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 DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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MOTION

Pursuant to Rule 12(b)(1) and (b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), Defendant, the United States of America, moves to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. A memorandum in support of this motion follows.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs William Fletcher, Tara Damron, Kathryn Red Corn, and Richard Lonsinger are Native Americans who are owners of "headrights," personal property rights entitling them to a share of proceeds from the Osage Mineral Estate. The United States holds the Mineral Estate in trust for the Osage Nation ("Tribe").[1] Under the Osage Allotment Act of 1906, Pub. L. No. 59-321, 34 Stat. 539 as amended ("1906 Act"), gross production taxes and tribal operations expenses are deducted from proceeds of the Mineral Estate and the remaining funds are distributed on a quarterly basis to each headright owner.

Plaintiffs allege that the United States mismanaged their trust funds, although Plaintiffs' Complaint fails to specify how exactly the United States did so or how this case differs from litigation previously brought and settled by the Tribe. In so doing, Plaintiffs seek to assert tribal rights and injuries, which they have no standing to raise. They also seek to relitigate matters that have already been decided or settled. For over two decades, the Osage Nation and headright owners have been litigating claims concerning the alleged mismanagement of the Mineral Estate, headright distributions, and Indian trust funds in this Court, as well as in two other district and appellate courts. Plaintiffs now ask this Court for over $100,000,000 in damages, despite the fact that the headright owners received their share of the settlement of the Osage Nation's tribal trust litigation against the United States and that all other mismanagement claims were waived.

Plaintiffs' claims should be dismissed for several reasons. First, Plaintiffs lack standing because they do not have a legally protectable interest in the Osage Tribal Trust Account, which is held for the benefit of the Osage Nation. Second, the majority of Plaintiffs' claims are barred by

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

claim and issue preclusion. Representing headright holders' interests, the Osage Nation has already litigated and settled claims in this Court based on the United States' alleged mismanagement. Plaintiffs also fully litigated their accounting claim in district and appellate courts, and the United States has provided an accounting to Plaintiffs. Third, Plaintiffs' breach of trust claims were expressly waived and released in part in the Osage settlement agreement. Moreover, Plaintiffs who were part of the *Cobell* class action lawsuit are also barred from bringing historical trust fund mismanagement and accounting claims.

Fourth, the Indian Tucker Act does not provide jurisdiction for Plaintiffs' claims because they are not an identifiable group of Indians under 28 U.S.C. § 1505. Finally, Plaintiffs failed to identify any money-mandating statutory or regulatory trust duties and their claim for an order mandating the United States change its trust management system falls far outside this Court's jurisdiction. In the event that Plaintiffs' claims are not dismissed in their entirety, Plaintiffs should be required to make a more definite statement pursuant to RCFC 12(e).

II. BACKGROUND

A. Osage Allotment Act of 1906 ("1906 Act")

In 1872, Congress established a reservation in the Oklahoma Territory for the Osage Tribe of Indians. *See McCurdy v. United States*, 246 U.S. 263, 265 (1918); *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010). The reservation was "largely underlaid with petroleum, natural gas, coal and other minerals." *McCurdy*, 246 U.S. at 265. In 1906, Congress passed legislation providing for the allotment of the Osage Nation's lands. 1906 Act, § 1. Section 3 of the 1906 Act severed the surface estate from the subsurface mineral estate, referred to as the Osage Mineral Estate, reserving all oil, gas, coal, and other minerals to the Tribe. In accordance with the 1906 Act, the United States holds the Osage Mineral Estate in trust for the benefit of the Osage Nation. Compl., ¶¶ 18-19, ECF 1 ("Compl."); *Fletcher v. United States*, 854 F.3d 1201, 1203 (10th Cir. 2017) ("*Fletcher III*"); 1906 Act,

§§ 1, 3, 4. The 1906 Act authorizes the Osage Nation to lease the Osage Mineral Estate for oil, gas, and other mineral development, with the approval of the Secretary of the Interior. 1906 Act, § 3. The Act directed the Secretary to distribute royalties from the Mineral Estate on a pro rata basis to Osage tribal members whose names were recorded on an official roll. Compl., ¶¶ 19, 30; 1906 Act, § 4. These interests in the net proceeds from the Osage Mineral Estate are known as "headrights." *Fletcher III*, 854 F.3d at 1203. Royalty revenue derived from the Mineral Estate is held in trust in the Osage Tribal Trust Account and then distributed directly to the headright owners' Individual Indian Money ("IIM") accounts on a quarterly basis.[2] *Fletcher*, 153 F. Supp. 3d at 1357; *Osage Nation v. United States*, 57 Fed. Cl. 392, 395 (2003) ("*Osage I*").

B. Previous trust accounting and alleged mismanagement litigation

The Osage tribal trust case and the *Fletcher* cases, including this case, concern the accounting of funds derived from the Osage Mineral Estate and the damages claimed because of the government's alleged mismanagement. *See, e.g.*, Compl., ¶¶ 19, 37-50; *Osage I*, 57 Fed. Cl. at 393-94; *Fletcher III*, 854 F.3d at 1203-04. The *Cobell* litigation is also relevant to this case because Plaintiffs include individuals who were certified class members in the *Cobell* settlement.

1. The *Osage* Tribal Trust litigation

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 I*, 57 Fed. Cl. at 393. The Osage Nation argued that the United States had complete control over the Osage Nation's mineral assets and trust fund established by the 1906 Act, and had never given the Osage a satisfactory accounting of its assets. *Id.* at 394.

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[2] The "vast majority" of distributions are done via transfers to IIM accounts; in limited cases, distributions are made by direct check to headright owners. *Fletcher*, 153 F. Supp. 3d 1354, 1357 (N.D. Okla. 2015).

a. Osage Nation's standing to sue on behalf of headright holders

Early in the case, the United States moved to dismiss the Osage Nation's claims on the basis that any injury was to the headright holders, not the Tribe itself. *Id.* at 394. The court rejected this argument, finding that the 1906 Act established a trust fund for the Tribe, where mineral royalties are held in trust for the Osage Nation before being distributed to the individual members, and holding that the government's responsibility is to the Tribe and Osage Tribal Trust Account. *Id.* at 395. The court based this determination on the fact that the mineral royalties are deposited in the Osage Tribal Trust Account established by the 1906 Act, where they remain for at least a quarter of a year before being distributed to individual headright owners. *Id.* The court also noted that the determination of "what amount is owed to each headright holder also takes place while the funds are in the tribal trust fund." *Id.* Further, the alleged mismanagement took place while the funds were within the tribal trust fund, not at the point of distribution to the individual headright holders. *Id.* Rejecting the United States' concern, the court found that any damages awarded to the Tribe in the litigation would "flow down" to the headright holders because such distribution is required by Section 4 of the 1906 Act. *Id.* Consequently, the court found that the Tribe had standing to sue. *Id.*

Later, the court denied eight individual headright holders' motion to intervene in the case, finding that the intervenors did not meet the requirements for intervention of right under RCFC 24(a). *Osage Tribe of Indians of Okla. v. United States*, 85 Fed. Cl. 162, 174 (2008) ("*Osage VI*"). The court found that while the proposed intervenors had an interest in the pro-rata share of proceeds of the Osage Mineral Estate through their headright ownership and would be directly affected by a judgment "because damages awarded to the Tribe are ultimately to be paid to the credit of headright holders pursuant to statute," they did not have a legally protectable interest. *Id.* at 169. The court further stated that the Tribe, not the headright holders, is the direct trust beneficiary and therefore the real party in interest. *Id.* at 170. "Proposed Intervenors are not a party to the trust relationship

which exists between" the United States and the Tribe and "do not have a legally protectable interest in a dispute concerning a trust relationship to which they are not a party." *Id.* at 171–72.

The court also found that the Osage Nation represented the headright holders' interest. The Tribe and the proposed intervenors had a common interest in obtaining the maximum award for money damages because the award would ultimately be distributed to the headright holders under the 1906 Act. *Id.* at 174-75. The court noted that the Tribe "with sovereignty over its members analogous to the sovereignty of the United States over its citizens, is competent to litigate claims on behalf of and in the interest of its members and therefore adequately to represent Proposed Intervenors' interests." *Id.*

b. The *Osage* settlement

Proceeding on the merits, the court divided the trial into two phases or "tranches." Tranche One focused on the alleged mismanagement of four Osage Mineral Estate oil and gas leases in five months over a twenty-year period. The parties litigated allegations of trust mismanagement, including 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. The court found the government breached its fiduciary duty and entered judgment for the Tribe in the amount of $1,876,878.30 for that limited time frame. *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629 (2006); 75 Fed. Cl. 462 (2007); 93 Fed. Cl. 1, 6 (2010). Next, the Tribe moved for partial summary judgment, asking the court to apply the Tranche One rulings to the remaining oil and gas leases. *Osage*, 93 Fed. Cl. at 6. The court granted the motion and awarded damages of over $330 million. *Id.*; *Osage Tribe of Indians of Okla. v. United States,* 97 Fed. Cl. 542 (2011).

After the court's ruling, the United States and the Osage Nation negotiated a settlement, a copy of which is attached as Exhibit 1. The Osage Nation created the "Osage Trust Team" to manage and direct the litigation and settlement, consisting of representatives from the Osage

Minerals Council, the Osage Nation Congress, and the Osage Nation Executive Branch. *Osage* Settlement, ¶ 1.g. The Osage Minerals Council has authority delegated under the Osage Constitution for the management of the Osage Mineral Estate and therefore has a fiduciary obligation to act in the best interest of Osage headright holders. Osage Const., Art. XV, § 4, found at https://osagenation-nsn.gov/who-we-are/legislative-branch (last visited December 20, 2019).

The Osage Trust Team consulted with headright holders during the settlement negotiations and canvassed headright holders to confirm their support of the Osage Nation's settlement of the trust claims related to the Osage Mineral Estate. *Osage* Settlement, ¶¶ 1.l, m. The canvass revealed that "the vast majority of the Osage Headright interests held by the Osage Headright Holders who participated in the canvass expressed support for the actions of the Osage [Nation] acting through the Osage Minerals Council in approving the terms [of the settlement agreement]." *Id.* ¶ 1.n. The Osage Nation also affirmed its authority to "act for, to protect the interests of, and to bind Headright Holders with respect to matters relating to the Osage Mineral Estate, including the initiation, prosecution, and settlement of claims relating to the Osage Mineral Estate." *Id.* ¶ 1.d.

