IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 1:19-cv-1246-LAS
Senior Judge Loren A. Smith

UNITED STATES' RENEWED MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT

RENEWED MOTION TO DISMISS

Pursuant to Rules 12(b)(6) and 12(b)(7) of the Rules of the United States Court of Federal Claims ("RCFC"), Defendant, the United States of America, moves to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted and failure to join a required and indispensable party, or, in the alternative, for an order directing Plaintiffs to make a more definite statement under Rule 12(e). A memorandum in support of this motion follows.

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INTRODUCTION

This suit concerns Osage "headrights," which are personal property interests in prospective future distributions from the Osage Mineral Estate. The United States holds the Osage Mineral Estate in trust for the benefit of the Osage Nation. Act of June 28, 1906, Pub. L. No. 59-321, § 3, 34 Stat. 539, 543-44, as amended ("1906 Act"). Under the 1906 Act, proceeds from the Osage Mineral Estate are deposited in the Osage Tribal Trust Account held by the Department of Treasury for the Osage Nation. *Id.* § 4, 34 Stat. at 544. The funds held in that account are distributed to headright holders quarterly on a pro rata basis, with interest, following the deduction of certain taxes and expenses.

Plaintiffs are alleged owners of headrights and allege that the United States, prior to distribution, mismanaged the funds held in the Osage Tribal Trust Account. But this suit is not the first time that the United States has confronted such mismanagement claims. Indeed, for over two decades, the Osage Nation and headright holders, including some Plaintiffs, have been litigating claims concerning the alleged mismanagement of the Osage Mineral Estate, headright distributions, and the Osage Tribal Trust Account in this Court, as well as in two other district and appellate courts. Plaintiffs now ask this Court for over $100 million in damages, despite the fact that headright holders received a share of the $380 million settlement reached as part of the prior tribal trust litigation against the United States—a settlement which, critically, waived virtually all trust mismanagement claims.

This Court previously dismissed Plaintiffs' Complaint in its entirety for jurisdictional reasons. On appeal, the Federal Circuit reversed concluding that Plaintiffs had standing and established jurisdiction under the Tucker Act. In its prior motion to dismiss, however, the United States argued that the Complaint was also subject to dismissal under RCFC 12(b)(6) for several

reasons. Neither this Court nor the Federal Circuit reached that issue. In addition, the Federal Circuit's ruling now makes evident that the Complaint should also be dismissed under RCFC 12(b)(7).

Thus, despite the Federal Circuit's remand, the Complaint should again be dismissed for five independent reasons. First, the Osage Nation is a required party that cannot be joined due to sovereign immunity, and this case should not proceed in its absence. Second, the majority of Plaintiffs' claims are barred by claim preclusion because Plaintiffs seek to relitigate matters that have already been decided or settled. Third, Plaintiffs' breach of trust claims were expressly waived and released in a prior settlement agreement that resolved the Osage tribal trust litigation. Fourth, Plaintiffs have failed to plead cognizable causes of action, meaning the Court should either dismiss their claims or order Plaintiffs to provide a more definite statement pursuant to RCFC 12(e). Finally, to the extent Plaintiffs seek an accounting, one is not available in this Court unless and until liability is proven.

FACTUAL AND PROCEDURAL BACKGROUND

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

The 1906 Act allotted the Osage Nation's lands, severing the surface estate from the subsurface mineral estate (the latter of which is referred to as the "Osage Mineral Estate") and reserving all oil, gas, coal, and other minerals to the Osage Nation.[1] In accordance with the 1906

[1] In 2006, the Osage Tribe of Indians of Oklahoma ratified the Osage Constitution and reorganized as the Osage Nation. *See* Osage Const., art. I. (2006), attached hereto as Ex. 2. The Osage Nation is the successor-in-interest to the Osage Tribal Council. *Id.* art. XXII, § 2. The Osage Constitution created the Osage Minerals Council, an independent agency of the Osage Nation vested with authority to manage development of the Osage Mineral Estate. *Id.* art. XV, § 4. The Osage Minerals Council is elected by Osage headright holders and all councilmembers must be Osage headright holders. *Id.* The Osage Nation revised its Constitution in 2014, 2016, 2017 and 2020. The Osage Nation's obligation to preserve the Osage Mineral Estate and the Osage Minerals Council's authorities over the development thereof remain unchanged.

Act, the United States holds the Osage Mineral Estate in trust for the benefit of the Osage Nation. 1906 Act, §3, 34 Stat. at 543. The 1906 Act authorizes the Osage Nation to lease the Osage Mineral Estate for oil, gas, and other mineral development, with the approval of the Secretary of the Interior. *Id.* The 1906 Act establishes a trust fund for the Osage Nation into which all proceeds from the Osage Mineral Estate will be deposited—known as the "Osage Tribal Trust Account"—and directs the Secretary to distribute such proceeds to Osage tribal members listed on the official roll quarterly on a pro rata basis, with interest. *Id.* § 4, 34 Stat. at 544. These interests in the net proceeds from the Osage Mineral Estate are known as "headrights." *Fletcher, et al. v. United States (Fletcher III)*, 854 F.3d 1201, 1203 (10th Cir. 2017). Quarterly headright payments are distributed from the Osage Tribal Trust Account directly to headright holders' Individual Indian Money ("IIM") accounts, following the deduction of gross production taxes paid to the state of Oklahoma and authorized Tribal operating expenses. *Fletcher v. United States (Fletcher I)*, 153 F. Supp. 3d 1354, 1357 (N.D. Okla. 2015), *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); *Osage Nation v. United States (Osage I)*, 57 Fed. Cl. 392, 395 (2003).

B. Previous trust accounting and alleged mismanagement litigation

The *Osage* tribal trust litigation (described further below) and *Fletcher* cases, including this case, concern the accounting of funds derived from the Osage Mineral Estate and asserted damages arising from the government's alleged mismanagement of such funds while they were held in the Osage Tribal Trust Account.[2] *See*, *e.g.*, Compl. ¶¶ 19, 37-50, ECF No. 1; *Osage I*, 57

[2] Certain Plaintiffs in this case were also certified class members in *Cobell, et al. v. Salazar*, No. 96-cv-1285 (D.D.C.), where individual Indians asserted that the United States failed to account

Fed. Cl. 392, 393-94 (Cl. Ct. 2003); *Fletcher III*, 854 F.3d at 1203-04.

1. The *Osage* Tribal Trust litigation

In 2000, the Osage Nation sued the United States in this Court for breach of fiduciary duties, alleging failure to account and mismanagement of the Osage Mineral Estate and Tribal trust funds. *See, e.g., Osage I*, 57 Fed. Cl. at 393-94. The United States moved to dismiss the case, arguing that the Osage Nation lacked standing because any injury from alleged mismanagement of proceeds from the Osage Mineral Estate was to headright holders, not the Nation itself. *Id.* at 394. The court rejected that argument, finding that the 1906 Act established a trust fund for the Osage Nation and that the United States' responsibility is to the Nation and Osage Tribal Trust Account. *Id.* at 394-95. The court based this determination on the fact that mineral royalties are deposited in the Osage Tribal Trust Account, where they remain for at least a quarter of a year before being distributed to headright holders. *Id.* at 395. Further, the alleged mismanagement took place while the funds were within the Osage Tribal Trust Account, not at the point of distribution to headright holders. *Id.* The court explained that the Osage Nation has "both an interest in and a claim to the funds when those funds are within the tribal trust account" and, further, that any damages awarded to the Nation in the litigation would "flow down" to the headright holders because such distribution is required by Section 4 of the 1906 Act. *Id.* Consequently, the court held that the Osage Nation had standing to sue for alleged mismanagement of the Osage Tribal Trust Account because it was the "real part[y] in interest"

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for trust funds held in IIM accounts, resulting in the *Cobell* settlement, the proceeds of which were paid to such accountholders. In opposition to the United States' prior motion to dismiss the instant case, Plaintiffs stated that they "do not raise claims relating to the management of their IIM accounts," thus, the *Cobell* settlement is not relevant to this case. Pls.'s Resp. in Opp'n to United States' Mot. To Dismiss, ECF No. 10 at 23. If Plaintiffs later raise issues relating to their IIM accounts, the United States requests the opportunity to provide additional briefing on the *Cobell* settlement and its effects on this case.

and "direct trust beneficiary." *Id.*

Later, the court denied eight headright holders' motion to intervene in the case, holding that the intervenors did not meet the requirements for intervention of right under RCFC 24(a). *Osage Tribe of Indians of Okla. v. United States (Osage VI)*, 85 Fed. Cl. 162, 174 (2008). The court found that the proposed intervenors lacked a legally protectable interest in the litigation, noting that while they had an interest in the pro-rata share of proceeds from the Osage Mineral Estate, the fact that any damages awarded to the Osage Nation would be paid to headright holders "[did] not in itself create a legal right enforceable in [the] action." *Id.* at 169-71. The court also found that the Osage Nation and headright holders had a common interest in obtaining the maximum award for money damages because the award would ultimately be distributed to the headright holders under the 1906 Act. *Id.* at 174-75. The court explained that the Osage Nation "with sovereignty over its members analogous to the sovereignty of the United States over its citizens, is competent to litigate claims on behalf of and in the interest of its members and therefore to adequately represent Proposed Intervenors' interests." *Id.* at 175.

