IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WILLIAM FLETCHER, TARA DAMRON, KATHRYN RED CORN, and RICHARD LONSINGER, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 1:19-cv-1246-LAS Senior Judge Loren A. Smith

UNITED STATES' REPLY IN SUPPORT OF ITS RENEWED MOTION TO DISMISS

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A plaintiff may be master of his complaint, but he is nevertheless limited by the claims he has alleged. In this case, Plaintiffs allege claims that fail for several reasons. As shown in the United States' renewed motion to dismiss, Plaintiffs failed to (and cannot) join a necessary party—the Osage Nation—in whose absence their case cannot proceed. ECF No. 30, United States' Renewed Motion to Dismiss ("Motion"). In addition, Plaintiffs' claims are barred by claim preclusion and the waiver and release provisions of a prior settlement agreement. Plaintiffs also fail to allege cognizable claims, meaning that the Court should either dismiss Plaintiffs' claims or order them to make a more definite statement. Plaintiffs' opposition fails to rebut the United States' arguments and the Court should again dismiss their case in its entirety.

I. THE COURT SHOULD DISMISS UNDER RCFC 12(B)(7) FOR FAILURE TO JOIN THE OSAGE NATION

Plaintiffs advance three arguments in response to the United States' argument that the Court should dismiss under RCFC 12(b)(7) for failure to join a required and indispensable party. ECF No. 34-1, Plaintiffs' Corrected Response in Opposition to the United States' Renewed Motion to Dismiss) ("Pls.' Opp."). But, contrary to Plaintiffs' contentions: (1) the rules of this Court do not prohibit the United States' argument; (2) issue preclusion does not bar the argument; and (3) the Osage Nation is a required and indispensable party.

A. The Rules of this Court Do Not Prohibit the United States from Raising Joinder In Its Renewed Motion.

Plaintiffs assert that the United States is barred from raising joinder in its renewed motion to dismiss under RCFC 12(g)(2). Not so. That rule prohibits a defendant from filing successive Rule 12 motions "raising a defense or objection that was available to the party but omitted from its earlier motion." RCFC 12(g)(2). A party is not precluded, however, "from making a *second* motion based on a defense … that became available only after a motion had been made under

Rule 12." § 1388 Application of Rule 12(g)—Limited to Motions that Were "Available", 5C Fed. Prac. & Proc. Civ. § 1388 (3d ed.) (emphasis added). Further, where a renewed motion "responds to the Federal Circuit's[ ] opinion, which issued well after defendant filed its earlier motion to dismiss," and raises "defenses or objections … not available to defendant" previously, defendants "are not barred from consideration by Rule 12(g)." *Cardiosom, L.L.C. v. United States*, 115 Fed. Cl. 761, 766 (2014). Such is the case here.

It was the Federal Circuit's opinion that brought the Rule 19 issue to the fore, specifically, the Circuit's finding that *both* the Osage Nation and headright holders have a trust interest in the Osage Tribal Trust Account. Motion at 11, 13-15. In the United States' original motion to dismiss, we had argued that Plaintiffs here, headright holders, did not hold any legally protected interest in the Osage Tribal Trust Account. ECF No. 7 at 14-19. In our view, management of the Osage Tribal Trust Account was not properly at issue, and there was therefore no reason to argue that the Osage Nation's interests could be impacted. Joinder only became a basis for dismissal under RCFC 12(b)(7) *after* the Federal Circuit reached its conclusions regarding trust interests under the 1906 Act. *Fletcher v. United States ("Fletcher V")*, 26 F.4th 1314, 1323–24 (Fed. Cir. 2022). The United States' renewed motion responds to that opinion. That Plaintiffs have not amended their complaint is not dispositive. In *Cardiosom*, this Court entertained a renewed motion to dismiss which argued new bases for dismissal in response to a Federal Circuit opinion, even though no amendment was made. 115 Fed. Cl. at 766; Case No. 08-533C, *compare* Motions to Dismiss, ECF Nos. 33 (May 28, 2009) *and* 81 (Dec. 5, 2013).

In any event, even if the Court concludes that RCFC 12(g)(2) prohibits the United States from raising joinder in this motion, the Court may consider the issue *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). The Court can and should do that here in the interests of justice and in furtherance of the Osage Nation's sovereign interests.

