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

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

PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT AND BRIEF IN SUPPORT

COME NOW Plaintiffs and hereby respectfully move the Court, pursuant to Fed.R.Civ.P. Rule 59(e), to alter or amend its Judgment of December 30, 2015 [Doc. No. 1281] (herein the "Judgment") in accordance with the proposed Amended Judgment attached to this motion as Exhibit 1. In support of this Motion, Plaintiffs state:

INTRODUCTION

Plaintiffs' Rule 59 Motion to Alter or Amend the Judgment asks the Court to alter or amend the Court's Judgment of December 30, 2015 [Doc. No. 1281]. The proposed amended judgment differs from the Judgment in two ways: (A) it expands the temporal scope of the accounting that the Court has ordered, and (B) it requires greater accounting detail than would the Judgment.

ARGUMENT AND AUTHORITIES

I. The Judgment Should Be Amended to Require That Government Account for All Periods for Which it Possesses, or can Obtain or Recreate, Accounting Records.

A. No "misdistribution claim" is currently being prosecuted in this civil action.

The Court's Opinion and Order of December 30, 2015 [Doc. No. 1280] (herein the "Order") explains:

> The circumstances here do not warrant a [109-year] accounting . . . Although plaintiffs now demand an accounting reaching back to 1906, they have not explained why such information is needed to pursue their *misdistribution claim*.
>
> * * *
>
> To the extent that this is [Plaintiffs'] objective, the ends do not justify the cost and burden on the government. The likelihood that plaintiffs will be able to successfully attack *these transfers* in such a way as to meaningfully increase their beneficial interest is remote.

Order at 23-24 (all emphasis added).

Hence the Court ties the limited time scope for the accounting to Plaintiff's "misdistribution claim." But the "misdistribution claim" is no longer active in this litigation. This Court dismissed that claim without prejudice by its order of April 10, 2014, [Doc. No. 1164] at 14. Plaintiffs did not appeal that ruling and the Court of Appeals did not rule on the misdistribution claim. *See Fletcher v. United States*, 730 F.3d 1206, 1216, n. 6 (10th Cir. 2013)("the district court also dismissed without prejudice the plaintiffs' separate claim charging the government with improper trust fund

distributions; "[p]laintiffs . . . do not seek a ruling from us now on that claim" and "[a]ccordingly, we decline to reach it").

What the Court of Appeals *did* rule on is Plaintiffs' comprehensive accounting claim advanced by all class members, each of whom has a right to a full accounting respecting (i) receipts coming into the Segregated Osage Tribal Trust Account (hereinafter, "the SOTTA"),[1] (ii) the handling of funds once in the account (particularly the crediting of interest as expressly required by statute), and (iii) the resulting disbursements from that account. The difficulties that might cripple efforts to trace improper transfers do not affect this accounting project.

2. *The temporal scope of the required accounting should be expanded.*

The temporal scope of the accounting ordered in the Opinion and in the Judgment should be expanded for two reasons. First, a trustee should not gain an advantage from its failure to maintain accurate, inexpensively accessible records to the detriment of its beneficiary, just as a trustee should not benefit from such a records-maintenance failure in the calculation of the monetary amounts due the beneficiary. *See* Subpart i below. Second, the Indian Trust Management Reform Act of 1994 ("the 1994 Act") contains no express or implied temporal limitations on the required accounting scope. *See* Subpart ii below.

[1] This term is defined in the Affidavit of S. Christopher Lopp, [Doc. No. 1262-1] at p. 2, ¶ 2(A).

i. A trustee should not gain an advantage from its failure to maintain accurate, inexpensively accessible records to the detriment of its beneficiary.

The Government should not be heard to protest that a full accounting - not to "misdistributees," but to those headright owners whose ownership rights are undisputed - is too difficult or expensive. The Government is a *trustee*. The consequences of its failure to keep adequate, inexpensively accessible records ought not to be visited upon the *beneficiary*. The case law dealing with the adequacy of accountings -- once such accountings are actually delivered to the beneficiary -- makes one thing clear: when a trustee fails to keep proper records of his trust, the consequences of that failure must be borne by the trustee, not the beneficiary. *See infra* next paragraph. The same principles, which are discussed below, should apply to the question of how the Court should proceed when the Government asserts that the accounting task itself is overly burdensome.

