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

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

PLAINTIFFS' OPENING BRIEF ON THE MERITS

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INTRODUCTION

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—are 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). In the common parlance, the right to receive Section 4 Royalty Payments has come to be known as "headrights."

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 part of the void created when the Tribe was compelled to allot its lands to its members under the 1906 Act.

Plaintiffs are Osage Indians who receive Section 4 Royalty Payments. As trustee over these Section 4 Royalty Payments, 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. Specifically, the United States is obligated by federal law to account to Plaintiffs, and the class members they represent, for the management and disbursement of trust funds held for individual Indians. *See, e.g.*, 25 U.S.C. §§ 162a, 4011, and 4044; *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (herein "*Cobell VI*"). "[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 members of the class, even though the United States alleged in its briefing to the District Court that it did account. *See* United States' Motion to Dismiss [Doc. No. 1126] at 11. 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.[1] The United States bears this burden as a matter of federal law. *See, e.g.*, 25 U.S.C. §§ 162a, 4011, 4044; *Otoe-Missouria Tribe of Oklahoma v. Kempthorne*, 2008 U.S. Dist. LEXIS 99548 (W.D. Okla. Dec. 10, 2008); *Shoshone v. United States*, 364 F.3d 1339 (Fed. Cir. 2004). 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.

ARGUMENT AND AUTHORITIES

I. Rules of Construction for Federal Law.

When interpreting a statute, the Court'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)).

[1] 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).

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*").

II. Plaintiffs Are Owed An Accounting From The United States.

A. Plaintiffs' Trust Funds.

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). Additionally, Congress requires that these trust 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.

See 1906 Act, 34 Stat. 539, § 4. The 10th Circuit summarized the act as follows:

> Congress severed the mineral estate underlying Osage lands from the surface estate, placed the mineral estate in trust, directed the Secretary of the Interior to collect royalties, and told the Secretary to distribute the royalties (along with interest income) every quarter on a pro rata basis to individual members of the tribe.

Fletcher v. United States, 730 F.3d 1206, 1207 (10th Cir. 2012) (relying on 34 Stat. at 544).[2] This right to receive royalty payments has become known as a "headright" and could, originally, be sold, given away or bequeathed. *Fletcher*, at 1208.

"Displeased with the choice by some headright owners to convey their interests to non-tribal members, Congress responded with a series of legislative amendments placing ever increasing limits on the practice." *Id*. at 1208 (relying on Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 4.07, at 304-08 (Nell Jessup Newton ed., 2012)). Additionally, the 10th Circuit found that "[t]he 1906 Act clearly creates a trust relationship–and not just a trust relationship between the federal government and the Osage Nation, but also between the federal government and the individual Osage headright owners who are plaintiffs in this case." *Fletcher*, 730 F.3d at 1209. In fact, "[o]ver the years both Congress and [the 10th Circuit] have repeatedly recognized that, in

[2] Over time, Congress imposed additional trust duties on the United States in relation to the distribution of the Section 4 Royalty Payments. *See* generally, Third Amended Complaint [Doc. No. 985, 985-1] at ¶¶ 24-26.

this way, the 1906 Act created a trust relationship between the government and individual headright owners." *Id*. at 1209.

Accordingly, it is the law of the case that the United States holds funds in trust for Plaintiffs pursuant to Federal Law.

B. The United States Must Account To Plaintiffs.

The 10th Circuit already determined that Plaintiffs, as trust beneficiaries, are entitled to an accounting of their trust funds. *Fletcher*, 730 F.3d at 1209-1211. Specifically, the Circuit found that through 25 U.S.C. § 4011 "Congress has chosen to afford individual tribal members the statutory right to seek and obtain an accounting." *Fletcher*, 730 F.3d at 1210. 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). "By its plain language [§ 4011] appears to impose on the federal government a duty to 'account for'—to render a reckoning, answer for, explain or justify—the daily and annual balances of money it holds in trust." *Fletcher*, 730 F.3d at 1209 (internal citation omitted).

The 10th Circuit envisioned one roadblock interfering with Plaintiffs right to an accounting. Specifically, the 10th Circuit stated: "No one before us disputes that the

plaintiffs' current complaint adequately alleges that their trust funds are deposited in a bank pursuant to section 162a(a), thought this may of course be the subject of factual exploration on remand." *Fletcher*, 730 F.3d at 1214. Although hard to decipher from the Administrative Record, Plaintiffs' trust funds are held before distribution as a part of the 162a(a) account: United States Treasury Account No. PL 7386706, a segregated portion of the Osage tribal trust account (herein "the Segregated Osage Tribal Trust Account"). *See* Exhibit 1, Aff. Lopp at ¶ 2(A). As such, Plaintiffs are entitled to an accounting.