B. Issue Preclusion Does Not Bar the United States' Joinder Argument.

Plaintiffs next argue that the Court should not entertain the United States' joinder argument because it was previously decided by the Northern District of Oklahoma and is thus barred by issue preclusion. Plaintiffs are mistaken. As a threshold matter, "[t]he determination," under Rule 19 as to "whether a particular non-party is necessary to an action," "is heavily influenced by the facts and circumstances of each case." *Confederated Tribes of Chehalis Indian Rsrv. v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991); *see also Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625, 628 (5th Cir. 2009) ("Determining whether an entity is an indispensable party is a highly-practical, fact-based endeavor …"). Thus, whether issue preclusion bars litigating joinder in a subsequent case will depend on the claims and interests at issue in each action.

Issue preclusion applies only where four requirements are met: "(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 against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the first action." *Innovad Inc. v. Microsoft Corp.*, 260 F.3d 1326, 1334 (Fed. Cir. 2001). Plaintiffs' argument fails on the first factor: the issue decided by the Northern District of Oklahoma in 2009 is not identical to the issue in this case.

Plaintiffs assert that the issue previously decided and at issue here is "the role of the Osage Nation in the administration of the Osage Mineral Estate." Pls.' Opp. at 10. The relevant inquiry, however, is whether the Northern District of Oklahoma decided the Osage Nation's

joinder in the context of breach of trust claims relating to management of the Osage Tribal Trust Account, like those Plaintiffs assert here. The answer is no.

In the Northern District of Oklahoma, the United States raised joinder as a basis for dismissal of plaintiffs' first amended complaint. *Fletcher v. United States (Fletcher VI)*, No. 02-CV-427-GKF-FHM, 2009 WL 920692, at *5 (N.D. Okla. Mar. 31, 2009). It is also true that the court denied the United States' motion to dismiss, concluding that the Osage Nation was not a required party. *Id*. But Plaintiffs misconstrue the court's reasoning for that decision. The court concluded that the Osage Nation was not a required party because the claims in that case "focus[ed] on headright distributions only, *not* the Osage Nation tribal trust fund." *Id*. (emphasis added). The court further found that: "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." *Id*. (emphasis added). Thus, the court's ruling that the Osage Nation was not a required party rested on two key findings: (1) the case involved only headright distributions, and the related individual accounting rights, not mismanagement of the Osage Tribal Trust Account; and (2) the Nation's interests were aligned with those of plaintiffs and all other headright holders who receive distributions and, therefore, were adequately represented.

This case, after the Federal Circuit's remand, presents a different landscape. Here, Plaintiffs' claims directly implicate the Osage Tribal Trust Account and allege that the United States mismanaged that account *writ large*, not simply at the point of distribution, as was the case in the Northern District of Oklahoma. Plaintiffs' present claims thus parallel those previously litigated by the Osage Nation in this Court, *see Osage Tribe of Indians of Okla. v. United States(Osage VII)*, 68 Fed. Cl. 322, 324 (2005), *Osage I*, 57 Fed. Cl. at 393, not the

claims plaintiffs litigated in the Northern District of Oklahoma and Tenth Circuit, which ultimately were whittled down to a single accounting claim under 25 U.S.C. § 4011(a).

C. The Osage Nation is a Required and Indispensable Party and This Case Should Not Proceed in its Absence.

i. Plaintiffs fail to rebut that the Osage Nation is a required party under RCFC 19(a).

Plaintiffs advance three arguments in response to our showing that the Osage Nation is a required party under RCFC 19(a). Pls.' Opp. at 17-22. As shown below, each argument fails.

First, Plaintiffs argue that the Osage Nation's interests cannot be impaired or impeded because the Nation waived any further trust mismanagement claims in the 2011 Settlement Agreement. Pls.' Opp. at 17-18. But the waiver signed away the Osage Nation's *then-existing claims*, not any future claims or the Nation's interest within the meaning of RCFC 19(a). While the Osage Nation waived its right to litigate certain trust mismanagement claims, it continues to have a legally protectable interest in the Osage Tribal Trust Account under the 1906 Act, *see* 34 Stat. at 544, as well as any adjudication relating to the division of interests and trust duties owed under the 1906 Act. Any judgment in this case will require the Court to first delineate the specific trust duties owed to headright holders and the Osage Nation for the Osage Tribal Trust Account under the 1906 Act, which, among other things, may impact the Osage Nation's ability to bring future claims not waived by the settlement agreement. For the avoidance of doubt, the 2011 Settlement Agreement includes a provision recognizing the parties' (and, thus, the Osage Nation's) agreement that the Osage Nation would be a required party for purposes of RCFC 19(a) for any future claims relating to the "management of funds in the Osage Tribal Trust Account …" ECF No. 30-1 (2011 Settlement Agreement) ¶ 11.f. This is because the Osage Nation "will either gain or lose by the direct legal operation and effect of [a] judgment," in such

a case—like this one. *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318, 1325 (Fed. Cir. 2007).