It is "usually stated that all presumptions are against [the trustee] on his accounting, or that all doubts on the accounting are resolved against him." *Cobell v. Kempthorne*, 569 F. Supp. 2d 223, 249 (D.D.C. 2008), citing *Rainbolt v. Johnson*, 669 F.2d 767 (D.C. Cir. 1981)(additional citations and internal quotation marks omitted). *Rainbolt* holds that "[u]nder established principles of trust law, if the . . . trustee has not kept adequate accounts, the benefit of the doubt is to be given to the beneficiary." 669 F.2d at 769. "This rule," the cited *Cobell* decision notes, "is no doubt required to prevent the trustee from benefitting from his own breach; a claim that the trustee has held trust funds as his own cannot be defended on the ground that the trustee's own records are

unclear." *Cobell*, 569 F. Supp. 2d at 250, citing *Cafritz v. Corp. Audit Co.*, 60 F. Supp. 627, 632 (D.D.C. 1945).

The foregoing principles have been applied to the *specific* account (the SOTTA) at issue here. Thus, "where, as here, proper trust records are missing, doubts about calculations should be resolved against the trustee." *Osage Tribe of Indians v. United States*, 93 Fed. Cl. 1, 8 (Fed. Cl. 2010)(citations to lower court cases and internal quotation marks omitted), citing *Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365, 1373 (Fed. Cir. 2001) and William F. Fratcher, SCOTT ON TRUSTS § 172 (4th ed. 1987). *See also Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) ("the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"). *Bigelow* is cited in yet another *Osage Tribe of Indians* opinion, *Osage Tribe of Indians v. United States*, 96 Fed. Cl. 390 (Fed. Cl., Dec. 29, 2010). *See, finally*, *Confederated Tribes v. United States*, 248 F.3d 1365, 1373 (Fed. Cir. 2001)(citing in turn *Donovan v. Bierwirth*, 754 F.2d 1049, 1058 (2d Cir. 1984) and *Nedd v. United Mine Workers*, 556 F.2d 190, 211 (3d Cir. 1977). *United Mine Workers* in turn holds that, once the beneficiaries have established their prima facie case by demonstrating the trustees' breach of fiduciary duty, the "burden of explanation or justification" shifts to the fiduciaries.

Plaintiffs fully understand that the foregoing cases relate to purported Government "accountings" already delivered, which accountings are afflicted by gaps or inadequacies. But, Plaintiffs respectfully submit, these principles ought to be applied also to the duty to

account *itself*. If the Government were to be saddled with a 109-year accounting burden, that burden would be a direct result of the fact that, during that span, the Government has failed to provide any periodic, meaningful accountings whatsoever. As discussed at hearing and in the Affidavit of S. Christopher Lopp, the "APA record" shows that the Government (specifically, the BIA) does not even provide IIM account holders the rudimentary royalty payment detail that private oil and gas producers (lessees) routinely provide to their royalty owners *monthly*.[2] The Government provides, instead, conclusory, "bottom line" statements -- "black boxes" in Lopp's words. *See* Affidavit of S. Christopher Lopp, [Doc. No. 1261-1] at ¶ 6, pp. 5-6 (filed 7/17/15).

That the Government has *never* provided *any* accounting is made clear from the record in *Osage Tribe of Indians v. United States. See, e.g.*, the opinions reported at 93 Fed. Cl. 1, (April 30, 2010) and 96 Fed. Cl. 390 (Dec. 29, 2010). Hence to this date the Government has not accounted to anyone (not the tribe and not any individual headright owner) for its stewardship, or lack thereof, in respect of the SOTTA, United States Treasury Account No. PL7386706. *See* Lopp Affidavit, [Doc. No. 1261-1] at p. 2. If the Government ought to bear the "burden of explanation or justification" for the inadequacies of its putative accountings (due to poor or missing accounting records) the

[2] The IIMs, as such, are not at issue here, but statement details (volumes and prices, at least) provided to the Government, as trustee for the royalty owners, at the SOTTA level could be "passed through" to the IIM account holder. The IIM account holder would then be able to see whether, e.g., oil and gas had been sold at the highest offered price for a given month.

Government ought also to bear the burden of showing why it cannot do what a trustee – a *fiduciary* – should have been doing for the last hundred years.

Plaintiffs anticipate that the Government does not possess sufficient records to provide a 109-year accounting. But Plaintiffs and this Court also know that the Government has records that predate *2002*, a date that long post-dates the dawn of electronic record-keeping. Why, Plaintiffs must ask, is the *trustee* that has utterly neglected its duty for so long to be spared the "burden" of delivering the most temporally complete accounting that its records allow? If it is literally impossible to provide records before some date certain, the trustee – *not the beneficiary* – should bear the burden of showing this Court what that date is and why accounting before that date is "impossible."[3]

The Government, it appears, misled the Tenth Circuit concerning the Government's accounting to the Osage Nation. Thus:

