IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CASE NO. 16-505

WILLIAM FLETCHER, ET AL.,

PLAINTIFFS-APPELLANTS,

V.

UNITED STATES, ET AL.,

DEFENDANTS-APPELLEES.

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Plaintiffs/Appellants ("Plaintiffs") submit this brief in reply to the Answering Brief of the United States, *et al.*, filed October 12, 2016 ("Government Brief"). Appellant's Opening Brief filed August 19, 2016 is called herein "Opening Brief" and all terms defined there have the same meaning in this reply brief. The Government's appendix is abbreviated "Govt. App." and the Plaintiff/Appellants' appendix is again abbreviated "Pltf. App."

INTRODUCTION

The Government mischaracterizes the accounting claim at issue in this appeal as a "misdistribution claim." The misdistribution claim—one of many claims Plaintiffs believe may be necessary after an accounting is provided—was in fact dismissed four years ago. The Government's refusal to recognize that procedural fact forms the foundation for two of the Government's misplaced arguments. First, the Government hitches its defense of the overly-restrictive accounting directly to the false premise that the sole purpose of the accounting is to ferret out payments to ineligible recipients. Such payments are simply not the issue here, as shown in Part III.A below. Regardless, even if they were, Plaintiffs have never limited their accounting claim in such a manner. Second, the Government makes much of the fact that Plaintiffs' accounting claim is "unmoored" from the now-dismissed misdistribution claim. "Mooring" is a *non*

sequitur. The claims have been amended in accordance with the Federal Rules of Civil Procedure and by leave of court in each instance.

The Government, when it finally reaches the issues before this Court, argues that this Court must defer to the "discretion" of the district court to issue a wholly inadequate accounting. That "deference" argument is well-nigh self-refuting. *See* Part III.B below. This Court must order the district court to order a *meaningful* accounting and may tell the district court exactly what the accounting order should provide. The Government, looking at the "other side of the equation," asserts that the accounting—an accounting due from a trustee who owes all Osage headright owners a *statutory* fiduciary duty—will just be *too expensive*. But the Government made no showing below concerning the expense of the accounting. The Government repeatedly invokes this Court's colorful "green eyeshade death march" reference. But the Government never explains to this Court why the accounting order that the Plaintiffs have proposed would usher in any kind of "death march."

The Government, finally, argues that Plaintiffs' challenge to the adequacy of the accounting order is disabled by a procedural error, *viz*, that Plaintiffs were not permitted to challenge the district court's original judgment by a Fed. R. Civ. P. 59(e) motion. The argument in Part III.C below shows that, to the contrary, Rule 59(e) is an appropriate vehicle to challenge an equitable accounting order because

it "enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings."

ARGUMENT

I. The Government's Arguments Regarding The Scope Of The District Court's Accounting Plan Ignores The Requirement Than An Accounting Be "Meaningful."

A. The misdistribution claim, long since dismissed, is a red herring.

Nowhere in its 50-page brief does the United States deny it never accounted for the management of the funds in the Segregated Osage Tribal Trust Account ("SOTTA") for *any* period of time.[1] *See* Opening Brief at 5, note 3 and accompanying text.[2] The Government's flawed analysis follows along these lines:

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[1] It must be noted, in the proceedings before the district court the United States admitted to the district court that it had misrepresented to *this* Court that it had provided the Osage Nation with an accounting, and, in fact, what had occurred is the United States had settled the Osage Nation's claims with a payment of money, without ever accounting.

