IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WILLIAM FLETCHER, TARA DAMRON, KATHRYN RED CORN, and RICHARD LONSINGER, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 1:19-cv-1246- LAS

PLAINTIFFS' RESPONSE IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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COME NOW Plaintiffs, William Fletcher, Tara Damron, Kathryn Red Corn, and Richard Lonsinger, by and through undersigned counsel, and submit this Response in Opposition to United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Relief can be Granted (herein "United States' Motion")). In opposition to United States' Motion, Plaintiffs state:

INTRODUCTION

Defendant's Motion should be denied for the following reasons, which are presented in this Response in Opposition in the following order: ***First***, the *Cobell* litigation, which the United States asserts settled the claims in this case, actually contains an express provision excepting Plaintiffs' claims here from that settlement.[1] ***Second***, the *Osage Nation* settlement was about different claims and is not a bar to Plaintiffs' claims in this action. ***Third***, the former Chief of the Osage Nation will testify that the Osage Nation did not settle the claims in this case and, in any event, the Tenth Circuit and the Northern District of Oklahoma held that neither the *Cobell* nor the *Osage Nation* cases settled the claims in this case. The United States had a full and fair opportunity to litigate those issues, did in fact litigate them, and lost them. Issue preclusion should bar the United States from again raising these rejected defenses. ***Fourth***, Plaintiffs are an identifiable Indian group. Plaintiffs are not all members of the Osage Nation, and in fact many headright[2] holders are from diverse tribes. However, even if the Court holds Plaintiffs are not an identifiable group of Indians, jurisdiction still exists under the Tucker Act. The only material difference in this matter is that Plaintiffs would certify a class under the Tucker Act, whereas

[1] The *Cobell* litigation was a class action breach of trust action against the United States relating to the United States' mismanagement of individual Indian money ("IIM") accounts.

[2] The right to receive royalty payments distributed from exploitation of the Osage Mineral Estate has been commonly referred to as a "headright." *See Fletcher v. United States*, 153 F.Supp. 3d 1354, 1356 (N.D. Okla. 2015).

they would functionally be representing a group claim under the Indian Tucker Act. Plaintiffs plead their case both ways. ***Fifth***, while the United States takes pages to outline and trivialize every statute Plaintiffs cited in their Complaint, the argument fails to even address the United States' pertinent money-mandating trust responsibilities. As Plaintiffs alleged, multiple times, Section 4 of the Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory and for Other Purposes, 34 Stat. 539 (June 25, 1906) (herein the "1906 Act"),[3] provides the money-mandating duty of the United States. There are other relevant statutory duties (*e.g.*, to account), but the United States' complete failure to recognize and address the money mandating duty in this case is not an argument the Court should find persuasive. ***Sixth***, as discussed below, Plaintiffs have standing to bring these claims. Plaintiffs' standing is based upon their (protectable) interest in receiving Osage headright payments. ***Seventh***, the pleading in the prequel accounting action in the Northern District of Oklahoma does not limit the scope of the remedy in this case. This Court allowed other Indian groups to extend their pleadings to earlier timeframes in trust accounting cases. There is nothing about the prequel *Fletcher* litigation that should limit Plaintiffs' claims in this action. ***Eighth and finally***, any findings regarding Plaintiffs' requested relief should be delayed until sufficient factual development allows the Court and the parties to consider what remedies may in fact be possible.

SUMMARY OF THE ARGUMENT

I. The *Cobell* Settlement is not a bar.

Defendant asserts that it settled the claims in this case as part of the *Cobell* litigation. Such an assertion borders on sanctionable as the *Cobell* settlement contains within in it a provision which expressly excepts *this* claim from that settlement. Moreover, the United States

[3] *See* Exhibit 1, a true and correct copy of the 1906 Act.

already lost exactly this very argument before the Northern District of Oklahoma, because Plaintiffs' claims are not based upon mismanagement of funds while they are within IIM accounts. Issue preclusion should apply to defeat the United States' Motion on this matter.

Moreover, the United States takes a position regarding *Cobell* and the *Osage Tribe* cases which has no merit. It argues that, somehow, Plaintiffs' claims are about an account – they are not. Plaintiffs' claims are about the United States' failure to abide by its money mandating statutory and regulatory duties. The United States' fixation on IIM accounts and the Osage Mineral Trust Account are a not-too-cleverly-packaged distraction. The point—the claim—in this lawsuit is that the United States has a duty to pay Plaintiffs the correct amount of money, timely. Plaintiffs have already obtained their accounting and, damning for the United States, the accounting uncovered significant discrepancies and trust fund mismanagement. By trying to make the case about "accounts" (and particularly the label it gives to those accounts), the United States is fighting yesterday's war, a war that it already lost.

II. The *Osage* Settlement is not a bar.

Through *Section 4* of the 1906 Act, the United States Congress created a unique trust fund. Under this trust fund, royalties received by the United States from the production of minerals under leases to third parties on the Osage Mineral Estate—after certain minor deductions—are segregated and paid *to Osage Indians and their heirs*. *See* 1906 Act at § 4; *see also Osage Nation v. United States*, 57 Fed. Cl. 392, 395 (Fed. Cl. 2003) ("*Osage I*"). In common parlance, this right to receive Section 4 Royalty Payments has come to be known as Osage "headrights." Since 1906, the persons who own headrights has expanded far beyond Osages or other Indians; even the States of Texas and Oklahoma, the Catholic Church, and various now-defunct, non-existent charities hold headrights and receive part of this money today.

As will be proved in this case, many of those payments by the United States were wrongful.

These Section 4 Royalty Payments were intended to fulfill an important governmental purpose: providing a substantial benefit to individual Osage Indians. From this trust fund, Osage Indians were intended to receive long-term economic sustenance based on the consumption of non-renewable mineral resources within Osage County, Oklahoma (formerly the Osage Nation reservation), thereby filling—or at least attempted to fill—the void created when the Tribe was forced by the United States to allot away its lands under the 1906 Act.

There is a separate section of the 1906 Act, Section 3, which creates the Osage Mineral Estate: a unique, underground Tribal reservation of oil and gas. Section 3 provides for leasing of the oil and gas deposits. The text of Sections 3 and 4 is important to the analysis because, upon examination, one can see that the Osage Nation's earlier litigation concerned the activities in Section 3, while Plaintiffs in this case are concerned with the distribution of the money as set out in Section 4.

Section 3 of the 1906 Act reads as follows:

> 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 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.

1906 Act, Section 3. Section 3 clearly creates an Indian reservation which, by itself, represents a

trust relationship.[4] This reservation of oil and gas is then administered by the President of the United States and by the Secretary of the Interior under leases and at royalty rates mandated by the statute and resulting regulations. Indeed, that is exactly what the Osage Tribe's lawsuit was about – leases and royalty rates, and the United States even admits as much in the own Motion. *Compare* United States' Motion at 5 *with* Exhibit 2, *Osage Tribe* Third Amended Complaint.

Conversely, Section 4 of the 1906 Act reads as follows:

> 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:
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> *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 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 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 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 misued [*sic*] or squandered he may withhold the payment of such interest: *And provided further*, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

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[4] The "term [reservation] is typically associated with the creation of a trust relationship between the government and the tribe or community of Indians for which the reservation is created." *Wolfchild v. United States*, 559 F.3d 1228, 1253 (Fed. Cir. 2009) (citing *Cohen's Handbook of Federal Indian Law* §§ 3.04[2][c], at 191; 15.04[3][b], at 982 and *N. Paiute Nation v. United States*, 8 Cl. Ct. 470, 485 (1985)); *see also Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 789 (1993); *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425 (1991) ("the crucial issue is whether the pertinent statute and executive orders created a trust relationship which covered the government's actions when representing plaintiffs' interests"); *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1109–10 (S.D. Cal. 2008) (statutory control creates a trust relationship).

