IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CASE NO. 12-5078

WILLIAM FLETCHER, ET AL.,

PLAINTIFFS-APPELLANTS,

V.

UNITED STATES, ET AL.,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA (CASE NO. 02-CV-427-GKF-PJC)
HONORABLE GREGORY K. FRIZZELL

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JURISDICTION

On May 6, 2010, Appellants, William Fletcher and Charles Pratt, (herein "Appellants" or "Plaintiffs") filed their Third Amended Complaint (herein the "Complaint") in this action. The Complaint stated claims against the United States of America, the Department of the Interior, the Secretary of the Interior, the Bureau of Indian Affairs and the Assistant Secretary of the Interior for Indian Affairs (herein "Appellees," "Defendants" or the "United States")[1] for (1) breach of trust responsibilities in accounting for the distribution of royalties from the Osage Mineral Estate; (2) takings claims for deprivation of property as a result of both the United States' mismanagement of distributions of funds from the Osage Mineral Estate and United States' refusal to account for those funds; and (3) administrative action not in accordance with law, violating the Plaintiffs' rights. Aplt. App. at 452-456. The District Court's jurisdiction in this case arises from 5 U.S.C. § 702 and the "Appropriations Acts."[2]

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[1] The Complaint also asserted claims against approximately 1,700 individuals whom the District Court held were required parties. Aplt. App. at 427. Before the District Court's judgment and opinion and order at issue on this appeal, the District Court first ordered the Plaintiffs to sue each of the 1,700 individuals holding they were necessary parties, and then later the District Court dismissed each of the individual defendants, finding that they were no longer necessary parties to the action. Aplt. App. at 587-596, 686.

[2] 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.

On March 31, 2012, the District Court—pursuant to the United States' third motion to dismiss—dismissed Plaintiffs' Complaint and entered judgment for the United States.[3] Over the history of this case in the last decade, the United States' filed three motions to dismiss. This District Court granted the first one. That decision was overturned on appeal. *See Fletcher v. United States*, 160 Fed. Appx.

Shoshone Indian Tribe of Wind River Reservation v. United States, 364 F.3d 1339 (Fed. Cir. 2004). The most recent appropriations act provides:

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

[3] The District Court entered a March 31, 2012 Opinion and Order dismissing Appellants' claims. On April 10, 2012, the District Court entered an Amended Opinion and Order correcting a citation in the March 31, 2012 Opinion and Order.

792 (10th Cir. 2005). The District Court denied the second motion. Aplt. App. at 319. The order granting the third motion, which is at issue here, found that: (1) Plaintiffs failed to sufficiently specify any challenged agency action or inactions regarding their claim that the United States had improperly distributed royalty payments, and (2) despite the United States' trust responsibility to Plaintiffs, the United States did not have an obligation to account for the funds paid to headright recipients each quarter of every year. Aplt. App. at 1266-1273. On April 27, 2012, Plaintiffs timely filed their Notice of Appeal initiating this appeal of the District Court's final judgment. *See* R. App. P. 4(a)(1). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Federal Law, including *inter alia*, 25 U.S.C. §§ 162a, 4011, 4044 or the "appropriation acts", impose upon the United States a fiduciary duty to account to Indian recipients of trust funds held and paid out by the United States.

2. Whether the United States' refusal to account for the Plaintiffs' trust funds is agency action or inaction sufficient to base the Plaintiffs' claims.

3. Whether the District Court improperly considered factual issues in reaching its decision to dismiss Plaintiffs' accounting claim under Rule 12(b)(6).

4. Whether Plaintiffs properly plead a claim for improper headright distributions.

STATEMENT OF THE CASE

I. Nature of the Case.

Plaintiffs are Osage Indians. The United States each quarter holds trust funds for the Plaintiffs and thousands of other Indians. The United States pays these trust funds out, and the payments are called, for the purposes of this suit, "Section 4 Royalty Payments."[4] Section 4 Royalty Payments are segregated by law from the monies collected by the United States for the development of the Osage Mineral Estate. Aplt. App. at 435-436.

Federal statutes require the trust funds that are being paid to the Plaintiffs and other similarly situated Indians to be segregated prior to payment. *See* 1906 Act at § 4.[5] Accordingly, the District Court's assumption that there were no

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[4] "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.

[5] The Act provides in relevant part on the issue of the segregation of the funds,

> "all the funds … shall be segregated … and placed to the credit of the individual members of the said Osage tribe on a basis of a *pro rata* division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto … .".

Act of June 28, 1906, ch. 3572, 34 Stat 539 § 4.

"accounts" is a *non-sequitur* because the United States was obligated to segregate the Plaintiffs trust funds prior to their distribution. *See, e.g.*, 25 U.S.C. § 162a, 4011, 4044 and the "Appropriation Acts;" *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001) ("*Cobell VI*"); Act of June 28, 1906, ch. 3572, 34 Stat 539 § 4. If the United States failed to segregate the fund, such failure would likely be a breach of the United States' trust responsibility to Plaintiffs.

In the common parlance, the right to receive Section 4 Royalty Payments has come to be known as "headrights." The Plaintiffs claim that the United States breached its statutory trust responsibilities by refusing to account for the distribution of the trust funds, and upon information and belief, by failing to ensure that Section 4 Royalty Payments from the trust fund are made only to those individuals who may legally receive such payments. Aplt. App. at 452-456. The Plaintiffs assert that the United States' breach of its trust responsibilities diluted the Plaintiffs' reciept of trust funds. Because the Plaintiffs share in a common trust fund, the United States' failures and refusals to abide by its duty to account to the Plaintiffs, and the United States' breaches of trust, have equal impacts on each of the other recipients from the fund. Accordingly, the claim has been styled as a class action.

