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

COME NOW Plaintiffs and submit this reply brief addressing Federal Defendants' Response in Opposition to Plaintiffs' Rule 59(3) Motion to Alter or Amend Judgment [Doc. No. 1294]("Government Response"). Plaintiffs' motion and opening brief filed January 27, 2016 [Doc. No. 1289] is called herein "Plaintiffs' Rule 59 Motion." The acronym "SOTTA" herein refers to the "Segregated Osage Tribal Trust Account" and all other terms defined in Plaintiffs' Rule 59 Motion have the same meaning herein.

ARGUMENT AND AUTHORITIES

I. A Rule 59(e) Motion is a Proper Vehicle for Asking a District Court to Reconsider the Contents of a Final Judgment or to Correct its Own Errors.

The Government advances a pinched reading of Rule 59(e) that would exclude both the Plaintiffs' Rule 59(e) Motion *and* the Government's *own* Rule 59(e) motion. Thus the Government says -- citing cases widely afield from the unique history and current procedural posture of this litigation – that a motion to alter or amend a judgment is warranted only 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." Government Response at 1.[1]

The Government's own protestations about the difficulty of timely complying with the Court's accounting order are not "evidence," much less "newly discovered evidence." And the Government has identified no "intervening change in the controlling law." Hence it is not clear which of these three -- supposedly narrow -- categories of allowable grounds encompasses the Government's own motion. Plaintiffs suggest that the applicable category for the Government's Rule 59(e) motion might be "clear error" or maybe even "manifest injustice." In any event, Plaintiffs – in contrast with the Government's draconian take on Rule 59 -- do not maintain that the Government's Rule 59(e) motion is procedurally *barred.*

The truth is that Plaintiff's Rule 59(e) Motion is more pointedly addressed to a "clear error" than is the Government's Rule 59(e) motion. The broader truth is that the functions of a Rule 59(e) motion are not nearly so circumscribed as the Government suggests. Thus "Rule 59(e) . . . does include motions for reconsideration." 11 Wright Miller and Kane, FEDERAL PRACTICE AND PROCEDURE §2810.1 at p. 122 (West 1995 and Supp. 2015)(citing Courts of Appeal and District Court decisions from seven circuits,

[1] The Government cites *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195 (10th Cir. 2012) and *Servants of the Paraclete v. Does*, 204 F.3d 1005(10th Cir. 2000). *Devon Energy* involves Devon's quixotic attempt to get a state-law dispute between nondiverse litigants into federal court. The District Court dismissed Devon's declaratory judgment claims for lack of jurisdiction. Devon's Rule 59 motion—putatively predicated on "new evidence"—may as well have been titled "Motion for Second Bite at the Apple." *Servants of the Paraclete* is an installment in the sad saga of sexual abuse by Catholic clergy. There, Rule 60(b) and 59(e) motions were filed more than five months after the judgment in the litigation. Plaintiffs commend to the Court the question of whether *Servants of the Paraclete* has any bearing on the Rule 59(e) motions before the Court here.

including district court decisions within this circuit). More particularly, Rule 59(e) is an appropriate vehicle to advance an "elaboration of a ground *already set out in the original motion*." *Edward Gray Corp. v. Nat'l Union Fire Ins. Co.*, 94 F.3d 363, 367 (7th Cir. 1996)(emphasis added). "The rule essentially enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995) (reversing denial of Rule 59(e) motion).

The Seventh Circuit's "appellate burden" point is especially apt here. Plaintiffs are confident that this Court is endeavoring to heed the directives of the Tenth Circuit in *Fletcher v. United States*, 730 F.3d 1206 (2013) ("*Fletcher II*"). This Court has expressly enlisted the aid of the parties in that quest. Thus:

> I'm going to endeavor, if I can, to issue a definitive order and judgment . . . but I will not take offense if you file -- if both of you were to file motions for new trial to correct what you contend need[s] to be corrected.
>
> . . . I know there's a provision that talked about clear error, so obviously a motion for new trial would allow you to raise such an argument so obviously the law would permit that. But as officers of the court, I want to make certain that we get to the circuit something that they can hopefully render a definitive decision on.