Ultimately, the parties executed the Osage Tribal Trust Settlement Agreement and settled the case for $380 million. As a part of the settlement, the Osage Nation waived and released all claims related to Osage monetary and non-monetary trust assets and resources that were, or could have been asserted by the Osage Nation on behalf of itself, and the Osage headright holders, on or before September 30, 2011. *Id.* ¶ 7.a. Specifically, "the Osage Tribe, on behalf of itself and the Headright Holders, hereby waives and releases, and covenants not to sue on, any and all claims and/or liabilities of any kind of nature whatsoever, known or unknown, suspected or unsuspected, regardless of legal theory, for any damages, equitable or specific relief, that are based on harms or violations occurring on or before September 30, 2011, and that relate to the Osage Tribe's monetary or non-monetary trust assets or resources that have been or could have been asserted by the Osage

Tribe on behalf of itself and/or the Headright Holders on or before September 30, 2011. . . ." *Id.* The Settlement amount was paid into the Osage Tribal Trust Account, and then distributed in its entirety to Osage headright holders pursuant to the 1906 Act. *Id.* ¶ 5.b, c. The case was dismissed with prejudice pursuant to the stipulation of the parties. *Osage Tribe of Indians v. United States*, Case No. 99-550L, ECF Nos. 665–67.

2. Plaintiffs' litigation in the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit

In 2002, Plaintiff Fletcher and several other Osage headright holders filed suit in district court alleging claims based on their rights to participate in Osage tribal elections and government, breach of the United States' trust responsibilities, and failure to manage the Osage Nation's trust assets. Compl. ¶ 37; *Fletcher*, *v. United States*, No. 02-cv-427-GKF-FHM, 2012 U.S. Dist. Lexis 46390, at *2 (N.D. Okla. Mar. 31, 2012). Plaintiffs later amended their complaint to include an accounting claim. Compl. ¶¶ 37-38; *Fletcher*, 2012 U.S. Dist. Lexis 46390, at *9. The district court concluded that the headright owners were not entitled to an accounting under 25 U.S.C. § 162a or 25 U.S.C. § 4011. Compl. ¶ 38; *Fletcher*, 2012 U.S. Dist. Lexis 46390, at *23. The Tenth Circuit reversed on appeal, however, and the case was remanded to the district court to determine the appropriate scope of the accounting. Compl. ¶ 39; *Fletcher v. United States*, 730 F.3d 1206, 1214-16 (10th Cir. 2013) (*Fletcher II*).

On remand, the district court reinstated and granted Plaintiffs' motion to certify a class including all Indians who currently, or during the litigation, received 1906 Act § 4 royalty payments. *Fletcher,* No. 02-427-GKF-FHM, Op. and Order of Jan. 31, 2014, at 4 (ECF No. 1196). And the district court ordered an accounting of the Osage Tribal Trust Account. Compl. ¶ 42; *Fletcher*, 153 F. Supp. 3d at 1370. The district court required the accounting to: (1) run from the first quarter or 2002 until the last available quarter; (2) be divided and organized by month or by quarter; (3) state

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

The court rejected Plaintiffs' request for an accounting including receipts and distributions "going back one-hundred and nine (109) years, to 1906." *Fletcher*, 153 F. Supp. 3d at 1369-70. Plaintiffs appealed and the Tenth Circuit affirmed the district court's accounting order. Compl. ¶ 43; *Fletcher III*, 854 F.3d at 1205-07. The United States completed and delivered the accounting to Plaintiffs in 2017. Compl. ¶¶ 3, 8, 44; Fed. Defs.' Notice of Compliance, Sept. 11, 2017 (*Fletcher* ECF No. 1358). The parties continue to litigate Plaintiffs' motion for attorney fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Order of Feb. 21, 2019 (*Fletcher* ECF 1400); Notice of Appeal, Mar. 8, 2019 (*Fletcher* ECF No. 1402).

3. The *Cobell* litigation

The *Cobell* complaint was filed on June 10, 1996. In the original *Cobell* complaint, plaintiffs alleged that officials of the United States violated their fiduciary duties as trustee to individual Indians and sought an accounting of their trust funds held in IIM accounts. *Cobell v. Salaza*r, 573 F.3d 808, 809 (D.C. Cir. 2009) ("*Cobell XXII*"). On December 21, 2010, with leave of court, and pursuant to the jurisdictional grant of the Claims Resolution Act of 2010, Pub. L. 111-291; 124 Stat. 3064, the *Cobell* plaintiffs filed an amended complaint. *Cobell v. Salazar,* No. 96-1285-JR, Am. Compl. (D.D.C.) (ECF No. 3671).

a. The *Cobell* amended complaint

The *Cobell* amended complaint asserted three causes of action: (1) that the United States be

compelled to provide a historical accounting to IIM beneficiaries; (2) that the class plaintiffs be awarded "restitution, damages, and other appropriate legal and equitable relief" for the United States' alleged mismanagement of plaintiffs' IIM trust funds; and (3) that the class plaintiffs be awarded "restitution, damages, and other appropriate legal and equitable relief" for the United States' alleged mismanagement of plaintiffs' trust lands and non-monetary trust assets. *Cobell* Am. Compl. ¶¶ 43-52. In their amended complaint, the *Cobell* plaintiffs alleged, in pertinent part, that they sustained damages due to the United States' breaches of trust with respect to money, land, and natural resource assets, *id.* ¶ 1; that the United States mismanaged plaintiffs' land, funds, and resources, *id.* ¶ 3; and that the United States owes certain fiduciary obligations to individual Indians with respect to their trust funds and lands. *Id.* ¶¶ 19, 20, 22. The *Cobell* Amended Complaint was filed pursuant to the terms of a settlement agreement. *Cobell* Settlement Agreement, Terms of Agreement ¶ B.3(a), attached as Exhibit 2.

b. The *Cobell* settlement agreement

The *Cobell* settlement agreement established two settlement classes, the historical accounting class, *id.* ¶ A.16, and the trust administration class, *id.* ¶ A.35. The historical accounting class was a non-opt-out class. *Id.* ¶ C.2(a). Upon final approval of the settlement, the members of the historical accounting class released, waived, and discharged the United States from an obligation to perform a historic accounting of class plaintiffs' IIM accounts or other trust assets. *Id.* ¶ I.1. In addition, the historical accounting class was barred from prosecuting any claims for a historical accounting that were or could have been asserted in the *Cobell* amended complaint. *Id.* The trust administration class was an opt-out class. *Id.* ¶ C.2(b). Upon final approval of the settlement, the members of the trust administration class who did not opt-out released, waived, and discharged the United States for funds or land administration claims and barred class plaintiffs from prosecuting all claims that were or could have been asserted in the *Cobell* amended complaint. *Id.* ¶ I.2.

The *Cobell* settlement agreement released claims of Osage headright owners "to the extent monies from such headright interests beneficially owned by such individual Indian[s] have been deposited into an IIM Account for the benefit of such individual Indian[s]." *Id.* ¶ I.6.

On December 8, 2010, Congress passed the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064. The Claims Resolution Act, among other things, "authorized, ratified, and confirmed" the *Cobell* settlement (§ 101(c)(1)); conferred subject-matter jurisdiction on the United States District Court for the District of Columbia over the *Cobell* Amended Complaint (§ 101(d)(1)); and permitted certification of the trust administration class "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure" (§ 101(d)(2)).

c. Class certification and notice

On February 4, 1997, the district court certified *Cobell* as a class action under Fed. R. Civ. P. 23(b)(1)(A) and (b)(2). Order of Feb. 4, 1997 (*Cobell* ECF No. 27). On July 27, 2011, the district court re-certified and gave final approval to the historical accounting class, Order of Dec. 21, 2010, at 1-2 (*Cobell* ECF No. 3670), and certified the trust administration class consisting, in pertinent part, of individual Indians who had IIM accounts at any time after approximately 1985 or, as of September 30, 2009, had a recorded or other demonstrable beneficial ownership interest in land held in trust or restricted status. *Id.*

Notice of the settlement, which, among other things, informed trust administration class members of their opt-out rights, was mailed to "[a] list of all readily identifiable Class Members whose names and addresses were readily available and provided by the Department of Interior . . ., or whose addresses could be reasonably obtained through advanced legal research." Decl. of Katherine Kinsella, May 16, 2011 ¶ 11 (*Cobell* ECF No. 3762-2). Notice of the settlement was also provided in print media, *id.* at 20-22, 43-46, by radio, *id.* at 23-24, 34-42, 47, on the internet, *id.* at 25-26, and on television, *id.* at 27-33.

d. Plaintiffs Fletcher, Red Corn, and Lonsinger are *Cobell* class members

On December 21, 2010, the district court granted preliminary approval to the settlement agreement. Order of Dec. 21, 2010 (*Cobell* ECF No. 3667). Pursuant to the court's order, plaintiffs who wanted to opt-out of the trust administration class had 120 days, to April 20, 2011, to postmark their opt-out or objection forms. *Id.* ¶ 11. Plaintiffs Fletcher, Red Corn, and Lonsinger did not opt-out and are members of the trust administration class. Decl. of Michelle D. Herman ¶¶ 3, 13, 15, Dec. 17, 2019 (Herman Decl.), attached as Exhibit 3 (Herman Decl. refers to previous declaration filed in *Cobell*); *see also* Order Granting Final Approval to Settlement, July 27, 2011 (*Cobell* ECF No. 3850). Plaintiffs Fletcher and Red Corn are also members of the historical accounting class. Herman Decl. ¶¶ 3, 13.

C. The current Complaint

Plaintiffs filed their Complaint in this Court, seeking monetary damages for asserted mismanagement of "the Osage Headright trust fund," based on the accounting of the Tribal Trust Account they received in *Fletcher*. Compl. ¶¶ 3–4, 8. Plaintiffs brought the Complaint as a class action and seek to certify a class of "all Indians who lawfully receive distributions of trust property from the Osage Mineral Estate as determined and calculated by Defendant, as trustee, pursuant to the 1906 Act § 4 (as amended)." Compl. ¶ 51.

