No. 19-5023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM S. FLETCHER, et al.,
Plaintiffs/Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants/Appellees.

Appeal from the United States District Court
for the Northern District of Oklahoma
No. 4:02-cv-00427 (Hon. Gregory K. Frizzell)

BRIEF FOR DEFENDANTS/APPELLEES

(Oral argument requested)

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STATEMENT OF RELATED CASES

This case has been on appeal to this Court thrice before:

Fletcher v. United States, 160 Fed. Appx. 792 (10th Cir. 2005);

Fletcher v. United States, 730 F.3d 1206 (10th Cir. 2013); and

Fletcher v. United States, 854 F.3d 1201 (10th Cir. 2017).

INTRODUCTION

The only issue in this appeal is whether the district court abused its discretion when it denied in part a motion for attorney fees and costs filed by Plaintiffs William Fletcher, et al. under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). The court awarded Plaintiffs $34,839.61 in costs but denied Plaintiffs' request for approximately $1.8 million in attorney fees. The court concluded that Plaintiffs are prevailing parties but declined in its discretion to award attorney fees for three independent reasons: (1) Plaintiffs did not incur attorney fees; (2) the position of the United States was substantially justified; and (3) the court was unable to determine the reasonableness of the requested fees because Plaintiffs did not segregate their fees. The district court acted within its discretion in declining to award attorney fees on those grounds—any one of which is sufficient for affirmance.

STATEMENT OF JURISDICTION

(A) The district court had jurisdiction over Plaintiffs' underlying action pursuant to 28 U.S.C. § 1331 because Plaintiffs asserted claims arising under the Constitution and laws of the United States, including 5 U.S.C. § 706. 2 Appellees' Supplemental Appendix ("Supp. App.") 274-75, ¶ 2.

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because Plaintiffs appeal from a post-judgment order denying EAJA attorney fees. *See, e.g., Hackett v. Barnhart*, 475 F.3d 1166, 1168 (10th Cir. 2007) (so exercising jurisdiction).

(C) On February 21, 2019, the district court entered an order granting in part and denying in part Plaintiffs' attorney fee motion. 7 App. 1919. On March 8, 2019, or 15 days later, Plaintiffs filed a timely notice of appeal. 7 App. 1920; *cf.* Fed. R. App. P. 4(a)(1)(B)(i).

(D) The appeal is from an appealable post-judgment order. *See Hackett*, 475 F.3d at 1168.

PERTINENT STATUTORY PROVISIONS

Pertinent statutory provisions are contained in the addendum to this brief.

STATEMENT OF THE ISSUES

Whether the district court acted within its discretion in denying Plaintiffs' request for attorney fees under EAJA, and in particular:

1. Whether the court acted within its discretion in determining that Plaintiffs actually incurred no attorney fees.

2. Whether the court acted within its discretion in determining that the position of the United States was substantially justified.

3. Whether the court the court acted within its discretion in determining that Plaintiffs gave the court no evidentiary basis to assess the reasonableness of the requested fees because Plaintiffs failed to segregate their fees.

STATEMENT OF THE CASE

A. Statutory background

1. Equal Access to Justice Act

Under the "bedrock principle" known as the American Rule, "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015). EAJA, however, "deviate[s] from the American Rule" by rendering the United States "liable for attorney's fees for which it would not otherwise be liable." *Id.* EAJA therefore "amounts to a partial waiver of sovereign immunity." *Ardestani v. INS*, 502 U.S. 129, 137 (1991). As such a waiver, EAJA "must be strictly construed in favor of the United States." *Id.* EAJA provides in relevant part that

> a court shall award to a [1] prevailing party other than the United States fees and other expenses . . . [2] incurred by that party in any civil action. . . brought . . . against the United States in any court having jurisdiction of that action, unless the court finds that [3] the position of the United States was substantially justified.

28 U.S.C. § 2412(d)(1)(A). The term "fees and other expenses" includes "reasonable attorney fees." *Id.* § 2412(d)(2)(A).

A "prevailing party" is a party "who has been awarded some relief by the court." *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 603 (2001). Litigants have been deemed to "incur" attorney fees for EAJA purposes "when they have an express or implied

legal obligation to pay over such an award" to their legal representatives. *Turner v. Commissioner of Social Security*, 680 F.3d 721, 725 (6th Cir. 2012); *see also Centennial Archaeology, Inc. v. AECOM, Inc.*, 688 F.3d 673, 680 (10th Cir. 2012) (citing *Turner* with approval).

The test for "substantial justification" is "reasonableness in law and fact." *Hackett*, 475 F.3d at 1172. That is, the government's position must be "justified to a degree that could satisfy a reasonable person." *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items." *Commissioner, INS v. Jean*, 496 U.S. 154, 161-62 (1990). Accordingly, district courts determine whether the government's position was substantially justified "based on the totality of the circumstances, as reflected in the record before the court." *United States v. Charles Gyurman Land & Cattle Co.*, 836 F.2d 480, 485 (10th Cir. 1987). Even if the fee claimant has met the "multiple conditions for eligibility for EAJA fees," the district court still must determine "what fee is reasonable." *Jean*, 496 U.S. at 161.

2. Osage Allotment Act of 1906

A summary of the Osage Allotment Act of 1906 ("1906 Act"), ch. 3572, 34 Stat. 539, is helpful to an understanding of Plaintiffs' EAJA appeal. In 1872, Congress established a reservation in the Oklahoma Territory for the Osage Tribe of Indians. *See McCurdy v. United States*, 246 U.S. 263, 265 (1918); *Osage Nation v.*

Irby, 597 F.3d 1117, 1120 (10th Cir. 2010). The reservation was "largely underlaid with petroleum, natural gas, coal and other minerals." *McCurdy*, 246 U.S. at 265. In the 1906 Act, Congress severed the subsurface mineral estate from the surface estate, placed the mineral estate (referred to as the Osage Mineral Estate) in trust for the Tribe, and directed the Secretary of the Interior to distribute royalties from the mineral estate on a pro rata basis to Osage tribal members whose names were recorded on an official roll. §§ 1, 3, 4, 34 Stat. at 539-40, 543-44; *see also Fletcher v. United States* ("*Fletcher III*"), 854 F.3d 1201, 1203 (10th Cir. 2017). These royalty interests are known as "headrights." *Id.* at 1203. In the years following the 1906 Act, some individual Osages sold or bequeathed their headrights to non-tribal individuals and entities. *Id.*; *see also Fletcher v. United States* ("*Fletcher II*"), 730 F.3d 1206, 1208 (10th Cir. 2013). Congress responded with a series of amendments to the 1906 Act "placing ever increasing limits on" such transfers. *Id.* at 1208.

3. 25 U.S.C. §§ 162a and 4011

25 U.S.C. § 162a(a) authorizes the Secretary of the Interior to withdraw from the United States Treasury and deposit in banks the funds of any Indian tribe held in trust by the United States, including "funds of the Osage Tribe of Indians, and the individual members thereof." Section 162a(d) provides that the Secretary's general trust responsibilities include "[p]roviding adequate systems for accounting for and

reporting trust fund balances." 25 U.S.C. § 4011(a) provides that the Secretary "shall 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 [25 U.S.C. §] 162a."

B. Factual and procedural background of Plaintiffs' underlying action, as relevant to this appeal

As the district court aptly observed, this case "has a long and complicated history." 7 App. 1891. The court explained that the "claims plaintiffs made over the course of this long-running lawsuit fall within three general categories—(1) tribal voting rights; (2) breach of trust responsibilities, including allowing headrights to be alienated to persons not of Osage blood; and (3) an accounting." 7 App. 1909. The factual and procedural background of Plaintiffs' underlying lawsuit, as relevant to this appeal, is discussed below. As will be documented, Plaintiffs' theories of recovery changed over time as the lawsuit progressed.

1. Plaintiffs' original complaint (2002)

This action was commenced in 2002 by William Fletcher and several other named plaintiffs, who alleged that they are "descendants of individuals who were listed on the rolls of the Osage Tribe." 2 Supp. App. 275, ¶ 3. The original complaint asserted four claims: (1) federal regulations allegedly violated Plaintiffs' rights under the U.S. Constitution to vote in Osage tribal elections and to participate in the Osage Tribe's government; (2) the United States allegedly breached its trust

responsibilities by (a) eliminating Plaintiffs' right to participate or vote in Osage tribal elections, and (b) allowing headrights to be alienated to persons not of Osage blood; (3) the United States' failure to manage the Tribe's trust assets, coupled with the government's inability to keep Osage headrights from passing to non-Osages, allegedly constituted a Fifth Amendment taking of the Tribe's property; and (4) federal regulations relating to Osage tribal elections allegedly constituted illegal agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See* 7 App. 1891-92; 2 Supp. App. 279-85; *Fletcher v. United States* ("*Fletcher I*"), 160 Fed. Appx. 792, 793 (10th Cir. 2005) (describing claims and relief sought in original complaint). The original complaint did not allege that the government had failed to provide an accounting and did not seek an accounting.

In a June 2004 order, the district court (Hon. James O. Ellison) granted the government's motion to dismiss the complaint for failure to join the Osage Tribal Council as a necessary and indispensable party under Federal Rule of Civil Procedure 19. *See* 7 App. 1892; 2 Supp. App. 288-94. Plaintiffs appealed that order in *Fletcher I*.

2. *Fletcher I* (2005)

In *Fletcher I*, Plaintiffs did not challenge the district court's dismissal of claims that "concern their voting rights." 160 Fed. Appx. at 794. Plaintiffs did challenge the court's dismissal of their breach of trust and Fifth Amendment takings

claims "insofar as those claims concern the alleged wrongful transfer of mineral interests to non-Osages." *Id.* This Court concluded that the district court possessed jurisdiction over those claims but had not addressed whether the Osage Tribal Council was a necessary and indispensable party to those claims. *Id.* at 797. The case was remanded for the district court "to undertake the Rule 19 analysis in the first instance." *Id.*; *see also* 7 App. 1892.

3. Plaintiffs' amended complaints (2006, 2009, 2010)

In April 2006, on remand from *Fletcher I*, Plaintiffs filed a first amended complaint. 1 App. 1-12. This complaint asserted three claims: (1) the government allegedly breached its statutory trust responsibilities by wrongfully distributing royalty payments to persons who are not Osage Indians and by failing to account to Plaintiffs for all funds resulting from the Osage Mineral Estate and available to be distributed as trust property; (2) the government's alleged failure to properly manage the Osage Tribe's trust account and funds, coupled with the distribution of headright payments to persons who are not Osage Indians, constituted a Fifth Amendment taking of Plaintiffs' property; (3) the government's administrative actions, or failures to act, were allegedly not in accordance with law and were contrary to Plaintiffs' property rights. 1 App. 7-9, ¶¶ 21-35. Plaintiffs sought to represent a class comprising "all Osage Indians who lawfully receive distributions of trust property from the Osage Mineral Estate." 1 App. 9-10, ¶ 36; *see also* 7 App. 1893.

In 2007, the case was transferred to Judge Frizzell, *id.*, who presided over the case for the remainder of its pendency in the district court. In a March 2009 order, the court granted the government's motion to dismiss the first amended complaint, holding that (1) the Osage Nation was not a required party under Rule 19(a); (2) non-Osage headright owners were required parties because Plaintiffs sought to terminate their property interests in quarterly headright royalty distributions; and (3) it was impossible to discern from the complaint the specific agency actions or inactions that Plaintiffs were challenging. 1 App. 128-39. The court directed Plaintiffs to file a second amended complaint adding all non-Osage headright owners as defendants and identifying with specificity the challenged agency actions or inactions. 1 App. 138-39; *see also* 7 App. 1893-94.