III. Scope of Accounting Owed To Plaintiffs.

According to the 10th Circuit, "Congress has chosen to invoke the concept of an accounting. That concept has long been known and particular meaning in background trust law." [3] *Fletcher*, 730 F.3d at 1210. As a part of the accounting, "the plaintiffs are entitled not only to some measure of information about the government's handling of deposits . . . but also to some measure of information about disbursements. The scope of traditional equitable accounting includes, after all, some degree of information about both receipts and disbursements." *Fletcher*, 730 F.3d at 1214 (relying on 2 Joseph Story,

[3] The 10th Circuit went on to say: "It means that a beneficiary may initiate a proceeding to have the trustee's account settled by the court. Indeed, the beneficiary of a trust can maintain a suit to compel the trustee to perform his duties as a trustee, including his duty to account. So when Congress says the government may be called to account, we have some reason to think it means to allow the relevant Native American beneficiaries to sue for an accounting, just as traditional trust beneficiaries are permitted to do." *Fletcher*, 730 F.3d at 1210. For this reason, along with the issues raised by Plaintiffs in their most recent Motion to Compel [Doc. No. 1219], Plaintiffs believe it is wrong to treat this case as a traditional APA case. Instead, it should be treated like any other lawsuit where a trust beneficiary calls a trustee to account.

Commentaries on Equity Jurisprudence, as Administered in England and America § 1275, at 506-07 (1866)).

Under long-standing federal case law, 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. 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 fundamental principle governing the subject of trust administration." *White Mountain Apache Tribe v. United States*, 26 Cl. Ct. 446, 448 (1992) (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).

Generally speaking, "the 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) (defining accounting as "the report of all items of property, income, and expenses" prepared by the trustee for the beneficiary)). 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." *Cobell VI*, 240 F.3d at 813. "To read [the accounting requirement] as merely guaranteeing periodic reports to beneficiaries would" render the accounting requirement a nullity. *Fletcher*, 730 F.3d at 1210.

The "choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling[4] or something else, would be appropriate . . . are properly left in the hands of administrative agencies." *Cobell VI*, 240 F.3d at 1104. This Court's consideration should be whether a trust duty is owed to the Plaintiffs, and if so the Court must assure that the United States provide "the best accounting it can." *Cobell XXII*, 573 F.3d at 813.

[4] It must be noted that statistical sampling was discussed as an option in *Cobell* because of the immense size of documents the United States had to wade through to perform the required accounting for every single IIM account. Here, the breadth of documents is not nearly as large as to require statistical sampling.

Practically, the scope of the United States' accounting duty must be defined three ways: 1) temporally, 2) in relation to the specific duties imposed by the Osage trust statutes, and 3) in relation to the specific duties imposed by federal trust law.[5]

The starting point for Defendants' Accounting Duty begins with the Accounting Statutes themselves. According to Section 4011(a) of Title 25, Defendants are to "account for the daily and annual balance of ***all funds***" held in trust for the benefit of an Indian beneficiary. Additionally, such accounting must be "as full and complete [ ] as possible" and "to the earliest possible date." 25 U.S.C. § 4044 (2). These statutes were meant to provide "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. Additionally, Section 162a(d) of Title 25 requires the United States:

> (1) To provide adequate systems to report on and account for Trust Fund balances.
>
> (2) To provide adequate controls over receipts and disbursements of trust assets.
>
> (3) To provide periodic and, timely reconciliations to assure the accuracy of accounts.
>
> (4) The determination of accurate cash balances.
>
> (5) Preparing and supplying account holders with periodic statements of their account's performance and with balances of their accounts available on a daily basis.
>
> (6) Establishing consistent, written policies and procedures for trust fund management and accounting.

[5] Plaintiffs previously briefed this issue upon request from the Court. *See* Doc. No. 1215. Plaintiffs would incorporate by reference the briefing that has been performed thereto as if fully stated herein.

> (7) To provide adequate staffing, supervision, and training for trust fund management and accounting duties and requirements.

See 25 U.S.C. § 162a(d). *See also* 25 U.S.C. § 4011, which supplements the above duties by specifying the Secretary is to "account for" daily annual balances of all Indian trust funds, report quarterly on the "performance" of funds deposited pursuant to section 162a, and perform an annual audit. Therefore, taking the 7 elements of Section 162a(d) together with the 3 elements of Section 4011, one has 10 elements of law defining the scope of the United States trust accounting duty.