Plaintiffs' Complaint contains four counts. Count I alleges that the United States failed to provide adequate systems and controls for accounting for and reporting trust fund balances. Compl. ¶¶ 59–66. Specifically, Plaintiffs assert that the United States under-paid interest, overcharged gross production taxes, failed to accurately report transfers to the Osage Nation, and failed to account for administrative costs. *Id.* ¶¶ 62–66. Count II asserts that the United States failed to establish written policies and procedures or provide adequate staffing, supervision, and training for trust fund management and accounting. *Id.* ¶¶ 67–69. Count III alleges that the United States failed to

provide periodic statements of headright owners' accounts and "erred in reporting expenses and simply adjusted the revenue so as to balance the account of Osage Headright Owners." *Id.* ¶¶ 70–72. Count IV alleges that Plaintiffs are entitled to damages for the United States' breach of its fiduciary obligations to Plaintiffs. *Id.* ¶¶ 73–74.

Plaintiffs request damages "in an amount exceeding One Hundred Million Dollars ($100,000,000.00)," and also seek an order mandating that the United States provide an accounting and other injunctive relief, such as changing the trust management system. *Id.* ¶ 75.

III. LEGAL STANDARD

A. Rule 12(b)(1) Dismissal for lack of subject matter jurisdiction

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 502 (2003) (quoting *United States v. Mitchell* ("*Mitchell II*") 463 U.S. 206, 212 (1983)). Jurisdiction has to be established before the court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject-matter jurisdiction unless it is affirmatively indicated by the record; therefore, it is plaintiffs' responsibility to allege facts sufficient to establish the court's subject-matter jurisdiction. *Renne v. Geary*, 501 U.S. 312, 316 (1991); *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction." (citations omitted)).

A plaintiff bears the burden of proving by a preponderance of the evidence the facts sufficient to establish that the court possesses subject matter jurisdiction. *McNutt v. Gen. Motors Acceptance Corp. of Ind.,* 298 U.S. 178, 189 (1936); *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). The court may look to evidence outside of the pleadings and inquire into jurisdictional facts to determine the existence of subject matter jurisdiction. *Land v. Dollar*, 330

U.S. 731, 735 n.4 (1947); *Reynolds*, 846 F.2d at 747. In doing so, the court may examine relevant evidence to decide any factual disputes. *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999). If the defendant or the court questions jurisdiction, then a plaintiff cannot rely solely on factual allegations in the complaint but must bring forth relevant adequate proof to establish jurisdiction. *See McNutt*, 298 U.S. at 189.

B. 12(b)(6) Failure to state a claim

The United States also seeks dismissal of Plaintiffs' claims pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. To state a claim, Plaintiffs' Complaint must allege facts showing that they are entitled to relief. RCFC 8(a). *See Huntington Promotional & Supply, LLC v. United States*, 114 Fed. Cl. 760, 766 (2014) (the complaint must "state a claim to relief that is plausible on its face") (internal quotations omitted)). Plaintiffs' obligation to provide supporting factual allegations requires more than labels and conclusions; a formulaic recitation of a cause of action is not sufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

C. 12(e) Motion for a more definite statement

Under RCFC 12(e), the court may grant a motion for a more definite statement, if the complaint is "so vague or ambiguous that the [United States] cannot reasonably prepare a response." RCFC 12(e). A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *See Twombly*, 550 U.S. at 570.

IV. ARGUMENT

Plaintiffs' claims should be dismissed for multiple reasons. First, Plaintiffs lack standing, as they do not have a protectable interest and thus have not identified a valid injury. Second, Plaintiffs are attempting to relitigate claims that have already been decided or settled. Thus, their claims are barred by the doctrines of claim and issue preclusion. Specifically, the Osage Nation represented Plaintiffs' interests in litigation before this Court asserting claims regarding mismanagement of the

Tribe's trust funds and asserts. In addition, Plaintiffs already received an accounting in the *Fletcher* litigation. Third, Plaintiffs' claims are barred by the doctrines of waiver and release, as the settlement in *Osage* waived claims for mismanagement that were or could have been brought, and *Cobell* class members are precluded from bringing historical trust fund mismanagement and accounting claims.

Fourth, Plaintiffs have not demonstrated that this Court has jurisdiction because they are not an identifiable group of Indians under 28 U.S.C. § 1505 and have not identified any money-mandating statutory or regulatory trust duties. Finally, their claim for an order mandating the United States change its trust management system is also outside this Court's jurisdiction. In the alternative, if this Court declines to dismiss Plaintiffs' claims in their entirety, Plaintiffs should be required to make a more definite statement pursuant to RCFC 8 as their vague allegations are insufficient to allow the United States to respond in a meaningful way.

A. Plaintiffs lack standing to assert their claims.

Plaintiffs lack the requisite legally protectable interest to support standing. Standing is a threshold jurisdictional issue. *See Steel Co.*, 523 U.S. at 102–104. "The party invoking federal jurisdiction bears the burden of establishing [the] elements [of standing]." *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002) (quoting *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561 (1992)). The Court of Federal Claims applies the same standing requirements as Article III courts. *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359 (Fed. Cir. 2009). To establish Article III standing, a plaintiff must show that:

> 1) . . . it has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; 2) [an] injury [that is] "fairly traceable" to the action of the defendant; and 3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Magnum Opus Techs., Inc. v. United States,* 94 Fed. Cl. 512, 528 (2010) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.,* 528 U.S. 167, 180–81, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000)).

Commissioning Sols. Glob., LLC v. United States, 97 Fed. Cl. 1, 7 (2011).

Here, Plaintiffs cannot show that they have suffered an "injury in fact" because they have not asserted a legally protected interest. Plaintiffs assert that they have been injured by Defendant's alleged mismanagement of the Osage Tribal Trust account. Compl. ¶¶ 4. Plaintiffs assert that they are bringing the case based on the accounting they received in *Fletcher*. *Id.* ¶¶ 4 (noting mismanagement allegedly discovered upon review of *Fletcher* accounting), 50 (stating that Plaintiffs are "seeking monetary restitution based upon instances of mismanagement of their trust funds found and interpreted from the accounting the United States provided to them in the *Fletcher* litigation"). The *Fletcher* accounting was "an accounting of the Osage tribal trust account—an account within the United States Treasury which holds Osage royalty income prior to its distribution to the headright owners." *Fletcher*, 153 F. Supp. 3d at 1356. Plaintiffs did not request or receive an accounting of their individual IIM accounts in *Fletcher*.

Plaintiffs, however, lack standing to seek damages related to management of the Osage Tribal Trust Account. *See Chippewa Cree Tribe of Rocky Boy's Reservation v. United States*, 73 Fed. Cl. 154, 163 (2006) (noting that "distribution of a communal asset did not create individual claims against the United States for mismanagement during the time the funds were held in common"). The Tribal Trust Account is held for the benefit of the Osage Nation, not individual Tribe members or Osage headright holders. The 1906 Act states that royalties from the Osage Mineral Estate are payable to the Osage Tribe. 1906 Act § 3 ("royalties to be paid to the Osage tribe under any mineral lease") (emphasis added). The 1906 Act provides 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." *Id.* § 4 (emphasis added); *see also Osage VI*, 85 Fed. Cl. at 171. Tribes are entities distinct from their individual members, and tribal property interests are held by the tribe, not the individual members. *See, e.g., United States v. Jim*, 409 U.S. 80,

82 (1972) ("It is settled that whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.") (internal quotations and citations omitted); *Short v. United States*, 12 Cl. Ct. 36, 42 (1987) ("[I]ndividual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common."); *Holt v. Comm'r of Internal Revenue*, 364 F.2d 38, 41 (8th Cir. 1966) ("No individual Indian has title or an enforceable right in tribal property.").

"[T]he distribution of communal assets . . . does not create an individual right on the part of the beneficiary where the tribe is 'the channel or conduit through which reimbursement is to flow.'" *Chippewa Cree*, 73 Fed. Cl. at 160 (citing *Hebah v. United States*, 428 F.2d 1334, 1337–38 (Ct. Cl. 1970)). In *Chippewa Cree,* the Treaty with the tribe provided for payment to the tribe that was then to be distributed among the individual Indians "in equal amounts per capita." *Id.* The court found that "the rights created by the 1863 Treaty were held by the tribe, even though payments were made to individuals." *Id.* The court held that the relevant statutes "providing for the allocation of the Awards to individual beneficiaries on a per capita basis[] did not create individual rights vested in the beneficiaries and therefore did not endow individual recipients with the right to bring suit against the United States for individual claims of mismanagement of communally-held trust funds." *Id.* (citing *Sac & Fox Indians of the Mississippi in Iowa v. Sac & Fox Indians of the Mississippi in Okla.*, 220 U.S. 481, 483–84, 486, 489–90 (1911); *Hebah*, 428 F.2d at 1337). So, too, here. Plaintiffs do not have "individual claims against the United States for mismanagement during the time the funds were held in common." *Id.* at 163.

Indeed, the court found in the *Osage* litigation that headright holders do not have a legally protectable interest in the Osage Tribal Trust Account. *Osage VI*, 85 Fed. Cl. at 171–72. The Proposed Intervenors were eight headright holders who asserted that they had an interest in the trust established by the 1906 Osage Act based on their "interest in income derived from the Osage

mineral estate." *Id.* at 169. According to the *Osage* court, the headright holders "are not a party to the trust relationship which exists between" the tribe and the United States created by the 1906 Act and "do not have a legally protectable interest in a dispute concerning a trust relationship to which they are not a party." *Id.* at 171–72. Plaintiffs concede that the headright holders were denied intervention in the *Osage* litigation when the court held that "the Osage Tribe [was] the real party in interest in [that] litigation and that the Osage Tribe owns the minerals which are the subject of that action. Therefore, Proposed Intervenors do not have an interest which the substantive law recognizes as belonging to or being owned by them." Compl. ¶ 48. The court's prior determination that headright holders do not have a legally protectable interest in the Osage Tribal Trust Account is equally applicable here.

Nor have Plaintiffs claimed a legally protected interest in the Osage Mineral Estate. Plaintiffs expressly state in their Complaint that "the minerals of the Osage Nation are not a subject of this litigation." Compl. ¶ 49. And Plaintiffs also have not asserted a claim in the individualized funds disbursed from the Tribal Trust Account to the headright holders' IIM accounts. Instead, they assert that this case is based on injuries discovered after the accounting provided in the Northern District of Oklahoma case, which was an accounting of the Tribal Trust Account, not their individual IIM accounts. *See, e.g.,* Compl. ¶ 53, *Fletcher*, 153 F. Supp. 3d at 1370. They also do not allege any specific injury to their individual IIM accounts. All of the alleged mismanagement issues that Plaintiffs specifically identify, such as collection of interest on royalty payments and overpayment of gross production taxes from royalty payments (Compl. ¶ 53) occur while the funds are still in the Tribal Trust Account and before net royalties are distributed to individual headright holders. But Plaintiffs do not have rights to challenge the mismanagement of the Tribal Trust Account. *See Chippewa Cree*, 73 Fed. Cl. at 163 (holding that individuals did not have rights to challenge mismanagement that occurred while funds were in communal account).

