**No. 16-5050**

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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WILLIAM S. FLETCHER, et al.,
*Plaintiffs-Appellees*,

v.

UNITED STATES OF AMERICA, et al.,
*Defendants-Appellants*.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
CASE NO. 2:13-CV-427 | JUDGE GREGORY K. FRIZZELL

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# ANSWERING BRIEF FOR THE UNITED STATES ET AL.

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ORAL ARGUMENT REQUESTED

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## STATEMENT OF RELATED CASES

This case has been on appeal to this Court twice before: *Fletcher v. United States*, 160 Fed. Appx. 792 (10th Cir. 2005) (*Fletcher I*); and *Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013) (*Fletcher II*).

## STATEMENT OF JURISDICTION

Plaintiffs-Appellants William Fletcher *et al*. (Plaintiffs) alleged jurisdiction in the district court pursuant to U.S. Const. Amend. V, 5 U.S.C. §§ 702 and 706, and 28 U.S.C. §§ 1331, 1343, 1346, 1361, and 1362. United States' Supplemental Appendix (S.App.) 39. On December 30, 2015, the district court determined that Plaintiffs are entitled to an accounting of the Osage tribal trust account, fashioned the scope of that accounting pursuant to this Court's guidance in *Fletcher II*, and entered judgment in Plaintiffs' favor. Plaintiffs' Appendix (App.) 551-52. Both parties moved to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e). *See* App. 244-45. On March 11, 2016, the district court granted Plaintiffs' motion in part and the United States' motion in full, and amended its judgment. App. 608-09. Plaintiffs filed a timely notice of appeal on May 9, 2016. S.App. 74-75. This Court has jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUE

In the 1906 Osage Allotment Act, Congress severed the subsurface mineral estate underlying the Osage lands, known as the Osage Mineral Estate, from the surface estate and placed it in trust for the benefit of the Osage Tribe. Congress further directed the Secretary of the Interior (the Secretary) to collect royalty income from the Osage Mineral Estate and distribute it to members of the Osage Tribe on a quarterly, pro-rata basis. Plaintiffs' rights to receive these quarterly, pro-rata distributions are known as "headrights." In *Fletcher II*, this Court held that individual headright owners have a right to an accounting under 25 U.S.C. § 4011(a), and provided guidance as to the nature and scope of that accounting right. *Fletcher II*, 730 F.3d 1208-16. As the Court explained, Section 4011(a) references a "traditional equitable remedy" from trust law, such that the district court possesses "considerable discretion to mould the nature and scope of the accounting to the necessities of the particular case." *Id*. at 1214 (citations omitted). This Court further clarified that in exercising that discretion, the district court "may focus the inquiry in ways designed to

get the plaintiffs what they need most without imposing gratuitous costs on the government." *Id.*

On remand, the district court applied the foregoing guidance to the facts of the case and fashioned a detailed accounting remedy that reflects the scope and purpose of Plaintiffs' accounting claim and does not impose unnecessary costs on the government. The sole issue on appeal is whether the district court committed an abuse of discretion in fashioning its accounting remedy.

## STATEMENT OF THE CASE

### I. Statutory and Regulatory Background

#### A. The 1906 Osage Allotment Act, as amended.

In 1872, Congress established a reservation for the Osage Tribe of Indians. Act of June 5, 1872, ch. 310, 17 Stat. 228; *see McCurdy v. United States*, 246 U.S. 263, 265 (1918); *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (2011). In or about 1896, oil and gas were discovered on the reservation, which turned out to be rich with deposits of oil, natural gas, coal, and other minerals. *McCurdy*, 246 U.S. at 265.

In 1906, Congress enacted an act for the division of the lands and funds of the Osage Indians in Oklahoma Territory. Act of June 28, 1906, Pub. L. No. 59-321, 34 Stat. 539 (the 1906 Act). The 1906 Act severed the subsurface mineral estate, referred to as the Osage Mineral Estate, from the surface estate, placed it in trust for the Tribe, and directed the Secretary to distribute royalties derived therefrom on a quarterly, pro-rata basis (with interest) to individual members of the Tribe. *Id.* § 3, 4(1)-(2), 34 Stat. at 543-44.

To determine which tribal members would be entitled to receive such distributions, the 1906 Act provided for the creation of an official tribal roll. *Id.* § 1, 34 Stat. at 539-40. The roll included only the Osage tribal members shown on the U.S. Government records as of January 1, 1906, and Osage children born before July 1, 1907. *Id.* Upon approval of the final roll by the Secretary, membership in the Osage Tribe was closed. *Id.* The Act thus limited membership in the Osage Tribe to the 2,229 individuals appearing on the final roll. *See Fletcher v. United States*, 2011 U.S. Dist. LEXIS 35992 at *12 (N.D. Okla. Mar. 31, 2011); *see also Big Eagle v. United States*, 300 F.2d 765 (Ct. Cl. 1962).