Accordingly, the scope of the accounting due in this case is broadly defined to:

1. Include *sufficient information* for the Class to readily to ascertain whether the trust has been faithfully carried out or whether there has been a loss; and
2. Relate back to the *earliest possible date*, which in this case could be as early as 1906 when the 1906 Act for the Osage Nation created the segregated fund.

Within these two parameters, the scope of the accounting relates to the processes by which the United States can provide this information in a reasonable way that is not overly burdensome on the federal government's budget, nor does it become, as the Tenth Circuit put it, a green eyeshade death march.[6]

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[6] Likewise, the D.C Circuit stated:

> Sitting in equity, the district court has the authority to approve a plan that efficiently uses limited government resources to achieve that goal. It is within the power of the district court to order an accounting without requiring Interior to perform analyses the costs of which exceed the benefits

As indicated by Plaintiffs' expert, S. Christopher Lopp, the American Institute of Certified Public Accountants publication titled "Practice Guide for Fiduciary (Trust) Accounting: A Guide for Accountants Who Perform Fiduciary Accounting Services" instructs as follows regarding the "duty to account":

> The third fundamental obligation of a fiduciary is the duty to account and is more focused than the duty of disclosure. This is the duty to provide relevant information to the beneficiaries. The duty stems from the fact that the fiduciary does not really own the "res", but holds it for the benefit of the beneficiary. The duty to account concerns itself with all the financial or other quantitative features of the "res". Therefore, the fiduciary is obligated to keep records of all transactions affecting the trust and make them available to the beneficiary either on request or at a scheduled time. It is an affirmative duty and requires that the fiduciary do more than merely be "honest". Rather, the fiduciary must keep records that prove honesty. This includes separating the fiduciary assets and not commingling them with the fiduciary's personal property. If the fiduciary does not render proper reports regarding the "res", he has not fulfilled his whole duty. His silence can create concern in the beneficiary regarding the condition of the property and this itself is a breach of fiduciary duty. *The accounting rendered by the fiduciary must be complete and must cover all transactions from the beginning of the relationship to the end, or for a shorter interim period*. It is not the beneficiary's job to ferret out the facts and figures or to discover any deficiencies in the fiduciary's accounts. The fiduciary's duty to account periodically is an ongoing and continuous obligation. *Sending the beneficiary copies of checks and other evidences of receipts and disbursements as they occur does not constitute a proper accounting*. The timing of a rendering of an accounting can be:

> payable to individual American Indians. It would indeed be "nuts" to spend billions to recover millions. *Cobell XX*, 532 F. Supp. 2d at 86. A court sitting in equity may avoid reaching that absurdity.

Cobell XII, 573 F.3d at 810.

Regular in nature;

On demand by the beneficiary;

Interim or final; or

On the termination of the fiduciary relationship.

See Exhibit 1, Aff. Lopp at ¶ 3.

IV. The Administrative Record Does Not Contain An Accounting For Plaintiffs Trust Funds.

To analyze the Administrative Record the United States provided, Plaintiffs engaged the services of S. Christopher Lopp, a Consulting Executive at Hogan Taylor, LLP. *See* Exhibit 1, Aff. Lopp at ¶ 1. In reviewing the Administrative Record, Mr. Lopp opines that it "does not qualify as, or contain, an 'accounting.'" *See id.* at ¶ 6. The information provided in the Administrative Record is nothing more than a collection of "black boxes" that provide:

> purely conclusory information that provides no meaningful detail even at a *summary* level, such as (i) a breakdown by income category of revenues collected for oil, for gas, for lease bonuses, or in respect of other property or rights, coupled with (ii) a transparent rendering of allocation of those categories of revenue to other sub-accounts within the Department of the Interior ("DOI") or Bureau of Indian Affairs ("BIA") sub-accounts held at the United States Treasury.

See id. at ¶ 6.

Additionally, "the Administrative Record completely fails to identify the categories of income that it received during the accounting period. Instead, it shows what purports to be a single, quarterly lump sum of trust income received from all sources." *See id.* at ¶ 6(A). The Administrative Record also "fails to document adequately or to substantiate the amounts paid out of the tribal trust fund for statutorily allowable

expenses or for other purposes or uses, *prior to* the determination of the trust fund's [distributable net income]." *See id.* at ¶ 6(C). Ultimately, as a result, "the Administrative Record discloses no clear and discernible methodology from which Trust Beneficiaries might be able to calculate the amounts held within the Segregated Osage Tribal Trust Account that are *not* being disbursed quarterly, i.e., the amounts left in the account." [7] *See id.* at ¶ 6(D). Finally, the Administrative Record "provides no reconciliation of (i) amounts earned, (ii) amounts paid, and (iii) other income received and expenses incurred, from month to month."[8] *See id.* at ¶ 6(F). Without this information, there is no way for

