if so, that is the subject of an entirely different case (Cobell), and is not at issue in this case. A potentially more complicated scenario may exist where the distribution is not effected for some time (such as where a check is not cashed for some reason), and those specific funds are later returned to the trust fund and perhaps segregated in some manner for (continued...)

For this same reason, there is no room for 25 U.S.C. § 162a(d) to apply. For example, there is no fund for which to provide "fund balances" or determine "accurate cash balances." 25 U.S.C. § 162a(d) (1) and (4); Response at 17. Nor is there any basis to discuss "receipts and disbursements" or "periodic statements of . . . account performance." Id. at (2) and (5). This point appears to be confirmed by both this Court, Plaintiffs, and the Court of Federal Claims. See Opinion and Order dated March 31, 2009 at 10-11 ("The claims in this case focus on headright distributions only, not the Osage Nation tribal trust fund"); Response at 15 n. 17 (same); Third Amended Complaint at ¶ 30 (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"); 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). Indeed, this Court's statement that "the Court of Federal Claims found that the determination of what amount is owed to each headright owner takes place while the funds are in the tribal trust fund," Opinion and Order dated March 31, 2009 at 11, appears to leave no room for Plaintiffs to argue otherwise. This case simply involves payments, whose amounts (per headright) are not part of this case.

This statement by this Court also leaves no room for Plaintiffs to seek anything that might look like an accounting. Plaintiffs obviously know what amounts they have received as headright

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4/ (...continued)
subsequent claiming and associated payment. Because Plaintiffs have not made any claim of this type, Federal Defendants have not investigated this potential situation any further, as any such claim by Plaintiffs appears purely speculative at this time.

payments. They similarly know what number of headrights they own (and, outside of fractional rounding, the total number of headrights has not changed). Nor is the total amount to be distributed to all headright holders each quarter kept as any secret. Thus, there is no basis for Plaintiffs to claim that Federal Defendants are "sheltering [any] information that only they know -- and that only they have ever known -- from the scrutiny of this Court." Response at 14 n. 13. Nor is there any basis for Plaintiffs to claim that the headright payments they receive "would be a government check in an arbitrary amount." Id. at 12 and 12 n.12. Not only is the amount transparent from the above information, it is (as noted above) no part of this case. Opinion and Order dated March 31, 2009 at 10-11.

Accordingly, Plaintiffs' claim for an accounting should be dismissed.[5/]

III. ANY REMAINING CLAIMS SHOULD BE DISMISSED AS SPECULATIVE AND FOR LACK OF JURISDICTION

Although Plaintiffs claim that they "have made additional claims, other than for an accounting," Response at 11 n.10, Plaintiffs' Response discusses no other claims but their "claim for an accounting, as well as any equitable claim to make the Plaintiffs whole for any losses such an accounting reveals," id. at 10. As noted above, not only is there no proper claim for an accounting, but any possible accounting that does not include "the determination of what amount is owed to each headright owner," Opinion and Order dated March 31, 2009 at 11, would not reveal

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[5/] Indeed, even if this claim was not dismissed, Plaintiffs have no need to seek an answer for this claim. As Plaintiffs themselves effectively admit, any claim for an accounting would be an Administrative Procedure Act (APA) claim for agency action unlawfully withheld or unreasonably delayed. See Response at 7, 12. Plaintiffs' citation to the "Appropriations Acts," id. at 9-10 and 9 n.9, does not change this as, even if those Acts applied here (which they do not), Plaintiffs cite them only for their effect on the statute of limitations. As an APA claim, under the procedures in this Circuit set forth in Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994), and its progeny, this action should proceed as an appeal.

any damages of the type sought by Plaintiffs. That is because Plaintiffs purport to seek damages not for the amount paid per headright share, but they hope instead to "perhaps . . . be able to show that" they are also entitled to the headrights currently held by others. Opinion and Order dated March 31, 2011 at 9; Response at 11.

As this Court has already held, such a claim is "merely . . . a speculative claim," Opinion and Order dated March 31, 2011 at 11, and must accordingly be dismissed. Any claim that Federal Defendants have paid the wrong persons or entities, or that they have improperly approved the transfer of a headright, can be no less of "a speculative claim" than their claim against individual defendants for having received such payments or headrights. Because any other claims may be dismissed as speculative at this time, there is no need for Plaintiffs "to file a motion to bifurcate the case, placing the accounting in the first phase of the litigation." Response at 2 n.2. Just as with Plaintiffs' claims against the individual defendants, these speculative claims may simply be dismissed.

Moreover, as explained in more detail in the motion to dismiss, jurisdiction is lacking for any such claim. Any claim that Federal Defendants have paid the wrong persons or entities, or that they have improperly approved the transfer of a headright, is simply an APA claim for improper agency action. But, for the same reasons as this Court found such claims speculative, jurisdiction under the APA is lacking because Plaintiffs have not sufficiently identified the specific agency actions they challenge. See 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)"); Opinion and Order dated March 31, 2009 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").

Because Plaintiffs have repeatedly failed to sufficiently specify any challenged agency actions or inactions, even after repeated requirements, see Opinion and Order dated March 31, 2009 (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).

CONCLUSION

For the foregoing reasons, as well as those set forth in the opening motion to dismiss, this Court should dismiss this action.[6/]

RESPECTFULLY SUBMITTED this 21st day of June, 2011.

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[6/] To the extent that this Court finds oral argument helpful, the undersigned notes that he will be out of the office from June 28 to July 12, and respectfully requests that any argument be scheduled for sometime after July 19.

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CERTIFICATE OF SERVICE

I hereby certify on the 21st day of June, 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.

s/ Joseph H. Kim