Moreover, "Rule 19, by its plain language, does not require the absent party to actually possess an interest; it only requires the movant to show that the absent party '*claims an interest* relating to the subject of the action.'" *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001), *opinion modified on reh'g,* 257 F.3d 1158 (10th Cir. 2001) (quoting Fed. R. Civ. P. 19(a)(2)). "Consequently, Rule 19 excludes only 'those *claimed* interests that are 'patently frivolous.'" *Id*. (citing *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992)).

Second, Plaintiffs argue that the United States "misrepresents the Osage Nation's role" as it relates to Osage Tribal Trust Account transactions. Pls.' Opp. at 18. In its motion, the United States showed that the Osage Nation reviews and approves many of the transactions that Plaintiffs challenge in their Complaint. Motion at 17-18. Contrary to Plaintiffs' reading, these are not "unsupported assertions." Pls.' Opp. at 19. They are borne out by the documentary evidence the United States attached in support of its motion. *See* Motion at 17-18; ECF Nos. 30-3, 30-4. Indeed, Plaintiffs do not argue that the Osage Nation *does not* approve these transactions, instead they assert that the Nation's role is merely "ministerial." Pls.' Opp. at 20. Regardless of how its role is characterized, however, there is no dispute that the Osage Nation reviews and approves the very transactions that Plaintiffs challenge here.

Plaintiffs relatedly complain that there is no statutory or regulatory *requirement* that the Osage Nation approve these transactions. Pls.' Opp. at 19. Again, they are mistaken. Under 25 C.F.R. § 115.815(a), tribes must submit written requests authorizing funds to be withdrawn or transferred from tribal trust accounts. Interior requires that such requests include a standard

form, like the ones attached to the United States' motion showing that the Osage Nation, acting through the Osage Minerals Council, approves transfers of trust funds from the Osage Tribal Trust Account for gross production tax and Tribal operating expense payments.[1] ECF Nos. 30-3, 30-4. Even in the absence of statutory or regulatory requirements for such transfers, the United States may, in its discretion, determine the policy for effectuating transfers and involve a tribal beneficiary in the management of tribal trust funds. And contrary to Plaintiffs' assertion, the Osage Nation's statutorily-defined role with respect to the Osage Mineral Estate does not limit or constrain its role with respect to the Osage Tribal Trust Account held in trust for its benefit.

Third, Plaintiffs claim that there is not a "substantial risk of additional litigation," if the case moves forward without the Osage Nation. Pls.' Opp. at 21. This argument is belied both by the claims Plaintiffs assert in this action and the lengthy litigation history relating to the Osage Tribal Trust Account, which has already spanned decades across several district and circuit courts and included litigation brought *by the Osage Nation*, on behalf of headright holders.

To begin, Plaintiffs allege that a future damages claim from the Osage Nation is "speculative." Pls.' Opp. at 21. But Rule 19 speaks of risks not certainties. RCFC 19(a)(1)(B)(ii) does not require an existing party to prove that they will necessarily be subjected to inconsistent obligations or double recoveries, it requires a showing that they will be left at "*substantial risk*." That risk is evident here because a resolution of Plaintiffs' breach of trust claims will not bar the Osage Nation from subsequently asserting claims against the United States based on the same underlying conduct and operative facts.[2] This is not a case of

[1] *See* Bureau of Indian Affairs and Office of the Special Trustee, Interagency Procedures Handbook: Management of Trust Funds Derived from Assets and Resources on Trust and Restricted Indian Land, Chapter 5-5 (2002), attached as Exhibit 2.

[2] The Osage Nation did not waive all future trust mismanagement claims in the 2011 Settlement Agreement, though, such claims would be governed by the agreement's dispute resolution

"sequential claims for damages," as Plaintiffs suggest, Pls.' Opp. at 21, because the asset at issue here is a limited one: the proceeds held in the Osage Tribal Trust Account. Thus, the United States is at risk of subsequent litigation and conflicting orders and obligations. *See Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998) (explaining the distinction between inconsistent obligations and adjudications).[3]

In their effort to dispel the risk of subsequent litigation, Plaintiffs claim that they seek damages only "for the violation of *their* rights, not the rights of the Osage Nation." Pls.' Opp. at 22 (citing *Brown v. United States*, 42 Fed. Cl. 538, 565 (1998), *aff'd*, 195 F.3d 1334 (Fed. Cir. 1999)). In *Brown*, the tribe was "a party neither to the lease at the center of th[e] dispute nor, more importantly, to the alleged trust relationship between the United States and lessors." *Brown*, 42 Fed. Cl. at 566. Here, by contrast, the Osage Nation is the named and direct beneficiary of the trust account at issue, 1906 Act § 4, 34 Stat. at 544. In any event, Plaintiffs' professed intent does not alter the risk calculus for the United States with respect to subsequent litigation. If anything, it only heightens the risk, as Plaintiffs acknowledge that the Osage Nation may attempt to litigate a subsequent suit for damages relating to the Nation's rights, and that that suit "might" involve "the same 'conduct.'" Pls.' Opp. at 22.

ii. Plaintiffs' RCFC 19(b) arguments are unpersuasive.