As this Court explained in *Fletcher I*, "[e]ach individual on the final roll received an interest in the tribal mineral estate." 160 Fed. Appx. at 793. Each Osage whose name appeared on the roll received one headright interest in the Osage Mineral Estate. *Fletcher v. United States*, 116 F.3d 1315, 1319 (10th Cir. 1997). The right to receive a quarterly distribution of revenues derived from the Osage Mineral Estate is known as a "headright." *See, e.g.*, Act of October 21, 1978, Pub. L. No. 95-496, § 8, 92 Stat. 1660, 1663 (1978) (1978 Amendments) (defining "headright" as "[a]ny individual right to share in the Osage mineral estate," including those rights "owned by a person not of Indian blood"); *Osage Tribe of Indians Technical Corrections Act of 1984*, Pub. L. No. 98-605, § 2(h), 98 Stat. 3163, 3165-66 (Oct. 30, 1984) (1984 Amendments) (defining "headright" as "any right of any person to share in any royalties, rents, sales, or bonuses arising from the Osage mineral estate").

The 1906 Act further provided that "the royalty received from oil, gas, coal, and other mineral leases" and other moneys received from various sales of lands and from grazing lands –

> shall be placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this Act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States.

1906 Act § 4(2), 34 Stat. at 544. Section 4(1) of the Act provided that the various "other moneys" due to the Osage Tribe, referred to in Section 4(2), "shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe" as shown on the final roll, or to their heirs, with interest to be paid quarterly. 1906 Act § 4(1), 34 Stat. at 544.

Section 6 of the 1906 Act provided that "the lands, moneys and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma," or (absent such legal heirs) to the mother and father equally. 1906 Act § 6, 34 Stat. at 545.

Congress amended the 1906 Act numerous times, often addressing the alienation and succession of headrights. For many years, headrights could be transferred to non-Osage Indians under various circumstances. For example, in 1912, Congress provided:

> any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: Provided, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior.

Act of April 18, 1912, Publ. L. No. 62-125, § 8, 37 Stat. 86, 88. The Act of April 12, 1924, provided that "any right to or interest in the lands, money, or mineral interests, as provided in the Act of Congress approved June 28, 1906 * * *, and in Acts amendatory thereof and supplemental thereto, vested in, determined, or adjudged to be the right or property of any person not an Indian by blood, may with the approval of the Secretary of the Interior and not otherwise be sold, assigned, and transferred under such rules and regulations as the Secretary of the Interior may prescribe." Pub. L. No. 68-79, 43 Stat. 94.

In 1978, Congress extended the trust period "in perpetuity" and severely limited headright succession to non-Osage Indians. *See* §§ 2(a), 5(c), 7, 1978 Amendments, 92 Stat. at 1660, 1662, 1663.

As set forth in the 1978 Amendments:

> [a]ny individual right to share in the Osage mineral estate (commonly referred to as 'headright') owned by a person not of Indian blood may not, without the approval of the Secretary of the Interior, be sold, assigned, or transferred. Sale of any such interest shall be subject to the right of the Osage Tribe to purchase it within forty-five days at the highest legitimate price offered the owner thereof.

1978 Amendments, § 8(a), 92 Stat. at 1663.

The 1978 Amendments also retained the requirement in the 1912 Act that the will of any Osage Indian could not be admitted to probate or have any validity absent approval by the Secretary following the testator's death. These Amendments further provided for a hearing, and notice thereof, on the validity of the will, and set forth procedures for obtaining judicial review of contests. 1978 Amendments, § 5(a), 92 Stat. at 1661-62.

Thus, as Congress further specified in1984 Amendments, "[n]o person who is not an Osage Indian may, on or after October 21, 1978, receive any interest in any headright, other than a life estate." *See*

1984 Amendments, § 2(e), 98 Stat. at 3164-65. The 1984 Amendments expanded the right of purchase to include individual Osage Indians, as well as the Osage Tribe, and expanded application of the right of purchase to include any transfer (not just a "sale") by a non-Indian of any headright interest. 1984 Amendments, § 2(f), 98 Stat. at 3165.

Currently, the original 2,229 headrights established by the 1906 Act are owned by more than 7,000 individuals and entities, including Osage Indians, non-Osage Indians, non-Indian individuals, corporations, non-profit organizations, private trusts, and the Osage Tribe itself.

**B. 25 U.S.C. §§ 162a and 4011.**

The Act of June 24, 1938, 52 Stat. 1037, *codified at* 25 U.S.C. § 162a, authorizes the Secretary to withdraw from the United States Treasury and deposit in banks funds of any Indian tribe held in trust by the United States, including "funds of the Osage Tribe of Indians, and the individual members thereof." 25 U.S.C. § 162a(a).

In Section 162a(d), Congress provided that the Secretary's general trust responsibilities include (but are not limited to) the following:

> (1) Providing adequate systems for accounting for and reporting trust fund balances.