In June 2009, Plaintiffs filed a second amended complaint joining approximately 1,700 non-Osage headright owners as defendants. 1 App. 140-211. In September 2009, however, the district court once again ordered Plaintiffs to amend because their complaint again failed to specify the agency actions being challenged. 2 Supp. App. 295; *see also* 7 App. 1894.

In May 2010, Plaintiffs filed a third (and final) amended complaint. 2 App. 268-357. In a March 2011 order, the district court granted a motion (filed by one of the defendant non-Osage headright owners named Ben T. Benedum) to dismiss that complaint for failure to state a claim. 2 App. 512-21. The court rejected Plaintiffs'

"overarching legal argument" that the 1906 Act, as amended, precludes non-Osages from receiving payments from the Osage Mineral Estate. 2 App. 520; *see also* 7 App. 1894. In a May 2011 order, the court dismissed the other defendant non-Osage headright owners on the same grounds. 2 Supp. App. 296; *see also* 7 App. 1894.

In an April 2012 order, the district court granted the government's motion to dismiss the third amended complaint. 3 App. 543-56. Thus, the court (1) dismissed without prejudice Plaintiffs' claim alleging improper distributions from the Osage Mineral Estate to non-Osage headright owners for failure to state a claim; (2) struck Plaintiffs' APA claim for failure to sufficiently specify the challenged agency action or inaction "despite having been given repeated opportunities to do so"; and (3) concluded that Plaintiffs had not identified in 25 U.S.C. §§ 162a and 4011 a statutory right to an accounting of distributions from the Osage Mineral Estate. 3 App. 549-56; *see also* 7 App. 1894-95; *supra* pp. 5-6 (discussing §§ 162a and 4011). Plaintiffs appealed only the dismissal of their accounting claim in *Fletcher II*. *See* 730 F.3d at 1216 n.6.

4. *Fletcher II* (2013)

Fletcher II concluded that the district court "misread [25 U.S.C.] § 162a(a)." 730 F.3d at 1211. The Court explained that "[n]othing in that provision purports to limit the Secretary's fiduciary obligations to the Osages, let alone circumscribe the

accounting promised by [25 U.S.C.] § 4011(a)." *Id.* The Court reversed the judgment and remanded to the district court, providing substantial guidance concerning the contours of the accounting to be fashioned by the district court on remand. *Id.* at 1214-16. "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." *Id.* at 1214.

5. District court's orders on remand from *Fletcher II* (2014-2016)

In January 2014, on remand from *Fletcher II*, the district court granted Plaintiffs' motion to certify a class under Federal Rule of Civil Procedure 23. 2 Supp. App. 297-300; *see also* 7 App. 1895. The government subsequently filed the administrative record, and the parties briefed the scope of the government's accounting duty to Plaintiffs, i.e., the issue remanded by *Fletcher II*.

In a December 2015 order, 4 App. 829-55, the district court held that Plaintiffs were entitled to an accounting of the Osage tribal trust account "running from the first quarter of 2002 until the last available quarter," 4 App. 854. The court specified the contents of the accounting, e.g., that it "must state the date and dollar amount of each receipt and distribution." *Id.*; *see also* 7 App. 1895. The court rejected Plaintiffs' contention that the accounting should run from 1906 rather than from the first quarter of 2002. 4 App. 849-53. The court also rejected Plaintiffs' contention

that the accounting should include "such detailed information as the volume of oil and gas sold, the unit price, and the amount of mineral acreage that is not currently generating income." 4 App. 851.

Plaintiffs and the government subsequently filed motions to alter or amend judgment under Federal Rule of Civil Procedure 59(e). *See* 7 App. 1895. In a March 2016 order, 4 App. 906-13, the district court denied Plaintiffs' motion insofar as Plaintiffs continued to seek a more detailed accounting and an expanded timeframe reaching back to 1906, 4 App. 910-12. The court concluded that "Plaintiffs' latest argument—that the dismissal of their misdistribution claim somehow entitles them to an accounting more expansive than they originally requested—is unpersuasive." 4 App. 911; *see also* 7 App. 1895. Plaintiffs appealed the district court's accounting order in *Fletcher III*. 7 App. 1896.

6. *Fletcher III* (2017)

Fletcher III affirmed the district court's accounting order. 854 F.3d at 1203. Among other things, this Court concluded that "the increased expense of obtaining the additional information now sought [by Plaintiffs] seems large when compared to how small Plaintiffs' potential recovery will likely be for their misdistribution theory." *Id.* at 1206. Noting that the district court's "example and accompanying calculations illustrate this point," the Court explained that every headright "yields on average $7975 per quarter, and there are 2229 headrights." *Id.* at 1206-07.

Accordingly, "restoring a single headright to the Osage tribal members would only increase each headright holder's royalty distribution by $3.58 per quarter, or a little less than $15.00 per year." *Id.* at 1207 (citing 4 App. 852-53 n.16). Therefore, "even if a more detailed accounting might uncover additional evidence of misdistribution, the increased expense to do so is not justified." *Id.*; *see also* 7 App. 1896.

C. Factual and procedural background of Plaintiffs' EAJA motion

Meanwhile, on January 29, 2016—while the parties' respective Rule 59(e) motions were pending before the district court—Plaintiffs filed a motion seeking attorney fees and costs under EAJA. 4 App. 882-98. Relevant here, Plaintiffs sought $1,835,665.19 in attorney fees. 4 App. 896; *see also* 7 App. 1896. In a June 2016 order, the district court granted the government's motion to stay proceedings on Plaintiffs' EAJA motion pending the outcome of Plaintiffs' appeal of the court's accounting order in *Fletcher III*. 4 App. 980-81; *see also* 7 App. 1896.

On July 13, 2017, after this Court affirmed the district court's accounting order, the district court granted Plaintiffs' motion to lift the stay, struck their initial EAJA motion, and ordered consolidated briefing on (among other issues) whether Plaintiffs had actually incurred attorney fees and whether the government's position was substantially justified. 4 App. 997. The court also directed Plaintiffs to address the "identification, attribution, and separation of attorney's fees . . . in relation to the claim on which plaintiffs prevailed." *Id.*; *see also* 7 App. 1897 & n.2.

On August 17, 2017, Plaintiffs filed a second EAJA motion. 7 App. 1897.[1] The next day, the district court discovered that Plaintiffs had submitted lump sum billing summaries regarding their requested fees. *Id.* In an August 18, 2017 order, the court directed Plaintiffs to file detailed attorney time records identifying, at a minimum, the attorney(s) who performed the work, a description of the work performed, the time allocated to each task, and the hourly rate. 2 Supp. App. 303; *see also* 7 App. 1897. On August 25, 2017, Plaintiffs filed their attorney time records. 5 App. 1145-1300; *see also* 7 App. 1897.

Subsequently, in response to discovery propounded by the government, Plaintiffs provided copies of engagement letters with their attorneys, dated December 11, 2009. 6 App. 1532-41. These letters, which are identical, are signed only by Plaintiffs William Fletcher and Charles Pratt; i.e., they are not signed by the other named Plaintiffs. 6 App. 1536, 1541. The engagement letters, which concern the present case, state: "You desire to employ Jason Aamodt and the law firm of Sneed Lang Herrold PC (collectively, the 'Lawyers') to represent you in a lawsuit on the terms and conditions recited herein; and the Lawyers agree to provide legal services to you with respect to the terms and conditions recited herein." *Id.* The letters include the following provision:

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[1] This motion was timely because it was filed within 30 days of the date on which this Court's judgment in *Fletcher III* became final and non-appealable. *See* 28 U.S.C. § 2412(d)(1)(B), (2)(G).

> **4.** **Attorney Fees**. The Lawyers will charge a reasonable fee for services rendered. Our fee will be a contingent fee. The Lawyers will not be paid for our time and our work as lawyers unless
>
> (a) the captioned case settles; or
>
> (b) the Government is ordered to pay over amounts improperly paid to non-Osages pursuant to an order of the United States District Court for the Northern District of Oklahoma, as referenced above; and/or
>
> (c) the Lawyers obtain funding from a third party willing to underwrite all or part of our fees.
>
> The amount of our fee will be forty [percent] (40%) of the amount (i) paid in settlement; or (ii) paid by the Government pursuant to the order of the United States District Court for the Northern District of Oklahoma *and* any amount awarded as fees; *or* such other amount as that Court, or any reviewing court, may determine and order.

6 App. 1538 (emphases in original).

In discovery, Plaintiffs also provided a copy of an earlier, *unsigned* engagement letter, dated May 2, 2002, ostensibly between Plaintiffs Fletcher and Pratt, and attorney Aamodt. 6 App. 1543-47. This engagement letter is in reference to "Representation of you and the Osage Development Council regarding challenges to the 1906 Act's voting provisions regarding the Osage Nation, and the recovery of lost mineral allotments." 6 App. 1543. The letter includes the following provision:

> In this case I am agreeing to work on a contingency basis, and you agree that I shall receive 40% of anything of value received, or at a minimum, the value of the time I have expended on your behalf, as charged on my statements. You agree that I will seek attorney fees on your behalf. If attorney fees are obtained, you agree I shall retain them and that the attorney fees obtained will be credited against any attorney fees you owe to me.

6 App. 1547.

D. The district court's EAJA decision

On February 21, 2019, the district court issued a well-reasoned 29-page order declining to award Plaintiffs attorney fees under EAJA. 7 App. 1891-1919.

1. Prevailing party

The district court concluded that "Plaintiffs are prevailing parties." 7 App. 1903. The court explained that "though the accounting claim was only one of several claims for relief, and though it was not the most significant issue presented, the plaintiffs may be considered prevailing parties insofar as they succeeded on an issue which achieved some of the benefit they sought in bringing suit." *Id.*

2. Incurring attorney fees

The district court concluded that "Plaintiffs have not incurred attorney fees under EAJA." 7 App. 1903. Applying the Sixth Circuit's decision in *Turner*, 680 F.3d at 725, the court explained that "litigants 'incur' fees under the EAJA when they have an express or implied legal obligation to pay over such an award to their legal representatives." 7 App. 1903. Applying that test to the signed 2009 engagement letters, the court concluded that Plaintiffs did not incur attorney fees because "none of the explicitly listed conditions have occurred"—i.e., none of the conditions listed in the "Attorney Fees" provision. 7 App. 1904. The court reasoned that to nonetheless award attorney fees would—as *Turner* admonished—create a

windfall for Plaintiffs, since under the conditions in the "Attorney Fees" provision, Plaintiffs would have no obligation to pay over the fee award to their counsel. *See* 7 App. 1905.

The district court also considered the possibility that Plaintiffs' *unsigned* May 2, 2002 engagement letter might establish an obligation to pay over a fee award to their counsel. 7 App. 1905-06. The court explained that "Mr. Aamodt has assured the court that the only copy available was one that he had on a computer server, that plaintiffs' counsel did not have a signed copy, and that Mr. Fletcher did not have a signed or unsigned copy." 7 App. 1905. The court found that "Mr. Fletcher testified he has no memory of seeing or signing the document." 7 App. 1905-06. In these circumstances, the court declined to consider the unsigned 2002 engagement letter as "evidence that plaintiffs incurred fees under EAJA." 7 App. 1906.

3. Substantial justification

The district court concluded that the "government's position was substantially justified." *Id.* The court explained that EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items." 7 App. 1907 (quoting *Jean*, 496 U.S. at 161-62). "Even prior to *Jean*," the court observed, "the Tenth Circuit had instructed its district courts 'to determine whether the government's position was substantially justified based on the totality of the circumstances, as reflected in the record before the court.'" *Id.* (quoting *Gyurman*, 836 F.2d at 485). Applying those principles, the

court concluded that "[t]reating the case as an inclusive whole, and based on the totality of the circumstances . . . the government's position was substantially justified," i.e., had a reasonable basis in law and fact. 7 App. 1913; *see also id.* at 1909-13. In that connection, the court explained that it had granted the government's motion to dismiss Plaintiffs' lawsuit insofar as Plaintiffs alleged the misdistribution of royalty payments to non-Osage headrights owners—"the most heavily litigated claim in this case"—and Plaintiffs did not appeal that dismissal in *Fletcher II*. Moreover, the court explained that the government prevailed in *Fletcher III* when Plaintiffs appealed the court's accounting order. 7 App. 1911-12.