Plaintiffs do not dispute that the Osage Nation cannot be joined because of sovereign immunity. And Plaintiffs' Rule 19(b) arguments in support of allowing the case to proceed

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procedures; thus, to the extent that Plaintiffs assert claims post-dating September 30, 2011, they assert claims that the Osage Nation could likewise potentially assert.

[3] The United States has not argued that a potential future suit for indemnification against the Osage Nation factors into the subsequent litigation risk, as Plaintiffs suggest. Pls.' Opp. at 21-22 n. 14. Rather, the United States flagged the possibility that the Osage Nation could have to "repay or credit amounts received" as one of the many factors demonstrating the Nation's interest in the subject of this litigation. Motion at 21.

without the Osage Nation are unpersuasive. Contrary to Plaintiffs' characterization, the United States has not argued that this suit "should be dismissed solely because" of the Osage Nation's sovereign immunity. Pls.' Opp. at 26. Rather, the United States has argued that sovereign immunity weighs heavily in favor of dismissal on the facts of this case, and that the Rule 19(b) factors likewise favor dismissal. Motion at 24-25. While sovereign immunity is not an absolute bar to proceeding in a sovereign's absence, the case law unequivocally shows that it is a weighty consideration in some circumstances. *See* Motion at 24-26. As this Court has explained "'[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 (alterations in original).

The cases Plaintiffs cite do not hold otherwise. Pls.' Opp. at 26-27. In fact, they do not even directly engage with the issue. For example, in *Washington v. Daley*, 173 F.3d 1158, 1169 (9th Cir. 1999), the Ninth Circuit noted: "Because we conclude that the Tribes are not necessary parties, we need not consider whether they are indispensable parties under Rule 19(b)." The other cases are similarly unhelpful. *See Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001) (no analysis of the tribe's interest in sovereign immunity); *Alto v. Black*, 738 F.3d 1111, 1129 (9th Cir. 2013) ("Because the Tribe is not a necessary party to the first three causes of action, the district court did not err in declining to decide whether tribal sovereign immunity bars the Band's joinder, and if so, whether the action should be dismissed under Rule 19(b).")). Moreover, all but *Brown* were brought under the Administrative Procedure Act (APA); thus, they present a different posture under Rule 19. In APA suits challenging federal agency action, the United States is generally the only required and indispensable party. *See, e.g., Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996); *cf. National*

Licorice Co. v. NLRB, 309 U.S. 350, 363 (1940). And in *Brown*, 42 Fed. Cl. at 565, because the court concluded the tribe was not a necessary party under RCFC 19(a), its RCFC 19(b) analysis was limited and did not directly analyze the tribe's interest in sovereign immunity.

Turning to the RCFC 19(b) factors, Plaintiffs fail to appreciate the extent to which the Osage Nation might be prejudiced by a judgment in this case (the first factor). Here, again, Plaintiffs protest that they seek to vindicate only *their* interests not the tribe's. Pls.' Opp. at 24. But, as explained in our opening brief, to adjudicate Plaintiffs' claims, the Court must first address the threshold question of the duties owed to headright holders and the Osage Nation and their division of interests in the Osage Tribal Trust Account, as the Federal Circuit suggested. Motion at 21 (citing *Fletcher V*, 26 F.4th at 1323-24). That inquiry will certainly implicate the Osage Nation's legal rights, and any findings respecting the fiduciary duties owed and interests held under the 1906 Act necessarily implicate the Osage Nation.

Plaintiffs' suggestion that the United States can adequately represent the interests of the Osage Nation is also incorrect. Pls.' Opp. at 24-25. As explained in our opening brief, the interests of the Osage Nation and the United States are not necessarily aligned.[4] Motion at 21 n.9. Moreover, the Federal Circuit has now determined that *both* the Osage Nation and headright holders have interests in the Osage Tribal Trust Account under the 1906 Act. Thus, to the extent there is a conflict between the interests of those beneficiaries, some courts have held that the United States may not be able to adequately represent either, as it owes a fiduciary duty to both. *See, e.g., Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998-999 (10th Cir. 2001)

[4] Confusingly, Plaintiffs also assert that their interests are aligned with the Osage Nation. Pls.' Opp. at 22. They cannot have it both ways. If, in fact, Plaintiffs' interests are aligned with the Osage Nation, the United States could not adequately represent the Nation. And if their interests are not aligned, then the United States cannot adequately represent either entity, as each has a trust relationship.