> (2) Providing adequate controls over receipts and disbursements.
> (3) Providing periodic, timely reconciliations to assure the accuracy of accounts.
> (4) Determining accurate cash balances.
> (5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.
> (6) Establishing consistent, written policies and procedures for trust fund management and accounting.
> (7) Providing adequate staffing, supervision, and training for trust fund management and accounting.
> (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

25 U.S.C. § 162a(d).

The Indian Trust Fund Management Reform Act of 1994, 25 §§ U.S.C. 4011 *et seq*., provides that the Secretary "shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title (25 U.S.C. § 162a)." 25 U.S.C. § 4011(a). It further requires periodic statements of performance with respect to funds "deposited or invested pursuant to section 162a of this title" (25 U.S.C. § 4011(b)); and provides for an "annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian

which are deposited or invested pursuant to section 162a of this title (25 U.S.C. § 162a)." 25 U.S.C. § 4011(c).

## II. Procedural History

This lawsuit has a long and complicated history, during which Plaintiffs' claims have changed considerably. The suit was originally commenced in 2002 by William Fletcher and Charles Pratt, who identified themselves as "descendants of individuals who were listed on the rolls of the Osage Tribe." S.App. 2. The lawsuit then concerned the tribal voting rights of Osage Indians that were not headright holders and asserted four claims: (1) a claim that the government violated Plaintiffs' right to political association and participation in the Osage government; (2) a claim that the government breached its trust responsibilities by (a) eliminating Plaintiffs' right to participate or vote in Osage tribal elections, and (b) allowing mineral royalties to be alienated to non-members of the Osage Tribe; (3) a Fifth Amendment takings claim; and (4) a claim that the federal regulations relating to the Osage Tribe violated Plaintiffs' right to participate in their government and constituted a breach of the government's trust

responsibilities. S.App. 1-14; App.527; *see also Fletcher I*, 160 Fed.Appx. at 793 (describing original claims).

**A. *Fletcher I***

This Court first considered this case when Plaintiffs appealed from the district court's dismissal of their original complaint for failure to join the Osage Tribal Council as a necessary and indispensable party. *Fletcher I*, 160 Fed.Appx. at 792. In that appeal, Plaintiffs did not contest the district court's dismissal of the voting rights portions of their claims, because Congress' 2004 enactment of the Reaffirmation of Certain Rights of the Osage Tribe Act appeared to grant them what they had sought, *i.e.*, "'the right to participate in the affairs of the Osage Nation as members.'" *Id.* at 794, *quoting* Plaintiffs' Opening *Fletcher I* Brief. Plaintiffs did challenge the district court's dismissal of their breach of trust and Fifth Amendment takings claims, and as to those claims, this Court determined that the United States had waived its sovereign immunity under 5 U.S.C. § 702, which provides for suits against the United States "seeking relief other than money damages." *Id.* at 795-96. The Court stated that Plaintiffs alleged a "failure to perform a statutory duty to pay them money . . . to which they are

entitled pursuant to the 1906 statute," and reasoned that "'insofar as the plaintiffs seek specific injunctive and declaratory relief—and, in particular, seek the accounting to which they are entitled—the government has waived its sovereign immunity under [§ 702]." *Id.* at 796, *quoting Cobell v. Norton*, 240 F.3d 1081, 1094-95 (D.C. Cir. 2001).

In reaching this conclusion, this Court also relied on Plaintiffs' representation that their requested relief ran only from the date of filing the original complaint:

> Additionally, we note that at oral argument, the plaintiffs' counsel explained that his clients did not seek the payment of royalties that had been withheld in the past. Instead, he explained, the plaintiffs sought an order directing the defendants to comply with the requirements of the 1906 act from the date of the filing of the complaint in this case. The prospective nature of the relief sought by the plaintiffs further supports their argument that they have not sought "money damages." *See United States v. Testan*, 424 U.S. 392, 403 (1976) (distinguishing "between prospective reclassification [of a government employee], on the one hand, and retroactive reclassification resulting in money damages, on the other").

*Id.* at 797. The Court declined to address the Rule 19 issue because the district court had not applied the Rule to the Plaintiffs' breach of trust

and takings claims, and remanded for the district court to undertake this analysis in the first instance. *Id.*

A significant amount of litigation has occurred in the intervening years, not all of which need be set forth here. A description of the procedural history between the filing of Plaintiffs' First Amended Complaint and the government's Motion to Dismiss the Plaintiffs' Third Amended Complaint—the most recent complaint—is included in the district court's April 10, 2012 opinion and order. App. 296-300.