When it denied the United States' second motion to dismiss, on March 31, 2009, the District Court held that all non-Osage headright holders were necessary

parties and directed Plaintiffs to file an amended complaint joining such non-Osages. Aplt. App. at 312-318. As they were directed, the Plaintiffs attempted service on these approximately 1,700 non-Osage headright holders, which consisted of individuals, corporations, and private trusts.

On March 31, 2011, pursuant to a motion by one of these non-Osage headright holders, the District Court reversed course, and held that the non-Osage headright holders were no longer necessary parties. Aplt. App. at 595-596. Shortly thereafter, the District Court ordered the United States to answer or otherwise respond to Plaintiffs' Complaint. Aplt. App. at 598. The United States responded by filing the motion to dismiss that is the subject of this appeal.

II. The United States' Motion to Dismiss.

The United States moved the District Court to dismiss Plaintiffs' Complaint asserting that: (a) Plaintiffs failed to sufficiently identify final agency action regarding their claim that the United States has improperly distributed headright payments to non-Osage headright holders, (b) the United States does not owe Plaintiffs any trust responsibilities *because* headright holders are not trust fund beneficiaries, (c) even if Plaintiffs are trust fund beneficiaries, they would not be entitled to the accounting requested, and (d) even if Plaintiffs have a valid claim

for an accounting, the Osage Nation would be an necessary and indispensible party.[6]

III. Pending motions at the time of Judgment.

After the United States' Motion to Dismiss was fully briefed, the parties filed three motions before the Court's decision that is the subject of this appeal. *First*, Plaintiffs—pursuant to the District Court's suggestion—filed a motion to bifurcate. Aplt. App. at 751-759. Plaintiffs' motion to bifurcate sought to separate the case into two phases: an accounting phase focused on whether Plaintiffs were entitled to an accounting, and a restoration phase focused on Plaintiffs' claims of improper distributions based upon the accounting. *Second*, Plaintiffs refiled their Motion for Class Certification. Aplt. App. at 760-781. *Finally*, the United States filed a Motion for Protective Order regarding discovery requests issued by Plaintiffs. Aplt. App. at 1150-1155. Plaintiffs sought documentation regarding the United States' claim from their Motion to Dismiss that the United States had already provided an accounting to Plaintiffs. Aplt. App. at 609.

[6] The District Court did not address the Osage Nation's status in its order. The District Court *previously* held that the Osage Nation was not an indispensable party (Aplt. App. at 317-318), the United States did not appeal that prior order, and its second motion to dismiss appeared to be an improper attempt to relitigate the issue.

IV. The District Court's Opinion and Order Dismissing Plaintiffs' Complaint.

On March 31, 2012, the District Court dismissed Plaintiffs' Complaint pursuant to Rule 12(b)(6) for failure to state a claim. The District Court held that Plaintiffs failed to plead any specific facts supporting their allegations of improper headright distribution. In the alternative, the District Court held that Plaintiffs failed to identify any final agency action, or inaction, in relation to their claim of improper headright distribution. Finally, the Court dismissed Plaintiffs' claims for an accounting; holding that despite the existence of a trust relationship between the United States and Plainitffs, the United States had no duty to provide an accounting to the Plaintiffs.

STATEMENT OF FACTS

In 1906, the United States Congress created a trust fund in section 4 of the Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory and for Other Purposes, 34 Stat. 539 (June 25, 1906) (herein the "1906 Act"). Under this trust fund, the royalties received by the United States from the production of minerals by third parties on the Osage Mineral Estate—after deducting and withholding some portion for Osage Tribal purposes—were to be segregated and distributed to Osage Indians and their heirs. *See* 1906 Act at § 4; *see also Osage Nation v. United States*, 57 Fed. Cl. 392, 395 (Fed. Cl. 2003).

These Section 4 Royalty Payments fulfill an important governmental purpose, providing a substantial benefit to the Osage Indians. By requiring the segregation and distribution of Section 4 Royalty Payments to Osage Indians, Congress ostensibly fulfilled part of its general trust responsibility to the members of the Osage Tribe. Under this trust fund, Osage Indians receive long-term economic sustenance based on the consumption of mineral resources within the reservation, thereby filling the void created when the Tribe was compelled to allot its lands to its members under the 1906 Act.

The United States is obligated by federal law to account to the Plaintiffs for management and disbursement of trust funds held for individual Indians. *See, e.g.*, 25 U.S.C. § 162a, 4011, 4044 and the "Appropriation Acts;" *Cobell VI*, 240 F.3d at 1098. "[T]he government has longstanding and substantial trust obligations to Indians . . . not the least of which is a duty to account." *Cobell VI*, 240 F.3d at 1098.