4. Reasonableness of the amount of attorney fees requested

The district court concluded that, because Plaintiffs did not incur attorney fees, and because the government's position was substantially justified, the court "need not address the reasonableness of the requested fees." 7 App. 1914. Nevertheless, referring to its order of July 13, 2017, the court found that "in the event it becomes necessary to address the reasonableness of the request, plaintiffs' billing records do not comply with the Order requiring the 'identification, attribution, and separation of attorneys' fees and costs in relation to the claim on which plaintiffs prevailed.'" *Id.* (applying *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983); record citation omitted).

SUMMARY OF ARGUMENT

The district court's denial of Plaintiffs' request for attorney fees under EAJA should be affirmed because the district court acted within its discretion for any of three independent reasons.

1. The district court acted within its discretion in concluding that Plaintiffs did not actually incur attorney fees for EAJA purposes. The district court's order declining to award attorney fees should be affirmed on this ground, and this Court need not address Plaintiffs' other contentions. Plaintiffs' contention lacks merit because the district court's conclusion that Plaintiffs did not incur attorney fees under the terms of their signed 2009 engagement letters is consistent with the reasoning of *Centennial*. That conclusion is likewise consistent with the Sixth Circuit's decision in *Turner* because, under the 2009 engagement letters, Plaintiffs had no legal obligation to pay over an award of attorney fees to their counsel. Plaintiffs' other challenges to the district court's conclusion are either forfeited, contrary to the record, or ignore unchallenged evidentiary rulings and factual findings by the court.

2. Assuming arguendo that Plaintiffs incurred attorney fees for EAJA purposes, the district court acted within its discretion in concluding that the position of the United States was substantially justified. In so concluding, the court correctly treated the case as an inclusive whole and considered the totality of the

circumstances as reflected in the record, as required by *Jean* and *Gyurman*. The court properly rejected Plaintiffs' contention that the government's position was not substantially justified because the government lost on the merits of one issue—i.e., whether Plaintiffs are entitled to an accounting of the Osage tribal trust account—in *Fletcher II*. Plaintiffs' other arguments, including that the government allegedly engaged in "duplicitous behavior," are contrary to the record.

3. Assuming arguendo that Plaintiffs incurred attorney fees and that the position of the United States was not substantially justified, Plaintiffs' failure to comply with the district court's July 13, 2017 order deprived the court of an evidentiary basis for determining whether the amount of attorney fees requested was reasonable. It was therefore within the district court's discretion to deny a fee award. Plaintiffs' failure to comply with the court's 2017 order as a practical matter left the court with a choice: either award the entire amount of fees requested or deny a fee award. The court acted within its discretion in choosing the latter.

STANDARD OF REVIEW

A district court's decision whether to award attorney fees under a fee-shifting statute is reviewed for an abuse of discretion. *Amigos Bravos v. EPA*, 324 F.3d 1166, 1171 (10th Cir. 2003); *see also Pierce*, 487 U.S. at 563 (establishing "deferential review of a district court's decision regarding attorney's fees under the EAJA"). Ordinarily, the district court's interpretation of the 2009 engagement letters would

be reviewed de novo. *See, e.g.*, *Level 3 Communications, LLC v. Liebert Corp.*, 535 F.3d 1146, 1154 (10th Cir. 2008). But here, where Plaintiffs failed to challenge that interpretation below, review is only for plain error. *See Employers Reinsurance Corp. v. Mid-Continent Casualty Co.*, 358 F.3d 757, 769 (10th Cir. 2004). The district court's conclusion that the position of the United States was substantially justified is reviewed for an abuse of discretion. *Hackett*, 475 F.3d at 1172.

ARGUMENT

The district court acted within its discretion in denying Plaintiffs' request for attorney fees under EAJA on multiple grounds, any one of which is sufficient for affirmance. In their opening brief, Plaintiffs fail to demonstrate that the court abused its discretion in declining to award attorney fees on the record in this case.

I. The district court acted within in its discretion in concluding that Plaintiffs did not actually incur attorney fees.

Under EAJA, to qualify for an award of attorney fees, a prevailing party must have "incurred" attorney fees. 28 U.S.C. § 2412(d)(1)(A). Here, the district court acted within its discretion in concluding that, under the terms of the 2009 engagement letters, Plaintiffs did not incur attorney fees. The district court's EAJA order should be affirmed on this basis, and this Court need not address Plaintiffs' other contentions.

A. The district court's ruling that Plaintiffs did not incur attorney fees is consistent with *Centennial*.

Relying almost exclusively on this Court's opinion in *Centennial*, 688 F.3d at 678-83, Plaintiffs contend that the district court "failed to apply the law of this Circuit" in ruling that they did not incur attorney fees for EAJA purposes. Plaintiffs' Brief 38 (section heading; capitalization altered); *see also id.* at 19 (citing *Centennial* in arguing that the court "refus[ed] to apply this Circuit's law the way it is written"); *id.* at 38 & n.6, 39 (citing *Centennial* no fewer than seven times). Although we do not go so far as to say that Plaintiffs forfeited this contention, it deserves mention that Plaintiffs did not cite *Centennial* in their EAJA briefing in the district court, much less contend that *Centennial* compels (or even supports) a ruling that Plaintiffs incurred attorney fees. *See* 4 App. 999-1039 (Plaintiffs' principal EAJA brief below, which does not cite *Centennial*); 2 Supp. App. 304-23 (Plaintiffs' EAJA reply brief below (ECF Doc. 1399), which likewise does not cite *Centennial*). Ironically, *Centennial* itself reiterated and applied this Court's "general rule . . . not to address arguments that were not first presented to the district court." 688 F.3d at 684 (quoting *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1198 n.2 (10th Cir. 2006)).

In any event, Plaintiffs' contention lacks merit because the district court's ruling that Plaintiffs did not incur attorney fees is consistent with *Centennial*. In that case, this Court concluded that the plaintiff incurred attorney fees relating to an award of discovery sanctions imposed on the defendant by the district court under

Federal Rule of Civil Procedure 37, even though the plaintiff's attorneys were "working for a fixed fee." 688 F.3d at 674; *see also id.* at 678-82. The Court emphasized that the purpose of Rule 37 sanctions "would be thwarted if a party could escape the sanction whenever opposing counsel's compensation is unaffected by the abuse, as when the fee arrangement is a contingency fee or, as here, a flat rate." *Id.* at 680; *see also id.* at 682 (In interpreting fee-shifting statutes, courts "should look to their statutory purposes rather than focusing on the inclusion of a word (*incurred*) that, in ordinary usage, would be read into the statute in any event.").

Accordingly, the analogous question here is whether the statutory purpose of EAJA—"to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions," *Jean*, 496 U.S. at 163—would be thwarted if Plaintiffs Fletcher and Pratt were not awarded attorney fees given the particular terms of their 2009 engagement letters, which are contingency fee arrangements. The answer is *no*. The purpose of EAJA is *not* to provide persons challenging allegedly unreasonable government action with a financial windfall—that is, to permit challengers to obtain legal services *and* to retain the fee award if they are prevailing parties in the litigation. Absent a pre-existing obligation to pay any EAJA fee award to the prevailing party's counsel, fees have not been incurred and payment to the prevailing party presents the risk of a windfall.

Moreover, in construing Rule 37 and fee-shifting statutes, *Centennial* cited the Sixth Circuit's decision in *Turner* with approval, *see* 688 F.3d at 680—indeed, Plaintiffs recognize as much, Plaintiffs' Brief 38 n.6—and the district court applied *Turner* in concluding that Plaintiffs did not incur attorney fees. 7 App. 1903-05 (applying *Turner*, 680 F.3d at 725). As Plaintiffs further recognize, Plaintiffs' Brief 38 n.6, *Centennial* also cited with approval the Federal Circuit's decision in *Ed A. Wilson, Inc. v. General Services Administration*, 126 F.3d 1406 (Fed. Cir. 1997). *See* 688 F.3d at 682. In *Ed. A Wilson*, the court held—consistent with *Turner*—that a prevailing party incurs attorney fees under a contingency fee arrangement provided that (in contrast to the present case) there is an express or implied agreement that the fee award "will be paid to the legal representative." *Id.* at 1409.

Plaintiffs selectively quote *Centennial*'s statement that "an 'attorney fee' arises when a party uses an attorney, regardless of whether the attorney charges the party a fee." Plaintiffs' Brief 39 (quoting 688 F.3d at 679). But understood in context, that statement does not support the notion that a litigant *necessarily* incurs attorney fees under any contingency fee arrangement, irrespective of the terms of that arrangement and without regard to the statutory purpose of the fee-shifting provision at issue. Although Plaintiffs contend that this Court has "awarded EAJA fees and costs in cases involving contingency fee arrangements," *id.*, that is not an accurate description of the cited cases, which are not on point in any event. *See*, *e.g.*,

Frazier v. Apfel, 240 F.3d 1284, 1286-87 (10th Cir. 2001) (holding that in a Social Security benefits case, the district court may award attorney fees under both EAJA and 42 U.S.C. § 406, but it would be "improper for the district court to blindly approve" a "flat 25% award of the past-due benefits" under § 406 merely because "that is what the contingency contract called for"), *cited in* Plaintiffs' Brief 39.[2]

Contrary to Plaintiffs' contention, the district court did not improperly "interject itself and determine which attorney-client relationships are proper for compensation, and which are not." Plaintiffs' Brief 39. Rather, the court *agreed* with Plaintiffs that, "as a general matter," contingency fee arrangements "do not prevent an award of fees." 7 App. 1904. But consistent with *Turner*, *Centennial*, and *Ed A. Wilson*, the court concluded that Plaintiffs did not incur attorney fees given the particular terms of their 2009 contingency fee agreements. Put another way, if the agreements had expressly or impliedly placed a legal obligation on Plaintiffs to pay over a fee award to their counsel, the court would have ruled that Plaintiffs incurred attorney fees under EAJA. Plaintiffs argue that "there is no disagreement

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[2] *See also Gordon v. Astrue*, 361 Fed. Appx. 933, 934-36 (10th Cir. 2010) (affirming, in a Social Security benefits case, a fee award of $5,265 under 42 U.S.C. § 406 (not EAJA), where the district court found unreasonable the higher amount requested by the prevailing claimant's law firm under a contingency fee agreement), *cited in* Plaintiffs' Brief 39; *Kemp v. Bowen*, 822 F.2d 966, 968-69 (10th Cir. 1987) (holding that in a Social Security benefits case, the district court may award attorney fees under both EAJA and 42 U.S.C. § 406; remanding calculation of fees to the district court, which "should issue such order as may be required to prevent the double payment of fees for the same work"), *cited in* Plaintiffs' Brief 39.

between the contracting parties," i.e., no disagreement among Fletcher, Pratt, and their counsel as to whether Plaintiffs would pay over any fee award to counsel. Plaintiffs' Brief 39-40. But in so arguing, Plaintiffs do not rely on the text of their 2009 agreements; rather, they invoke testimony offered by Fletcher in his deposition and on Plaintiffs' request for an award of EAJA fees in their first amended complaint. *Id.* at 19. But as documented in Section I.C. below (pp. 29-31), those materials do not amount to an agreement by Plaintiffs to pay over an award of attorney fees to their counsel.

