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

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

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COME NOW Plaintiffs, William Fletcher, Tara Damron, Kathryn Red Corn, and Richard Lonsinger, by and through undersigned counsel, and submit this Response in Opposition to United States' Renewed Motion to Dismiss and Memorandum of Law in Support [ECF No. 30] (herein "Renewed Motion")).[1] In opposition to United States' Motion, Plaintiffs state:

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A plaintiff is the masters of his or her own complaint. *See Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 525 U.S. 826, 831 (2002). Despite the United States' attempt to recast the claims in this case, it is for Plaintiffs to actually define what is at issue. Plaintiffs are holders of Osage Headrights (rights to receive a portion of the royalties resulting from mineral production in Osage County, Oklahoma, from mineral interests that are held in trust by the United States). Plaintiffs presented claims against the United States – that it overpaid gross production taxes, underpaid interest, and misreported distributions that allow the United States—as a trustee—to balance the books when they otherwise would not. The United States' malfeasance diminished the amount of every Headright Holder's quarterly distribution of royalty payments. These are the issues in this case.

After leading this court on a wild goose chase of legal issues that resulted in reversal at the Federal Circuit, the United States "renews" its Motion to Dismiss, speculating about "issues" that do not exist to manufacture a Rule 19 defense. This defense was noticeably absent from the United States' first Motion to Dismiss [ECF No. 7]. The United States seeks to be excused for its own neglect, claiming that it was not aware of potential Rule 19 issues until the Federal Circuit's decision "brought the issue of joinder to the fore." Renewed Motion at 15. However, that simply

[1] Despite being misleadingly labeled a "Renewed Motion," the Motion raises entirely new arguments that were not raised by the United States in its first Motion to Dismiss.

is not the case. The United States, in 2006, in this case with these Plaintiffs, litigated and lost this very Rule 19 defense; a defense the United States claims was never considered before. The United States has offered a new wild goose to chase. Plaintiffs simply want a resolution, as swiftly as possible.[2] With this case in its 20th year, Plaintiffs are entitled to justice. Further delay is justice denied.

PROCEDURAL BACKGROUND

In 2002, William Fletcher[3] challenged the United States' management of the trust created by the 1906 Act,[4] of which he was, and continues to be, a beneficiary.[5] His action in the Northern District of Oklahoma entailed a request for an accounting of the trust fund created by the 1906 Act. After the Northern District of Oklahoma dismissed the Complaint without prejudice to refiling, plaintiffs appealed the dismissal of their request for an accounting. On appeal, the Tenth Circuit reversed the dismissal, holding that "[o]ver the years both Congress and [the 10th Circuit]

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[2] Plaintiffs note that the briefing before the Northern District of Oklahoma involved different counsel for the United States than the counsel involved now, and the counsel involved in this action during the briefing on the United States' First Motion to Dismiss [ECF No. 7]. However, this pattern of re-drumming up previously-lost arguments and defenses seems to be the United States' *modus operandi*. *See e.g. Cherokee Nation v. United States Dept. of Interior*, 2021 WL 1217911 at n.2 (D.D.C. Jan. 4, 2021) (noting that the United States "should have followed the sage advice of Kenny Rogers and known to run away," instead of reasserting previously rejected defenses).

[3] The other original co-plaintiffs in that action have all passed away from old age. Mr. Fletcher, holding strong yet undeniably aging, seeks justice. The United States' playbook defense of delay is unfair because it denies Plaintiffs an opportunity for justice. The United States' re-submission of a defense under Rule 19 which it already lost is simply cruel. But, it is not as cruel as the Government's mishandling of this trust, as exposed recently by Bloomberg: https://www.bloomberg.com/features/2022-in-trust-podcast/.

[4] 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).

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

have repeatedly recognized that, in this way, the 1906 Act created a trust relationship between the government and individual headright owners." *Fletcher v. United States*, 730 F.3d 1206, 1209 (10th Cir. 2013) ("*Fletcher II*").[6] 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.

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*. The United States initially appealed that order, but voluntarily dismissed that appeal less than a month later. 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.

The United States responded to the action by filing its first Motion to Dismiss. In that motion, 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) this Court 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 this Court jurisdiction over their claims; and (7) this Court lacked jurisdiction over Plaintiffs' claim for injunctive relief. ECF No. 7 at 1-2.

[6] There is no established and consistent number for judicial opinions from the dispute between Plaintiffs and the United States regarding this dispute. As such, as a matter of consistency and clarity, Plaintiffs are adopting the numbering system used by the United States in its Renewed Motion.

> The Court granted the United States' first Motion to Dismiss, finding 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.

ECF No. 22 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.

Plaintiffs appealed the Court's decision to the United States Court of Appeals for the Federal Circuit. On February 24, 2022, the Federal Circuit reversed, holding that: (1) a trust relationship exists between Plaintiffs and the United States under the 1906 Act sufficient to confer standing, *Fletcher v. United States*, 26 F.4th 1314, 1321-24 (Fed. Cir. 2022) ("*Fletcher V*") (reversing this Court's holding that "plaintiffs have no standing to pursue their breach of trust claims because they lack a legally protectable interest"); (2) this Court has jurisdiction over Plaintiffs' claims pursuant to the Tucker Act, 28 U.S.C. § 1491, *Fletcher V*, 26 F. 4th at 1324-1325; and, finally, (3) Plaintiffs' original accounting does not constrain the temporal scope of, nor foreclose, an accounting for damages, although said accounting may be limited by other factors such as "[s]tautes of limitations, waiver, forfeiture, preclusion, and other equitable considerations," *Fletcher V*, 26 F. 4th at 1325-1327.

STANDARD OF REVIEW

Generally, motions to dismiss are "viewed with disfavor and should rarely be granted." *Lachney v. United* States, 2 Cl.Ct. 244, 247 (1983). In considering a Motion to Dismiss, the Court "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in [the non-moving party's] favor." *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000); *Inter-Tribal Council of Arizona, Inc. v. United States*, 125 Fed. Cl. 493, 498 (2016). 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." *Id.* (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.

ARGUMENT AND AUTHORITIES

I. By Rule The United States Is Prohibited From Raising Rule 19 Defenses In Its Motion.

Pursuant to RCFC 12(g)(2), when a party makes a Rule 12 motion, that party "must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." A defense that the party failed to initially raise is waived unless it is protected pursuant to subsection (h)(2) or (3). RCFC 12(h)(2) "preserves a defense based upon failure to join an indispensable party from waiver. However, it must be asserted in a manner consistent with that provision." *EP Operating Ltd. Partnership v. Placid Oil Co.*, 1994 WL 507455 at *2 (E.D. La. Sept. 14, 1994).[7] RCFC 12(h)(2) details that such omitted defenses may only be raised in the parties' Answer, at trial, or through a motion for judgment on the pleadings. As a result, "[t]he right to raise these defenses by preliminary motion is lost when the defendant neglects to consolidate them in his ***initial*** motion." 5C Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1385 (3d ed.) (emphasis added); *see also* Moore's Federal Prac. § 19.02[4][b] at 19-28 (3d Ed. 2009) ("Clearly, if defendant makes any of the

[7] The Eastern District of Louisiana was interpreting a previous version of FRCP 12. The current version, which matches the text of its RCFC counterpart, was amended in 2007 as an overall restyling of the Federal Rules of Civil Procedure to make them easier understood. *See* FRCP 12 at cmt. on 2007 Amendment. These changes were not meant to make a substantive change to the rules, but were "intended to be stylistic only." *Id.*

defensive motions enumerated in Rule 12 and fails to assert the necessary party issue, it waives the matter.").

Here, the United States admits that it "did not raise the Osage Nation's joinder in its original motion to dismiss." *See* Renewed Motion at 14. However, it asks to be forgiven for its neglect because—allegedly—the Federal Circuit's Opinion has "brought the issue of joinder to the fore." *Id*. at 15. However, Plaintiffs have not filed an amended complaint, and Plaintiffs' Complaint is unchanged since the filing of this action. The only thing that has changed is the United States' approach concerning arguments it has already lost in trying to dismiss Plaintiffs' claims over the years. While the United States seeks to—in this case—formulate yet *another* argument to further delay resolution of this two-decade dispute between the parties,[8] the reality is that the Rule 19 defense is the same defense which the United States lost before the Northern District of Oklahoma, as discussed further below. Because the United States did not raise this defense as part of its ***initial*** Rule 12 Motion, the Rules of Procedure of this Court prohibit the defense from being raised in this motion.

[8] S*ee also Fletcher II*, 730 F.3d at 1208, 1215 (Justice Gorsuch writing that the action had created a "decade-long blizzard of paper" but "remain[ed] stunted at the motion to dismiss stage" and hoping the dispute "already about to reach its teenage years, might come to a speedy end at last"),

II. The United States' Defenses Are Barred By Issue Preclusion.[9]

The United States raises two issues in defense that are barred by issue preclusion: 1) its argument that Rule 19 requires dismissal, and 2) that the Osage Nation settlement bars this action. Both issues were fully and fairly litigated before the United States District Court for the Northern District of Oklahoma, and before the Tenth Circuit Court of Appeals. The United States lost both arguments, twice. It should not be permitted to collaterally attack these prior orders but, rather, it is bound by them.

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

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[9] In the briefing of the United States' First Motion to Dismiss, the United States wrongfully treated the issue of claim preclusion as a matter of "precedent," when it is more a matter of *res judicata*. ECF No. 16 at 4 ("Notably, the district court noted the Court of Federal Claims' earlier rulings in the *Osage v. United States* litigation supported the federal defendants' argument, but it was bound by contradictory Tenth Circuit precedent. *Fletcher v. United States*, 153 F. Supp. 3d 1354, 1363 n.7 (N.D. Okla. 2015) ("*Fletcher I*"). This Court however is not bound by the district court's or Tenth Circuit's decisions, and should rely on its own analysis.") and 13 n.1 (same). As counsel for Plaintiffs explained at the Court's hearing on the First Motion to Dismiss:

> 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] 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 from, 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.

Hearing Trans. [ECF No. 21] at 28:8-24.

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).

A. The Northern District Of Oklahoma Has Already Decided That The Osage Nation Is Not A Necessary Party.

On July 27, 2006, after plaintiffs prevailed at the Tenth Circuit in *Fletcher v. United States*, 160 Fed. Appx. 792, 793 (10th Cir. 2005) ("*Fletcher VIII*"), the United States again moved to dismiss, arguing that the Osage Nation was a necessary and indispensable party to the Headright holders' action. *See* Exhibit 1, Defendants' Memorandum in Support of Supplemental Motion to Dismiss at 5-15. In that motion, the United States raised the same arguments it makes in its current Motion. This includes the argument that the Osage Nation "claims a central role as the tribal overseer of the Osage mineral estate and trust funds" including the filing of the *Osage Tribe* litigation (not yet settled at that point), and the potential for double recovery. *Id*. at 5; *see also id*. at 8-11; *compare with* Renewed Motion at 17. The Northern District of Oklahoma rejected the United States' argument, finding that the claims brought by the plaintiffs were distinct from the claims brought by the Osage Nation in this Court. *Fletcher v. United States*, 2009 WL 920692 at *5 (Mar. 31, 2009) ("*Fletcher VI*").

Specifically, in this case, as in the Northern District of Oklahoma case, Plaintiffs claim that the mineral royalties owed to "headright holders" were being mis-paid. *See* Exhibit 2, Complaint

at ¶ 40; *Fletcher VIII*, 160 Fed. Appx. at 793. The United States moved to dismiss that case, primarily pursuant to FRCP 19, arguing that the Osage Nation's "Tribal Council" was an indispensable party to the litigation. *See* Exhibit 3, Federal Defendants' Motion to Dismiss and Brief in Support at 4. The argument put forth by the United States 20 years ago, which it repeats today, was that "[c]onflicting claims to a common trust fund present a textbook example of a case where one party is prejudiced by a decision in its absence." *Id*. at 6. The Northern District of Oklahoma dismissed the case in 2004 based only upon an analysis of Rule 19, agreeing with the United States that the Osage Nation was a necessary and an indispensable party because some of the plaintiffs' claims at that time would change membership and voting requirements for the Osage Nation. *See* Exhibit 4, Order.

The Tenth Circuit vacated that dismissal and remanded for an analysis of the Rule 19 issue as it related to the plaintiffs' claims regarding underpayment of royalties. *See Fletcher VIII*, 160 Fed. Appx at 797.[10] As the Tenth Circuit pointed out:

> Significantly, in applying Fed. R. Civ. P. 19 to plaintiff's complaint, the district court discussed only the plaintiffs' allegations regarding the denial of their voting rights. Thus, the dismissal order does not explain why the council is a necessary and indispensable party as to the plaintiffs' other claims.

Id. at 794. The Tenth Circuit remanded the matter to the District Court to determine whether the Osage Nation was a necessary and indispensable party. *Id*. at 797. In response to the Tenth Circuit's direction, the Rule 19 issue was briefed and the District Court held,

> To the extent the Osage Nation has an interest as a headright holder in the distribution of funds, its interests are aligned with those of the plaintiffs. [. . .] based upon the briefs thus far presented to this court, the Osage Nation does not appear to claim an interest relating to the subject of the action such that it is a "required party under Rule 19(a).

[10] While the case was pending at the Tenth Circuit, the plaintiffs secured a victory on their voting rights claims in Congress. *See* the Reaffirmation of Certain Rights of the Osage Tribe, P.L. 108-431, 118 Stat. 2609 (2005).

Fletcher VI, 2009 WL 920692 at *5. The United States never appealed that Order.

1. The Issue Is Identical To One Decided In The First Action.

In both this case as well as the Northern District of Oklahoma litigation, the question raised pertains to the role of the Osage Nation in the administration of the Osage Mineral Estate. Indeed, as the Northern District pointed out:

> although the Court of Federal Claims found that the determination of what amount is owed to each headright owner takes place while the funds are in the tribal trust fund, there is no indication that the Osage Nation or its Minerals Council participates in any way in that determination.

Fletcher VI, 2009 WL 920692 at *5.