To counsel's knowledge, no accounting has ever been provided to any Indian, anywhere, ever, by the United States despite the government's longstanding obligation to do so. *See, e.g.*, MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. Rep. No. 102-499 at 5 (1992). Counsel is certain that the United States never accounted to Plaintiffs or the putative Class Members, even though the United States alleged in

its briefing to the District Court that it did account. Aplt. App. at 609. As a result of the United States' refusal to account, there is no evidence that Defendants paid the proper amounts, that interest was collected and paid on the segregated funds, that the funds were properly invested while held by the Defendants, or that the funds were ultimately paid to the right persons. The United States bears this burden as a matter of federal law. *See, e.g.*, 25 U.S.C. § 162a, 4011, 4044 and the "Appropriation Acts; *Otoe-Missouria Tribe of Oklahoma v. Kempthorne*, 2008 U.S. Dist. LEXIS 99548 (W.D. Okla. Dec. 10, 2008); *Shoshone*, 364 F.3d 1339. Plaintiffs believe that an accounting will show that the United States' actions are deficient – if not derelict – with respect to each of these trust duties. Relevant to this action at this time, the United States still has not met its threshold duty to account for the Plaintiffs' trust funds.

SUMMARY OF ARGUMENT

Plaintiffs are beneficiaries of a specific fund, held in trust and managed by the United States pursuant statutory acts. *See* 1906 Act at § 4. The United States "is obligated to act as a fiduciary . . . [its] actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), adopted as majority opinion as modified

en banc, 782 F.2d 855 (10th Cir. 1986) ("*Supron*"). Congress has imposed upon the United States the specific duty to account for all *trust funds* held for the benefit of Indians, such as Plaintiffs.

In its order dismissing this case, the District Court erred for two reasons: *First*, the District Court improperly dismissed Plaintiffs' request for an accounting. The District Court's decision is diametrically opposed to rulings made in similar situations by numerous other courts, including the the District of Columbia Circuit Court, the District Court for the District of Columbia, the Court of Federal Claims, the Western District of Oklahoma, and the Eastern District of Oklahoma. It is well understood law that "the government has longstanding and substantial trust obligations to Indians . . . ***not the least of which is a duty to account***." *See Cobell VI*, 240 F.3d at 1098 (emphasis added). The District Court based its decision on an misreading of federal statutes, and it ignores the decisions of these other courts, creating disharmony between the courts on a matter of federal law. In addition, the District Court improperly considered—and made factual findings—on facts outside Plaintiffs' Complaint.

Second, the District Court erred in dismissing—or striking—Plaintiffs' claims of improper trust distributions. While the District Court based its decision on two alternative grounds, its decision was made for a single reason. The District Court held that Plaintiffs' allegations were not sufficiently specific in relation to

any one trust fund distribution. The District Court held that Plaintiffs' allegations that trust fund distributions were done improperly by the Defendants was "speculative" and not sufficient for the identification of "final agency action."

As demonstrated herein, and within the record below, Plaintiffs' claim of improper trust fund distributions is plausible and was as specific as possible without the United States complying with its statutory duty to account. In fact, until Plaintiffs receive the accounting they are owed, their claims for improper trust fund distributions have, as a legal matter, not yet accrued. *See Shoshone*, 364 F.3d at 1347 (Fed. Cir. 2004) (holding that the Appropriations Acts provide "that claims falling within [their] ambit shall not accrue, i.e., 'shall not commence to run,' until the claimant is provided with a meaningful accounting." … "This is simple logic--how can a beneficiary be aware of any claims unless and until an accounting has been rendered?"); *see also Otoe-Missouria*, 2008 U.S. Dist. LEXIS 99548; 25 U.S.C. 4044(2) (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***") (emphasis added). Ultimately, the Plaintiffs alleged the facts about which they *have* information, notwithstanding that on a class wide basis there are likely many more specific factual situations where the United States failed to properly distribute the trust funds in question.

ARGUMENT

I. Standard of Review for Rule 12(b)(6) Motion to Dismiss.

The Tenth Circuit reviews a District Court's decision to grant a Rule 12(b)(6) motion to dismiss *de novo*. *Alverado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). The Circuit must "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Id*. at 1215 (citing *David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996). The focus for the Circuit is whether the Plaintiffs' allegations "plausibly support a legal claim for relief." *Alverado*, 493 F.3d at 1215, n. 2 (citing *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007)).

II. The District Court erred in holding that no legal basis exists to require the United States to account for the distribution of trust funds to Plaintiffs.

A. Rules of Construction for Federal Law.

The Tenth Circuit reviews a District Court's construction of federal law *de novo*. *United States v. Hunt*, 673 F.3d 1289, 1291 (10th Cir. 2012). When interpreting a statute, the Circuit's primary purpose "is to ascertain the congressional intent and give effect to the legislative will." *Ribas v. Mukasey*, 545 F.3d 922, 929 (10th Cir. 2003). Congressional intent is to be ascertained from "the purpose and intent of a statute." *Matthiesen v. BancOne Mortg. Corp.*, 172 F.3d 1242, 1245 (10th Cir. 1999). "In ascertaining the plain meaning of [a] statute, [the

Circuit] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Chickasaw Nation v. United States*, 208 F.3d 871, 878 (10th Cir. 2000) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811 (1988)).

Furthermore, 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 law relating to 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)).

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*").

B. The subject-matter of this lawsuit is a trust fund managed by the United States pursuant to statutory requirements.

Section 4 of the 1906 Act established that, "***all funds*** belonging to the Osage tribe, and all moneys due, and all money that may become due, or may hereafter be found to be due . . . shall be held ***in trust*** by the United States." *See* 1906 Act, 34 Stat. 539, § 4(1) (June 25, 1906) (emphasis added). Congress provided a list of duties for the United States that makes up the terms of the trust. *Id*. The first duty set out in Section 4 is ***segregation*** and the second duty is the ***distribution*** to Plaintiffs, and other rightful headright holders. *Id*. at §§ 4(1)-(2).