B. The district court properly applied *Turner*.

Plaintiffs contend that the district court misapplied *Turner*. Plaintiffs' Brief 40. That contention lacks merit. Plaintiffs assert that the court "did the very same thing that the Sixth Circuit *reversed* in *Turner*," elaborating: "In both the reversed holding in *Turner* and this case, the District Court was faced with an unsatisfied contingency agreement. In *Turner*, the Sixth Circuit held such a finding to be reversible error." *Id.* at 42-43 (footnote omitted).

Plaintiffs misconstrue the Sixth Circuit's holding. In *Turner*, the district court had denied an EAJA award on the ground that if Social Security benefits claimants could receive EAJA awards without first incurring legal debt, then claimants who never received an award of benefits from the district court (but rather, as in *Turner*, only obtained a so-called "sentence four" remand to the agency) "could simply

pocket the EAJA fee award," thereby creating a "windfall" for the claimant. 680 F.3d at 722-23; *cf.* Plaintiffs' Brief 46 (erroneously suggesting that this reasoning was endorsed by the Sixth Circuit in *Turner*). Reversing, the Sixth Circuit concluded that, under its interpretation of the term "incurred" in EAJA, the district court's concern about windfalls was misplaced: the "requirement that a litigant have a legal obligation to *pay over* any fee award to his attorney prevents litigants from pocketing these awards, because litigants with no obligation to pay over fees do not 'incur' them." 680 F.3d at 725 (emphasis in original). That is the same principle applied by the district court in ruling that Plaintiffs did not incur attorney fees under the terms of their 2009 engagement letters.

Plaintiffs erroneously contend that, in applying *Turner*, the district court "adopted the United States' position, string cite and all." Plaintiffs' Brief 46. In fact, the referenced string cite is from *Plaintiffs'* EAJA reply brief below. *See* 7 App. 1905 (district court's citing 2 Supp. App. 309-10 (ECF Doc. 1399, at 6-7)). The court referenced the cases string cited by Plaintiffs in the context of expressing *agreement* with Plaintiffs that contingency fee agreements do not as a general matter preclude an award of attorney fees. *See* 7 App. 1904-05.

Next, in a footnote that quotes selectively from their 2009 engagement letters, Plaintiffs summarily fault the district court for not analyzing under *Turner* a provision that counsel "would be entitled to 'any amount awarded as fees.' "

Plaintiffs' Brief 43 n.9. But this footnote "does not even contain an argument," and so the assertion of error is forfeited. *See Therrien v. Target Corp.*, 617 F.3d 1242, 1253 (10th Cir. 2010). Moreover, Plaintiffs did not raise their current contention (such as it is) in the district court, and have accordingly "failed to argue for plain error and its application on appeal." *Campbell v. City of Spencer*, 777 F.3d 1073, 1080 (10th Cir. 2014) (citing *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130-31 (10th Cir. 2011)). In their EAJA briefing below, Plaintiffs argued that the district court need not review the terms of any of their contingency fee agreements, but that if the court were to do so, it should review their *unsigned 2002 agreements*, which (allegedly) show that Plaintiffs incurred fees for EAJA purposes. 2 Supp. App. 309 n.3. The district court reasonably declined to rely on an unsigned agreement that Fletcher did not possess and could not recall having seen much less signed. *See supra* p. 17.

Plaintiffs do not try to demonstrate in their opening brief that any arguable error by the district court is plain—meaning "clear or obvious under current law," i.e., under cases such as *Turner*. *Campbell*, 777 F.3d at 1080; *see also Therrien*, 617 F.3d at 1253. Nor do Plaintiffs address any of the other requirements for this Court's exercise of discretion to correct plain error. *Id*. The provision of the 2009 engagement letters from which Plaintiffs now selectively quote states in relevant part that the "amount of our fee will be forty [percent] (40%) of the amount . . . paid

by the Government pursuant to the order of the United States District Court for the Northern District of Oklahoma *and* any amount awarded as fees." 6 App. 1538 (emphasis in original), *quoted in* Plaintiffs' Brief 43 n.9.

The "amount . . . paid by the Government pursuant to the order of the United States District Court for the Northern District of Oklahoma" refers to the condition that the "Lawyers will *not* be paid for our time and our work as lawyers *unless* . . . the Government is ordered to pay over amounts improperly paid to non-Osages" by the district court. 6 App. 1538 (emphasis added). However, the district court did not order the government "to pay over amounts improperly paid to non-Osages," which triggers the provision that counsel "will not be paid for our time and our work." Nor did the court award Plaintiffs any amount "as fees." Given the agreement's use of the conjunctive "and," it is not clear or obvious, *Campbell*, 777 F.3d at 1080, that Plaintiffs agreed to remit a fee award to their counsel in the event that—as ultimately occurred here—the district court did not order the government to pay over any amounts improperly paid to non-Osages.

C. The district court did not ignore whether Plaintiffs had an implied obligation to pay over a fee award to their counsel.

There is no merit to Plaintiffs' contention that the district court "ignored" *Turner*'s holding that a legal obligation to pay over an EAJA fee award to their counsel "need not be express, but can also be implied." Plaintiffs' Brief 43. Rather, as the district court correctly stated, under *Turner* such an obligation may be implied.

7 App. 1903 (discussing 680 F.3d at 725). Plaintiffs argue that they had such an implied obligation based primarily on their *unsigned* 2002 engagement letter. Plaintiffs' Brief 43. But as shown above (p. 17), the district court reasonably declined to consider that letter as "evidence that plaintiffs incurred fees under EAJA." 7 App. 1906. Plaintiffs do not challenge that evidentiary ruling, much less show that the court clearly abused its discretion in excluding the letter from evidence. *See Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1407 (10th Cir. 1991) (where a party has in effect made an offer of proof, the trial judge's decision to exclude evidence will not be reversed absent a clear abuse of discretion).

Plaintiffs contend that an implied legal obligation to pay over an EAJA award to their counsel is found in a passage from Fletcher's deposition testimony. Plaintiffs' Brief 44-45. But again, in the cited snippet, Fletcher was testifying about his *unsigned 2002 agreement* with counsel. *Id.* at 44. As noted, the district court excluded that agreement from evidence and, in any event, the snippet does not support a reasonable inference that Fletcher agreed to pay over a fee award to his counsel. Indeed, the district court found more probative Fletcher's deposition testimony that "he has no memory of seeing or signing the [2002] document." 7 App. 1905-06; *see also supra* p. 17. Plaintiffs do not contend, much less demonstrate, that the court's factual finding on this point is clearly erroneous. *See generally Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

In his deposition testimony, Fletcher also referred to Plaintiffs' request in their original complaint for an award of EAJA fees. *See* Plaintiffs' Brief 44-45 (discussing 2 Supp. App. 286, ¶ 5). Plaintiffs note that they made the same request for EAJA fees in their first amended complaint, which is a verified complaint. *Id.* at 19, 47 (discussing 1 App. 13-17). But Plaintiffs do not explain how that request for relief is reasonably construed as giving rise to a legal obligation that Plaintiffs would pay over a fee award to their counsel. *See Turner*, 680 F.3d at 725. The text of Plaintiffs' request for relief in the original complaint does not address whether any relief awarded by the district court as attorney fees would be paid over to Plaintiffs' counsel, nor do the cited verifications.

In sum, the district court acted within its discretion in concluding based on the record that Plaintiffs did not "incur" attorney fees for EAJA purposes. The district court's order declining to award attorney fees should be affirmed on this ground, and this Court need not address Plaintiffs' other contentions.

II. The district court acted within in its discretion in concluding that the position of the United States was substantially justified.

Assuming arguendo that Plaintiffs incurred attorney fees for EAJA purposes, liability for such fees is precluded because the position of the United States was "substantially justified." 28 U.S.C. § 2412(d)(1)(A). The district court's conclusion that the position of the United States was substantially justified is reviewed for an abuse of discretion. *Hackett*, 475 F.3d at 1172; *accord Pierce*, 487 U.S. at 559;

Madron v. Astrue, 646 F.3d 1255, 1257 (10th Cir. 2011). Plaintiffs fail to demonstrate that the district court abused its discretion in so concluding.

A. The district court treated the case as "an inclusive whole."

Plaintiffs contend that, instead of treating the case "as an inclusive whole," the district court impermissibly conducted an "atomized" review in ruling that the position of the United States was substantially justified. Plaintiffs' Brief 22-23; *see also id.* at 26. That contention lacks merit. The district court correctly recognized that, under *Jean*, 496 U.S. at 161-62, EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items"; the court also properly recognized that, under *Gyurman*, 836 F.2d at 485, the relevant inquiry is "whether the government's position was substantially justified based on the totality of the circumstances, as reflected in the record before the court." 7 App. 1907 (quoting *Jean* and *Gyurman*). "Treating the case as an inclusive whole, and based on the totality of the circumstances," the court district court concluded that "the government's position was substantially justified." 7 App. 1913.

As Plaintiffs observe, the district court examined the substantial justification issue through the lens of "three general categories" of claims brought by Plaintiffs over the course of a series of dismissals and complaint amendments: (1) tribal voting rights; (2) alienation of headrights to persons not of Osage blood; and (3) an accounting. Plaintiffs' Brief 23 (discussing 7 App. 1909). That approach does not

amount to impermissible "atomization" by the court. Rather, as quoted above, the court made clear that it was applying the "inclusive whole" and "totality of the circumstances" principles outlined in *Jean* and *Gyurman*. Given the "long and complicated history" of this case, 7 App. 1891, the court acted reasonably in organizing Plaintiffs' lawsuit into general categories of claims to aid in determining whether the government's position was substantially justified.

A position is substantially justified if it has a "reasonable basis both in law and fact." *Jean*, 496 U.S. at 158 n.6 (quoting *Pierce*, 487 U.S. at 565). The district court acted within its discretion in concluding that the government's position satisfied this standard. *See* 7 App. 1909-13. In that connection, the court found that "the most heavily litigated claim in this case was the claim of wrongful distributions to persons who were not Osage Indians," as to which the court had *granted* the government's motion to dismiss—i.e., the *government* prevailed on this point—and Plaintiffs did not appeal that dismissal in *Fletcher II*. 7 App. 1911, 1912-13. The court further found that Plaintiffs' accounting claim was "subordinate to and in furtherance of" their *dismissed* (and unappealed) misdistribution claim. 7 App. 1913. Moreover, "although the accounting claim survived the 2012 dismissal of the wrongful distributions claim, *it became unmoored from its original scope and purpose* of identifying royalty payments to persons who were not Osage Indians." *Id.* (emphasis added). As the court noted, *Plaintiffs* unsuccessfully challenged the

court's accounting order in *Fletcher III*; that is to say, even as to the accounting that Plaintiffs ultimately obtained, the *government* prevailed when Plaintiffs challenged that accounting. Finally, the court observed that the tribal voting rights aspect of Plaintiffs' lawsuit became moot while *Fletcher I* was pending due to intervening legislation, after the court had *granted* the government's motion to dismiss the original complaint. 7 App. 1909-10.

Although Plaintiffs correctly disclaim reliance on the "catalyst theory" rejected in *Buckhannon*, 532 U.S. at 610, they cite no authority for the assertion that their original 2002 complaint led Congress "to take up the issue and provide the requested relief." Plaintiffs' Brief 27. The text of the intervening legislation does not mention Plaintiffs' lawsuit, nor does the accompanying House report. *See* Pub. L. No. 108-431, 118 Stat. 2609 (2004); H.R. Rep. No. 108-502, *reprinted in* 2004 U.S.C.C.A.N. 2431. In these circumstances, the court reasonably concluded that "the position of the United States in this case as a whole was substantially justified," 7 App. 1909—that is, justified "in substance or in the main," or "for the most part." *Pierce*, 487 U.S. at 565, 566 n.2.

The district court's conclusion is buttressed by *United States v. Johnson*, 920 F.3d 639 (10th Cir. 2019), *cert. denied sub nom. Smith v. United States*, No. 19-10 (U.S. Oct. 7, 2019), which issued after the court filed its EAJA order. *Johnson* held that, under the "holistic approach" to the substantial justification

inquiry, a district court properly focuses on whether there was a reasonable basis in law and fact for the government's overall position in the litigation. *Id.* at 650. *Johnson* found persuasive the Fourth Circuit's analysis in *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132 (4th Cir. 1993), which informed the district court's ruling here. *See Johnson*, 920 F.3d at 649-50; 7 App. 1907-08. The Fourth Circuit held that the substantial justification inquiry should "look beyond the issue on which [the fee claimant] prevailed to determine, from the totality of the circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation"). *Roanoke River*, 991 F.2d at 139.

Moreover, the record reflects that *Plaintiffs* urged the district court to adopt, in effect, an "atomized" approach to the substantial justification issue, but that the court properly rejected Plaintiffs' approach. In particular, Plaintiffs contended that the government "was not justified in refusing to account to Plaintiffs"—that is, Plaintiffs impermissibly focused on only one claim in their lawsuit and sought a ruling that the government's position in the case as a whole was not substantially justified based on that one claim. *See* 4 App. 1028-30. But the court properly rejected Plaintiffs' approach, concluding instead that "the type of claim-by-claim substantial justification determination advocated by plaintiffs is difficult to reconcile with the EAJA's text." 7 App. 1909.

Plaintiffs contend that the district court relied on "outlier cases" of the Sixth and Seventh Circuits, which apply an inappropriate "predominate issue" test. Plaintiffs' Brief 28. Plaintiffs, however, misunderstand the district court's decision. This aspect of the court's analysis was only an *alternative* holding: "Alternatively, the court finds and concludes that the government's position as a whole was substantially justified based on the more prominent claims." 7 App. 1913 & n.4 (citing *Amezola-Garcia v. Lynch*, 835 F.3d 553, 555 (6th Cir. 2016), and *Gatimi v. Holder*, 606 F.3d 344, 350 (7th Cir. 2010)). But as clearly stated in the court's order, its *principal* holding was that, "[t]reating the case as an inclusive whole, and based on the totality of the circumstances," the government's position was substantially justified. 7 App. 1913. As shown, in so ruling, the court acted within its discretion.[3]

Plaintiffs also contend that, regardless of the test applied by the district court, the record does not support the court's finding that their accounting claim was subordinate to and in furtherance of their claim that the government wrongfully distributed royalty payments to persons who were not Osage Indians. Plaintiffs' Brief 29 (discussing 7 App. 1913). Plaintiffs' contention lacks merit: *Fletcher III*

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[3] Plaintiffs cite *Air Transport Association of Canada v. FAA*, 156 F.3d 1329 (D.C. Cir. 1998), *cited in* Plaintiffs' Brief 28-29. But the present case is not one in which a litigant "has successfully challenged a government action as substantially unjustified and achieved a complete victory in terms of the relief prayed." 156 F.3d at 1332. Nor is this a case in which a litigant "asserted several different arguments or reasons in support of a single claim for remand." *Dye v. Astrue*, 244 Fed. Appx. 222, 223 (10th Cir. 2007), *cited in* Plaintiffs' Brief 29.

explained—consistent with the district court's finding—that "Plaintiffs maintained in multiple proceedings that the accounting claim is *merely a means to later sue for misdistribution*." 854 F.3d at 1205 (emphasis added); *see also id.* at 1205 n.5. In light of *Fletcher III*'s explanation, there is no basis for Plaintiffs' assertion that the misdistribution claim was actually a claim raised by the government (not by Plaintiffs), or that the government "drove the litigation into procedural delay" by raising a misdistribution claim. Plaintiffs' Brief 30.

Plaintiffs further err in contending that the court's finding is inconsistent with *Fletcher I*. *Id.* at 29. That decision does not address the relationship between Plaintiffs' misdistribution and accounting claims; in fact, Plaintiffs' original complaint, the dismissal of which was appealed in *Fletcher I*, did not even include an accounting claim. *See supra* p. 7. Plaintiffs also state that the government did not prevail on Plaintiffs' misdistribution claim because that claim was dismissed without prejudice. Plaintiffs' Brief 31-32. But the EAJA question is whether *Plaintiffs* obtained relief on that claim; they did not.[4]

In sum, the district court applied the correct legal standard and acted within its discretion in ruling that the government's position was substantially justified.

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[4] Plaintiffs ask: "If the misdistribution claim was predominate, why would the District Court agree that it was more proper to resolve the accounting claim first?" Plaintiffs' Brief 32 n.5. The answer is that, once the court had dismissed the misdistribution claim without prejudice, Plaintiffs had no option but to proceed with the accounting claim "first," assuming they wanted to continue the litigation.

B. Plaintiffs' other arguments do not demonstrate that the district court abused its discretion in ruling that the position of the United States was substantially justified.

1. The district court did not ignore the facts.

Plaintiffs argue that the district court "ignored the facts of the matter" in ruling that the position of the United States was substantially justified. Plaintiffs' Brief 23. For example, continuing to apply an impermissible "atomization" approach by focusing only on one aspect of their lawsuit, Plaintiffs contend that "on the facts, the United States is at the very least obliged to account to Individual Indians by statute at all times relevant to this lawsuit." *Id.* But Plaintiffs do not explain how that is a "fact"; rather, it is a question of law, as demonstrated by Plaintiffs' citations to statutory provisions like 25 U.S.C. §§ 162a and 4011. *See supra* pp. 5-6 (discussing those provisions). Plaintiffs contend that there was no "*legitimate* question that the United States is obligated to account." Plaintiffs' Brief 23. By "legitimate," Plaintiffs apparently mean only that the government lost on the merits of that issue in *Fletcher II*—which does not demonstrate that it was an abuse of discretion for the district court to conclude that the government's position was substantially justified in the totality of the circumstances. Even (improperly) considering that single issue in isolation, the government's position need not be correct in order to have a reasonable basis both in law and fact. *See Jean*, 496 U.S. at 161-62; *Pierce*, 487 U.S. at 566 n.2; *Madron*, 646 F.3d at 1257; *Hackett*, 475 F.3d at 1172.

Moreover, although for EAJA purposes Plaintiffs now describe the accounting order they obtained from the district court on remand from *Fletcher II* as "important," Plaintiffs' Brief 15; "unprecedented," *id.* at 37; and a "substantial benefit," *id.* at 47, Plaintiffs unsuccessfully *challenged* that accounting order in *Fletcher III* and there repeatedly assailed the accounting ordered by the district court as not "meaningful." *See* Plaintiffs' Opening Brief in *Fletcher III*, No. 16-5050, at 30 (filed Aug. 19, 2016) (district court failed "to order a meaningful accounting"); *id.* at 2, 8, 11, 14, 15, 25, 26, 28, 29; Plaintiffs' Reply Brief 6 (filed Oct. 31, 2016) (district court "refused a meaningful accounting in favor of an inadequate accounting"); *id.* at 8 (district court ordered a "window-dressing accounting"); *id.* at, 9-10 (district court ordered a "woefully inadequate accounting"); *id.* at 12-13, 15, 16; *cf.* Plaintiffs' Brief 15 (stating that Plaintiffs "wanted a more robust accounting"). Plaintiffs cannot have it both ways.

2. The district court did not find substantial justification merely because Plaintiffs did not receive all the relief that they requested.

As discussed above (p. 12), in proceedings on remand from *Fletcher II*, the district court ruled on Rule 59(e) motions filed by both parties. Quoting from the EAJA order in which the court discussed those earlier rulings, Plaintiffs contend that "it appears the District Court reasoned that because [Plaintiffs] did not receive *all* the relief they requested, the United States was substantially justified." Plaintiffs'

Brief 22. But Plaintiffs misunderstand the district court's reasoning. The passage quoted by Plaintiffs appears in the "background" section of the court's order, 7 App. 1895, in which the court provided context for the "long and complicated history" of this case, 7 App. 1891. In addressing the substantial justification issue, however, the court did not refer to its earlier ruling on the parties' respective Rule 59(e) motions—much less conclude that the position of the United States was substantially justified merely because Plaintiffs "did not receive *all* the relief they requested" in their motion. *See* 7 App. 1906-13.

3. The government did not engage in "duplicitous behavior."

Plaintiffs contend that the government's alleged "duplicitous behavior" is a "basis for a finding that the United States was not substantially justified." Plaintiffs' Brief 25. That contention should be rejected for several reasons.

First, Plaintiffs muster no legal authority for their contention: the case cited by Plaintiffs does not address alleged "duplicitous" behavior by the government. *See Hackett*, 475 F.3d at 1175 (concluding that an administrative law judge's error "does not meet the reasonableness test for substantial justification" where the ALJ mischaracterized the testimony of a vocational expert in denying the plaintiff's application for Social Security disability benefits).

Second, Plaintiffs do not explain what they mean by "duplicitous" behavior. "Duplicitous" is defined as "[g]iven to a tricky doubleness in character, speech, or

conduct; esp., deceitful in behaving or speaking differently with different persons in relation to the same matter, with the intent of fooling one or more of them." *Black's Law Dictionary* 613 (10th ed. 2014). The two cited hearing transcript snippets, Plaintiffs' Brief 34-36, do not establish that the government spoke deceitfully with the intent of fooling anyone, and Plaintiffs do not argue otherwise.

Third, Plaintiffs provide insufficient context for their snippet from the oral argument transcript in *Fletcher II*, Plaintiffs' Brief 34-35, but context is important. During that argument, the Court pressed Plaintiffs' counsel (Mr. Aamodt) to explain "with some specificity, what is the accounting that you're asking the Court to order." 3 App. 567. After counsel's argument time had expired, the Court apparently had yet to receive a satisfactory response. *See* 3 App. 572 ("And I'm still trying to nail you down a little bit further as to what you really want."). After further colloquy, a panel member stated that "I still haven't heard what you want with some specificity," and a panel member twice stated that what Plaintiffs' counsel had described is "not an accounting." 3 App. 573-74.

Against this backdrop, the government's counsel (Ms. Hazard) explained that, "[a]s to the accounting, we have been troubled throughout this lawsuit by our inability to understand exactly . . . what it is that plaintiffs have requested." 3 App. 577. Counsel explained that, based on Plaintiffs' oral argument, "[w]hat plaintiffs seem to be seeking is a statement regarding what other people in the denominator

are receiving," i.e., other individuals and entities holding some of the 2,229 total headrights in the Osage Mineral Estate. 3 App. 578. Government counsel explained: "But the accounting identified in [25 U.S.C.] 162(a)(5) [sic] provides for account holders, and here the account holder is the tribe, to receive periodic statements of their account. That would be the tribe's account." *Id.* (referring to 25 U.S.C. §§ 162a(d)(5), 4011(b)). Counsel further stated that "the accounting required under [25 U.S.C.] 4011 and 162a is provided to the tribe." *Id.* In this context, counsel made the statement upon which Plaintiffs now seize: "we've done an accounting to Osage Nation." 3 App. 580.

In context, therefore, the record shows that during argument in *Fletcher II*, government counsel was attempting to respond to the unclear argument of Plaintiffs' counsel regarding what specific accounting the Plaintiffs were seeking from the Court. In stating that "we've done an accounting to Osage Nation," the government's counsel was referring in part to the "periodic statements of their [the Osage Nation's] account," known as periodic statements of performance. *See* 25 U.S.C. § 162a(d)(5). This dovetailed with the government's brief in *Fletcher II*, which explained that in October 2011, the Osage Nation and the United States had entered into a settlement agreement in the Nation's lawsuit against the United States in the Court of Federal Claims; the Nation had "agreed that the accountings and audits specified in the Settlement Agreement—which includes periodic statements

at least quarterly—fulfill the Secretary of Interior's obligations under 25 U.S.C. 4011." United States' Answering Brief in *Fletcher II*, No. 12-5078, at 37 & n.4 (filed Nov. 14, 2012).

Consistent with the foregoing, the Court's opinion in *Fletcher II* explained that, on remand, 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 Nation." 730 F.3d at 1215-16. That "something like" is essentially what occurred on remand: in the accounting ordered by the district court, Plaintiffs received monthly account statements for the Osage tribal trust account running from the first quarter of 2002, plus additional information specified by the court. *See* 4 App. 853-55 & n.18, 914-15.

Fourth, Plaintiffs provide insufficient context for their second snippet, Plaintiffs' Brief 35-36; again, however, context is important. This snippet is from the transcript of a telephone conference held before a magistrate judge in 2014 on remand from *Fletcher II* regarding the government's motion for a protective order. *See* 3 App. 601-03. At this conference, which took place more than a year *before* the district court's December 2015 accounting order, government counsel (Mr. Kim) stated that "specifically as to this question about what resolved the accounting claims that were brought in the tribal trust case, there was no other accounting done." 3 App. 632. By "no other accounting," counsel appeared to mean no other

accounting beyond that referenced in the October 2011 settlement agreement for the Osage Nation's lawsuit against the United States in the Court of Federal Claims.

Fifth, Plaintiffs do not explain why any arguable tension between the respective statements of government counsel supports a conclusion that the position of the United States was not substantially justified. Rather, Plaintiffs' argument is yet another instance of their impermissibly breaking the litigation into "atomized line-items." *Jean*, 496 U.S. at 162. According to Plaintiffs, the government's position was not substantially justified because of one arguable instance of tension in statements of government counsel in a case that has been litigated for more than 17 years (generating a district court docket containing some 1,400 entries), including three previous trips to this Court. That is impermissible atomization with a vengeance. For all of these reasons, Plaintiffs' "duplicitous behavior" contention should be rejected.

4. The district court did not fail to consider the government's "pre-litigation" position.

Plaintiffs contend that the district court erroneously failed to consider the government's pre-litigation position, and that the government's "pre-litigation activity here weighs particularly heavily against a finding of substantial justification." Plaintiffs' Brief 33-34. That contention lacks merit for two reasons.

First, the government activity to which Plaintiffs refer is not in fact "pre-litigation." Rather, Plaintiffs rely on the same two snippets discussed above (pp. 41-

44) from hearing transcripts in connection with their meritless "duplicitous behavior" contention. *See* Plaintiffs' Brief 34-36. These snippets are obviously from the *litigation* (not "pre-litigation") stage of this case.

Second, again erroneously focusing their substantial justification analysis on only one aspect of the case, Plaintiffs' argument about "pre-litigation activity" reduces to a contention that federal law "has always required the United States to account to its Indian trust beneficiaries," and that "[p]ersistent denial of this duty to account cannot be genuinely justified." Plaintiffs' Brief 34. But that contention rests on the ground that the government's *litigating position* in *Fletcher II* was rejected. *See id.* (citing *Fletcher II*). In other words, this argument is in part a re-packaging of their erroneous argument that the government's position was not substantially justified merely because the government lost on one aspect of the lawsuit in *Fletcher II*. The district court correctly recognized that the government's position in underlying *administrative proceedings* that precede judicial review is part of a substantial justification analysis. *See* 7 App. 1906 (citing 28 U.S.C. § 2412(d)(1)(B)). But here, there were no such agency proceedings for the court to consider, and Plaintiffs do not argue otherwise.

In sum, the district court acted within its discretion in concluding that the position of the United States was substantially justified. If necessary, the district court's order declining to award attorney fees may be affirmed on this ground.

III. Plaintiffs' failure to comply with the district court's July 13, 2017 order deprived the court of an evidentiary basis for determining whether the amount of attorney fees requested was reasonable.

Assuming arguendo that Plaintiffs incurred attorney fees, and that the position of the United States was not substantially justified, Plaintiffs' failure to comply with the district court's July 13, 2017 order deprived the court of an evidentiary basis for determining whether the amount of attorney fees requested was reasonable. Plaintiffs therefore did not meet their burden of proof, and it was within the court's discretion to deny a fee award; even if a claimant has met the "multiple conditions for eligibility for EAJA fees," a district court still must determine "what fee is reasonable." *Jean*, 496 U.S. at 161.

The district court explained that "in the event it becomes necessary to address the reasonableness of the [fee] request, plaintiffs' billing records do not comply with the Order requiring the 'identification, attribution, and separation of attorneys' fees and costs in relation to the claim on which plaintiffs prevailed,' " i.e., the accounting claim. 7 App. 1914 (applying *Hensley*, 461 U.S. at 440; citation omitted). The court's reference to *Hensley* reflects its concern that while "the extent of a plaintiff's success is a crucial factor in determining the proper amount" of a fee award, *id.* (quoting 461 U.S. at 440), Plaintiffs' billing records did not provide the court with a basis for determining whether the extent of Plaintiffs' success warranted the amount of fees requested (approximately $1.8 million). *See id.*

In these circumstances, the district court acted within its discretion in denying Plaintiffs' fee request. *See Hensley*, 461 U.S. at 437 ("We reemphasize that the district court has discretion in determining the amount of a fee award."). It is fundamental that "no award of fees is 'automatic.'" *Jean*, 496 U.S. at 163. The court's decision is consistent with *Hensley*'s admonition that "prevailing party" status is "a generous formulation that brings the plaintiff only across the statutory threshold," and that it "remains for the district court to determine what fee is reasonable." 461 U.S. at 433. Moreover, the court's decision is consistent with *Hensley*'s teaching that "the fee applicant bears the burden" of "documenting the appropriate hours expended," *id.* at 437, and that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained," *id.* at 440. Plaintiffs achieved only limited success here: after some 17 years of litigation, Plaintiffs obtained only an accounting order, which they themselves unsuccessfully challenged as not "meaningful" in *Fletcher III*. *See supra* p. 39.

Plaintiffs' failure to comply with the district court's 2017 order effectively presented the court with a choice: (1) notwithstanding Plaintiffs' only limited success, award the entire amount of fees requested; or (2) deny a fee award. The court acted within the above-described discretion in opting for the latter, particularly as it was under no obligation to sift through Plaintiffs' billing records. *See Hensley*,

461 U.S. at 437 (holding that it is the fee applicant's burden to document the appropriate hours expended).

Contrary to Plaintiffs' contention, the district court's 2017 order, and the court's enforcement of that order in its EAJA decision, is not "an error of law." Plaintiffs' Brief 48. Rather, the court's action is consistent with *Hensley* and *Jean*. As Plaintiffs emphasize, the "result is what matters." *Id.* (quoting *Hensley*, 461 U.S. at 435). Here, the result is that after 17 years of litigation, Plaintiffs obtained only an accounting from the district court, which they then unsuccessfully challenged as not "meaningful" in *Fletcher III*. That is hardly the sort of "excellent results" that *Hensley* indicated would support "a fully compensatory fee." 461 U.S. at 435.

Moreover, *Jean* does not hold that, absent unreasonably dilatory conduct by the fee applicant, the district court presumptively must award the full amount of attorney fees requested. Plaintiffs' Brief 47-48. Rather, *Jean* explained that "once a private litigant has met the multiple conditions for eligibility for EAJA fees, the district court's task of determining what fee is reasonable is essentially the same as that described in *Hensley*." 496 U.S. at 161. In its 2017 order, the court did not direct Plaintiffs to "limit" their billing records. Plaintiffs' Brief 48 (discussing 4 App. 997). Plaintiffs were free to submit whatever billing records they wished, so long as they complied with the court's 2017 order. Plaintiffs simply failed to comply with that order—and without explanation.

Contrary to Plaintiffs' contention, the district court did not conclude that Plaintiffs' fee request was "excessive." Plaintiffs' Brief 14 n.2. Rather, the court concluded that it could not determine whether the amount of fees requested was reasonable given Plaintiffs' failure to comply with the court's July 13, 2017 order. Nor did the government "agree" that if Plaintiffs incurred fees and the position of the United States was not substantially justified, "then a substantial portion of the fees should be paid." *Id.* (citing 6 App. 1377). Plaintiffs' record citation does not support that assertion. Rather, the government contended that even if the district court were to find that Plaintiffs are entitled to an award of attorney fees, the court should "drastically reduce the number of hours Plaintiffs claim." 6 App. 1524. The government further contended that Plaintiffs' failure to comply with the court's 2017 order warranted denial of their fee request. 6 App. 1496.

Finally, Plaintiffs contend that "[r]egardless of the propriety of the District Court's direction," they "attempted to comply" with the court's 2017 order. Plaintiffs' Brief 48. The record is to the contrary. Plaintiffs cite declarations of their counsel, *id.* at 48-49, but those declarations do not address the amount of time counsel spent regarding the accounting claim, *see* 5 App. 1125-42 (declarations of Mark Waller, Amanda S. Proctor, and Jason Aamodt). Plaintiffs cite the declaration of D. Kenyon Williams, an attorney who reviewed Plaintiffs' time records, Plaintiffs' Brief 49, but Williams' declaration states that he was asked to opine on

the reasonableness of the attorney fees sought by Plaintiffs "in their January 29, 2016" EAJA motion—a pleading that was *stricken* from the record by the district court, 5 App. 1302, ¶ 6; *see also supra* p. 13. In any event, Williams' declaration does not address the amount of time spent by Plaintiffs' counsel regarding the accounting claim. *See* 5 App. 1305, ¶ 16.

Plaintiffs now contend that *Fletcher III* establishes it would have been "impractical" for them to comply with the district court's 2017 order. Plaintiffs' Brief 49. That argument is forfeited because Plaintiffs did not ask the court to excuse their non-compliance on the basis of *Fletcher III*. *See Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004); *Richison*, 634 F.3d at 1128; *Employers Reinsurance*, 358 F.3d at 769-70. Even if not forfeited, Plaintiffs' contention lacks merit. While *Fletcher III* explained that Plaintiffs' misdistribution and accounting claims are intertwined, 854 F.3d at 1205, this does not mean it would have been impractical for Plaintiffs' counsel to keep billing records showing the amount of time spent on the accounting claim. That is particularly so given the district court's granting of the government's motion to dismiss Plaintiffs' misdistribution claim in April 2012, *see supra* p. 10—more than five years *before* the court's July 13, 2017 order—and Plaintiffs' failure to appeal that dismissal in *Fletcher II*. In other words, as of April 2012, there was no longer a live misdistribution claim with which the accounting claim could have been intertwined.

In sum, if necessary to reach, the district court's decision may be affirmed on the ground that Plaintiffs failed to comply with the court's July 13, 2017 order.

* * *

At the end of the day, while Plaintiffs "can derive satisfaction from the fruit of [their] labors" insofar as they obtained an accounting in this case, the district court acted within its discretion in declining to "order further compensation." *Amigos Bravos*, 324 F.3d at 1175-76 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the district court's order denying Plaintiffs' request for attorney fees under EAJA should be affirmed.

Respectfully submitted,

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October 8, 2019
90-2-4-10781

STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs have requested oral argument. The United States favors oral argument if it would be helpful to the Court in deciding this appeal.

CERTIFICATES OF COMPLIANCE AND DIGITAL SUBMISSION

I hereby certify that the foregoing document complies with the type-volume and typeface requirements of Fed. R. App. P. 32(a)(5) and (7) because it contains 12,493 words in 14-point type (Times New Roman).

