No. 2021-1625

United States Court of Appeals for the Federal Circuit

WILLIAM FLETCHER, TARA DAMRON,
KATHRYN RED CORN, and RICHARD LONSINGER,
Appellants

v.

THE UNITED STATES OF AMERICA,
Appellee

Appeal from the United States Federal Court of Claims Case No. 19-1246

BRIEF OF APPELLANTS

JASON B. AAMODT
DALLAS L.D. STRIMPLE
INDIAN & ENVIRONMENTAL LAW GROUP, PLLC
406 S. Boulder Ave, Suite 830
Tulsa, Oklahoma 74103
Telephone: (918) 347-6169

ATTORNEYS FOR APPELLANTS
ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTEREST

In accordance with Federal Circuit Rule 47.4(a) and (b), counsel for Appellants William Fletcher, Tara Damron, Kathryn Red Corn, and Richard Lonsinger certifies the following:

1. The full name of every party represented by me is William Fletcher, Tara Damron, Kathryn Red Corn, and Richard Lonsinger.

2. The parties, William Fletcher, Tara Damron, Kathryn Red Corn, and Richard Lonsinger, are real persons and thus Federal Circuit Rule 47(a)(2) is not applicable.

3. The parties, William Fletcher, Tara Damron, Kathryn Red Corn, and Richard Lonsinger, are real persons and thus Federal Circuit Rule 47(a)(3) is not applicable.

4. The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this Court and who are not already listed on the docket for the current case:

   a. Dallas L.D. Strimple of the Indian & Environmental Law Group, PLLC

5. There are no related cases known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.

/s/ Jason B. Aamodt
Jason B. Aamodt

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

SECONDARY SOURCES

STATEMENT OF RELATED DASES

Pursuant to Circuit Rule 47.5, Appellants states as follows:

(a) No previous appeal has been taken in this action; and

(b) Counsel is not aware of any other case pending before this court, any other court, or any agency that will directly affect or be directly affected by this court's decision in the pending appeal.

JURISDICTIONAL STATEMENT

On August 21, 2019, Appellants/Plaintiffs William Fletcher, Tara Damron, Kathryn Red Corn, and Richard Lonsinger (herein "Plaintiffs")—a group of four American Indians—brought suit in the Court of Federal Claims, asserting discrete breach of trust claims against the United States regarding its breach of fiduciary obligations owed to individual Indian beneficiaries seeking monetary damages relating thereto. Plaintiffs presented their claims under both the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, relating to violations of the Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory and for Other Purposes, 34 Stat. 539 (June 25, 1906) (herein the "1906 Act") which first established the United States' trust obligations relating to the Osage Mineral Estate.

On December 7, 2020, the Court of Federal Claims (herein the "Court of Claims") dismissed Plaintiffs' Complaint finding it lacked jurisdiction to hear Plaintiffs' claims under both the Tucker Act and the Indian Tucker Act and, further, that Plaintiffs lacked standing to bring their claims and, also, that Plaintiffs are barred from asserting their claims due to issue preclusion. On January 28, 2021, Plaintiffs timely filed their Notice of Appeal from the final judgment. *See* R. App. P. 4(a)(1). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF ISSUES PRESENTED

1. Whether the Court of Claims erred in finding that the 1906 Act does not grant Plaintiffs a legally protectable interest in their pro rata shares of distributions from the Osage Mineral Estate that are provided by federal statute, overseen by a federal agency?

2. Whether the Court of Claims erred in failing to consider Plaintiffs' issue preclusion argument regarding the United States' contention that Plaintiffs lack a legally protectable interest in their pro rata share of distributions from the Osage Mineral Estate when the issue had been previously litigated in the Northern District of Oklahoma and the Tenth Circuit Court of Appeals between these same parties?

3. Whether the Court of Claims erred in finding the 1906 Act and other statutes/regulations do not create a money-mandating obligation upon the United States owed to Plaintiffs?

4. Whether the Court of Claims erred in holding that Plaintiffs would not be owed compensation for damages resulting from the United States' breach of its trust obligations to Plaintiffs?

5. Whether the Court of Claims erred in finding that Plaintiffs, and the other American Indians they represent, are not an "identifiable group of American Indians" pursuant to the Indian Tucker Act?

6. Whether the Court of Claims erred in finding it lacked jurisdiction over Plaintiffs' claims under the Tucker Act?

7. Whether the Court of Claims erred in striking declarations relating to the United States' settlement with the Osage Nation by misapplying a "No Cooperation" clause found in the settlement agreement?

STATEMENT OF THE CASE

I. Nature of the Case.

This is the latest—and perhaps last—chapter in a saga of litigation stretching back nearly two decades. In 2002, Plaintiff William Fletcher and three other individuals (all now deceased) commenced suit in the Northern District of Oklahoma, challenging the United States' management of the trust created by the 1906 Act, of which they were beneficiaries.[1] For nearly two decades, while literally losing his contemporaries, Mr. Fletcher slogged on the litigation with the hope of eventually obtaining justice regarding long-standing grievances with how the United States had treated him and his fellow—and former—Indian brethren. The path was, at times, winding. And the path was certainly uncharted—never before had any group of American Indians obtained a general trust accounting from the United States through court action, at least not in the modern era.

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

Through the litigation, Mr. Fletcher ultimately forced the United States to account for its management of the Osage Mineral Estate—something that had, to that point, never been completed in over 100 years. Mr. Fletcher was able to overcome the United States' unrelenting defenses and, after expending considerable time and resources, finally obtained the long-denied accounting from the United States.

Then, for the first time, Mr. Fletcher and his fellow trust beneficiaries were able to glean meaningful insight into the United States' mis-handling of their trust assets. By examining the ledgers of their accounts they were able to identify significant shortcomings from the United States. Empowered with this information, Mr. Fletcher, along with three members of the next generation of trust beneficiaries, brought suit in the Court of Claims seeking monetary damages for the United States' breaches of trust which Plaintiffs identified from the Court-ordered accounting. The Court of Claims dismissed Plaintiffs' action, leading to this appeal. At this juncture, arising from a motion to dismiss, there are no disputes of fact but, rather, matters of law for the Court's consideration.

That said, the United States holds trust funds for Plaintiffs, as well as thousands of other Indians, resulting from ongoing development of the Osage Mineral Estate. The United States is obligated to pay these trust funds out quarterly to Plaintiffs and other Indians similarly situated. For the purposes of this

suit, the payments are called "Section 4 Royalty Payments" or, in more common parlance, Osage "headrights." Specifically, under Federal Law, the United States has an obligation "to distribute funds to individual headright owners in a timely (quarterly) and proper (pro rata, with interest) manner." *Fletcher v. United States*, 730 F.3d 1206, 1209 (10th Cir. 2013) ("*Fletcher II*").

Plaintiffs commenced the underlying action, alleging the United States breached its fiduciary obligations by, *inter alia*: (1) overpaying Gross Production Taxes, *see* Aplt. App. at 42; (2) failing to collect interest on royalties once collected and segregated for distribution but before distribution actually takes place, *see id.*; 1906 Act § 4 (1) ("said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto"); and (3) incorrectly calculating tribal operation payments to hide the United States' own miscalculations, *see* Aplt. App. at 43 ("There are numerous instances in which Defendant erred in reporting expenses and simply adjusted revenue as to balance the account of Osage Headright Owners").

Plaintiffs now ask this Court to reverse the decision of the Court of Claims dismissing this case. The Court of Claims misapprehended the nature of Plaintiffs' claims and, importantly, its holding is inapposite to the Court's precedent on this very matter. *See Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 186

(2020). Plaintiffs' have followed the *exact* path the *Chemehuevi* court explained Indians should take when they are unsure whether or how the United States has breached its trust obligations: obtain an accounting in District Court whereby breaches of trust may be identified and then proceed to the Court of Claims for monetary damages where a "quantum" valuation of the identified breaches can be conducted. It is a travesty of justice that Plaintiffs did as the Court of Claims requires, only to have their Complaint dismissed.

As trustee, the United States is obligated to, every quarter, pay Plaintiffs the "proper" headright due and, importantly, the United States' trust duties include accounting to Plaintiffs for its management of the trust funds. This leaves the consequential question: is the United States obligated to pay damages when it mismanages the trust funds? Following, when the only accounting the United States ever provided in over a century (to anyone) concerning this trust fund shows that the United States failed to properly pay each headright holder, is the United States obligated to pay damages to headright holders? As explained herein, the law provides that is precisely the case.

II. Course of Proceedings.

The United States responded to Plaintiffs' Complaint by filing a Motion to Dismiss on December 20, 2019. The United States argued Plaintiffs' claims should be dismissed because: (1) Plaintiffs lacked standing to pursue their breach

of trust claims; (2) Plaintiffs were precluded from bringing their own claims because they were settled as a part of the *Osage Tribe* litigation; (3) Plaintiffs were precluded from bringing their own claims because they were settled as a part of the *Cobell* litigation; (4) Plaintiffs were precluded from seeking any additional accounting beyond what Plaintiffs received from litigation in the Northern District of Oklahoma; (5) the Court of Claims lacked jurisdiction under the Indian Tucker Act because Plaintiffs were not an "identifiable group of Indians;" (6) Plaintiffs failed to identify money-mandating duties sufficient to grant the Court of Claims jurisdiction over their claims; and (7) the Court of Claims lacked jurisdiction over Plaintiffs' claim for injunctive relief. *See e.g.* Aplt. App. at 73-74.

Plaintiffs filed their Response to the Motion to Dismiss on February 18, 2020. As a part of their Response, Plaintiffs presented declarations from two (2) individuals with intimate knowledge of the *Osage Tribe* litigation: Jim Gray, the former Principal Chief of the Osage Nation; and Wilson Pipestem, counsel for the Osage Nation in the *Osage Tribe* litigation. Chief Gray and Mr. Pipestem offered testimony regarding the scope and applicability of the settlement agreement between the Osage Nation and the United States. *See* Aplt. App. at 299, 337-338, and 343-344. The United States moved to strike the declarations pursuant to a "No Cooperation" clause of the settlement agreement between the Osage Nation and the United States. *See e.g. id*. at 474

.

On June 3, 2020, the Court of Claims held a telephonic hearing on both the Motion to Dismiss and the Motion to Strike and took both matters under consideration. *See e.g. id.* at 612.

III. Court of Claims' Opinion and Order Dismissing Plaintiffs' Complaint.

On December 7, 2020, the Court of Claims entered the Opinion and Order that is the subject of this appeal. *See* Aplt. App. at 1. The Court granted the United States' Motion to Strike, holding that the challenged declarations violated the *Osage Tribe* Settlement's "No Cooperation" clause. *Id*. at 6. Despite granting the United States' Motion to Strike, the Court of Claims never actually applied the *Osage Tribe* Settlement to preclude Plaintiffs' claims. As such, the Motion to Strike is not actually relevant to the Court of Claims' dismissal of Plaintiffs' claims.

Then, turning to the United States' Motion to Dismiss, the Court of Claims found that:

> (1) plaintiffs lack standing to bring their claims; (2) plaintiffs' claims lack subject matter jurisdiction under the Indian Tucker Act, Tucker Act, the 1906 Act, and other authorities identified by plaintiffs' Complaint; and (3) plaintiffs' request for an expanded accounting is barred by issue preclusion.

Id. at 8. In relation to the Indian Tucker Act, the Court of Claims held that Plaintiffs were not an "identifiable group of American Indians" as required under the statute. *Id*. at 12.

STATEMENT OF THE FACTS

In 1906, Congress passed the 1906 Act which, *inter alia*, allotted the surface of the Osage Nation's land reservation from communal Osage holding into individualized ownership. Of particular consequence, the 1906 Act severed the subsurface mineral estate and placed it into trust.

Pursuant to the 1906 Act, the subsurface estate was to be managed by the United States and all royalties resulting from the production of minerals (largely oil and gas) from the Osage Mineral Estate would be placed in a trust fund and—after deducting and withholding some portion for Osage Tribal purposes—were to be segregated and distributed to Osage Indians and their heirs. *See* 1906 Act at § 4; *see also Osage Nation v. United States*, 57 Fed. Cl. 392, 395 (Fed. Cl. 2003) ("*Osage I*"). For more than a century, these Section 4 Royalty Payments have played an important governmental purpose and provided a substantial benefit to the Osage Indians. Under this trust fund, Osage Indians receive long-term economic sustenance based on the consumption of mineral resources within the reservation, thereby filling the void created when the Tribe was compelled to allot its lands under the 1906 Act. However, the chicanery, fraud, and abuses which divested

these important funds from the Osage people is infamous, *see* DAVID GRANN, Killers of the Flower Moon: The Osage Murders and the Birth of the FBI (2017), and, coupled with generational fractionalization, today there are thousands of non-Osages, including states, universities, and corporations, receiving Section 4 Royalty Payments which were expressly intended for Osage Indians and their heirs.

A prominent claim at the beginning of the original Northern District of Oklahoma litigation addressed the United States' historical practice to tie Osage voting rights to ownership of a headright. Specifically, the 1906 Act provided that the Osage Mineral Estate would be managed by a tribal council selected at periodic elections in a manner prescribed by federal regulation. *See Fletcher v. United States*, 160 Fed. App'x 792, 793 (10th Cir. 2005) ("*Fletcher I*"). The Bureau of Indian Affairs limited the ability of Osages to vote or hold office to only those adult members of the Osage Nation who possessed headrights, and votes would be weighted proportionately to an individual's fractional or multiple headright interest. *Id*. While the case was pending, plaintiffs secured a victory on their voting rights claims with Congress' passage of the Reaffirmation of Certain Rights of the Osage Tribe, 118 Stat. 2609.