Plaintiffs try to skirt the obvious conclusion that they lack standing to assert claims of mismanagement of the Tribal Trust Account by alluding to a "Segregated Fund," which they apparently construe as the money from the Tribal Trust Account that is to be distributed to individual Osage Indians. *See* Compl. ¶¶ 30, 45–50. But no "Segregated Fund" actually exists. Neither the 1906 Act nor the regulations at 25 C.F.R. Parts 115 (Trust Funds for Tribes and Individual Indians) or 226 (Leasing of Osage Reservation Lands for Oil and Gas Mining) define or establish a separate trust fund for the individual headright holders' benefit. *See, e.g.,* 1906 Act § 4; 25 C.F.R. § 115.002 (defining a "trust account" as "a tribal account, an IIM account, or special deposit account for trust funds maintained by the Secretary"); *Fletcher*, 153 F. Supp. 3d at 1362 (noting that "the 1906 Act does not say anything about IIM accounts"). Funds flow directly from the Osage Tribal Trust Account to the individual headright holders' IIM accounts after expenses are paid. *See Osage I*, 57 Fed. Cl. at 395 (noting that "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"). As the district court noted, the Tribal Trust Account "is the means by which the government carries out its duties to collect, hold, and distribute funds pursuant" to the 1906 Act.[3] *Fletcher*, 153 F. Supp. 3d at 1361. "No other account exists to carry out these functions." *Id.* (citing the federal defendants' brief stating that "there 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"). There is no Segregated Fund separate from the Tribal Trust Account, and Plaintiffs cannot rely upon such a

[3] Plaintiffs made the same argument regarding a "Segregated Fund" in *Fletcher*. The district court noted that "[i]t was only after the government's submission of the administrative record and its brief on the merits that it became clear that 'segregation' and 'distribution' occur together such that there is no separate 'segregated tribal trust account." 153 F. Supp. 3d at 1362 n.6. The court also noted that "Plaintiffs had no way of knowing this information prior to the government's filings." *Id.* Plaintiffs, however, here persist in asserting that a Segregated Fund exists, despite *Fletcher*'s findings.

fund to establish a concrete injury for standing.

That Plaintiffs and other headright holders will eventually receive the proceeds of the Tribal Trust Account also is insufficient to establish that they have a legally protectable interest in the Tribal Trust Account itself. *See Osage VI*, 85 Fed. Cl. at 171–72. The *Osage* court rejected the United States' argument that the individual headright holders were the proper beneficiaries, finding instead that the Tribe had standing to assert the claims because it is the "direct trust beneficiary." *Osage I,* 57 Fed. Cl. at 394–95; *see also Taylor v. Tayrien*, 51 F.2d 884, 887 (10th Cir. 1931) (finding that Osage headright holders have "only an inchoate right to receive [their] share" of Osage tribal trust funds prior to distribution). While the Osage headright holders may have a "direct and immediate" interest in their right to their share of Osage tribal trust funds after distribution, they do not have such interest prior to distribution. Consequently, Plaintiffs lack standing to assert their claims here.

B. Claim and issue preclusion bar Plaintiffs' claims.

Many of the issues Plaintiffs raise have been raised in other litigation and are consequently barred by the doctrines of claim and issue preclusion. The Osage Nation litigated and ultimately settled its tribal trust claims in this Court based on the government's alleged mismanagement of the Tribe's trust funds and assets. Plaintiffs now seek to relitigate these settled mismanagement claims, but claim preclusion blocks them from doing so because the Osage Nation represented Plaintiffs' and other headright holders' interests in that litigation.

In addition, Plaintiffs litigated their accounting claim in district and appellate court. Unsatisfied with the accounting ultimately awarded to them, Plaintiffs now seek to relitigate the scope of accounting despite this issue having been argued and decided by the *Fletcher* district court and affirmed by the Tenth Circuit. Issue preclusion bars them from doing so.

Res judicata includes the two related doctrines of issue preclusion and claim preclusion. *Sharp Kabushiki Kaisha v. Thinksharp, Inc.*, 448 F.3d 1368, 1370 (Fed. Cir. 2006). "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.'" *Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1323 (Fed. Cir. 2008) (quoting *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 327 n. 5 (1979)). "The general concept of claim preclusion is that when a final judgment is rendered on the merits, another action may not be maintained between the parties on the same 'claim,' and defenses that were raised or could have been raised in that action are extinguished." *Hallco Mfg. Co. v. Foster*, 256 F.3d 1290, 1294–95 (Fed. Cir. 2001) (citing Restatement (Second) of Judgments, §§ 18–19).

"Accordingly, a second suit will be barred by claim preclusion if: (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." *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362–63 (Fed. Cir. 2000) (citing *Parklane,* 439 U.S. at 326 n. 5).

A settlement agreement "constitutes a final judgment on the merits in a *res judicata* analysis." *Ford-Clifton* v. *Dept. of Veteran Affairs*, 661 F.3d 655, 660 (Fed. Cir. 2011); *see also Hallco,* 256 F.3d at 1294-95 (stating that "consent judgments are considered to have the same force and effect as judgments entered after a trial on the merits" (citation omitted)). "[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). It is beyond cavil that unnamed members of a class action are bound "even though they are not parties to the suit." *Smith v. Bayer Corp.*, 564 U.S. 299, 314 (2011).

Issue preclusion requires 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." *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994). 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." *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009) (citation

omitted).

Claim and issue preclusion may be considered by way of a Rule 12(b)(6) motion to dismiss. *See Bowers Inv. Co. LLC, v. United States*, 695 F.3d 1380, 1383–84 (Fed. Cir. 2012). In evaluating such defenses, the court is not limited to the pleadings. *Larson v. United* States, 89 Fed. Cl. 363, 382-83 (2009).

1. The settlement in the *Osage* tribal trust litigation bars Plaintiffs' claims.

Plaintiffs are barred from relitigating issues related to the management of Osage trust funds and assets, as those issues were previously litigated by the Osage Nation. *Osage Nation of Okla. v. United States*, No. 00-169L. That case ended with a consent settlement between the United States and the Osage Nation. In the Settlement Agreement, the Osage Nation stated that it "ha[d] the authority to act for, to protect the interests of, and to bind Headright Holders with respect to matters relating to the Osage Mineral Estate . . . including the settlement of claims relating [thereto]" and that it was settling "all claims regarding the United States' obligation to provide a historical accounting or reconciliation of the Osage Tribal Trust Account...on behalf of itself and the Headright Holders." *Osage* Settlement, ¶¶ 1.d, 7.a.i.2. That settlement bars Plaintiffs from raising its claims for mismanagement of the Tribal Trust Account here.

All elements necessary for claim preclusion are met here. First, there is privity between the Osage Nation and headright holders. In *Osage*, the Court held repeatedly that the Tribe was the proper party to bring claims related to the Mineral Estate and the Tribal Trust Account and represented the headright holders' interests. The court rejected the United States' argument that the headright holders were the real party-in-interest because the headright holders are not a party to the trust relationship that exists exclusively between the Tribe and the United States. *Osage I,* 57 Fed. Cl. at 394–95 (addressing argument that headright holders are the proper beneficiaries and finding that "the Tribe . . . is the direct trust beneficiary"); *Osage VI*, 85 Fed. Cl. at 171. The court also found

that the Tribe had standing to assert the claims because the funds were deposited and held in the Tribal Trust Account before being distributed to the individual headright holders. Notably, the Court also found that the Tribe represented the headright holders' interests in the litigation, and that any judgment would go directly to the headright holders by statute. *Osage VI*, 85 Fed. Cl. at 168–69, 175. Indeed, the settlement monies were distributed among headright holders. *Id.* at 169. As such, the *Osage* court's holdings demonstrate that privity exists between the Tribe and the Plaintiffs.

Second, there was a final judgment on the merits. *Osage* ended with a consent judgment, wherein the Osage Nation waived all claims related to the management of the Osage Mineral Estate and Osage Tribal Trust Account prior to September 30, 2011. *Osage* Settlement. "For claim preclusion purposes, consent judgments are considered to have the same force and effect as judgments entered after a trial on the merits." *Hallco,* 256 F.3d at 1294–95 (citing *Epic Metals Corp. v. H.H. Robertson Co.,* 870 F.2d 1574, 1576 (Fed. Cir. 1989)). This settlement, and dismissal of the case with prejudice, therefore acts as a final judgment for claim preclusion purposes.

Third, Plaintiffs' Complaint is based on the same set of transactional facts as *Osage*. "[A] common set of transactional facts is to be identified 'pragmatically.'" *Jet, Inc.*, 223 F.3d at 1363 (quoting Restatement (Second) of Judgments § 24(2)). "Seeking to bring additional clarity to this standard, courts have defined 'transaction' in terms of a 'core of operative facts,' the 'same operative facts,' or the 'same nucleus of operative facts,' and 'based on the same, or nearly the same factual allegations.'" *Ammex, Inc. v. United States*, 334 F.3d 1052, 1056 (Fed. Cir. 2003) (quotations in original, citations omitted). "Thus, regardless of shared forms of relief or theories of liability, two suits share the same operative facts when the facts that are relevant and material to *some* theory of liability are the same in each." *Lower Brule Sioux Tribe v. United States*, 102 Fed. Cl. 421, 424 (2011)).

This case and *Osage* arise from the same set of factual allegations. *See Ammex*, 334 F.3d at 1056. Both cases allege that the United States mismanaged the Osage Mineral Estate and Tribal

Trust Account, including claims that undercollection of royalties and interest on oil and gas leases resulted in diminished trust fund earnings. *See Osage Tribe of Indians of Okla. v. United States,* 68 Fed. Cl. 322, 324 (2005) ("*Osage II*"); Compl. ¶ 4. The Tribe sought "damages from defendant for breach of fiduciary duty in the mismanagement of tribal trust funds and for failure to account," *Osage I*, 57 Fed. Cl. at 393, and Plaintiffs' Complaint makes the same allegations, Compl. ¶¶ 53, 61. The trust corpus is the same. In addition, Plaintiffs rely upon the same sources of law to support their assertion of fiduciary duty as *Osage*. *See infra* Section IV.E. Plaintiffs may allege different breaches of fiduciary duty from those asserted in *Osage*, but they "all spring from the same set of facts." *Wyandot Nation of Kansas v. United States*, 115 Fed. Cl. 595, 599 (2014); *see also Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256, 284–85 (2008) (noting that "it is of no consequence that plaintiff styles its suits to focus on different trust duties, when the proof of breach of each of those purportedly distinct duties will necessarily require review of the same facts").

In *Ak-Chin Indian Cmty. v. United States*, 80 Fed. Cl. 305 (2008), the Court of Federal Claims found that two cases involved the same set of operative facts when "in each action, the courts must consider the government's management and administration of plaintiff's trust by reviewing the government's alleged failure to maintain records and account for plaintiff's trust property." *Id.* at 319. The *Ak-Chin* court rejected the argument that the different trust duties — such as the duty to account and the duty to invest and deposit trust funds — resulted in different sets of transactional facts. *Id.* "The nature of Indian trust cases and the government's trust responsibility owed to Indian tribes does not lend itself to a simple delineation or separation of operative facts as they pertain to the government's various duties owed to Indian tribes." *Id.* The court found, therefore, that because both cases would involve "considering any existing records related to the government's collection, handling, and investment of the Community's trust funds and property," they arose from the same operative facts. *Id.* Other Court of Federal Claims cases have similarly held. *See, e.g.,*

Wyandot Nation, 115 Fed. Cl. at 601; *Lower Brule Sioux*, 102 Fed. Cl. at 425–26; *Prairie Band of Potawatomi Indians v. United States*, 101 Fed. Cl. 632, 636–37 (2011); *Iowa Tribe of Kan. & Neb. v. United States*, 101 Fed. Cl. 481, 484 (2011); *Winnebago Tribe of Nebraska v. United States*, 101 Fed. Cl. 229, 233–34 (2011); *Omaha Tribe of Neb. v. United States*, 102 Fed. Cl. 377, 382–90 (2011); *Passamaquoddy*, 82 Fed. Cl. at 284–85. These suits involved 28 U.S.C. § 1500, but the Supreme Court has noted that "[c]oncentrating on operative facts is also consistent with the doctrine of claim preclusion. . . ." *United States v. Tohono O'Odham*, 563 U.S. 307, 315 (2011).

The situation here is the same as in the above cases: the Court would review the same records relating to the United States' alleged mismanagement of the trust funds and assets as were at issue in *Osage*. The two cases are therefore based on the same set of operative facts and claim preclusion prevents the Tribe and headright holders from returning to this Court to request additional damages based on a new theory of mismanagement arising therefrom. .

Thus, the United States settled all claims and paid the Osage Nation — and consequently the headright holders — for all claims related to alleged mismanagement of the Tribe's trust estate. Claim preclusion prevents the Tribe or the headright holders from returning to this Court to request additional damages based on a new theory of mismanagement.

Plaintiffs assert that their claims are unaffected by the Osage settlement because *Osage* was solely about the Osage Nation's minerals, whereas Plaintiffs' claims are based on mismanagement of their trust funds "found and interpreted" from the *Fletcher* accounting. Compl. ¶¶ 49, 50. Plaintiffs' characterization of *Osage* is patently false. As previously discussed, *Osage* involved claims relating to the United States' alleged mismanagement of both the Mineral Estate and the Tribe's trust funds. *See, e.g., Osage I*, 68 Fed. Cl. at 324 (noting that Tribe alleged that defendant mismanaged trust funds by failing to collect royalty payments and late fees and failing to invest income collected in the manner required by law). Moreover, the Osage Tribal Trust Account was at the core of the Osage

trust fund mismanagement claims. *Osage II*, 72 Fed. Cl. 629, 670-71 (Fed. Cl. 2006) (discussing expert testimony regarding the management of Account No. 7386, the Osage Tribal Trust Account, "into which oil and gas receipts are deposited").

Plaintiffs also misinterpret this Court's denial of headright holders' intervention in *Osage*. In the Complaint, Plaintiffs quote *Osage VI* as stating that intervention was denied because "the [Tribe] [wa]s the real party in interest in [that] litigation and the [Tribe] own[ed] the minerals [that were] the subject of th[at] action." Compl. ¶ 48. Plaintiffs then interpret that language as stating that the reason the court found the Tribe to be the real party in interest in *Osage* is because the Tribe owns the Osage Mineral Estate. This interpretation attributes causality to the statement that is absent from the Court's opinion and ignores the larger analysis. In the analysis in *Osage VI*, the Court cites to *Osage I* for the proposition that headright holders lack a legally protectable interest in the Tribal Trust Account because pursuant to 1906 Act § 4, the Tribe is the "direct trust beneficiary" and, therefore, the real party in interest. *Osage VI*, 85 Fed. Cl. at 170; *Osage I*, 57 Fed. Cl. at 395. The court further explained that because the alleged mismanagement took place while the funds were in the Tribal Trust Account, not at the point of distribution to headright holders, it was the Tribe that had an interest in and claim to the funds. *Id.*

The district court's determination that the *Osage* settlement did not bar the *Fletcher* cases also does not dictate a different result. The district court found that the settlement did not bar Plaintiffs' request for an accounting because Plaintiffs had a right to an accounting of the Osage Tribal Trust Account under 25 U.S.C. § 4011. *Fletcher*, 153 F. Supp. 3d at 1366–67. While the district court found that Plaintiffs have a statutory right to an accounting of the Osage Tribal Trust Account, it did not address whether, contrary to this Court's rulings, Plaintiffs have a claim to, and are the real party in interest in, funds derived from the Osage Mineral Estate while they are in the Tribal Trust Account. Nor did the district court address whether Plaintiffs have standing in this Court to request

damages on the basis of the accounting thereof.

In light of the foregoing, this Court should find that claim preclusion bars Plaintiffs' claims because they were settled in the *Osage* litigation. Should this Court determine that Plaintiffs have standing to assert mismanagement claims as to the Tribal Trust Account, Plaintiffs' claims should be limited to the period after September 30, 2011 claims, pursuant to the *Osage* tribal trust settlement.

2. Plaintiffs are barred from seeking a second accounting.

Plaintiffs claim they are entitled to a more expansive accounting than the one they have already received from the United States. But this claim fails because Plaintiffs' argument that they are entitled to such an expanded accounting has already been raised and rejected in Federal court. Plaintiffs litigated the scope of the accounting due in the *Fletcher* case filed in district court, where the court held that Plaintiffs were entitled only to an accounting of the Osage Tribal Trust Account running from the first quarter of 2002 until the last available quarter. *Fletcher*, 153 F. Supp. 3d at 1372. The district court rejected Plaintiffs' contention that the accounting should run from 1906 (when the headrights were created) and that it should instead include additional detailed information. *Id.* at 1369-72. That court's conclusions have been affirmed by the Tenth Circuit. *Fletcher III*, 854 F.3d at 1205-07. Because Plaintiffs have already litigated this issue fully, issue preclusion bars them from litigating it again here. *Freeman*, 30 F.3d at 1465.

Plaintiffs litigated this issue in the Tenth Circuit, so this Court applies the law of the Tenth Circuit on issue preclusion. *Dana v. E.S. Originals, Inc.* 342 F.3d 1320, 1323 (Fed. Cir. 2003). In the Tenth Circuit, issue preclusion bars a claim if the following "four elements are met: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *Moss*, 559 F.3d at

1161 (citation omitted).

Plaintiffs had their day in court and, as they admit in their Complaint, they have previously obtained an accounting from the United States. Compl. ¶ 3 (the United States produced an accounting of the trust account for Osage headright owners); *id.* ¶ 8 ("Plaintiffs obtained some accounting[.]"); *id.* ¶ 44 (the United States provided the accounting). Plaintiffs also admit they were parties to the *Fletcher* district court and appellate litigation and the identical accounting issue has been finally adjudicated on the merits. *Id.* ¶ 37 ("Plaintiffs filed an action in the United States District Court for the Northern District of Oklahoma in 2002 seeking, *inter alia*, an accounting for the money handled by Defendant under Defendant's trust responsibility created under Section 4 of the 1906 Act."); *id.* (Plaintiffs alleged that the United States improperly managed their royalties); ¶ 38 (in the *Fletcher* district court case, "Plaintiffs sought to compel the government to perform an accounting"); *id.* ¶¶ 42-43 (describing the accounting ordered by the *Fletcher* district court and upheld by the Tenth Circuit).

Plaintiffs received a "full and fair opportunity" to litigate this issue. Plaintiffs sought an accounting and received such relief from the *Fletcher* district court. *Fletcher*, 153 F. Supp. 3d at 1372. They argued extensively to the Tenth Circuit that they were entitled to an accounting for a longer time period and that the accounting should encompass a greater scope of information. *Fletcher III*, 854 F.3d at 1205-07. Then, the Tenth Circuit decided this issue. *Id.* Plaintiffs may argue that the Tenth Circuit should not have rejected their request for an expanded accounting, but this "does not reflect . . . on a party's opportunity to litigate an issue." *Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation*, 975 F.2d 683, 686-90 (10th Cir. 1992).

Now, Plaintiffs complain about the scope of the accounting they received (Compl. ¶¶ 3, 4, 8) and want this Court to revisit the issue and determine whether the accounting previously awarded in Federal court was flawed. Plaintiffs are asking the Court to order the United States to provide them

with a more detailed accounting covering a greater time span. *Id.* ¶ 62 (alleging that a review of documents older than 2002, "those not produced as a part of the time-limited accounting," will show additional injury); *id.*, Request for Relief (requesting that the Court "order Defendant to accurately account to the Class"). Because the issue of the scope of the accounting the United States owes to Plaintiffs has already been decided, Plaintiffs are precluded from relitigating this issue and obtaining a second accounting.

C. Plaintiffs' claims are barred by the doctrines of waiver and release.

The Complaint also contains claims that have been expressly waived and released by two previous settlement agreements. Plaintiffs' pre-September 30, 2011 breach of trust claims were settled in the *Osage* litigation. *Cobell* class members also settled their historical trust fund mismanagement and accounting claims.

"The interpretation of a settlement agreement is an issue of law." *King v. Dep't of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997) (citing *Mays v. United States Postal Serv.*, 995 F.2d 1056, 1059 (Fed. Cir. 1993) ("The settlement agreement is a contract, of course, and its interpretation is a matter of law."); *Greco v. Dep't of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). When examining a written settlement agreement, the Court must "first ascertain whether the written understanding is clearly stated and was clearly understood by the parties." *King,* 130 F.3d at 1033. "In so doing the words used by the parties to express their agreement are given their ordinary meaning, unless it is established that the parties mutually intended and agreed to some alternative meaning." *Id.* (citation omitted).

1. Plaintiffs are barred from bringing Tribal Trust Account mismanagement claims.

The doctrines of waiver and release bar Plaintiffs' breach of trust claims in this case that pre-date September 30, 2011, because the parties to the *Osage* settlement agreement settled all claims related to the Tribal Trust Account. In the Osage Tribal Trust Settlement, the Osage Nation

released and waived all trust asset mismanagement claims that it had, has, or might have had, on behalf of the Tribe and the Osage headright holders. The proceeds of the settlement were distributed to the headright holders consistent with the provisions of the 1906 Act. Plaintiffs should not be allowed to re-litigate those claims that have been resolved and compensated.

The stipulations for entry of judgment in the *Osage* litigation plainly and unambiguously released and waived all claims that were or could have been asserted by the Osage Nation on behalf of the Osage headright holders in those cases. Paragraph 7 of the Settlement Agreement clearly releases claims relating to the United States' management of the Osage Mineral Estate and the accounting of trust funds derived from that estate. Specifically, the Osage Nation explicitly waived and released on behalf of itself and all headright holders:

> [a]ll claims asserted, or that could have been asserted by the Osage Tribe in the CFC Action; all claims regarding the United States' obligation to provide a historical accounting or reconciliation of the Osage Tribe Trust Account and the Other Osage Accounts or the United States' fulfillment of such obligation; all claims regarding the United States' alleged mismanagement of the Osage Mineral Estate…; [and] 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….

Osage Settlement, ¶ 7(a)(i). The plain language of these stipulations unambiguously released and waived all claims, including those not actually set forth in the petitions or complaint or pursued in the action. Thus, the United States was discharged from liability for all claims based upon alleged mismanagement of the Osage Nation's Mineral Estate or trust funds derived from the Mineral Estate.

Plaintiffs' claims are included in the claims waived and released by the Osage Settlement. The stipulations in the Settlement Agreement are very broad, and Plaintiffs' claims fall within the scope of the release. In addition, Plaintiffs are bound by the terms of the Settlement Agreement. The Court repeatedly found that the Osage Nation represented the headright holders' interests in the litigation and that the headright holders did not have a sufficient interest to intervene in the

litigation. The Settlement Agreement also clearly intended to bind the headright holders. *See Osage* Settlement, ¶ 1(d), (f); 7(a)(i) (waiving claims on behalf of Osage Nation and headright holders). Headright holders were consulted, *id.* ¶ 1(l), (m), (n) and were directly represented by the Osage Minerals Council, an independent agency of the Osage Nation vested with the responsibility to administer and develop the Osage Mineral Estate in accordance with the 1906 Act, which has a fiduciary obligation to act in the best interest of Osage headright holders under the Osage Constitution. Osage Const., XV § 4.

In short, the Settlement Agreement waived all claims relating to mismanagement of the Osage Tribe's trust funds, including those claims that Plaintiffs bring now. Plaintiffs were compensated for their claims through the Settlement, which went directly to headright holders. Their claims must therefore be dismissed.

2. Plaintiffs who were *Cobell* class members are barred from bringing historical trust fund mismanagement and accounting claims.

Due to their status as certified class members in the *Cobell* settlement, Plaintiffs Fletcher, Red Corn, and Lonsinger are also precluded from bringing claims for breach of trust and mismanagement of trust funds claims involving their IIM accounts for all times prior to September 30, 2009.[4] Simply put, *Cobell* class members released the United States "from liability arising out of prior mismanagement of their trust accounts." *Cobell v. Jewell*, 802 F.3d 12, 16-17 (D.C. Cir. 2015).

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[4] A substantial number of putative class members are anticipated to be *Cobell* class members. *See* Compl. ¶ 51 (seeking to certify a class of all Indians headright owners who receive headright distributions). The *Cobell* historical administration class included present and former beneficiaries of IIM accounts and the trust administration class included individuals who had an IIM account at any time after approximately 1985. *Cobell* Settlement Agreement, A.16, 35. And the vast majority of headright distributions are transferred into IIM accounts. *Supra* at 3 n.2. Such putative class members would also be barred from bringing historical mismanagement of trust funds and accounting claims.

The *Cobell* settlement agreement expressly addressed the claims of Osage headright owners and released the United States from liability for the IIM accounts in which their Osage headright payments were deposited. The *Cobell* settlement also precludes Plaintiffs Fletcher and Red Corn from bringing historical accounting claims. Hence, these claims should be dismissed.

Plaintiffs Fletcher, Red Corn, and Lonsinger were members of the *Cobell* trust administration class. Herman Decl. ¶¶ 3, 13, 15. Although they had the opportunity to opt out of the trust administration class, they did not do so. *Id.* Both the *Cobell* settlement agreement and the district court's judgment expressly waive and release Plaintiffs Fletcher, Red Corn, and Lonsinger's pre-September 30, 2009 trust fund mismanagement claims. Plaintiffs Fletcher and Red Corn were also members of the historical accounting class, *id.* ¶ 13, and thus are barred from prosecuting any claims for a historical accounting that were, or could have been asserted in the *Cobell* amended complaint. *See Eagle v. United States*, No. 16-959L, 2017 U.S. Claims Lexis 390, at *6-9 (Fed. Cl. Apr. 25, 2017) (plaintiff was precluded from bringing claims due to the preclusive effect of his status as a class member in *Cobell*); *Two Shields v. United States*, 119 Fed. Cl. 762, 775-81 (2015) (claims relating to oil and gas leasing released as part of *Cobell* settlement of land administration claims); *see also Villegas v. United States*, 963 F. Supp. 2d 1145, 1158-61 (E.D. Wash. 2013) (dismissing plaintiff's accounting claim against the United States on the basis of the preclusive effect of the *Cobell* settlement).

The *Cobell* settlement agreement waives, releases, and discharges the United States from liability for and forever bars and precludes class members "from prosecuting, any and all claims and/or causes of action that were, or should have been, asserted in the [*Cobell*] Amended Complaint when it was filed . . . by reason of, or with respect to, or in connection with, or which arise out of" claims for alleged breach of trust and mismanagement of trust funds, land administration claims, and statutory and common law claims for a historical accounting, including claims arising under the

Trust Reform Act[5] through September 30, 2009 of "any and all IIM accounts and any asset[s] held in trust . . . including . . .[l]and and funds held in any account." *Cobell* Settlement Agreement ¶¶ A.14, 15; I.1, 2.

Under the settlement agreement, mismanagement of individual Indian trust funds includes, among other things, known and unknown claims for: failure to collect or credit funds owed under a lease, sale, easement or other transaction, including failure to collect or credit all money due, failure to audit royalties, and failure to collect interest on late payments; erroneous or improper distributions or disbursements; excessive or improper administrative fees; deposits into wrong accounts; accounting errors; failure to deposit and/or disburse funds in a timely fashion; and other like claims arising out of allegations of the United States' breach of trust of individual Indian trust funds that have been or could have been asserted. *Id.* ¶ A.14(a), (e), (f), (g), (n), (o), (p). The *Cobell* settlement agreement also specifically releases claims of Osage headright owners regarding the "IIM accounts in which their Osage headright payments have been deposited." *Id.* ¶ I.6.

To the extent that Plaintiffs now seek to relitigate claims in this case regarding their IIM accounts, these very same claims were "waived, released, and forever discharged" in the *Cobell* settlement. For example, Plaintiffs seek an accounting and allege claims for underpayment of interest (Compl. ¶ 62); overcharging gross-production taxes (*id.* ¶¶ 63-64); losses to Plaintiffs' trust funds (*id.* ¶ 65); failure to account for administration costs (*id.* ¶ 66); failure to establish written policies and procedures or provide adequate staffing, supervision, and training for trust fund management and accounting (*id.* ¶¶ 67-69); failure to provide accurate periodic statements of headright owners' accounts (*id.* ¶¶ 70-72); errors in expense reporting (*id.* ¶ 71); and mismanagement

[5] American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 codified as amended at 25 U.S.C. § 162a et. seq.

of Plaintiffs' money (*id.* ¶ 74). Thus, Plaintiffs generally claim the United States breached its trust duties, mismanaged Plaintiffs' trust funds, and failed to account to Plaintiffs. *Cf. Cobell* Settlement Agreement ¶¶ A.14, 15; I.6.

The unambiguous intent of the *Cobell* settlement agreement was to "wipe the slate clean" as to the class members' claims for mismanagement of trust funds and accounting claims that existed as of September 30, 2009. The settlement agreement contains a full and complete release of these claims, "known and unknown," for trust administration class members that did not opt out of the settlement, and for historical accounting class members, who could not opt out of the settlement agreement. As members of the trust administration class, when Plaintiffs Fletcher, Red Corn, and Lonsinger were compensated for their trust fund mismanagement claims, they waived, released, and forever discharged the United States from liability for those claims. Additionally, Plaintiffs Fletcher and Red Corn waived any claim they might have for a historical accounting.[6]

D. This Court lacks jurisdiction under the Indian Tucker Act because Plaintiffs are not an "identifiable group of Indians."

Plaintiffs assert that this Court has jurisdiction under the Indian Tucker Act, 28 U.S.C. § 1505, which gives the Court of Federal Claims jurisdiction over

> any claim against the United States ... in favor of any tribe, band, or other identifiable group of American Indians ... 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. Plaintiffs, however, are not a "tribe, band, or other identifiable group of American Indians."