> It may be too much to hope, but in the end it may be the government can satisfy its accounting duty very simply. The government has suggested that in its settlement with the Osage Nation it has discharged its accounting duty to the Nation. If this is true, this lawsuit, already about to reach its teenage years, might come to a speedy end at last. It may very well be within the district court's considerable discretion simply to order the government to share with the plaintiffs something like it has already shared with the

[3] Plaintiffs will not belabor this point, but the record of this civil action, the appellate record in *Fletcher II*, and the record in *Osage Tribe of Indians v. United States*, is replete with hyperbolic, the-sky-is-falling protestations from the Government concerning the expense of, and its very ability to comply with, orders from federal judges. No matter what period this trustee is ordered to account for, it can be predicted that the trustee will protest the oppressiveness of the Court's order and ask that the burden of the trustee's 100-year failure to account be visited upon on the trustee's beneficiaries.

> Nation. Indeed, one can't help but wonder why the government hasn't already offered to give the plaintiffs what it has given the Nation.

Fletcher v. United States, 730 F.3d 1206, 1215-16 (10th Cir. 2013). As the parties to the Tribal Settlement Agreement stipulate, the Government did not in fact account to the tribe before settling with the tribe. But the reported decisions in the *Osage Tribe of Indians* litigation reveals a great deal about the information available to the Government that predates 2002. Thus:

- The Nation claimed that the Government breached royalty payment duties over two separate time periods: "fiscal years 1973 to 1992 for all deposit-lag, excessive-cash-balance and investment-yield claims, and July 1974 through December 2000 for all Oil-Royalty Under-Collection claims." *Osage Tribe of Indians v. United States*, 93 Fed. Cl. 1, 5 (Fed. Cl., April 30, 2010).

- "The parties [the Nation and the Government] agree that the Joint Data Base 'consists of information that is reasonably correct . . . regarding oil production from the Osage mineral estate during the period from July 1974 to December 1980 and from January 1988 to December 2000.'" *Id* at 14, n. 12.

- "To compute royalty values in accordance with the law of the case, plaintiff's expert Mr. Reineke used production data from the Osage Agency and the Joint Data Base . . . to identify the highest posted or offered price by a major purchaser in the Kansas-Oklahoma area on the date of sale or removal for each Osage oil purchase." *Id* at 14.

- "It is undisputed that the Joint Database is incomplete because the Osage Agency failed to keep adequate trust records for years. It is also undisputed that the government has consistently failed and refused to fill the gaps in the historical record, *citing time and money concerns*." *Id* at 20 (emphasis added).

- "The law of this case is that defendant breached its fiduciary duties as trustee for the Osage Tribe by mismanaging both its royalty collection and its investment responsibilities; the proper discharge of those dual responsibilities required that the government as trustee keep and generate the very records upon which plaintiff would now need to rely to meet its summary judgment burden of proof as movant." *Id* at 8.

Plainly the Government has a great deal of information for periods of time that pre-date 2002. *See also* testimony of James Cason, Associate Deputy Secretary of the Department of the Interior given July 25, 2002 before the Committee of Indian Affairs, United States Senate (testifying that "[s]ince 1985, most of the IIM Trust Fund financial information has been contained in electronic systems" and that "before that," the Department would "need to compile paper records").[4] It should be ordered either (i) to account to the "earliest possible date,"[5] 25 U.S.C. § 4044(2), or (ii) bear the burden to show that it literally cannot do so.

ii. The 1994 Act contains no temporal limitations on the scope of the statutorily required accounting.

> Nothing in the 1994 Act limits the temporal scope of Interior's accounting obligation. *See e.g.*, *Cobell VI*, 240 F.3d at 1104. The historical aspect of that accounting duty has been declared by this Court and affirmed by the Court of Appeals. It was established by the statutory language [set forth in § 4011(a) of the 1994 Act].

* * *

[4] A link to the quoted testimony is available at: http://www.bia.gov/WhoWeAre/AS-IA/CLA/IATestimony/2002/index.htm

[5] Plaintiffs understand the concern that accounting for earlier time frames may not be economically feasible for the United States because it may not have sufficient electronic records for some of the time frames. These concerns appear to arise from a review of the *Cobell* litigation. Respectfully, the *Cobell* litigation involved millions of individuals and millions of accounts. Here, there is admittedly only one account. Accordingly, an accounting should be economically feasible even if the agency has to rely on paper records. However, in deference to the Court's opinion, it is economically feasible for the United States to account starting in 1972 because that is the time frame for which the United States maintains electronic records. Therefore, while Plaintiffs maintain that they are entitled to an accounting to the "earliest possible date," under a consideration of economic feasible, the order should be amended at least to require an accounting as far back as 1972.