> *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 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.

1906 Act, Section 4 (first and second parts). Section 4 clearly and unambiguously states that any "royalty received from oil, gas, coal, and other mineral leases … shall be placed … to the credit of the members of the Osage tribe of Indians … and the same shall be distributed to the individual members of said Osage tribe. . ."[5]

Defendant confuses Section 3 (the creation of the Osage Mineral Estate, its ownership by the Tribe, and the leasing scheme) with Section 4 (the segregation and distribution of money *derived from* the Osage Mineral Estate along with its payment to headright holders). Importantly, the 1906 Act never contemplated the Tribe as a headright holder. Nor did the 1906 Act contemplate that the money at issue would result in a massive murder scheme that even today is the storyline of a bestseller, was the first prosecution to conviction by the FBI, and will be a forthcoming Martin Scorsese movie starring Leonardo DiCaprio and Robert De Niro.[6]

This case is not the sleepy leasing claim by the Osage Nation concerning whether the United States obtained the highest posted prices for oil, or whether the United States ever

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[5] While the United States, at the end of its Motion, goes on a pedantic and blind-eyed journey through the various statutes cited in the Complaint, the plainly money-mandating duty is the one the United States conveniently ignored: Section 4 of the 1906 Act.

[6] https://www.imdb.com/title/tt5537002/fullcredits?ref_=tt_ql_1. The book upon which the movie is based is outlined here: https://www.davidgrann.com/book/killers-of-the-flower-moon/

deposited the money it was supposed to have collected from the exploitation of the Osage Tribe's mineral estate. *That* case, prosecuted to a $380,000,000 settlement by the Osage Nation, never involved the issues presented in *this* case. *That* case involved the Osage Nation's Section 3 trust, whereas *this* case involves the individual headright holders' Section 4 trust interests.

Indeed, the face of the complaint from *that* case shows what it was about:

1) Count 1: Damages resulting from … Oil and Gas Mining **Leases** Covering Portions of the Osage Mineral Estate. *See* Exhibit 2, Osage Tribe Third Amended Complaint at 8.

2) Count 2: Damages resulting from … **Leases** Covering the Osage Surface and ore Mineral Estates Other than Oil and Gas Leases. *See* Exhibit 2, Osage Tribe Third Amended Complaint at 10.

As the parties agree, *that* case was divided into two tranches with the settlement, in the United States' own words, relating to "undercollection of royalties, failure to obtain highest posted prices, deposit lags, and failure to obtain highest available investment yields on funds derived from trust royalties." *See* United States' Motion [Doc. No. 7] at 5. Indeed, these are all leasing issues, with perhaps an exception for the last claim regarding investment. In any event, investment of the fund has little to do with the United States' improper disbursement of funds as alleged in *this* case.

Rather, *this* case is about the fund of money discussed in the 1906 Act Section 4. That fund—in the billions of dollars—was handled by the United States with, in the words of Congress, a "pitchfork."[7] While that statement—from the 1800s—seems dated, in a

[7] *See* Exhibit 3, MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. Rep. No. 102-499 at 9 (1992) (herein "Misplaced Trust"). H.R. Schoolcraft famously wrote, "The derangements in the fiscal affairs of the Indian department are in the extreme. One would think that appropriations had been handled

Congressional report from the 1990s, the United States Congress stated after extensive hearings, "One hundred sixty-three years later [that] assessment of the BIA's financial management still rings true." *See* Exhibit 3, Misplaced Trust at 9.

Since the 1990s, little-to-nothing has changed. In October 2014, the Office of the Inspector General issued a scathing report of the Bureau of Indian Affairs' handling of Osage trust resources, which is prefaced as follows:

> We found that the Agency's oil and gas management program is fundamentally flawed, thereby preventing the Agency from effectively managing the mineral estate. BIA can only reform the program through sweeping changes in how the Agency conducts oil and gas activities. Specifically, we found weaknesses in the Agency's oil and gas policies and procedures that guide critical activities affecting royalty payments. **In addition, we determined that the Agency's system for accounting and leasing activities is inadequate** and, as a result, Agency staff conducts many activities manually. Finally, **we identified many competing interests in the Agency's oil and gas operations, including tribal beneficiaries, the Osage Nation Minerals Council, leaseholders and operators, and surface owners**. These interests contribute to the complexity of managing the Osage Nation's mineral estate and put significant pressures on Agency staff.

Exhibit 4, Office of the Inspector General, *BIA Needs Sweeping Changes To Manage The Osage Nation's Energy Resources*, Report No.: CR-EV-BIA-0002-2013 (Oct. 2014) (*see* cover letter) (emphasis added) (herein "Inspector General Report"). Admittedly, the Inspector General's report focuses on the management of the minerals for the most part, but it notes that the financial transactions are in no better shape.

As the accounting which Plaintiffs obtained by hard-fought court order shows, and as will be proved in this case, the BIA systematically overpaid gross production taxes (pitchfork). The BIA also failed to collect the proper interest on the funds to be paid to Plaintiffs in this action (pitchfork). The United States allowed massive payments to defunct institutions and other entities not entitled to receive the funds (pitchfork). The United States made numerous

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with a pitchfork … there is a screw loose in the public machinery somewhere."

accounting errors that cannot be rectified, even though the United States had two (2) years to account for fifteen (15) years of their management of the funds (pitchfork). These are the claims—and what will be the facts—in *this* case. The damages to Plaintiffs are staggering yet these damages have nothing to do with the leasing and posted price of oil issues in *that* case filed by the Osage Nation.

What is perhaps most important to note about the damages in *this* case is that they are not damages the Osage Nation could have brought in *that* case. These damages impact only Plaintiffs. Moreover, the damages were not revealed to the Osage Nation. There was never an accounting in *that* case, and even if there would have been an accounting, it would not have revealed these damages because these damages – as one can be sure the United States would quickly have pointed out to the Osage Nation – are not based on metrics or data impacting the tribe itself.

In the prequel to *this* case, the accounting revealed the Gross Production Tax is taken from the funds to-be-paid to Osage headright holders. Following, any overpayment of taxes does not adversely impact the Osage Nation itself but, rather, the full "loss" is born by all headright holders directly. That is, the loss impacts individuals: individuals who are plaintiffs (as group or a class) in this case. Similarly, the way the United States handled the interest due for the individuals results in millions of dollars of damages: damages only to Plaintiffs.

The United States finds itself in a convenient position where it plays both sides against the middle. Indeed, when the Osage Nation brought *that* case—the case about leasing under Section 3 of the 1906 Act—the United States quickly argued that individuals were the real party in interest. *See Osage I*, 57 Fed. Cl. at 394-395. Dispatching that argument, this Court clearly recognized the United States' duplicity. The same duplicity is at play in this case. When the

individual headright holders now bring their case – *this* case – the United States argues that it already settled these claims with the Osage Nation in *that* case.

The terms of the settlement in *that* case are instructive. Not one of the terms mentions claims for the overpayment of gross production taxes. Nor do any of the terms mention (incorrectly) paying entities that were not entitled to receive payments. And, none of the terms mentions the United States failing to collect interest for the headright holders. *See Osage* Settlement Agreement [Doc. No. 7-1] at 11-12. None of these claims could have been brought in 2011 when the Osage Nation settled – because there was no accounting of them yet. And, none of these claims were in fact settled – as attested to by Chief Jim Gray. *See* Exhibit 5, Dec. J. Gray.