The *Osage* court previously held that the headright holders were not an "identifiable group"

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[6] To the extent Plaintiff Damron seeks to bring trust fund mismanagement and accounting claims prior to her ownership of her headright interest, such claims would be similarly barred if the headright was owned by a *Cobell* class member at that time.

of Indians. *Osage VI*, 85 Fed. Cl. at 167–68. The court found that the headright holders who sought to intervene were members of the Osage Tribe, and thus differed from other claimant groups who were able to sue as "identifiable groups." *Id.* Those groups, the court found, were not represented by tribes who could establish jurisdiction on their own. *Id.* For example, several groups established jurisdiction as "identifiable groups" of Indians when the tribe had ceased to exist. *Id.* (citing *Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 69 Fed. Cl. 639 (2006) and *Snoqualmie Tribe of Indians v. United States*, 372 F.2d 951, 956–57 (1967)). In another case, the court noted, the lineal descendants of the loyal Mdewakanton were an "identifiable group" of Indians because they could had severed tribal relations and could not sue as a tribe, and their interests were not represented by other tribes in the litigation. *Id.* (discussing *Wolfchild v. United States*, 62 Fed. Cl. 521 (2004)). Here, however, as the court found, Plaintiffs are members of the Osage Nation, which has already brought claims challenging the government's management of the Osage tribal resources at issue. Because Plaintiffs are not a tribe, band, or other identifiable group of Indians, this Court lacks jurisdiction under 28 U.S.C. § 1505.

E. Plaintiffs' claims should be dismissed because they fail to identify a money-mandating statutory or regulatory trust duty for any of their claims.

Plaintiffs' Complaint should also be dismissed because they fail to identify a money-mandating duty that the United States owes to Plaintiffs, which is required to trigger the Court's jurisdiction under the Tucker Act. In an attempt to establish jurisdiction, Plaintiffs list numerous statutes and regulations in the appendices to the Complaint. Compl. ¶ 5; App. A, B. Plaintiffs also summarily assert that these authorities "provide for compensation for damages in the event of the breach of these duties." *Id.* ¶ 6. However, many of the cited sources of law, have no applicability to Plaintiffs' claims, fail to establish specific fiduciary trust duties, and do not require compensation if breached. And even where Plaintiffs identify a source of law that is potentially money-mandating, Plaintiffs fail to allege with specificity what portions of those statutes or regulations establish the

duty or how exactly the United States breached that duty. More importantly, Plaintiffs appear to be relying upon the portions of such laws that do not create money-mandating fiduciary obligations.

1. Plaintiffs must establish a money-mandating duty to support Tucker Act jurisdiction for their claims.

Plaintiffs assert that jurisdiction exists in this case under the Tucker Act, 28 U.S.C. §1491 and the Indian Tucker Act, 28 U.S.C. § 1505. Compl. ¶ 5. As explained above, the Indian Tucker Act does not provide a basis for this Court's jurisdiction because individual headright holders are not an "identifiable group" of Indians for purposes of jurisdiction under § 1505. *See*, *e.g.*, *Osage VI*, 85 Fed. Cl. at 167-78.

In any event, the Indian Tucker Act provides essentially the same access to relief as the Tucker Act, 28 U.S.C. § 1491(a)(1). *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citing 28 U.S.C. § 1505). But, neither the Tucker Act nor the Indian Tucker Act creates substantive rights enforceable against the United States for money damages. *United States v. Navajo Nation,* 556 U.S. 287, 290 (2009) ("*Navajo II*"). In addition to invoking the two acts, Plaintiffs have to establish, among other things, a money-mandating legal duty imposed upon the United States by some other constitutional, statutory, or regulatory provision. *Id.* at 290-91.

The Supreme Court has held that there are "two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act" for a non-contract claim. *Id.* at 290. "First, the tribe '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.'" *Id.* (quoting *Navajo I,* 537 U.S. at 506). "The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law . . . ." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011). *Accord Menominee Indian Tribe of Wisc. v. United States*, 136 S. Ct. 750, 757 (2016) ("We do not question the 'general trust relationship between the United States and the Indian tribes,' but any specific obligations the Government may have under that relationship are 'governed

by statutes rather than the common law.'") (quoting *Jicarilla*, 56 U.S. at 162, 165).

"[A]n Indian tribe must identify statutes or regulations that both impose a specific obligation on the United States and bear[] the hallmarks of a conventional fiduciary relationship." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (citation and quotation marks omitted). "[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." *Id.* (citation omitted). Thus, the analysis must "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo II*, 556 U.S. at 301 (internal quotation marks omitted).

Second, and only after a tribe identifies a substantive source of law, "the court must then determine whether the relevant source of law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Navajo II*, 556 U.S. at 290–91 (quoting *Navajo I*, 537 U.S. at 506). This second showing reflects the understanding that jurisdiction cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages. *United States v. Testan*, 424 U.S. 392, 400–01 (1976) (citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)); *see Navajo I*, 537 U.S. at 503, 506.

To be money-mandating in breach, "the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *Eastport S.S. Corp.*, 372 F.2d at 1007. Discretionary schemes are money-mandating only if (1) they provide "clear standards for paying" money to recipients; (2) they state the "precise amounts" that must be paid; or (3) as interpreted, they compel payment on satisfaction of certain conditions. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (citation omitted).

2. Many of the statutes and other authority cited by Plaintiffs do not establish trust duties or are not money-mandating.

a. Appropriations Acts

Plaintiffs' Complaint cites a series of Appropriation Acts from 1991-2015, Compl. ¶¶ 7, n.1, 28, that purportedly provide the Court of Federal Claims with jurisdiction to hear their claims and that serve as a waiver of sovereign immunity for the United States. But these Acts do not waive sovereign immunity nor are they substantive source of laws that establish a right of action at all, let alone any specific fiduciary duties. Indeed, the *Fletcher* district court previously made the very same point to these Plaintiffs. "On their face, it is clear these provisions do not create an independent cause of action. Their only function is to defer the accrual of causes of action created elsewhere—including claims pending when the Appropriations Acts were enacted." Order of Mar. 31, 2015, at 4 (*Fletcher* ECF No. 1247). Citing *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 2004), the *Fletcher* district court further found that the Appropriations Acts do not independently waive the government's sovereign immunity. *Id.*

Similarly, the additional Appropriation Acts cited by Plaintiffs, *see* Compl., App. A.a, b, do not create specific trust duties nor are the Acts money-mandating. The allocation of lump sum appropriations is committed to agency discretion, and statutes that give an agency complete discretion are not money-mandating. *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006). As the Federal Circuit explained, "[t]he annual Appropriations Acts and the statutes that establish programs supported by TPA [Tribal Priority Allocation] funds do not impose any specific trust obligations on the Government beyond the general trust relationship that exists between the Government and the [T]ribe[]." *Samish Indian Nation v. United States*, 657 F.3d 1330, 1337 (Fed. Cir. 2011), *vacated on other grounds*, 568 U.S. 936 (2012).

Further, Plaintiffs' reliance on such Acts is misplaced. For example, Plaintiffs contend that certain language in the Appropriation Acts "requir[ed] the Bureau of Indian Affairs . . . to audit and

reconcile Individual Indian trust funds and to provide Individual Indians with an accounting of such finds." Compl., App. A.a; *see also id.* A.b. But the provisions referenced by Plaintiffs address congressional concern over potential privatization of the financial management of American Indian trust funds. As a result, Congress required certain audits, accountings, and other safety measures be conducted and delivered to tribes as a prerequisite for Interior transferring trust funds to non-governmental, third-party fund managers.[7] Plaintiffs' funds were never delivered to a private manager for investment, and they do not make any allegations to that effect. So, these provisions have no relevance to Plaintiffs' Complaint. And there is no indication in the Acts that the United States is compelled to compensate an Indian beneficiary if such audits or reconciliations were not performed.

b. The Non-Intercourse Act, 25 U.S.C. § 177

Plaintiffs cite the Non-Intercourse Act, Compl., App. A.e, but fail to explain how this statute is applicable to their claims. The Act addresses conveyances of land or interests in land between Indians and non-Indians. *Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1566 (Fed. Cir. 1993) (under Non-Intercourse Act, "transfers of title to Native American lands [a]re prohibited unless [made] pursuant to a treaty approved by the United States"). And the Supreme Court has long held that this statute does not apply to actions by the United States. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960) ("[Section] 177 is not applicable to the sovereign United States"). Moreover, the Non-Intercourse Act does not set forth any specific, mandatory

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[7] "That none of the funds in this Act shall be used by the Bureau of Indian Affairs to transfer funds under a contract with any third party for the management of tribal or individual Indian trust funds until the funds held in trust for such tribe or individual have been audited and reconciled, and the tribe or individual has been provided with an accounting of such funds, and the appropriate Committees of Congress and the tribes have been consulted with as to the terms of the proposed contract or agreement." An Appropriations Act for the Fiscal Year Ending Sept. 30, 1988, Pub. L. No. 100–202, 101 Stat. 1329, 1329-229 (Dec. 22, 1987).

fiduciary duties with respect to the United States. The Act creates a discretionary general trust relationship that permits, although does not require, enforcement of its provisions by the Executive Branch. *See Inupiat Cmty. of the Arctic Slope v. United States*, 680 F.2d 122, 131 (Ct. Cl. 1982) (discussing § 177 and finding "[t]here is nothing here that waives sovereign immunity").

c. Procedural accounting and auditing statutes for Federal agencies

Plaintiffs cite 31 U.S.C. §§ 3511-3521, Compl., App. A.e, which establish the formal legislative framework and standard procedures for accounting practices and audit of government agencies. Again, Plaintiffs fail to show that these statutes apply in this case or specify how the United States breached trust duties under these sections. Plaintiffs also fail to demonstrate how these statutes are compensable in money damages. *See McKuhn v. United States*, No. 18-107C, 2018 U.S. Claims Lexis 502, at *5-7 (Fed. Cl. May 9, 2018) (31 U.S.C. § 3515, which relates to the financial statements of Federal agencies, is not money-mandating and thus does not confer jurisdiction).

d. Government manuals

In addition, Plaintiffs cite two government manuals as substantive sources of law that allegedly confer subject matter jurisdiction on the Court of Federal Claims. Compl., App. A.e (citing the Treasury Fiscal Requirements Manual and the Department of the Interior's Departmental Manual). These manuals are for agency guidance only, were not published in the Federal Register, and do not have the force of a law or regulation. *Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981). As such, the manuals do not provide the basis for a claim founded on an Act of Congress or implementing regulation, as required by the Tucker Act. *Anderson v. United State*s, 85 Fed. Cl. 532, 543 (2009) ("The [Department of Veterans Affairs] Policy Manual is not a source of law that can support Tucker Act jurisdiction.").

3. The remaining statutes and regulations cited by Plaintiffs do not create an applicable, specific money-mandating duty.