Tr. of Oct. 23, 2015 hearing at 102-103.

Fletcher II gives these instructions:

> A green eye-shade death march through every line of every account over the *last one hundred years* isn't inevitable: the trial court may focus the inquiry in ways designed to get the plaintiffs what they need most without imposing gratuitous costs on the government.

> [T]he 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 a traditional equitable accounting includes, after all, some degree of information about both receipts and disbursements. * * * And as we've seen, § 4011(a) guarantees an accounting, not half of one.
>
> On the other hand, equity does not require an accounting so punctilious, so expensive, and so laboriously long in coming that the final volume is released with great fanfare only after [a very long time has passed] and only the lawyers have grown fat.

730 F.2d at 1214-15 (emphasis added).

1. Plaintiffs' Proposed Accounting Order Would not Usher in a Green-Eye-Shade Death March.

Plaintiffs have not asked for a 100-year accounting, nor have they asked the Government to account for "every line of every account." Indeed Plaintiffs have tailored their proposed accounting order to (i) the time period that was covered in the tribal trust case itself (*Osage Tribe of Indians v. United States*, 93 Fed.Cl. 1 (Fed.Cl., Apr. 10, 2010), hereinafter "Tribal Trust Case") and (ii) the receipts-and-disbursements data that is minimally necessary to make the BIA accounting meaningful. Regarding temporal scope, *see* the material cited in Plaintiffs' Rule 59 Motion at 8 (quoting passages from the Tribal Trust Case.[2] Regarding the level of detail that Plaintiffs seek in an amended accounting order, the Government offers no real basis for its objection to the additional

[2] Plaintiffs do not question that this Court has discretion to determine the scope of an accounting. But the Court has the same quantum of discretion to alter or amend its accounting order in the particulars that Plaintiffs request as it had to determine the scope of the original accounting order now under discussion. This discussion is one that this Court expressly invited.

detail sought by Plaintiffs other than to suggest that compliance will take a long time and be expensive. *See* Government Response at 10.

The Government submits neither sworn testimony nor any kind of study to support its parade of horribles that supposedly will ensue if Plaintiffs' proposed accounting order is entered. Apparently the Court is supposed to accept these statements as some sort of unrebuttable truth. The Court has the power to order the Government to provide whatever accounting the Court believes appropriate within some reasonable time set by the Court. Again the Government is the trustee here. Its unilateral, unsupported protestations about time and expense should not be accepted at face value. To ask an obvious question: if it costs $19 million to produce the accounting in nine years, what would it cost to produce the accounting in one year? $171 million? Or wouldn't the total cost of a more comprehensive accounting rendered in, say, a year's time, be much less than $171 million, due to the decline in *incremental* costs associated with adding additional quantities of data? Plaintiffs respectfully suggest that, if the Government had been properly accounting for all trust funds, everything that Plaintiffs have requested -- or a reasonable substitute containing the same information at the same level of detail -- would be readily available.

III. The Government's Other Responses to Plaintiffs' Rule 59 Motion Lack Merit.

Apart from its procedural attack on Plaintiffs' Rule 59 Motion and its unilateral and factually empty pronouncement about the time and expense required to perform an accounting, the Government advances four other arguments that merit a brief reply. These are the Government's assertion (or at least suggestion): (i) that the Government in

fact accounted to the Osage Nation ("the Tribe") in conjunction with the settlement of the Tribal Trust Case (an issue counsel for the Government has floundered back and forth on); (ii) that Plaintiffs here seek improperly to "relitigate" the Tribal Trust Case; (iii) that there is a distinction between an accounting case and a damages case that somehow delimits this Court's power to order a more comprehensive accounting; and (iv) that the Plaintiffs' demonstrative money-flow diagram is "troubling."[3]

A. *There was been no accounting to the Tribe that is accessible to Plaintiffs.*

The Government states that "the [Tribal Trust Case] settlement agreement plainly stated that there was 'No Admission' and that 'the Osage Tribe accepts, as a matter of settlement and 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." Government Response at pp. 8-9 (brackets in original). First, the "no admission" statement plainly is