III. The *Osage Nation* and *Cobell* Defenses are Precluded Because the United States Already Lost Them.

As discussed below, the United States already made and already lost much of its "defense" in this case—losing the same argument before the Tenth Circuit and the District Court for the Northern District of Oklahoma that it makes here. Before the Tenth Circuit, the issue was "doubly waived," as now-Justice Gorsuch wrote. And, when the United States raised this argument again – before the District Court – it was again rejected. The same is true for the *Cobell* litigation.

More than that, Congress saved this case (and others like it) from dismissal precisely because the United States had never accounted. In the "Appropriation Acts," as discussed below, this Court held that Congress stated that no cause of action *begins to accrue* until the United States accounts. *See Shosone Indian Tribe of Wind River Reservation v. United States,* 364 F.3d 1339, 1348 (Fed. Cir. 2004) (holding that "[a] cause of action for breach of trust traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of

that repudiation."); *see also Pelt v. Utah*, 611 F. Supp 2d 1267, 1285 (D. Utah 2009) ("Repudiation of a trust occurs when the trustee expressly terminates the fiduciary relationship or takes actions inconsistent with the terms of the trust"). That, of course, has importance here since the United States only accounted to plaintiffs in 2017. Plaintiffs' claims did not *begin to accrue* until then.

Even the United States accepts that claims which fall within the subject matter of their settlements, but which *accrue after* the settlement, are not barred by the settlement. *See* United States' Motion at 26 ("Plaintiffs' claims should be limited to the period after September 30, 2011, pursuant to the Osage tribal trust settlement."). As a matter of law, none of Plaintiffs' claim began to accrue until 2017–when the accounting was providing which, in turn, informed Plaintiffs of the United States' mismanagement. United States' Motion should be denied accordingly.

IV. There is Jurisdiction for this Lawsuit.

The Indian Tucker Act and the Tucker Act both support jurisdiction in this case. Both were alternatively pleaded. The only difference in the jurisdictional approach might be the procedural posture of the parties. Under the Indian Tucker Act, the case is automatically a group claim, while under the Tucker Act class procedures would need to be satisfied for the issues to be completed in a single case. But, in the prequel to this suit, the United States did not object to class certification, and it does not indicate any reason why a class should not be certified in this case.

V. There is a Money Mandating Basis and Claim.

The 1906 Act, Section 4 provides the underpinnings for Plaintiffs' cause of action. Courts have established that Osage headright holders have a trust relationship with the United

States and, in turn, the United States has a duty to account for its management of the trust resources. *See Fletcher v. United States*, 730 F.3d 1206, 1210-1211 (10th Cir. 2013) (herein "*Fletcher II*"). This it has done pursuant to court order. Now, Plaintiffs seek to enforce the terms of Section 4 to ensure proper, full payment of funds owing. If, as the United States seems to argue, Plaintiffs are unable to act on a deficient accounting, it would render that accounting "pointless." The United States' failure to even acknowledge, within this litigation, its Section 4 obligations speaks volumes. None of which is availing to its defenses.

VI. Plaintiffs have Standing to Bring Claims For Mismanagement Of Their Trust Funds.

Perhaps begrudgingly, the United States recognizes that Plaintiffs have rights as Indian trust beneficiaries. However, the United States seeks to minimize Plaintiffs' rights as nothing other than an "inchoate" or non-protectable right. Rather than honestly disputing that Plaintiffs have been harmed by the United States' mismanagement, the United States adopts a shoot-the-moon posture and boldly argues that Plaintiffs simply cannot do anything about the mismanagement uncovered through the 2017 accounting. Plaintiffs have standing to bring *and protect* their rights as Indian trust beneficiaries.

VII. Nothing about the Accounting Ordered By The Northern District Of Oklahoma Limits This Damages Lawsuit.

As a part of this action, an accounting will need to be performed to determine the breadth of the United States' liability for its mismanagement of Plaintiffs' trust funds. The United States claims that such an accounting, analyzing funds pre-dating 2002, is improper because Plaintiffs have already received an accounting of their trust funds from 2002 to 2015 and cannot seek a "second" accounting here. However, the limits of the previous accounting were limited to specific pleadings of the Northern District of Oklahoma, and do not relate to the specific finding that may be a part of Plaintiffs' damage award here. The United States' argument is simply

misplaced.

VIII. The question of whether structural relief is possible should wait for factual development.

The United States argues that this Court cannot compel the government to comply with its duties. Perhaps the United States is correct, perhaps not. The *Osage Nation* case, which settled in 2011, resulted in an Office of the Inspector General report three years later, reporting on the same parade of horribles still permeating the administration of the Osage Nation Mineral Estate. See Exhibit 4, Inspector General Report. While the United States argues strenuously that this Court has no equitable jurisdiction, and that may be, this Court is not powerless to stand by and watch the Bureau of Indian Affairs create new losses to Osage headright holders and new liability to the Federal government. If that were the case, then perhaps the only remedy Plaintiffs have would be to file a new lawsuit the day after this one is resolved. Such a result is absurd.

PROCEDURAL BACKGROUND

In 2002, one of the plaintiffs in this action, William Fletcher, along with three other individuals (all now deceased) challenged the United States' management of the trust created by the 1906 Act, of which they were all beneficiaries, in the Northern District of Oklahoma.[8] A prominent claim at the beginning of that action, back in 2002, was the United States' historical practice to tie Osage voting rights to ownership of a headright. Specifically, the 1906 Act provided that the Osage Mineral Estate would be managed by a tribal council selected at periodic elections in a manner prescribed by the Commissioner of Indian Affairs. *See Fletcher v. United States*, 160 Fed. App'x 792, 793 (10th Cir. 2005) (herein "*Fletcher I*"). Under that authority and through regulation, the Bureau of Indian Affairs limited the ability of Osages to vote or hold office to only those adult members of the Osage Nation who possessed headrights, and votes

[8] Plaintiff Tara Damron joined the Northern District of Oklahoma case after Charles Pratt passed away from prostate cancer and she inherited his headright interest.

would be weighted proportionately to an individual's headright interest. *Id*. While the case was pending in the Northern District of Oklahoma and the Tenth Circuit, the plaintiffs secured a victory on their voting rights claims with Congress's passage of the Reaffirmation of Certain Rights of the Osage Tribe, 118 Stat. 2609.

Thereafter, the plaintiffs' action in the Northern District of Oklahoma focused on breach of trust claims, and centrally on a request for an accounting of the trust fund created by the 1906 Act. After the Northern District of Oklahoma dismissed the breach of trust claims without prejudice to refiling, plaintiffs appealed the dismissal of their request for an accounting. On appeal, the Tenth Circuit Court of Appeals reversed the decision, holding that "[t]he 1906 Act clearly creates a trust relationship – and not just a trust relationship between the federal government and the Osage Nation, but also between the federal government and the individual Osage headright owners who are plaintiffs in this case." *Fletcher II*, 730 F.3d at 1209. Additionally, "[o]ver the years both Congress and [the 10th Circuit] have repeatedly recognized that, in this way, the 1906 Act created a trust relationship between the government and individual headright owners." *Id*. at 1209. As a result, the Tenth Circuit found that Osage headright holders, as trust beneficiaries, are entitled to an accounting of their trust funds. *Fletcher II*, 730 F.3d at 1209-1211.