**B. Plaintiffs' Third Amended Complaint**

Relevant to the instant appeal, Plaintiffs filed their Third Amended Complaint on May 6, 2010. S.App. 17-55. In that Complaint, they sought to bring a class action on behalf of "all Osage Indians who lawfully receive distributions of trust property from the Osage Mineral Estate." S.App. 48. Plaintiffs' first claim alleged that members of the class "have been deprived of Section 4 Royalty Payments as a result of the Federal Defendants' distribution of such trust assets to persons who are not Osage Indians." S.App. 40; *see also* S.App. 43 (alleging that the government breached its trust responsibilities and acted in violation of Section 4 of the 1906 Act "by improperly distributing Section 4 Royalty

Payments to persons who are not Osage Indians (or their lawful heirs)"; S.App. 44 (government breached its trust obligations by "improperly distributing trust assets comprised of the Section 4 Royalty payments" to individuals who are not Osage Indians); S.App. 45 (Plaintiffs have been denied "the right to fully participate in distributions from the Osage Mineral Estate because the Federal Defendants have allowed Section 4 Royalty Payments to be distributed to the Individual Defendants who are not otherwise entitled to receive Section 4 Royalty Payments from the Osage Mineral Estate").[1] In the second claim, Plaintiffs alleged that the government's failure to properly manage the trust assets and failure to account and audit their actions constitutes a deprivation of property in violation of the Fifth Amendment of the U.S. Constitution. S.App. 45.

The third claim alleged that Plaintiffs are entitled to "an accounting for the Federal Defendants' receipt, handling and

[1]Paragraph 37 of the Third Amended Complaint identifies the "Individual Defendants" as individuals described in Exhibit A to the Second Amended Complaint. *See* S.App. 40. Exhibit A to the Second Amended Complaint lists 1744 individuals and entities as Individual Defendants who Fletcher believes are "not entitled pursuant to Federal Law to receive a SECTION 4 ROYALTY PAYMENT." S.App. 15-16.

distribution of funds segregated from the Osage Mineral Estate and paid under section 4 of the 1906 Act." S.App. 40. They asserted that Federal Defendants have failed to take actions, including an accounting and audit, required by federal statutes, including 25 U.S.C. §§ 162a and 4011, and that this failure-to-act claim was timely brought pursuant to the APA. S.App. 46; *see also* S.App. 44 ("Defendants' failure to account includes, but is not limited to, failure to account concerning distribution of Section 4 Royalty Payments to individuals who are not Osage Indians (or heirs)."); S.App. 44-45 (alleging that Federal Defendants are required by federal law to account to Plaintiffs for the management of assets managed and to audit their actions, citing 25 U.S.C. §§ 162a and 4011), and have breached this obligation by failing to account for all funds held in trust); S.App. 48 (refusal of Federal Defendants to account to Plaintiffs for all funds resulting from the Osage Mineral Trust is in direction violation of federal laws, including but not limited to 25 U.S.C. §§ 162a and 4011). The complaint further states: "Upon information and belief, Plaintiffs allege that Federal Defendants have not paid the proper amounts of funds under section 4 of the 1906 Act to the proper persons." S.App. 48. Plaintiffs further asserted that the "wrongful

distribution of royalties to the Individual Defendants diminishes on a dollar-for-dollar basis the trust property that should otherwise have been available for distribution *only* to the Plaintiffs and class members *qua* Osage Indians." S.App. 49 (emphasis in original).

As relief, Plaintiffs sought: (1) an order compelling the government to provide to Plaintiffs "an accounting and audit of the Section 4 Royalty Payments distributed from the Osage Mineral Estate showing the amounts actually paid to each person and the basis for such payment;" (2) an order requiring that such an accounting and audit determine whether funds from the Osage Mineral Estate have been distributed only to Osage Indians and their heirs; (3) a "reformation" of the "trust funds" found to be due and owing to the Plaintiffs and class members "after an accounting and audit has been completed which shows that the Federal Defendants[] failed to abide by the requirements of federal statutes relating to the distribution of Osage Mineral Estate Royalties only to Osage Indians and their lawful heirs"; (4) an order compelling the government "to prospectively distribute Section 4 Royalty Payments only to Osage Indians and their heirs"; (5) an order directing the government "to prospectively permit

the payment of Section 4 Royalty funds only in the manner prescribed by law; (6) an order directing the government to pay Plaintiffs' attorney costs and fees; and (7) such other relief as the court deems necessary and equitable. S.App 50-51.

**C. The District Court's 2012 Decision**

Plaintiffs' first two claims have been dismissed and are not before this Court at this time. In its April 10, 2012 order on the government's motion to dismiss the Third Amended Complaint, the district court explained that each of Plaintiffs' three claims have two central elements: 1) an assertion that the government has improperly paid royalties to non-Osage persons and entities; and 2) an assertion that the government has failed to provide a required accounting and audits. App. 301. As to the first element, the court explained that it had previously rejected Plaintiffs' "overarching legal argument" that the 1906 Act, as amended, prohibits non-Osage Indians from receiving quarterly income payments from the Osage Mineral Estate. App. 303. Accordingly, for each of the three claims, the district court dismissed without prejudice the allegations for improper distribution to non-Osage headright owners on the ground that Plaintiffs had "failed to plead any

specific facts supporting their allegation that any specific headright was transferred illegally." App. 303. In the alternative, it dismissed the third claim's allegations of administrative action not in accordance with law in connection with this element on the ground that, despite multiple opportunities to do so, Plaintiffs had not sufficiently specified any challenged actions or inactions reviewable under the APA. App. 303-309.