Proceeding on the merits, the court divided the trial into two phases or "tranches." Tranche One focused on the alleged mismanagement of four Osage Mineral Estate oil and gas leases for five months over a twenty-year period. The parties litigated allegations of trust mismanagement, including undercollection of royalties, failure to obtain highest posted prices, deposit lags, and failure to obtain highest available investment yields on funds derived from trust royalties. The court found that the government breached its fiduciary duty and entered judgment for the Osage Nation in the amount of $1,876,878.30 for that limited time frame. *Osage Tribe of Indians of Okla. v. United States (Osage II)*, 72 Fed. Cl. 629 (2006), *subsequent determination,* 75 Fed. Cl. 462 (2007); *Osage Tribe of Indians of Okla. v. United States (Osage III),* 75 Fed. Cl.

462 (2007); *Osage Tribe of Indians of Okla. v. United States (Osage IV),* 93 Fed. Cl. 1, 6 (2010). Next, the Osage Nation moved for partial summary judgment, asking the court to apply the Tranche One rulings to the remaining oil and gas leases. *Osage IV*, 93 Fed. Cl. at 6. The court granted the motion and awarded damages of over $330 million. *Id.*; *Osage Tribe of Indians of Okla. v. United States (Osage V),* 97 Fed. Cl. 542, 545 (2011).

a. The *Osage* Settlement Agreement

After the court's rulings, the United States and Osage Nation negotiated a settlement resolving the litigation, a copy of which is attached as Ex. 1 ("2011 Settlement Agreement"). The Osage Nation created the "Osage Trust Team" to "manage and direct litigation and settlement relating to the Osage Mineral Estate and Osage Tribal Trust Account." 2011 Settlement Agreement, ¶ 2.r. The Osage Trust Team consisted of representatives from the Osage Minerals Council, Osage Nation Congress, and Osage Nation Executive Branch. 2011 Settlement Agreement, ¶ 1.g. The Osage Minerals Council is an independent agency of the Osage Nation with administrative authority to manage development of the Osage Mineral Estate consistent with the 1906 Act. Ex. 2, Osage Const., art. XV, § 4. The Osage Minerals Council is elected by, and comprised of, Osage headright holders. *Id.*

The Osage Trust Team consulted with headright holders during settlement negotiations and canvassed headright holders to confirm their support of the settlement of the trust claims. 2011 Settlement Agreement, ¶ 1.l.m. The canvass revealed that "the vast majority of the Osage Headright interests held by the Osage Headright Holders who participated in the canvass expressed support for the actions of the Osage [Nation] acting through the Osage Minerals Council in approving the terms of [the] settlement." *Id.* ¶ 1.n. In the 2011 Settlement Agreement, the Osage Nation affirmed its authority to "act for, to protect the interests of, and to bind Headright Holders with respect to matters relating to the Osage Mineral Estate, including

the initiation, prosecution, and settlement of claims relating to the Osage Mineral Estate." *Id.* ¶ 1.d.

Ultimately, the parties executed the 2011 Settlement Agreement and settled the case for $380 million. As a part of the settlement, the Osage Nation waived and released all claims relating to monetary and non-monetary trust assets and resources that were, or could have been asserted by the Osage Nation on behalf of itself, and headright holders, on or before September 30, 2011. *Id.* ¶ 7.a. Specifically,

> the Osage Tribe, on behalf of itself and the Headright Holders, hereby waives and releases, and covenants not to sue on, any and all claims and/or liabilities of any kind or nature whatsoever, known or unknown, suspected or unsuspected, regardless of legal theory, for any damages, equitable or specific relief, that are based on harms or violations occurring on or before September 30, 2011, and that relate to the Osage Tribe's monetary or non-monetary trust assets or resources that have been or could have been asserted by the Osage Tribe on behalf of itself and/or the Headright Holders on or before September 30, 2011. . . .

Id. ¶ 7.a.i. The Osage Nation also waived certain future trust mismanagement claims, *see id.* ¶¶ 2.h, 8.g, 8.h, and established a dispute resolution process for such claims, *id.*, as well as for claims relating to the settlement agreement more broadly, *id.* ¶ 11.j. The settlement amount was paid into the Osage Tribal Trust Account and then distributed to headright holders pursuant to the 1906 Act. *Id.* ¶ 5.b, 5.c. The case was dismissed with prejudice pursuant to the stipulation of the parties. Stipulation of Dismissal with Prejudice, November 22, 2011 Order, and November 29, 2011 Judgement, *Osage Tribe of Indians v. United States*, Case No. 99-550L (Fed. Cl. *judgment entered* Nov. 29, 2011), ECF Nos. 665–67.

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

In 2002, Plaintiff Fletcher and several other headright holders filed suit in district court alleging claims based on their rights to participate in Osage tribal elections and government,

breach of the United States' trust responsibilities, and failure to manage the Osage Nation's trust assets. Compl. ¶ 37; *Fletcher v. United States (Fletcher VII)*, No. 02-cv-427-GKF-FHM, 2012 U.S. Dist. Lexis 46390, at *2 (N.D. Okla. Mar. 31, 2012) , *rev'd and remanded,* 730 F.3d 1206 (10th Cir. 2013). Plaintiffs later amended their complaint to include an accounting claim for the Osage Tribal Trust Account. Compl. ¶¶ 37-38; *Fletcher VII*, 2012 U.S. Dist. Lexis 46390, at *8-9. The district court ultimately concluded that headright holders were not entitled to an accounting under 25 U.S.C. § 162a or 25 U.S.C. § 4011. Compl. ¶ 38; *Fletcher VII*, 2012 U.S. Dist. Lexis 46390, at *22-23. The Tenth Circuit reversed on appeal, however, and the case was remanded to the district court to determine the appropriate scope of the accounting. Compl. ¶ 39; *Fletcher v. United States (Fletcher II)*, 730 F.3d 1206, 1214-16 (10th Cir. 2013).

On remand, the district court reinstated and granted Plaintiffs' motion to certify a class including all Indians who currently, or during the litigation, received 1906 Act § 4 royalty payments, January 31, 2014 Opinion and Order at 3-4, *Fletcher v. United States,* No. 02-427-GKF-FHM (N.D. Okla. Jan. 31, 2014), ECF No. 1196, and ordered an accounting of the Osage Tribal Trust Account. Compl. ¶ 42; *Fletcher I*, 153 F. Supp. 3d at 1370. Plaintiffs have received that accounting. Compl. ¶ 3.

C. The Current Complaint

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

Three of Plaintiffs' original four claims are now before the Court.[3] Count I alleges that the United States failed to provide adequate systems and controls for accounting for and reporting trust fund balances. Compl. ¶¶ 59–66. Specifically, Plaintiffs assert that the United States under-paid interest, overcharged gross production taxes, failed to accurately report transfers of Tribal operating expenses to the Osage Nation, and failed to account for administrative costs. *Id*. ¶¶ 62–66. Count III alleges that the United States failed to provide periodic statements of headright owners' accounts and "erred in reporting expenses and simply adjusted the revenue so as to balance the account of Osage Headright Owners."[4] *Id*. ¶¶ 70–72. Finally, Count IV alleges that Plaintiffs are entitled to damages for the United States' breach of its fiduciary obligations to Plaintiffs. *Id.* ¶¶ 73–74.

Plaintiffs request damages "in an amount exceeding One Hundred Million Dollars ($100,000,000.00)," and seek an order mandating that the United States provide an accounting and other injunctive relief, such as changing the trust management system. *Id*. ¶ 75, Prayer for Relief ¶¶ 3-4.

D. The United States' Prior Motion to Dismiss and Order Granting Motion

The United States moved to dismiss Plaintiffs' claims for lack of jurisdiction and failure

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[3] This Court previously dismissed Count II and the Federal Circuit confirmed dismissal. *Fletcher v. United States (Fletcher V)*, 26 F.4th 1314, 1321 n.2 (Fed. Cir. 2022).

[4] Plaintiffs characterize the Osage Tribal Trust Account in a variety of ways in the Complaint (*see, e.g.*, Compl. ¶ 4 ("Osage Headright trust fund"), ¶ 30 ("Segregated Fund"), at 25 (Claim III heading referring to "Headright Owners' Accounts")). There is, however, only one account in existence and only one account at issue in this litigation—the Osage Tribal Trust Account, established under the 1906 Act. Plaintiffs also reference "accounts," plural, in Claim III, though, as noted above, they have disclaimed any claim of mismanagement related to their IIM accounts. *See supra* n.2. To the extent that Plaintiffs allege mismanagement of their IIM accounts in Count III, such claims would be barred by the *Cobell* settlement. Should Plaintiffs raise this argument in their opposition to this motion, the United States will address it in reply.

to state a claim. Defs.' Mot. to Dismiss, ECF No. 7. The United States offered five bases for dismissal. First, the United States argued Plaintiffs had failed to demonstrate a legally protectable interest in the Osage Tribal Trust Account, and consequently, lacked standing. *Id.* at 14-19. Second, Plaintiffs' claims are barred by claim and issue preclusion. *Id.* at 19-28. Third, Plaintiffs' claims were waived and released by the *Osage* and *Cobell* settlement agreements. *Id.* at 28-33. Fourth, the Indian Tucker Act does not provide jurisdiction for Plaintiffs' claims because they are not an identifiable group of Indians under 28 U.S.C. § 1505. *Id.* at 33-34. Fifth, Plaintiffs' failed to identify a money-mandating statutory or regulatory trust duty for any of their claims. *Id.* at 34-43. Finally, the United States argued, in the alternative, that if the Court did not dismiss Plaintiffs' claims in their entirety, the Court should order Plaintiffs to make a more definite statement pursuant to RCFC 12(e). *Id.* at 44.

This Court granted the United States' motion and dismissed the case in its entirety. *See Fletcher v. United States (Fletcher IV)*, 151 Fed. Cl. 487 (2020), *rev'd in part, vacated in part,* 26 F.4th 1314 (Fed. Cir. 2022). Specifically, this Court held that: "(1) plaintiffs have no standing to pursue their breach of trust claims because they lack a legally protectable interest," in the Osage Tribal Trust Account, *Fletcher IV*, 151 Fed. Cl. at 496–97; "(2) the Court lacks jurisdiction under the Indian Tucker Act and the Tucker Act because plaintiffs (a) are not an 'identifiable group of Indians,'" *id.* at 498–99, and (b) fail to identify a money-mandating statutory or regulatory trust duty, *id.* at 499–501; and (3) issue preclusion bars plaintiffs' claims for an expanded accounting, *id.* at 501–04." This Court also struck the Gray and Pipestem declarations, which Plaintiffs submitted to support their argument that the 2011 Settlement Agreement did not affect Plaintiffs' claims. *Id.* at 496. This Court did not address the United States' arguments regarding the sufficiency of the pleading, claim preclusion, or application of

the 2011 Settlement Agreement.

E. Federal Circuit Opinion

On appeal, the Federal Circuit "reverse[d] on the issues of standing and Tucker Act jurisdiction, [and vacated] on the issues of the availability of a damages accounting and the striking the declarations." *Fletcher V*, 26 F.4th at 1327. The Federal Circuit did not address the sufficiency of the Complaint, the scope of the government's trust obligation to Plaintiffs, claim preclusion, or the application of the 2011 Settlement Agreement.

With respect to standing, the Federal Circuit concluded that both the Osage Nation and the individual headright holders have a trust relationship with the United States under the 1906 Act, thus, the headright holders have standing to bring their claims. *Id.* at 1323-24. It declined, however, to "precisely defin[e] the respective boundaries of the trust interests of the tribe and the individual headright owners," since that issue was not properly before it on appeal. *Id.* at 1324. The Federal Circuit explained that this threshold issue would need to be resolved on remand because "the prior *Osage Tribe* litigation has already resulted in a significant payment of money by the government to the tribe. . . . Thus, there are concerns about double recovery if individual headright owners and the tribe are entitled to assert overlapping (or the same) interests in separate litigations." *Id.* at 1323. Moreover, the Federal Circuit acknowledged that Plaintiffs' failure to allege "how the trust duties were breached specifically by an alleged undercollection of interest or overpayment of taxes" may be grounds for dismissal under RCFC 12(b)(6) and "reserved [this issue] for the government to raise on remand." *Id*. at 1325. The Federal Circuit went on to conclude that this Court had jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1). *Id.* at 1324. In light of that conclusion, it did not address this Court's finding that it

lacked jurisdiction under the Indian Tucker Act. *Id*.[5]

With respect to Plaintiffs' accounting claim, the Federal Circuit concluded that this claim was not barred by issue preclusion or "automatically constrain[ed] . . . based on the scope of the accounting that was ordered" by the Northern District of Oklahoma in the prior *Fletcher* litigation. *Id.* at 1326. Importantly, however, the Federal Circuit cautioned that this "does not mean there are no limits to the information the plaintiffs could get as part of a *damages accounting*. Statutes of limitations, waiver, forfeiture, preclusion, and other equitable considerations may limit the scope of the plaintiffs' recovery and the information the plaintiffs should receive." *Id.* at 1327 (footnote omitted) (emphasis added).

Finally, the Federal Circuit vacated this Court's order striking the two declarations that Plaintiffs submitted, finding that this Court "did not properly determine whether the 'No cooperation'" provision of the *Osage* Settlement Agreement applied. *Id*. at 1327. Because this Court did not apply the 2011 Settlement Agreement, the Federal Circuit did not reach the issue of whether the declarations should be considered.

LEGAL STANDARDS

A. RCFC 12(b)(6) Failure to state a claim

The United States seeks dismissal of Plaintiffs' claims pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. To state a claim, Plaintiffs' Complaint must allege facts showing that they are entitled to relief. RCFC 8(a). *See Huntington*

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[5] Now that the Federal Circuit has concluded that this Court has jurisdiction under the Tucker Act, the United States recognizes that this Court cannot dismiss for lack of jurisdiction under the Indian Tucker Act. That said, the United States preserves its position that this Court lacks jurisdiction under the Indian Tucker Act for the reasons this Court previously explained in granting the United States' motion to dismiss. *Fletcher IV*, 151 Fed. Cl. at 497-99. For that reason, should this case proceed to the merits, Plaintiffs would be required to seek and have this Court grant class certification under RCFC 23 in order to litigate on behalf of other Indians.

Promotional & Supply, LLC v. United States, 114 Fed. Cl. 760, 766 (2014) (the complaint must "state a claim to relief that is plausible on its face" (internal citation omitted)). Plaintiffs' obligation to provide supporting factual allegations requires more than labels and conclusions; a formulaic recitation of a cause of action is not sufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

B. RCFC 12(b)(7) Failure to join a necessary and indispensable party under RCFC 19

The United States also seeks dismissal of Plaintiffs' claims pursuant to RCFC 12(b)(7) for failure to join the Osage Nation as a required and indispensable party pursuant to RCFC 19. Dismissal under RCFC 12(b)(7) is warranted "when the defect is serious and cannot be cured." *Direct Supply, Inc. v. Specialist Hosps. of Am., LLC*, 878 F. Supp. 2d 13, 23 (D.D.C. 2012) (citations omitted). When considering an RCFC 12(b)(7) motion, the court must accept the allegations in the complaint as true but may consider evidence outside the pleadings. *IRIS Corp. Berhad v. United States*, 82 Fed. Cl. 488, 498 (2008) (citation omitted).

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

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

D. RCFC 12(g)(2) Renewed Motion to Dismiss

Following remand, a party may renew arguments previously asserted but not addressed by the court or raise new arguments or defenses that were not available at the time the party filed its original motion. *See* RCFC 12(g)(2); *see also Cardiosom, LLC v. United States*, 115 Fed. Cl. 761, 766 (2014). In addition, as this Court has explained, upon remand, RCFC 12(g)(2) permits

a defendant to make new arguments in a renewed motion to dismiss if those arguments respond to questions or issues that the Federal Circuit raised upon consideration of the original motion. *See Cardiosom*, 115 Fed. Cl. at 766.

ARGUMENT

The Court should dismiss Plaintiffs' claims for several reasons. First, the Osage Nation is a required party that cannot be joined due to its sovereign immunity, and the case should not proceed in its absence. Second, Plaintiffs' claims are barred by claim preclusion, as they were decided and settled in the *Osage* tribal trust litigation. Third, Plaintiffs' claims were waived and released under the 2011 Settlement Agreement. Fourth, Plaintiffs' claims lack the basic factual content required to plead cognizable claims. Thus, the Court should either dismiss them or order Plaintiffs to make a more definite statement pursuant to RCFC 12(e). Finally, to the extent Plaintiffs seek an accounting, and if this case proceeds, one is not available in this court unless and until liability is proven.

I. THE OSAGE NATION IS A REQUIRED AND INDISPENSABLE PARTY

The Court should dismiss this action pursuant to RCFC 12(b)(7) because the Osage Nation is a required and indispensable party that cannot be joined due to its sovereign immunity. The United States did not raise the Osage Nation's joinder in its original motion to dismiss but does so here under RCFC 12(g)(2) to address significant questions identified by the Federal Circuit in the prior appeal.[6] Contrary to the Court of Federal Claims' prior rulings in *Osage*—finding that the Osage Nation is the real party in interest and direct trust beneficiary of the Osage

[6] Even if the United States were not raising this issue, the Court may consider the absence of a required party *sua sponte*. *See Philippines v. Pimentel*, 553 U.S. 851, 861 (2008); *see also Klamath Tribe Claims Comm. v. United States (Klamath Claims Comm.)*, 97 Fed. Cl. 203, 212 & n.15 (2011) (raising issue of joinder *sua sponte* and directing parties to brief the issue).

Tribal Trust Account—the Federal Circuit found that both the Osage Nation and headright holders have an interest in the account, creating a "question of the division of interests" requiring further examination. *Fletcher V*, 26 F.4th at 1323. The Federal Circuit stated that such division raises concerns regarding double recovery if "individual headright owners and the tribe are entitled to assert overlapping (or the same) interests in separate litigations." *Id.* Further, the Federal Circuit noted that whether the 2011 Settlement Agreement ultimately binds Plaintiffs and precludes the present litigation may depend on what claims the Osage Nation could have asserted in *Osage* and whether the Osage Nation had authority to act on Plaintiffs' behalf. *Id.* at 1323-24. The Federal Circuit declined to rule on the boundaries of the Osage Nation's and headright holders' trust interests, however, because the issue was not addressed in this Court's prior decision. *Id.* at 1324. These previously unexamined questions have brought the issue of joinder to the fore. *See Cardiosom*, 115 Fed. Cl. at 766; RCFC 12(g)(2).

RCFC 19, which governs compulsory joinder, poses three sequential questions for the Court in determining whether a suit should be dismissed in a party's absence.

First, is the party "required"? In other words, should the absentee be joined? RCFC 19(a); *Klamath Claims Comm.*, 97 Fed. Cl. at 210; *see also W. Md. Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 961-62 (D.C. Cir. 1990).[7] Under RCFC 19(a), a party should be joined if it "claims an interest relating to the subject of the action and is so situated that disposing of the

[7] "In general, the rules of [Court of Federal Claims] are patterned on the Federal Rules of Civil Procedure, making 'precedent under the Federal Rules of Civil Procedure ... relevant to interpret rules of [Court of Federal Claims]' … As to Rule 19, the Federal Circuit has recently noted that 'RCFC 19 is virtually identical to Fed. R. Civ. P. 19' and '[b]ecause our case law on RCFC 19 is limited, we rely on cases interpreting Fed. R. Civ. P. 19 in our analysis of what is a 'necessary' party under RCFC 19.'" *Klamath*, 106 Fed. Cl. at 93 n. 9 (internal citations omitted).

action in [its] absence may . . . as a practical matter impair or impede [its] ability to protect the interest . . . ." RCFC 19(a)(1)(B)(i). As part of this analysis, the court should also consider whether disposing of the case in the party's absence may "leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations." RCFC 19(a)(1)(B)(ii). In either case, the absent party is a required party.

Second, if the absentee party is required, the court considers whether the absentee can be joined? *W. Md. Ry. Co.*, 910 F.2d at 961. As relevant here, a party that enjoys sovereign immunity cannot be joined absent a waiver of that immunity. *See Philippines*, 553 U.S. at 867.

Finally, if the required absentee cannot be joined, the court analyzes whether the lawsuit should proceed in the party's absence. *Id*. An action should be dismissed if "in equity and good conscience" the litigation should not proceed without the absent party. RCFC 19(b); *see Klamath Tribe Claims Comm. v. United States (Klamath)*, 106 Fed. Cl. 87, 93 (2012) (quoting RCFC 19(b)), *aff'd sub nom. Klamath Claims Comm. v. United States*, 541 F. App'x 974 (Fed. Cir. 2013). Such is the case here.

A. The Osage Nation Is A Required Party.

The Osage Nation is a required party under RCFC 19(a)(1)(B) because it claims an interest relating to the subject of this litigation (the Osage Tribal Trust Account) and disposing of this case in its absence may impair or impede its ability to protect its interest as well as expose the United States to potential double recovery and inconsistent obligations.

i. The Osage Nation has an interest in the subject of this action.

This litigation seeks damages and an accounting related to the Osage Tribal Trust Account—an account held in trust by the United States for the benefit of the Osage Nation under the 1906 Act. 1906 Act § 4, 34 Stat. at 544 ("That all funds *belonging to the Osage tribe*, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said

Osage tribe of Indians, shall be held in trust by the United States." (emphasis added)). Consistent with the 1906 Act, the Osage Nation previously asserted, and this Court held, that the Nation is the real party in interest and direct trust beneficiary for the Osage Tribal Trust Account. *See Osage I*, 57 Fed. Cl. at 395; *Osage VI*, 85 Fed. Cl. at 169-71. Accordingly, there is no question that the Osage Nation has an interest in management of the Osage Tribal Trust Account. The Federal Circuit confirmed this, finding that while a trust relationship exists between the United States and headright holders sufficient to confer standing to bring this suit, the Osage Nation has an interest in the Osage Tribal Trust Account as the trust beneficiary identified in the 1906 Act. *Fletcher V*, 26 F.4th at 1323.

Plaintiffs' claims also make plain the Osage Nation's interest in the subject of this action. Three allegations in the Complaint are associated with transactions the Osage Nation directly authorizes, through the Osage Minerals Council, while the funds are held in the Osage Tribal Trust Account—underpayment of interest, overpayment of gross production tax, and failure to accurately report the transfer (overpayment) of Tribal operating expenses. Compl. ¶¶ 62-65.

The Osage Minerals Council receives monthly statements for the Osage Tribal Trust Account indicating the amount of interest credited and both reviews and approves the United States' quarterly headright payment calculation, which indicates the amount of interest included in the funds to be disbursed for the subject headright payment. *See Fletcher v. United States,* No. 4:02-cv-427 (N.D. Okla. Apr. 28, 2014), ECF No. 1212-2 at 4-34 (periodic statement); *Fletcher*, ECF No. 1212-3 at 14-17 (quarterly payment calculation signed by Tribal auditor), attached as Ex. 4. The Osage Minerals Council also reviews and approves the United States' gross production tax calculation before payment is remitted to the Oklahoma Tax Commission. *See, e.g.,* 2016, Fourth Quarter, Gross Production Tax Letter and accompanying oil and gas

royalty statements, with approval voucher signed by the Osage Minerals Council, attached as Ex. 3. The Osage Minerals Council votes on the amount of Tribal operating expenses to drawdown consistent with the Osage Nation's annual budget and submits Resolutions supporting such drawdowns to the United States. *See Fletcher*, ECF No. 1212 at 71-85, attached as Ex. 4. The United States must obtain the Osage Minerals Council's express authorization to transfer funds out of the Osage Tribal Trust Account, so the Council signs the Federal Government forms required to effectuate each transfer of headright payments to headright holders' IIM accounts, gross production tax to the Oklahoma Tax Commission, and Tribal operating expenses to the Council.[8] *See id.*, ECF No. 1212-3 at 35, 37 (headright payment), 60 (Tribal operating expenses), attached as Ex. 4; *see also* Ex. 3.

Thus, the Osage Nation not only claims an interest in the Osage Tribal Trust Account at the center of this litigation as the trust beneficiary, it is directly involved in the transactions that form the basis of Plaintiffs' claims.

Indeed, in the 2011 Settlement Agreement resolving the *Osage* tribal trust litigation, the Osage Nation explicitly recognized that it has a direct interest in the subject matter of this case. The 2011 Settlement Agreement was negotiated and signed by the United States and Osage Trust Team. As previously explained, the Osage Trust Team included Osage Minerals Councilmembers (all of whom were headright holders). The 2011 Settlement Agreement states that:

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[8] Plaintiffs also allege that the United States failed to properly report the costs it charged for administering the Osage Tribal Trust Account. Compl. ¶ 66. The United States does not charge the Osage Nation fees for administering the Osage Tribal Trust Account. Had the United States been assessing such fees, however, the Osage Nation's review and approval of the fees and express authorization to transfer or deduct fees from the Osage Tribal Trust Account would have been required.

> the Osage [Nation] is the only party with standing and interest to bring claims relating to the accounting and management of funds in the Osage Tribal Trust Account and Other Osage Accounts or claims relating to the management of the Osage Mineral Estate. The Parties further agree that the Osage Tribe's interest in any such claim is such that the Osage Tribe would be a required party for purposes of Rule 19(a) of the Federal Rules of Civil Procedure and for purposes of Rule 19(a) of the Rules of the Court of Federal Claims.

2011 Settlement Agreement, ¶ 11.f. Plaintiffs are bound by the 2011 Settlement Agreement, as discussed further *infra*. While the Court must conduct its own RCFC 19 analysis to determine whether this case should be dismissed in the Osage Nation's absence, this provision in the 2011 Settlement Agreement evidences the Nation's interest in the subject of this litigation and, as discussed below, that its ability to protect that interest may be impaired or impeded if it is not a party.

Nor may Plaintiffs assert that the Nation is not a required party because their suit supposedly concerns only the *distributions* flowing to headright holders and does not implicate the Mineral Estate or the Osage Trust Account. Plaintiffs' suit is premised on alleged mismanagement of the Osage Tribal Trust Account. They generally claim that the United States breached its trust duties, mismanaged that trust account, and failed to account to Plaintiffs. More specifically, they allege claims for underpayment of interest (Compl. ¶ 62); overcharging gross-production taxes (*id*. ¶¶ 63-64); losses to Plaintiffs' trust funds based on overpayment to the Nation (*id*. ¶ 65); failure to account for trust administration costs paid to the Council (*id*. ¶ 66); errors in expense reporting (*id*. ¶ 71); and mismanagement of Plaintiffs' money (*id*. ¶ 74). As in the prior *Osage* litigation, "[t]he mismanagement is not alleged to take place at the point of distribution of the funds to the individual headright holders," but, rather, while those funds were managed in the Osage Tribal Trust Account. *Osage I*, 57 Fed. Cl. at 395. Accordingly, the

injuries Plaintiffs allege occurred *while* the funds were held in the Osage Tribal Trust Account. *See Fletcher I*, 153 F. Supp. 3d at 1361-62. Thus, Plaintiffs' claims directly implicate the Osage Tribal Trust Account and the Osage Nation's ability to protect its interest in that account. To adjudicate these claims and determine whether Plaintiffs are entitled to damages, this Court will have to evaluate whether the United States has in fact mismanaged the Osage Tribal Trust Account—which it has not—such that the amount of money in that account available for distributions to headright holders was too little.