Thereafter, the plaintiffs' action in the Northern District of Oklahoma focused on breach of trust claims, and centrally on a request for an accounting of

the trust fund created by the 1906 Act. After the Northern District of Oklahoma dismissed the breach of trust claims without prejudice to refiling, plaintiffs appealed the dismissal of their request for an accounting. On appeal, the Tenth Circuit reversed, holding "[t]he 1906 Act clearly creates a trust relationship – and not just a trust relationship between the federal government and the Osage Nation, but also between the federal government and the individual Osage headright owners who are plaintiffs in this case." *Fletcher II*, 730 F.3d at 1209. Additionally, "[o]ver the years both Congress and [the 10th Circuit] have repeatedly recognized that, in this way, the 1906 Act created a trust relationship between the government and individual headright owners." *Id*. at 1209. As a result, the Tenth Circuit found that Osage headright holders, as trust beneficiaries, are entitled to an accounting of their trust funds. *Id*. at 1209-1211. It is important to note that this litigation—between the same parties here—is the only litigation to directly address the question of whether the 1906 Act created a trust responsibility between the United States and Plaintiffs.

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

1. The accounting must run from the first quarter of 2002 until the last available quarter;
2. The accounting must be divided and organized either by month or quarter;
3. The accounting must state the date and dollar amount of each receipt and distribution;
4. The accounting must briefly identify and describe the source of each trust receipt (i.e., the name of the payer/lessee and thee contract number for the oil and/or gas lease on which the payment is made);
5. The accounting must state the number of the individual or organization to whom each trust distribution was made;
6. For headright distributions, the accounting must state the headright interest that each beneficiary possessed at the time of distribution;
7. The accounting must state the amount of interest income generated from the tribal trust account and the date on which such interest was credited to the account.

Fletcher v. United States, 153 F.Supp. 3d 1354, 1372 (N.D. Okla. 2015), ("*Fletcher III*") *amended*, No. 02-CV-427-GKF-PJC, 2016 WL 927196 (N.D. Okla. Mar. 11, 2016), and *aff'd*, 854 F.3d 1201 (10th Cir. 2017). On or about September 11, 2017, the United States provided the required accounting to the plaintiffs. Based upon review of the accounting, and the discovery of trust fund mismanagement, this action followed.

SUMMARY OF THE ARGUMENT

This appeal stems from the Court of Claims' over-reliance upon discrete provisions of the Court of Claims' opinion in the Osage Tribe's trust litigation. The *Osage Tribe* litigation commenced in March of 2000 when the Osage Nation

filed suit against the United States alleging, *inter alia*, that the United States failed to collect the proper amount of money due from oil and gas leases, and failed to properly deposit and invest funds in the Osage Tribal Trust Account.

On October 15, 2007, a group of headright holders (none of the current Plaintiffs nor their privies) sought to intervene in the *Osage* litigation. *Osage Tribe of Indians of Okla. v. United States*, 85 Fed. Cl. 162, 165 (2008) ("*Osage VI*"). The Court of Claims denied the intervention, finding that, at least as it related to the claims brought by the Osage Tribe, the headright holders were not the "real party in interest" because the Osage Mineral Estate was reserved to the Osage Tribe itself and the claims brought related solely to leases that the headright holders were not a party to. *Id*. at 170-171, 173. However, the Court of Claims did recognize that headright holders have a claim to ensure the United States distributes their pro rata share of royalties (which would include any damages awarded in the Osage Tribe's litigation). *Id*. at 173-174.[2] Specifically, the Court

[2] Ultimately, the Osage Nation settled its claims with the United States. However, it must be noted that the United States refused to consult with Plaintiffs in the negotiation of the Settlement Agreement with the Osage Nation. On October 19, 2011, Jason Aamodt, counsel for Plaintiffs, approached Joseph Kim, counsel for the United States—after Mr. Kim had ignored Plaintiffs' concerns regarding the proposed settlement agreement between the United States and the Osage Nation—to discuss what effect, if any, the settlement agreement would have of Plaintiffs' breach of trust claims. *See* Aplt. App. 339-342. Mr. Aamodt had spoken with counsel for the Osage Nation and representatives of the Osage Nation who represented that the settlement agreement would not affect Plaintiffs' claims. *See id*. at 337, 343-344. Mr. Kim refused to comment on what legal effect, if any,

of Claims stated: "Here, as in Cheyenne-Arapaho, Proposed Intervenors 'may still have recourse to an appropriate court to compel distribution in accordance with applicable law.'" *Osage VI*, 85 Fed. Cl. at 173-174 (quoting *Cheyenne-Arapaho Tribes of Indians of Okla. v. United States*, 1 Cl.Ct. 293, 296 n. 4 (1983)). As outlined in *Osage VI*, Plaintiffs should be permitted to compel the proper distribution of funds and seek damages relating to distributions which were not proper, as identified in the United States' accounting. In dismissing Plaintiffs' Complaint, the Court of Claims did not address this part of *Osage VI*.

In the instant matter, the Court of Claims held that *Osage VI* "previously decided the issues" in this litigation and held that individual headright holders "do not have a legally protectable interest in the Osage Tribal Trust Account." Aplt. App. at 9 (quoting the United States' Motion to Dismiss which relied on *Osage VI*, 85 Fed. Cl. at 171-172). The United States pressed this constricted interpretation of *Osage VI* upon the Court of Claims, reducing or disregarding the scope of specific duties set out by Congress:

> [UNITED STATES COUNSEL:] Plaintiffs here are headright holders who are now seeking to bring new mismanagement claims based on the United States management of the same tribal trust account.
>
> ***

---

the settlement agreement would have on Plaintiffs' breach of trust claims. *See id.* at 345.

> The first reason is that the Plaintiffs lack standing to raise claims related to the tribal trust account.
>
> ***
>
> Plaintiffs are seeking to litigate claims for the same tribal trust account that was at issue in Osage. There is no separate, segregated account. Funds flow directly from the tribal trust account into the individual headright holders' accounts.
>
> ***
>
> And the injury that the Plaintiffs allege purportedly occurred while the funds are in the tribal account. But as this Court held in Osage, the individual headright holders do not have a legally protectable interest in the tribal trust account.
>
> ***
>
> So, again, because the injury that the Plaintiffs are asserting occurs while the funds are in the tribe's trust account, they lack standing to assert claims for mismanagement of the trust account, and we ask that the Court dismiss their claims on that basis.
>
> ***
>
> Again, Plaintiffs are asserting mismanagement of the same tribal trust account that was at issue in the Osage litigation. And so consideration of their claim would involve the same facts and the same review of the United States' management of the trust accounts that occurred in Osage.
>
> THE COURT: Mm-hmm.
>
> MS. MCCUNE: So even here if Plaintiffs are alleging a different breach of fiduciary duty from the ones asserted in Osage, the claims are still springing from the same set of facts.

Aplt. App. at 621, 622, 624, 627.

This is not the first time the United States has crafted arguments around how it labels the accounts it manages. In the Northern District of Oklahoma, the United States made—and lost—this same argument:

> The government makes much of the fact that plaintiffs previously have disclaimed seeking an accounting of the Osage tribal trust account. [*See* Dkt. #1221, p. 3-4]. These statements, as the government itself acknowledges, were "driven by Plaintiffs' prior belief that a third type of account existed to which they could seek an accounting," namely, a "segregated fund." [Dkt. #1266, Defendants' Brief, p. 12]. Plaintiffs' belief was premised on the text of the 1906 Act, which at one point states that royalty income "shall be segregated... and placed to the credit of" tribal members and then, shortly thereafter, states that such funds "shall be distributed" to the tribal members. 1906 Act. § 4(1), (2). Based on this language, plaintiffs believed that segregation and distribution were separate steps and thus that there was a separate "segregated account" holding royalty income prior to distribution. It 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.['] [Dkt. #1266, p. 7].
>
> Plaintiffs had no way of knowing this information prior to the government's filings. Their understanding of how the government manages funds under the 1906 Act was reasonable based on the text of the statute. Thus, given that plaintiffs have always sought an accounting of funds held and disbursed under the 1906 Act, the court will not deny them that accounting simply because they initially did not understand the arrangement by which those funds are administered or what to call the account at issue.

Fletcher III, 153 F. Supp. 3d at 1362. Ultimately, while Plaintiffs' funds (as opposed to the Osage Tribe's funds) are in the so-called "Osage Tribal Trust

Account," the United States' fiduciary obligations are not reduced merely because of the label the United States gives to a particular account.

Additionally, the Court of Claims' narrow reading ignores the express provisions of *Osage VI* which provide that Plaintiffs have a legally protectable interest in assuring funds are distributed accurately in a pro rata manner, the specific claims Plaintiffs present in this action. *Osage VI*, 85 Fed. Cl. at 173-174. This duty to distribute, and associated statutes and regulations relating to how distribution is to occur and what can be deducted from distributions, is a fiduciary duty owed directly to Plaintiffs and the headright holders they represent. These are not obligations owed to the Osage Tribe. Breach of these duties by the United States entitles Plaintiffs, and other headright holders, to damages to correct the breach.

ARGUMENT

I. Standard of Review.

A. Motion to Dismiss

Whether the Court of Claims properly dismissed a plaintiff's complaint "for lack of jurisdiction and for failure to state a claim upon which relief can be granted are both questions of law that [the Federal Circuit] review[s] *de novo*." *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000). In considering a Motion to Dismiss, whether for lack of jurisdiction or for failure to state a claim upon which

relief can be granted, the Court of Claims "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in [the non-moving party's] favor." *Id.*; *Estes Exp. Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014). "If a motion to dismiss for lack of subject matter jurisdiction, however, challenges the truth of the jurisdictional facts alleged in the complaint, the district court may consider relevant evidence in order to resolve the factual dispute." *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). Factual findings by the Court of Claims are reviewed for clear error. *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1343 (Fed. Cir. 1998).

To survive a motion to dismiss under RCFC 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

B. Indian Canons of Construction

Under the Indian Canons of Construction, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("doubtful expressions of legislative intent must be resolved in favor of the Indians"); *Fletcher II*, 730 F.3d at 1210 ("within the narrow field of Native American trust relations statutory ambiguities must be resolved in favor of the Indians") (citing *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976)) (internal quotations omitted). The Canons provide "for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Nat'l Labor Relations Bd. v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002) (citing Felix Cohen, *Handbook of Federal Indian Law* 232 (1982)) (internal quotations omitted). Treaties and federal agreements with tribes should also be liberally construed to favor Indians. *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). Ambiguous expressions in treaties and statutes are resolved in favor of the tribes and their members. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973). Additionally, the familiar "*Chevron* deference" that courts normally grant to a federal agency's interpretation of statutes it administers is applied with "muted

effect" in cases involving Indians. *See Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009) ("*Cobell XXII*").

II. The Court of Claims Misapplied the *Osage Tribe* Opinion to Find That Plaintiffs Lack Standing.

Standing is a "threshold jurisdictional issue" for federal courts in every action. *See Myers Investigative & Sec. Servs. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998)). The Supreme Court has developed a three-prong test for standing that a plaintiff must show:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000).

The Court of Claims dismissed Plaintiffs' action upon finding that Plaintiffs lack standing to bring their claims because they have not suffered an "injury-in-fact" because they "have not asserted a legally protectable interest." Aplt. App. at 9-11(quoting United States' Motion to Dismiss). The Court of Claims reasoned its way to this conclusion, stating:

> [P]laintiffs' claims regarding trust fund mismanagement are not appropriately asserted against the government because the

> government's responsibility to correctly distribute and manage funds is a fiduciary duty owed to the tribe—not individual tribal members.

Id. at 10. The basis of this reasoning was that "[t]he Court previously decided the issues underlying the case at bar through litigation of *Osage* [*VI*] and, as such, it is inclined to follow that precedent." Aplt. App. at 10. However, a close review of *Osage VI* reveals the Court of Claims erred in its application to this action.

The fiduciary duties alleged to be breached in *Osage Tribe* related to the collection of royalties generated from exploitation of the Osage Mineral Estate. *See Osage VI*, 85 Fed. Cl. at 165 ("alleging that the United States violated its duty as trustee of the Osage mineral estate by failing to collect all moneys due from Osage oil leases and to deposit and invest those moneys as required by statute and according to the fiduciary duty owed to the Osage Tribe.").[3] In denying headright holders' request to intervene in *Osage Tribe*, the Court of Claims found they did not have a "legally protectable interest" because it is "the Osage Tribe [that] is the

[3] More specifically, the Osage Tribe's claims consisted of: (1) failure to collect royalties in the appropriate amount (the "highest posted price"); (2) lag in deposit of funds, resulting in a loss of interest; (3) failure to keep adequate cash on hand; and (4) investment underperformance. *See Osage Tribe of Indians of Okla. v. United States*, 93 Fed. Cl. 1, 9 (2010). Simply put, these are claims related to mismanagement by the United States in collecting funds *coming into* the trust fund as a part of royalty collection.

real party in interest"[4] because it "owns the minerals which are the subject of the action." *Id*. at 170.[5]

This comports with Section 3 of the 1906 Act, which creates a reservation of "oil, gas, coal, or other minerals" to the Osage tribe that would be held in trust by the United States.[6] 1906 Act, Section 3, 34 Stat at 544. This reservation of oil and gas is managed by the President of the United States and by the Secretary of the Interior under leases and at royalty rates mandated by the statute and resulting

---

[4] "The real party in interest is the party who, by substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir. 1984) (internal quotations omitted) (followed by *Osage VI*, 85 Fed. Cl. at 171),

[5] As a part of its holding, the Court of Claims in *Osage Tribe* found persuasive the Tenth Circuit's holding in *Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849, 850-51 (10th Cir. 1981) where the proposed interveners were not parties to the lease being challenged. *Osage VI*, 85 Fed. Cl. at 171 ("The applicant for intervention did not have a legally protectable interest because it was not a party to the lease at issue.").

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

regulations. These are the items, all relating to exploitation of the Osage Mineral Estate, challenged by the Osage Tribe in its litigation. Specifically, the face of the complaint from *that* case shows what it was about:

> 1) Count 1: Damages resulting from … Oil and Gas Mining **Leases** Covering Portions of the Osage Mineral Estate.
>
> 2) Count 2: Damages resulting from … **Leases** Covering the Osage Surface and ore Mineral Estates Other than Oil and Gas Leases.

Aplt. App. at 331, 333. *That* case, according to the United States' own words, related to the "undercollection of royalties, failure to obtain highest posted prices, deposit lags, and failure to obtain highest available investment yields on funds derived from trust royalties." *See id*. at 77. Indeed, those were all leasing issues, with perhaps an exception for the last claim regarding investment – itself an issue of income generation. In any event, investment of the fund has little to do with the United States' improper disbursement of funds as alleged by Plaintiffs now.