On December 30, 2015, the Northern District of Oklahoma ordered the United States to provide the plaintiffs with an accounting which, dating back to the trust's 1906 beginning, *had never previously been done*. In doing so, the Northern District of Oklahoma outlined the following scope of the ordered accounting:

1. The accounting must run from the first quarter of 2002 until the last available quarter;
2. The accounting must be divided and organized either by month or quarter;

3. The accounting must state the date and dollar amount of each receipt and distribution;
4. The accounting must briefly identify and describe the source of each trust receipt (i.e., the name of the payer/lessee and thee contract number for the oil and/or gas lease on which the payment is made);
5. The accounting must state the number of the individual or organization to whom each trust distribution was made;
6. For headright distributions, the accounting must state the headright interest that each beneficiary possessed at the time of distribution;
7. The accounting must state the amount of interest income generated from the tribal trust account and the date on which such interest was credited to the account.

Fletcher, 153 F.Supp. 3d at 1372. On or about September 11, 2017, the United States provided the required accounting to the plaintiffs. Based upon review of the accounting, and the discovery of trust fund mismanagement, this action followed.

STANDARD OF REVIEW

Generally, motions to dismiss are "viewed with disfavor and should rarely be granted." *Lachney v. United* States, 2 Cl.Ct. 244, 247 (1983). In considering a Motion to Dismiss, the Court "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in [the non-moving party's] favor." *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000); *Inter-Tribal Council of Arizona, Inc. v. United States*, 125 Fed. Cl. 493, 498 (2016).

To establish jurisdiction, and defeat a motion to dismiss under RCFC 12(b)(1), a claimant bringing breach of trust claims must: (1) "identify a substantive source of law that establishes specific fiduciary duties, and allege that the Government has failed faithfully to perform those duties;" and (2) "show that the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as result of the breach of duties." *Inter-Tribal Council*, 125 Fed. Cl. at 499 (quoting *United States v. Navajo Nation*, 556 U.S. 287 (2009)).

To survive a motion to dismiss under RCFC 12(b)(6), "a complaint must contain

sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

ARGUMENT AND AUTHORITIES

I. The *Cobell* Case is Not a Bar.

Plaintiffs do not raise claims relating to the management of their IIM accounts, which was the subject of the *Cobell* case. In an attempt to limit confusion–whether inadvertent or surreptitious–the *Cobell* settlement expressly carved out an exception for Plaintiffs' current claims: "Nothing in this [*Cobell*] Agreement releases claims of individual Osage headright owners regarding their headright interests, except to the extent monies from such headright interests beneficially owned by such individual Indian have been deposited into an IIM Account for the benefit of such individual Indian." *See Cobell* Settlement Agreement [Doc. No. 7-2] at p. 46, ¶ I(6).

The United States raised the *Cobell* settlement before the District Court for the Northern District of Oklahoma, but that argument was quickly rejected because the plaintiffs' claims had "never been about IIM accounts." *Fletcher*, 153 F.Supp. 3d at 1362 and n.6. Raising this issue again is incredible, if not sanctionable. At best, it is a waste of judicial resources.

II. Plaintiffs Are Not Precluded By the *Osage Nation* Settlement.

A. Plaintiffs' Claims are not barred by res judicata.

The United States also argues that the settlement agreement between it and the Osage

Nation bars Plaintiffs' claims by *res judicata*. However, fatal to the United States' *res judicata* argument, there is no unity of claims between the Osage Tribe's claims and Plaintiffs' claims here. "Under the doctrine of claim preclusion, 'a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies *based on the same cause of action*'" *Sikorsky Aircraft Corp. v. United States*, 122 Fed. Cl. 711, 719-720 (2015) (emphasis added). Additionally, "[f]or purposes of evaluating alleged claim preclusion, the court applies the following tripartite test: whether '(1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) *the second claim is based on the same set of transactional facts as the first*.'" *Id*. (emphasis added). As addressed below, there is a clear the lack of identify of parties in this action and the Osage Tribe's action. With that fact established, this section addresses how there is not a shared set of transactional facts between the two actions.

Plaintiffs challenge the United States' payments to Osage headright holders under the 1906 Act due to (1) overpayment of Gross Production Taxes, *see* Complaint [Doc. No. 1] at ¶¶ 63, 64; (2) failure to collect interest on royalties once collected and segregated for distribution, but before distribution actually takes place, *see id*. at ¶ 62; and (3) incorrect calculation of tribal operation payments, *see id*. at ¶ 71. These are all actions occurring as part-and-parcel to distribution of headright payments. That is, the transactional facts currently at issue relate to the United States' management of funds leading to distribution *from* the Trust Account. Meanwhile, the claims and transactional facts in the Osage Tribe's action related to mismanagement by the United States in collecting funds *coming into* the trust fund as a part of royalty collection. The Osage Tribe's claims specifically consisted of: (1) failure to collect royalties in the appropriate amount (the "highest posted price"); (2) lag in deposit of funds, resulting in a loss of interest; (3)

failure to keep adequate cash on hand; and (4) investment underperformance. *See Osage Tribe of Indians of Okla. v. United States*, 93 Fed. Cl. 1, 9 (2010).

B. Plaintiffs were not a party to the Osage Nation Settlement.

Contracts only create obligations upon parties to the contract. *See Nickel v. Pollia*, 179 F.2d 160, 163-164 (10th Cir. 1950) (finding that contractor cannot look to third party for payment on contract). It is a longstanding "principle that one owes no [contractual] duty to persons with whom he has no privity of contract." *Spencer v. Madsen*, 142 F.2d 820, 822 (10th Cir. 1944); *see also* BLACK'S LAW DICTIONARY (3d Pocket Ed. 2006) (defining privity of contract as "[t]he relationship between parties to a contract allowing them to sue each other but preventing a third party from doing so"). The United States' argument on this point seems to be that because Osage headright holders were intended to be third-party beneficiaries of the Osage Nation's Settlement Agreement, it made them parties to the contract. However, this Court has rejected such a contortion of the law. For instance, "[w]here the Government is a third-party beneficiary of a contract between two private parties, there is no 'contract with the United States.'" *Wagner v. United States*, 71 Fed. Cl. 355, 364 (2006). Simply put, Osage headright holders are not a party to the Settlement Agreement between the Osage Tribe and the United States.

In its Motion, the United States argues that Article XV, Section 4 of the Osage Constitution grants the Osage Tribe authority to settle the claims of Osage headright holders. *See* United States' Motion at 30. Despite the fact that the United States lost this issue in the Northern District of Oklahoma, the Section relied upon by the United States only creates the Osage Mineral Council which is only empowered to "consider and approve leases and to propose other forms of development of the Osage Mineral Estate." *See* Osage Const. Art. XV § 4

(available at https://www.osagenation-nsn.gov/sites/default/files/library/ConstitutionOfTheOsageNation.pdf). *See Fletcher*, 153 F.Supp.3d at 1368 ("The government contends that the tribe possesses such authority as the 'elected representative' of the headright owners, but nothing in the Osage Constitution purports to confer such authority.") (internal citation omitted) The Osage Mineral Council is not empowered with any right to sue on behalf of Osage headright holders, let alone settle their breach of trust claims out from under them.

