

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
Senior Judge Loren A. Smith

**UNITED STATES' MOTION TO STRIKE THE DECLARATIONS OF
JIM GRAY AND WILSON PIPESTEM**

I. INTRODUCTION

The Declarations of Jim Gray (ECF No. 10-5) and Wilson Pipestem (ECF No. 10-7) should be stricken. The United States moved to dismiss the Complaint (ECF No. 7) arguing, in part, that Plaintiffs are barred from relitigating claims that were raised and settled in previous litigation between the Osage Nation and the United States and that the settlement in that case waived and released Plaintiffs' claims. In response to the United States' motion, Plaintiffs filed two declarations opining on whether Plaintiffs' claims are affected by the settlement agreement entered into in the *Osage* Tribal Trust litigation. Because the declarations are in violation of the terms of the *Osage* Settlement, include legal conclusions, and are unhelpful to the Court, they should be stricken.

II. BACKGROUND

The Osage Nation sued the United States in this Court in 2000 for breach of fiduciary duties, alleging mismanagement of the Osage Mineral Estate and Osage trust funds. *See, e.g., Osage Nation v. United States*, 57 Fed. Cl. 392, 393 (2003) ("*Osage P*"). Ultimately, the United States and the Osage Nation executed the Osage Tribal Trust Settlement Agreement and settled the case. A copy

of the Settlement Agreement is attached as Exhibit 1. Paragraph 11.g of the Agreement states, in part:

No Cooperation. The Osage Tribe,¹ its officers or its employees, or the Osage Minerals Council, shall not aid, assist, or support in any way any individual or party in the development, initiation, or litigation of a claim against the United States that the Osage Tribe has otherwise waived in this Agreement, including in the form of sharing evidence, documents, materials, or other information the Osage Tribe, their counsel, consultants, experts, or contractors possess relating to the claims in the CFC Action.

Osage Settlement, ¶ 11.g.

In the case at bar, Plaintiffs William Fletcher, Tara Damron, Kathryn Red Corn, and Richard Lonsinger, who are entitled to a share of proceeds from the Mineral Estate, allege that the United States mismanaged their trust funds. The United States moved to dismiss the Complaint for multiple reasons, including that Plaintiffs are barred from relitigating claims that were raised and settled in *Osage* and that the *Osage* Settlement waived and released Plaintiffs' claims. *See* United States' Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Relief Can be Granted at 19-26, 28-30, ECF No. 7. In response, Plaintiffs attached the declarations of Jim Gray and Wilson Pipestem to argue that the *Osage* Settlement does not affect their claims. *See* Pls.' Resp. in Op. to United States' Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Relief Can be Granted at 10, 19, ECF No. 10.

Mr. Gray "served as Principal Chief of the Osage Nation from 2002 to 2010 and was deeply involved in the Nation's litigation against the United States." Decl. of Jim Gray ¶ 1, ECF No. 10-5. He testifies that he "was no longer Principal Chief of the Osage Nation at the time" of the Settlement, but "participated in many of the settlement discussions." *Id.* ¶ 4.

¹ The Osage Nation was previously named the Osage Tribe of Indians of Oklahoma.

Mr. Pipestem “was lead counsel for the Osage Nation for the final eight years of the eleven-year litigation against the United States in the U.S. Court of Federal Claims” and “participated in every meaningful settlement discussion with the United States.” Decl. of Wilson Pipestem ¶ 1, ECF No. 10-7. The Osage Nation is not a party to this case.

III. ARGUMENT

The Court may strike a pleading, or portions thereof, for “any redundant, immaterial, impertinent, or scandalous matter.” RCFC 12(f). The Court should strike the declarations of Jim Gray and Wilson Pipestem because they are in violation of the *Osage* Settlement, include legal conclusions, and are not helpful to the Court.

The declarations provided by Plaintiffs are in violation of ¶ 11.g of the *Osage* Settlement, which states that “the Osage Tribe, its officers or its employees, or the Osage Minerals Council, shall not aid, assist, or support in any way any individual or party in the development, initiation, or litigation of a claim against the United States” that was settled in the Settlement Agreement. Here, the declarations are intended to assist Plaintiffs in the litigation of their claims against the United States. As the United States has demonstrated in its Motion to Dismiss and supporting briefs, Plaintiffs’ claims were settled and/or waived in the Settlement Agreement. In short, Plaintiffs seek to recover for claims of trust mismanagement by the United States under Section 4 of the 1906 Act, when those claims were brought as part of the Osage Tribal Trust litigation.

Importantly, the declarations should be struck because they are not relevant or helpful to the litigation. It is the terms of the Settlement Agreement, not the declarants’ years-later interpretation of the terms, which should control. Because the terms of the Settlement Agreement are clear, it is not necessary to pepper the record with declarations—something that could, if allowed, also be done by the United States. Further, to the extent the declarations offer legal conclusions about which claims were part of the *Osage* Settlement, those conclusions are neither admissible nor useful

to this Court. *See Ryco Constr., Inc. v. United States*, 55 Fed. Cl. 184, 196 (2002) (noting that lay witness's legal conclusions would not be admissible); *Sparton Corp. v. United States*, 77 Fed. Cl. 1, 8 (2007) (noting caselaw holding that expert testimony regarding the legal significance or interpretation of contract language is inadmissible); *Stobie Creek Invs., LLC v. United States*, 81 Fed. Cl. 358, 360-61 (2008) (excluding opinion that concerned interpretation of law as unhelpful).

Plaintiffs' attempt to use declarations that are in violation of the *Osage* Settlement Agreement, improperly include legal conclusions, and do not aid the Court should be rejected. Accordingly, the United States respectfully requests that this Court strike the Declarations of Jim Gray and Wilson Pipestem from the record, along with all related references in Plaintiffs' Response in Opposition to the United States' Motion to Dismiss.

Respectfully submitted this 30th day of March, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2020, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Sara E. Costello

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