(agreeing that the United Sates could not adequately represent varied and potentially conflicting tribal interests). The cases Plaintiffs cite in support of their argument (*Sac & Fox* and *Daley*) are inapposite. Both were brought under the APA and involved challenges to federal agency action. *See Sac & Fox*, 240 F.3d at 1253 (action to prevent the Secretary of the Interior from taking a tract of land into trust on behalf of a tribe); *Daley*, 173 F.3d at 1161 (challenge to regulations promulgated by the Secretary of Commerce acting under the authority of the Magnuson Fishery Conservation and Management Act). As noted above, in such challenges to federal agency action, the United States can adequately represent others' interest in defending federal action and is generally the only required and indispensable party.

Plaintiffs offer no analysis of the second RCFC 19(b) factor (the extent to which prejudice could be lessened or avoided), referencing it only in a footnote. Pls.' Opp. at 24 n. 15. On the third RCFC 19(b) factor, Plaintiffs fail to explain how a judgment rendered in the Osage Nation's absence would be adequate. Instead, they simply reiterate their belief that the Court can afford complete relief between the existing parties. *Id*. at 25-26. But Plaintiffs are mistaken. As the Supreme Court explained: "We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to [the] public stake in settling disputes by wholes, whenever possible." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968). A judgment without the Osage Nation would set the stage for piecemeal, duplicative litigation and fail to fairly resolve the division of interests' question that is now at the heart of this controversy.

Finally, with respect to the fourth RCFC 19(b) factor, the United States acknowledges that, if the Court dismisses the suit, Plaintiffs may not have an adequate forum in which to litigate their claims. That fact, however, is not always determinative. *Kescoli v. Babbitt*, which

Plaintiffs cite, Pls.' Opp. at 26, recognized that, where "no alternative forum exists, the district court should be 'extra cautious' before dismissing an action." 101 F.3d 1304, 1311 (9th Cir. 1996). But the court ultimately affirmed the district court's dismissal for failure to join an absent tribe, explaining that, "although the factors were not clearly in favor of dismissal, the concern for the protection of tribal sovereignty warranted dismissal." *Id.* It also "recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." *Id*. The other case Plaintiffs cite, *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407 (10th Cir. 1996), did not involve sovereign immunity. Pls.' Opp. at 26.

II. CLAIM PRECLUSION AND THE 2011 SETTLEMENT AGREEMENT BAR PLAINTIFFS' CLAIMS

The United States' motion explained that claim preclusion and the 2011 Settlement Agreement bar Plaintiffs' claims predating September 30, 2011. Motion at 28-38. Plaintiffs counter with three responses: (1) there is no unity of claims or identity of parties between this action and the *Osage* action; (2) Plaintiffs were not parties to the *Osage* action or 2011 Settlement Agreement and, thus, they are not bound by it; and (3) issue preclusion bars the United States from arguing waiver. None of these arguments saves Plaintiffs' claims.

A. Claim Preclusion Bars Plaintiffs' Claims.

As we explained in our brief, Plaintiffs' claims are barred by claim preclusion. Motion at 28-34. In response, Plaintiffs assert that (1) "there is no unity of claims between the Osage Tribe's claims [in the prior *Osage* suit] and Plaintiffs' claims here," Pls.' Opp. at 27, and (2) there is no identity of parties, *id*. at 28. Both arguments fail.

First, the claims in *Osage* and the claims Plaintiffs assert here arise from the same set of transactional facts, as detailed in our opening brief. Motion at 32-34. Plaintiffs' attempt to distinguish their claims is unavailing. They frame their case as involving "actions occurring as

part-and-parcel to distribution of headright payments." Pls.' Opp. at 28. In other words, they argue that their case involves the United States' management of payments *from* the Osage Tribal Trust Account, while *Osage* involved payments *coming into* the trust account. *Id*. Not so. Both cases challenge the United States' management of the Osage Tribal Trust Account and allege that mismanagement of that account resulted in losses to headright holders. *Compare Osage Tribe of Indians v. United States*, Fed. Cl. No. 99cv550, Osage Tribe's Third Am. Compl. ¶¶ 17–21, ECF No. 69 (Oct. 20, 2004) (alleging that the United States failed to properly administer the Osage Tribal Trust Account, "to preserve the trust assets," and to make the trust assets productive), *with Fletcher v. United States*, Fed. Cl. No. 19-1246, Compl. ¶¶ 53, 62, ECF No. 1 (Aug. 21, 2019) (alleging that the United States failed to collect interest on royalties before distribution), *and* Pls.' Opening Appellate Br. at 5, *Fletcher v. United States*, Fed Cir. No. 21-1625, ECF No. 27 (June 1, 2021) (arguing that the United States failed "to collect interest on royalties once collected and segregated for distribution *but before distribution actually takes place*" (emphasis added)).

Plaintiffs' claims thus "spring from the same set of facts" as the claims in *Osage*, even assuming that the specific fiduciary duties alleged to have been breached by the United States in this action are different. Motion at 32-33. In other words, "it is of no consequence that plaintiff styles its suit 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); *see also Ak-Chin Indian Cmty. v. United States*, 80 Fed. Cl. 305, 319 (2008). Because claims

regarding management of the Osage Tribal Trust Account have already been litigated and decided, issue preclusion bars Plaintiffs from re-litigating them here.[5]

Second, while there is a general "rule against nonparty preclusion," the Supreme Court has identified a number of exceptions to this rule. *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008); *see also id*. at 894 n. 8 (explaining that the term privity is often used "as a way to express the conclusion that nonparty preclusion is appropriate" as a result of the application of these exceptions). For example, a nonparty may be bound by a judgment where the nonparty is "'adequately represented by someone with the same interests who was a party' to the suit." *Id*. at 894. Representation will only be adequate where "[t]he interests of the nonparty and [their] representative are aligned" and "the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id*.

Here, the Osage Nation and Osage Minerals Council adequately represented headright holders', including Plaintiffs', interests in the prior *Osage* litigation. The Osage Nation understood itself to be representing headright holders and the court, in denying headright holders' motion to intervene, expressly found that the Nation's interests were aligned with the headright holders and that the Nation could adequately represent their interests in that case. *Osage VI*, 85 Fed. Cl. at 168–75 ("Both plaintiff and Proposed Intervenors share an interest in maximizing the damages awarded . . . ."). Moreover, the Osage Nation, acting through the

[5] The United States acknowledges that one component of Plaintiffs' breach of trust claims, their charge regarding payment of tribal operating expenses, was not previously litigated in *Osage*. To the extent that the Court concludes that the Osage Nation's and Plaintiffs' interests are not aligned on that issue, claim preclusion alone may not bar Plaintiffs' claim. That claim, however, is still barred by the 2011 Settlement Agreement, which waived all trust mismanagement claims based on conduct before September 30, 2011, that were "or *could have been asserted* by the Osage Tribe on behalf of itself and/or the Headright Holders …" ECF No. 30-1 ¶ 7.a.i. (emphasis added), and, in any event, the case must still be dismissed for failure to join a necessary party.

Osage Minerals Council, had the authority to represent headright holders in that litigation under the Osage Constitution and relevant Tribal resolutions. *See* Motion at 28-31. Thus, there is an identity of parties, as required for claim preclusion.

The situation here is akin to an organization that represents its members and stands in privity with them. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003) ("[T]he Association represented the interests of its member property owners sufficiently thoroughly to bind other members alleging similar wrongs arising from the same set of facts."). "[I]f there is no conflict between the organization and its members, and if the organization provides adequate representation on its members' behalf, individual members not named in a lawsuit *may* be bound by the judgment won or lost by their organization." *Id*.

B. Plaintiffs Are Bound by The 2011 Settlement Agreement.

Regardless of whether the doctrines of claim or issue preclusion bar some or all of Plaintiffs' claims, Plaintiffs are bound by the 2011 Settlement Agreement and have waived all pre-September 30, 2011 claims of mismanagement. Motion at 35-38. As the Federal Circuit has acknowledged, the Agreement "resulted in a significant payment of money by the government to the tribe," which "plaintiffs' counsel has represented, was distributed to the headright holders, including plaintiff Fletcher." *Fletcher*, 26 F.4th at 1323. Nonetheless, Plaintiffs offer three reasons as to why the terms of the 2011 Settlement Agreement are inapplicable to them.