Additionally, it must be noted that the United States refused to consult with Plaintiffs in the negotiation of the Settlement Agreement. On October 19, 2011, Jason Aamodt, counsel for Plaintiffs, approached Joseph Kim, counsel for the United States—after Mr. Kim had ignored Plaintiffs' concerns regarding the proposed settlement agreement between the United States and the Osage Nation—to discuss what effect, if any, the settlement agreement would have of Plaintiffs' breach of trust claims. *See* Exhibit 6, Electronic Mail from Aamodt to Kim (Oct. 19, 2011). Mr. Aamodt had spoken with counsel for the Osage Nation, and representatives of the Osage Nation, who represented that the settlement agreement would not affect Plaintiffs' claims. *See* Exhibit 7, Dec. W. Pipestem; Exhibit 5, Dec. J. Gray. On October 20, 2011, Mr. Kim refused to comment on what legal effect, if any, the settlement agreement would have on Plaintiffs' breach of trust claims. *See* Exhibit 8, Electronic Mail from Kim to Aamodt (Oct. 20, 2011).

III. United States' Defenses are Barred by Issue Preclusion.

As the United States' Motion points out, issue preclusion ensures that "a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again." Motion at 20 (quoting *In re: Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994)). Additionally, as admitted by the United States, issue preclusion "bars a party from

relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim." Motion at 20-21 (quoting *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009) (internal citation omitted)); *see also Zacharin v. United States*, 43 Fed. Cl. 185, 194 (1999) ("The rationale behind the doctrine is that a party should be bound by decisions made with respect to litigated issues and should not be permitted to obtain a second decision on such issues."). There are four requirements to be met before issue preclusion applies:

> (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) [the party precluded] had a full and fair opportunity to litigate the issue in the first action.

Zacharin, 43 Fed. Cl. at 194 (quoting *In re: Freeman*, 30 F.3d at 1465).

A. The Northern District of Oklahoma has already decided that Plaintiffs are not bound by the United States' Settlement with the Osage Nation.

In its Motion, the United States parades out a defense it previously litigated, and lost, in the parties' previous action in the Northern District of Oklahoma. Specifically, the United States asserted that the plaintiffs' (in the Northern District of Oklahoma) claims were waived and/or released by the United States' settlement with the Osage Nation. On that issue, the United States originally raised this defense in a footnote of its Answer Brief to the Tenth Circuit:

> it is questionable whether . . . Plaintiffs could pursue a claim for an accounting [because the settlement agreement between the United States and the Osage Nation] waives on behalf of the Osage Nation and Headright Holders all claims . . . including all claims regarding the United States' obligation to provide a historical accounting."

See Exhibit 9, United States' Tenth Circuit Brief at 38 n. 5. Regarding the defense, the Tenth Circuit stated:

> The footnote itself—notably—stops short of claiming that the tribe has the power to waive individual tribal members' claims. Indeed, the footnote cites no authority one way or the other on the 'question' it highlights. And when we asked

> the government at oral argument to clarify its position on the 'question' its footnote posed it retreated still further, ***disclaiming any suggestion that the Osage Nation's waiver might bind the individual plaintiffs in this case***.

Fletcher II, 730 F.3d at 1213-1214 (emphasis added). As a result, the Tenth Circuit considered the defense "doubly waived." *Id.* at 1214.

Regardless, when the parties returned to the Northern District of Oklahoma on remand, the United States continued to assert its argument, which was ***also*** rejected by the Northern District of Oklahoma:

> As part of the settlement agreement, the Osage Nation, "on behalf of itself and the Headright Holders" waived "all claims regarding the United States' obligation to provide a historical accounting or reconciliation of the Osage Tribal Trust Account." [Dkt. #1212-1, p. 11].
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> Based on this language, the government asserts, as an affirmative defense, that plaintiffs are barred from seeking an accounting of the tribal trust account. In response, plaintiffs submit that they were not a party to the settlement agreement at issue and that the Osage Nation has no authority to settle accounting claims on their behalf. Although the settlement agreement states that the Osage Nation "has the authority to act for…and to bind Headright Holders with respect to matters relating to the Osage Mineral Estate," [*id.* at 2], the government here offers no evidence or authority to substantiate this assertion.
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> Turning to the merits, the court finds no evidence or authority to support the government's contention that plaintiffs are bound by the Osage Nation's purported waiver of their accounting rights. As previously mentioned, § 4011(a) grants *both* the Osage Nation *and* the headright owners the right to an accounting of funds held on their behalf under the 1906 Act. *See Fletcher II*, 730 F.3d at 1209. Nothing in these provisions, or any other statute cited by the parties, gives the tribe authority to waive the individual accounting rights of the headright owners. The government contends that the tribe possesses such authority as the "elected representative" of the headright owners, [Dkt. #1279, Oct. 2014 Hearing Transcript, p. 86], but nothing in the Osage Constitution purports to confer such authority, *see* Osage Nation Const. art. 15. Further, even if it did, such a grant would conflict with—and thus be preempted by—federal law, which assigns separate accounting rights to the plaintiffs and the tribe. *See Winton v. Amos*, 255 U.S. 373, 391 (1921) ("Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property."); *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) ("Congress

> in the exercise of its plenary power over Indian affairs may divest Indian tribes of their inherent sovereign authority.").
>
> The individual Osage headright owners were not a party to the settlement agreement at issue. Indeed, the Court of Federal Claims denied them the opportunity to intervene in the case. *See Osage Tribe*, 85 Fed. Cl. at 166-79. Because the Osage Nation lacks authority to waive the plaintiffs' individual accounting rights, they are not bound by the tribe's settlement agreement with the federal government.

Fletcher, 153 F.Supp.3d at 1365, 1368.

By the United States' own admission, because the parties "have already litigated this issue fully, issue preclusion bars them from litigating it again here." United States' Motion at 26 (citing *In re Freeman*, 30 F.3d at 1465). Specifically, regarding whether plaintiffs' accounting claims are waived/barred due to the *Osage* litigation: (1) the United States raised this identical issue to the Northern District of Oklahoma; (2) the issue was fully litigated in the Northern District of Oklahoma; (3) resolution of the issue was essential to the Northern District of Oklahoma's resolution of plaintiffs' accounting claim; and (4) the United States had a full and fair opportunity to litigate the issue in the Northern District of Oklahoma. *See Zacharin*, 43 Fed. Cl. at 194. Accordingly, the United States should be precluded from relitigating this identical issue before this Court.

B. The Tenth Circuit Court of Appeals has already decided that the 1906 Act created an enforceable Trust between the United States and both the Tribe and Individual Headright Holders.

The United States argues that the 1906 Act does not create a legally protectable interest on behalf of headright holders for breach of trust claims because that right—according to the United States—belongs solely to the Osage Nation. The United States made similar failed arguments to both the Northern District of Oklahoma and the Tenth Circuit of Appeals. The Tenth Circuit flatly and unequivocally rejected this line of argument, noting:

> The 1906 Act clearly creates a trust relationship—and not just a trust relationship between the federal government and the Osage Nation, but also between the federal government and the individual Osage headright owners who are plaintiffs in this case. Though the language of the Act is both arcane and antiquated, after laboring through it there's no question about this much. The Act requires the government to collect royalties, place them "to the credit of" each individual headright owner, and then disburse them to each individual headright owner on a quarterly basis, with interest. *See* 1906 Act § 4(1)-(2), 34 Stat. at 544. A small slice of royalty income may be diverted to tribal operations, *id.* § 4(3), (4), but all else is "placed ... to the credit" of headright owners and distributed to them personally. In short, the 1906 Act imposes an obligation on the federal government to distribute funds to individual headright owners in a timely (quarterly) and proper (pro rata, with interest) manner. Over the years both Congress and this court have repeatedly recognized that, in this way, the 1906 Act created a trust relationship between the government and individual headright owners.
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> ***
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> The government recognizes that the 1906 Act creates a trust relationship running directly between the government and individual Osage headright owners, but it suggests one of the usual fiduciary duties attendant to a typical trust relationship here belongs *only* to someone else (the tribe). Of course, it's not impossible Congress could have chosen to rearrange normal trust principles in this way, but the government identifies *nothing* in the text or structure of the relevant laws suggesting such a design. To the contrary, § 4011(a) indicates that the government's accounting duty applies to all funds "held in trust ... for the benefit of an Indian tribe *or an individual Indian.*" In turn, the 1906 Act requires the Secretary to hold Osage mineral wealth in trust for *individual* Osage headright owners. Taken together, these provisions suggest a trust relationship and an attendant accounting duty running directly between the government and individual Osage headright owners like the plaintiffs before us. We cannot detect so much as a whiff suggesting they grant accounting privileges *only* to the tribe. While (again) we see no ambiguity in the relevant statutory language about all this, and while (again) the government has not even attempted to identify statutory language or features that might give rise to an ambiguity, even if we could somehow conjure up the sort of ambiguity the government seems to assume but never identifies, it would still have to be resolved in the plaintiffs' favor.

Fletcher II, 730 F.3d at 1209, 1213. The Tenth Circuit later recognized that Plaintiffs would have the right to pursue damages for losses discovered in the accounting they were owed. *Id*. at 1215 ("And in any subsequent litigation it will be their burden to prove a breach of trust, not the government's burden to disprove it.").

In fact, the United States' brief to the Northern District of Oklahoma regarding the scope of the ordered accounting bears a striking resemblance to the argument in its Motion here; even the claim that Osage headright holders only have an "inchoate right." *See* Exhibit 10, United States' Brief Regarding the Scope of Accounting at 4-5; *see also* Exhibit 11, United States' Response Brief on the Merits at 14-15. The Northern District of Oklahoma described this argument by the United States as a revival of "an argument that the Tenth Circuit has already considered and rejected." *Fletcher*, 153 F.Supp.3d at 1362. Additionally, this argument by the United States "would render 'pointless' the accounting received by the individual Osage headright owners." *Id*. at 1364. In describing the plaintiffs' trust relationship with the United States, the Northern District rejected any determination made based on the label of the account being used, but based its decision on what purpose the account was created to perform:

> The tribal trust account "was established by the 1906 Act," *Osage Tribe*, 81 Fed. Cl. at 348, and is the means by which the government carries out its duties to collect, hold, and distribute funds pursuant thereto, [*see* Dkt. #1212-1, Administrative Record, p. 2 ("[P]ursuant to the 1906 Act the revenues from the Osage Mineral Estate are … placed in the Osage Tribal Trust Account….[P]ursuant to the 1906 Act the revenues in the Osage Tribal Trust Account are … distributed to the Headright Holders.")]. No other account exists to carry out these functions. [*See* Dkt. #1266, Defendants' Brief, p. 7 ("[T]here is just one tribal trust account related to this case, and funds are segregated from this account when they are distributed to the headright holders on a quarterly basis." (internal quotation marks omitted))]. Thus, it necessarily follows that plaintiffs are entitled to an accounting of the tribal trust account.

Id. at 10.

Just as with the United States' argument pertaining to the alleged "waiver" through the *Osage Nation* Settlement, because the parties "have already litigated this issue fully, issue preclusion bars them from litigating it again here." United States' Motion at 26 (quoting *In re Freeman*, 30 F.3d at 1465). Specifically: (1) the United States' argument to this Court that the United States' trust responsibilities are limited solely to the Osage Nation is nearly identical to

argument made to the Northern District of Oklahoma; (2) the issue was fully litigated in the Northern District of Oklahoma; (3) resolution of the issue was essential to the Northern District of Oklahoma's resolution of plaintiffs' accounting claim; and (4) the United States had a full and fair opportunity to litigate the issue in the Northern District of Oklahoma. *See Zacharin*, 43 Fed. Cl. at 194. Accordingly, the United States should be precluded from relitigating the issue here.

IV. There is Jurisdiction for Plaintiff's Claims.

A. Plaintiffs are an "Identifiable Group of American Indians" under the Indian Tucker Act.

Pursuant to the Indian Tucker Act:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505.

The United States argues that Plaintiffs are not an "identifiable group of American Indians" because they are members of the Osage Tribe. *See* United States' Motion at 34. It must first be noted, the United States' proposition is incorrect on the facts, Plaintiff Lonsinger is a member of the Ponca Tribe of Indians of Oklahoma, and not the Osage Tribe. *See* Complaint [Doc. No. 1] at ¶ 10; *compare with* United States' Motion at 34. Evidence in the case will show many persons who have headrights are not Osage, but are Indian. Plaintiffs represent a cross section of the identifiable group of American Indians who each hold a headright.

Chippewa Cree Tribe v. United States, 69 Fed. Cl. 639 (2006),[9] provides an outstanding

[9] In *Osage VI*, which the United States claims is determinative on this issue, the Court distinguished *Chippewa Cree* and other similar cases largely on the fact that the Osage Nation was already a party to that action. *Osage Tribe of Indians of Okla. v. United States*, 85

summary of the legislative history surrounding the adoption of the Indian Tucker Act, particularly addressing the "identifiable Group of American Indians" language. The main thrust of that legislative history is that the Indian Tucker Act, through its original adoption as part of the Indian Claims Commission Act, "reflected congressional concern that all legitimate claims of the Indians against the United States be provided with a forum and the opportunity to be heard." *Chippewa Cree*, 69 Fed. Cl. at 671. This Court in *Chippewa Cree* also noted how determination of "'identifiable group' required a more limited showing of formal relationship than that required for a tribe or band." *Id*. at 673 (relying on *McGhee v. Creek Nation*, 122 Ct. Cl. 380). Simply put, courts should take a liberal viewpoint in determining whether a plaintiff is an "identifiable group of American Indians." 28 U.S.C. § 1505.

Here, each one of Plaintiffs, and the class they intend to represent ("Osage Headright Owners [who are] citizens of more than one federally-recognized Indian tribe," Complaint [Doc. No. 1] at ¶¶ 13, 51), are beneficiaries of a trust fund created by Section 4 of the 1906 Act. They are easily identifiable as a group due to the way the United States has administered their trust by granting them "shares" in the royalty production of the Osage Mineral Estate. *See* Complaint [Doc. No. 1] at ¶ 54. Even so, the identification of putative class membership is not premised on particular tribal citizenship. All told, they are an "identifiable group of American Indians" that may, accordingly, bring this claim under the Indian Tucker Act.

Fed. Cl. 162, 167-168 (2008) ("The 'group of nonmember Pembina lineal descendants,' which qualified for status as an 'identifiable group' in *Chippewa Cree* were not represented by any of the other sub-groups of plaintiffs in that case," "In *Wolfchild*, as in *Chippewa Cree*, the claimants' interests were not represented by any other tribe involved in the litigation," and "in this case, unlike in *Chippewa Cree* and *Wolfchild*, the organization of which Proposed Intervenors are members, the Osage Nation, is a party to this litigation") (distinguishing *Chippewa Cree*, 69 Fed. Cl. at 669 and *Wolfchild*, 62 Fed. Cl. at 540) ("*Osage VI*"). Here, however, the Osage Nation is not a party, and regardless, as addressed above, the claims brought in this action belong to headright holders, not the Osage Nation itself, even if the Osage Nation had similar claims at some time.