[3] The Government also argues that the accounting period must be limited to the six-year period before filing, citing the general six-year statute of limitation that applies to all non-tort actions against the United States provided by 28 U.S.C. § 2401(a) (the tort limitation period is two years). It is telling that the Government relegates this spurious argument to a footnote. The Government's position contradicts *Fletcher II*'s point-blank holding that there is *no limit* on the temporal scope of the accounting. *See* Plaintiffs' Rule 59 Motion at 9 (quoting *Fletcher II* verbatim). Indeed if this Government argument were valid, none of the federal court Indian trust claims (e.g., the Tribal Trust Case) could have proceeded (i) on damages claims covering much longer periods and (ii) requiring accountings for longer periods than six years before filing. In fact, 25 U.S.C. § 4011(a) provides that the Government is to "account for the daily and annual balance of *all funds*" held in trust for the benefit of an Indian beneficiary (emphasis added). Additionally, such accounting must be "as full and complete [ ] as possible" and "to the earliest possible date." 25 U.S.C. § 4044 (2). Plainly "earliest possible date" does not equate with a date that is "six years" before the accounting action is filed. 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.

for the benefit of the *Government itself*, making it clear that "the payment of the Tribal Trust Settlement Amount" does not constitute a Government admission of liability to the Tribe. It has no bearing on the question of whether an actual accounting was provided. Second, the key phrase in the second clause of the passage quoted above is "as a matter of settlement and compromise." This is far from a stipulation that the Government tendered an *actual* accounting for the entire period encompassed in the Tribal Trust Case. This is made clear by an examination of the "Exhibit 6" that the Government chooses to reference by the substitution of brackets for the number of the exhibit. *See* Government Response at page 9.

Exhibit 6 to the Tribal Trust Case settlement agreement [Doc. No. 1212-1] is truly a black box, a single month's statement for September of 2011 that shows receipts and disbursements for that month and a resulting account balance at 9-30-16. It scarcely sets forth, by any definition, an *accounting*. As Plaintiffs' Rule 59 Motion showed, the Tribe simply stipulated away its right to an accounting, accepting some $380 million *in lieu of* such an actual accounting. Hence, in Paragraph 7(a)(2) of the settlement agreement, the Tribe *waives* "all claims regarding the United States' obligation to provide a historical accounting or reconciliation of the Osage Tribal Trust Account and the Other Osage Accounts or the United States' fulfillment of such obligation."[4]

[4] This is not to suggest that documents sufficient to constitute an accounting were not prepared and/or reviewed by the Tribe. *See Fletcher II* at 1215 (suggesting that, if there *was* an accounting, it should be provided to Plaintiffs). But those documents, if they exist, are not of record and Plaintiffs are not required to take the Government's word for what the documents showed. Indeed the Government has never told this Court what these putative documents showed.

Finally on this point, the Government's suggestion that the Tribe received and accepted an accounting as adequate contradicts the Government's own statements directly to this Court. Thus:

> What happened in the tribal trust case was their claim for an accounting was exhausted or completed because they settled it. They didn't settle it by receiving an accounting and saying it was acceptable, they settled their claim before an accounting by accepting funds . ..

Transcript of Hearing held herein on June 24, 2104 [Doc. 1223] at p. 31, line 24 to p. 32, line 4 (statements of Mr. Kim).

B. *Plaintiffs are not barred from "relitigating" issues litigated in the Tribal Trust Case.*

The "relitigation" issue is a red herring. Plaintiffs would not be barred from "relitigating" accounting issues "litigated" in the Tribal Trust Case even if those issues were actually litigated *among the parties to that case*. That is the core of *Fletcher II*, which makes clear that Plaintiffs hold *independent and separate* rights in the SOTTA that the Tribe could not "litigate" (or, obviously, *settle*) on behalf of these individual headright owners. Because Plaintiffs were not parties to the Tribal Trust Case – and its interests were not represented by any litigant in the Tribal Trust Case – even a *judgment* in that case could have no res judicata effect on Plaintiffs. *King v. Union Oil Co.*, 117 F.3d 443, 445 (10th Cir. 1997) ("To apply the doctrine of res judicata, three elements must exist: (1) a judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits"). Plainly two

of the three *res judicata* elements necessary to preclude "relitigation" are missing here (the first two), if not all three.[5]