As to Plaintiffs' third claim, the district court held that the trust relationship between the Osage headright owners and the federal government is defined by the 1906 Act, which requires the United States to make royalty payments "in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States." App. 306 (*quoting* 1906 Act). "At the least," therefore, the district court found that "the 1906 Act imposes a trust obligation upon the Federal Defendants to "distribute royalty payments to headright owners in a timely and proper manner." App. 306.

The district court then analyzed whether 25 U.S.C. §§ 162a and 4011 afford Plaintiffs a right to the accounting they seek, and concluded

that the statutes do not afford such a right. App. at 304-07. It accordingly dismissed the claim.

**D. *Fletcher II***

On appeal, this Court held that the district court erred in dismissing Plaintiffs' accounting claim and reversed.[2] *Fletcher II*, 730 F.3d 1206 (10th Cir. 2013). The Court began by explaining that the district court was correct in its general approach to the question, as "[t]he government's relationship with and duties to Native American tribes are generally defined in the first instance by 'applicable statutes and regulations.'" *Id.* at 1208, quoting *United States v. Jicarilla Nation*, 564 U.S. 162, 177 (2011). It recognized Congress' "considerable latitude in deciding how to organize and manage Native American trusts . . . to pursue its own policy goals," such that Congress sometimes establishes "full blown trust relationship[s]" and at other times "'establish[es] only a limited trust relationship to serve a narrow[er] purpose." *Id.*, quoting *Jicarilla*, 564 U.S. at 176. Accordingly, the district court was correct that "to trigger a duty to account the plaintiffs in this case first had to

[2] The Court did not rule on the district court's dismissal of Plaintiffs' misdistribution claim, because Plaintiffs did not ask the Court to consider that issue. *Fletcher II*, 730 F.3d at 1216 n.6.

identify some statute or regulation creating a trust relationship between them and the government." *Id.* at 1208-09.

The Court further agreed with the district court that the 1906 Act creates such a relationship, "not just . . . between the federal government and the Osage Nation, but also between the federal government and the individual Osage headright owners who are plaintiffs in this case." *Id.* at 1209. It stated:

> [t]hough the language of the Act is both arcane and antiquated, after laboring through it there's no question about this much. The Act requires the government to collect royalties, place them "to the credit of" each individual headright owner, and then disburse them to each individual headright owner on a quarterly basis, with interest. A small slice of royalty income may be diverted to tribal operations, but all else is 'placed to the credit of' headright owners and distributed to them personally. In short, the 1906 Act imposes an obligation on the federal government to distribute funds to individual headright owners in a timely (quarterly) and proper (pro rata, with interest) manner.

*Id.* (internal citations omitted).

Having concluded that a trust relationship exists between the federal government and Plaintiffs, the Court framed the "only

remaining question" as whether "the government must provide an accounting when asked." *Id.* On this point, the Court found:

> [b]y its plain language [25 U.S.C. § 4011(a)] appears to impose on the federal government a duty to 'account for'—to render a reckoning, answer for, explain or justify, *see* 1 *The Oxford English Dictionary* 85 (2d ed. 1989)—the daily and annual balances of money it holds in trust. Of course, the government must account, answer or explain itself to *someone*, and the plain language of the statute seems to tell us who: to the tribe when the funds are held 'for its benefit,' and to individual tribal members when the funds are held 'for [their] benefit.' As we've seen, the trust funds at issue in this case—collected and disbursed under the terms of the 1906 Act—are being held for the benefit of individual members of the Osage Nation. So it would seem that—in our case at least—Congress has chosen to afford individual tribal members the statutory right to seek and obtain an accounting, just as plaintiffs contend.

*Id.* at 1209-10 (emphasis in original).

Noting that the district court likewise "accepted that § 4011(a) affords individual Osage tribal members the right to compel an accounting," the Court proceeded to identify the point of its disagreement with the district court—the conclusion that the accounting right granted would do the Plaintiffs no good because it is limited to "accounting for the trust fund deposits [the government] makes, not the withdrawals [the government] effects." *Id.* at 1211. This Court held that the district court misread Section 162a(a) as

delimiting the scope of the government's accounting duties, where it instead pertains to the different subject of "the Secretary's investment options." *Id*. at 1212.