[2] The Government continues to mischaracterize the *extant* accounting claim that demands a class-wide accounting of all receipts into and disbursements from the SOTTA. The Government, it would appear, does so in the interest of convincing this Court that it ought to approve a truncated accounting to a class composed of all Osage headright owners. Thus the Government insists that Plaintiffs' original claim that royalty revenues were disbursed to ineligible recipients (the "misdistribution claim") somehow remains at issue in this appeal. (Indeed, looking at the sweep of the Government's entire argument, it sometimes appears that the Government maintains that this is the *only* issue in this appeal). But as both parties have now informed this Court: (i) the misdistribution claim was long ago dismissed, (ii) the dismissal was not appealed and (iii) this Court, in *Fletcher II*, acknowledged that the misdistribution claim simply was not at issue in its ruling. *See* Government Brief at 18-20 and, especially, at p. 20, note 2. For

because the Plaintiffs limited their misdistribution claim from 2002 to present, and because not much detail is needed to show whether the funds were misdistributed, the accounting must be extremely limited in temporal scope and in quantitative detail.

The uncontroverted facts belie the United States' argument: There is no question about the comprehensive composition of the class (all lawful headright owners) to whom the Government must account. There is no question the breadth of the accounting for which the Third Amended Complaint prays exceeds a more restrictive accounting based solely on the misdistribution claim. *See* Govt. App. at 50-51 (Third Amended Complaint, praying for broad accounting relief for all headright owners). None of these arguments regarding Plaintiffs' dismissed misdistribution claim is relevant to Plaintiffs' claim for the accounting they are owed by the Government.

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that reason alone, the *Fletcher II* order to the district court requiring the latter to order an accounting could not have been–and plainly was not–addressed to the narrow, subsidiary misdistribution issue.

Of course an adequate accounting, once rendered, may very well reveal that, among many other things, payments were in fact made to ineligible recipients. The many other things include the possible revelation that *no* eligible headright owner was paid the royalty amounts due him or her during the time period for which the Government (at long last) accounts. Moreover, an accounting to the earliest known date is likely to show distributions being paid to the wrong individuals *today* based on malfeasance by the government decades ago.

B. The district court does not enjoy "discretion" to Order an accounting that is not meaningful to the beneficiaries.

No one, of course, can gainsay the truism that the district court has "discretion" in crafting a remedy in accounting cases. But the devil is in the details and the Amended Judgment does not require that enough of those be disclosed to Plaintiffs to render the accounting "meaningful."

To undersigned counsel's knowledge, with the exception of some limited guidance in *Fletcher II*, this is the first instance this Circuit will have to address the standard for the accounting owed by the Federal Government to individual Indians and tribes. The other courts that have addressed this issue—the Federal Court of Claims, the Federal Circuit, the district court of the D.C. Circuit, and the district court of the Western District—have all held that the accounting must be "meaningful," that is it must contain "information sufficient to alert the beneficiar[ies] to possible losses." *Chippewa Cree Tribe, et al. v. United States*, 69 Fed. Cl. 639, 664 (Fed. Cl. 2006); *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004); *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."); *Chickasaw Nation v. Dept. of Int.*, 120 F. Supp. 3d 1190, 1231 (W.D. Okla. 2014);

cases cited in the Opening Brief at 14 (defining "meaningful accounting") and authorities cited and discussed therein at 25-26 (temporal scope) and 26-30 (accounting detail). The Government does not dispute that its accounting to Plaintiffs must be "meaningful."

This Court has plenary power to reverse a pure legal ruling by the district court that involves no assessment of testimonial credibility or assessment of the weight of all of the evidence. *See e.g. United States v. Lilly*, 810 F.3d 1205 (10th Cir. 2016) (quoting *United States v. Ellis*, 527 F.3d 203, 205 (1st Cir. 2008) (holding by this Court that a state law enforcement agency had no legal authority to promise defendant immunity)); *accord 1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 257 n.2 (2d Cir. 2014) (an order of a district court functioning in its capacity as an appellate court is subject to "plenary review" in the Court of Appeals, meaning that "pure questions of law" and all legal conclusions "are evaluated de novo"). Simply put, while district courts possess considerable "discretion" to craft an equitable remedy, they cannot avoid the legal requirements of that remedy. The district court did just that when it refused a meaningful accounting in favor of an inadequate accounting. The district court's order for an inadequate accounting is beyond its discretion and must be reversed because the district court does not have discretion to order less than the minimum that the law requires, which in this case, is a meaningful accounting.