C. *Federal court treatments of accounting issues within damages cases are relevant here.*

It is not clear to Plaintiffs exactly how the Government's distinction between an accounting case and damages case is pertinent at this procedural juncture. Among others, the United States Court of Appeals for the Tenth Circuit apparently fails to appreciate the significance of this distinction. Thus "this case [i.e., the Fletcher case] may be like *Cobell* in the sense that it involves a claim for an accounting . . .." *Fletcher II*, 730 F.3d at 1215. Both *Cobell* and the Tribal Trust Case were damages cases in which trial courts ordered accountings as a necessary step in the process of ascertaining damages. This litigation, in practical effect, is a bifurcated case in which the accounting step will occur in this court and a damages claim will proceed in a separate action in this or another federal court. Among such courts are the Court of Federal Claims, which presided over both *Cobell* and the Tribal Trust Case.

D. *Plaintiffs' diagram is a fair representation of how headright owner monies should be handled from collection to disbursement.*

The Government takes issue with what is represented in Plaintiffs' Exhibit 2 diagram – a purely demonstrative exhibit – complaining that the diagram is not only

[5] And, of course, the Government and the Tribe itself successfully opposed intervention by any headright owners in the Tribal Trust Case, thereby assuring that the Government might one day have to "relitigate" these issues with headright owners. In addition, the Government – as discussed in the next section of this brief – takes the position that "accounting cases" and "damages cases" are apples and oranges. Hence it is difficult to see how the litigation of an apple could ever constitute the "relitigation" of an orange.

"unhelpful" but indeed "troubling." Government Response at 9. The Government is troubled, Plaintiffs suggest, because it dislikes what the diagram accurately depicts. When the Government says "there are no such accounts" (i.e. separate subaccounts within the SOTTA), it can only mean that the Government has in fact failed to establish separately-numbered accounts for each interest holder (i.e., headright owners on the one hand and the Tribe *qua* Tribe on the other hand[6]), but has instead comingled all of these monies. Everyone understands that there are no separately numbered "subaccounts" within the SOTTA. But *Fletcher II* holds that the Government's duty to each headright owner begins immediately upon the Government's collection of any Indian monies, even if the initial deposit is into a commingled Treasury account. To discharge its fiduciary duties, the Government is required to treat every dollar collected as a dollar held in trust

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[6] The 1906 Act in fact sets forth these separate interests in two separate sections of PL 59-321. Sec. 4 "Second" of the Act provides that revenue collections:

> shall be placed in the Treasury of the United States to the credit of the *members* of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this Act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided.

(emphasis added). Meanwhile, Sec. 4 "Fourth" of the Act provides that:

> There shall be set aside and reserved from the [revenues] received . . . an emergency fund for the Osage tribe, which shall be paid out from time to time, upon the requisition of the Osage tribal council, with the approval of the Secretary of the Interior.

If the Government has a legitimate complaint about the diagram, it might be that it fails to depict the "subaccount" for the "Osage Boarding School and for other schools on the Osage Indian Reservation" provided for in Sec. 4 "Third" of the 1906 Act.

as it flows through the commingled Treasury account, into the SOTTA, and out of the SOTTA into the IIMs. The "subaccount" is a conceptual construct that aids understanding of how Indian monies held in trust should be treated from receipt though disbursement into IIMs or directly to individual headright owners. *See* Affidavit Of Chris Lopp at ECF. No. 1262-1, ¶ 6 at pp 5-6 (explaining subaccount concept).

CONCLUSION

For the reasons set forth herein and those set forth in Plaintiffs' Rule 59 Motion, such motion should be granted.

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CERTIFICATE OF SERVICE

This certifies that on the 10th day of March, 2016, I electronically transmitted the foregoing document to the Clerk of Court using the CM/ECF System. A Notice of Electronic Filing will be automatically transmitted to all persons who have entered their appearance as ECF registrants in this case.

/s/ J. David Jorgenson
J. David Jorgenson