Having reached this conclusion, the Court remanded the case to the district court to determine "the exact contours of the accounting . . . with the assistance of the parties" but also, in light of the lengthy history of the case, opted to provide "as much guidance as [possible]." *Id*. at 1214, citing *Cobell v. Salazar*, 573. F.3d 808, 813 (D.C. Cir. 2009). In that regard, it stated that in Section 4011(a), Congress referenced a traditional equitable remedy of an accounting, and that in such an accounting, "the trial court possesses considerable discretion 'to mould' the nature and scope . . . 'to the necessities of the particular case." *Id*., quoting *Cobell*, 573 F.3d at 813. The Court explained:

> A green eye-shade death march through every line of every account over the last one hundred years isn't inevitable: the trial court may focus the inquiry in ways designed to get the plaintiffs what they need most without imposing gratuitous costs on the government. While the necessities of each case may be particular and for the trial court to determine in the first instance, any case seeking to do equity must seek to balance the often warring (and admittedly incommensurate)

> considerations of completeness and transparency, on the one hand, and speed, practicality, and cost, on the other.

*Id*. On the first hand, the Court stated that Plaintiffs are entitled to "some measure of information" about the government's handling of both deposits and disbursements. *Id*. On the other, it referenced Plaintiffs' express acknowledgment that no one will benefit by prolonging the litigation needlessly and that "the government is entitled to a degree of discretion in choosing an appropriate accounting methodology." *Id*. at 1215.

The Court also addressed the relationship between the Plaintiffs' other claims and their accounting claim in some detail:

> We don't doubt that the plaintiffs ultimately hope to prove that the government has sent money to persons ineligible to receive headright shares under the various amendments to the 1906 Act—and, in this way, improperly diminished their pro rata share. But in an accounting action, trust beneficiaries are entitled only to information that is 'reasonably necessary to enable [them] to enforce [their] rights under the trust.' They are not entitled to information that only loosely relates to their own personal beneficial interests, or to information that is unlikely because it is so old, or so *de minimis*, say) to have a meaningful effect on their beneficial interests. And in any subsequent litigation it will be their burden to prove a breach of trust, not the government's burden to disprove it. To say that the plaintiffs have a right to an accounting, then, is to say that it must give some sense of where money has come from and gone to—not to say it must disprove through a title search or

> otherwise any breach of trust theory the plaintiffs may later choose to posit. Neither does the plaintiffs' accounting right necessarily mean that they will even be able to attack through collateral litigation headright transfers long ago approved according to statutorily prescribed processes—processes that already have in place means for objectors to challenge proposed headright transfers . . . Put simply, a duty to account is a duty to account, not a duty to respond to and disprove any and all potential breaches of fiduciary duty a beneficiary might wish to pursue once the accounting information is in hand.

*Id*. As a possibility that would bring this litigation to a "speedy end," the Court stated that if the United States had discharged its accounting duty to the Tribe when it settled the Tribe's Court of Federal Claims lawsuit, then it might be within the district court's discretion "simply to order the government to share with the plaintiffs something like it has already shared with the Nation" pursuant to that settlement agreement. *Id*. at 1215-16. The Court directed the district court to "work through the matter," with "much hope it can be worked through promptly." *Id*.

**E. The District Court's Decision on Remand**

On remand, the district court granted Plaintiffs' motion to certify a plaintiff class consisting of "[a]ll Indians who currently, or during the pendency of this litigation have received Section 4 Royalty payments . .

.", S.App. 61, and the government submitted an administrative record containing statements for the Plaintiffs' IIM accounts from 2006 through 2013, redacted monthly statements from the Osage tribal trust account for the same period, and other documents. App. 530. Following two rounds of briefing and a hearing, the district court issued an opinion and order on the scope of the government's accounting duty to Plaintiffs on December 30, 2015. App. 524-550. In that order, the court first held that Plaintiffs are entitled to an accounting of the Osage tribal trust account. App. 531-37. It further held that the Osage Nation's waiver of certain rights in its settlement of different litigation in 2011 did not bind Plaintiffs in this case. App. 538-43.

Turning to the specific parameters of the accounting due, the district court referenced this Court's guidance in *Fletcher II* and recounted that Plaintiffs' stated purpose for seeking an accounting is to obtain information showing that the government has diminished their pro rata share by paying headright distributions to ineligible recipients. App. 544. On this point, the district court cited numerous representations made by Plaintiffs, including: Plaintiffs' counsel's statements in oral argument before this Court and in two district court

hearings; statements made in Plaintiffs' Opening Brief in *Fletcher II* and a district court brief; and Plaintiffs' Third Amended Complaint. App. 544-45 n. 12. The district court also noted this Court's recognition of this fact. App. 544-45 n.12, *quoting Fletcher II*, 730 F.3d at 1215.