C. The Indian Cannons of Construction, as applied to the duty to account, require a meaningful accounting.

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 Canons 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*").

At the time the district court ordered its limited accounting, the only evidence in the record was that the accounting was inadequate. *See* Pltf. App. 336-

344. In fact, the only evidence on the sufficiency of the United States' accounting is that the accounting is a "black box." *Id*. at 341. The United States Congress, when it legislated for the purposes of ensuring an accounting to the Indians, could not have meant to provide the "black box" the district court has ordered. The district court's adherence to a limited and confusing accounting, as suggested by the Government, violates the Indian Canons of Construction. Accordingly, "when Congress says the government may be called to account," as it has in 25 U.S.C. § 4011, the court must interpret that duty to account liberally pursuant to the Indian Cannons of Construction. *Fletcher v. United States*, 730 F.3d 1206, 1209-1210 (10th Cir. 2013) ("*Fletcher II*"). Therefore, pursuant to the Indian Canons of Construction, the accounting should be expanded meaningfully as Plaintiffs requested.

D. The fact that the extant claims were pleaded by amendment is irrelevant.

The Government, throughout its brief, insinuates that Plaintiffs somehow gamed the system by filing amended pleadings over the years. According to the Government, the district court was justified in punishing the class plaintiffs by ordering a window-dressing accounting, *i.e.*, by superficially complying with this Court's order in *Fletcher II*. *See*, *e.g.*, Government Brief at 12, 27 ("Plaintiffs' accounting request has changed dramatically over time"). More disappointing is the district court's complicity in this fractured reasoning. Indeed, it is that very

reasoning that lies at the heart of the Amended Judgment's (inadequate) accounting order. As the Government informs this Court in endorsing the district court's flawed approach, the district court thought it critically important that the Third Amended Complaint's broad accounting claim is "unmoored from" the "original purpose" of Plaintiff's misdistribution claim. *See* Government Brief at 32.

The extent of the "mooring" between the dismissed misdistribution claim and the accounting claim is irrelevant. Plaintiffs were not shackled by any "original purpose" that existed in 2002, but that no longer survives because Congress remedied many of Plaintiffs' claims by statute, but left Plaintiffs' breach of trust claims unresolved. In any event, pleading amendments were filed with leave of court in every instance. The Government cites no authority (nor does it *overtly* argue) that the claims pleaded in the Third Amended Complaint should be truncated by judicial fiat because they somehow come "too late." Such a recasting of the Plaintiffs' claims is particularly unjustified in the context of an accounting action prosecuted against a trust-fund fiduciary.

The truth is that the entire "issue" of what relief the class plaintiffs *once* sought in this litigation is a scarlet-red herring served up by a trustee that shrinks from its statutory fiduciary duty. The Government, unfortunately, has been abetted in its dereliction by a district court that found a *dismissed claim* (a claim dismissed before the *Fletcher II* appeal) to be indispensable to its decision to order a woefully

inadequate accounting. The district court's misapprehension of its duty to adjudicate the case before it – the case set forth in the First Claim for Relief of the Third Amended Complaint – and to issue orders accordingly alone mandates reversal.

E. There is no "counsel admission" relevant to the class-wide accounting claim for a comprehensive accounting.

The Government, following the lead of the district court it seems, continues to dredge up the supposed "counsel admission" about the temporal scope of the accounting sought by the Third Amended Complaint (even as that pleading existed after *dismissal* of the misdistribution claim). The colloquy between counsel and this Court was about the scope of the *misdistribution claim*, not the accounting claim. *See* Govt. App. at 50-51, numbered paragraphs "1" and "4" (prayer for relief seeking accounting to all headright owners). The pleading itself contains no suggestion whatsoever that the accounting sought is limited to the time period postdating the filing of the original Complaint in the action below. The pleading on its face, by any fair reading, avers that an accounting is due for all periods postdating 1906. *See id.* at 43-44. Again it is disappointing that the United States would be so anxious to evade its fiduciary duties to Indians that it would resort to this kind of diversionary tactic.[3]

[3] The Government apparently would have this Court ignore the pleading quoted and ignore the rights of 100% of all Osage trust beneficiaries by

F. The possibility of future litigation to recover sums that an accounting reveals to be due is irrelevant here.

The Government (apparently) maintains that the Plaintiffs' intent to "obtain facts that will allow them to eventually litigate their misdistribution claim" somehow delimits the scope of the accounting. *See* Government Brief at 41-42. Of course "facts obtained" from an accounting might well support numerous monetary claims for underpayment of lawful headright owners (i) because amounts owed to such owners were not paid to them but rather were retained or squandered by the BIA (*e.g.* by unauthorized intragovernmental funds transfers) and/or (ii) because amounts owed to them were paid to the wrong payees, be they Osage Indians who own no headrights, Indians who are members of other tribes, or Germans.[4] It may come as a shock to the Government, but the usual purpose for an accounting is to find out if your trustee (or, *e.g.*, an operator of an oil and gas well if the would-be plaintiff is a nonoperator or royalty owner) mismanaged your trust

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saddling such beneficiaries with some kind of counsel waiver (made in a spontaneous question-and-answer colloquy at oral argument) that severely impairs the beneficiaries' rights. Plaintiffs respectfully suggest that a court of equity (Plaintiffs only seek equitable relief here) ought to reject that suggestion made by the beneficiaries' *trustee*, even if the counsel remarks could be given the meaning erroneously ascribed to them by the Government.

[4] This Court recognized this concept three years ago: "To say that the plaintiffs have a right to an accounting, then, is to say that it must give some sense of where money has come from and gone to… (and only after that need they plead) any breach of trust theory the plaintiffs *may later choose to posit*." *Fletcher II*, 730 F.3d at 1215 (emphasis added).

fund. If the accounting discloses that he or she did then, yes, you likely will demand restitution. What any of that has to do with the proper scope of the accounting in the first place is hard to fathom. It certainly does not suggest that the Government is justified in rendering a more truncated, less than meaningful accounting.

II. The Government's Argument Regarding The Cost Of An Accounting Is Misleading And Based Upon Facts Not In The Record.

On the subject of "gratuitous costs," the Government once again resorts to fighting last year's war (actually a war that ended in 2012). Hence the Government serves up the non sequitur that Plaintiffs cannot "prov[e] an illegal transfer" and so the cost of gathering evidence to make this "proof" is somehow "gratuitous." The reality, *again*, is that Plaintiffs' accounting claim is in no way dependent upon proving even one "illegal transfer." That issue, *again*, became moot before the appeal in *Fletcher II*.[5]

Moreover, the government's accounting will not only reveal how much the Class has lost, it will also reveal the processes by which the United States has in the past and may in the future continue to damage the Class' trust funds. Accordingly, one significant aspect of any litigation that may result from a

[5] *See*, however, Note 2 *supra* regarding the possibility that a comprehensive accounting might expose misdistributions along with *non*distributions of monies due.

meaningful accounting would relate to structural amendments necessary to overhaul the Government's flawed financial management system.

This is not a trivial problem. The United States Congress investigated the Interior Department's mismanagement of Indian Trust funds dozens of times. Interior's scorecard is frighteningly bad. In its original reports, Congress found that Interior manages Indian Trust Funds with a "pitchfork." *See* MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. Rep. No. 102-499 at 8-9 (1992) (quoting an 1828 statement from H.R. Schoolcraft). Then, the Interior Department embarked on an illegal policy of disbanding Indian tribes in Oklahoma. *See Harjo v. Kleppe*, 420 F.Supp. 1110 (D.D.C. 1976) *affirmed by Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). The Osages in particular were subject to depredations of the worst character. *See e.g.* Dennis McAuliffe, Jr., THE DEATHS OF SYBIL BOLTON: AN AMERICAN HISTORY (1994). While one might color the Interior Department's role in the raiding of Osage wealth either as inept or incomprehensible, the fact is that the Osages have suffered illegal depredations. In the 1990's, with the re-emergence of Indian tribes in Oklahoma, Congress commissioned a report – Misplaced Trust – showing that little or nothing had changed. *See* MISPLACED TRUST. Even more recently, while this case was proceeding, Congress commissioned a report on the administration of Indian trust funds by the Interior Department – and found it *still* lacking. *See*

https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf

Standing in stark contrast to the Interior Department's inability to do its job in managing Indian Trust Funds is the fact that never once, to Counsel's knowledge, has the Interior Department been required to account. Instead, the Interior Department paid the Osage Nation $380,000,000 to avoid accounting and for other claims. More recently, the Interior Department settled with nineteen Indian tribes and the Government paid nearly $500,000,000 in lieu of any kind of an accounting. *See Colorado River Indian Tribes v. Jewell*, Case No. 06-2212-TFH (D.C. Dist. Ct.) (Joint Stipulation at Doc No. 80). In *Cobell*, the government paid more than $1,000,000,000 to avoid its duty to account. *See Cobell v. Salazar*, 96-CV-1285-TFH (D.C. Dist. Ct) (Order Granting Final Approval to Settlement, Doc. No. 1285).

Despite the sorry record recounted above, the Interior Department to this day has not fixed its problems, needing new legislation to address issues in ways that are indeterminate at best. *See* 2016 Indian Trust Asset Reform Act, available at https://www.gpo.gov/fdsys/pkg/PLAW-114publ178/pdf/PLAW-114publ178.pdf. Plaintiffs believe that in this case an accounting as they have asked for will expose the continued mismanagement of the SOTTA. Once the problem is exposed, the

Plaintiffs believe that a prescription can be devised to eliminate that problem in the future. While the goal may, admittedly, be naive, the Government's "accounting lite" option is far more unappealing: more Congressional reports that are unable to rely on any specific data, resulting in more Congressional legislation that lacks precise methods to resolve the problems. A meaningful accounting is due, and when it has been delivered, it may eliminate the need for additional lawsuits like this in the future.

The district court improperly characterized any misdistribution remedy as a $3 affair. *See* Pltf. App. at 547-48, Note 16 (Opinion and Order of Dec. 30, 2015). Beyond the fact that the district court has prejudicially analyzed a hypothetical case that has not even been filed—without the benefit of a single known fact—the SOTTA has in the last 100 years contained billions of dollars. The SOTTA can reasonably be expected to contain billions more in the coming century. This is not the district court's $3 issue. Getting the management of this trust fund right – and getting the process for the accounting of it right – is not a trivial matter.

One might have expected the Government to argue that the cost of the meaningful accounting that Plaintiffs seek in the Third Amended Complaint is prohibitive. *See* Opening Brief at 23, note 12 and accompanying text (concerning hyperbolic cost protestations). But then the Government has never proffered any evidence of any kind about the cost of such an accounting. The Government gave

the district court no basis, and it has given this Court no basis, for flatly denying a meaningful accounting predicated on excessive cost.

Had a *bona fide* cost issue been raised below, it might have led to a discussion of the actual value of the SOTTA and of the fact that providing a meaningful accounting in this case will ensure that, in the future, the United States will manage properly billions of dollars of Indian money. At the same time, had such a cost issue been raised by the United States, it would have been revealed that there is but a single account at issue. And so to make a *meritorious* cost argument, the United States would have been compelled to argue that it would cost billions of dollars for it to account for just one single Indian trust account. It is not hard to see why the Government failed even to attempt to make its excessive-cost case. Knowing that it could not make the facts of the case out, it hid behind a construct of a hypothetical $3 argument. This Court should not be so easily misled from justice.