In this way, Plaintiffs' claims are distinct from those at issue in the *Fletcher* litigation, where the Northern District of Oklahoma concluded that the Nation was not a required party. That litigation concerned the individual accounting rights of headright holders under 25 U.S.C. § 4011(a). As the court there explained, the claims "focus on headright distributions only, not the Osage Nation tribal trust fund." *Fletcher v. United States (Fletcher VI)*, No. 02-CV-427-GKF-FHM, 2009 WL 920692, at *5 (N.D. Okla. Mar. 31, 2009). And because that case "[was] about *plaintiffs'* accounting rights, not the [Nation's]. Providing plaintiffs with an accounting in no way undermines or affects the Osage Nation's separate right to an accounting." *Fletcher I*, 153 F. Supp. 3d at 1366. But, here, the question is not whether Plaintiffs enjoy individual accounting rights. Plaintiffs' claims concern the *management* of the Osage Tribal Trust Account, and the proper inflow and outflow of funds from that account. And while the Federal Circuit has concluded that Plaintiffs have an interest in that account at least insofar as they have standing to bring this suit, the Osage Nation is the direct trust beneficiary and, therefore, has a direct interest in the account and, as a result, this litigation.

ii. Disposing of this case in the Osage Nation's absence may impair or impede its ability to protect its interests.

Litigating the merits of this case in the Osage Nation's absence may impair or impede the Nation's ability to protect its interests.[9] In order to adjudicate the merits of Plaintiffs' claims, the Court will necessarily have to opine on the nature and scope of the trust duties owed to headright holders and the Osage Nation, as the Federal Circuit suggested. *Fletcher V*, 26 F.4th at 1323-24. This foundational inquiry into the division of interests between headright holders and the Osage Nation implicates the Nation's legal rights and may impact its rights into the future. For this reason alone, the case should not proceed without the Osage Nation.

In addition to impacting the Osage Nation's legal rights, adjudicating this case in its absence may also impact it financially. For example, a ruling in Plaintiffs' favor regarding Tribal operating expenses could impact the Osage Nation's governance and Tribal budget, reduce the amount of funds available for the Nation to fulfill its tribal constitutional duty to manage the Osage Mineral Estate, and potentially result in the Nation having to repay or credit amounts received. If, on the other hand, the Court concludes that no mismanagement has occurred, such finding may prejudice future claims the Osage Nation may bring should it believe there had been a breach of trust with respect to the Osage Tribal Trust Account. Though a ruling in this case may not preclude the absent Osage Nation's future claims under the doctrine of collateral estoppel, such findings could at minimum prejudice the Nation's claims, and, if any

[9] Importantly, the United States' participation in the litigation cannot adequately protect the Osage Nation's interest on the facts of this case. In general, when federal agency action is challenged, the United States may adequately represent absent parties' interest in seeing the federal action upheld. *See, e.g., Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996). Here, however, for the reasons discussed, the Osage Nation's view on the central question of whether mismanagement has occurred may diverge from that of the United States.

rulings are issued by the Federal Circuit as part of an appellate proceeding, such rulings would bind this Court and potentially prejudice the Nation's ability to litigate its own claims.

These circumstances are analogous to those in *Klamath*, where this Court concluded that this rationale supported dismissal in the absence of a tribe. 106 Fed. Cl. at 95-96. There, plaintiff, the Klamath Tribe Claims Committee, sought damages for alleged takings and breaches of fiduciary duty, and asserted that the United States failed to disburse funds owed to tribal members and to safeguard treaty-based water rights associated with a dam. *Id*. at 88. The Court dismissed the action after concluding that the Klamath Tribes—a signatory to the treaty at issue—was a necessary and indispensable party that could not be joined due to its sovereign immunity. *Id*. The Court held that the tribe's interests could be impaired by an adverse ruling in the case: "Even without a direct preclusive effect, such a ruling would be a negative precedent that the Tribes would have to confront in future litigation involving the 1864 Treaty and the associated statutes . . . And that negative precedent could ripen into binding adverse precedent were this court's ruling affirmed by the Federal Circuit." *Id*. at 96 (citation and footnote omitted); *see also Doty v. St. Mary Parish Land Co.*, 598 F.2d 885, 887 (5th Cir. 1979) (dismissing case under Rule 19(b) because "an unfavorable judgment in the present case would constitute precedent adverse to the [absent party's] claims"). The same is true here.

iii. Disposing of this case in the Osage Nation's absence may subject the United States to multiple lawsuits, inconsistent judgments, or double recoveries.

In addition, resolving the merits of this action in the Osage Nation's absence may prejudice the United States by subjecting it to multiple lawsuits challenging the same conduct, inconsistent obligations, or claims for double recovery. Plaintiffs and the Osage Nation assert overlapping and conflicting interests in the Osage Tribal Trust Account. Since the Osage Nation would not be bound by a judgment in this case, it could, for example, attempt to initiate its own

litigation against the United States, subject to the terms of the 2011 Settlement Agreement, challenging the same alleged mismanagement at issue here. There, it could argue that the United States underpaid it for Tribal operating expenses—thus, exposing the United States to a potentially inconsistent obligation with respect to the management of proceeds from the Osage Mineral Estate deposited and held in the Osage Tribal Trust Account. *See, e.g., Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1292 (10th Cir. 2003) ("More important, however, is that the Tribe would not be bound by the judgment in this case and could initiate litigation against Defendants if the BIA withheld funds. Thus, Defendants might well be prejudiced by multiple litigation or even inconsistent judgments if this litigation were to proceed without the Tribe.").

As another example, if Plaintiffs were to obtain a favorable judgment on their trust mismanagement claims here—premised on a finding that the trust duty at issue was owed to the Osage Nation *and* headright holders—and receive monetary damages, the Osage Nation could later argue that Plaintiffs recovered too little and that the United States owes additional damages for the same conduct. Thus, potentially exposing the United States to inconsistent obligations or double recoveries based on the same alleged mismanagement. *See N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279 (10th Cir. 2012) ("Even if the court were to rule in favor of the State and County Defendants, still the State of Wyoming would be left at a substantial risk of inconsistent obligations, because nothing would stop the Eastern Shoshone, unbound by the decision, from relitigating the issue.").

In sum, this case, like the prior *Osage* tribal trust case, seeks damages for alleged mismanagement of the Osage Tribal Trust Account, of which the Osage Nation is the direct trust beneficiary. The Osage Nation, as a sovereign, has a clear and vested interest in protecting its authority to govern, manage, and make decisions regarding the Osage Tribal Trust Account held

by the United States for the Nation's benefit. Resolving the merits of this case in the Osage Nation's absence will prevent the Nation from protecting its interests in the Osage Tribal Trust Account and could impact its ability to purse its own claims in the future. Resolving the merits of this case in the Osage Nation's absence may also expose the United States to a substantial risk of incurring multiple lawsuits and the potential for double recovery and inconsistent obligations. For these reasons, the Osage Nation is a required party pursuant to RCFC 19(a)(1).

B. The Osage Nation Cannot Be Joined Due To Sovereign Immunity.

The Osage Nation is a federally recognized Indian tribe, Indian Entities Recognized by and Eligible to Receive for Services from the BIA, 87 Fed. Reg. 4636-02, 4639 (Jan. 28, 2022), and, thus, enjoys sovereign immunity from suit absent a clear waiver or consent to suit by the Nation or the United States Congress. Ex. 2, Osage Const. art. XIX; *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Plaintiffs have not attempted to join the Osage Nation or provided any evidence that the Nation or Congress waived sovereign immunity in this case.

C. The Case Should Not Proceed In The Osage Nation's Absence.

If a required party cannot be joined, the court then must determine whether in "equity and good conscience" the action should proceed among the parties before it or should be dismissed. RCFC 19(b). Rule 19(b) identifies four factors for the Court's consideration: (1) prejudice caused to any party or the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy can be awarded without the absent party; and (4) whether there is an alternative forum for the plaintiff's claims. RCFC 19(b). The factors are not rigid, instead serving as guides to the overarching "equity and good conscience" inquiry. *Brown v. United*

States, 42 Fed. Cl. 538, 565 (1998) (citation omitted), *aff'd*, 195 F.3d 1334 (Fed. Cir. 1999). Additionally, where, as here, the absent party is a sovereign entity that cannot be joined, sovereign immunity weighs heavily in favor of dismissal. Considering the Osage Nation's sovereign immunity and applying these four factors compels the conclusion that this suit for damages and an accounting should not proceed without the Nation.

i. The Osage Nation's sovereign immunity supports dismissal.