First, Plaintiffs argue that they cannot be bound by the 2011 Settlement Agreement because they were not a party to it. Pls.' Opp. at 29. But Plaintiffs misunderstand the United States' argument. We do not argue that they are bound as intended third-party beneficiaries of the agreement, as Plaintiffs suggest. *Id*. Rather, Plaintiffs are bound to the contract by and through the Osage Nation, acting through the Osage Minerals Council, the latter of which is elected by Osage headright holders and represented and protected the headright holders' interests

in the litigation. Motion at 30-31; 35-37; *see also Osage VI*, 85 Fed. Cl. at 168–75. Contrary to Plaintiffs' assertions (Pls.' Opp. at 30), documentary evidence such as the Osage Constitution and Osage Nation Congress and Osage Minerals Council Resolutions demonstrate that the Osage Nation and the Osage Minerals Council have the power to bind headright holders and to sue on their behalf. Motion at 30-31. The Osage Constitution gives the Nation the power and obligation to act to protect headright holders' interests. *Id*. at 30-31 (quoting Osage Const. XV, §§ 3, 4). Thus, the facts here illustrate that the Osage Minerals Council represented Plaintiffs' interests in the *Osage* litigation.

Next, Plaintiffs accuse the United States of making a circular argument with respect to the Osage Nation's authority to represent and bind headright holders because we rely on the 2011 Settlement Agreement as documenting that authority. Pls.' Opp. at 29-30. But a party's representation—here, the Osage Nation's and Osage Mineral Council's—that it has the authority to bind is one factor to consider in evaluating whether a contract is binding on, for example, members of an organization. *See, e.g., Moreau v. Loc. Union No. 247, Int'l Bhd. of Firemen & Oilers, AFL-CIO*, 851 F.2d 516, 520 (1st Cir. 1988) ("[a]n agreement entered into by a union representative with apparent authority to bind the union is valid and binding even if actual authority, such as through membership ratification, is lacking."). In any event, the United States has not argued that the Osage Nation's and Osage Mineral Council's representations, standing alone, are sufficient to confer binding authority.

Other evidence suggests that the Osage Minerals Council can and does bind headright holders in litigation, including in other litigation against the United States. For example, in *Osage Minerals Council v. U.S. Dep'tof the Interior*, the Osage Minerals Council stated that the 1906 Act gave it "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 and prosecution of claims related to the Osage Mineral Estate." Compl. ¶ 2, *Osage Minerals Council v. U.S. Dep't of the Interior*, Case No. 4:15-CV-371 (N.D. Okla. 2015), attached as Exhibit 1.

Finally, Plaintiffs argue that both their discussions with the Osage Nation and lack of discussions with the United States' counsel in the prior *Osage* litigation evidence that the parties to that case did not intend to settle Plaintiffs' present claims in this case, which had not yet been asserted. Pls.' Opp. at 31. This makes little sense. For one, the 2011 Settlement Agreement includes an integration clause, making clear that this is the entire agreement between the parties. ECF No. 30-1 ¶11a. Plaintiffs' proffered exhibits may not be used to interpret the Agreement. *See Nutt v. United States*, 837 F.3d 1292, 1296 (Fed. Cir. 2016) ("Where the language is unambiguous, as the court determined, the 'inquiry ends and the plain language of the Agreement controls,' so extrinsic evidence need not be considered."). In any event, the declarations show, at most, that the Osage Nation did not intend to settle the claims raised in the Oklahoma *Fletcher* litigation.[6] But, as discussed above, the prior *Fletcher* litigation was ultimately about a right to an accounting, not breach of trust. And the prior *Fletcher* litigation was not about the funds held in the Osage Tribal Trust Account. Rather, as Plaintiffs' counsel himself explained, the *Fletcher* plaintiffs sought an accounting of the United States' alleged improper distribution of monies segregated from the Osage Nation's accounts to those who were

[6] The Court should not consider the two declarations Plaintiffs attach, ECF Nos. 33-15, 33-16, for several reasons. First, they are irrelevant. The declarants were opining on the effects of the *Osage* settlement on the claims in the Northern District of Oklahoma, years before Plaintiffs filed this suit. Second, the declarants offer improper legal opinions for which they have no expert qualifications. *Id*. Finally, the "No Cooperation" provision in the 2011 Settlement Agreement prohibits these declarants from assisting Plaintiffs in litigating claims against the United States that were waived under that agreement. ECF No. 30-1 ¶ 11.g (waiving trust mismanagement claims pre-dating September 30, 2011). Should this case proceed, the United States reserves its right to move to strike the declarations.

not headright holders. ECF No. 33-17 at 2; *see also Fletcher v. United States*, No. 19-5023, 2020 WL 748844, at *2 (10th Cir. Feb. 14, 2020) (describing the plaintiffs' first amended complaint filed in April 2006).