Specifically, Congress requires that

> "all the funds … shall be segregated … and placed to the credit of the individual members of the said Osage tribe on a basis of a *pro rata* division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto … .".

Act of June 28, 1906, ch. 3572, 34 Stat 539 § 4

In this litigation, the United States' counsel has admitted these trust duties exist:

> THE COURT: But clearly isn't there a trust duty, I mean with regard to distributions?
>
> MR. KIM: I mean, there's a duty, obviously. The United States is clearly under a duty. It can't keep the money, that would be a taking.

THE COURT: But you have to properly distribute it to the proper individuals; correct?

MR. KIM: That is correct. . . .

Aplt. App. at 348.

Over time, Congress imposed various trust duties on the United States in relation to the distribution of the Section 4 Royalty Payments. *See* generally, Aplt. App. at 437-445. While all of these duties are important, right creating, and require the United States to account for them, a few bear specific mention:

1. Under the Act of April 18, 1912:

> §6: That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, **including trust funds**, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: Provided, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior.

37 Stat. 86 (emphasis added).

2. Under the Act of March 3, 1921:

> §4: That from and after the passage of this Act **the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust**

> **funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter** and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly out of the income of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the Superintendent of the Osage Agency, and to invest the remainder after paying all the taxes of such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe: Provided, That at the beginning of each fiscal year there shall first be reserved and set aside out of the Osage tribal funds available for that purpose a sufficient amount of money for the expenditures authorized by Congress out of the Osage funds for that fiscal year: Provided further, That all just existing individual obligation of adults not having certificates of competency outstanding upon the passage of this Act when approved by the Superintendent of the Osage Agency, shall be paid out of the money of such individual as the same may be place to his credit in addition to the quarterly allowance provided for herein.

41 Stat. 1249 (emphasis added).

3. Under the Act of March 2, 1929:

> §1: * * * The lands, money, 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.

45 Stat. 1478 (emphasis added).

C. The District Court erred by failing to enforce the United States' Fiduciary Obligations, including specifically the United States' duty to account to the Plaintiffs for the trust funds.

"The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship." *See Cobell VI*, 240 F.3d at 1086. Generally, Indian trusts are "defined and governed by statutes" and "particular statutes and regulations clearly establish fiduciary obligations." *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2323, 2325 (2011) (hereinafter "*Jicarilla Apache")* (internal quotation omitted) (citing *United States v. Mitchell*, 463 U.S. 206, 226, 103 S.Ct. 2961 (1983) (*Mitchell II*)). The "applicable statutes and regulations . . . define the contours of the United States' fiduciary responsibilities."

Jicarilla Apache, 131 S.Ct. at 2324.[7] Furthermore, the actual fiduciary duties established by statute, and owed to Indian beneficiaries, may be interpreted through the common law where necessary. *Id*. at 2325; *White Mountain Apache*, 537 U.S. 465, 475-76 (2003) (inferring a common law fiduciary duty to preserve trust corpus from delegation of control over resources to U.S.); *Mitchell II*, 462 U.S. at 224, 103 S.Ct. 2691; *Cobell v. Norton*, 392 F.3d 461, 472 (D.C. Cir. 2004) ("*Cobell XIII*") ("[O]nce a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation."); *see also Cobell VI*, 240 F.3d at 1099.[8]

The United States Congress—after over a century of the United States' "inept management" of Indian trusts—issued a report in 1992 that catalogued the United States' "dismal history of inaction and incompetence." *Cobell XIII*, 392 F.3d at 463-464 (quoting MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. Rep. No. 102-499 at 5 (1992) ("MISPLACED TRUST")) (internal quotation omitted). Specifically, Congress found that the United States "repeatedly failed to take resolute corrective action to reform

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[7] This Court has recognized that, where the United States "is obligated to act as a fiduciary . . . [its] actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Supron*, 728 F.2d at 1563.

[8] In *Cobell XIII*, the D.C. Circuit observed "that interpretation of statutory terms is informed by common law trust principals." *Id*. at 473.

its longstanding financial management problems." *Cobell XIII*, 392 F.3d at 464 (quoting MISPLACED TRUST at 3)(internal quotation omitted).

In 1994, responding to these findings, 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) (herein the "1994 Act"). The purpose of the 1994 act was "to provided for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes ***and individual Indians***. . . ." 25 U.S.C. § 4041(1) (emphasis added).

According to the Western District of Oklahoma, 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 U.S. Dist. LEXIS 99548 at *6. The D.C. Circuit described the 1994 Act, not as an act creating new rights of Indian beneficiaries to an accounting,[9] but as a "remedial statute to address [the]

[9] The D.C. Circuit held that the United States has a pre-existing duty, established prior to the 1994 Act, to account to Indians and Indian tribes for the funds and assets the United States holds in trust:

> [T]he 1994 Act does not *create* 'trust responsibilities of the United States.' Rather it lists some of the means through which the Secretary shall discharge these preexisting duties. For instance, the first listed duty is 'providing adequate systems for accounting for and reporting trust fund balances.' 25 U.S.C. § 162a(d)(1). This would not be

unconscionable delay" by the United States, as trustee, in providing the accounting it "*already*" owed to Indian beneficiaries. *See Cobell VI*, 240 F.3d at 1096 & 1101

The accounting the United States is required to provide must be "meaningful." The phrase "meaningful accounting" is a term of art. It means something more than "simple notice." *See Chippewa Cree Tribe, et al. v. U.S.*, 69 Fed. Cl. 639, 664 (Fed. Cl. 2006); *see also 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, "meaningful accounting" means "information sufficient to alert the beneficiar[ies] to possible losses." *Chippewa Cree*, 69 Fed. Cl. At 664.