[7] Mr. Lopp did discover that the Administrative Record illustrates that "there are significant amounts retained in the trust account (which might be characterized as a 'holdback' or the like) during each accounting period. But that record again fails to explain in any form or fashion how that holdback amount was calculated or determined. Moreover, the Administrative Record reveals that the holdback amounts varied significantly from quarter to quarter, (i) without any overt explanation and (ii) without even presenting enough information to allow an accountant (much less a Trust Beneficiary) to be able to 'back into' the calculation." *See id.* at ¶ 6(D).

[8] Mr. Lopp also opined about missing information regarding non-producing mineral assets:

> the Administrative Record contains no disclosure of any kind concerning mineral acreage that is not currently generating income. Total net mineral acres owned -- those that are under lease but not producing, and those that are producing -- should be broken out periodically. Properties that are not generating current income would include not only unleased acreage, but leases with shut-in gas wells, and leased acreage as to which the producer is not, *for whatever reason*, remitting royalties. A trust beneficiary is entitled to all of this information because it bears on the *property value* of the properties separate and apart from the amount of current income being generated. A beneficiary is especially entitled to know if the mineral lessee is in breach of his payment obligations or if the Trustee, again for whatever reason, is not collecting royalties due to the trust.

See Exhibit 1, Aff. Lopp at ¶ 6(G).

Plaintiffs "to assure that the trustee is not pocketing trust funds or spending trust income improperly." *See id.* at ¶ 6(F).

V. Defendants' Defenses Are Inapplicable To Plaintiffs Request For An Accounting.

The bulk of the United States "defense" to Plaintiffs' claim for an accounting is based upon their reliance on one sentence from the 10th Circuit's recent opinion: "No one before us disputes that the plaintiffs' current complaint adequately alleges that their trust funds are deposited in a bank pursuant to section 162a(a), thought this may of course be the subject of factual exploration on remand." *Fletcher*, 730 F.3d at 1214. Technically, Plaintiffs' trust funds are held—depending on whether its pre or post distribution—in one of two 162a(a) accounts. Before distribution, the funds begin as a part of the 162a(a) account that houses the Osage Mineral Estate. As some point those funds are segregated and the royalty amount to each headright owner is calculated, but the funds remain in that account until ultimately distributed. Some distributions—very few—are made by direct check to headright owners. The vast majority, however, are transferred into Individual Indian Money (herein "IIM") 162a(a) accounts, although Plaintiffs do not challenge the management of the funds after they are placed in IIM accounts.

The United States claims they have no remaining duty to account to Plaintiffs because: (1) the management of IIM accounts was settled by *Cobell* class action settlement; and (2) the management of tribal funds within the Osage Mineral Estate were settled with Osage Tribe. The United States does not treat these as settlements of claims with individuals—as they should be—but as "settlements of accounts."

A. Cobell Class Settlement.

Defendants' argument regarding the *Cobell* class settlement in nothing more than a red herring. Plaintiffs do not challenge the management of funds as they exist inside their IIM accounts. Instead, Plaintiffs' concerns are targeted on how the funds *get* to their IIM accounts, and into the hands of class members who receive checks directly from the government. The parties to the *Cobell* case recognized this as well and specifically carved out an exception for Plaintiffs' claims here. *See* Record at Vol. I, Cobell 3660-2 Settlement Agreement at I(6).

B. Osage Highest Posted Price Settlement.

The other "defense" the United States raises regards its settlement of certain trust accounting claims with the Osage Nation. The United States originally raised this "defense" in a footnote of Plaintiffs' most recent appeal to the 10th Circuit:

> it is questionable whether . . . Plaintiffs could pursue a claim for an accounting [because the settlement agreement between the United States and the Osage Nation] waives on behalf of the Osage Nation and Headright Holders all claims . . . including all claims regarding the United States' obligation to provide a historical accounting."

See Exhibit 2, United States' Brief on Appeal at 38 n. 5. Regarding the defense, the 10th Circuit stated:

> The footnote itself—notably—stops short of claiming that the tribe has the power to waive individual tribal members' claims. Indeed, the footnote cites no authority one way or the other on the 'question' it highlights. And when we asked the government at oral argument to clarify its position on the 'question' its footnote posed it retreated still further, ***disclaiming any suggestion that the Osage Nation's waiver might bind the individual plaintiffs in this case***.