As an initial matter, tribal sovereign immunity favors dismissal here because Plaintiffs' claims seek damages and an accounting related to an account held in trust for the required and absent Osage Nation. *See Klamath*, 106 Fed. Cl. at 95-96; *see also Pembina Treaty Comm. v. Lujan*, 980 F.2d 543, 545-46 (8th Cir. 1992); *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460–61 (9th Cir. 1994). As this Court has explained in another case seeking damages based on federal management of tribal trust assets: "'[w]hen . . . a necessary party ... is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves.'" *Klamath*, 106 Fed. Cl. at 95 (alternations in original) (quoting *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir.1989)); *cf. Philippines*, 553 U.S. at 865-69 (holding sovereign immunity weighed in favor of dismissal where parties and absent sovereign asserted conflicting claims to subject assets). And "[w]hile 'this does not mean that balancing can be completely avoided simply because an absent person is immune from suit,' it does mean that 'the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent party from suit.'" *Klamath*, 106 Fed. Cl. at 95 (quoting *Davis ex rel.*

Davis v. United States, 343 F.3d 1282, 1293–94 (10th Cir. 2003)). Here, the facts support dismissal.

ii. The Rule 19(b) factors likewise support dismissal.

Sovereign immunity aside, the Rule 19(b) factors also compel dismissal on the facts of this case. The first factor, prejudice to the absentee and current parties, is largely reflected in the Rule 19(a) examination into impairment of the claimed interest. *See N. Arapaho Tribe*, 697 F.3d at 1282; *see also United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996). This factor favors dismissal because, as described above, a judgment favorable to Plaintiffs could result in less money flowing to the Osage Nation for Tribal operating expenses, while an adverse ruling could prejudice the Nation's ability to litigate its own trust mismanagement claims, and no existing party adequately represents the Osage Nation's interest. In this respect, the competing interests are akin to "[c]onflicting claims by beneficiaries to a common trust [that] present[s] a textbook example of a case where one party may be severely prejudiced by a decision in his absence." *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986). Moreover, as also described above, the United States would be prejudiced by proceeding in the absence of the Osage Nation because it could be subject to multiple or inconsistent liabilities if the Nation later brings its own suit seeking monetary damages for alleged breaches of the same fiduciary duties. *See Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 109-10 (1968) (interest in avoiding multiple litigation is proper Rule 19(b) consideration).

Turning to the second factor, prejudice to both the United States and absent Osage Nation likely cannot be avoided by carefully tailoring any judgment. The only adequate remedy here, if liability is established, would be a damages award to compensate for the alleged

mismanagement, underpayment of interest, and overpayment for gross production taxes and Tribal operating expenses. Such a damages award would require the Court first to determine the scope of the fiduciary duties owed to headright holders, which, as discussed above, implicates the Osage Nation's legal interests and risks prejudicing the Nation's ability to protect its rights. Further, any award of damages to Plaintiffs will put the United States at risk of double liability as Plaintiffs seek to relitigate trust mismanagement claims that were previously settled. To the extent Plaintiffs allege mismanagement claims not waived or precluded by the 2011 Settlement Agreement, the Osage Nation could later attempt to challenge the same conduct and raise the same claims as here, in the case of overlapping trust interests. Thus, the second factor favors dismissal.

Factor three likewise favors dismissal because a judgment rendered in the Osage Nation's absence would be inadequate. "The intent of the inquiry under this factor is not to examine the adequacy of the judgment from the point of view of the plaintiff but to determine whether a judgment would comport with 'the interest of the courts and public in complete, consistent and efficient settlement of controversies.'" *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1191 (W.D. Wash. 2014) (quoting *Patterson*, 390 U.S. at 111). As shown above, there could be further litigation and inconsistent judgments if this litigation continues without the Osage Nation. There would be nothing "complete, consistent, [or] efficient," *Patterson*, 390 U.S. at 111, about the settlement of this controversy if the United States might need to relitigate these issues with the Osage Nation, "with potentially different results." *N. Arapaho Tribe*, 697 F.3d at 1283. Further, even were the Court to find that it can fashion an adequate judgment, that "cannot be given dispositive weight" where, as here, "the efficacy of the judgment would be at

the cost of the [Osage Nation's] rights to participate in litigation that critically affect[s its] interests." *Wichita & Affiliated Tribes of Okla.*, 788 F.2d at 777-78.

Finally, with respect to factor four, while Plaintiffs' interest in having a forum in which to litigate their claims is important, as detailed above, the absent tribe's interest in maintaining sovereign immunity outweighs this interest on the facts of this case. *See Philippines*, 553 U.S. at 865-69; *Pembina Treaty Comm.*, 980 F.2d at 545–46; *Klamath*, 106 Fed. Cl. at 95-96.

In sum, a judgment in the Osage Nation's absence would prejudice both the Nation and the United States, this prejudice cannot be avoided, and complete relief cannot be granted in the Nation's absence. For these reasons, the Osage Nation is an indispensable party under RCFC 19(b), and because the Osage Nation has not waived its sovereign immunity and cannot be joined, Plaintiffs' Complaint should be dismissed under RCFC 12(b)(7).

II. CLAIM PRECLUSION BARS PLAINTIFFS' PRE-SEPTEMBER 30, 2011 CLAIMS

Plaintiffs are barred from bringing claims related to the management of the Osage Tribal Trust Account predating September 30, 2011, as those claims were previously litigated and settled in the *Osage* tribal trust litigation. *See* 2011 Settlement Agreement, ¶ 1.e. The Osage Nation, through the Osage Minerals Council, represented headright holders' interests, including Plaintiffs', in that litigation, and had authority to bind headright holders in settlement. 2011 Settlement Agreement, ¶ 1.d; *see also* Osage Minerals Council Resolution No. 2-67 (Sept. 26, 2011) ¶ 6, attached as Ex. 3 to 2011 Settlement Agreement.[10] The parties negotiated and executed the 2011 Settlement Agreement and settlement monies were then distributed to

[10] In evaluating whether a Complaint should be dismissed under the doctrine of claim preclusion, the court is not limited to the pleadings. *Larson v. United States*, 89 Fed. Cl. 363, 382-83 (2009), *aff'd,* 376 F. App'x 26 (Fed. Cir. 2010) (per curiam).

headright holders consistent with the 1906 Act. 2011 Settlement Agreement ¶ 5. Consequently, Plaintiffs' pre-September 30, 2011, claims must be dismissed under RCFC 12(b)(6). *See Avant Assessment, LLC v. United States*, 159 Fed. Cl. 632, 636-37 (2022) ("A Rule 12(b)(6) dismissal may be appropriate based on an affirmative defense such as claim preclusion."); *see also Bowers Inv. Co. v. United States*, 104 Fed. Cl. 246, 253 (2011) ("As claim preclusion rests on a final judgment on the merits, it can quite properly and naturally be raised via a merits-based RCFC 12(b)(6) motion." (quoting *Chisolm v. United States*, 82 Fed. Cl. 185, 193 (2008))).

"The general concept of claim preclusion is that when a final judgment is rendered on the merits, another action may not be maintained between the parties on the same 'claim,' and defenses that were raised or could have been raised in that action are extinguished." *Hallco Mfg. Co. v. Foster*, 256 F.3d 1290, 1294–95 (Fed. Cir. 2001) (citing Restatement (Second) of Judgments, §§ 18–19). "Accordingly, a second suit will be barred by claim preclusion if: (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first." *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362–63 (Fed. Cir. 2000) (citing *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979)). A settlement agreement "constitutes a final judgment on the merits in a *res judicata* analysis." *Ford-Clifton v. Dep't of Veterans Affairs*, 661 F.3d 655, 660 (Fed. Cir. 2011). All elements necessary for claim preclusion are met here.

A. Privity

First, there is privity between the Osage Nation and headright holders. In *Osage*, the Court expressly found that the Osage Nation represented headright holders' interests in the litigation, and that any judgment would go directly to the headright holders in accordance with

the 1906 Act. *Osage VI*, 85 Fed. Cl. at 168–69, 175 (noting that "[t]he Osage Nation represents Proposed Intervenors' interests" and finding that money damages would be distributed directly to headright holders).

The *Osage* tribal trust litigation was settled with the Osage Nation, acting, through the Osage Minerals Council, on behalf of headright holders. The 2011 Settlement Agreement expressly states that Osage Nation "has the authority to act for, to protect the interests of, and to bind Headright Holders with respect to matters relating to the Osage Mineral Estate . . . including the initiation, prosecution, and settlement of claims relating [thereto]" and that it was settling "all claims regarding the United States' obligation to provide a historical accounting or reconciliation of the Osage Tribal Trust Account," "on behalf of itself and the Headright Holders." 2011 Settlement Agreement, ¶¶ 1.d, 7.a.i.2. The 2011 Settlement Agreement also evidences that the headright holders were consulted and that the United States "confirm[ed] [headright holder] support for the actions of the Osage Tribe acting through the Osage Minerals Council in approving th[e] Agreement." *Id.* ¶ 1.l, 1.m, 1.n.