2. The Issue Was Actually Litigated In The First Action.

As can be seen on the face of the order, the issue was fully litigated. In the United States' briefing to the Northern District of Oklahoma, it asserted:

> Indeed, the Osage Tribe has taken positions showing that it is a necessary and indispensable party to the breach of trust and funds mismanagement claims Plaintiffs assert here. The Osage Tribe argued that it is uniquely charged with a "direct role in policing the tribal trust account from which mineral estate and other income from Osage tribal assets are paid. . . . With this action [in the CFC], the Tribe seeks to fulfill its proper role. … On the basis of Rule 19(a)(2)(ii) alone, the Court should find the Osage Tribe a necessary party to this action

See Exhibit 1, Defendants' Memorandum in Support of Supplemental Motion to Dismiss at 8, 10.

In this case, the United States urges:

> 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.

See Renewed Motion at 26.

The United States—disingenuously—now urges that until it reviewed the 2022 Order from the Court of Federal Appeals, this question of the role of the Osage Nation was never considered, and it therefore never filed a Rule 19 Motion. The United States' excuses are not merely incorrect; they are untrue. Indeed, the reason the United States did not raise Rule 19 as a defense previously in this litigation is because it should be estopped from doing so *because* it lost the defense when it fully litigated it before the Northern District of Oklahoma. In July 2006, the United States not only made the same arguments, it relied upon the same references to the *Osage Tribe* case before the Court of Claims as the reason why the Osage Nation had an interest in Mr. Fletcher's litigation. *See* Exhibit 1, Defendants' Memorandum in Support of Supplemental Motion to Dismiss at 8, 9.

3. Resolution Of The Issue Was Essential To A Final Judgment In The First Action.

Not only was the issue essential to a final judgment in the Northern District of Oklahoma, it was required to be addressed by the Tenth Circuit Court of Appeals. That is, the issue needed to be decided so that the matter could be resolved. That resolution resulted in Plaintiffs obtaining an accounting which allowed them to learn that the payments they receive were less than they should have been.

4. The United States Had A Full And Fair Opportunity To Litigate The Issue In The First Action.

Its first brief before the Northern District of Oklahoma, which was largely dedicated to its Rule 19 defense, was 39 pages long – and to file such a lengthy document, the Court specifically permitted filing an oversized brief. *See* Exhibit 5, Motion for Leave (seeking additional pages); Exhibit 6, Order (permitting additional pages); Exhibit 1, Defendants' Memorandum in Support of Supplemental Motion to Dismiss (39-page brief). For reply, the United States sought and obtained permission to file a 22-page reply brief. *See* Exhibit 7, Order. As such, the United States was permitted to spill more than 60 pages of ink on its Rule 19 Defense—which it in fact did—

and resulted in it losing its Rule 19 Defense in complete fashion. No more pages, no more ink, and no more time is necessary to get to the merits of this case. It is patently unfair for the United States to make up a reason to file a *new* motion in this action in an effort to relitigate issues it has already lost in prior litigation. This presses the bounds of candor for what may be rightly presented to this Court as a "renewed" matter. The United States must be collaterally estopped from dragging Mr. Fletcher—who is in his 80s—along with the other Plaintiffs down this path, again. Mr. Fletcher cannot justly be required to jump the same hurdles again but, rather, he deserves to see a just, substantive result to this litigation.

B. The Northern District Of Oklahoma Has Already Decided That Plaintiffs Are Not Bound By The United States' Settlement With The Osage Nation.

After the Northern District of Oklahoma dismissed plaintiffs' case, without prejudice to refiling, holding that Plaintiffs could never obtain a meaningful accounting, Plaintiffs appealed. In that 2013 appeal before Justice Gorsuch, the United States raised the defense of *its* prior settlement with the Osage Nation, asserting:

> it is questionable whether . . . Plaintiffs could pursue a claim for an accounting [because the settlement agreement between the United States and the Osage Nation] waives on behalf of the Osage Nation and Headright Holders all claims . . . including all claims regarding the United States' obligation to provide a historical accounting."

See Exhibit 8, United States' Tenth Circuit Brief at 38 n. 5. The United States' argument—set forth in a footnote—was rejected by the Tenth Circuit, who stated:

> The footnote itself—notably—stops short of claiming that the tribe has the power to waive individual tribal members' claims. Indeed, the footnote cites no authority one way or the other on the 'question' it highlights. And when we asked the government at oral argument to clarify its position on the 'question' its footnote posed it retreated still further, ***disclaiming any suggestion that the Osage Nation's waiver might bind the individual plaintiffs in this case***.

Fletcher II, 730 F.3d at 1213-1214 (emphasis added). As a result, the Tenth Circuit considered the defense "doubly waived." *Id*. at 1214.

Regardless, when the parties returned to the Northern District of Oklahoma on remand, the United States reasserted this same, already "doubly waived" argument, which the Northern District of Oklahoma also rejected:

> 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 I, 153 F.Supp.3d at 1368 (emphasis added).

1. The Issue Is Identical To One Decided In The First Action.

Both this case and the action before the Northern District of Oklahoma involved questions regarding whether Plaintiffs' claims were waived by the United States' settlement with the Osage Nation, and whether the Osage Nation had authority to waive Plaintiffs' claims. This is demonstrated in the United States' own briefing to the Northern District of Oklahoma. The United States—as it does here—argued that privity exists between plaintiffs and the Osage Nation because the Osage Minerals Council acts "on behalf of itself and Headright Holders." *See* Exhibit 9,

Federal Defendants' Responsive Brief on the Merits at 18, n. 11 (quoting the Osage Tribe Settlement Agreement); *compare with* Renewed Brief at 30-31 ("Osage Nation had authority, through the Osage Minerals Council, to enter into the 2011 Settlement Agreement on behalf of headright holders").

2. The Issue Was Actually Litigated In The First Action, And The United States Had A Full And Fair Opportunity To Litigate The Issue.

Whether the United States' settlement with the Osage Nation settled plaintiffs' claims was a central issue to the Northern District of Oklahoma's final judgment. Following remand from the Tenth Circuit, the court requested the parties provide briefing on the scope of the United States' accounting duty to the plaintiffs. In that briefing, the United States made substantive argument regarding the alleged settlement of plaintiffs' claims:

> Indeed, even if Plaintiffs could somehow claim a legal right to an accounting of the Osage tribal trust funds or account(s) in addition to or in parallel with the Osage tribe, the record makes clear that as a factual matter they no longer can. As part of the settlement of all accounting claims between the United States as the Osage Nation, the Osage Nation noted that it "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," and was settling "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" "on behalf of itself and the Headright Holders." See ECF 1212-1 at 2, 11. Moreover, Plaintiffs here did in fact benefit from this settlement. See ECF 1212-3 at 424, 426 (showing the CFC settlement payments made to the named Plaintiffs).

Exhibit 10, Federal Defendants' Brief Regarding the Scope of Accounting at 7.

Then, the United States relied upon the Osage Nation Settlement in its merits briefing. *See* Exhibit 9, Federal Defendants' Responsive Brief on the Merits. After the United States fully briefed the matter, the Settlement Agreement dominated the merits hearing:

> THE COURT: How can the government claim that the plaintiffs are bound by the government's settlement with the Osage Nation in the Court of Federal Claims

> when the headright owners weren't a party to that agreement and were not allowed to intervene in that case?

Exhibit 11, Hearing Trans. at 36:3-8.[11]

> But if we needed to rely on it back here, then the question is, well, why would that bind them? And it binds them because it was entered by their duly-elected representatives.

Id. at 38:7-10 (argument by counsel for United States).

> THE COURT: Well, obviously if the agreements with couched in a such a way that the headright owners saw that they were going to receive monies but it didn't point to the waiver of an accounting, how can one say that it was a knowing waiver of their right?
>
> I mean, at the beginning of this argument, you said, well, the tribe as their duly-elected government or representative could waive their right to an accounting. But the statute has the conjunctive "and," and there is a duty owed by the government both to the nation and to the individual headright owners, correct, to account?

Id. at 39:11-23.

> THE COURT: If the Court of Claims made clear, as you hold, that the headright owners don't have a right to an accounting to the tribal trust account before distribution, why then does the settlement agreement include a provision in which the Osage Nation purports to waive the headright holder's right to seek an historical accounting of the Osage tribal trust account?

Id. at 51:9-16.

> THE COURT: Were the individual headright owners given the opportunity to opt out of the settlement agreement insofar as the tribe has waived their rights to an accounting?

Id. at 56:23-57-1.

> But what the record specifically shows is we were focused on the record for distributions was the tribal auditor signing off. There's no dispute that they're members of the tribe. There's no dispute that they have their -- in terms of good governance, they have their duly-elected personnel handling this issue for them.

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[11] Normally undersigned counsel would only attach the cited transcript pages. However, because the issue of the Osage Nation Settlement permeates the entire hearing, more than can be referenced herein, counsel is providing the entirety of the hearing transcript.

Id. at 82:24-83:5 (argument by counsel for United States).

The Northern District of Oklahoma devoted more than a fourth of its analysis to the Osage Nation Settlement matter, ultimately rejecting the United States' argument.

3. Resolution Of The Issue Was Essential To A Final Judgment In The First Action.

Purported waiver of plaintiffs' claims by the Osage Nation Settlement was the United States' first substantive affirmative defense claimed in the United States' Answer. *See* Exhibit 12, Answer and Affirmative Defenses at 9-10. The United States also raised the issue at nearly every stage after its Answer in order to prevent resolution of Plaintiffs' claims. Exhibit 10, Federal Defendants' Brief Regarding the Scope of Accounting; Exhibit 9, Federal Defendants' Responsive Brief on the Merits. Since settlement of Plaintiffs' claims would have barred judgment in Plaintiffs' favor, resolution of the issue was essential to the litigation.

As such, this issue meets all four requirements for issue preclusion to apply. *Zacharin*, 43 Fed. Cl. at 194. Because the parties have already litigated this issue fully, issue preclusion bars the United States from relitigating it here. *In re Freeman*, 30 F.3d at 1465.

III. The Osage Nation Is Not A Necessary And Indispensable Party.

Although the United States should be precluded from raising its previously lost Rule 19 defense, the fact remains that the Osage Nation is not a necessary and indispensable party to this action. "In determining whether to dismiss a lawsuit for failure to join a necessary party, this court analyzes the factors enunciated in RCFC 19." *Iris Corp. Berhad v. United States*, 82 Fed. Cl. 488, 498-99 (2008). First, "the court must determine whether the absent party is 'necessary'" under RCFC 19(a). *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318, 1324 (Fed. Cir. 2007). Then, "if an absent party is necessary but joinder is not feasible, the court must consider several factors to determine" whether the case should be dismissed under

RCFC 19(b). *Mesa Grande Band of Mission Indians v. United States*, 121 Fed. Cl. 183, 191 (2015).

A. The Osage Nation Is Not A Necessary Party.

A non-party is "necessary" and must be joined if "in that person's absence, the court cannot afford complete relief among existing parties" or "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may … impair or impede the person's ability to protect the interest; or leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." RCFC 19(a)(1). Here, the United States does not contend that the Court cannot award complete relief between the existing parties. Instead, the United States bases the entirety of its argument on the latter two situations identified in RCFC 19(a)(1).

1. The Osage Nation's Interests Will Not Be Impaired or Impeded.

The Federal Circuit has explained that the "interest" of the non-party cannot be "indirect or contingent" but must be "of such a direct and immediate character that the [absent party] will either gain or lose by the direct legal operation and effect of the judgment." *United Keetoowah Band*, 480 F.3d at 1324-25 (quoting *Am. Mar. Transp. Inc. v. United States*, 870 F.2d 1559, 1561 (Fed. Cir. 1989)). Courts have held that a non-party's interests will not be impeded if a plaintiff is only seeking to enforce their own rights via-a-vis the defendant, and not vis-à-vis the non-party. *See Mille Lacs Band of Chippewa Indians v. State of Minn.*, 853 F.Supp. 1118, 1130-31 (D. Minn. 1994).

a. <u>The Osage Nation Has Waived Its Interests.</u>

Though the United States conveniently overlooks this obvious fact, the Osage Nation lacks an interest in this action because it has disclaimed any further claim arising from the United States'

mismanagement. As noted by the United States itself, the Osage Nation

> waive[d] and release[d], and covenant[ed] 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…

See Settlement Agreement [ECF No. 30-1] at 10. Additionally, through the Settlement Agreement the Osage Nation continues to waive and release every claim it might have against the United States if the Osage Nation "does not present an objection in writing to the Department of the Interior" by the later of "two (2) years after the close of the calendar year in which the reported period occurs or one (1) year after the Periodic Statement is received" by the Osage Nation. *Id*. at 15, 17 (paragraphs 8(g)(i) and 8(h)). Plaintiffs are unaware of any such objection, and the United States has not provided evidence of any such objection.

The Osage Nation cannot as a legal matter claim an interest in claims relating to the mineral estate (past, present, and future) because it waived them. The United States not only fails to recognize this fact, it does not even try to rationalize how it is asserting on one hand that the Osage Nation maintains an interest in claims relating to the fund, while also relying on its waiver of all claims relating to the same fund. *See* Renewed Motion at 37 (United States asserting that that Osage Nation granted "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."). The Renewed Motion lacks candor or consistency and must be rejected.

b. <u>The United States Misrepresents The Osage Nation's Role.</u>

The United States spends a copious portion of its argument claiming, seemingly for the first time, that the Osage Nation participates in the management of the trust funds at issue in this action:

- That the Osage Nation, through the Osage Minerals Council, "directly authorizes" the transactions at issue in this action. *See* Renewed Motion at 17.
- That the Osage Minerals Council "approves" the United States' headright payment calculations. *See* Renewed Motion at 17.
- That the Osage Minerals Council "approves" the United States' gross production tax payments. *See* Renewed Motion at 17.
- That the Osage Minerals Council votes on the amount of Tribal operating expenses to drawdown from the trust account(s). *See* Renewed Motion at 18.
- That the United States "must obtain" approval from the Osage Minerals Council for withdrawal from the trust account(s). *See* Renewed Motion at 18.

Interestingly, the United States does not cite to any statute or regulation requiring the Osage Minerals Council's action in the above instances. Instead, in most instances these are just unsupported assertions by the United States. Then, in others, they are contradicted by the very exhibits the United States purports to rely upon.

From undersigned counsel's research of relevant statutes and regulations, the only role the Osage Tribal Council (as its defined in 25 C.F.R. § 226.1) has in relation to the Osage Mineral Estate is regarding the granting of leases, including the term of the lease, when the oil producer must make royalty payments to the United States, and provisions for the granting of easements to access leases. *See e.g.* 25 C.F.R. § 226.2 (Sale of leases.); 25 C.F.R. § 226.10 (Term of lease.); 25 C.F.R. § 226.11 (Royalty payments.); 25 C.F.R. § 226.13 (Time of royalty payments and reports.); 25 C.F.R. § 226.15 (Unit leases, assignments and related instruments.); 25 C.F.R. § 226.26 (Easements for wells off leased premises.). None of these regulations grant the Osage Nation, or any of its instrumentalities, a role in the actions being challenged here, such as the collection of

interest and accurate payment of gross production taxes.[12]

Then, looking to the specific exhibits relied upon by the United States, it is apparent that, at most, the Osage Nation serves a ministerial role in the United States' management of Plaintiffs' trust. For instance, the United States argues that the Osage Nation "approves" gross production taxes because tribal officials co-sign on the wire transfer for said payments, along with signatures by the BIA Osage Agency Superintendent. *See* Renewed Motion at 17-18; Approval Voucher [ECF No. 30-3] at 13. Moreover, and not discussed by the United States, the same document shows that the calculation of gross production taxes is made by the United States, ECF No. 30-3 at 2, and the wire transfer is specifically requested by the BIA's Osage Agency, ECF No. 30-3 at 3. Finally, the document states that "***Pursuant to the law***, the Bureau of Indian Affairs Osage Agency, therefore, request a report of the distribution of the taxes that are allocated for Osage County, Oklahoma." *Id.* at 3 (emphasis added). The United States' exhibit also shows that headright payments are approved by the Bureau of Indian Affairs, but *allows* the Osage Nation to concur in that payment.[13] ECF No. 30-4 at 67.

Finally, in an attempt to manufacture an interest for the Osage Nation, the United States misrepresents the claims being brought by Plaintiffs. Specifically, the United States asserts that Plaintiffs are seeking damages for "overpayment to the [Osage] Nation." Renewed Motion at 25. However, that is not Plaintiffs' claim. Instead, Plaintiffs' claim has to do with the United States' dubious accounting of payments to the Osage Nation. Plaintiffs' Complaint explains that "[t]here

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[12] It must be noted, on appeal, the United States admitted it does not collect adequate information to assure gross production taxes are being paid in the correct amounts. *See* Exhibit 13, United States' Answering Brief at 32 (stating that regulations only provide producers provide information on a total basis, and not on a well-by-well basis).

[13] Paternalistic, bureaucratic colonialism is not dead at the Bureau of Indian Affairs.

are numerous instances in which Defendant erred in reporting expenses and simply adjusted the revenue so as to balance the account." Complaint [ECF No. 1] at ¶ 71. This resulted in inaccurate reporting of distributions to the Osage Nation and causing losses to Plaintiffs. *Id*. at ¶ 65. Despite the United States' numerous misrepresentations, Plaintiffs are not challenging actual distributions to the Osage Nation, they are instead claiming those amounts were misrepresented in the accounting to nefariously hide other mismanagement to show the account balanced. That is, Plaintiffs allege the United States cooked the books. And, they have the evidence to prove it.

2. There Is No Substantial Risk Of Additional Litigation.

The United States argues that without the presence of the Osage Nation, it will be subject "multiple lawsuits challenging the same conduct, inconsistent obligations, or claims for double recovery." *See* Renewed Motion at 22. On this issue, "[t]he key is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy the Rule 19(a) criteria." 7 Wright, Miller & Kane, Federal Practice and Procedure § 1604 at 62 (2d ed. 1986); *Air-Exec, Inc. v. Two Jacks, Inc.*, 584 F.2d 942, 945 (10th Cir. 1978) ("when evaluating the harm to the defendants we are to look at the practical probabilities more than the theoretical possibilities") (relying on 3A Moore's Federal Practice § 19.07-2(1) (2d ed. 1995)). Moreover, this prong of the 19(a)(1) analysis is intended "to avoid inconsistent *obligations*, and not to avoid inconsistent adjudications." Moore's Federal Practice § 19.03(4)(D) at 19-59 (3d Ed. 2009) (emphasis in original). As such, "[s]equential claims for damages do not inflict the relevant harm." *Id*. at 19-60.

Here, the United States' entire argument is based on speculative, potential, subsequent damages claims from the Osage Nation.[14] Specifically, the United States argues that. "***if*** Plaintiffs

[14] The United States also argues, in relation to the interests of the Osage Nation, that the Osage Nation ***might*** be forced to disgorge trust payments it received from the United States.

were to obtain a favorable judgment on their trust mismanagement claims here . . . 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." Renewed Motion at 23. However, Plaintiffs are only seeking damages for the violation of *their* rights, not the rights of the Osage Nation. *See Brown*, 42 Fed. Cl. at 564-565 ("The government is alleging that the Tribe has an interest in possible consequences that *may* result from this litigation. Those interests are not interests in the case at bar, which is a suit for breach of trust, but rather interests in potential future litigation. Thus, the Tribe does not have an interest in the outcome of the *present* litigation that will be prejudiced if this case proceeds in its absence.") This might be the same "conduct" but they are obligations to different entities, and thus do not involve the same *obligations*.

And in any event, given the Osage Nation's waiver, it is hard to imagine how the Nation would make these claims on behalf of Plaintiffs. Moreover, all the United States' argument shows is that Plaintiffs present claims and any potential, future, speculative claims the Osage Nation *might* bring would be aligned with the interests Plaintiffs hold. An alignment of claims is a reason to deny a Rule 19 Motion, and somehow the United States fails to address or even consider this point. Ultimately, the United States' argument should be rejected.

See Renewed Motion at 21. This is not a remedy Plaintiffs are seeking in this action. Any restoration damages would be paid by the United States, not the Osage Nation. *See e.g. Brown v. United States*, 42 Fed. Cl. 538, 564-565 (1998) ("the government is the only party subject to liability for *breach of fiduciary duty* because only the government is a trustee, not the Tribe.") If the United States wants to later seek contribution from the Osage Nation, that does not make the Osage Nation a required party. *See id. at 655*; *Janney v. Shepard Niles, Inc.*, 11 F.3d 399, 411-12 (3d Cir. 1993) ("An outcome adverse to Shepard Niles in Janney's present action against it does not have any legal effect on whatever right of contribution or indemnification Shepard Niles may have against Underwood."); *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.3d 496, 503 (7th Cir. 1980) ("potential indemnitors have ***never*** been considered indispensable parties, or even parties whose joinder is required if feasible.") (emphasis added).

B. Even If The Osage Nation Were A Necessary Party, This Action Should Not Be Dismissed.

Under RCFC 19(a) a "necessary" party must be joined "if feasible." If joinder is not feasible, such as when the necessary party is protected by sovereign immunity, the court considers the following factors in order to determine whether the action may proceed amongst the existing parties:

> **(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> **(2)** the extent to which any prejudice could be lessened or avoided by:
> **(A)** protective provisions in the judgment;
> **(B)** shaping the relief; or
> **(C)** other measures;
> **(3)** whether a judgment rendered in the person's absence would be adequate; and
> **(4)** whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

RCFC 19(b). The court has "substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward in the absence of someone needed for a complete adjudication of the dispute." *Cloverleaf Standardbred Owners Ass'n, Inc. v. National Bank of Washington*, 699 F.2d 1274, 1277 (D.C. Cir. 1983) (quoting 7C Wright & A Miller, Federal Practice and Procedure § 1604 at 45-46 (1972)). Generally, in determining whether the action can continue in the absence of the necessary party, "the preference is for non-dismissal." *Princeton Digital Image Corp. v. Hewlett-Packard*, 2013 WL 1454945 at *5 (S.D.N.Y. Mar. 23, 2013) (quoting *Drankwater v. Miller*, 830 F.Supp. 188, 191 (S.D.N.Y. 1993)).

1. The Osage Nation Would Not Be Prejudiced.[15]

Generally speaking, due to the requirements for issue and claim preclusion, a non-party to a suit is not prejudiced by a judgment in that suit. *See e.g. Council for Tribal Employment Rights v. United States*, 112 Fed. Cl. 231, 252, n.20 (2013). This is particularly true where, as here, the Osage Nation has disclaimed any claim Plaintiffs put at issue. As noted above, the Osage Nation has released and/or waived any potential interest in this action. As such it cannot be prejudiced by any judgment this Court may enter.

Moreover, Plaintiffs are only seeking damages regarding the breach of the United States' trust responsibilities to them, and not the breach of trust responsibilities owed to the Osage Nation. As such, this is not a case of "[c]onflicting claims by beneficiaries" as asserted by the United States. Renewed Motion at 26 (quoting *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986)). Specifically, unlike in *Wichita*, there is no dispute between the Osage Nation and Plaintiffs about how the trust fund is distributed. Both the Osage Nation and Plaintiffs recognize that after certain distributions are made to the Osage Nation and expenses charged on the royalty payments, the remaining amount is to be paid to headright holders. This is in contrast to *Wichita*, where the Caddo Nation "had grown disenchanted with the equal distribution" of funds between three tribes and facilitated a change to distributions based on tribal populations, a decision the Delaware Nation appealed. 788 F.2d at 769-771.

Should this action proceed, the Osage Nation's claims would not be prejudiced. And even if they were, such prejudice is lessened by the presence of the United States as a party. 3A Moore's Federal Practice § 19.07-2(1) at 19–106 (2d ed.1995) ("the fact that the absent person may be

[15] To the extent the Osage Nation's interests were prejudiced through this action, the Court still possesses considerable discretion to shape its judgment to lessen or avoid such prejudice. *See* RCFC 19(b)(2).

bound by the judgment does not of itself require his joinder if his interests are fully represented by parties present"); *Sac and Fox Nation of Missouri v. Norton*, 240 F.4d 1250, 1259 (10th Cir. 2001) ("The potential of prejudice to the Wyandotte Tribe's interests is greatly reduced, however, by the presence of the Secretary as a party defendant. As a practical matter, the Secretary's interest in defending his determinations is 'virtually identical' to the interests of the Wyandotte Tribe."); *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) ("As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit."). To the extent the interests that the United States asserts that the Osage Nation would have in this action are "virtually identical" to the position of the United States, it can represent those interests.

For instance, the United States asserts that the "foundational inquiry into the division of interests between headright holders and the Osage Nation implicates the Nation's legal rights." Renewed Motion at 21. This theoretical interest of the Osage Nation is "virtually identical" to the interest of the United States. As the United States has made known, it believes all trust duties are owed to the Osage Nation, and the headright holders are beneficiaries in name only. *See* United States' First Motion to Dismiss [ECF No. 7] at 15-19. Moreover, if there is anything the past twenty-years of litigation has shown, it should be that the United States will represent those interests vigorously; probably even—if based upon previous conduct—raising arguments they have lost multiple times in multiple courts. The Osage Nation, along with any claims it may still retain, if any, would not be prejudiced.

2. The Court Can Award Adequate Relief Amongst The Parties.

The third RCFC 19(b) factor "echoes the 'complete relief' clause of the" RCFC 19(a)(1) analysis. Moore's Federal Prac. § 19.05(4) at 19-98 (3d Ed. 2009); *Burger King v. American Nat.*

Bank and Trust Co. of Chicago, 119 F.R.D. 672, 679 (N.D. Ill. 1988). In its Renewed Motion, the United States does not challenge that this Court may award complete relief between the parties. Then, instead of directly addressing the adequacy of relief, the United States largely reiterates its concerns regarding the "multiple litigation" prong of the RCFC 19(a) analysis. Specifically, the United States raises concerns about "relitigat[ing] these issues with the Osage Nation, 'with potentially different results.'" Renewed Motion at 27. However, "the possibility of a subsequent adjudication that may result in a judgment that is inconsistent as a matter of logic [does not] trigger the application of Rule 19." *Field v. Volkswagenwerk AG*, 626 F.2d 293, 301-302 (3d Cir. 1980).

3. Plaintiffs Would Not Have An Adequate Remedy If The Action Were Dismissed.

If no alternate forum exists, the Court should be "'extra cautious' before dismissing the action." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996). "The absence of an alternative forum would weigh heavily, if not conclusively against dismissal." *Rishell v. Jane Phillips Episcopal Memorial Medical Center*, 94 F.3d 1407, 1413 (10th Cir. 1996) (quoting *Pasco*, 637 F.3d at 501 n.9). Here, the United States does not dispute that dismissal of this action would leave Plaintiffs without an adequate remedy.

4. Sovereign Immunity Is Not A Silver Bullet.

The United States argues that this action should be dismissed solely because the Osage Nation is immune from suit as a sovereign entity. *See* Renewed Motion at 25-26. However, sovereign immunity of an absent necessary party is not an absolute bar. *See Brown*, 42 Fed. Cl. 538 (tribe was not a required party in action by tribal members alleging mismanagement of lease between tribe and golf course); *Sac and Fox*, 240 F.3d 1250 (finding that the Wyandotte Tribe was not a required party despite the action challenging the Tribe's ability to conduct gaming activities on a specific tract); *Daley*, 173 F.3d 1158 (tribes were not a required party to action challenging

allocation of groundfish catches to tribes); *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013) (tribe was not a required party to disenrolled citizens' challenge to BIA's decision to uphold tribe's decision to disenroll descendants). Instead, sovereign entities are provided "heightened protection" if a lawsuit poses "a potential injury to the sovereign's interest." *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1181 (11th Cir. 2011). However, the sovereign's interest must not be frivolous; it must be directly affected by the litigation. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 868 (2008). Finally, even if the absent party receives heightened protection as a sovereign "this does not mean that balancing can be completely avoided simply because an absent person is immune from suit." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1293-94 (10th Cir. 2003).

Here, as noted above, the Osage Nation does not have an interest in this litigation, and to the extent it does, it is tangential at best or adequately represented by the parties to this suit. Plaintiffs are only seeking damages for the United States' mismanagement as it relates to Plaintiffs, not the Osage Nation. Moreover, as noted above, the FCRC 19(b) factors weigh in favor of the case proceeding in the Osage Nation's absence. The United States' "Renewed" Motion should be denied.