I further hereby certify that with respect to the foregoing document:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender: Antivirus Definition 1.303.1210.0 (last updated October 8, 2019), and according to the program are free of viruses.

/s/ John Emad Arbab
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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. All counsel in this appeal are registered CM/ECF users who will be served by the appellate CM/ECF system.

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Addendum

Index to Addendum

Fletcher v. United States
No. 19-5023

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 161. United States as Party Generally (Refs & Annos)

28 U.S.C.A. § 2412

§ 2412. Costs and fees

Effective: March 12, 2019
Currentness

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special

circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to chapter 71 of title 41;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, or an adversary adjudication subject to chapter 71 of title 41, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5)(A) Not later than March 31 of the first fiscal year beginning after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act, and every fiscal year thereafter, the Chairman of the Administrative Conference of the United States shall submit to

Congress and make publicly available online a report on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection.

(B) Each report under subparagraph (A) shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information that may aid Congress in evaluating the scope and impact of such awards.

(C)(i) Each report under subparagraph (A) shall account for all payments of fees and other expenses awarded under this subsection that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is sealed or otherwise subject to a nondisclosure provision.

(ii) The disclosure of fees and other expenses required under clause (i) shall not affect any other information that is subject to a nondisclosure provision in a settlement agreement.

(D) The Chairman of the Administrative Conference of the United States shall include and clearly identify in each annual report under subparagraph (A), for each case in which an award of fees and other expenses is included in the report--

(i) any amounts paid under section 1304 of title 31 for a judgment in the case;

(ii) the amount of the award of fees and other expenses; and

(iii) the statute under which the plaintiff filed suit.

(6) As soon as practicable, and in any event not later than the date on which the first report under paragraph (5)(A) is required to be submitted, the Chairman of the Administrative Conference of the United States shall create and maintain online a searchable database containing, with respect to each award of fees and other expenses under this subsection made on or after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act, the following information:

(A) The case name and number, hyperlinked to the case, if available.

(B) The name of the agency involved in the case.

(C) The name of each party to whom the award was made as such party is identified in the order or other court document making the award.

(D) A description of the claims in the case.

(E) The amount of the award.

(F) The basis for the finding that the position of the agency concerned was not substantially justified.

(7) The online searchable database described in paragraph (6) may not reveal any information the disclosure of which is prohibited by law or a court order.

(8) The head of each agency (including the Attorney General of the United States) shall provide to the Chairman of the Administrative Conference of the United States in a timely manner all information requested by the Chairman to comply with the requirements of paragraphs (5), (6), and (7).

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of this section of costs enumerated in section 1920 of this title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 973; Pub.L. 89-507, § 1, July 18, 1966, 80 Stat. 308; Pub.L. 96-481, Title II, § 204(a), (c), Oct. 21, 1980, 94 Stat. 2327, 2329; Pub.L. 97-248, Title II, § 292(c), Sept. 3, 1982, 96 Stat. 574; Pub.L. 99-80, §§ 2, 6(a), (b)(2), Aug. 5, 1985, 99 Stat. 184, 186; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 102-572, Title III, § 301(a), Title V, §§ 502(b), 506(a), Title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4511-4513, 4516; Pub.L. 104-66, Title I, § 1091(b), Dec. 21, 1995, 109 Stat. 722; Pub.L. 104-121, Title II, § 232, Mar. 29, 1996, 110 Stat. 863; Pub.L. 105-368, Title V, § 512(b)(1)(B), Nov. 11, 1998, 112 Stat. 3342; Pub.L. 111-350, § 5(g)(9), Jan. 4, 2011, 124 Stat. 3848; Pub.L. 116-9, Title IV, § 4201(a)(2), (3), Mar. 12, 2019, 133 Stat. 763.)

28 U.S.C.A. § 2412, 28 USCA § 2412
Current through P.L. 116-58.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 4. Performance by United States of Obligations to Indians
Subchapter III. Deposit, Care, and Investment of Indian Moneys

25 U.S.C.A. § 162a

§ 162a. Deposit of tribal funds in banks; bond or collateral security; investments; collections from irrigation projects; affirmative action required

Currentness

(a) Deposit of tribal trust funds in banks

The Secretary of the Interior is hereby authorized in his discretion, and under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States and on which the United States is not obligated by law to pay interest at higher rates than can be procured from the banks. The said Secretary is also authorized, under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be selected by him the funds held in trust by the United States for the benefit of individual Indians: *Provided,* That no individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate, subject, however, to the regulations of the Board of Governors of the Federal Reserve System in the case of member banks, and of the Board of Directors of the Federal Deposit Insurance Corporation in the case of insured nonmember banks, except that the payment of interest may be waived in the discretion of the Secretary of the Interior on any deposit which is payable on demand: *Provided further,* That no tribal or individual Indian money shall be deposited in any bank until the bank shall have furnished an acceptable bond or pledged collateral security therefor in the form of any public-debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States, except that no such bond or collateral shall be required to be furnished by any such bank which is entitled to the benefits of section 12B of the Federal Reserve Act, with respect to any deposits of such tribal or individual funds to the extent that such deposits are insured under such section: *Provided, however,* That nothing contained in this section, or in section 12B of the Federal Reserve Act, shall operate to deprive any Indian having unrestricted funds on deposit in any such bank of the full protection afforded by section 12B of the Federal Reserve Act, irrespective of any interest such Indian may have in any restricted Indian funds on deposit in the same bank to the credit of a disbursing agent

of the United States. For the purpose of this section and said Act, said unrestricted funds shall constitute a separate and distinct basis for an insurance claim: *Provided further,* That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States: *And provided further,* That the foregoing shall apply to the funds of the Osage Tribe of Indians, and the individual members thereof, only with respect to the deposit of such funds in banks.

(b) Investment of collections from irrigation projects and power operations on irrigation projects

The Secretary of the Interior is authorized to invest any operation and maintenance collections from Indian irrigation projects and revenue collections from power operations on Indian irrigation projects in--

(1) any public-debt obligations of the United States;

(2) any bonds, notes, or other obligations which are unconditionally guaranteed as to both principal and interest by the United States; or

(3) any obligations which are lawful investments for trust funds under the authority or control of the United States.

The Secretary of the Interior is authorized to use earning [1] from investments under this subsection to pay operation and maintenance expenses of the project involved.

(c) Investment of tribal trust funds in public debt obligations

(1) Notwithstanding subsection (a), the Secretary of the Interior, at the request of any Indian tribe, in the case of trust funds of such tribe, or any individual Indian, in the case of trust funds of such individual, is authorized to invest such funds, or any part thereof, in guaranteed or public debt obligations of the United States or in a mutual fund, otherwise known as an open-ended diversified investment management company if--

(A) the portfolio of such mutual fund consists entirely of public-debt obligations of the United States, or bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States, or a combination thereof;

(B) the trust funds to be invested exceed $50,000;

(C) the mutual fund is registered by the Securities and Exchange Commission; and

(D) the Secretary is satisfied with respect to the security and protection provided by the mutual fund against loss of the principal of such trust funds.

(2) The Secretary, as a condition to complying with a request pursuant to paragraph (1) of this subsection, is authorized to require such tribe or individual Indian, as the case may be, to enter into an agreement with the Secretary for the purpose of relieving the United States of any liability in connection with the interest, or amount thereof, payable in connection with such trust funds so invested during the period of that investment.

(3) Investments pursuant to paragraph (1) of this subsection shall be deemed to be the same as cash or a bank deposit for purposes of section 955 of this title.

(d) Trust responsibilities of Secretary of the Interior

The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

(1) Providing adequate systems for accounting for and reporting trust fund balances.

(2) Providing adequate controls over receipts and disbursements.

(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

(4) Determining accurate cash balances.

(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

CREDIT(S)

(June 24, 1938, c. 648, § 1, 52 Stat. 1037; Pub.L. 98-146, Title I, Nov. 4, 1983, 97 Stat. 929; Pub.L. 101-644, Title III, § 302, Nov. 29, 1990, 104 Stat. 4667; Pub.L. 103-412, Title I, §§ 101, 103(b), (c), Oct. 25, 1994, 108 Stat. 4240, 4241.)

Footnotes

1 So in original. Probably should be "earnings".

25 U.S.C.A. § 162a, 25 USCA § 162a
Current through P.L. 116-58.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 42. American Indian Trust Fund Management Reform
Subchapter I. Recognition of Trust Responsibility

25 U.S.C.A. § 4011

§ 4011. Responsibility of Secretary to account for daily and annual balances of Indian trust funds

Currentness

(a) Requirement to account

The Secretary shall 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.

(b) Periodic statement of performance

Not later than 20 business days after the close of a calendar quarter, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to section 162a of this title. The statement, for the period concerned, shall identify--

(1) the source, type, and status of the funds;

(2) the beginning balance;

(3) the gains and losses;

(4) receipts and disbursements; and

(5) the ending balance.

(c) Annual audit

The Secretary shall cause to be conducted an annual audit on a fiscal year basis 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, and shall include a letter relating to the audit in the first statement of performance provided under subsection (b) after the completion of the audit.

CREDIT(S)

(Pub.L. 103-412, Title I, § 102, Oct. 25, 1994, 108 Stat. 4240.)

25 U.S.C.A. § 4011, 25 USCA § 4011
Current through P.L. 116-58.

End of Document

CHAP. 3569.—An Act To amend section twenty-eight hundred and forty-four of the Revised Statutes of the United States, and to provide for an authentication of invoices of merchandise shipped to the United States from the Philippine Islands.

June 28, 1906.
[H. R. 19755.]
[Public, No. 318.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section numbered twenty-eight hundred and forty-four of the Revised Statutes of the United States is hereby amended by adding thereto the following: "*Provided*, That the authentication may be made by the collector or a deputy collector of customs in the case of merchandise shipped to the United States from the Philippine Islands."

Invoices.
R. S., sec. 2844, p. 551, amended.

Authentications in Philippines.

Approved, June 28, 1906.

CHAP. 3570.—An Act To authorize the Monongahela Connecting Railroad Company to construct a bridge across the Monongahela River in the State of Pennsylvania.

June 28, 1906.
[H. R. 19830.]
[Public, No. 319.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Monongahela Connecting Railroad Company, a corporation organized under the laws of the State of Pennsylvania, its successors and assigns, be, and they are hereby, authorized to construct, maintain, and operate a bridge and approaches thereto across the Monongahela River at Pittsburg, from a point on the north shore between Hazlewood avenue and the Glenwood highway bridge to a point on the south shore in the township of Baldwin or the township of Lower Saint Clair, in Allegheny County, in the State of Pennsylvania, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters," approved March twenty third, nineteen hundred and six.

Monongahela River.
Monongahela Connecting Railroad Company may bridge, at Pittsburg, Pa.

Ante, p. 34.

SEC. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Amendment.

Approved, June 28, 1906.

CHAP. 3571.—An Act To authorize the board of supervisors of Sunflower County, Mississippi, to construct a bridge across Sunflower River.

June 28, 1906.
[H. R. 19854.]
[Public, No. 320.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the board of supervisors of Sunflower County, Mississippi, be, and they are hereby, authorized to construct, maintain, and operate a bridge and approaches thereto across the Sunflower River at Lehrton, in Sunflower County, in the State of Mississippi, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters," approved March twenty-third, nineteen hundred and six.

Sunflower River.
Sunflower County, Miss., may bridge, at Lehrton.

Ante, p. 34.

SEC. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Amendment.

Approved, June 28, 1906.

CHAP. 3572.—An Act For the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes.