The Osage Nation had authority, through the Osage Minerals Council, to enter into the 2011 Settlement Agreement on behalf of headright holders pursuant to the 2006 Osage Constitution, Osage Nation Congress Resolution No. ONCR 11-12 (Sept. 26, 2011), attached as Ex. 4 to 2011 Settlement Agreement, and Osage Minerals Council Resolution No. 2-67 (Sept. 26, 2011), attached as Ex. 3 to 2011 Settlement Agreement.[11] The 2006 Osage Constitution

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[11] The 2006 Osage Constitution is attached as Ex. 2. The cited resolutions are attached as Ex. 3 and 4, respectively, to the 2011 Settlement Agreement. The Court may take judicial notice of these records. *See Klamath Claims Comm. v. United States*, 541 F. App'x 974, 979 n.8 (Fed. Cir. 2013) (taking judicial notice of tribal resolutions which were "publically available records of the Tribe's government whose accuracy cannot be reasonably questioned"); *see also Omaha*

states that "[t]he right to income from mineral royalties shall be respected and protected by the Osage Nation through the Osage Minerals Council . . ." Ex. 2, Osage Const. art. XV, § 3. The Constitution further states that "[t]he government of the Osage Nation shall have the perpetual obligation to ensure the preservation of the Osage Mineral Estate" and "shall… ensure that the rights of members of the Osage Nation to income derived from th[e] Mineral Estate are protected." *Id*. art. XV, § 4. The Osage Nation Congress and Osage Minerals Council Resolutions further state that "[t]he Osage Minerals Council has the authority to act for, to protect the interests of, and to bind Headright Holders with respect to matters relating to the Osage Mineral Estate, including the initiation, prosecution, and settlement of claims relating to the Osage Mineral Estate." Ex. 3 to 2011 Settlement Agreement, ¶ 6.[12]

The Court's findings in the *Osage* tribal trust litigation, 2011 Settlement Agreement, and above-cited Tribal documents, establish that the Osage Nation, through the Osage Minerals Council, is charged with protecting the interests of headright holders and represents Plaintiffs' relevant interests. As such, privity exists between the Osage Nation and Plaintiffs.

B. Final Judgment on the Merits

Second, there was a final judgment on the merits. *Osage* ended with a consent judgment, wherein the Osage Nation waived all claims related to the management of the Osage Mineral Estate and Osage Tribal Trust Account prior to September 30, 2011. 2011 Settlement

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Tribe of Neb. v. Miller, 311 F. Supp. 2d 816, 819 n.3 (S.D. Iowa 2004) (taking judicial notice of public documents including the Constitution and Bylaws of the Omaha Tribe of Nebraska and the Corporate Charter of the Omaha Tribe of Nebraska).

[12] The Osage Minerals Council made the same statement in subsequent litigation involving the United States. *See* Complaint ¶ 2, *Osage Minerals Council v. U.S. Department of the Interior*, No. 15-cv-371 (N.D. Okla., July 1 2015), ECF No. 2; Surreply to Motion to Intervene at 5, *United States v. Osage Wind, LLC et al.*, No. 14-cv-704 (N.D. Okla. Dec. 20, 2016), ECF No. 64.

Agreement ¶ 7.a.i. "For claim preclusion purposes, consent judgments are considered to have the same force and effect as judgments entered after a trial on the merits." *Hallco,* 256 F.3d at 1294–95 (citing *Epic Metals Corp. v. H.H. Robertson Co.,* 870 F.2d 1574, 1576 (Fed. Cir. 1989)).

C. Same Set of Transactional Facts

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

This case and *Osage* arise from the same set of factual allegations, at least to the extent that the mismanagement claims here pre-date the 2011 Settlement. *See Ammex*, 334 F.3d at 1056. Both cases allege that the United States mismanaged the Osage Tribal Trust Account, resulting in diminished trust fund earnings. *See Osage Tribe of Indians of Okla. v. United States (Osage VII),* 68 Fed. Cl. 322, 324 (2005); Compl. ¶ 4. In *Osage*, the Osage Nation sought "damages from defendant for breach of fiduciary duty in the mismanagement of tribal trust funds and for failure to account," *Osage I*, 57 Fed. Cl. at 393, and Plaintiffs' Complaint makes the same allegations, Compl. ¶¶ 53, 61. The trust corpus is the same—the Osage Tribal Trust

Account. In addition, Plaintiffs rely upon the same sources of law to support their assertion of fiduciary duty as *Osage*. *See Osage II*, 72 Fed. Cl. at 629; *Osage III*, 75 Fed. Cl. at 462; *Osage IV*, 93 Fed. Cl. at 6. Plaintiffs may allege additional breaches of fiduciary duty from those asserted in *Osage*, but they "all spring from the same set of facts." *Wyandot Nation of Kan. v. United States*, 115 Fed. Cl. 595, 599 (2014). And "it is of no consequence that plaintiff styles its suits to focus on different trust duties, when the proof of breach of each of those purportedly distinct duties will necessarily require review of the same facts." *Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256, 284–85 (2008), *aff'd,* 426 F. App'x 916 (Fed. Cir. 2011).

For example, in *Ak-Chin Indian Community v. United States*, the Court of Federal Claims found (in the context of 28 U.S.C. § 1500) that two cases involved the same set of operative facts when "in each action, the courts must consider the government's management and administration of plaintiff's trust by reviewing the government's alleged failure to maintain records and account for plaintiff's trust property." 80 Fed. Cl. 305, 319 (2008). The *Ak-Chin* court rejected the argument that the different trust duties—such as the duty to account and the duty to invest and deposit trust funds—resulted in different sets of transactional facts. *Id.* "The nature of Indian trust cases and the government's trust responsibility owed to Indian tribes does not lend itself to a simple delineation or separation of operative facts as they pertain to the government's various duties owed to Indian tribes." *Id.* The court found, therefore, that because both cases would involve "considering any existing records related to the government's collection, handling, and investment of the Community's trust funds and property," they arose from the same operative facts. *Id.*

The situation here is similar: for any alleged mismanagement pre-dating the 2011 Settlement, the Court would review the same records relating to the United States' alleged

mismanagement of the trust funds and assets as were at issue in *Osage*. The two cases are therefore based on the same set of operative facts and claim preclusion prevents Plaintiffs from returning to this Court to seek additional damages based on a new theory of mismanagement, but the same underlying conduct.

Plaintiffs may protest that their claims are unaffected by the 2011 Settlement Agreement because the *Osage* litigation was solely about the Osage Mineral Estate, whereas Plaintiffs' claims here are based on mismanagement of their trust funds "found and interpreted" from the *Fletcher* accounting. Compl. ¶¶ 49, 50. But the Federal Circuit expressly rejected this argument; and for good reason—it is contradicted by the operative complaints and prior court rulings. *Fletcher V*, 26 F.4th at 1323 ("Contrary to the plaintiffs' characterization, while the *Osage Tribe* litigation involved issues that could be characterized as tied to the mineral estate . . . it also involved issues that could be characterized as relating to the trust fund . . . ").

As previously discussed, *Osage* involved claims relating to the United States' alleged mismanagement of both the Mineral Estate *and* the Osage Tribal Trust Account. *See, e.g., Osage VII*, 68 Fed. Cl. at 324 (noting that Osage Nation alleged that defendant mismanaged trust funds by failing to collect royalty payments and late fees and failing to invest income collected in the manner required by law). Indeed, the Osage Tribal Trust Account was at the core of the *Osage* trust fund mismanagement claims. *Osage II*, 72 Fed. Cl. at 670-71 (discussing expert testimony regarding the management of Account No. 7386, the Osage Tribal Trust Account, "into which oil and gas receipts are deposited"). Thus, both litigations concern the same set of transactional facts for the time period pre-dating the 2011 Settlement.

Because all elements of claim preclusion are met here, the Court should dismiss Plaintiffs' breach of trust claims that pre-date September 30, 2011.

III. WAIVER AND RELEASE BAR PLAINTIFFS' PRE-SEPTEMBER 30, 2011 CLAIMS

Plaintiffs' pre-September 30, 2011 claims of mismanagement should likewise be dismissed because they were waived and released by the 2011 Settlement Agreement. "The interpretation of a settlement agreement is an issue of law." *King v. Dep't of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997) (citing *Mays v. U.S. Postal Serv.*, 995 F.2d 1056, 1059 (Fed. Cir. 1993) ("The settlement agreement is a contract, of course, and its interpretation is a matter of law.")); *Greco v. Dep't of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). When examining a written settlement agreement, the Court must "first ascertain whether the written understanding is clearly stated and was clearly understood by the parties." *King,* 130 F.3d at 1033. "In so doing the words used by the parties to express their agreement are given their ordinary meaning, unless it is established that the parties mutually intended and agreed to some alternative meaning." *Id.* (citation omitted).

Plaintiffs' breach of trust claims that pre-date September 30, 2011, were waived and released in the 2011 Settlement Agreement. The parties to the 2011 Settlement Agreement settled all claims related to the Osage Tribal Trust Account, whether known or unknown, and the proceeds of the settlement were distributed to the headright holders. Plaintiffs cannot re-litigate claims that have been resolved and for which they have been compensated for two key reasons.