B. Since Plaintiffs' claims belong to them individually, they may bring their claims under the Tucker Act.

Plaintiffs did not limit their claim of jurisdiction solely to 28 U.S.C. § 1505 (Indian Tucker Act), but also claimed jurisdiction under 28 U.S.C. § 1491 (Tucker Act). *See* Complaint [Doc. No. 1] at ¶ 5. As the Federal Circuit has held, "an Indian tribe can sue on a treaty under 28 U.S.C. § 1505 and an individual Indian can sue under 28 U.S.C. § 1491." *Tsosie v. United States*, 825 F.2d 393, 401 (Fed. Cir. 1987); *see also Hebah v. United States*, 428 F.2d 1334, 1338-39 (Cl. Ct. 1970); *Ayanuli v. United States*, 2018 WL 3486110 at *2 (Fed. Cl. July 19, 2018). In the event that Plaintiffs, and the class they seek to represent, are not an "identifiable group of American Indians" under 28 U.S.C. § 1505, they are still individual Indians who may bring their claims under 28 U.S.C. § 1491. As noted above, these claims belong to class members as individuals, and are not claims belonging solely to the Osage Tribe. As such, and independent from any jurisdiction under the Indian Tucker Act, this Court has jurisdiction over Plaintiffs' claims and the United States' Motion should be denied.

V. United States Owes Money-Mandating Fiduciary Duties to Plaintiffs.

Through the Tucker Act,[10] this Court has jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. §

[10] As noted above, at the Motion to Dismiss stage, the Court "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in [the non-moving party's] favor." *Boyle*, 200 F.3d at 1372. However, if the truth of jurisdictional facts is challenged, the Court "may consider relevant evidence in order to resolve the factual dispute." *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988). In such a situation, the non-moving party must establish the Court has subject matter jurisdiction over its claims "by a preponderance of the evidence." *Id.*at 748. Here, the United States does not challenge the factual predicate of jurisdiction, only the legal basis of such jurisdiction. Accordingly, no evidence is provided by Plaintiffs because the issue is entirely legal.

1491(a)(1). Through the Indian Tucker Act, this same jurisdiction extends to "any tribe, band, or other identifiable group of American Indians" for claims against the United States accruing after August 13, 1946. 28 U.S.C. § 1505. However, "[n]either the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)." *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) ("*Navajo II*"). "The other source of law need not explicitly provide that the right or duty it creates is enforceable through a suit for damages, but it triggers liability only if it can fairly be interpreted as mandating compensation by the Federal Government." *Id*. (internal quotations omitted).

In regard to Indian breach of trust claims, this Court has described this process as setting "two hurdles" for the plaintiff to clear:

> First, the plaintiff "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." [*Navajo II*, 556 U.S. at 290] (citing *United States v. Navajo Nation*, 537 U.S. 488, 506, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003) ("*Navajo I*")). At this stage, "a statute or regulation that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed.Cir.2015) (citing *United States v. Mitchell*, 445 U.S. 535, 542–44, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) ("*Mitchell I*")). "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 131 S.Ct. 2313, 2325, 180 L.Ed.2d 187 (2011).
>
> Second, the plaintiff must show that the relevant source of substantive law "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties" imposed by the governing law. *Navajo II*, 556 U.S. at 291, 129 S.Ct. 1547. "At the second stage, principles of trust law might be relevant 'in drawing the inference that Congress intended damages to remedy a breach.' " *Id.* (citing *White Mountain Apache Tribe*, 537 U.S. at 477, 123 S.Ct. 1126). The Supreme Court has "looked to common-law principles to inform [its] interpretation of statutes and to determine the scope of liability that Congress has imposed." *Jicarilla Apache Nation*, 131 S.Ct. at 2325 (citing *White Mountain Apache Tribe*, 537 U.S. at 475–76, 123 S.Ct. 1126). The Federal Circuit has noted that "when a statute establishes specific fiduciary obligations, 'it naturally follows that the Government should be liable in damages for the breach of its fiduciary

> duties. It is well established that a trustee is accountable in damages for breaches of trust.'" *Hopi Tribe*, 782 F.3d at 668 (citing *United States v. Mitchell*, 463 U.S. 206, 226, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) ("*Mitchell II*")).

Inter-Tribal Council, 125 Fed. Cl. at 499.

As noted above, "the 1906 Act imposes an obligation on the federal government to distribute funds to individual headright owners in a timely (quarterly) and proper (pro rata, with interest) manner." *Fletcher II*, 730 F.3d at 1209; *Osage I*, 57 Fed. Cl. at 395 ("Under the 1906 Act, the tribal trust fund is credited to individual members of the Osage tribe 'on a basis of a pro rata division among the members' and interest payments are made on a quarterly basis. *See* [1906 Act] at § 4(1)").

Here, Plaintiffs allege breach of trust losses as a result of the United States' mismanagement in making payments to Osage headright holders under the 1906 Act. Plaintiffs discovered this mismanagement through the Court-ordered accounting provided by the United States.[11] Specifically, Plaintiffs claim that the United States: (1) overpaid Gross Production Taxes, *see* Complaint [Doc. No. 1] at ¶¶ 63, 64; (2) failed to collect interest on royalties once collected and segregated for distribution, but before distribution actually takes place, *see id*. at ¶ 62; 1906 Act § 4(1) ("said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto"); and (3) incorrectly calculated tribal operation payments to hide its own miscalculations, *see id*. at ¶ 71 ("There are numerous instances in which Defendant erred in reporting expenses and simply adjusted revenue as to balance the account of Osage Headright Owners"). Gross Production Taxes are paid out of the trust to the State of Oklahoma pursuant to The Act of April 25, 1940, 54 Stat. 168:

[11] It must be noted, the United States' argument that it does not owe money-mandating fiduciary duties to Plaintiffs would render the accounting provided to Plaintiffs meaningless, as recognized by the District Court in the Northern District of Oklahoma. *See Fletcher*, 153 F.Supp.3d at 1362

> the State of Oklahoma is authorized . . . to levy and collect a gross-production tax . . . upon all oil and gas produced in Osage County, Oklahoma . . . The gross-production tax on the royalty interests of the Osage Indians shall be at the rate levied by said State but in no event to exceed 5 per centum and said tax shall be paid by the Secretary of the Interior, through the proper officers of the Osage Agency, to the State of Oklahoma from the amount received by the Osage Indians from the production of oil and gas. . . .

Plaintiffs have alleged that, from time to time, the United States has overpaid the tax by simply paying the five percent (5%) cap on Gross Production Taxes, even when the actual taxable percentage is less than five percent (5%) in violation of its trust duties. *See* Complaint [Doc. No. 1] at ¶¶ 63, 64.

These statutes[12] and regulations, along with other traditional trust responsibilities, create money-mandating responsibilities for the United States. Accordingly, the United States' Motion on this issue should be denied.