> The Interior Department reads limitations into [the statute's] words that are not there. The reference to the Act of June 24, 1938 does not set a start date for the accounting. All it does is identify the funds for which Congress has mandated an accounting. The parties' hunt for the meaning of the 1994 Act's reference to the 1938 Act was diverted by the Court of Appeals' notation, in Cobell VI, that all funds means all funds, irrespective of when they were deposited (or at least so long as they were deposited after the [1938] Act, [25 U.S.C. 162a].

Cobell v. Kempthorne, 532 F. Supp. 2d 37, 93-94 (D.D.C. 2008) (*Cobell XX*) (footnotes omitted). *And see Fletcher II*, 730 F.3d at 1209 (BIA must "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).[6]

II. The Judgment Should Be Amended to Impose More Detailed Accounting Requirements on the Government.

Plaintiff's proposed Amended Judgment, setting forth the accounting requirements that Plaintiff believes to be necessary, is attached to their Rule 59 motion as Exhibit 1. The proposed Amended Judgment would cover the same general categories of

[6] It is noteworthy that the Tenth Circuit omits reference to "the Act of 1938" -- referring only to the U.S.C. section where that act is codified -- and does not even suggest, as does *Cobell*, that the accounting *might* be limited to the period post-dating 1938. Be that as it may, Plaintiffs have made clear here that they do not seek an accounting dating back to 1938, but rather to the earliest date at which records can be marshaled. Regardless of the opening date of the accounting, of course, Plaintiffs' right to recover damages is not delimited by the dates for which the Government accounts. *See Osage Tribe of Indians v. United States*, 93 Fed.Cl. at 20 (noting that "plaintiff [the Osage Nation] seeks to extrapolate the holdings of the Tranche One trial" to a broader period *and that* it is "undisputed that the government has consistently failed and refused to fill the gaps in the historical record, citing time and money concerns").

information, but would require more details. The devil, as the old saying goes, is in those details.

The proposed judgment speaks for itself concerning the type of detail that Plaintiffs maintain is in order. In general, Plaintiffs submit that the Government should be required not just to show what was received and disbursed, but to show how those respective amounts were determined, how the monies flowed through various treasury sub-accounts (so that it can be determined that all receipts in fact eventually found their way into the SOTTA)[7], what interest was credited in each such sub-account and in the SOTTA, and what amounts eventually were disbursed. And, Plaintiffs respectfully submit, it is fundamental that all monthly or quarterly statements should show opening and closing balances.

An accounting should not be a conclusory statement of "dollars in and dollars out," i.e., just a series of meaningless "black boxes." The most basic requirement of an accounting is that it show detailed "backup" data that allows the beneficiary to determine whether the receipt amounts and disbursement amounts were the *correct amounts*. It is the kind of information that auditors are entitled to when they audit, e.g., the joint accounting records of oil and gas operating companies.[8]

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[7] In hopes of aiding understanding of the "money flow," Plaintiffs have attached as Exhibit 2 a diagram that attempts to capture the flow of funds from first Treasury receipt to disbursement into (i) an IIM account, or (ii) directly to a headright owner who has elected to receive cash. It should be noted that, in some cases, there are "split-outs" that take place between initial receipt into the Treasury comingled account and the SOTTA.

[8] The Plaintiff's proposed Amended Judgment has been fashioned in consultation with Plaintiffs' energy industry accounting expert and with reference to a body of legal

Plaintiffs believe that it might be helpful to the Court to look at particular category of accounting information that requires "backup" detail in order to be meaningful. At hearing, the Court and counsel discussed briefly the importance of volume and price information in oil and gas accounting. Requiring disclosure of, *inter alia*, volumes taken and prices paid, rather than disclosure merely of "receipts," is not oppressive. On the contrary, such information is indispensable to a *meaningful* accounting. The Court of Federal Claims has explained, respecting the Osage Nation's claims against the Government relating to *this very account*, the SOTTA:

> The first two government breaches relate to the government's duty to collect oil royalties on behalf of the Osage Tribe in accordance with the regulations incorporated into all Osage oil leases. These regulations establish that royalties "may be expressed by the formula: Royalty Due = Royalty Rate x Volume x Royalty Value." The royalty rate is the fraction of oil produced at a given lease due to the Tribe as royalty; the volume is the gross number of barrels produced; and the royalty value is the dollar amount (calculated pursuant to the regulation) at which a royalty barrel is valued.