In addition to various amendments to the 1906 Act for the Osages and the United States duty to account under the 1994 Act, Congress has enumerated various items that the United States must provide as a part of the accounting. For

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> necessary to discharge the government's trust responsibilities were not the government *already* obliged to account for and report trust fund balances.

Cobell VI, 240 F.3d at 1101 (emphasis in original).

instance, 25 U.S.C. § 4011(a) requires the Secretary of the Interior to "account for the daily and annual balance of ***all funds held in trust*** by the United States for the benefit of an Indian tribe ***or an individual Indian*** which are deposited or invested pursuant to section 162a of this title." (emphasis added). In addition, under 25 U.S.C. § 4011(b) the Secretary is also required to provide a statement of performance identifying "(1) the ***source, type, and status of the funds***; (2) the beginning balance; (3) the gains and losses; (4) ***receipts and disbursements***; [and] (5) the ending balance." (emphasis added).

To the extent the District Court's opinion relies on a counter-factual assumption that Plaintiffs' funds are not in an "account" and therefore the United States has no duty to Plaintiffs, the District Court misreads the United States' legal duty to account. As set forth above, the United States duty to account relates to the trust funds held by the United States. Any other result would illogically allow the United States to avoid its duty to account by simply never depositing the funds it receives into an "account." Given that the United States has duties to obtain a return on investment on Indian money, such an assumption was not well founded. *See* 25 U.S.C. § 162a. In any event, such a judicially created exception would violate the purpose of the trust accounting statutes, permitting the United States to

never deposit cash received for Indians, and thereby assert that no accounting is due.[10]

D. The District Court erred by holding that the Plaintiffs are not entitled to an accounting.

The parties agree[11]—and the Court rightly found—that a trust relationship exists between the United States and Plaintiffs as a result of the 1906 Act. Aplt. App. at 1268-1271. The District Court erred by separating the United States' duty to account from its trust duty. The Plaintiffs' right to an accounting "inheres in the trust relationship itself." *Cobell VI*, at 240 F.3d at 1103 (relying on *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446, 448 (1992) (citing G.T. BOGERT, TRUSTS § 141, at 494 (6th ed. 1987))); *see also* Restatement (3d) Trusts, § 83(b) ("The right of any beneficiary to request information . . .

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[10] The notion that the United States has managed the Section 4 Royalty Payments on a cash basis, as seems to be implied by the District Court's order, is not factually based, and seems unlikely, at best.

[11] *See* Aplt. App. at 519:

> MR. KIM: After it's distributed or at the point of distribution, if you are an Indian or have an individual Indian money account, then there's a trust duty to you.

See also Aplt. App. at 570:

> MR. KIM: It's not our money, it's money we hold in trust for someone else and then we distribute.

includes a right to request and receive accounting or comparable reports" and allowing courts to compel such accountings).[12]

Once it is clear a trust exists, "[t]he district court sitting in equity ***must do everything it can to ensure that [the United States] provides [the Indians] an equitable accounting***," even if such an accounting seems impossible. *Cobell XXII*, 573 F.3d at 813. An accounting is necessary because, "without an accounting, it is impossible to know who is owed what. The best any beneficiary could hope for would be a government check in an arbitrary amount." *Id*. at 813. Therefore, the accounting provided must contain "information sufficient to alert the beneficiar[ies] to possible losses." *Chippewa Cree*, 69 Fed. Cl. at 664.

Here, Plaintiffs receive "a government check in an arbitrary amount" each quarter of ever year. They requested an accounting that will allow them to determine whether they have suffered possible losses. *See Cobell XX*, 532 F.Supp.2d at 90; Restatement (3d) of Trusts § 173. Specifically, Plaintiffs seek an accounting relating to whether the United States has properly distributed headright payments only to those who may rightfully hold a headright, whether interest was collected and distributed, and whether the correct amounts were distributed to the

[12] The comments to section 83 make it clear that any "trust provision that states that the trustee does not have to account will not be enforced . . . as against public policy." *Id*. at comment b (quoting Charles E. Rounds, Jr., *Loring: A Trustee's Handbook* § 6.1.5.2 (8th ed. 2006)).

correct recipients. *See* 25 U.S.C. 162a(d)(2) (requiring the United States provide "adequate controls over receipts and disbursements.");[13] Aplt. App. at 452-456.

This may well require the United States to reconcile whether the United States' distribution of trust funds today is proper taking into account past actions by the United States. *See Cobell VI*, 240 F.3d at 1102.[14] Plaintiffs confirmed this approach to the District Court:

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[13] The United States mistakenly interpreted this claim—and convinced the District Court of this improper interpretation—to be a claim that *no* non-Osage may rightfully hold headrights. However, as Plaintiffs' counsel noted, this is not Plaintiffs' claim:

> MR. AAMODT: . . . the question that we lay out, Judge, of whether or not persons are entitled to receive these monies is not just a simple question of whether or not any non-Osage can obtain. We concede, in fact we plead in our pleadings that many non-Osages are entitled to receive these funds and, in fact, we think that they are a part of our class. The problem that we have in this case is we don't know which ones they are and there's no way to determine that until an accounting is provided. . . .

Aplt. App. at 483.

[14] The D.C. Circuit noted:

> Appellants never explain how one can give a fair and accurate accounting of all accounts without first reconciling the accounts, taking into account ***past*** deposits, withdrawals, and accruals. Indeed the government's own expert acknowledged that one could not determine an accurate account balance without confirming historical account balances.

> THE COURT: . . . it begs the question are you going to ask that the United States account for each and every of its approvals of distributions to non-Osage for the last 104 years?
>
> MR. AAMODT: Your Honor, the law requires that.

Aplt. App. at 481.[15]

"[T]he management of a trust and rendering of an adequate accounting requires the locating and retention of records, operational computer systems, and adequate staffing. . . . Anything less would produce an inadequate accounting." *Cobell VI*, 240 F.3d at 1103. Finally, the "accounting necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception." *Id*. at 1103 (relying on *Engelsmann v. Holekamp*, 402 S.W.2d 382,391 (Mo. 1966) and BLACK'S LAW DICTIONARY (7th ed. 1999)

Id. at 1102 (emphasis added).

[15] *See also* App at 495:

> MR. AAMODT: Each quarter the government takes out a dollop of [the royalties generated] and it distributes it to . . . those people who [the United States] decides are entitled to receive Section 4 royalty payments. The government has never accounted for how it does that.

In addition, the United States has never accounted for how it manages unclaimed funds; i.e., whether such funds escheat or are redistributed to other headright holders. Aplt. App. at 487.

(defining accounting as "the report of all items of property, income, and expenses" prepared by the trustee for the beneficiary)).

The United States sees the Plaintiffs' accounting request as "something akin to a title search" of headrights. Aplt. App. at 609. It may very well be that the requested accounting will have to take such a format *because* of the way the United States managed the fund over time. However, that is not a decision for the District Court—or even this Court. The "choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate . . . are properly left in the hands of administrative agencies." *Cobell VI*, 240 F.3d at 1104. The District Court's consideration should be whether a trust duty is owed to the Plaintiffs, and if so the District Court must assure that the United States provide "the best accounting it can." *Cobell XXII*, 573 F.3d at 813.

E. The District Court's erroneous rejection of the United States' duty to account[16] stands in opposition to all other authority.

The common principal developed throughout case law in all the other courts to address this issue is that the "obligation of a trustee to provide an accounting is a

[16] It could be argued that the District Court did not hold that Plaintiffs cannot receive an accounting from the United States. In that view, the District Court's opinion makes a factual finding—without any evidence provided by either of the parties, or without any of the issues briefed—that the accounting Plaintiffs' request is outside the scope of the accounting Plaintiffs are owed. If that is assumed, however, the District Court improperly dismissed all of the Plaintiffs' claims.

fundamental principle governing the subject of trust administration." *White Mountain Apache*, 26 Cl. Ct. at 448 (citing G.T. BOGERT, TRUSTS § 141, at 494 (6th ed. 1987)); *Cobell VI*, 240 F.3d at 1103 (explaining that such an obligation to account is inherent in the trust relationship itself); *Otoe-Missouria*, 2008 U.S. Dist. LEXIS 99548, at *13; *Seminole Nation v. Salazar*, 2009 U.S. Dist. LEXIS 27836, at *3 (E.D. Okla. Mar. 31, 2009). The District Court's opinion turns these principals on their head by refusing to find a duty for the United States to account to Plaintiffs, despite the District Court's finding of a trust relationship. Aplt. App. at 1271-1273.

i. The District Court Misreads Section 162a.

The District Court's erroneous holding rejected accounting responsibilities, based upon its interpretation of 25 U.S.C. § 162a. The District Court said "Section 162a(a) applies 'to the funds of the Osage Tribe of Indians, and the individual members thereof, *only with respect to the deposit of such funds in banks*.'" Aplt. App. at 1271 (emphasis added). However, section 162a is not the entire universe of the United States accounting duties, and section 162a is not as limited as the District Court would imply. Simply put, the deposit of funds pursuant to section 162a, identifies the trust and affirms certain trust responsibilities applicable to that trust in the most general sense. 25 U.S.C. § 162a. In addition to section 162a, the United States is required to account for the trust funds in its possession under 25

U.S.C. §§ 4011 and 4044, *and* the Appropriation Acts, as set out above. Moreover, specifically in this case, "all funds" received for segregation and distribution to Plaintiffs "shall be held in trust by the United States." *See* 1906 Act § 4.

Contrary to the many other Court's clear reading of these statutes, the District Court assumed that, since Section 162a(a) applied to the duties of the Secretary of the Interior must follow in depositing Indian funds in banking institutions, Appellants could not rely upon any other subsection of Section 162a—nor any statute referencing Section 162a—as a basis for an accounting relating to the disbursement of Indian funds. Aplt. App. at 1271-1272. For instance, the District Court also rejected Section 4011 because it "imposes a requirement to account only for funds 'deposited or invested pursuant to section 162a.'" Aplt. App. at 1271-1272.

The District Court has erroneously concluded that to challenge the distribution of Indian trust funds, a plaintiff must also challenge their deposit. Such an interpretation finds no basis in law. Section 162a's "deposit" requirement only identifies the trust; if the funds are deposited—as they were here—an Indian beneficiary is owed an accounting of *at least* those specific items listed in 25 U.S.C. §§ 162a and 4011, regardless of whether the beneficiary is concerned with how the trust funds were deposited. As set out above, every individual Indian who received trust funds held by the United States is entitled to a meaningful

accounting for those trust funds as confirmed by Congress on approximately twenty different occasions by repeatedly passing the Appropriation Act language. *See* Appropriations Acts, *supra* footnote 2; *see also Chippewa Cree*, 69 Fed. Cl. 639 (Fed. Cl. 2006).