IV. Plaintiffs Are Not Precluded By the *Osage Nation* Settlement.

A. Plaintiffs' Claims Are Not Barred By Res Judicata.

The United States also argues that the settlement agreement between it and the Osage Nation bars Plaintiffs' claims by *res judicata*. However, fatal to the United States' *res judicata* argument, there is no unity of claims between the Osage Tribe's claims and Plaintiffs' claims here. "Under the doctrine of claim preclusion, 'a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.'" *Sikorsky*

Aircraft Corp. v. United States, 122 Fed. Cl. 711, 719-720 (2015). Additionally, "[f]or purposes of evaluating alleged claim preclusion, the court applies the following tripartite test: whether '(1) there is identity of parties (or their privies);[16] (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.'" *Id*. As addressed in the section below, regarding the United States' argument that the Osage Nation waived and released Plaintiffs' claims, there is a clear the lack of identify of parties in this action and the Osage Tribe's action. Further, there is not a shared set of transactional facts between the two actions.

Plaintiffs challenge the United States' payments to Osage headright holders under the 1906 Act due to (1) overpayment of Gross Production Taxes, *see* Complaint [ECF No. 1] at ¶¶ 63, 64; (2) failure to collect interest on royalties once collected and segregated for distribution, but before distribution actually takes place, *see id*. at ¶ 62; and (3) incorrect reporting of tribal operation payments that permits the United States to force the balancing of the account, when it otherwise would not balance, *see id*. at ¶ 71. These are all actions occurring as part-and-parcel to distribution of headright payments. That is, the transactional facts currently at issue relate to the United States' management of funds resulting in the distribution *from* the Trust Account. Meanwhile, the claims and transactional facts in the Osage Tribe's action related to mismanagement by the United States in collecting funds *coming into* the trust fund as a part of royalty collection. The Osage Tribe's claims specifically 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

[16] This requirement is important because generally "one is not bound by a judgment *in personam* in litigation in which he is not designated a party" for due process reasons because the person has not received a "full and fair opportunity to litigate" their claims. *Council for Tribal Employment Rights*, 112 Fed.Cl. at n.20 (holding that failure to join a party under Rule 19 does not prejudice the non-joined parties' claims).

adequate cash on hand; and (4) investment underperformance. *See Osage Tribe of Indians of Okla. v. United States*, 93 Fed. Cl. 1, 9 (2010). The Osage Nation's claims were all those that resulted in under-collection of funds, not underpayment of the funds after they were collected.

B. Plaintiffs Were Not Parties To The Osage Tribe Litigation Or Settlement.

Contracts only create obligations upon parties to the contract. *See Nickel v. Pollia*, 179 F.2d 160, 163-164 (10th Cir. 1950) (finding that contractor cannot look to third party for payment on contract). It is a longstanding "principle that one owes no [contractual] duty to persons with whom he has no privity of contract." *Spencer v. Madsen*, 142 F.2d 820, 822 (10th Cir. 1944); *see also* BLACK'S LAW DICTIONARY (3d Pocket Ed. 2006) (defining privity of contract as "[t]he relationship between parties to a contract allowing them to sue each other but preventing a third party from doing so"). The United States' argument on this point seems to be that because Osage headright holders were intended to be third-party beneficiaries of the Osage Nation's Settlement Agreement, it made them parties to the contract. However, this Court has rejected such a contortion of the law. For instance, "[w]here the Government is a third-party beneficiary of a contract between two private parties, there is no 'contract with the United States.'" *Wagner v. United States*, 71 Fed. Cl. 355, 364 (2006). Simply put, Osage headright holders are not a party to the Settlement Agreement between the Osage Tribe and the United States.

"As the party seeking to enforce the settlement, [the United States] bears the burden of demonstrating that" the Osage Nation had the authority to bind Plaintiffs to the settlement. *Hodges v. Potter*, 2005 WL 6336682 at *1 (D.D.C. Aug. 31, 2005) (citing *Makins v. Dist. of Columbia*, 861 A.2d 590 (D.C. Cir. 2004)). In its Motion, the United States put forth two arguments to support the Osage Nation's purported ability to waive Plaintiffs' claims. First, the United States makes a circular argument that the Osage Nation possessed such power because the Osage Nation said it

had such power in the recitals found in the Settlement Agreement. *See* Renewed Motion at 30, 35. Such circular logic is easily dismissed by the Court. *See In re: NTP, Inc.*, 654 F.3d 1279, 1293 (Fed. Cir. 2011) ("Again, this falls into the circular logic of use the files to corroborate the testimony and the testimony to corroborate the files."); *Novo Nordisk Pharmaceuticals, Inc. v. Bio-Technology General Corp.*, 424 F.3d 1347, 1362 (Fed. Cir. 2005) ("As we have done in similar situations in the past, we reject the 'circular logic' of this request.").

Second, the United States argues that Article XV, Section 4 of the Osage Constitution grants the Osage Tribe authority to settle the claims of Osage headright holders. *See* Renewed Motion at 31. Despite the fact that the United States lost this issue in the Northern District of Oklahoma, *see supra* at Section II(B), the Section relied upon by the United States only creates the Osage Minerals Council which is only empowered to "consider and approve leases and to propose other forms of development of the Osage Mineral Estate." *See* Osage Const. Art. XV § 4 (available at https://www.osagenation-nsn.gov/sites/default/files/library/ConstitutionOfTheOsageNation.pdf). *See Fletcher I*, 153 F.Supp.3d at 1368 ("The government contends that the tribe possesses such authority as the 'elected representative' of the headright owners, but nothing in the Osage Constitution purports to confer such authority.") (internal citation omitted). The Osage Minerals Council is not empowered with any right to sue on behalf of Osage headright holders, let alone settle their breach of trust claims out from under them.[17] The United States' misrepresentation of the facts relating to the authority of the Osage Minerals Council does not make its argument more persuasive.

[17] Further, although the United States presents argument to show the Osage Minerals Council has limited authority relating to oversight of the Osage mineral estate, the United States fails to show any role of the Osage Minerals Council relating to oversight of the Osage Tribal Trust Fund, said fund being the focus and corpus of Plaintiffs' claims.

Additionally, it must be noted that the United States refused to consult with Plaintiffs in the negotiation of the Settlement Agreement. On October 19, 2011, Jason Aamodt, counsel for Plaintiffs, approached Joseph Kim, counsel for the United States in both the Osage Tribe Litigation and the *Fletcher* Litigation—after Mr. Kim 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* Exhibit 14, Electronic Mail from Aamodt to Kim (Oct. 19, 2011). 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* Exhibit 15, Dec. W. Pipestem; Exhibit 16, Dec. J. Gray. On October 20, 2011, Mr. Kim refused to comment on what legal effect, if any, the settlement agreement would have on Plaintiffs' breach of trust claims. *See* Exhibit 17, Electronic Mail from Kim to Aamodt (Oct. 20, 2011).[18] This is significant because if the settlement agreement was intended to impact this case, Plaintiffs would have objected. Given that the Osage Settlement required a vote of the headright holders it is not clear that the settlement would have been approved if it was believed at the time that the settlement would impact this case. Whether or not it would have mustered the votes, the prejudice of the United States' argument is clear; it unfairly wants to impose a settlement on Plaintiffs now when it knows that admitting the same thing before settlement was approved by a vote of headright holders would have permitted Plaintiffs here to protect themselves.