Fletcher, 730 F.3d at 1213-1214 (emphasis added). As a result, the 10th Circuit considered the defense "doubly waived." *Id*. at 1214.

Regardless of whether the defense is "doubly waived," it flies in the face of contract law. Contracts only create obligations upon parties to the contract. *See Nickel v. Pollia*, 179 F.2d 160, 163-164 (10th Cir. 1950) (finding that contractor cannot look to third party for payment on contract). It is a longstanding "principle that one owes no [contractual] duty to persons with whom he has no privity of contract." *Spencer v. Madsen*, 142 F.2d 820, 822 (10th Cir. 1944); *see also* BLACK'S LAW DICTIONARY (3d Pocket Ed. 2006) (defining privity of contract as "[t]he relationship between parties to a contract allowing them to sue each other but preventing a third party from doing so").

The defense also files in the face of the representations they made to another Court, concerning exactly the same issues, and exactly the same cases. The United States asserted in the *Osage Nation* litigation "that the headright holders, not the Tribe, suffer any damages that result from the mismanagement of mineral royalties because, as required by statute, the funds are ultimately distributed to those individuals." *Osage Nation*, 57 Fed. Cl. at 394 (2003). It was the United States' belief that the Osage Nation lacked standing to represent the headright holders' interests. *Id*. at 394-395.[9] The United States' breathtaking argument here leaves one wondering when they were telling the truth, to whom, and if ever.

[9] It is quite interesting that the United States would now argue that a party it believed lacked standing over Plaintiffs claims here, could have settled Plaintiffs claims out from under them.

Here, the United States entered into an agreement with a third party, the Osage Nation, settling claims in litigation in the Court of Federal Claims regarding the United States' trust obligations *owed to the Osage Nation* for approximately three-hundred eighty million dollars ($380,000,000).[10] The Osage Nation's claims included a claim for an accounting of *deposits* into the Osage Mineral Estate. *See* Plaintiffs' Response in Opposition to Federal Defendants' Motion to Dismiss [Doc. No. 1144] at 14-18.

During the settlement negotiations between the United States and Osage Nation, Plaintiffs approached the United States as to whether it was attempting to settle their claims as well. As the United States was completing that settlement, and in response to Plaintiffs' pointed question of whether the United States intended to attempt a settlement of this case, the United States responded by stating "was not in a position to characterize the legal effect of the Osage settlement agreement on the claims in any other case." *See* Exhibit 3, Electronic Mail from Kim to Aamodt (Oct. 20, 2011). In addition, the United States refused to entertain Plaintiffs' recommendations for revisions to the settlement agreement—even though *now* the United States claims the Plaintiffs are bound by it. *See id.* at Electronic Mail from Kim to Aamodt (Oct. 19, 2011). Plaintiffs had previously reached out the Osage Nation, who indicated that the Nation was not attempting to settle Plaintiffs' claims. *See* Exhibit 4, Email from Aamodt to Kim (Oct. 19, 2011).

[10] The settlement is expected to provide headright holders with a windfall payment of over one-hundred fifty-five thousand ($155,000) to each full headright share. These payments illustrate the further need for an accounting of the United States distributions to headright holders to confirm that these disbursements are made lawfully.

As a result, there is no privity of contract between the United States and Plaintiffs. The Plaintiffs never agreed to—nor were Plaintiffs allowed to participate in the negotiation of—the settlement agreement. The settlement agreement between the United States cannot obligate and bind Plaintiffs. *See Nickel*, 179 F.2d at 163-164. Under the United States' view of the law, an individual need not rob Peter to pay Paul; instead the individual can simply enter into an agreement with Paul that Peter will pay him, regardless of whether Peter agrees.

CONCLUSION

The accounting in this case must be meaningful so that the beneficiaries can determine whether there has been a loss. The information provided here by the United States is nothing more than a proverbial black box from which nothing can be ascertained other than the fact that the United States has not accounted. In its ever shifting theory of what it has done with the Plaintiffs money, the United States now asserts that the Osage Tribal Trust Account *is* the Segregated Fund from Section 4 of the 1906 Act. Furthermore, the United States refuses to account for what it now asserts is the Segregated Fund. Accordingly, there is no dispute between the parties that the United States has not accounted, and that it will not account without Order of this Court.

In compliance with the 10th Circuit's mandate, the United States must be ordered to account to Plaintiffs. To perform such an accounting, Plaintiffs believe that the Court's prior indication that a special master be appointed should be considered as the Court moves forward to a resolution of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on that on this 17th day of July, 2015 I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Amanda Sue Proctor
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