Further, the district court recounted that the nature and scope of Plaintiffs' accounting request has changed dramatically over time, from an original request for an accounting of trust distributions dating back to 2002 (in their Third Amended Complaint, *Fletcher II* oral argument and a district court hearing held in September, 2009), to their most recent request for an accounting of both receipts and deposits dating back to 1906 (in their brief on remand from *Fletcher II* on the scope of the accounting due). App. 545-46. The court also noted that as to receipts, the Plaintiffs' most recent request was "not limited to information about the amount and source of money coming into the account, but rather includes such detailed information as to the volume of oil and gas sold, the unit price, and the amount of mineral acreage

that is not currently generating income." App. 546, *citing* Affidavit of S. Christopher Lopp, pp. 7-9, and Oct. 2015 Hearing Transcript pp. 73-74.

The court found that the circumstances of the case did not warrant such a broad accounting, and determined that one running from 2002 to the most recent quarter struck the appropriate balance, as it was in accord with the Plaintiffs' prior requests and would give them "'what they need most without imposing gratuitous costs on the government.'" *Id.*, *quoting Fletcher II*, 730 F.3d at 1214. To the extent Plaintiffs had broadened their request in an effort to trace the transfer of headrights over time, the court found that the ends did not justify the cost and burden on the government. App. 547. On this point, the district court explained that Plaintiffs' possibility of success on a misdistribution claim was remote in light of the statutory scheme, which prior to 1978 allowed Osage Indians to transfer headrights to non-Osages under various circumstances and since 1978 has strictly controlled headright succession to prevent such transfers. App. 547 and n.16. Further, the court explained that even if Plaintiffs could successfully prove a misdistribution claim, the possibility that it would have more than a *de minimis* impact on their beneficial interest was

still more remote. App. 547-48 n.16. By way of example, the district court explained that if Plaintiffs could ultimately demonstrate that one of the 2,229 existing headrights had been improperly transferred, the redistribution of that headright share would only generate a quarterly increase of $3.58 per headright. App. 547 n.16.

As for content, the court determined that the accounting must include a description of each receipt and distribution for the relevant period. App. 548. More specifically, the court found that the government must provide: the date and dollar amount of each receipt and distribution; a brief description of each trust receipt (*i.e.*, the name of the payee/lessee and the contract number for the oil and/or gas lease on which payment is made); the name of the beneficiary to whom each trust distribution was made; for headright distributions, the respective headright share of each headright owner at the time of distribution; and the amount of interest income generated from the tribal trust account and the date at which it was credited to the account. App. 548. The court directed the government to provide this accounting within six

months from the later of the entry of judgment or the conclusion of any appeal. App. 552.

Both parties subsequently moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The government sought an additional 12 months to complete the accounting or, in the alternative, the ability to identify the source of receipts by a mechanism other than the contract or lease number. App. 603. Plaintiffs did not oppose the government's request for additional time but did oppose its request in the alternative to identify receipts by different means. The court modified its judgment to afford the government the additional time.

For their part, Plaintiffs sought to significantly expand both the temporal scope and the level of detail of the accounting required by the district court's judgment; they also asked the court to modify the deadline for providing the accounting to run only from the entry of judgment. App. 604. With respect to temporal scope, Plaintiffs argued that the government should be ordered to either account to "the earliest possible date," or demonstrate that "it literally cannot do so." App. 561. In support of this argument, Plaintiffs contended that the court should

not consider any arguments made by the government as to difficulty or cost, because the government is a trustee. App. 556. With respect to the level of detail, Plaintiffs argued that the government should be ordered to provide "detailed 'backup' data" because such data is "[t]he most basic requirement of an accounting." App. 563. As an example of such information, Plaintiffs identified "the kind of information that auditors are entitled to when they audit, *e.g.*, the joint accounting records of oil and gas operating companies." App. 563. Plaintiffs contended that "volumes taken and prices paid" for oil and gas is "indispensable to a *meaningful* accounting." App. 563 (emphasis in original).

The court denied Plaintiffs' motion as to the scope and level of detail of the accounting. On this point, it explained that while Plaintiffs objected to the use of their misdistribution claim as a benchmark, they did not propose any alternative benchmark and simply requested an accounting back to the "earliest possible date," with detailed information about distributions and receipts. App. 605. The court agreed with the government that Plaintiffs had not identified any grounds warranting Rule 59 relief, as it had already considered and

rejected the Plaintiffs' request for an accounting "'unmoored from the original purpose from which it was sought.'" App. 605, *quoting* App. 546. It also rejected as unpersuasive Plaintiffs' argument that the dismissal of their misdistribution claim warranted a significantly expanded accounting. The court explained that it dismissed that claim without prejudice due to a lack of detailed factual allegations, and following that dismissal, Plaintiffs had repeatedly represented that they sought the accounting in order to investigate and pursue that claim. App. 605. The district court reiterated its "considerable discretion" to mould the accounting "in ways designed to get the plaintiffs what they need most without imposing gratuitous costs on the government," and stated that Plaintiffs' proposed accounting was precisely the sort of "green eye-shade death march" that it was not bound to order. App. at 606, quoting *Fletcher II*, 730 F.3d at 1214.