[18] It is worth noting that in the Northern District of Oklahoma the United States ***admitted*** that its inclusion of references to headrights holders in the waiver provisions were added "in a belt and suspenders manner," *Fletcher I*, 153 F.Supp.3d at 1366, or in other words merely out of an abundance of caution.

V. Plaintiffs' Claims Are Adequately Pled.

The United States seeks either dismissal of Plaintiffs' claims under RCFC 12(b)(6) claiming that Plaintiffs did not provide adequate factual detail for their claim, or seeks an order requiring Plaintiffs to make a more definite statement of their claims. *See* Renewed Motion at 38-39. Specifically, the United States argues that "Plaintiffs do not detail any of their management claims with any specificity so that those allegations can be rebutted." *Id*. at 39.

Pleading rules require "that a plaintiff provide a 'short and plain statement of the claim showing that the pleader is entitled to relief,' which requires that the complaint 'give the defendant fair notice of what the … the claim is and the grounds upon which it rests.'" *ABB Turbo Systems AG v. Turbousa, Inc.*, 774 F.3d 979 (Fed. Cir. 2014) (quoting *Twombly*, 550 U.S. at 555); *see also* RCFC 12(b)(6). To avoid dismissal, a complaint's *factual allegations* must "raise the right to relief above a speculative level." *Twombly*, 550 U.S. at 555. This requirement "does not require 'detailed factual allegations,'" instead the pleading need only contain "*factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 555 U.S. at 678 (emphasis added). District courts are not to make the analysis "too demanding of specificity [or] too intrusive in making factual assessments." *Turbousa,* 774 F.3d at 986 (reversing dismissal on the plausibility of plaintiff's claim). Ultimately, a plaintiff need only "nudge[his or her] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Finally, the courts "take all factual allegations in the complaint as true and construe them facts in the light most favorable to the non-moving party." *Jones v. United States*, 846 F.3d 1343, 1351 (Fed. Cir. 2017).

In their Complaint, Plaintiffs made detailed allegations regarding the United States' breaches of trust in *distributing* properly-owing royalty payments, including: (1) overpayment of

Gross Production Taxes, *see* Complaint [ECF No. 1] at ¶¶ 63-64; (2) failure to collect interest on royalties once collected and segregated for distribution, but before distribution actually takes place, ¶ 62; 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* Complaint [ECF No. 1] at ¶ 71 ("There are numerous instances in which Defendant erred in reporting expenses and simply adjusted revenue as to balance the account of Osage Headright Owners"). The Renewed Motion illustrates that these allegations provided *more than adequate* notice of Plaintiffs' claims. *See* Renewed Motion at 9. In fact, the United States provides a detailed summary of Plaintiffs' claims down to the specific Complaint paragraph citation:

> 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." *Id*. ¶¶ 70–72.

Id. Despite this clarity, the United States contends that Plaintiffs should be held to a pleading standard that would require them to provide a detailed ledger of every improper transaction, complaining that Plaintiffs failed to identify specific "deposit[s] into or payment[s] from the Osage Tribal Trust Account that might serve as the basis for their trust mismanagement claims." *See* Renewed Motion at 39.

Ultimately, the United States' position would create a standard that is "too demanding of specificity [and] too intrusive in making factual assessments." *Turbousa*, 774 F.3d at 986. Such detail at the initial pleading stage would make an unscalable wall for litigants. The resulting pleading would look less like a complaint, and more like an expert report. It is likely that the amount of detail for such a pleading would not even be possible without discovery by the parties

into the details of the United States' transactions to cover information not provided in the accounting which was produced at the order the Northern District of Oklahoma. For instance, the produced accounting did not provide enough detail to identify every single overpayment of gross production taxes because—allegedly—the United States itself never collected the data necessary to make the requisite calculations, instead paying a flat 5% on a lease-by-lease basis. Exhibit 13, United States' Answering Brief at 32-33.[19]

Moreover, the Federal Circuit addressed, at oral argument, the United States' motion for a more definite statement, stating in regards to overpayment of gross productions taxes that:

> I thought they have a fairly specific claim that says during non-trivial periods here, quite a number of the wells that were producing were subject to a less than five per-cent tax and yet five per-cent was paid and that's real money, and it shouldn't have been paid, and it was mistakenly paid out of the trust

Oral Argument (December 10, 2021) Audio Recording at 28:13-28:35, and that:

> the statute is a matter of public record and one can take judicial notice that there were different rates like, two-percent for the first three years of the new wells or something during certain periods, and then what they don't know is obviously how many wells there were, and how much production there was. That doesn't seem like its particularly close to the *Twombly* line.

Id. at 31:56-32:19.

Plaintiffs have provided adequate notice of their claims and the United States has been able to articulate and delineate these claims and where they are identified in Plaintiffs' Complaint. *See* Renewed Motion at 9. As such, the Renewed Motion should be denied.

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[19] It must be noted, but for Mr. Fletcher prevailing on his accounting claim, no one would have discovered the United States' malfeasance in the payment of gross production payments. In fact, none of Plaintiffs' claims here accrued until the United States accounted to headright holders. *See Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) (holding that Congress had "deferred the accrual of [Indian trust claims] until an accounting is provided.").

VI. The United States' Accounting Arguments Are Moot.

As a part of its Renewed Motion, the United States seeks dismissal of Plaintiffs' accounting claim "unless and until liability is proven." Renewed Motion at 40. As counsel for Plaintiffs previously described regarding the request for an accounting:

> 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.

Hearing Tr. (June 3, 2020) [ECF No. 21] at 68:24-69:16. As such, Plaintiffs' accounting request was a request "for full damages rather than an expanded version of the accounting they received in the *Fletcher* litigation." *Fletcher V*, 26 F.4th at 1326.

In reversing this Court's dismissal of Plaintiffs' damages accounting claim, the Federal Circuit stated "we see no reason to automatically constrain the scope of an accounting for damages based on the scope of the accounting that was ordered as a part of the trustee's duty to the plaintiffs." *Id*. at 1326. The Federal Circuit found that, should Plaintiffs prevail, "a further accounting may be required of the government 'for the purpose of enabling the court to determine the amount which plaintiffs are entitled to recover.'" *Id*. at 1326-27 (quoting *Klamath & Modoc Tribes & Yahooskin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 490-92 (1966)). As such, the United States' request on this issue is moot.

CONCLUSION

The thrust of the United States' argument for dismissal of this action has already been rejected in the parties' previous litigation. Specifically, the Northern District of Oklahoma previously held that the Osage Nation was not a necessary and indispensable party to Plaintiffs' breach of trust claims and that the United States' settlement with the Osage Nation did not extinguish Plaintiffs' breach of trust claims. The United States' other arguments also fail for the reasons set forth above. As such, the United States' Renewed Motion to Dismiss should be denied. Alternatively, and to the extent necessary, Plaintiffs would ask for leave of Court to file an Amended Complaint to address any pleading deficiencies.

Respectfully submitted this 7th day of October, 2022,

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2022, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

s/ Jason B. Aamodt
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