Finally, such a limitation on the United States' accounting duties would create an illogical loophole where the United States could avoid the duty to account by never depositing the trust funds in an "account." Such a scenario, where the United States handles Indian trust funds on only a cash basis, probably has not occurred since the passage of the Non-Intercourse Act. 25 U.S.C. § 177; *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 204 (U.S. 2005);[17] William E. Dwyer, Jr., *Land Claims Under the Indian Nonintercourse Act: 25 U.S.C. § 177*,

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[17] The Supreme Court stated:

> The Federal Government initially pursued a policy protective of the New York Indians, undertaking to secure the Tribes' rights to reserved lands. *See Oneida II*, 470 U.S., at 231-232; *Oneida I*, 414 U.S., at 667, 39 L. Ed. 2d 73, 94 S. Ct. 772; F. Cohen, *Handbook of Federal Indian Law* 418-419 (1942 ed.); F. Cohen, *Handbook of Federal Indian Law* 73-74 (1982 ed.) (hereinafter Handbook). In 1790, Congress passed the first Indian Trade and Intercourse Act , commonly known as the Nonintercourse Act. Act of July 22, 1790, ch. 33, 1 Stat. 137. Periodically renewed, *see Oneida I*, 414 U.S., at 667-668, 39 L. Ed. 2d 73, 94 S. Ct. 772, and remaining substantially in force today, see Rev Stat § 2116, HN125 U.S.C. § 177 [25 USCS § 177], the Act bars sales of tribal land without the acquiescence of the Federal Government."

Sherrill, 544 U.S. at 204.

7 B.C. Envtl. Aff. L. Rev. 259 (1978) (describing claims made under the Indian Nonintercourse Act).

ii. The District Court erred in its analysis of the accounting duty because it is immaterial whether the segregated fund of the Osage Mineral Estate is separated into individual "accounts" for individual headrights.

The District Court also held that an accounting is not required because "there is no underlying trust account with a balance for headright owners to examine." Aplt. App. at 1272. This is immaterial as to whether Plaintiffs are entitled to an accounting. In fact, the District Court's assumed fact scenario is similar to the manner the "accounts" in the *Cobell* litigation were organized. In *Cobell*, the D.C. Circuit recognized that "[t]he Treasury Department maintains only a single 'IIM account' for all IIM funds, rather than individuated accounts for each individual IIM beneficiary." *Cobell VI*, 240 F.3d at 1089.[18] However, the D.C. Circuit affirmed the right of individuals entitled to the trust funds to demand an accounting from the United States. *Id*. at 1110.

Setting aside the issue that the District Court improperly issued a finding of fact at the Motion to Dismiss stage,[19] even if the United States chooses to distribute

[18] In fact, the United States in *Cobell VI* conceded that it did "not know the precise number of IIM trust accounts that it is to administer and protect." *Id*.

[19] "In deciding a Rule 12(b)(6) motion, a federal court may ***only*** consider facts alleged within the complaint." *County of Santa Fe v. Public Serv. Co.*, 311 F.3d 1031, 1035 (10th Cir. 2002) (emphasis added).

payments from the trust without the creation of individuated accounts, the fact remains that the funds are still held in trust and are still distributed by the United States after they are by law to be "segregated" from the Osage Mineral Estate. It is agreed by all the parties that the United States distributes these trust funds each quarter. It is difficult to imagine how the United States can distribute the trust funds without passing them through an account. Regardless, an accounting does not relate to "accounts" but the management of *trust funds*:

> [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 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).

The trust funds--segregated for the purposes of distribution—are held in trust pursuant to the statute. *See* 1906 Act, § 4. As such, the fact remains that as trustee of the trust funds segregated from the Osage Mineral Estate, the United States has an affirmative duty to meaningfully account to the Plaintiffs, the beneficiaries of the segregated fund. The United States has never provided such an accounting to the Plaintiffs. Aplt. App. at 455.

Accordingly, the Plaintiffs have established that the United States holds "trust funds" for them, and that the United States has failed to account for these

funds in compliance with the requirements of federal law. The District Court's analysis requires the assumption of facts that are contrary to the Plaintiffs' well founded allegations. Moreover, the District Court's assumptions themselves are not grounded on any evidence. Accordingly, the District Court's dismissal of the Plaintiffs' claims under Rule 12 (b)(6) should be reversed, and the Plaintiffs ask that this Court order the defendants to provide the requested accounting.

III. Plaintiffs state a proper cause of action for trust mismanagement, including improper headright distributions.

Plaintiffs alleged that the United States breached its "trust responsibilities and acted in violation of federal law by improperly distributing Section 4 Royalty Payments to persons who are not Osage Indians (or their lawful heirs)." Aplt. App. at 451-452. The District Court held that this allegation was speculative and dismissed the claim for failure to state a claim under Rule 12(b)(6). Aplt. App. at 1267. In the alternative, the Court held that this allegation did not sufficiently identify final agency action, or inaction to invoke the jurisdiction of the Administrative Procedure Act's (herein the "APA") judicial review provisions.[20] Aplt. App. at 1267-1268.