First, for the reasons described above, the Osage Nation had the authority to bind the headright holders with respect to matters relating to the Osage Mineral Estate and Osage Tribal Trust Account, including the initiation, prosecution, and settlement of claims relating to both. *See supra* at 30-31; *see* 2011 Settlement Agreement, ¶¶ 1.d, 1.f, 7.a.i (waiving claims on behalf of the Nation and headright holders). During settlement negotiations, headright holders were represented by the Osage Nation through the Osage Minerals Council, an independent agency of

the Nation vested with the specific responsibility to administer and develop the Osage Mineral Estate in accordance with the 1906 Act. Ex. 2, Osage Const. art. XV, § 4. Both the Osage Nation and Osage Minerals Council participated in settlement negotiations and are signatories to the 2011 Settlement Agreement. *See* 2011 Settlement Agreement ¶ 2.r; *id*. at 28; *see also* Ex. 3 and 4 to 2011 Settlement Agreement. Moreover, though not required, the Osage Minerals Council directly consulted headright holders during the course of settlement negotiations to determine their support for the proposal, *id.* ¶ 1.l, 1.m, 1.n, and headright holders overwhelmingly supported the settlement. Ex. 3 to 2011 Settlement Agreement, ¶ 12.

Second, the 2011 Settlement Agreement plainly and unambiguously waived and released *all* claims that were or could have been asserted by the Osage Nation on behalf of the headright holders, whether known or unknown, in those cases. In Paragraph 7 of the 2011 Settlement Agreement, the Osage Nation explicitly waived and released, on behalf of itself and headright holders:

> any and all claims and/or liabilities of any kind or nature whatsoever, known or unknown, suspected or unsuspected, regardless of legal theory, for any damages, equitable or specific relief, that are based on harms or violations occurring on or before September 30, 2011, and that relate to the Osage Tribe's monetary or non-monetary trust assets or resources that have been or could have been asserted by the Osage Tribe on behalf of itself and/or the Headright Holders on or before September 30, 2011 . . . .

2011 Settlement Agreement, ¶ 7.a.i. In that same paragraph, the 2011 Settlement Agreement expressly releases claims relating to the United States' management of the Osage Mineral Estate and the Osage Tribal Trust Account. Specifically, that waiver included, but was not limited to:

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

> the *Osage Tribal Trust Account* and Other Osage Accounts up through and including September 30, 2011….

Id. ¶ 7.a.i.1-4 (emphasis added). This provision effected a broad waiver and release of all trust mismanagement claims associated with the Osage Tribal Trust Account, including those not actually set forth in the complaint or pursued in that action. Plaintiffs' claims, which broadly allege mismanagement of the Osage Tribal Trust Account, fall within the scope of the plain language of this waiver and release provision to the extent they seek recovery for alleged mismanagement pre-dating September 30, 2011. Moreover, headright holders were compensated for these claims through the 2011 Settlement Agreement proceeds, totaling $380 million, which were paid out to headright holders consistent with the 1906 Act. *Id*. ¶ 5.

The Federal Circuit noted that whether these waiver provisions bind Plaintiffs and bar their present claims, "may depend on what claims 'could have been asserted by the Osage [Nation].'" *Fletcher V*, 26 F.4th at 1324. The Osage Nation could have asserted any claim alleging that the United States mismanaged the Osage Nation's monetary or non-monetary trust assets, including the Osage Tribal Trust Account, as detailed in the waiver provision in the Settlement Agreement. 2011 Settlement Agreement ¶ 7.a. Here again, Plaintiffs attempt to litigate the same types of trust mismanagement claims: they allege the United States mismanaged the Osage Tribal Trust Account, specifically, by overpaying gross production taxes and underpaying interest. And, here again, Plaintiffs' alleged injuries all occurred while the United States held the funds in the Osage Tribal Trust Account. These are claims the Osage Nation could have brought in the prior tribal trust suit and could again bring now or in the future, subject, of course, to the terms of the 2011 Settlement Agreement. This overlap further evidences that the waiver provisions bar Plaintiffs' claims in this case.

For these reasons, those portions of Plaintiffs' claims regarding alleged trust

mismanagement occurring before September 30, 2011, must be dismissed.

IV. PLAINTIFFS FAIL TO ADEQUATELY STATE CLAIMS; THEIR COMPLAINT SHOULD BE DISMISSED OR THEY SHOULD BE ORDERED TO MAKE A MORE DEFINITE STATEMENT UNDER RCFC 12(E)

The Court should dismiss the Complaint under RCFC 12(b)(6) because Plaintiffs fail to state claims upon which relief could be granted. To avoid dismissal under RCFC 12(b)(6), a plaintiff's factual allegations must "raise a right to relief above the speculative level" and cross "the line from conceivable to plausible." *Twombly*, 550 U.S. at 555. "[I]n the breach-of-trust context, the Court must determine whether plaintiffs alleged sufficient facts to demonstrate it is plausible that the government failed to perform its fiduciary duties." *Confederated Tribes & Bands of the Yakama Nation v. United States*, 153 Fed. Cl. 676, 696 (2021); *see also Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 200 (2020) ("The Tribe cannot survive a motion to dismiss by pointing to mere conclusory allegations of law or by alleging that the government may have breached its trust duties."), *appeal filed,* No. 21-1366 (Fed. Cir. Dec. 4, 2020). Here, Plaintiffs' claims rely on bare assertions and conclusory allegations that lack even the most basic factual detail.

Count III appears to seek an accounting, though, as explained below, an accounting is a remedy in this court, not a cause of action. Compl. ¶¶ 70-72. In any event, Plaintiffs do not identify any statutory basis for the requested accounting. Nor do they identify any other cause of action to support Count III.

Counts I and IV, read generously, appear to allege claims for breach of trust, though, neither identifies what fiduciary obligations the United States has allegedly breached. Compl. ¶¶ 59-66; 73-75. They are likewise devoid of basic factual details regarding the claimed breach, such as when the obligation was breached or how. Despite being premised on the accounting Plaintiff Fletcher received following the litigation in the Northern District of Oklahoma,

Plaintiffs do not identify even one deposit into or payment from the Osage Tribal Trust Account that might serve as the basis for their trust mismanagement claims. To the extent Plaintiffs' claims are premised on a breach of the 1906 Act, they fail to identify what obligation under that statute the United States has breached with regard to headright holders. Apart from the 1906 Act, Plaintiffs merely attach an appendix that lists Acts of Congress and another appendix that lists statutes "dealing with Osage affairs." Nowhere, however, does the Complaint allege how any of those acts are relevant to the current litigation or how they have been breached. *See* Compl. ¶ 32. Plaintiffs thus fail to adequately state claims upon which relief could be granted.

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

Here, Plaintiffs' Complaint is so vague and ambiguous that the United States cannot reasonably prepare a meaningful response, in the event it must answer. Plaintiffs do not detail any of their mismanagement claims with any specificity so that those allegations can be rebutted. This lack of specificity makes Plaintiffs' Complaint little more than "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555–56 (citation omitted). For this reason, if the Court does not dismiss the case, an order directing Plaintiffs to provide a more definite statement through and amended complaint is appropriate.

V. AN ACCOUNTING IS NOT AVAILABLE IN THIS COURT, UNLESS AND UNTIL LIABILITY IS PROVEN

This Court lacks jurisdiction over claims for injunctive relief. *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1293-94 (Fed. Cir. 1999). Thus, to the extent that Plaintiffs seek an accounting in Count III, it is unavailable. *See Chemehuevi*, 150 Fed. Cl. at 204 ("A suit for an accounting is a suit in equity and we have no equity jurisdiction except in aid of a judgment of liability against the Government . . . Accordingly, we have no jurisdiction over plaintiff's suit for an accounting.") (citing *Ft. Mojave Tribe v. United States*, 546 F.2d 429, 728 (Ct. Cl. 1976)). This Court may only order an accounting in aid of judgment to determine damages. 28 U.S.C. § 1491(a)(2). The Federal Circuit recognized this distinction when it explained that an accounting "may be required of the government 'for the purpose of enabling the court to determine the amount which plaintiffs are entitled to recover,'" but only after "[P]laintiffs meet their 'burden of proving specifically how the defendant and its agents have failed in their duty to [P]laintiffs . . . .'" *Fletcher V,* 26 F.4th at 1326-27 (citations omitted).

CONCLUSION

Plaintiffs' claims fail for numerous reasons and should be dismissed. As shown above, the Osage Nation is a required and indispensable party that cannot be joined due to sovereign immunity, and the case should not proceed in its absence. The court should thus dismiss under RCFC 12(b)(7). Separately, the Court should dismiss under RCFC 12(b)(6) because claim preclusion bars Plaintiffs from relitigating matters previously litigated and settled; Plaintiffs waived and released their claims in the 2011 Settlement Agreement; and Plaintiffs fail to state claims upon which relief could be granted, meaning that their claims should either be dismissed, or, the Court should order them to make a more definite statement.

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

Dated: August 26, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2022, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Sally J. Sullivan .
Sally J. Sullivan
Trial Attorney