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

WILLIAM S. FLETCHER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 02-CV-00427-GKF-PJC**
	)	
THE UNITED STATES OF AMERICA, et al.,	)	
	)	
	)	
Federal Defendants.	)	

FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT

Plaintiffs have moved, pursuant to Federal Rule of Civil Procedure 59(e), to alter or amend the Court's Judgment of December 30, 2015 [ECF No. 1281]. See ECF No. 1289, Plaintiffs Motion to Alter or Amend Judgment and Brief in Support ("Plaintiffs' Motion"). The United States of America, the Department of the Interior, Sally Jewell (in her official capacity as Secretary of the Interior), the Bureau of Indian Affairs, and Larry Roberts (in his official capacity as Acting Assistant Secretary – Indian Affairs, United States Department of the Interior) (collectively, "Federal Defendants"), hereby respond.[1]

STANDARD OF REVIEW

A Rule 59(e) motion to alter or amend judgment is warranted where there is (1) an intervening change in the controlling law, (2) new evidence previously unavailable, or (3) the need to correct clear error or prevent manifest injustice. Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc., 693 F.3d 1195, 1212 (10th Cir. 2012); Servants of the Paraclete v. Does,

[1] Federal Defendants have also moved, pursuant to Federal Rule of Civil Procedure 59(e), to alter or amend the Court's December 30, 2015 Opinion and Order [ECF No. 1280] and accompanying Judgment [ECF No. 1281]. See ECF No. 1285, Federal Defendants' Rule 59(e) Motion to Alter or Amend the Judgment.

204 F.3d 1005, 1012 (10th Cir. 2000); Grayson v. DynaTen Corp., No. 10-CV-795-TCK-PJC, 2012 WL 1995284, *1 (N.D. Okla. May 31, 2012) (unpublished)[2]. A motion to alter or amend judgment is not appropriate, however, to revisit issues already addressed or to advance arguments that could have been raised in prior briefing. Servants of the Paraclete, 204 F.3d at 1012; Grayson, 2012 WL 1995284 at *1; see also Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008) ("Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment'.") (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1 at 127-28 (2d ed. 1995); footnotes omitted).

ARGUMENT

Plaintiffs' Motion is improper under Rule 59(e) for at least two reasons. First, Plaintiffs' Motion improperly seeks to revisit or re-argue issues already addressed and decided, both by this Court and the Tenth Circuit. Second, Plaintiffs' Motion addresses issues clearly vested to this Court's discretion, without providing any basis for concluding that this discretion has been abused. Neither is a proper basis for the relief that Plaintiffs seek. See, e.g., Devon Energy Prod. Co., 693 F.3d at 1212-13; Servants of the Paraclete, 204 F.3d at 1012; Grayson, 2012 WL 1995284 at *1. See also Transcript of Hearing on October 23, 2015 [ECF No. 1279] at 102 ("THE COURT: . . . I don't mean to suggest that we should relitigate that which has already been presented . . . ."); id. at 103 ("THE COURT: . . . I'm not asking for motions for new trial as to things that have not been argued.").

[2] Unpublished decisions are not precedential, but may be cited for their persuasive value. *See* Fed. R. App. 32.1; 10th Cir. R. 32.1.

I. THE TEMPORAL SCOPE OF THE ORDERED ACCOUNTING IS PROPER

The Judgment provides for an accounting that runs "from the first quarter of 2002 until that last available quarter[.]" Judgment at 1. Plaintiffs' Motion seeks to expand the temporal scope to the "'earliest possible date,' but not later than first quarter of 1973 . . . ." Plaintiffs' Motion, Ex. 1 at 2 (¶ 1). The question of whether 2002 was an appropriate time frame for the accounting has already been litigated. For example, at the last hearing in this case, this Court asked Plaintiffs:

> Why shouldn't I hold the plaintiffs to your statement to the circuit that you're only looking to an accounting back to 2002?

Transcript of Hearing on October 23, 2015 at 8. Plaintiffs were given an opportunity to then argue otherwise. Id. at 8-10; see also id. at 93-94.[3] The Judgment reflects that the Court was not convinced, perhaps because it found Plaintiffs' arguments difficult to follow -- "like trying to nail Jell-O to a wall." Id. at 10-11. However, given that the accounting claim did not even exist until 2006, see id. at 12-13, 64, there was nothing improper with the Court limiting the ordered accounting to 2002 -- when the first version of this case (as a voting rights case, id. at 13) was filed. As Plaintiffs acknowledge, the Tenth Circuit granted this Court "considerable discretion" in fashioning any accounting on remand. Plaintiffs' Motion at 7 (quoting Fletcher v. United