Rather, *this* case is about the proper distribution of money to Plaintiffs under the law—a fiduciary obligation the United States' own accounting shows that it mismanaged. The Court of Claims never analyzed the 1906 Act to determine whether the duty to distribute money in proper amounts is owed to the Osage Tribe (it is not), or to Plaintiffs (it is).

Indeed, Plaintiffs' trust claims are premised primarily on Section 4 of the 1906 Act, which reads clearly and unambiguously that any "royalty received from

oil, gas, coal, and other mineral leases … shall be placed … to the credit of the members of the Osage tribe of Indians … and the same shall be distributed to the individual members of said Osage tribe. . .” 34 Stat at 544. Simply put, “the trust funds at issue in this case—collected and disbursed under the terms of the 1906 Act—are being held for the benefit of individual members of the Osage Nation.” *Fletcher II*, 730 F.3d at 1209.

Now-Supreme Court Justice Gorsuch explained:

> The 1906 Act clearly creates a trust relationship—and not just a trust relationship between the federal government and the Osage Nation, but also between the federal government and the individual Osage headright owners who are plaintiffs in this case. Though the language of the Act is both arcane and antiquated, after laboring through it there's no question about this much. The Act requires the government to collect royalties, place them “to the credit of” each individual headright owner, and then disburse them to each individual headright owner on a quarterly basis, with interest. *See* 1906 Act § 4(1)-(2), 34 Stat. at 544. A small slice of royalty income may be diverted to tribal operations, *id.* § 4(3), (4), but all else is “placed ... to the credit” of headright owners and distributed to them personally. In short, the 1906 Act imposes an obligation on the federal government to distribute funds to individual headright owners in a timely (quarterly) and proper (pro rata, with interest) manner. Over the years both Congress and this court have repeatedly recognized that, in this way, the 1906 Act created a trust relationship between the government and individual headright owners.

Id. at 1209. This holding comports with long-standing precedent that “the United States took the legal title to the funds and moneys in trust, but the beneficial title to the funds and moneys vested in the individual members of the tribe.” *Globe*

Indem. Co. v. Bruce, 81 F.3d 143, 150 (10th Cir. 1935), *certiorari denied in Bruce v. Globe Indem. Co.*, 56 S.Ct. 591 (1936).

Plaintiffs' Complaint identified specific fiduciary obligations that the United States breached in *distributing* royalty payments: (1) overpayment of Gross Production Taxes, *see* Aplt. App. at 42; (2) failure to collect interest on royalties once collected and segregated for distribution, but before distribution actually takes place, *see id.*; 1906 Act § 4(1) ("said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto"); and (3) incorrectly calculating tribal operation payments to hide its own miscalculations, *see* Aplt. App. at 43 ("There are numerous instances in which Defendant erred in reporting expenses and simply adjusted revenue as to balance the account of Osage Headright Owners").[7] Gross

[7] *See also* Aplt. App. at 638:

> the Federal Government has failed to distribute the monies at appropriate times. They've failed to distribute the right amount of money. They've distributed some of the money to the wrong people. They have failed to distribute the right amount of interest. They have overcharged the Plaintiffs for gross production tax charges and overcharged them for other elements that they're allowed to take out legally, but they just did the job the wrong way. These are all distribution claims.

In regard to distributing trust funds to the wrong individuals, counsel for Plaintiff offered express examples:

> So -- and specifically the evidence will show in the case that in some cases the money was sent to defunct entities that never should have

Production Taxes are paid out of the trust to the State of Oklahoma pursuant to The Act of April 25, 1940, 54 Stat. 168:

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

As the United States' accounting showed, this tax payment to the State of Oklahoma is charged to Plaintiffs directly, not the mineral estate itself nor to the Tribe:

> The Osage Tribe has no idea that the Federal Government has overcharged the gross production taxes. The individuals do. It comes out of their portion and it's reported on their own statement of account . . . .

> received the money and never could have received the money but received the money anyhow. And the most famous example of that is the Hissom Memorial Trust in Oklahoma that hasn't existed for 20 years but continues to get a check every quarter.
>
> THE COURT: What was the name of the -- the Hissom Memorial Trust?
>
> MR. AAMODT: Hissom, H-i-s-s-o-m, Memorial Trust. It was a trust established to support a mental institution in Sand Springs, Oklahoma, that was disbanded because of its unfair and improper treatment of the individuals who were incarcerated there 20 years ago.

Id. at 649.

Aplt. App. at 641. Plaintiffs alleged that, from time to time, the United States has overpaid the tax by simply paying the five percent (5%) cap on Gross Production Taxes, even when the actual taxable percentage is less than five percent (5%). *See id*. at 42.

The Court of Claims' decision in the instant action is particularly confusing when one looks to the specific holding of *Osage VI*, which the Court of Claims understood to have "decided the issues underlying the case." *Id*. at 9. *Osage VI* expressly recognized that headright holders "may still have recourse to an appropriate court to compel distribution in accordance with applicable law." 85 Fed. Cl. at 173 (quoting *Cheyenne-Arapaho*, 1 Cl. Ct. at 296 n. 4).

Plaintiffs understand there may be shades of gray but, ultimately, the Osage Nation has the mineral estate (and the United States owes specific trust responsibilities to the Nation for management of this trust resource) and the individual headright holders have the royalties resulting from development of the mineral estate. The United States owes specific trust responsibilities to the headright holders regarding royalty management that it simply does not owe to the Tribe.

Phrased differently, the United States owes the Nation direct obligations regarding *what goes into the Osage Tribal Trust Account* and the United States owes headright holders direct obligations regarding *what goes out of the Osage*

Tribal Trust Account. The *Osage Tribe* litigation addressed only the front half of this matrix. Left unaddressed, and for which Plaintiffs must have standing if anyone ever could, is meaningful oversight and restitution regarding the United States' distribution shortcomings—which the United States is charged by statute to perform properly, but which its own accounting reveals it failed to accomplish.

III. The Court of Claims Failed to Analyze Plaintiffs' Issue Preclusion/*Res Judicata* Argument.

The United States resurrected arguments the Tenth Circuit unequivocally rejected—that the 1906 Act does not create a legally protectable interest on behalf of headright holders for breach of trust claims. *Fletcher II*, 730 F.3d at 1209 ("In short, the 1906 Act imposes an obligation on the federal government to distribute funds to individual headright owners in a timely (quarterly) and proper (pro rata, with interest) manner."). The Tenth Circuit recognized that Plaintiffs would retain the right to pursue damages for losses discovered in the accounting they were owed. *Id*. at 1215 ("And in any subsequent litigation it will be [plaintiffs'] burden to prove a breach of trust, not the government's burden to disprove it."). *This case* is that foreshadowed "subsequent litigation."

The United States' arguments in its Motion to Dismiss (which carried the day before the Court of Claims) track the arguments made before the Northern

District of Oklahoma – even down to the argument that headright holders only have an "inchoate right" in the trust funds. *Compare* Aplt. App. at 91 *with* Aplt. App. 444, 464. In dispatching this proposition, the District Court described the United States' position as one "that the Tenth Circuit has already considered and rejected." *Fletcher III*, 153 F.Supp.3d at 1362. Undeterred by its losses, the United States trotted out this very same argument before the Court of Claims, to a different outcome.

Issue preclusion ensures that "a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again." *In re: Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994). Additionally, 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) (internal citation omitted); *see also Zacharin v. United States*, 43 Fed. Cl. 185, 194 (1999) ("The rationale behind the doctrine is that a party should be bound by decisions made with respect to litigated issues and should not be permitted to obtain a second decision on such issues."). There are four requirements to be met before issue preclusion applies:

> (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4)

> [the party precluded] had a full and fair opportunity to litigate the issue in the first action.

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

In its Motion to Dismiss, the United States argued that the 1906 Act does not create a legally protectable interest on behalf of headright holders for breach of trust claims because that right—according to the United States—belongs solely to the Osage Nation. Since the United States made (and lost) this same argument to both the Northern District of Oklahoma and the Tenth Circuit, Plaintiffs argued in their Response to the United States' Motion to Dismiss that the United States should be precluded from raising the same argument before the Court of Claims. *See* Aplt. App. at 299-305. Counsel for Plaintiffs also raised the issue at oral argument:

> So the other thing that I want to point out kind of generally, and I'll get into it specifically, is this isn't a case about precedent. Right? This isn't whether or not you should follow the precedent from the Court of Federal Claims or the Federal Circuit. This is a question about res judicata. All these issues on standing and issue preclusion were already truly and fairly litigated by the United States --
>
> THE COURT: Mm-hmm.
>
> MR. AAMODT: -- in a court, and they lost them all. And what they're trying to do is they're trying to come back and collaterally attack decisions that they already lost in this Court. It's not about whether or not you should follow the decisions that were made by Judge Hewitt, whether or not you should follow the decisions made by Justice Gorsuch, but the question here is were those decisions firm, final, litigated opportunities where the United States had every

> opportunity to put its defenses out and lost them. And the answer to that question is absolutely yes.

Id. at 639. The Court of Claims, however, never addressed the argument in its Opinion. Instead, the Court of Claims addressed the prior Tenth Circuit litigation on other issues, and declared it to be "merely persuasive" upon the Court and that the Court would interpret it "narrowly," ultimately leading the Court to find that the United States had no fiduciary obligations to Plaintiffs other than those specifically articulated by the Tenth Circuit and the Northern District of Oklahoma. *Id*. at 9-10. Given the full, fair, and final litigation on this issue by these parties, this is not a question of "interpretation" but rather, of application. And, rather than being "merely persuasive," it is binding.

Because the parties "have already litigated this issue fully, issue preclusion bars them from litigating it again here." *In re Freeman*, 30 F.3d at 1465. Specifically: (1) the United States' argument in this litigation is that the United States' trust responsibilities are limited solely to the Osage Nation is identical to its argument made to the Northern District of Oklahoma; (2) the issue was fully litigated in the Northern District of Oklahoma; (3) resolution of the issue was essential to the Northern District of Oklahoma's resolution of plaintiffs' accounting claim; and (4) the United States had a full and fair opportunity to litigate the issue in the Northern District of Oklahoma. *See Zacharin*, 43 Fed. Cl. at 194. Despite this, the Court of Claims adopted the United States' previously-

lost arguments in full. This was error by the Court of Claims and its decision should be reversed.

IV. The Court of Claims Erred in Finding That It Lacked Jurisdiction.

Through the Tucker Act, the Court of Claims has jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act does not create substantive rights, it is simply a jurisdictional provision "that operate[s] to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)." *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) ("*Navajo II*"). "The other source of law need not explicitly provide that the right or duty it creates is enforceable through a suit for damages, but it triggers liability only if it can fairly be interpreted as mandating compensation by the Federal Government." *Id*. (internal quotations omitted).

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

> First, the plaintiff must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. At this stage, a statute or regulation that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty. The Government assumes Indian

> trust responsibilities only to the extent it expressly accepts those responsibilities by statute.
>
> Second, the plaintiff must show that the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties imposed by the governing law. At the second stage, principles of trust law might be relevant in drawing the inference that Congress intended damages to remedy a breach. The Supreme Court has looked to common-law principles to inform its interpretation of statutes and to determine the scope of liability that Congress has imposed. The Federal Circuit has noted that when a statute establishes specific fiduciary obligations, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.

Inter-Tribal Council of Arizona, Inc. v. United States, 125 Fed. Cl. 493, 499 (2016) (internal citation and quotation omitted). Indeed, "the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." *United States v. Mitchell*, 463 U.S. 206, 226, 103 S. Ct. 2961, 2973 (1983) ("*Mitchell II*").

A. Plaintiffs Identified a Substantive Source of Law That Establishes Fiduciary Obligations for The United States to Properly Distribute Royalty Payments to Headright Holders.

As noted above, the 1906 Act creates a fiduciary duty "on the federal government to distribute funds to individual headright owners in a timely (quarterly) and proper (pro rata, with interest) manner." *Fletcher II*, 730 F.3d at 1209. Additionally, the United States is required to collect interest on the trust

funds after royalty collection. *See* 1906 Act § 4(1) ("said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly *to the members entitled thereto*") (emphasis added). While some small portion of the trust funds may be used for other purposes, all remaining funds are to be paid to individual headright holders. *See* 1906 Act §§ 4(3) and (4).[8] Additionally, the Act of April 25, 1940, 54 Stat. 168, requires the United States to accurately pay the State of Oklahoma Gross Production Taxes on the royalties being paid to individual headright holders. The United States overpaid the State of Oklahoma millions of dollars in Gross Production Taxes directly from Plaintiffs' pro rata shares.

The Court of Claims did not provide its own analysis or interpretation of these statutes and regulations.[9] But they create fiduciary obligations owed to

[8] In fact, the United States seemingly admitted that it would be a conflict of interest for the Osage Tribe to present the claims of headright holders because of this specific allegation:

> There, there's a direct conflict between the tribe's interests and the Plaintiffs' interest, particularly because Plaintiffs are claiming that the United States overpaid tribal operations payments. So that would put their interest in conflict.

Aplt. App. at 633.

[9] At oral argument, counsel for Plaintiffs provided detail regarding additional statutes that create fiduciary obligations in this action:

> the Budget and Accounting Procedures Act of 1950 requires Treasury to maintain Indian accounts, and they haven't done it. The accounting

Plaintiffs, and other headright holders, that the United States has failed to perform adequately, resulting in losses for all headright holders.

B. The Court of Claims Erred in Finding That Plaintiffs Cannot Be Compensated for The United States' Breach of Trust.

The Court of Claims went on to make another error, holding that:

> Assuming that plaintiff actually alleged that the defendant breached that duty, this Court would still have difficulty interpreting any of plaintiffs' identified statutes, regulations, or manuals as mandating compensation for damages sustained as a result of such breach.

Aplt. App. at 13-14. This holding is contrary to this Court's holding in *Hopi Tribe v. United States*, 782 F.3d 662, 668 (2015), which adopted the Supreme Court's holding in *Mitchell II*:

> Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it

---

> shows that they haven't maintained this account. And that has caused the class to lose money.
>
> 31 U.S.C. Sections 3511 and 3512 require Treasury and the Interior to comply with the government accounting manual and other relevant accounting standards, which they haven't done. The GAO reports that they haven't done it. And 25 CFR Part 115 and Part 1200 provide for particular accounting and trust fund management rules that the Federal Government has failed to perform in this case. And the accounting shows that they've failed to and that the Plaintiffs have lost money as a result of that.

Aplt. App. at 676-677.

> naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. *See* Restatement (Second) of the Law of Trusts §§ 205–212 (1959); G. Bogert, The Law of Trusts & Trustees § 862 (2d ed. 1965); 3 A. Scott, The Law of Trusts § 205 (3d ed. 1967). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.
>
> The recognition of a damages remedy also furthers the purposes of the statutes and regulations, which clearly require that the Secretary manage Indian resources so as to generate proceeds for the Indians. It would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed.

463 U.S. 206 at 226–27, 103 S. Ct. 2961 at 2972–73. Put more simply, in Indian trust cases, the existence of fiduciary obligations, and breaches of those obligations by the United States, creates an action for damages resulting from those breaches without any additional statutory or regulatory provisions.

It cannot be said that the United States is not obligated to timely pay individual headright holders their "proper" distributions. *See Fletcher II*, 730 F.3d at 1209. The 1906 Act provides as much. It also cannot be said that these obligations upon the United States were not subject to "the highest responsibility and trust" and, as a result, are "to be judged by the most exacting fiduciary standards." *See Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) ("*Cobell VI*") (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297, 62 S.Ct. 1049

(1942)); *see also Fletcher II*, 730 F.3d at 1209 (establishing that "the 1906 Act clearly creates a trust relationship [...] between the federal government and the individual Osage headright owners"). Given these uncontested facts, it is unclear how the United States would not be responsible to individual headright holders when it fails to meet its fiduciary obligations to timely pay Plaintiffs their proper headright distribution and to accurately pay the gross production taxes to the State of Oklahoma. The Court of Claims' Order should be reversed.

V. The Court of Claims' Opinion Renders Plaintiffs' Accounting Meaningless.

"[A]n accounting of trust assets is a fundamental component of a tribe's ability to identify any mismanagement." *Goodeagle v. United States*, 128 Fed. Cl. 642, 649 (2016). "[T]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." *See* Restatement (3d) of Trusts § 173. At a minimum, an accounting must contain "information sufficient to alert the beneficiar[ies] to possible losses." *Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 69 Fed. Cl. 639, 664 (2006).

Part of the Northern District of Oklahoma's responsibility in determining the scope of plaintiffs' accounting was to ensure including information necessary to protect their interests, while avoiding those items "only loosely relate[d] to their own personal beneficial interests." *Fletcher II*, 730 F.3d at 1215. In determining

that scope, the Northern District of Oklahoma looked specifically at the fiduciary obligations the United States owed to Plaintiffs and other headright holders. This is because the financial cost to perform such accounting can be staggering. In some instances, "Interior estimated that the average cost of an accounting, per transaction, would exceed the average value of the transaction." *Cobell XXII*, 573 F.3d at 813; *see Fletcher II*, 730 F.3d at 1215 (the accounting need not be "so punctilious, so expensive, and so laboriously" to drain the public coffers yet provide only marginally relevant or useful information).

With this said, it would make little sense for the government to expend considerable resources to perform an accounting that is ultimately meaningless. However, that is exactly what the Court of Claims' Opinion accomplishes. If a beneficiary does not have a right to bring claims for distribution errors discovered in the produced accounting, the accounting serves no purpose. *See Goodeagle*, 128 Fed. Cl. at 649 (discussing how removing the binding effect of an accounting's findings would reduce it to a "meaningless document").

Moreover, the Opinion only creates a situation where Plaintiffs know an injury has occurred, but are prevented from calling the United States to remedy it. "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, [. . .] in every

case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." *Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 39–40, 36 S. Ct. 482, 484 (1916) (internal citations omitted). This, of course, is simple application of the maxim *ubi jus ibi remedium*: no right without a remedy. *Id.* Plaintiffs have a right to receive proper distributions under the 1906 Act. This litigation is their attempt at a remedy.

It is "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66, 112 S. Ct. 1028, 1033 (1992) (citing 3 W. Blackstone, Commentaries 23 (1783)). As Chief Justice Marshall cautioned in *Marbury v. Madison*, the undergirding of the federal government is at stake "if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. 137, 163, 2 L. Ed. 60 (1803); *see also Oglala Sioux Tribe of Pine Ridge Indian Rsrv. v. United States*, 21 Cl. Ct. 176, 193 n. 22 (1990) ("if we fail to permit Indians to call government agencies to account on obligations assumed by the federal government by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States.") (citing H.R. Rep. No. 1466, 79th Cong., 1st Sess., 5 (1945)) (alterations omitted). It would be "a monstrous absurdity in a

well organized goverment [*sic*], that there should be no remedy, although a clear and undeniable right should be shown to exist." *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 624, 9 L. Ed. 1181 (1838). For, a "right without a remedy is unknown to the Law." *Barrett v. Holmes*, 102 U.S. 651, 26 L. Ed. 291 (1880).

The 1906 Act is unmistakably clear: the United States has an obligation to pay individual Osage headright holders the proper amount due. It defies all logic or reason to hold that the United States' statutorily-imposed, trust-based, fiduciary duties are sufficient enough to be accounted for, but not sufficient enough to bring breach of trust claims upon when the accounting shows the duties were violated. Congress could not have intended such a costly and absurd result. *See Otoe and Missouria Tribe of Indians v. United States*, 131 Cl. Ct. 593, 602 (1955) ("strict construction will not be applied to defeat the clear intention of the legislature or to produce an absurd result, unless absolutely unavoidable"); *Saunders v. Sec. of Dept. of Health and Human Serv.*, 25 F.3d 1031, 1036 (Fed. Cir. 1994) ("Taking the Vaccine Act as a whole and giving effect to all of its parts, the result the government urges, in the setting of a prospective case, yields a result which we do not believe Congress could have intended."). For these reasons, the Court of Claims' Opinion should be reversed.

VI. The Court of Claims Erred in Rejecting Indian Tucker Act Jurisdiction.

Pursuant to the Indian Tucker Act:

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

28 U.S.C. § 1505. *Chippewa Cree*, 69 Fed. Cl. 639,[10] provides a comprehensive summary of the legislative history surrounding the adoption of the Indian Tucker Act, particularly addressing the "identifiable Group of American Indians" language. The main thrust of that legislative history is that the Indian Tucker Act, through its original adoption as part of the Indian Claims Commission Act, "reflected congressional concern that all legitimate claims of the Indians against

[10] In *Osage VI*, which the Court of Claims held was determinative on this issue, the Court distinguished *Chippewa Cree* and other similar cases largely on the fact that the Osage Nation was already a party to that action. 85 Fed. Cl. at 167-168 ("The 'group of nonmember Pembina lineal descendants,' which qualified for status as an 'identifiable group' in *Chippewa Cree* were not represented by any of the other sub-groups of plaintiffs in that case," "In *Wolfchild*, as in *Chippewa Cree*, the claimants' interests were not represented by any other tribe involved in the litigation," and "in this case, unlike in *Chippewa Cree* and *Wolfchild*, the organization of which Proposed Intervenors are members, the Osage Nation, is a party to this litigation") (distinguishing *Chippewa Cree*, 69 Fed. Cl. at 669 and *Wolfchild*, 62 Fed. Cl. at 540). Here, however, the Osage Nation is not a party, and regardless, as addressed above, the claims brought in this action belong to headright holders, not the Osage Nation itself.

the United States be provided with a forum and the opportunity to be heard." *Chippewa Cree*, 69 Fed. Cl. at 671. This Court in *Chippewa Cree* also noted how determination of "'identifiable group' required a more limited showing of formal relationship than that required for a tribe or band." *Id.* at 673 (relying on *McGhee v. Creek Nation*, 122 Ct. Cl. 380). Simply put, courts should take a liberal viewpoint in determining whether plaintiffs are an "identifiable group of American Indians." 28 U.S.C. § 1505.

The Court of Claims held that Plaintiffs did not satisfy the "identifiable group of American Indians" requirement because "previous case law has repeatedly shown that plaintiffs are considered an 'identifiable group of American Indians' when they are unable to sue as a tribe or there is no existing tribal organization in which plaintiffs can assert their claims."[11] *See* Aplt. App. at 12.[12] While that may be, and while a large segment of cases entail formal tribal entities bringing claims, the jurisdictional statute does not contain such a limitation,

[11] It is worth noting, as explained *supra*, the Osage Nation would have a conflict of interest in bringing Plaintiffs' claims here.

[12] The Court of Claims also took issue with the fact that plaintiffs were "members of a currently-existing tribe, [and] supplemented by a single member of another tribe." Aplt. App. at 12. This is despite the Court of Claims acknowledging that Plaintiffs alleged that there exist "many persons who have headrights [who] are not Osage, but are Indian." *Id.* at 11. If Plaintiffs need to add additional plaintiffs who are non-Osage, but Indian, headright holders, they will do so upon remand. However, that seems like an unnecessary and inefficient step.

thereby allowing more loosely-affiliated "groups of American Indians" to satisfy this threshold.

However, the Court of Claims' narrow interpretation[13] of this provision fully excludes subsets of tribal populations, or groups made of members of several different tribes, that are owed separate duties from the United States than the tribe(s) they are members of. This is such a case. Each named Plaintiff, and all in the class they intend to represent ("Osage Headright Owners [who are] citizens of more than one federally-recognized Indian tribe," Aplt. App. at 22, 39), is a beneficiary of a trust fund created by Section 4 of the 1906 Act. They are easily identifiable as a group due to the way the United States has administered their trust by granting them "shares" in the royalty production of the Osage Mineral Estate. *Id*. at 40. Furthermore, membership is not premised on particular tribal citizenship, but on share ownership—thus severing any tribal-affiliation oversight the Osage Nation may otherwise have. All told, Plaintiffs (along with all members of the putative class) are "identifiable," a "group," and "American Indians" such that their claims should be sufficient to trigger Indian Tucker Act jurisdiction.

VII. The Court of Claims Erred in Striking Declarations Relating to the Preclusive Effect of the *Osage Tribe* Settlement.

[13] It must be noted, this narrow construction also conflicts with the Indian Cannons of Construction which requires that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana*, 471 U.S. at 766.

As a part of the Court of Claims' dismissal of Plaintiffs' claims, it granted a motion to strike the declarations of two former officers of the Osage Nation relating to the preclusive effect of certain provisions of the Osage Nation's settlement of its breach of trust claims with the United States. Ultimately, the Court of Claims did not apply the Settlement Agreement to Plaintiffs' claims. However, should the issue arise again on remand, the Court of Claims' erroneous decision to strike the declarations would adversely affect Plaintiffs and should be addressed now.

The stricken declarations from Jim Gray and Wilson Pipestem, individuals with personal knowledge of the settlement and its negotiation, show that the United States did not settle the claims made by Plaintiffs in this litigation. The basis for the Court of Claims' decision was paragraph 11(g) of that Settlement Agreement, which provides:

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

Aplt. App. at 504-505. According to the Court of Claims, the Court was required to strike the declarations because they were created to "aid, assist, or support in . . .

the development, initiation, or litigation of a claim against the United States." *Id.* at 7 (quoting the No Cooperation clause).

The Court, however, only applied half of the clause. The clause goes on to limit the "aid, assist, or support" provision to claims "the Osage Tribe has otherwise **waived** in this Agreement." *Id*. at 504-505 (emphasis added). Here, the Court of Claims never made a finding that the Osage Tribe waived Plaintiffs' claims in this action. In fact, the Osage Tribe does not even have authority to do so, and the United States previously lost this issue in the Northern District of Oklahoma:

> Turning to the merits, the court finds no evidence or authority to support the government's contention that plaintiffs are bound by the Osage Nation's purported waiver of their accounting rights. As previously mentioned, § 4011(a) grants *both* the Osage Nation *and* the headright owners the right to an accounting of funds held on their behalf under the 1906 Act. *See Fletcher II*, 730 F.3d at 1209. Nothing in these provisions, or any other statute cited by the parties, gives the tribe authority to waive the individual accounting rights of the headright owners. The government contends that the tribe possesses such authority as the "elected representative" of the headright owners, [Dkt. #1279, Oct. 2014 Hearing Transcript, p. 86], but nothing in the Osage Constitution purports to confer such authority, *see* Osage Nation Const. art. 15. Further, even if it did, such a grant would conflict with—and thus be preempted by—federal law, which assigns separate accounting rights to the plaintiffs and the tribe. *See Winton v. Amos*, 255 U.S. 373, 391 (1921) ("Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property."); *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) ("Congress

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

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

There was no finding, nor could there be such a finding, that the Osage Nation waived Plaintiffs' claims. As such, the Court of Claims' decision on the Motion to Strike should be reversed.

VIII. The Court of Claims Erred in Finding that Plaintiffs Are Barred from Presenting Their Claim for Damages in This Litigation.

Under the long-established *Klamath* theory, the Court of Claims "has the power to require an accounting in aid of its jurisdiction to render a money judgment on that claim. . . ." *Klamath & Modoc Tribes & Yahooskin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 490 (1966); *see also Oglala Sioux*, 21 Cl. Ct. at 183 n. 9 (the *Klamath* theory provides that once an Indian tribe proves a breach of fiduciary obligations by the United States, the Court of Claims "may require an accounting in aid of its jurisdiction to render a money judgment on those claims").

By bringing suit in district court first, Mr. Fletcher did not lose the opportunity to later file in the Court of Claims. *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316–17, 131 S. Ct. 1723, 1730–31 (2011). Indeed, an Indian group "may seek an accounting in federal district court to identify any breach of the government's investment and accounting duties and proceed with an action if it discovers any financial impropriety." *Inter-Tribal Council*, 125 Fed. Cl. at 505 n. 16. Such an "accounting sought in the district court suit (required incident to fiduciary responsibilities as well as by statute) may be a predicate for at least proof of damages or identification of additional breaches in the CFC action...." *Rosebud Sioux Tribe v. United States*, 102 Fed. Cl. 429, 436 (2011).

Quite simply, the accounting helped identify specific breaches, all of which occurred during the accounting period and which all-but-certainly also occurred before the accounting period and continue to occur. Though the accounting Mr. Fletcher obtained was time-limited, there is no basis for that accounting to limit the Court of Claims' "power to require an accounting in aid of its jurisdiction to render a money judgment. . . ." *Klamath*, 174 Ct. Cl. at 490. Nor should Plaintiffs' damages in this action be abruptly truncated.

The Court of Claims accepted the United States' characterization of Plaintiffs' full damages request to be a request for an "expanded" accounting. *See* Aplt. App. at 14 ("plaintiffs' claims for an expanded accounting is identical to the

issue decided" in *Fletcher III*). But this is in clear contrast to how Plaintiffs described their request for an accounting to the Court:

> On the accounting question, we did use the word "accounting" in the complaint. You know, I don't have tons and tons of experience before the Court of Federal Claims. I've read a lot of the cases. But what I have read is that oftentimes in these cases the Court may say, well, figure out how much is owed and then do an accounting of that. And so, you know, when I was drafting the complaint, that's what I was envisioning as a potential for the resolution of the case and that's why it's listed in the remedy section in the end.
>
> I fully agree that this is not a case about getting a whole 'nother accounting. We're not looking for that. We're not going in that direction. We have the accounting the United States provided. We have our damages experts. We're ready to go to trial. Mr. Fletcher is 80 years old, and he's been working on this case for a long time, and I want him to see a judgment. And we've been working really hard to get him there.

Aplt. App. at 679-680.

To be sure, Plaintiffs will seek discovery into the United States' identified breaches in both the pre-accounting and post-accounting years. The accounting from the District Court was never intended to apprise Plaintiffs of the complete scale of breaches. Instead, it was targeted to provide adequate information "from which the beneficiary can determine whether there has been a loss." *See Wolfchild v. United States*, 731 F.3d 1280, 1290–91 (Fed. Cir. 2013) (quoting Pub. L. No. 108–108, 117 Stat. 1241, 1263 (2003)) (internal quotations omitted). As trust beneficiaries, Plaintiffs "are entitled only to information that is reasonably necessary to enable them to enforce their rights under the trust." *Fletcher II*, 730

F.3d at 1215 (internal alternations and quotations omitted). Such an accounting need only "give some sense of where money has come from and gone to." *Id.* Indeed, that is all the ordered accounting facilitated.

Now, Plaintiffs seek recovery for all damages which they have identified, though for which they do not yet know the full "quantum." *See Chemehuevi*, 150 Fed. Cl. at 204 (Court of Claims to facilitate accountings to allow parties to ascertain the value or quantum of the damages at issue).

CONCLUSION

Justice has long been denied to American Indians and, particular to this instance, justice has been long-delayed for Osage headright holders. After costly and protracted litigation, Plaintiffs—for the first time in history—finally received their entitled-to yet long-denied accounting. And that accounting showed what Plaintiffs suspected all along: that the United States was not fulfilling its trust obligations.

Quite literally, a generation has passed while this litigation has been grinding along. To date, the only relief Plaintiffs have obtained is a paper accounting which demonstrates that the United States has improperly—and substantially—diminished their headright distributions. This is not to say the accounting was not "meaningful," but it certainly is hollow under the Court of Claims' Opinion. So long as the United States is allowed to shirk its obligations—

spelled out clearly in the 1906 Act—justice will remain out of reach for this generation of Osage headright holders, just as it was for those before who were deprived of knowing how the United States was (mis)handling their trust funds.

Plaintiffs have articulated clear fiduciary obligations the United States is required—but has failed—to properly perform as a part of its trust duties to headright holders. Everyone in this litigation would certainly agree that Plaintiffs have an interest in their headright distributions. However, the parties diverge as to whether Plaintiffs have anything that is "protectable." The Court of Claims' position on this is clearly erroneous and, as detailed above, should be reversed and remanded.

Respectfully submitted,

Dated: March 15, 2021

THE INDIAN & ENVIRONMENTAL LAW GROUP

/s/ Jason B. Aamodt
Jason B. Aamodt, CFC Bar No. OK-13
406 S. Boulder Ave, Suite 830
Tulsa, OK 74013
(918) 347-6169
jason@iaelaw.com

Counsel for Appellants

In the United States Court of Federal Claims

No. 19-1246
Filed: December 7, 2020

FLETCHER, et al., Plaintiffs, v. THE UNITED STATES, Defendant.	Tribal Trust; Native American Trust Management; Tucker Act; 28 U.S.C. § 1491; Indian Tucker Act; 28 U.S.C. § 1505; Motion to Dismiss; RCFC 12(b)(1); Subject Matter Jurisdiction; RCFC 12(b)(6); Standing; Issue Preclusion; RCFC 12(e); Motion to Strike; RCFC 12(f).

Jason Bjorn Aamodt, Indian and Environmental Law Group, LLC, Tulsa, OK, for plaintiffs.

Sara E. Costello, U.S. Department of Justice, Environment & Natural Resources Division, Washington, DC, for defendant.

OPINION AND ORDER

***SMITH*, Senior Judge**

This action is before the Court on defendant's Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(6), and 12(e) of the Rules of the Court of Federal Claims ("RCFC"), and on defendant's Motion to Strike pursuant to RCFC 12(f). On August 21, 2019, plaintiffs filed their Complaint with this Court, seeking "monetary restitution" for defendant's "gross mismanagement of the Osage Headright Trust fund." Complaint at 1–2 [hereinafter Compl.]. On December 20, 2019, defendant filed its Motion to Dismiss, arguing the following: (1) plaintiffs do not have a legally protectable interest to support standing; (2) this Court lacks jurisdiction over plaintiffs' claims under the Indian Tucker Act, the Tucker Act, and other authorities identified in plaintiffs' Complaint; and (3) plaintiffs' claims are barred by the doctrine of issue preclusion. United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim upon Which Relief Can Be Granted at 1–2, ECF No. 7 [hereinafter Def.'s MTD]. For the reasons set forth below, the Court grants both defendant's Motion to Dismiss and defendant's Motion to Strike.

I. Background

A. Historical Facts

Under Article I of the United States Constitution, Congress possesses the plenary power to "regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. Const. art. I, § 8. In 1872, Congress established a reservation for the Osage Tribe

of Indians ("Osage Tribe" or "Osage Nation")[1] in the Oklahoma Territory, *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010), which "contained about a million and a half acres of fertile well-watered prairie land and of heavily timbered hill lands, largely underlaid with petroleum, natural gas, coal and other minerals." *McCurdy v. United States*, 246 U.S. 263, 265 (1918). Once the federal government discovered the resources beneath the Osage lands, it designated itself trustee in order to collect and distribute royalty payments to tribal members. *Fletcher v. United States*, 730 F.3d 1206, 1207 (10th Cir. 2013) ("*Fletcher II*").

In furtherance of this trust scheme, Congress passed the Osage Allotment Act of 1906 which "severed the mineral estate underlying Osage lands [('Osage Mineral Estate')] from the surface estate, placed the mineral estate in trust, [and] directed the Secretary of Interior to collect [and distribute] royalties," with interest, to individual members of the Osage Tribe on a quarterly, pro rata basis. *Id*.; *see also* Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory, and for other Purposes, Pub. L. No. 59-321 §§ 3–4, 34 Stat. 539, 543–44 (1906) [hereinafter 1906 Act].

Specifically, Section Three of the 1906 Act, severed the Osage Mineral Estate from the surface estate, reserving "the oil, gas, coal, or other minerals" for the Osage Nation. 1906 Act § 3. Section Three allows the Osage Tribe to lease the Osage Mineral Estate for oil, gas, and mineral development with the approval of the Secretary of the Interior, provided that royalties are paid to the Osage Tribe under any mineral lease as determined by the President of the United States. *Id*. Section Four of the 1906 Act establishes the trust ("Osage Tribal Trust Account") relationship between the United States and the Osage Tribe. *See id*. § 4. Section 4 details that the funds of the Osage tribe "shall be segregated" and "placed to the credit of the individual members of the [] Osage tribe on a [pro rata basis with] division among the members of [the] tribe."[2] *Id*. Funds from the Osage Tribal Trust Account are distributed to headright owners by direct check or, more likely, distributions made to Individual Indian Money ("IIM") accounts.[3] *Fletcher v. United States*, 153 F. Supp. 3d 1354, 1356 (N.D. Okla. 2015) ("*Fletcher I*"). "An IIM account is 'an interest bearing account for trust funds held by the Secretary that belong to a

---

[1] As defined in the *Osage* Settlement Agreement, the "Osage Tribe" is identified as the Osage Tribe of Indians of Oklahoma, the tribal government established under the 1906 Act, which is now federally recognized as the "Osage Nation." United States' Motion to Strike the Declarations of Jim Gray and Wilson Pipestem, ECF No. 15 [hereinafter Def.'s Mot. to Strike], Exhibit ("Ex.") 1 at 6 [hereinafter *Osage* Settlement Agreement]; *see also Osage Nation v. United States*, 57 Fed. Cl. 392, 393 (2003) ("*Osage I*").

[2] Congress created an official tribal role to determine who qualified as a tribal member for purposes of receiving an interest in the mineral estate. *Fletcher v. United States*, 730 F.3d 1206, 1207 (10th Cir. 2013). As time went on tribal members sold, gave away, or bequeathed their royalty interest (known as "headrights") or portions thereof which resulted in non-tribal members owning a headright in the Osage mineral estate. *Id*. at 1208. As a result, Congress limited this practice, of assigning headrights to non-tribal members, through legislative amendments. *Id*.

[3] A "headright" is defined as "the right to a distribution of a portion of the proceeds of the Osage Mineral Estate, as provided by the 1906 Act and the tribal roll created pursuant to the 1906 Act." *Osage* Settlement Agreement at 5. A "headright holder" is "the lawful owner of any interest in any Headright, including fractional interests." *Id*.

person who has an interest in trust assets.'" *Id*. (citing 25 C.F.R. § 115.002). Individual headright owners may withdraw funds from their IIM accounts to access their money.

In summary, the United States places funds derived from the Osage Mineral Estate into the Osage Tribal Trust Account, which is later segregated and placed into IIM accounts, as a means of distribution to headright owners. *See* 1906 Act § 4. Sections Three and Four of the 1906 Act obligate the United States to hold in trust and, consequently, manage all mineral royalties received on behalf of the Osage Tribe. *See* 1906 Act §§ 3–4.

B. Prior Related Litigation

In 2000, the Osage Nation filed a separate complaint with this Court, asserting that the United States breached its fiduciary duties to the Osage Nation "in the mismanagement of tribal trust funds and for failure to account." *Osage Nation v. United States*, 57 Fed. Cl. 392, 393 (2003) ("*Osage I*"). On October 14, 2011, after years of litigation, the parties executed a settlement agreement to resolve that case. *See* United States' Motion to Strike the Declarations of Jim Gray and Wilson Pipestem, ECF No. 15 [hereinafter Def.'s Mot. to Strike], Ex. 1 [hereinafter *Osage* Settlement Agreement]. The *Osage* Settlement Agreement, among other terms and resolutions, resulted in the payment of $380,000,000.00, of which $345,800,000.00 was deposited into the Osage Tribal Trust Account. *Osage* Settlement Agreement at 9. The *Osage* Settlement Agreement expressly waived and released any and all of the Osage Nation's claims and/or liabilities "based on harms or violations . . . 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 [h]eadright [h]olders on or before September 30, 2011." *Id.* at 10. Additionally, Section Eleven, paragraph g of the *Osage* Settlement Agreement expressly prohibits the "Osage Tribe, its officers or employees, including the Osage Minerals Council . . . [from] aid[ing], assist[ing], or support[ing] in any way any individual or party in the development, initiation, or litigation of a claim against the United States that the Osage Tribe has otherwise waived in this Agreement." *Id*. at 24–25.

In 2002, plaintiffs originally brought a complaint in the Northern District of Oklahoma ("District Court") over "tribal voting rights of non-headright-owning Osage Indians" which later evolved into a complaint concerning the federal government's "allegedly wrongful distribution of Osage royalty income to non-Osages and its failure to account to the headright owners." *Fletcher I*, 153 F. Supp. 3d at 1357–58. The federal government moved to dismiss plaintiffs' accounting claim, *inter alia*, because it argued that there was no trust relationship between the federal government and headright owners. *Id*. The District Court held that "the 1906 Act created a limited trust relationship between the federal government and the Osage headright owners" which "only took effect upon distribution [to the headright owners] and that, prior to distribution, royalty funds were held in trust for the Osage Nation only." *Id*. The District Court held that, based on this limited trust relationship, plaintiffs could not seek an accounting. *Id*. The United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") reversed the District Court, holding that plaintiffs could seek an accounting. *Fletcher II*, 730 F. 3d at 1209–10 (holding that the trust funds collected and disbursed under the 1906 Act for the benefit of individual Osage tribal members indicates that "Congress has chosen to afford individual tribal members the statutory right to seek and obtain an accounting.").

On remand, the District Court used its discretion to determine the nature and scope of the accounting due to plaintiffs. *Fletcher I*, 153 F. Supp. 3d at 1360. After the District Court determined the scope and time period of the accounting, plaintiffs challenged that ruling, arguing that the accounting should go back to 1906, instead of 2002, and that the government should give a "more detailed accounting." *Fletcher v. United States*, 854 F.3d 1201, 1204–05 (10th Cir. 2017) ("*Fletcher III*"). The Tenth Circuit held that the District Court did not abuse its discretion in determining the time period or scope of accounting. *Id*. Regarding the time period, the Tenth Circuit stated that "district courts must be reasonable, not punitive, when sitting in equity, and requiring the government to sift through more than 100 years of records does not achieve the balance we envisioned in *Fletcher II*." *Id*. at 1206 (citing *Fletcher II*, 730 F.3d at 1214). As to the scope of accounting, the Tenth Circuit stated that it was bound by *Fletcher II*, and a duty to account is not the same as a "duty to respond to and disprove any and all potential breaches of fiduciary duty a beneficiary might wish to pursue once the accounting information is in hand." *Id*. (citing *Fletcher II*, 730 F.3d at 1215). Accordingly, the Tenth Circuit affirmed the District Court's holding. *Id*. at 1207.

C. Current Litigation

On December 20, 2019, defendant filed its Motion to Dismiss with this Court, arguing that plaintiffs lack standing, that the Indian Tucker Act does not provide this Court with jurisdiction over plaintiffs' claims, and that plaintiffs' claims are barred by the doctrines of claim preclusion, issue preclusion, waiver, and release. Def.'s MTD at 1–2. Defendant additionally contends that plaintiffs "failed to identify any money-mandating statutory or regulatory trust duties" that the United States owes to plaintiffs. *Id*. at 2. In the alternative, defendant claims that plaintiffs "should be required to make a more definite statement pursuant to RCFC 12(e)," as plaintiffs' Complaint is "vague and ambiguous." *Id*. at 2, 44.

On February 18, 2020, plaintiffs filed their Response to defendant's Motion to Dismiss, asserting, *inter alia*, that the Court does have jurisdiction over this matter, that plaintiffs do have standing, and that the prior accounting action in the Northern District of Oklahoma does not limit the scope of remedy in this matter. *See* Plaintiffs' Response in Opposition to United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim upon Which Relief Can Be Granted at 1–2, ECF No. 10 [hereinafter Pls.' Resp. to Def.'s MTD]. Among the exhibits attached to plaintiffs' Response are the Declarations of Jim Gray and Wilson Pipestem. *See id*. Ex. 5 [hereinafter Gray Decl.], 7 [hereinafter Pipestem Decl.]. On March 30, 2020, defendant filed its Reply, reiterating its arguments in support of its Motion to Dismiss. *See* United States' Reply Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim upon Which Relief Can Be Granted, ECF No. 16 [hereinafter Def.'s Reply in Supp. of MTD].

On March 30, 2020, defendant filed a motion to strike both the declaration of Jim Gray, the former Principal Chief of the Osage Nation, and the declaration of Wilson Pipestem,[4] the

[4] As lead counsel, Wilson Pipestem was involved in the final eight years of the eleven-year litigation in the previous *Osage* litigation, which began in 2000. He was involved in "every meaningful settlement discussion with the United States." *See* Plaintiffs' Response in

former lead counsel in the previous litigation[5] before this Court between the Osage Nation and the United States. Def.'s Mot. to Strike at 2–3. In 2011, the previous *Osage* litigation resulted in a comprehensive settlement agreement, which waived and released all of the Osage Nation's trust claims. *Id*. at 1. In its Motion to Strike, defendant asks the Court to strike both declarations, as they are "in violation of the [*Osage*] Settlement [Agreement], include legal conclusions, and are unhelpful to the Court." *Id*. On April 14, 2020, plaintiffs filed their Response, arguing that the Court should not strike the declarations, as they do not violate the *Osage* Settlement Agreement and because the declarations provide factual—not legal—conclusions. *See* Plaintiffs' Response in Opposition to United States' Motion to Strike the Declarations of Jim Gray and Wilson Pipestem at 2, ECF No. 17 [hereinafter Pls.' Resp. to Def.'s Mot. to Strike]. On April 20, 2020, defendant filed its Reply, reiterating its arguments in support of its Motion to Strike and further alleging that plaintiffs both misconstrued and failed to address defendant's arguments therein. United States' Reply in Support of Motion to Strike the Declarations of Jim Gray and Wilson Pipestem at 1, ECF No. 18 [hereinafter Def.'s Reply in Supp. of Mot. to Strike]. The Court held oral argument on June 3, 2020, and both defendant's Motion to Dismiss and Motion to Strike are fully briefed and ripe for review.

In summary, plaintiffs seek monetary restitution for defendant's "breach of statutorily-imposed trust obligations" including the following allegations: the defendant failed to (1) provide adequate systems and controls for accounting for and reporting trust fund balances; (2) establish written policies and procedures or provide adequate staffing, supervision, and training for trust fund management and accounting; and (3) provide accurate periodic statements of headright owners' accounts. Comp. at 23–26. As a result, plaintiffs claim that defendant breached its fiduciary obligations and mismanaged plaintiffs' money. *Id*. at 26.

II. Standard of Review

In determining whether subject matter jurisdiction exists, the Court will treat factual allegations in a complaint as true and will construe them in the light most favorable to the plaintiff. *Estes Express Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014) (citing *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d. 1573, 1583–84 (Fed. Cir. 1993)). When a party challenges whether this Court possesses subject matter jurisdiction, the plaintiff must establish, by a preponderance of the evidence, that this Court has jurisdiction over its claims. *See Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011) (citing *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)). In reviewing such a claim, the Court "must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Id*. (citing *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995)).

Opposition to United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim upon Which Relief Can Be Granted, Ex. 7 at 1 [hereinafter Pls.' Resp. to Def.'s MTD].

[5] The previous *Osage* litigation commenced in 2000 when the Osage Nation filed a complaint with this Court, asserting that the United States breached its fiduciary duties to the Osage Nation and mismanaged both the Osage Mineral Estate and the Osage Tribal Trust Account. *Osage I*, 57 Fed. Cl. at 393.

The Court will dismiss a case pursuant to RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." *Spectre Corp. v. United States*, 132 Fed. Cl. 626, 628 (2017) (quoting *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002)). In reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, the Court "must accept as true all the factual allegations in the complaint . . . and we must indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (internal citations omitted). The Court need not, however, "accept legal conclusions cast in the form of factual allegations," *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008) (citing *Kowal v. MCI Commc'ns. Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)), and the Court will grant a motion to dismiss when faced with conclusory allegations that lack supporting facts, as "a formulaic recitation of the elements of a cause of action" alone will not withstand a motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007).

III. Discussion

A. Motion to Strike

In their Response to the Motion to Dismiss, plaintiffs attached the declarations of Jim Gray and Wilson Pipestem to support their argument that that the *Osage* Settlement Agreement "would not affect Plaintiffs' claims." Pls.' Resp. to Def.'s MTD at 19 (citing Gray Decl.; Pipestem Decl.). In its Motion to Strike, defendant argues that the declarations of Jim Gray and Wilson Pipestem should be stricken, as "they are in violation of the *Osage* Settlement [Agreement], include legal conclusions, and are not helpful to the Court." Def.'s Mot. to Strike at 3. In support of its first argument—that the declarations violate the *Osage* Settlement Agreement—defendant quotes the No Cooperation Clause from that Agreement, which states, in relevant part, the following:

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

Osage Settlement Agreement at 24–25. Plaintiffs claim that, because they were not parties to the *Osage* Settlement Agreement, the No Cooperation Clause does not apply. *Id.* at 8. Furthermore, plaintiffs contend that the No Cooperation Clause is unenforceable here because the declarations are not "being offered to present testimony on some confidential aspect of the [*Osage*] [S]ettlement [A]greement" but, rather, simply provide "narrow testimony regarding the scope of waiver . . . and whether the contracting parties intended to waive the claims of non-parties to the Settlement." *Id.* at 9–10.

As "Mr. Gray 'served as the Principal Chief of the Osage Nation from 2002 to 2010,'" a position which the Osage Nation Constitution vests with "'the supreme executive power of the Osage Nation,'" defendant asserts that, consistent with the meaning of the No Cooperation

Clause, Mr. Gray qualifies as an officer. Def.'s Reply in Supp. of Mot. to Strike at 3 (first quoting Gray Decl. at 1; and then quoting Osage Const. art. VII, § 1). "Officer" is defined by Black's Law Dictionary as "[s]omeone who holds an office of trust, authority, or command. [] In public affairs, the term usually refers esp. to a person holding public office under a national, state, or local government, and authorized by that government to exercise some specific function." *Officer*, Black's Law Dictionary (11th ed. 2019). Therefore, as the Principal Chief, Mr. Gray was clearly an officer of the Osage Tribe for the purposes of the No Cooperation Clause.

Next, defendant contends that, given Mr. Pipestem's position as "lead counsel for the Osage Nation for the final eight years of the eleven-year litigation" before this Court, and consistent with both the meaning of the No Cooperation Clause and Black's Law Dictionary's definitions of an agent and an employee, Mr. Pipestem "acted as an agent and/or employee of the Osage Nation." *See* Def.'s Mot. to Strike at 3 (quoting Pipestem Decl. at 1); Def.'s Reply in Supp. of Mot. to Strike at 3–4 (first citing Pipestem Decl. at 1; then citing *Agent,* Black's Law Dictionary (11th ed. 2019); and then citing *Employee,* Black's Law Dictionary (11th ed. 2019)). "Agent" is defined by Black's Law Dictionary as "[s]omeone who is authorized to act for or in place of another; a representative []." *Agent*, Black's Law Dictionary (11th ed. 2019). "Employee" is defined by Black's Law Dictionary as "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." *Employee*, Black's Law Dictionary (11th ed. 2019). As lead counsel for the Osage Tribe, Mr. Pipestem both was "authorized to act for" the tribe and worked "in the service of" the tribe "under an express" contract. *See Agent*, Black's Law Dictionary (11th ed. 2019); *see also Employee*, Black's Law Dictionary (11th ed. 2019). Therefore, Mr. Pipestem was clearly an agent or employee of the Osage Tribe for the purposes of the No Cooperation Clause.

"When contract language is unambiguous, the plain language of the contract is controlling." *BPLW Architects & Eng'rs, Inc. v. United States*, 106 Fed. Cl. 521, 537 (2012) (citing *Bristol-Myers Squibb Co. v. United States*, 48 Fed. Cl. 350, 355 (2000)). The Federal Circuit has stated that "[a] contract is ambiguous only when it is susceptible to two reasonable interpretations." *Hunt Const. Grp., Inc. v. United States*, 281 F.3d 1369, 1372 (Fed. Cir. 2002) (quoting *A-Transport Northwest Co. v. United States*, 36 F.2d 1576, 1584 (Fed. Cir. 1994)). The Federal Circuit continued by stating that "[w]hen the contract language is unambiguous on its face, [the Court's] inquiry ends, and the plain language of the contract controls." *Hunt*, 281 F.3d at 1373. The No Cooperation Clause clearly states that officers, employees, or the Osage Tribe itself shall not aid, assist, or support any individual or party from attempting to raise claims which are waived by the *Osage* Settlement Agreement. *See Osage* Settlement Agreement at 24–25. The No Cooperation Clause is unambiguous, and therefore the plain language of the contract is controlling. As the No Cooperation Clause applies to both Mr. Gray and Mr. Pipestem, and, as both declarations were created to "aid, assist, or support in . . . the development, initiation, or litigation of a claim against the United States," *Id*. at 24–25, the Court must strike those declarations from the record.

B. Threshold Issues

In their Complaint, plaintiffs allege that the United States breached its "statutorily-imposed trust obligations, which resulted in a loss of trust funds to Plaintiffs and to the putative class." Compl. at 1. Plaintiffs assert that this Court has jurisdiction pursuant to the Tucker Act, the Indian Tucker Act, the 1906 Act, "other acts of Congress set forth in Appendices A & B" of their Complaint, and "the Department of the Interior and Related Agencies Appropriations Act, Public Law No. 108-7 (herein the 'Appropriation Acts')." *Id.* at 2–3. Furthermore, plaintiffs contend that the "statutes and regulations defining Defendant's duties in managing Indian trust funds create specific fiduciary duties that provide for compensation for damages in the event of the breach of these duties." *Id.* (citing *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 738–39 (2011)).

In its Motion to Dismiss, defendant argues, *inter alia*, that plaintiffs' Complaint should be dismissed on the following jurisdictional grounds: (1) plaintiffs fail to establish that the Court has jurisdiction pursuant to the Indian Tucker Act, as plaintiffs are not an "identifiable group of Indians"; (2) plaintiffs lack standing, as they "cannot show that they have suffered an 'injury in fact' because they have not asserted a legally protected interest"; and (3) plaintiffs fail to "identif[y] any money-mandating statutory or regulatory trust duties" for the purpose of establishing jurisdiction under both the Tucker Act and the Indian Tucker Act. *See* Def.'s MTD at 13–14, 33–43. Additionally, defendant contends that issue preclusion bars plaintiffs from seeking an expanded accounting of the Osage Tribal Trust Account. *Id.* at 26.

For the reasons more fully set forth below, the Court concludes the following: (1) plaintiffs lacks standing to bring their claims; (2) plaintiffs' claims lack subject matter jurisdiction under the Indian Tucker Act, Tucker Act, the 1906 Act, and other authorities identified by plaintiffs' Complaint; and (3) plaintiffs' request for an expanded accounting is barred by issue preclusion.

1. Standing

In order to proceed with any litigation, the parties must demonstrate standing. Whether a plaintiff has standing to pursue its claims is a "threshold jurisdictional issue." *Myers Investigative & Sec. Servs. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–04 (1998)). "The party invoking federal jurisdiction bears the burden of establishing these elements", *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)), which the Supreme Court has held are the following:

> (1) [plaintiff] has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 528 U.S. 167, 180–81 (2000) (citing *Lujan*, 504 U.S. at 560–61).

i. Injury-in-Fact

Defendant argues that plaintiffs have not suffered an "injury in fact" because plaintiffs "have not asserted a legally protectable interest." *Id*. at 15. Defendant points out that plaintiffs are bringing their claims in the context of the accounting they received under *Fletcher*. *Id*. (citing Compl. ¶¶ 4, 50). Defendant argues that because the accounting was for 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," plaintiffs lack standing to seek damages regarding the management of the Osage Tribal Trust Account. *Id*. Defendant points out that the Osage Tribal Trust Account is "held for the benefit of the Osage Nation, not individual Tribe members or Osage headright holders." *Id*.

Further, defendant argues that the distribution of communal assets through the tribe to recipients does not create an individual right on the part of the beneficiary. *See id*. at 16 ("[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.'") (quoting *Chippewa Cree Tribe of Rocky Boy's Rsrv. v. United States*, 73 Fed. Cl. 154, 160 (2006)). Defendant points to *Osage Tribe v. United States*, arguing "that [Osage] headright holders do not have a legally protectable interest in the Osage Tribal Trust Account." *Id*. (citing *Osage Tribe of Indians v. United States*, 85 Fed. Cl. 162, 171–72 (2008) ("*Osage VI*")). *Osage VI* held that headright holders are not a party to the trust relationship between the Osage Nation and the United States, and, as such, they "do not have a legally protectable interest in a dispute concerning a trust relationship to which they are not a party." *Id*. at 17 (quoting *Osage VI*, 85 Fed. Cl. at 171–72).

The Court previously decided the issues underlying the case at bar through litigation of *Osage Tribe of Indians v. United States*, and, as such, it is inclined to follow that precedent. *Osage VI*, 85 Fed. Cl. 162 (stating that the "headright holders are not in fact 'the real parties in interest' because the Tribe, not the headright holders, is the direct trust beneficiary.") (quoting from *Osage I*, 57 Fed. Cl. at 395; *Osage Tribe of Indians of Okla. v. United States*, 81 Fed. Cl. 340, 349 (2008) ("Osage V")). Under *Osage I*, this Court held that the "responsibility of the government is to the tribal trust fund account" with the "tribal trust fund [] then responsible for the ultimate distribution to the individual headright owners." *Id*. Accordingly, plaintiffs' claims regarding trust fund mismanagement are not appropriately asserted against the government because the government's responsibility to correctly distribute and manage funds is a fiduciary duty owed to the tribe—not individual tribal members. *See id*.

Further, the "fact that the ultimate distribution of any funds awarded to the Osage Tribe will be placed to the credit of the headright holders does not in itself create a legal right enforceable in this action." *Osage VI*, 85 Fed. Cl. at 171. This Court takes note of the decision reached by the Tenth Circuit, specifically—and as of yet exclusively—concerning the duty to account, the 1906 Act created a trust relationship between the federal government and the individual Osage headright owners. *See Fletcher II*, 730 F.3d at 1209. This Court interprets the merely persuasive decision of the Tenth Circuit narrowly and will not now judicially create additional fiduciary duties on the government beyond the contours of the specific accounting

articulated by the Tenth Circuit and the Northern District of Oklahoma. *See Fletcher III*, 854 F.3d 1205–07; *see also Fletcher I*, 153 F. Supp. 3d at 1369–72. Accordingly, the plaintiffs do not have an injury in fact and therefore do not have standing to bring their claims.

2. Subject Matter Jurisdiction

The Tucker Act is only a jurisdictional statute and "does not create substantive rights enforceable against the United States for money damages." *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*") (quoting *United States v. Testan*, 424 U.S. 392, 398 (1976) (*superseded by statute,* Civil Service Reform Act of 1978, 5 U.S.C. § 5596 (b)(4))). Plaintiffs "must identify a separate source of substantive law that creates the right to money damages" for their claim to come within the jurisdictional reach and waiver of the Tucker Act. *Jan's Helicopter Serv. v. FAA*, 525 F.3d 1299 (Fed. Cir. 2008) (quoting *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc)). Accordingly, a plaintiff has jurisdiction to bring its claim if the claim is for money damages against the United States and if plaintiff can "demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *Id*. at 1306 (quoting *Mitchell II*, 463 U.S. at 216–17). On the contrary, if "plaintiff's case does not fit within the scope of the [money-mandating] source . . . plaintiff loses on the merits for failing to state a claim on which relief can be granted." *Id*. at 1307 (citing *Fisher*, 402 F.3d at 1175–76).

The Indian Tucker Act, similar to the Tucker Act, creates a limited waiver of sovereign immunity and states, in relevant part, the following:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians . . . 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 (2018); *see United States v. Navajo Nation*, 556 U.S. 287, 289–90 (2009) ("*Navajo II*"). The Supreme Court has held that the Indian Tucker Act, much like the Tucker Act, does not "create[] substantive rights," but, rather, it is a "jurisdictional provision[] that operate[s] to waive sovereign immunity for claims premised on other sources of law (*e.g.*, statutes or contracts)." *Navajo II*, 556 U.S. at 290 (citing *Testan*, 424 U.S. at 400; *United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("*Mitchell I*")). Importantly, the courts have made clear that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act," and by extension the Indian Tucker Act; rather, a plaintiff must bring a claim for money damages against the United States and "demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *Mitchell II*, 463 U.S. at 216–17 (citing *Testan*, 424 U.S. at 400).

Plaintiffs bear the burden of establishing subject matter jurisdiction. *See Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors*

Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936)). If the facts upon which jurisdiction is predicated are challenged, the plaintiffs must demonstrate the existence of a factual basis for jurisdiction by a preponderance of the evidence. *Reynolds*, 846 F.2d at 748; *McNutt*, 298 U.S. at 189. The Court must dismiss the action if it determines at any time that subject matter jurisdiction is lacking. *See* R. Ct. Fed. Cl. 12(h)(3).

i. The Indian Tucker Act

As the Court iterated above, the Indian Tucker Act is a jurisdictional statute that "authorizes this court to hear claims brought by any 'tribe, band, or other identifiable group of American Indians.'" *Osage VI,* 85 Fed. Cl. at 167; *see Rosebud Sioux Tribe v. United States*, 102 Fed. Cl. 429, 432 (2011); *see also Navajo II*, 556 U.S. at 290 (2009) (citing *Testan*, 424 U.S. at 400; *Mitchell I*, 445 U.S. at 538). Thus, for plaintiffs to bring a claim under the Indian Tucker Act, they must qualify as an "identifiable group of American Indians" pursuant to 28 U.S.C. § 1505.

Plaintiffs in this case include William Fletcher, Tara Damron, and Kathryn Red Corn, who are, individually, Osage Headright Owners and citizens of the Osage Nation, as well as Richard J. Lonsinger, an Osage Headright Owner and citizen of the Ponca Tribe of Indians of Oklahoma. Compl. at 4. Plaintiffs state that the "Putative Class Members are Osage Headright Owners and citizens of more than one federally-recognized Indian tribe." *Id.* In its Motion to Dismiss, defendant argues that the Court does not have jurisdiction over plaintiffs' claims pursuant to the Indian Tucker Act, as plaintiffs "are not a 'tribe, band, or other identifiable group of American Indians.'" Def.'s MTD at 33. In support of that argument, defendant asserts that this Court's decision in *Osage* "held that the [Osage] headright holders were not an 'identifiable group' of Indians," because they are members of the Osage Tribe, and are different from other claimant groups that are "not represented by tribes who could establish jurisdiction on their own." *Id.* at 33–34 (quoting *Osage VI*, 85 Fed. Cl. at 167–68). As such, defendant contends that plaintiffs, as Osage Headright Owners, are "members of the Osage Nation, which has already brought claims challenging the government's management of the Osage tribal resources at issue." *Id.* at 34. Accordingly, defendant argues that, "[b]ecause plaintiffs are not a tribe, band, or other identifiable group of Indians, this Court lacks jurisdiction under 28 U.S.C. § 1505." *Id.*

In their Response, plaintiffs claim that they are an identifiable group of American Indians, as "many persons who have headrights are not Osage, but are Indian," including plaintiff Lonsinger, who is a member of the Ponca Tribe of Indians of Oklahoma. Pls.' Resp. to Def.'s MTD at 25. As such, plaintiffs contend that the current and putative "Plaintiffs represent a cross section of the identifiable group of American Indians who each hold a headright." *Id.* Plaintiffs argue that "courts should take a liberal viewpoint in determining whether a plaintiff is an 'identifiable group of American Indians,'" as the *Chippewa* decision "noted how [the] determination of [an] 'identifiable group required a more limited showing of formal relationship than that required for a tribe or band.'" *Id.* at 26 (quoting *Chippewa*, 69 Fed. Cl. at 673) (internal citation omitted). Against this backdrop, plaintiffs contend that they are an identifiable group "due to the way the United States has administered their trust by granting them 'shares' in the royalty production of the Osage Mineral Estate." *Id.* (citing Compl. ¶ 54).

Here, plaintiffs fail to identify any legal authority or case in which this Court has held that members of a currently-existing tribe, when supplemented by a single member of another tribe, constitutes an "identifiable group of American Indians" in accordance with the Indian Tucker Act. Further, the Court's review of relevant case law, including *Osage VI*, leads it to conclude that plaintiffs are not in fact an identifiable group of American Indians. *See Osage VI*, 85 Fed. Cl. 162. In *Osage VI*, this Court held that intervenors, individual members of the Osage Tribe, were not considered an "identifiable group" for purposes of the Indian Tucker Act because the proposed intervenors did not lack formal organization as a tribe. *Id*. at 168 ("Proposed intervenors do not lack formal organization as a tribe but are members of plaintiff[s'] tribe, the Osage Nation."). Similarly, the Osage Tribe represents the plaintiffs' interests here as its constituents. *See id*.

While the requirement to bring a claim under the Indian Tucker Act is not predicated on "particular tribal citizenship," previous case law has repeatedly shown that plaintiffs are considered an "identifiable group of American Indians" when they are unable to sue as a tribe or there is no existing tribal organization in which plaintiffs can assert their claims. *See Chippewa*, 69 Fed. Cl. at 673–74; *see also Wolfchild v. United States*, Fed. Cl. 521, 539–40 (2004); *Snoqualmie Tribe of Indians v. United States*, 372 F.2d 951, 956–57 (1967). Here, plaintiffs are able to sue as a tribe and there is an existing tribal organization, the Osage Nation, which represents plaintiffs' interests. Therefore, the Court does not find that plaintiffs are an "identifiable group of American Indians" in light of the precedent for the Indian Tucker Act.

As plaintiffs must prove by a preponderance of evidence that this Court has jurisdiction over its case, *see Reynolds*, 846 F.2d at 748, plaintiffs in this case have failed to do so with respect to the Indian Tucker Act; therefore, the Court must review plaintiffs' claims pursuant to the Tucker Act, the 1906 Act, and any other authority plaintiffs articulated in their Complaint to determine whether plaintiffs' claims fall within the jurisdiction of 28 U.S.C. § 1491(a)(1).

ii. The Tucker Act, the 1906 Act, and Other Authorities

In order to invoke jurisdiction, a plaintiff must clear the following two hurdles: (1) "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,'" and (2) "the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Navajo II*, 556 U.S. at 290–91 (citing *Navajo I*, 537 U.S. at 506). If "plaintiff's case does not fit within the scope of the [money-mandating] source . . . plaintiff loses on the merits for failing to state a claim on which relief can be granted." *Id.* at 1307 (citing *Fisher*, 402 F.3d at 1175–76).

The Supreme Court in *Mitchell I* and *Mitchell II* set forth the framework for determining whether a duty and, particularly, a fiduciary duty is established in statute, regulation or contract. *Mitchell I*, 445 U.S. 535; *Mitchell II*, 463 U.S. 206. Under *Mitchell I*, the Court held that the "General Allotment Act does not confer a right to recover money damages against the United States" because the Act created a limited trust relationship which did not "impose any fiduciary management duties or render the United States answerable for breach thereof." *Mitchell II*, 463

U.S. at 217–18 (citing from *Mitchell I*, 445 U.S. at 544). Conversely, in *Mitchell II*, "the statutes and regulations [] clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians" and "thereby establish[es] a fiduciary relationship and define[s] the contours of the Unites States' fiduciary responsibilities." *Id*. at 224. Importantly, the Supreme Court noted in *Mitchell II* that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians" and where all of the "elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and the trust corpus (Indian timber, lands, and funds). *Id*. at 225.

In its Motion to Dismiss, defendant contends that the Court lacks Tucker Act jurisdiction over plaintiffs' claims, as plaintiffs do not identify a substantive source of law that establishes fiduciary trust duties that the government owes plaintiffs or that requires compensation in the event such a duty is breached. Def.'s MTD at 34. Further, defendant argues that, even if plaintiffs identified a potential money-mandating statutory or regulatory trust duty, 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." *Id.* at 34–35. Finally, defendant argues that it is "[p]laintiffs' burden to demonstrate that their claim is based on 'specific rights-creating or duty imposing statutory or regulatory prescriptions.'" *Id*. at 43 (quoting *Navajo II*, 556 U.S. 287) (internal citation omitted).

In response, Plaintiff argues that the 1906 Act imposes an obligation on the federal government to distribute money to individual headright owners quarterly and on a pro rata basis, with interest. Pls.' Resp. to Def.'s MTD at 29. Plaintiffs argue that the United States' mismanagement in making payments to headright holders resulted in losses that were only discovered under the Court-ordered accounting in *Fletcher*. *Id.* In its Reply, defendant argues that "ownership of a headright does not create a trust relationship between headright holders and the United States with respect to management of the Osage Mineral Estate or the Tribal Trust Account." *Id.* at 18. Moreover, defendant argues that all of plaintiffs' claims pertain to "pre distribution activities occurring while the funds are in the Osage Tribal Trust Account," so the plaintiffs cannot rely on fiduciary duties owed, if any, to the Tribe. *Id.* at 18–19.

This Court is inclined to agree with defendant's argument that plaintiffs have not identified with specificity a separate source of substantive law that establishes a fiduciary trust duty that the government owes plaintiffs or that requires compensation if such a duty is breached. In fact, plaintiffs list several statutes, regulations, and manuals to convey the existence of such a duty, but plaintiffs fail to provide this Court with a specific reason as to how these authorities impose a duty upon the defendant that defendant breached. *See* Compl. at 2–3; *see also* Compl., Appendices A & B. Additionally, while the Tenth Circuit in *Fletcher II* imposed a limited fiduciary duty on the federal government to account to headright owners as beneficiaries, this Court interprets that duty to account narrowly and will not now impose additional judicially created duties beyond those which the Tenth Circuit found.

Assuming that plaintiffs could identify a specific fiduciary duty owed by defendant, and assuming plaintiff actually alleged that the defendant breached that duty, this Court would still have difficulty interpreting any of plaintiffs' identified statutes, regulations, or manuals as

mandating compensation for damages sustained as a result of such a breach. In other words, even if plaintiffs could clear the first hurdle and invoke jurisdiction, plaintiffs have not identified a relevant source of substantive law that can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of defendant's duties.