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[12] Additionally, the Appropriations Acts acknowledge that there exist money-mandating duties upon the United States to restore losses to trust funds:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, *concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting* of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 113-76, 128 Stat. 5, 305-306 (2014) (emphasis added). Since 1990, and through 2014, Congress passed similar language protecting both tribal and individual Indian claims in each successive appropriations act. *See also* Pub. L. 101-512, 104 Stat. 1915, 1930 (1990); Pub. L. No. 102-154, 105 Stat. 990, 1004 (1991); Pub. L. 102-381, 106 Stat. 1374, 1389 (1992); Pub. L. No. 103-138, 107 Stat. 1379, 1391 (1993); Pub. L. No. 103-332, 108 Stat. 2499, 2511 (1994); Pub. L. No. 104-134, 110 Stat. 1321, 1321-175 (1996); Pub. L. No. 104-208, 110 Stat. 3009, 3009-197 (1996); Pub. L. No. 105-83, 111 Stat. 1, 17 (1997); Pub. L. No. 105-277, 112 Stat. 2681, 2681-251 (1998); Pub. L. No. 106-113, 113 Stat. 1501, 1501-A153 (1999); Pub. L. No. 106-291, 114 Stat. 922, 939 (2000); Pub. L. No. 107-63, 115 Stat. 414, 435 (2001); Pub. L. No. 108-7, 117 Stat. 11 (2003); Pub. L. No. 108-108, 117 Stat. 1241 (2003); Pub. L. No. 108-447, 118 Stat. 2809 (2004); Pub. L. No. 109-54, 119 Stat. 499 (2005); Pub. L. No. 110-161, 121 Stat. 1844 (2007); Pub. L. No. 111-88, 123 Stat. 2904 (2009); Pub. L. No. 112-74, 125 Stat. 786, 1002 (2011); Pub. L. No. 113-76, 128 Stat. 5, 305-306 (2014). If a trust beneficiary was not entitled to

VI. Plaintiffs Have Standing To Pursue Damages For Mismanagement Of Their Trust Funds.

The United States argues that Plaintiffs lack standing, that they do not have an "injury-in-fact," because they do not have a "legally protectable interest" in the distribution of royalty payments under Section 4 of the 1906 Act.[13] *See* United States' Motion at 15. This argument appears premised upon this Court's holding in *Osage VI*, wherein Osage headright holders were denied intervention. But this is not that lawsuit, and the claims raised in this lawsuit relate specifically to the United States' mismanagement in the *distribution* of royalty shares to Osage headright holders, not to the leases and subsequent collection of royalty monies from oilfield producers, such as the claims raised by the Osage Nation. *See e.g. Osage Tribe*, 93 Fed. Cl. at 8 (explaining that the claims by the Osage Nation related to the United States "mismanaging both its royalty collection and its investment responsibilities").

The parties are in agreement that Plaintiffs, and all Osage headright holders, have a legally protectable interest "in their right to their share of Osage tribal trust funds after distribution." *See* United States' Motion at 19. However, the parties disagree as to when that point of distribution occurs. The United States would like the Court to believe this occurs when the funds hit Osage headright holders' IIM accounts. *See* United States Motion at 30. This is an argument the United States unequivocally made, and undeniably lost, before the Northern District of Oklahoma. *Fletcher*, 153 F.Supp. 3d at 1362 and n.6. Yet, as this Court has noted, "the additional step of determining what amount is owed to each headright holder also takes place while the funds are in the tribal trust fund." *Osage I*, 57 Fed. Cl. at 395. There is simply

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seek damages from trust fund mismanagement, why would Congress pass nearly 20 pieces of legislation, over more than 24 years, seeking to protect such claims?

[13] The remaining standing questions of redressability and causation are not argued by the United States. Accordingly, those issues are waived by the United States and Plaintiffs are not addressing issues not raised.

no merit to the idea that Plaintiffs do not have a legally cognizable interest to protect because other Osage Tribal members were denied the opportunity to intervene in a claim involving the tribal oil and gas leasing program.

In any event, there was a subtext to the intervention motion in the Osage Nation's case. There, a lawyer was dismissed from representing the tribe, and then reappeared with a handful of Osage Tribal members seeking to intervene in the litigation. The question over the efficient administration of that lawsuit, while subtext, clearly informed the result of that decision, making its general legal application somewhat problematic. The United States' failure to deal with the realities of the *Osage Nation* intervention proceedings undercuts their argument.

VII. The Previous Time-Limited Accounting Does Not Limit This Case.

The United States urges that because the prequel accounting in the Northern District of Oklahoma was limited to a claim from 2002 (the date of filing) until 2015, that Plaintiffs cannot seek an accounting of funds prior to 2002.[14] Such a position is preposterous. For instance, in *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, 71 Fed. Cl. 172, 177 (2006), this Court permitted the Shoshone Tribe to amend its claims to include claims prior to 1946 when the "Defendant acknowledges that 'claims for mismanagement of certain trust fund monies ... may be allowable for periods pre-dating 1946.'"

In *Shoshone*, the tribe started with a very conservative litigation approach, filing their case in 1979, and believing the 1946 Indian Claims Commission Act may bar claims that accrued prior to 1946. Subsequent Indian Trust litigation indicated that claims may be available prior to

[14] It must be noted, the 2002 starting date was chosen by the Northern District of Oklahoma because Plaintiffs' Complaint requested an accounting starting at that date, and Plaintiffs' counsel early in the litigation relied upon that date as the starting point. *Fletcher*, 153 F.Supp. 3d at 1369-1370 and n.13. The court did not, as the United States appears to argue, base that decision on specific factual findings that it would be too difficult or expensive to account for funds prior to that date.

1946, and even the United States admitted that claims for financial mismanagement may be allowable prior to 1946. Accordingly, the Shoshone sought to amend to make claims prior to 1946, and the Tribe was permitted to do so. *Shoshone*, 71 Fed. Cl. at 177.

In the prequel litigation, Plaintiffs likewise took a conservative approach seeking a prospective form of injunctive relief based on when the claims commenced. Those issues of the nature of injunctive relief simply do not apply in this Court, which is primarily focused on monetary damages. The accounting contemplated in Plaintiffs' Complaint is merely adjunct to their claim for damages and related to establishing the breadth of the United States' liability.

VIII. The Question of Available Remedies is Premature.

In its Motion, the United States urges this Court lacks the jurisdiction to provide injunctive relief to "Order Defendant to repair its flawed trust management systems." *See* United States' Motion at 43; Complaint [Doc. No. 1] at 26. The breath of relief that may in fact be available in this case—if only by shining the light of discovery on certain issues—cannot be fully ascertained at this time. For instance, the United States does not dispute that this Court can order an accounting, and indeed such an order could be construed as injunctive. But, in realty, this Court has ordered accountings in Indian claims cases to assist the parties in determining the amount of damages or structuring some other remedy.

Clearly, this Court's jurisdiction is limited by the width of the Tucker Act. However, the issues Plaintiffs raised regarding the "flawed trust management systems" are still relevant to both Plaintiffs' claims for damages and claims for an accounting. For instance, due to the United States' failure to provide adequate trust management systems, Plaintiffs discovered "numerous instances in which Defendant erred in reporting expenses and simply adjusted revenue as to balance the account of Osage Headright Owners" leading to a monetary loss to Osage headright

holders. *See* Complaint [Doc. No. 1] at ¶ 71. Accordingly, Plaintiffs respectfully submit that the question of this Court's jurisdiction and the relief available is premature and should be considered upon the development of evidence in this case.

CONCLUSION

The thrust of the United States' argument for dismissal of this action has already been rejected in the parties' previous litigation. Specifically, the Northern District of Oklahoma and the Tenth Circuit both held that the United States owes Plaintiffs money mandating fiduciary duties in regard to its mismanagement of Plaintiffs' trust funds and that the Osage Nation's settlement with the United States did not extinguish Plaintiffs' breach of trust claims. The United States' other arguments also fail for the reasons set forth above. As such, the United States' Motion to Dismiss should be denied. Alternatively, and to the extent necessary, Plaintiffs would ask for leave of Court to file an Amended Complaint to address any pleading deficiencies.

Respectfully submitted this 18th day of February, 2020,

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2020, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

s/ Jason B. Aamodt
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