June 28, 1906.
[H. R. 16388.]
[Public, No. 321.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Okla-

Osage Indians, Okla.
Division of tribal land, etc.
Tribal roll.

homa Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof: *Provided*, That the principal chief of the Osages shall, within three months from and after the approval of this Act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud, but no name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution, and the Secretary of the Interior, as early as practicable, shall carefully investigate such cases and shall determine which of said persons, if any, are entitled to enrollment; but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment to the Osage roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage roll the names of all persons found by him, after investigation, to be so entitled, whose applications were pending on the date of the approval of this Act: and the said Secretary of the Interior is hereby authorized to strike from the said roll the names of persons or their descendants which he finds were placed thereon by or through fraud, and the said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, and the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, Twenty-eighth Statutes at Large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right to appeal to the courts, are hereby repealed as far as the same relate to the Osage Indians: and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinafter provided.

Proviso. Fraudulent enrollment.

Restriction.

Revision of roll.

Decision of Secretary final. Vol. 28, p. 305.

Division of lands.

SEC. 2. That all lands belonging to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof in acres, as follows:

First selection.

Filing notice. Time limit.

Proviso. Ratification.

Failure to select.

First selections for minors.

First. Each member of said tribe, as shown by the roll of membership made up as herein provided, shall be permitted to select one hundred and sixty acres of land as a first selection; and the adult members shall select their first selections and file notice of the same with the United States Indian agent for the Osages within three months after the approval of this Act: *Provided*, That all selections of lands heretofore made by any member of said tribe, against which no contest is pending, be, and the same are hereby, ratified and confirmed as one of the selections of such member. And if any adult member fails, refuses, or is unable to make such selection within said time, then it shall be the duty of the United States Indian agent for the Osages to make such selection for such member or members, subject to the approval of the Secretary of the Interior. That all said first selections for minors shall be made by the United States Indian agent for the Osages, sub-

ject to the approval of the Secretary of the Interior: *Provided*, That said first selections for minors having parents may be made by said parents, and the word "minor" or "minors" used in this Act shall be held to mean those who are under twenty-one years of age: *And provided further*, That all children born to members of said tribe between January first, nineteen hundred and six, and the first day of January, nineteen hundred and seven, shall have their selections made for them within six months after approval of this Act, or within six months after their respective births. That all children born to members of said tribe on and after the first day of January, nineteen hundred and seven, and before the first day of July, nineteen hundred and seven, shall have their selections made for them on or before the last day of July, nineteen hundred and seven, the proof of birth of such children to be made to the United States Indian agent for the Osages.

Parents may select.

Time of selection.

Second. That in making his or her first selection of land, as herein provided for, a member shall not be permitted to select land already selected by, or in possession of, another member of said tribe as a first selection, unless such other member is in possession of more land than he and his family are entitled to for first selections under this Act; and in such cases the member in possession and having houses, orchards, barns, or plowed land thereon shall have the prior right to make the first selection: *Provided*, That where members of the tribe are in possession of more land than they are entitled to for first selections herein, said members shall have sixty days after the approval of this Act to dispose of the improvements on said lands to other members of the tribe.

Prior rights protected

Proviso. Disposal of improvements.

Third. After each member has selected his or her first selection as herein provided, he or she shall be permitted to make a second selection of one hundred and sixty acres of land in the manner herein provided for the first selection.

Second selection.

Fourth. After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall be permitted to make a third selection of one hundred and sixty acres of land in the manner herein provided for the first and second selections: *Provided*, That all selections herein provided for shall conform to the existing public surveys in tracts of not less than forty acres, or a legal subdivision of a less amount, designated a "lot." Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided.

Third selection.

Proviso. Surveys.

Homesteads inalienable, etc.

Surplus lands.

Fifth. After each member has selected his or her first, second, and third selections of one hundred and sixty acres of land, as herein provided, the remaining lands of said tribe in Oklahoma Territory, except as herein provided, shall be divided as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands.

Disposal of remaining lands.

Commission.

Sixth. The selection and division of lands herein provided for shall be made under the supervision of, or by, a commission consisting of one member of the Osage tribe, to be selected by the Osage council, and two persons to be selected by the Commissioner of Indian Affairs subject to the approval of the Secretary of the Interior; and said commission shall settle all controversies between members of the tribe relative to said selections of land; and the schedules of said selections and division of lands herein provided for shall be subject to the approval of the Secretary of the Interior. The surveys, salaries of said com-

Duties.

Expenses.

mission, and all other proper expenses necessary in making the selections and division of land as herein provided shall be paid by the Secretary of the Interior, out of any Osage funds derived from the sale of town lots, royalties from oil, gas, or other minerals, or rents from grazing land.

Authority to sell selected lands.

Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands decided him by reason of this Act,

Homesteads excepted.

except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: *Provided*, That upon the issuance of such certificate of

Provisos. Taxation, etc.

competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: *Provided*, That the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise

Sale of oil, etc., lands prohibited.

provided by Congress: *And provided further*, That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as

Individual ownership after 25 years.

hereinafter provided: *And provided further*, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress.

Sisters of Saint Francis. Land donated to.

Eighth. There shall be reserved from selection and division, as herein provided, one hundred and sixty acres on which the Saint Louis School, near Pawhuska, is located, and the one hundred and sixty acres on which the Saint John's School, on Hominy Creek, Osage Indian Reservation, is located, said tracts to conform to the public surveys; and said tracts of land are hereby set aside and donated to the order of the Sisters of Saint Francis; and said tracts shall be conveyed to said order, the Sisters of Saint Francis, as early as practicable, by deed.

Lands reserved near Gray Horse.

There shall also be reserved from selection and division forty acres of land near Gray Horse, to be designated by the Secretary of the Interior, on which are located the dwelling houses of John N. Florer, Walter O. Florer, and John L. Bird; and said John N. Florer shall be allowed to purchase said forty acres at the appraised value placed thereon by the Osage Allotting Commission, the proceeds of the sale to be placed to the credit of the Indians and to be distributed like other funds herein provided for.

Lands reserved for dwelling purposes.

Ninth. There shall be reserved from selection and division, as herein provided, the northeast quarter of section three, township twenty-five, range nine east, of the Indian meridian, and one hundred and sixty acres to conform to the public survey at the town of Gray Horse, including the Government doctor's building, other valuable buildings, and the cemetery, and the one hundred and sixty acres to conform to the public survey, adjoining or near the town site of Hominy; said lands or tracts are hereby set aside for the use and benefit of the Osage Indians, exclusively, for dwelling purposes, for a period of twenty-five years from and after the first day of January, nineteen hundred and

Proviso. Sale of reserved lands.

seven: *Provided*, That said land may, in the discretion of the Osage tribe, be sold under such rules and regulations as the Secretary of the Interior may prescribe; and the proceeds of the same under such sale shall be apportioned and placed to the credit of the individual members of the tribe according to the roll herein provided for.

Osage Boarding School reserve, etc.

Tenth. The Osage Boarding School reserve of eighty-seven and five-tenth acres, and the reservoir reserve of seventeen and three-tenths acres, and the agent's residence reserve, together with all the buildings located on said reservations in the town site of Pawhuska, as shown by the official plat of the same, are hereby reserved from selection and division as herein provided; and the same may be sold in the discretion of the Osage tribe, under such rules and regulations as the Secretary of the Interior may provide; and the proceeds of such sale shall be apportioned and placed to the credit of the individual members of said tribe according to the roll herein provided for.

Sale of.

Proceeds.

Sale of Government buildings, etc.

Eleventh. That the United States Indian agent's office building, the Osage council building, and all other buildings which are for the occupancy and use of Government employees, in the town of Pawhuska, together with the lots on which the said buildings are situated, shall be sold to the highest bidder as early as practicable, under such rules and regulations as the Secretary of the Interior may prescribe; and with the proceeds he shall erect other suitable buildings for the uses mentioned, on such sites as he may select, the remaining proceeds, if any, to be placed to the credit of the individual members of the Osage tribe of Indians: *Provided*, That the house known as the chief's house, together with the lot or lots on which said house is located, and the house known as the United States interpreter's house, in Pawhuska, Oklahoma Territory, together with the lot or lots on which said houses are located, shall be reserved from sale to the highest bidder and shall be sold to the principal chief of the Osages and the United States interpreter for the Osages, respectively, at the appraised value of the same, said appraisement to be made by the Osage town-site commission, subject to the approval of the Secretary of the Interior.

Erection of new buildings.

Proviso.
Buildings reserved from sale.

Cemetery reserve donated to Pawhuska.

Twelfth. That the cemetery reserve of twenty acres in the town site of Pawhuska, as shown by the official plat thereof, is hereby set aside and donated to the town of Pawhuska for the purposes of sepulture, on condition that if said cemetery reserve of twenty acres, or any part thereof, is used for purposes other than that of sepulture, the whole of said cemetery reserve of twenty acres shall revert to the use and benefit of the individual members of the Osage tribe, according to the roll herein provided, or to their heirs; and said tract shall be conveyed to the said town of Pawhuska by deed, and said deed shall recite and set out in full the conditions under which the above donation and conveyance are made.

Reversion.

Osage town-site commission.

That the provisions of an Act entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes," approved March third, nineteen hundred and five, relating to the Osage Reservation, pages one thousand and sixty-one and one thousand and sixty-two, volume thirty-three, United States Statutes at Large, be, and the same are hereby, continued in full force and effect.

Present law not affected.

Vol. 33, pp. 1061, 1062.

Oil and mineral lands.
Leases.

SEC. 3. That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selections and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided*, That the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: *And provided further*, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the

Provisos.
Royalties.

Prospecting restricted.

Existing contracts, etc., not affected.

written consent of the Secretary of the Interior: *Provided, however*, That nothing herein contained shall be construed as affecting any valid existing lease or contract.

Trust fund.

SEC. 4. That all funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided:

Segregation of funds.

First. That all the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon

Pro rata division.

after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as

Interest payments.

now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the

Proviso.
Misuse of interest money of minors.

parents until said minor arrives at the age of twenty-one years: *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further*,

Payments to guardians.

That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

Deposit of funds to credit of Indians.

Second. That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, 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

Distribution of.

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.

Royalties reserved for school purposes.

Third. There shall be set aside from the royalties received from oil and gas not to exceed fifty thousand dollars per annum for ten years from the first day of January, nineteen hundred and seven, for the support of the Osage Boarding School and for other schools on the Osage Indian Reservation conducted or to be established and conducted for the education of Osage children.

For agency purposes.

Fourth. There shall be set aside and reserved from the royalties received from oil, gas, coal, or other mineral leases, and moneys received from the sale of town lots, and rents from grazing lands not to exceed thirty thousand dollars per annum for agency purposes and 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.

Termination of trust fund.

SEC. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands

shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

Right of inheritance.

SEC. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.

Exception.

Leases for farming purposes.

SEC. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided: and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: *Provided*, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: *And provided further*, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

Provisos.
Parents to control minors' lands.

Approval of leases.

Deeds.

SEC. 8. That all deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior.

Tribal officers. Elections, etc.

SEC. 9. That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined.

Public highways.

SEC. 10. That public highways or roads, two rods in width, being one rod on each side of all section lines, in the Osage Indian Reservation, may be established without any compensation therefor.

Lands for railroad purposes.
Vol. 32, p. 47.

SEC. 11. That all lands taken or condemned by any railroad company in the Osage Reservation, in pursuance of any Act of Congress or regulation of the Department of the Interior, for rights of way, station grounds, side tracks, stock pens and cattle yards, water stations, terminal facilities, and any other railroad purpose, shall be, and are hereby, reserved from selection and allotment and confirmed in such railroad companies for their use and benefit in the construction, operation, and maintenance of their railroads: *Provided*, That such railroad companies shall not take or acquire hereby any right or title to any oil, gas, or other mineral in any of said lands.

Proviso.
Restriction.

Enforcement.

SEC. 12. That all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior.

Approved, June 28, 1906.