Furthermore, the existence of a trust relationship between the United States and a group of Indians or a tribe does not automatically convey "money-mandating" responsibilities upon the government. *Compare Mitchell II*, 463 U.S. at 225 (holding that the United States was subject to suit for damages because the timber management statutes show that the Government assumed "elaborate control over forests and property belonging to Indians" and "[a]ll of the necessary elements of a common-law trust are present.") *with Samish Indian Nation v. United States*, 657 F.3d 1330, 1337 (Fed. Cir. 2011) (*judgment vacated on other grounds*, 568 U.S. 936, 937 (2012)) (holding that the Samish have not invoked a money-mandating statute when the "network of statutes underlying the TPA system" did not convey the "level of detail necessary to establish a fiduciary relationship beyond the general trust relationship between the Government and the tribes." (citing *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011))). If "plaintiff[s'] case does not fit within the scope of the [money-mandating] source . . . plaintiff loses on the merits for failing to state a claim on which relief can be granted." *Id.* at 1307 (citing *Fisher*, 402 F.3d at 1175–76). Accordingly, plaintiffs' claims do not fall within the jurisdiction of 28 U.S.C. § 1491(a)(1)—the Tucker Act—because plaintiffs have not identified a substantive source of law that imposes a specific fiduciary duty on the government and that the government breached, and plaintiffs have not identified a relevant source of substantive law that the Court can interpret as mandating compensation as a result of such a breach. Nonetheless, the Court need not delve into this issue further as plaintiffs' claims cannot survive issue preclusion.

3. Issue Preclusion

In its Motion to Dismiss, defendant asserts that issue preclusion bars plaintiffs from relitigating their claims for an expanded accounting of the Osage Tribal Trust Account. Def.'s MTD at 19. Defendant argues that plaintiffs are seeking to relitigate the scope of the government's accounting of the Osage Tribal Trust Account "despite this issue having been argued and decided by the *Fletcher* district court and affirmed by the Tenth Circuit." *Id.* (citing *Fletcher I*, 153 F. Supp. 3d at 1372); *Fletcher III*, 854 F.3d at 1205–07). Defendant further claims that, because plaintiffs previously litigated this issue before the Tenth Circuit, this Court must apply the law of the Tenth Circuit on issue preclusion and find that plaintiffs' claim for an expanded accounting is barred. Def.'s MTD at 26 (citing *Dana v. E.S. Originals, Inc.*, 342 F.3d 1320, 1323 (Fed. Cir. 2003)).

In their Response, plaintiffs claim that "[t]here is nothing about the prequel *Fletcher* litigation that should limit Plaintiffs' claims in this action." Pls.' Resp. to Def.'s MTD at 2. Plaintiffs state that "the limits of the previous accounting were limited to specific pleadings of the Northern District of Oklahoma, and do not relate to the specific finding that may be a part of Plaintiffs' damage award here," and, therefore, the government's argument is "simply misplaced." *Id.* at 12–13. In other words, plaintiffs believe that the *Fletcher III* holding, which limited the time period and scope of the accounting, has no bearing on the damages that may be assessed from the accounting sought in this case. *See id.* Plaintiffs point to *Shoshone Indian*

Tribe of the Wind River Reservation v. United States to support their asserted right to amend their pleadings to more accurately reflect the harm suffered. Pls.' Resp. to Def.'s MTD at 32–33 (citing *Shoshone Indian Tribe of the Wind River Rsrv. v. United States*, 71 Fed. Cl. 172, 177 (2006)) ("[T]his Court permitted the Shoshone Tribe to amend its claims to include claims prior to 1946 when the 'Defendant acknowledges that 'claims for mismanagement of certain trust fund monies . . . may be allowable for periods pre-dating 1946.'"). As the accounting claims within the prior *Fletcher* litigation were based on a more conservative litigation approach, plaintiffs argue that this Court should apply the holding in *Shoshone* and allow plaintiffs' claims for an expanded accounting "merely adjunct to their claim for damages" that includes years prior to 2002. *See id*.

In its Reply, the defendant reiterates its argument that plaintiffs' claim for an expanded accounting is barred by issue preclusion. Def.'s Reply in Supp. of MTD at 8. Defendant further reasons that, simply the fact that "Plaintiffs are now pursuing monetary damages from the United States does not mean that Plaintiffs can once again litigate the scope of accounting they are entitled to, when this issue was adjudicated in *Fletcher*." *Id*. at 10 (citing *Park Lake Res. Ltd. Liab. Co. v. USDA*, 378 F.3d 1132, 1135–36 (10th Cir. 2004)). Further, defendant asserts that plaintiffs' reliance on *Shoshone* is misplaced and "offers no support for Plaintiffs' attempt to evade issue preclusion," as the *Shoshone* plaintiff sought to amend its complaint, not to relitigate a previously resolved claim. *Id*.

The Supreme Court has explained that collateral estoppel, or issue preclusion, "like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979). When resolving procedural issues not unique to this Court's exclusive jurisdiction, the Federal Circuit has held that the law of the relevant regional circuit must be applied. *Dana*, 342 F.3d at 1323 (citing *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 807 (Fed. Cir. 1999)); *see also Jones v. United States*, 122 Fed. Cl. 490, 524 (2015) (overturned on other grounds). Thus, because plaintiffs previously litigated this issue before the Tenth Circuit, the Court must now utilize the Tenth Circuit's application of issue preclusion, which analyzes whether the following elements are present:

> (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 v. Kopp, 559 F.3d 1155, 1161 (10th Cir. 2009) (citing *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir. 1995)). The Tenth Circuit has routinely held that all four elements must be met for issue preclusion to apply. *See Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1297–98 (10th Cir. 2014); *see also Park Lake Res. Ltd. Liab. v. U.S. Dept. of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004); *Coffey v. Dean Witter Reynolds Inc.*, 961 F.2d 922, 925 (10th Cir. 1992). The Court will analyze each of these elements in turn.

Under the first element of issue preclusion, this Court must determine whether the issues previously decided—those in the line of *Fletcher* cases—are identical to the issues being presented by the plaintiffs in this action. Plaintiffs allege that "a review of documents older than 2002, those not produced as part of the time-limited accounting, will show additional under-collection of interest by Defendant." Compl. at 24. Plaintiffs claim that "an accounting will need to be performed to determine the breadth of the United States' liability for its mismanagement of Plaintiffs' trust funds." Pls.' Resp. to Def.'s MTD at 12. Plaintiffs acknowledge that they filed an action before the Oklahoma District Court seeking, *inter alia*, an accounting related to the trust fund at issue in this matter. *Id*. at 14–15. The Oklahoma District Court determined that the time period and scope of the government's accounting obligations—later affirmed through *Fletcher III* and imposed in order to provide an accounting of royalty income from oil and gas reserves held in trust—started from the "first quarter of 2002 until the last available quarter." *Fletcher I*, 153 F. Supp. 3d at 1372; *see also Fletcher III*, 854 F.3d 1201.[6] Plaintiffs appealed the Oklahoma District Court's decision, challenging the District Court's determination that the time period of the accounting should begin in 2002 and arguing that the accounting instead should "go back to 1906 (when headrights were created) as opposed to 2002 (when the litigation started)" and that the government should "give a more detailed accounting." *Fletcher III*, 854 F.3d at 1204–05. The Tenth Circuit affirmed the lower court's decision regarding the scope and time period of the accounting, with the trust accounting to begin in the first quarter of 2002—not 1906—because the accounting need only provide "some sense of where money has come from and gone to." *Id*. at 1205–07 (quoting *Fletcher II*, 730 F.3d at 1215).

Additionally, plaintiffs argue that, because the Court allowed the Tribe in *Shoshone* to amend its pleadings, the Court should now permit plaintiffs to seek an expanded accounting. Pls.' Resp. to Def.'s MTD at 32–33; *see Shoshone*, 71 Fed. Cl. at 177. However, defendant asserts that the holding in *Shoshone* is inapplicable because *Shoshone* "did not address whether the parties had already litigated the proposed claims and thus the amendments would be barred by issue preclusion." Def.'s Reply in Supp. of MTD at 10. The Court agrees with defendant's argument that *Shoshone* is inapplicable to the facts of this case. *Shoshone* did not deal with an amendment to a complaint from previously decided litigation, nor did *Shoshone* provide any clarity on whether issue preclusion would bar that action. *See Shoshone*, 71 Fed. Cl. 172. As

---

[6] The exact scope of the accounting articulated by the Oklahoma District Court was as follows:

> [A] description of each receipt and distribution for the relevant accounting period. In particular, the accounting must include the following information: the date and dollar amount of each receipt and distribution; a brief description of the source of each trust receipt; the name of the beneficiary to whom each trust distribution was made; for headright distributions, the respective headright share of each headright owner at the time of distribution; and finally the amount of interest income generated from the tribal trust account and the date at which such interest was credited to the account.

Fletcher v. United States, 153 F. Supp. 3d 1354, 1371 (N.D. Okla. 2015).

such, this Court concludes that plaintiffs' claims for an expanded accounting is identical to the issue decided and affirmed by the Tenth Circuit in *Fletcher III*, and, therefore, the first element of issue preclusion is met. *See Fletcher III*, 854 F.3d 1201.

Under the second element of issue preclusion, the Court looks to whether the prior litigation has been finally adjudicated on the merits. *Moss*, 559 F.3d at 1161; *see Jones v. United States*, 846 F.3d 1343, 1361 (Fed. Cir. 2017). The Federal Circuit has held that prior adjudications are considered final when they are "sufficiently firm to be accorded conclusive effect." *Dana*, 342 F.3d at 1323 (citing *Restatement (Second) of Judgments* § 13 (1982)). "The test for finality is whether the prior decision was 'adequately deliberated and firm' or 'avowedly tentative,' and whether the parties were fully heard in the prior proceeding." *Id*. In *Fletcher I*, the District Court found that plaintiffs first asserted their accounting claim in 2006. *Fletcher I*, 153 F. Supp. 3d at 1358. The District Court based its determination that the Osage Tribal Trust accounting should begin in 2002 on nearly nine years of litigation. *See id.* at 1370. That decision was affirmed by the Tenth Circuit on appeal a year and a half later. *Fletcher III*, 854 F.3d at 1205–07. Therefore, for purposes of issue preclusion, the decision from the Tenth Circuit affirming the time period and scope of accounting should be considered a final adjudication on the merits.

Under the third element of issue preclusion, plaintiffs functionally acknowledge that, they were a party to or in privity with a party to the prior adjudication. *See* Compl. 14–17. In their Complaint, plaintiffs state that "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*. at 14. Plaintiffs note that both parties appealed the Oklahoma District Court's decision that the government provide accounting starting from 2002, and that the Tenth Circuit affirmed the District Court's holding. *See id*. at 17 (citing to *Fletcher I*, 153 F. Supp. 3d at 1372; *Fletcher III*, 854 F.3d at 1206). Additionally, plaintiffs do not contest that they are the same plaintiffs as those in the Tenth Circuit *Fletcher* litigation. *See* Pls.' Resp. to Def.'s MTD. The Court therefore determines that the plaintiffs here are the same party as those in the prior adjudication, and the third element of issue preclusion is met.

The fourth element of issue preclusion asks whether the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *Dana*, 342 F.3d at 1323. In determining whether a party had a full and fair opportunity to litigate an issue, the Tenth Circuit looks to "whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." *Burrell v. Armijo*, 456 F.3d 1159, 1172 (10th Cir. 2006) (quoting *Murdock v. UTE Indian Tribe of Uintah & Rsrv.*, 975 F.2d 683, 689 (10th Cir. 1992) (internal citation omitted)). In prior *Fletcher* proceedings, plaintiffs filed their Complaint with the Oklahoma District Court in 2002. *Fletcher v. United States*, No. 02-CV-427-GKF-FHM, 2012 U.S. Dist. LEXIS 46390, at *1–2 (N.D. Okla. Mar. 31, 2012). Plaintiffs first asserted their accounting claim in 2006 as part of their First Amended Complaint. *Fletcher I*, 153 F. Supp. 3d at 1358. After the District Court determined that the accounting should begin in 2002, plaintiffs appealed to the Tenth Circuit, which upheld the District Court's accounting determination. *See Fletcher III*, 854 F.3d 1201. As the parties engaged in fifteen

years of litigation and appeals to the Tenth Circuit on this issue, the Court finds that plaintiffs had a full and fair opportunity to litigate the time period and scope of the accounting.

The Court concludes that all four elements of issue preclusion have been met, and, thus, plaintiffs are estopped from relitigating the time and scope of the accounting before this Court. Additionally, as the Court found that it lacks subject matter jurisdiction over this matter, that plaintiffs lack standing to pursue their claims, and that plaintiffs are barred from seeking an expanded accounting, the defendant's motions must be granted.

IV. Conclusion

For the foregoing reasons, defendant's MOTION to Strike is **GRANTED**. Accordingly, the declarations of Jim Gray and Wilson Pipestem are hereby **STRICKEN** from the record. Additionally, defendant's MOTION to Dismiss is **GRANTED**. Plaintiffs' claims are accordingly **DISMISSED** pursuant to RCFC 12(b)(1) and 12(b)(6). Finally, as plaintiffs' claims have been dismissed, the request for class certification in plaintiffs' Complaint is hereby **found MOOT**. The Clerk is directed to enter judgment consistent with this Opinion and Order.

IT IS SO ORDERED.

s/ *Loren A. Smith*

Loren A. Smith,
Senior Judge

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 5, 2021, a true and correct copy of the foregoing will be served on the counsel of record by electronically filing the foregoing with the Clerk of Court using the CM/ECF system.

/s/ Jason B. Aamodt
Jason B. Aamodt

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

   [X] this brief contains [*12,877*] words.

   [ ] this brief uses a monospaced type and contains [*state the number of*] lines of text.

2. This brief complies with the typeface and type style requirements because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2007*] in [*14pt Times New Roman*]; or

   [ ] this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

Dated: May 5, 2021

/s/ Jason B. Aamodt
Jason B. Aamodt