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literature and professional accounting standards that attempt to capture generally what a meaningful accounting should encompass. These include:

- "(Trust) Accounting: A Guide for Accountants Who Perform Fiduciary Accounting Services," reproduced at: http://www.boa.virginia.gov/Docs/AICPAPracticeGuideForFiduciaryTrustAccounting.pdf
- The Uniform Trust Code, reproduced at http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf (especially at § 813)
- 25 U.S.C. §162a(d) and 25 U.S.C. § 4011(A) and 4011(B)
- The United States Securities and Exchange Commission "Industry Guide 2 – Disclosure of Oil and Gas Operations," reproduced at: https://www.sec.gov/about/forms/industryguides.pdf

Osage Tribe of Indians v. United States, 93 Fed. Cl. 1, 9 (Fed. Cl., April 30, 2010). So "royalty value" equates with price – not the price actually collected, but the price *that should have been collected* under the regulations, i.e., the highest offered price. *See generally Osage Tribe of Indians v. United States*, 96 Fed. Cl. 390 (Dec. 29, 2010)(the last substantive opinion in the *Osage Tribe of Indians* litigation). Plainly the Government could not have accounted to the Nation – and it cannot now "account" to Plaintiffs -- by simply disclosing "receipts." The receipts, standing alone, constitute a black box. Those receipts come into the SOTTA either directly from a producer or purchaser[9] or from another U.S. Treasury account into which the payment is first received. To know whether *the right amount* has been collected, the royalty owner must know, *at least*, what volumes were purchased at what price.[10] Undercollection of revenue was the key issue in *Osage Tribe of Indians* and is the breach first listed by the Court of Federal Claims. *See* 93 Fed. Cl. at 9 (listing breaches).[11] As counsel discussed with the Court at hearing, the Government itself (i) should have been demanding the monthly sales detail (volume,

[9] Historically, crude purchasers have remitted royalties directly to royalty owners while natural gas purchasers have remitted 100% to the producer/lessee/seller, who in turn remits 1/8 (or other royalty amount) to the royalty owner.

[10] To take a simple example, if the spot price of gas in Osage County, Oklahoma were $2.20 per mcf for a particular month and the seller sold 1,000 mcf, the seller's gross revenue would be $2,200.00 and the royalty would be $275.00 (i.e., 1/8 of the gross). A report that showed a receipt of $275.00 would be meaningless if the issue is price undercollection. That same amount would also be received if the seller sold 2,000 mcf at only $1.10 – *half the market price*. The latter collection would be a gross undercollection and a breach of fiduciary duty to the beneficiary. The former collection would not be, yet the two "receipts" are exactly the same.

[11] In fact, the first two breaches listed concern undercollection of revenue. The second breach relates to undercollection during periods of federal price controls.

price, adjustments to price, tax withholdings, other deductions, etc.) from the remitting party (the producer or first purchaser, such as a pipeline company), and (ii) should have been passing that accounting information along to the IIM holders or headright owners who have elected to receive direct payments from the SOTTA. The Government should not be heard to protest that, since it has utterly failed in its obligation to account monthly (or at least quarterly), it should not have to provide a *meaningful* accounting now because . . . well, because too many months (hundreds or thousands of months) have now gone by. That is the classic lament of the trustee who seeks to visit the consequences of its own misfeasance upon the beneficiary.

III. This Court Should Not Stay the Amended Judgment and Should Deny any Government Motion Seeking Such Relief.

The Judgment includes a "pre-granted" stay of the accounting order contained therein, pending any appeal. Plaintiffs respectfully suggest that the Court should eliminate such a pre-granted stay order from an Amended Judgment and should deny any motion for stay advanced by the Government.

The Government, of course, will not be required to post a supersedeas bond if it appeals the Amended Judgment. Fed.R.Civ.P. 62(e). But a stay (aside from the automatic 14-day stay of Rule 62(a)) is not automatic. In entering its accounting order and judgment, the Court will have done nothing more or less than exactly what the Court of Appeals ordered this Court to do. If the Court of Appeals itself believes that this Court has somehow exceeded (or fallen short of) the scope of the remand order in *Fletcher II*, *that* Court may issue a stay upon motion. *See* Fed.R.App.P. 8(a)(2). Requiring the

Government to ask the Court of Appeals for relief seems particularly appropriate here given that Court's expressed impatience with the pace of this litigation. *See* 730 F.3d at 1215 (noting the fact that this litigation is "about to reach its teenage years").

CONCLUSION

For the reasons advanced herein, this Court should grant this motion and modify Plaintiffs' Judgment in conformity with the form of Amended Judgment proposed by and attached to this motion. The Court, in addition, should deny any Government motion to stay the effect of the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on that on this 27th day of January, 2016, 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:

Joseph Hosu Kim
Cheryl L. Baber

s/Dallas Strimple
Dallas Lynn Dale Strimple