[20] The District Court did not address whether the United States' denial of Plaintiffs' request for an accounting constituted final agency action. However, case law clearly establishes that such a denial is finial agency action reviewable under the APA. *See e.g. Otoe-Missouria*, 2008 U.S. Dist. LEXIS 99548; *Seminole Nation*, 2009 U.S. Dist. LEXIS 27836.

In regard to the District Court's holding that Plaintiffs' failed to state a claim for their trust mismanagement allegations, the focus should be on the question of whether the specific allegations in the complaint "plausibly support a legal claim for relief." *Alverado*, 493 F.3d at 1215, n. 2 (citing *Iqbal*, 490 F.3d 143). As illustrated below, the record is replete with evidence that Plaintiffs' claim meets the *Alverado* test. For instance, in the District Court's September 10, 2009 Motion Hearing, counsel for the United States admitted that he could not identify under which statute certain individual non-Osage headright holders came to hold their headright:

> THE COURT: Any idea of how many of the 1700 are holding their rights by virtue of the most recent iteration?
>
> MR. KIM: I haven't done that analysis. . .
>
> * * *
>
> THE COURT: . . . at least conceptionally it's possible that you may have done everything correctly, under the previous iteration, but may not have followed every jot and tittle with regard to the law after '78 and because you are held to a high standard as fiduciary, perhaps, I'm just saying academically - -
>
> MR. KIM: Right.
>
> THE COURT: - - you may have breached that fiduciary duty with regard to any devises that occurred after '78; correct?
>
> MR. KIM: That's correct. . . .

Aplt. App. at 331-332. In addition, counsel for one of the dismissed individual defendants recognized that Plaintiffs' claim was plausible:

> MR. CLARK: But I would also point out, Your Honor, that there could be a situation. As you look in your courtroom today, you have a lot of corporate defendants. Corporate defendants as owners of headrights, of course, went out the window in 1984. There could be, although I doubt it, a stray cooperate [*sic*] transfer that occured after 1984, maybe slipped through or maybe wasn't properly written, there could be one.

Aplt. App. at 675. In fact, the United States' own records—produced through this litigation—show that records have been inadequate in identifying trust beneficiaries:

> MS. PROCTOR: . . . the list was erroneous because I am an Osage Indian and I knew many of the people who are on the list and I knew, many of them being friends and relatives, that they were deceased or that they were living, but they had inherited life estates as spouses of Osage after 1978. One of [the] people who was on the list, her name is Georgia Bollinger was my aunt and she was such a person who acquired a life interest after 1978 and who died in the early '90s when I was in high school, Your Honor, and she was on the list.
>
> There is an actress whose name is Jean Harlow who has been dead since the '30s, her mother was on the list. Her mother has been dead since the '50s, Your Honor.

Aplt. App. at 490-491.

The Court rejected the plausibility of Plaintiffs' claims on the basis that they were not specific to any one individual or to any particular distribution. Aplt. App. at 1266-1268. The District Court, likewise rejected Plaintiffs' allegation as an insufficient identification of final agency action, or inaction. *Id*. However, without the requested accounting, Plaintiffs' claims cannot be more specific, but under the law they did not have to be any more specific. To put it another way, Plaintiffs knew of some specific misdistributions, and alleged them. Aplt. App. at 455. Even though the Plaintiffs may not yet be aware of *all* the United States misdistributions, they still have stated facts sufficient to pass legal muster under this Court's authority in *Alverado*, 493 F.3d at 1215, n. 2 (citing *Iqbal*, 490 F.3d 143).

On the question of the other unknown misdistributions, until the requested accounting is provided, Plaintiffs' claims have not even accrued. *See Shoshone*, 364 F.3d at 1347 (Fed. Cir. 2004) (holding that the Appropriations Acts provide "that claims falling within [their] ambit shall not accrue, i.e., 'shall not commence to run,' until the claimant is provided with a meaningful accounting."). According to the Federal Circuit, "[t]his is simple logic--how can a beneficiary be aware of any claims unless and until an accounting has been rendered?" *Id*. at 1347.

Just because Plaintiffs are not aware, in this case, of every instance where the United States failed to comply with its duties to distribute Section 4 Royalty

Payments in compliance with the law does not mean that Plaintiffs have not stated a cause of action for the claims Plaintiffs are aware of. To hold otherwise is either illogical, or requires the invention of facts not in the record on a motion under Rule 12 (b)(6). Accordingly, the District Court's Order should be reversed, and Plaintiffs' cause of action for the United States breach of trust should be restored.

CONCLUSION

For the reasons set forth above, the District Court erred in dismissing Plaintiffs' Complaint for failure to state a claim under Rule 12(b)(6). Pursuant to federal law, the United States is required to provide Plaintiffs with a meaningful accounting for its management and distribution of Section 4 Royalty Payments. Furthermore, Plaintiffs have stated a plausible breach of trust claim against the United States for its mismanagement and distribution of Section 4 Royalty Payments. Plaintiffs therefore request that this Court reverse the District Court's decision and order the United States to account for the segregation and distribution of trust funds under Section Four of the 1906 Act, Appropriations Acts, and general accounting duties found in Title 25 of the United States Code.

REQUEST FOR ORAL ARGUMENT

As illustrated above, the District Court's ruling is unique and at odds with the prevailing precedents of other courts in the Circuit, courts in the D.C. Circuit

and Court of Federal Claims, and contrary to statutory law. For this reason, Plaintiffs request oral argument.

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/s/Dallas L.D. Strimple
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I hereby certify that on August 13, 2012, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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