Plaintiffs also cite generally the Trust Reform Act, 25 U.S.C. §§ 4001-4061, as establishing

trust duties that are money-mandating. Compl., App. A.c. Many of the sections of the Act establish no specific duties owed to trust beneficiaries. *See*, *e.g.*, 25 U.S.C. §§ 4041-43. Such sections establish the Office of the Special Trustee set policies; they create no specific duties, fiduciary or otherwise, owed to tribal trust account holders. Instead, the sections establish internal monitoring roles and policy goals for the Special Trustee, which create no obligation enforceable in this Court. *See Cent. Freight Lines, Inc. v. United States*, 87 Fed. Cl. 104, 112, n.7 (2009) (a statute that sets forth broad "policy goals" provides no basis for Tucker Act jurisdiction).[8]

Certain sections of the Act do describe prospective duties to "account for the daily and annual balance of all funds held in trust by the United States which are deposited or invested pursuant to section 162a of this title," provide periodic statements of performance, and annual audits of funds held in trust by the United States for the benefit of Indian tribes and individual Indians. *See* 25 U.S.C. §§ 4011(a)-(c). But just because these sections impose duties on the United States does not mean that they specifically mandate an award of money damages if the United States fails to perform those duties. *Navajo II*, 556 U.S. at 290–91. For example, there is no indication that Congress intended monetary compensation for Indian beneficiaries based on the failure to provide account statements. *See* Compl., Count III (alleging a failure to provide accurate periodic statements). Indeed, none of these sections explicitly or implicitly create a right to monetary damages in recompense for breach of the limited duties each creates.

Plaintiffs also cite 25 U.S.C. §§ 161a, 161b, and 162a and describe them as "[o]ther statutes [that] describe specifically and generally the United States' duties as a fiduciary to Plaintiffs in managing Plaintiffs' trust funds." Compl., App. A.d. Plaintiffs must make more than bare

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[8] Portions of the Trust Reform Act also apply only to tribes. *See*, *e.g.*, 25 U.S.C. § 4044.

allegations in order to invoke this Court's subject-matter jurisdiction. While portions of §§ 161a, 161b, and 162a may be money-mandating for certain tribal trusts,[9] Plaintiffs' allegations fail to show how such provisions apply to their headright interests and stated claims to establish jurisdiction in the Court of Federal Claims.

Rather, Plaintiffs attempt to invoke these statutes in a context that does not create money-mandating fiduciary obligations. For example, Plaintiffs allege that United States failed to provide adequate systems and controls for accounting for and reporting trust fund balances, to establish written policies and procedures, to maintain certain levels of staffing, supervision, and training for trust fund management and accounting—presumably in contravention of § 162a(d). *See* Compl. ¶ 27 (citing § 162a(d)); *id.*, Counts I-II. That provision states that Interior's duties include:

> (1) providing adequate systems and controls for accounting for and reporting trust fund balances; (2) providing adequate controls over receipts and disbursements; (3) providing periodic, timely reconciliations to assure the accuracy of accounts… (6) establishing consistent, written policies and procedures for trust fund management and accounting; and (7) providing adequate staffing, supervision, and training for trust fund management and accounting.

25 U.S.C. § 162a(d). But § 162a(d) does not at all speak to paying money to an Indian beneficiary if Interior fails to have adequate systems, controls, and policies or fails to provide staffing, supervision, and training to government employees. *Samish Indian Nation*, 419 F.3d at 1364.

The same problem affects Plaintiffs' citations to 5 C.F.R Part 115 and 25 C.F.R. Part 1200. Compl., App. A.e. The Complaint fails to specifically allege which regulatory provisions that Plaintiffs are invoking and how, when, or where the United States breached such alleged duties. *See*

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[9] *See*, *e.g.*, *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 732 (2011) ("the investment statutes—25 U.S.C. §§ 161a, 161b, and 162a—provide jurisdiction over claims predicated upon the assertion that defendant has not maximized the income of a tribal trust by prudent investment"). While Plaintiffs cite *Jicarilla Apache Nation*, Compl. ¶ 6, none of their claims involve a failure to invest trust funds. *See* Compl., Counts I-IV.

Ute Indian Tribe of the Uintah and Ouray Indian Reservation v. United States, No. 18-357L (Order and Op. (Fed. Cl. Nov. 4, 2019), at 21 (ECF No. 27)) (finding the tribe failed to meet "its burden of identifying a specific-rights creating duty that mandates compensation" because it "offer[ed] no statutory analysis, but simply its conclusions").

Plaintiffs take a similar approach to the 1906 Act simply listing it as one of the "jurisdictional bases for Plaintiffs' claims regarding the trust funds and other trust assets managed by Defendant" and reproducing various amendments to the Act. Compl., App. A.e, B; *see also id.* ¶ 32 (alleging that 15 statutes, enacted subsequent to the 1906 Act, are relevant to this dispute). As discussed above, the 1906 Act trust relationship exists exclusively between the Tribe and the United States and Plaintiffs do not have a legally-protected interest in the Osage Mineral Estate or the Tribal Trust Account. *Osage VI*, 85 Fed. Cl. at 170-72. Plaintiffs cannot utilize the 1906 Act as a basis for their trust claims because ownership of a headright does not create a trust relationship between headright holders and the United States with respect to any particular trust res. *Id.* at n.6 (citing *Osage I*, 57 Fed. Cl. at 395) ("the Tribe, not the headright holders, is the direct trust beneficiary").

But even if the law was otherwise, Plaintiffs have failed to allege with specificity what duties are established by the 1906 Act with regard to headright owners or how the United States breached such duties, nor have Plaintiffs established that such duties would be money-mandating. Plaintiffs cannot rely simply on broad and vague claims about the United States' alleged failures, nor can they rely on fiduciary duties allegedly owed to the Osage Nation. *See*, *e.g.*, Compl. ¶¶ 19 ("This lawsuit stems from Defendant's bureaucratic imperialism in the management—or, more aptly, mismanagement—of the mineral estate funds placed in trust for the benefit of Osage Headright Owners."); 46-47 (discussing fiduciary duties allegedly owed to the Osage Nation regarding royalty collection).

Plaintiffs cited a grab bag of statutes, regulations, and other sources as providing jurisdiction

for their claims. But it is Plaintiffs' burden to demonstrate that their claims are based on "'specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Navajo II*, 556 U.S. at 301 (quoting *Navajo I,* 537 U.S. at 506). Because Plaintiffs have failed to identify a specific money-mandating duty in support of their claims, their Complaint should be dismissed.

F. The Court lacks jurisdiction over Plaintiffs' claim for injunctive relief regarding the United States' trust management systems.

Plaintiffs ask the Court to order the United States to repair its allegedly "flawed" trust management systems. Compl., Request for Relief. But the Court of Federal Claims lacks general jurisdiction to provide declaratory and injunctive relief. *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1294 (Fed. Cir. 1999) (the court "cannot grant nonmonetary equitable relief such as an injunction or declaratory judgment, or specific performance"). Instead, this Court's ability to award equitable relief is limited to those circumstances when such relief is "incident of and collateral to" a money judgment. 28 U.S.C. § 1491(a)(2). In such cases, the Court may "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." *Id.*

Here, Plaintiffs' request for relief does not fit within the categories allowed under § 1491(a)(2). Plaintiffs seek an order from the Court that would require the United States to make changes to its trust management system. This is clearly not within the definition of "incidents of and collateral to" the money judgment demanded by Plaintiffs and has no place before the Court of Federal Claims. *Tohono O'odham Nation*, 563 U.S. at 313. *See also Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000) (reversing judgment because "the trial court strayed from the realm of legal remedies into that of equity"); *Smalls v. United States*, 87 Fed. Cl. 300, 307 (2009) (the court lacked jurisdiction over plaintiff's claim for injunctive relief seeking an order that the government take specific action).

G. Plaintiffs should be required to make a more definite statement.

In the alternative, should any claim survive, this Court deny the United States' Motion to Dismiss, Plaintiffs should be required to make a more definite statement. "A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." RCFC 12(e). A motion for a more definite statement is an "appropriate device[] to narrow the issues and disclose the boundaries of the claim and defense." *Williams v. United Credit Plan of Chalamette, Inc.*, 526 F.2d 713, 714 (5th Cir. 1976).

Plaintiffs' Complaint is so vague and ambiguous that the United States cannot respond in a meaningful fashion. Plaintiffs do not detail any of their mismanagement claims with any specificity so that those allegations can be rebutted. For example, instead of citing any particular fiduciary requirement from a statute or regulation, Plaintiffs merely attach an appendix that lists Acts of Congress and another appendix that lists statutes "dealing with Osage affairs." Nowhere, however, do Plaintiffs specify how any of those acts are relevant to the current litigation or have been breached. *See* Compl. ¶ 32. This lack of specificity makes Plaintiffs' Complaint little more than "a formulaic recitation of a cause of action." *Twombly*, 550 U.S. at 555–56.

V. CONCLUSION

Despite Plaintiffs' claims, as was established in previous Court of Federal Claims litigation, headright owners do not have a legally protectable interest in the Osage Tribal Trust Account. The United States holds the Osage Mineral Estate and the Tribal Trust Account in trust for the benefit of the Osage Nation. The bulk of Plaintiffs' claims have also been litigated many times—in this Court by the Osage Nation and in district and appellate court by Plaintiffs. Through these actions, Plaintiffs have received both compensation and an accounting. Claim and issue preclusion bar Plaintiffs from relitigating these matters over and over again. Plaintiffs have also waived and

released the majority of their claims in the *Osage* litigation and *Cobell* class action lawsuit. The Complaint should also be dismissed because Plaintiffs cannot rely on the Indian Tucker Act. Headright holders are not an "identifiable group" of Indians for purposes of jurisdiction under § 1505. Plaintiffs also try a "little bit of everything" approach and include two appendices of possible statutes and other authority in an attempt to trigger the Court's Tucker Act jurisdiction. But Plaintiffs fail to identify any statute or regulation that creates an actionable trust duty to support their breach of trust claims. Finally, Plaintiffs request equitable relief that is outside this Court's jurisdiction to grant.

The Court should grant the United States' motion and dismiss this case in its entirety.[10]

Respectfully submitted this 20th day of December, 2019.

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[10] In the event that Plaintiffs' claims are not dismissed, the Court should require Plaintiffs, at a minimum, to set forth the specific statutory or regulatory provisions that they allege establish fiduciary duties and are money-mandating in breach, and specify how the United States allegedly violated such duties.

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, 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
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