III. Appellants Timely And Appropriately Sought Reconsideration On The District Court's Inadequate Accounting.

The Government argues that Plaintiffs' attack on the adequacy of the accounting order is disabled by a procedural error. According to the Government, the Plaintiffs' Fed. R. Civ. P. 59(e) motion came too late because Plaintiffs had not theretofore told the district court "what they need most." But the Government

never says exactly what procedural device Plaintiffs should have employed—what motion they should have filed—at what earlier time.[6]

Pursuant to the district court's explicit directions that the parties file their first appeal with the district court itself, Plaintiffs filed their "Opening Brief on the Merits" on July 17, 2015. Pltf. App. at 310 *et seq*. At pages 7 to 13 of that brief (Pltf. App. at 321-327), Plaintiffs laid out to the district court the case law dealing with accounting requirements in Indian trust cases specifically, including the requirement that the accounting commence with the "earliest possible date." Plaintiffs offered the Affidavit of an oil and gas revenue accounting expert, S. Christopher Lopp, that explained why the administrative record (which, at that time, the Government untenably maintained *was* the accounting) was not an adequate accounting. Lopp also explained the type of detail that would be required to constitute a *bona fide* accounting. *See* Pltf. App. 336-344. (The Government filed no controverting affidavit or other evidence on the scope-of-accounting issue).

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[6] The Government also does not explain why its own Rule 59 motion—seeking to modify the original judgment to grant the Government an additional six months to comply—was not also defective. The Government's motion was, as a practical matter, granted when the district court extended the time for accounting to *eighteen* months. Indeed *Plaintiff's* Rule 59 motion was granted in part. Plaintiffs objected to the district court's imposition of a stay of the Government's accounting task pending this appeal. Judge Frizzell agreed that there should be no stay. Then he made the Plaintiffs sorry that they had asked for this legally-justified relief when he extended the Government's compliance deadline from six to eighteen months. *See* Pltf. App. at 608-609.

Neither Plaintiffs nor the Government could have known whether the district court would order the detailed accounting that the Lopp Affidavit and indeed the Third Amended Complaint would require. The district court stated that it made sense for the district court first to issue its order and for the parties to file appropriate motions challenging the scope of the order if any party found it wanting. *See* Pltf. App. at 589 (brief quoting the district court at hearing, excerpted *infra*). The filing of Rule 59 motions by both parties made perfect sense given the atypical procedural posture of this litigation at that juncture.[7]

The functions of a Rule 59(e) motion are not 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). More particularly, Rule 59(e) is an appropriate vehicle to advance an "elaboration of a ground already set out in the

[7] More typically, a Rule 59 motion (in a bench case) would be filed after the court had heard all of the evidence, taken post-trial briefs perhaps, and issued findings of fact and conclusions of law along with a judgment on the findings. The posture here was very different. The district court issued an accounting order after review of this Court's order, counsel argument, and submission of briefs by both parties.

original motion."[8] *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. Judge Frizzell expressly enlisted the aid of the parties in that quest:

> 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.

See Pltf. App. 589 (quoting Transcript of Oct. 23, 2105 hearing at 102-103).

Certainly the Government has not identified any prejudice that it suffered from the procedural approach taken by Plaintiffs. Had the district court entered an amended judgment tracking Plaintiff's proposal, the Government would have had every opportunity to appeal *that* amended judgment to this Court seeking a reversal

[8] Plaintiffs respectfully suggest that their "Opening Brief on the Merits" should stand in here for the "original motion." That brief discusses the requirements for a meaningful accounting at length. *See* Pltf. App. at 310 *et seq*.

and a reinstatement of the original, much more limited order. This Court's docket sheet will reveal that the Government in fact appealed the Amended Judgment, then dismissed the appeal. The putative Rule 59 bar, then, is a procedural "gotcha" tactic lacking any substantive basis, and not resulting in any prejudice to the United States.

CONCLUSION

For the reasons set forth herein and in the Opening Brief, this court should reverse the Amended Judgment with instructions to the district court to enter the order prosed by Plaintiffs in their Rule 59(e) motion (Pltf. App. at 570-73).

Respectfully submitted,

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Date: October 31, 2016

/s/Dallas L.D. Strimple
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/s/Dallas L.D. Strimple
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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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