[3] This argument included a discussion of Plaintiffs' arguments on this point before the Tenth Circuit, although Plaintiffs appeared to try to limit this to their 2005 Tenth Circuit oral argument. See Transcript of Hearing on October 23, 2015 at 9-10. But this issue of the time period for an accounting was also addressed during the most recent appeal of this case in 2013, where this 2002 date was specifically discussed. See Transcript of Tenth Circuit Hearing on March 5, 2013 at 35 (Plaintiffs discussing the requested accounting as, "in terms of time, I think we'd like to see it back to the filing of the complaint in 2002"); id. at 41 (Tenth Circuit confirming that "I thought you were just going to the filing of the complaint"); see also id. at 16 (Plaintiffs disclaiming any "accounting" "going back to 1906"). These statements make clear that Plaintiffs (1) had several opportunities to fully litigate this issue before this Court and before the Tenth Circuit and (2) agreed that an accounting dating back to 2002 was appropriate. They cannot now seek to relegate this very issue by way of a Rule 59(e) motion. See, e.g., Exxon Shipping, 554 U.S. at 486; Servants of the Paraclete, 204 F.3d at 1012; Grayson, 2012 WL 1995284 at *1.

States, 730 F.3d 1206, 1215-16 (10th Cir. 2013)); see also Transcript of Hearing on October 23, 2015 at 24 ("I know the Tenth Circuit has left it to this court to determine the proper scope of the accounting"). Further, Plaintiffs provide no argument as to why this "considerable discretion" has been abused, or more generally that this decision needs to be altered or amended based on (1) an intervening change in the controlling law, (2) new evidence previously unavailable, or (3) the need to correct clear error or prevent manifest injustice. See, e.g., Servants of the Paraclete, 204 F.3d at 1012; Grayson, 2012 WL 1995284 at *1.

Plaintiffs' asserted support for expanding the temporal scope of the accounting rests largely upon the notion that "the Indian Trust Management Reform Act of 1994 ('the 1994 Act') contains no express or implied temporal limitations on the required accounting scope." Plaintiffs' Motion at 3; see also id. at 9-10; 1994 Act, Pub. L. No. 103-412, 108 Stat. 4239 (codified as amended at 25 U.S.C. §§ 4011-4061). But, again, this is simply part of this issue that Plaintiffs have already been given an opportunity to address. See Transcript of Hearing on October 23, 2015 at 14-19. And again, Plaintiffs' arguments may have been difficult to follow. See id. at 16 ("THE COURT: Well, there again, there's Jell-O . . . ."). Plaintiffs' interpretation of the 1994 Act is incorrect.[4] Ultimately, however, that is beside the point as, even if Plaintiffs' interpretation of the 1994 Act is correct, it ignores this Court's "considerable discretion" to fashion its accounting remedy by, among other things, having it begin in 2002. Fletcher,

[4] Section 4011 of the 1994 Act set forth certain accounting requirements that are only prospective in nature. In any event, given the six-year statute of limitations (28 U.S.C. § 2401(a)), claims for an accounting meeting these requirements could not reach back before 1996, even assuming that the accounting claim first filed in 2006 could relate back to Plaintiffs' 2002 complaint. Thus, Plaintiffs' Motion cannot seek to have the accounting begin on or before 1973. See Plaintiffs' Motion, Ex. 1 at 2 (¶ 1). Of course, Plaintiffs may attempt to again argue that this statute of limitations has been somehow tolled, perhaps by certain "Appropriations Acts." But Plaintiffs may not relitigate this issue in their Rule 59(e) motion. See, e.g., Exxon Shipping, 554 U.S. at 485 n.1; Servants of the Paraclete, 204 F.3d at 1012; Grayson, 2012 WL 1995284 at *1.

730 F.3d at 1215-16. Plaintiffs' Motion has provided no basis for altering or amending this Court's Judgment based on an abuse of this Court's "considerable discretion," or any of the Rule 59(e) standards. See, e.g., Servants of the Paraclete, 204 F.3d at 1012; Grayson, 2012 WL 1995284 at *1.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE JUDGMENT'S ACCOUNTING REQUIREMENTS SHOULD BE AMENDED

In addition to seeking to amend the time frame for the ordered accounting, Plaintiffs seek to amend the Judgment with respect to almost every other specific requirement set forth therein. Plaintiffs' Motion at 10-14. As with the issue of the time frame for the accounting, however, the issue of the level of detail to be provided in the accounting has been vested to this Court's "considerable discretion," Id. at 7; Fletcher, 730 F.3d at 1214-15, and has already been litigated. Plaintiffs' Motion, therefore, provides no basis for amendment or alteration of the Judgment.