Finally, the court granted Plaintiffs' motion to modify the deadline to run only from entry of the court's judgment, agreeing with Plaintiffs that allowing the deadline to run from the conclusion of any appeal

operated as a stay pending appeal. App. at 606-07. This appeal followed.

## STANDARD OF REVIEW

The district court's accounting award is a traditional equitable remedy that may not be disturbed absent a showing that the court abused its discretion. *Davoll v. Webb*, 194 F.3d 1116, 1139-40 (10th Cir. 1999) (equitable remedy awards are reviewable for abuse of discretion); *see also Fletcher II*, 730 F.3d at 1214 ("in a traditional equitable accounting, the trial court possesses considerable discretion to mould the nature and scope of the accounting to the necessities of the particular case.") (internal citations omitted); *McKinney v. Gannett Co.*, 817 F.2d 659, 670 (10th Cir.1987) (the "application of equitable doctrines rests in the sound discretion of the district court"); *United States v. Henshaw*, 388 F.3d 738, 739 (10th Cir 2004) (review of district court's selection of appropriate equitable method for tracing money limited to abuse-of-discretion standard). Likewise, the district court's ruling on Plaintiffs' Rule 59(e) motion is reviewable for an abuse of

discretion. *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997). Under this standard:

> a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.

*Estate of Bishop v. Equinox Int'l Corp.*, 256 F.3d 1050, 1055 (10th Cir. 2001) (internal citations omitted). The question in abuse-of-discretion review is not whether the Court would "necessarily choose the same path the district court took" if it were making the decision in the first instance, nor is it whether "the district court's path was the only one available." *Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1130 (10th Cir. 2008). An abuse of discretion has been further defined as "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Estate of Bishop*, 256 F.3d at 1055 (internal citations omitted).

## SUMMARY OF ARGUMENT

Under this Court's *Fletcher II decision*, the district court had considerable discretion to fashion the accounting remedy on remand, and its judgment should be affirmed because Plaintiffs have failed to demonstrate—as they must—that the district court abused that

discretion. Consistent with this Court's guidance to "focus the inquiry in ways designed to get the plaintiffs what they need most without imposing gratuitous costs on the government," the district court tailored its accounting remedy to the purpose and scope of Plaintiffs' accounting claim. *Fletcher II*, 730 F.3d at 1214. The purpose and scope are clear from Plaintiffs' repeated representations—to both the district court and to this Court—that: (1) they seek an accounting in order to determine whether the United States improperly distributed any trust property generated from the Osage Mineral Estate to persons not entitled to receive it; and (2) their claims are temporally limited to the pendency of this lawsuit.

The district court's decision to tailor its accounting remedy to the purpose and scope of Plaintiffs' accounting claim is particularly sound in light of the fact that Plaintiffs did not articulate an alternative formulation of "what they need most" for the district court's consideration, much less demonstrate that such alternative is a more appropriate objective than the purpose and scope of their accounting claim. *Id.* On appeal, Plaintiffs contend that they provided the requested input when they moved for Rule 59(e) relief from the court's

judgment and submitted a proposed judgment, but that was too late, as Rule 59(e) may not be used to raise arguments or present evidence that could have been raised prior to the entry of judgment.

Moreover, Plaintiffs still did not articulate "what they need most" in their Rule 59(e) motion. Plaintiffs contended there, as they do in their Opening Brief on appeal, that the district court should have modeled its remedy on an audit of an oil or gas operating company, but the district court was not required to do so. Consistent with this Court's guidance, the level of detail required by the district court's order is sufficient to give Plaintiffs "some sense of where money has come from and gone to," but does not require the government to disprove every "breach of trust theory the plaintiffs may later choose to posit." *Id.* at 1215. The district court committed no abuse of discretion by fashioning a remedy consistent with this Court's guidance as to what Plaintiffs' accounting right does—and does not—entail.

Finally, the district court also appropriately avoided imposing gratuitous costs on the government. On this side of the equation, the court correctly explained that, in light of the statutory scheme, it is unlikely that Plaintiffs could succeed in proving any illegal headright

transfer, and even if they did, it would not result in anything more than a *de minimus* increase in their headright distributions. This analysis—which Plaintiffs have not disputed on appeal—supports the court's conclusion that, on balance, Plaintiffs' hoped-for end does not justify the 106-year "accounting" they now seek.

## ARGUMENT

### The Accounting Remedy is within the Bounds of the Trial Court's Discretion.

This Court should not disturb the district court's accounting remedy because Plaintiffs have failed to meet their burden to show that it is "arbitrary, capricious, whimsical, or manifestly unreasonable." *Estate of Bishop*, 256 F.3d at 1055. Remarkably, Plaintiffs have not acknowledged this Court's explicit holding in *Fletcher II* that the district court possesses "considerable discretion" to mould the accounting award to the necessities of the particular case, much less demonstrated that the district court abused its discretion in applying this Court's guidance to the unique facts of this case. *Fletcher II*, 730 F.3d at 1214. Instead, