

**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' REPLY IN SUPPORT OF MOTION TO STRIKE THE  
DECLARATIONS OF JIM GRAY AND WILSON PIPESTEM**

**I. INTRODUCTION**

The United States respectfully submits this Reply in Support of its Motion to Strike the Declarations of Jim Gray and Wilson Pipestem (ECF No. 15) ("Motion to Strike"). Plaintiffs' Response in Opposition to the United States' Motion to Strike (ECF No. 17) ("Plaintiffs' Response") misconstrues the United States' bases for filing the motion and fails to address the issues raised therein. The declarations violate the terms of the Osage Tribal Trust Settlement, provide legal conclusions, and are unhelpful to the Court. Accordingly, the Motion to Strike should be granted.

**II. ARGUMENT**

Plaintiffs' Response conflates the bases for the United States' filing of the Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim for Which Relief Can be Granted (ECF No. 7) ("Motion to Dismiss") with the basis of the Motion to Strike. This confusion is, perhaps, a purposeful attempt to present a sur-reply to the Motion to Dismiss by advancing additional arguments regarding the effect of the Settlement Agreement, the authority of the Osage Nation and Osage Minerals Council to bind Osage Headright Holders, *res judicata*, estoppel, and

more.<sup>1</sup> The Motion to Strike, however, does not concern the legal issues presented in the Motion to Dismiss, nor does granting of the Motion to Strike turn on whether the Plaintiffs are bound by the Settlement Agreement.<sup>2</sup> Rather, the Motion to Strike contends that the declarations must be stricken because Messrs. Gray and Pipestem are bound by Paragraph 11.g of the Settlement Agreement, which prohibits them from providing the declarations.

Paragraph 11.g was incorporated into the Settlement Agreement because the United States foresaw that a faction of Headright Holders, such as the current plaintiffs, may attempt, as they do in the instant case, to assert claims that are the proper province of the Osage Nation. With that in mind, the intent of Paragraph 11.g was twofold: (1) to restrain all interested parties, insiders, and participants in the Osage Tribal Trust Litigation from using knowledge and information obtained as a result of the litigation and settlement negotiations from taking future actions that would diminish the value of the settlement; and (2) mitigate the potential for future trust claims by forcing would-be litigants to develop their claims on their own. However, this Court need not consider parole or extrinsic evidence to find that the plain language of Paragraph 11.g applies and is enforceable against Messrs. Gray and Pipestem. It must simply determine whether the four corners of the Settlement

---

<sup>1</sup> Plaintiffs' Response addresses issues relating to, and repeatedly references, the Motion to Dismiss. *See* Plfs. Resp. at 2 (Argument, Section I is titled "The United States' Motion to Dismiss Raises Factual Issues"); *Id.* at 3 ("Without any factual support, and fueled by its own argument, the United States' so-called Motion to Dismiss...must be denied."); *Id.* at 5 (Argument, Section II is titled "The United States Litigated and Lost the Tribal Settlement Issue and Should be Estopped from Relitigating the Matter"); *Id.* at 8 ("As noted in Plaintiffs' Response to the United States' Motion to Dismiss, Plaintiffs were not parties to the Osage Settlement.").

<sup>2</sup> Footnote 1 in Plaintiffs' Response implies that because the United States did not move to strike the email chain between Plaintiffs' counsel and Mr. Kim relating to settlement of the Osage Tribal Trust Litigation, the United States is challenging only those submissions that undermine its argument. Plaintiffs' statement misunderstands the legal basis for the filing of the Motion to Strike. As discussed in the Motion to Strike and this reply brief, the declarations from Messrs. Gray and Pipestem are an express violation of the terms and conditions of the Settlement Agreement and contain improper legal conclusions. Mr. Kim's emails, however, do not.

Agreement state as much. They do. Paragraph 11.g of the Settlement Agreement states, in pertinent part:

**No cooperation.** The Osage Tribe, its *officers or employees*, including 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*. (Emphasis added).

The declarations from Mr. Gray and Mr. Pipestem violate each proviso in Paragraph 11.g of the Settlement Agreement. Paragraph 11.g applies to the “Osage Tribe, its officers or employees, including the Osage Minerals Council.” In Mr. Gray’s declaration (ECF No. 10-5), he states that he “served as Principal Chief of the Osage Nation from 2002 to 2010.” The Principal Chief is the elected head of the Executive Branch of the Osage Nation Government and is vested with “the supreme executive power of the Osage Nation.” Osage Const. Art. VII § 1. Thus, Mr. Gray, as Principal Chief, was an officer of the Osage Nation. In Mr. Pipestem’s declaration (ECF No. 10-7), he states that he was “lead counsel for the Osage Nation for the final eight years of the [Osage Tribal Trust Litigation].” In such capacity, Mr. Pipestem acted as an agent and/or employee of the Osage Nation. An “agent” is defined as “someone who is authorized to act for or in place of another.” Black’s Law Dictionary (11<sup>th</sup> ed. 2019), *available at* Westlaw BLACKS. To the extent that Mr. Pipestem was, as lead counsel, vested with the authority to act on behalf of the Osage Nation, he was, for all intents and purposes, the “Osage Tribe.” An “employee” is defined as “someone who works in the service of another person under an express or implied contract of hire, under which the employer has the right to control the details of work performance.” *Id.* To the extent

that Mr. Pipestem worked in the service, and at the direction, of the Osage Nation under an express contract of hire, he was an employee of the Osage Nation.<sup>3</sup>

Mr. Gray and Mr. Pipestem provided the subject declarations to “aid, assist, or support” an “individual or party,” Plaintiffs, in litigation of their claims against the United States. The Osage Nation, however, waived the claims at issue in this litigation in the Settlement Agreement. Plaintiffs challenge management of the Osage Tribal Trust Account, asserting that the United States underpaid interest, overpaid gross production taxes and tribal operations expenses, failed to properly report transfers of funds to the Osage Nation, and failed to account for administrative costs. Compl. ¶¶ 62-66. In the Settlement Agreement, the Osage Nation waived, on behalf of itself and Headright Holders, “...any and all claims and/or liabilities of any kind or nature...regardless of legal theory, for any damages, equitable or specific relief, that are based on harms or violations...that relate to the *Osage Tribe’s monetary or non-monetary trust assets or resources* that could have been asserted by the Osage Tribe on behalf of itself and/or Headright Holders on or before September 30, 2011.” Settlement Agreement, ¶ 7.a.i (emphasis added). This waiver included, but was not limited to, “[a]ll claims asserted, or that could have been asserted, by the Osage Tribe in the CFC Action” and “[a]ll claims regarding the United States’ obligation to provide a historical account or reconciliation of the Osage Tribal Trust Account and Other Osage Accounts or the United States’ fulfillment of such obligation.” *Id.* at ¶¶ 7.a.i.1-2.

The Osage Nation also waived “all claims regarding the United States’ alleged mismanagement of the Osage Tribal Trust Account and Other Osage Accounts up through and including September 30, 2011, including, but not limited to,” claims that the United States:

---

<sup>3</sup> Mr. Pipestem is a current employee and/or agent of the Osage Nation, working as legal counsel for the Osage Minerals Council.

- Failed to invest revenue in the Osage Tribal Trust Account and/or Other Osage Accounts in a timely manner (*Id.* at ¶ 7.a.i.4.a);
- Maintained excessive cash balances in the Osage Tribal Trust Account and/or Other Osage Accounts (*Id.* at ¶ 7.a.i.4.b);
- Failed to obtain an appropriate return on funds in the Osage Tribal Trust Account and/or Other Osage Accounts. (*Id.* at ¶ 7.a.i.4.c);
- Failed to deposit moneys into, or disburse monies from, the Osage Tribal Trust Account and/or Other Osage Accounts in a proper and timely manner (*Id.* at ¶ 7.a.i.4.d);
- Disbursed monies from the Osage Tribal Trust Account and/or Other Osage Accounts without the Osage Tribe's proper authorization (*Id.* at ¶ 7.a.i.4.e); and
- Failed to report or provide information about the United States' actions or decisions relating to the Osage Tribal Trust Account and/or Other Osage Accounts (*Id.* at ¶ 7.a.i.4.f).

While Plaintiffs' Response focuses heavily on their argument that Headright Holders can bring claims relating to the Osage Tribal Trust Account because they are not bound by the Settlement Agreement, that issue has no bearing on the application of Paragraph 11.g to the declarations from Messrs. Gray and Pipestem. The plain language of Paragraph 11.g indicates that, for purposes of analyzing the waiver proviso, the sole, relevant inquiry is whether the *Osage Nation*, not Headright Holders, waived the claims at issue in the Settlement Agreement. The above-referenced waiver provisions from the Settlement Agreement make it clear that it did.

The final proviso in Paragraph 11.g prohibits the Osage Tribe, its officers or employees from "sharing evidence, documents, materials, or other information...relating to the claims in the CFC Action." Messrs. Gray and Pipestem did precisely what the proviso prohibits; they provided Plaintiffs with information regarding the nature of the claims involved in the Osage Tribal Trust

Litigation before the Court of Federal Claims. Plaintiffs argue that Paragraph 11.g cannot be applied to the declarations at issue because Headright Holders were not parties to the Settlement Agreement. Plfs. Resp. at 8. Whether Headright Holders were parties to the Settlement Agreement, however, is irrelevant for purposes of the Motion to Strike. The United States seeks to enforce Paragraph 11.g not against Plaintiffs, but against Messrs. Gray and Pipestem who, as officers and/or employees of the Osage Nation, were parties to, and are therefore bound by, the Settlement Agreement.

Plaintiffs' argument that Paragraph 11.g is unenforceable is similarly unavailing. Plaintiffs argue that Paragraph 11.g of the Settlement Agreement cannot be enforced because "Mr. Gray and Mr. Pipestem are not being offered to present testimony regarding some confidential aspect of the settlement agreement between the Osage Tribe and the United States." Plfs. Resp. at 9. In support of this argument, Plaintiffs cite to *General Steel Domestic Sales, LLC v. Steel Wise, LLC*, 2009 WL 185614 at \*\*7-8 (D. Colo. Jan. 23, 2009), for the proposition that "[e]xceptions to the traditional enforcement of confidentiality agreements are sometimes made where the case is one of legitimate public interest or involves a governmental body." The facts in *General Steel* are not analogous to the facts in the present litigation. The states of Colorado and California filed suit against General Steel, a steel building manufacturer, for violating consumer protection laws. *Id.* at \*1-2. General Steel resolved the litigation by entering into two settlement agreements – one with state investigative agencies and another with individual consumers. *Id.* at \*3-5. Following settlement, the company filed the *General Steel* case against SteelWise and other entities it believed were responsible for its legal difficulties. Defendants in *General Steel* challenged the confidentiality provisions in the settlement agreements, contending that they violate public policy by preventing defendants from interviewing certain witnesses and eliciting their testimony at trial. *Id.* at \*7.

Plaintiffs' Response is based on the *General Steel* court's ruling regarding the confidentiality provision in the settlement agreement with individual consumers. Plfs. Resp. at 9. In analyzing the provision, the court stated that, in general, "[a]bsent a showing of compelling need, a purely private agreement among [ ] parties to keep the terms of [a] settlement and their own records confidential will be enforced." *Id.* at \*8. This is particularly true of "confidentiality agreements where the parties are involved in a purely private contractual matter and the settlement is not filed with the court." *Id.* at \*7 (citation omitted). The court explained that the issue at bar was not a purely private matter because the "[v]iolation of consumer protection statutes is an ultimate public concern; such statutes are designed to protect all consumers, not just those involved in one discrete litigation matter." *Id.* at \*8. As Plaintiffs note, the court goes on to state that "even when private confidentiality agreements are enforced, not all *factual matters* concerning the settled case will necessarily be muzzled; often courts will protect the terms of the settlement but will not allow a confidentiality agreement to prevent discovery directed to witnesses who can testify to otherwise admissible factual matters." *Id.* at \*\*7-8 (emphasis in original).

Ultimately, the court found that the confidentiality provision was unenforceable because it explicitly prohibited consumers from providing any testimony, even if compelled by subpoena, about the underlying facts of their claims against General Steel. *Id.* at \*9. In making such finding, the court placed particular importance on the fact that individual consumers' allegations did not appear in any court filings. *Id.* Consumers filed their notices of claim with the state Attorneys General, they did not initiate litigation against General Steel. *Id.* Thus, no information about the consumers' claims was publicly available. *Id.* The court found that "factual testimony about events which happened prior to the [consumer] receiving formal notice of the lawsuit and the opportunity to file a claim should not be hidden from the public." *Id.* The court did note, however, that

General Steel had a bona fide interest in the confidentiality of the amounts paid to individual consumers and the conditions of settlement therewith. *Id.*

Plaintiffs' Response fails to satisfy the burden of demonstrating a compelling need for information from Messrs. Gray or Pipestem regarding the Osage Tribal Trust Litigation or Settlement Agreement. The Settlement Agreement speaks for itself and no parole evidence is required. Plaintiffs also fail to argue, or otherwise show, that the Settlement Agreement violates public policy. "A court can properly refuse to enforce a contractual provision only where the contract violates 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Solar Turbines v. United States*, 23 Cl. Ct. 142, 157 (1991) (citation omitted). Absent such compelling need or violation of public policy, the Court must enforce a mutually agreed-upon contract according to its terms. *Madigan v. Hobin Lumber Co.*, 986 F.2d 1401, 1403 (Fed. Cir. 1993); *see e.g., Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1564-65 (Fed. Cir. 1990) (enforcing contractual waiver of both Article III and Seventh Amendment rights over contractor's objection); *McCall v. United States Postal Serv.*, 839 F.2d 664, 667 (Fed. Cir. 1988) (enforcing contractual waiver of right to appeal because such choice was "knowing and voluntary").

The Osage Tribal Trust Settlement Agreement is a private agreement between the Osage Nation and the United States and was not filed with the Court of Federal Claims. In contrast to the individual consumers' allegations in *General Steel*, the Osage Nation's allegations against the United States in the Osage Tribal Trust Litigation, the underlying facts of the Osage Nation's claims, and the claims themselves, are documented in over 660 court filings that are part of the public record. Plaintiffs do not seek information about events that happened prior to the Osage Nation filing suit, they seek to provide their interpretation of settlement negotiations and the terms of the Settlement Agreement. But the Court need only look within the four corners of the document to determine



what claims are covered. As the United States discussed in the Motion to Strike, such legal conclusions are inadmissible, unnecessary, and of no use to the Court. *See* Motion to Strike at 3-4.

### **III. CONCLUSION**

Plaintiffs' Response confuses the issues and misinterprets the United States' bases for filing the Motion to Strike. The declarations from Messrs. Gray and Pipestem violate the Paragraph 11.g of the Settlement Agreement, provide inadmissible legal conclusions, and are otherwise unhelpful to the Court. 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 20th day of April, 2020.

PRERAK SHAH  
Deputy Assistant Attorney General  
Environment & Natural Resources Division

/s/ Sara E. Costello  
SARA E. COSTELLO  
Trial Attorney  
United States Department of Justice  
Environment & Natural Resources Division  
Natural Resources Section  
P.O. Box 7611  
Washington, DC 20044-7611  
Tel: 202-305-0484  
Fax: 202-305-0506  
Email: [sara.costello2@usdoj.gov](mailto:sara.costello2@usdoj.gov)

OF COUNSEL:  
DEVON LEHMAN McCUNE  
U.S. Department of Justice  
Environment & Natural Resources Division  
Natural Resources Section

KENNETH DALTON  
DONDRAE MAIDEN  
KRISTEN KOKINOS  
SHANI WALKER  
United States Department of the Interior

Office of the Solicitor  
Indian Trust Litigation Office

**CERTIFICATE OF SERVICE**

I hereby certify that on April 20, 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  
Sara E. Costello  
Trial Attorney