The email exchange involving United States' counsel is similarly unilluminating. ECF No. 33-17. In the email, counsel declined to provide legal analysis regarding settlement negotiations to an attorney who did not represent any of the parties in those negotiations. The email hardly indicates that the Settlement Agreement did not mean to say what it plainly says.

C. The Northern District of Oklahoma Did Not Hold that Plaintiffs Are Not Bound by the 2011 Settlement Agreement.

Plaintiffs assert that the Northern District of Oklahoma "has already decided that plaintiffs are not bound by the [2011 Settlement Agreement]." Pls.' Opp. at 12. Plaintiffs are mistaken. The Northern District of Oklahoma decided *only* that the 2011 Settlement Agreement did not waive "plaintiffs' individual accounting rights." *Fletcher I*, 153 F. Supp. 3d at 1368.[7] In reaching this conclusion, the court explained that section 4011(a) grants accounting rights to both the Osage Nation and headright holders. *Id*. Thus, even if the Osage Nation settled its claims for an accounting, Plaintiffs had a separate statutory right they could enforce. *Id*. ("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."). Notably, the section of the court's opinion that Plaintiffs cite in support of their argument references individual accounting rights no less than five times, Pls.' Opp. at 13, making clear that the accounting claim was the only claim decided with respect to the United States' waiver argument.

[7] The Tenth Circuit never directly considered the argument, as it found that the federal defendants had waived the issue as a result of "lack of adequate development in briefing," and abandonment at oral argument. *Fletcher v. United States ("Fletcher II")*, 730 F.3d 1206, 1214 (10th Cir. 2013).

Plaintiffs' attempt to apply issue preclusion under these circumstances is meritless because the issue previously decided (whether the right to an accounting claim was waived) is not identical to the issue here (whether trust funds mismanagement claims were waived). That the scope and application of the waiver provisions in the 2011 Settlement Agreement was raised in both cases does not mean that the issues are the same, as Plaintiffs suggest. Pls.' Opp. at 13. Both courts must analyze the particular claims at issue and evaluate whether those claims are subject to the waiver. The Northern District of Oklahoma made clear that it decided only whether the settlement waived plaintiff's individual *accounting* rights.

The excerpt Plaintiffs cite from the United States' briefing and oral argument underscores this point, focusing on plaintiffs' "legal right to an accounting of the Osage tribal trust funds …" and arguing that that right, if it existed, was waived by the 2011 Settlement Agreement. Pls.' Opp. at 14-15. Whether the United States' arguments regarding the scope and application of the waiver extended beyond the accounting claim is of no moment. What matters for purposes of issue preclusion is what issue was actually decided by the court. That issue was narrow: whether plaintiffs' individual, statutory right to an accounting was, or could be, waived by the Osage Nation. And it was resolution of *that* issue that was essential to the court's judgment, not any broader findings with respect to the scope and application of the waiver provision.

III. PLAINTIFFS FAIL TO ALLEGE COGNIZABLE CLAIMS

While Plaintiffs may appreciate the pleading standard, they fail to apply it to their case. The issue here, as the United States explained in its opening brief, is that Plaintiffs' Complaint does not contain the requisite "factual content" to state cognizable breach of trust claims. Motion at 38-39. Plaintiffs' assertion that their Complaint contains "detailed allegations regarding the United States' breaches of trust," Pls.' Opp. at 32, is belied by the face of the document. Nowhere do Plaintiffs allege the basic how, when, or what of the alleged breaches.

They have thus failed to "allege[] 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).

Also fatal to their claims is the failure to identify any specific fiduciary obligation that the United States has allegedly breached. While Plaintiffs ostensibly rely on the 1906 Act as the basis for their claims, they fail to allege what provision(s) of that statute set forth the specific money-mandating duties they allege have been breached. Nor do they identify any other specific sources of fiduciary duties or allege how such duties have been breached. Pls.' Opp. at 32-34 (citing only the 1906 Act).

The United States does not demand an "expert report," Pls.' Opp. at 33, detailing the challenged transactions; it merely demands that Plaintiffs meet the basic pleading standard articulated in *Twombly* and allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In the alternative, the United States requests that the Court order Plaintiffs to provide a more definite statement under RCFC 12(e).

Finally, Plaintiffs' accounting claim must fail because in this Court an accounting is a remedy not a cause of action. Plaintiffs concede as much in their response. Pls.' Opp. at 35.

CONCLUSION

For these reasons, the Court should dismiss the Complaint in its entirety under RCFC 12(b)(6) or 12(b)(7), or, in the alternative, order Plaintiffs to provide a more definite statement under RCFC 12(e).

Dated: October 28, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 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