Plaintiffs have already been given the opportunity to address the particulars of the ordered accounting. See, e.g., Transcript of Hearing on October 23, 2015 at 72 ("THE COURT: But in order to fashion an accounting, the court has to have a sense, and a fairly particularized sense, and understanding of what's needed to pursue that which you want to pursue."); id. at 73 ("THE COURT: So try to be reasonable here and tell me what you really need."). This Court was clear that "I'm glad to see the Tenth Circuit agreed that this case doesn't call for a green eyeshade death march. I'll let you do that in other cases." Id. at 64. And Plaintiffs explicitly disclaimed any need to present any further evidence on this issue:

> THE COURT: * * * Insofar as this court does not believe that it will be ruling in favor of the government in terms of its position that the plaintiffs are only entitled to an accounting as to the IIM accounts, is there a need to call witnesses here?
>
> MR. AAMODT: No, your Honor. We see no need to call the witnesses as long as the court is comfortable relying on the papers that we provided.

Id. at 63. Plaintiffs may not relitigate this issue in their Rule 59(e) motion. See, e.g., Exxon Shipping, 554 U.S. at 486; Servants of the Paraclete, 204 F.3d at 1012; Grayson, 2012 WL 1995284 at *1.

Because this Court explicitly asked Plaintiffs to state "a fairly particularized sense" of "what [they] really need" from the ordered accounting, Transcript of Hearing on October 23, 2015 at 72, 73, to help guide this Court's "considerable discretion," Plaintiffs cannot now be heard to complain that the Judgment should be altered or amended to serve some purpose that Plaintiffs continue to fail to articulate. They correctly note both that their "'misdistribution claim' is no longer active," Plaintiffs' Motion at 2, and that this Court may have assumed "that this is [Plaintiffs'] objective" for the accounting, id. (alteration in original; quoting the Opinion and Order at 24), but they still neither claim nor disclaim whether the ordered accounting should or should not be shaped with this possible future objective in mind. Rather, they simply propose an Amended Judgment, and merely state that "[t]he proposed judgment speaks for itself concerning the type of detail that Plaintiffs maintain is in order." Id. at 11 (emphasis added). That is a questionable proposition, although perhaps it can be inferred that Plaintiffs instead seek to have the ordered accounting allow them to relitigate the tribal trust case. See, e.g., id. (perhaps seeking to support a damages claim by having the accounting "show how those respective amounts [for deposits to and disbursements from the tribal trust account] were determined"); id. at 13 (seeking "[t]o know whether the right amount has been collected," based "not [on] the price actually collected, but the price that should have been collected under the regulations, i.e., the highest offered price") (emphasis in original).

Moreover, to the extent that Plaintiffs seek to have the ordered accounting go beyond the dates and amounts of deposits and disbursements, and establish the "how" or "why" for these

transactions, the Tenth Circuit has already addressed this issue and rejected such a view of an accounting:

> That's not an accounting. An accounting is, here's a list of what I paid for and to whom. And then, as you point out, then if there's some additional claim that they've acted in bad faith, that's on you to come forward with. An accounting is traditionally with -- from a trustee is who did you pay and how much and when, isn't it?

Transcript of Tenth Circuit Hearing on March 5, 2013 at 17 (rejecting Plaintiffs' contention that "that the United States must demonstrate through the records that it has, that it has in good faith paid the right people the right amount of money"); see also id. at 18 ("That's not an accounting."). To be sure, this case "does seem to morph a lot[,]" Transcript of Hearing on October 23, 2015 at 42, and a purported accounting to determine whether Federal Defendants have "paid the right people" may relate only to the "misdistribution claim." But the Tenth Circuit's rejection of using an accounting claim to determine whether Federal Defendants have "paid . . . the right amount of money" fully rejects Plaintiffs' current claim for an accounting "[t]o know whether the right amount has been collected." Compare Transcript of Tenth Circuit Hearing on March 5, 2013 at 17 (emphasis added) with Plaintiffs' Motion at 13 (emphasis in original).[5]

Furthermore, not only are Plaintiffs improperly seeking to relitigate this issue, they completely mischaracterize the tribal trust case in the Court of Federal Claims regarding this issue. The tribal trust case was not (and, in the Court of Federal Claims, could not have been) an

[5] Indeed, both this Court and the Tenth Circuit have premised the duty to account on 25 U.S.C. § 4011(a) which states, "The Secretary shall account for . . . 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 [the Act of June 24, 1938 (25 U.S.C. § 162a)]" (emphasis added). See Opinion and Order at 6-7, 9-13, 18, 20 (quoting and citing Fletcher, 730 F.3d at 1209-16). The various aspects of the "accounting" that the plaintiffs request have nothing to do with actual funds that are actually held in trust.

accounting case. Rather, as Plaintiffs at least at times correctly recognize, that case involved damages for adjudicated breach of trust claims. See Transcript of Hearing on October 23, 2015 at 70-71 ("THE COURT: But in Cobell, as Mr. Aamodt conceded to the Tenth Circuit, the court first decided that there was a claim and then granted an accounting essentially as discovery for that claim. That's not the situation here. MR. JORGENSON: Right."). To the extent that there is any "accounting" in the Court of Federal Claims case, it is only an "accounting in aid of judgment." These are legally distinct concepts, as Plaintiffs explicitly recognized:

> MR. AAMODT: Finally, yes, I think that as co-counsel pointed out, the Osage Tribe case was a damages case. As he said at the very beginning of his oral argument today, he said -- or in response to your early questions, he said the Osage Tribe case was a case where the tribe sought damages and there was only an accounting for the purposes of supporting the damages claim, right? So it's a different procedure in the Court of Claims. Here, this is an accounting claim that's being made in this case. It is not the same claim that was made in the Osage Tribe case because the Osage Tribe case was a damages case and not an accounting claim case.

Id. at 99-100 (emphasis added).

Plaintiffs similarly err, as a matter of fact, when they wrongly claim that the tribal trust case held that "the Government has never provided any accounting" to the Osage Nation. Plaintiffs' Motion at 6 (emphasis in original). As noted above, whether the United States had breached any duty to account to the Osage Nation was simply not at issue in that Court of Federal Claims case.[6] Plaintiffs likewise wrongly claim that the settlement of the tribal trust case "stipulate[d]" that "the Government did not in fact account to the tribe before settling with the tribe." Plaintiffs' Motion at 8. On the contrary, the settlement agreement plainly stated that there was "No Admission" and that "the Osage Tribe accepts, as a matter of settlement and

[6] There was an accounting claim brought by the Osage Nation in the United States District Court for the District of Columbia, but that case was dismissed. See Osage Tribe of Indians of Oklahoma v. United States, No. 1:04-cv-00283-TFH (D.D.C. filed Feb. 20, 2004).

compromise, [the most recent Statement of Account for the tribal trust account] as constituting the accounting of the Osage Tribal Trust Account that is required by law through September 30, 2011." ECF No. 1212-1 at 9, 14-15.

The purportedly illustrative diagram Plaintiffs submit as Exhibit 2, "that attempts to capture the flow of funds," is both troubling and unhelpful. Plaintiffs' Motion, Ex. 2; id. at 11 n.7. It is unsupported by the administrative record in this case or by any other citations for support. This Court excused Plaintiffs' earlier misunderstandings in this regard. See Opinion and Order at 11 n.6 (noting Plaintiffs' incorrect belief "that segregation and distribution were separate steps" because "Plaintiffs had no way of knowing this" until "after the government's submission of the administrative record and its brief on the merits . . . .").[7] But there is no such excuse now. To the extent that Plaintiffs are only seeking an accounting for any accounts or sub-accounts structured as in Exhibit 2 to Plaintiffs' Motion, they have returned this case to the posture Federal Defendants always presumed, and this case can be quickly brought to a close because there are in fact no such accounts to serve as a basis for an accounting claim.

To the extent that the Judgment is amended "simply to order the government to share with the plaintiffs something like it has already shared with the Nation," Plaintiffs' Motion at 7-8 (quoting Fletcher, 730 F.3d at 1215-16), this case can also be brought to a relatively quick close. As noted in Federal Defendants' Rule 59(e) Motion to Alter or Amend the Judgment, these Statements of Account for the tribal trust account have already been provided to Plaintiffs starting from 2006, and can be provided back to 2002 relatively quickly.[8] By contrast, Plaintiffs

[7] Federal Defendants do not concede that this is correct, but this is irrelevant in the limited context of this Rule 59(e) motion.

[8] Moreover, to the extent that it may be helpful to bring this case to a conclusion, Federal Defendants note that, to the extent that the Judgment is amended to provide Plaintiffs with the

are correct that the alteration or amendment to the Judgment that they seek will dramatically expand the time and expense required to complete the accounting and truly bring this case to a close. Federal Defendants presently estimate that the requirements of the proposed Amended Judgment could require approximately nine years of work, at a cost of approximately $19 million.

CONCLUSION

For these reasons, Federal Defendants respectfully request that this Court decline to enter Plaintiffs' proposed Amended Judgment, and accordingly deny Plaintiffs Motion to Alter or Amend Judgment.

RESPECTFULLY SUBMITTED this 17th day of February, 2016.

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same statements of account that are provided to the Osage Nation, Federal Defendants could provide Plaintiffs with such statements, within the time frame ordered, for a greater time period. Federal Defendants presently expect that these statements will contain similar information to that noted in their own Rule 59(e) motion at least through 1999. Prior to 1999, investigation may be required to determine whether those statements provide the same or different types of information, and to the extent that searches of paper records are required, it is presently unclear whether older statements could be provided in the time frame ordered.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2016, I electronically transmitted the foregoing Federal Defendants' Response in Opposition to Plaintiffs' Rule 59(E) Motion to Alter or Amend Judgment to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

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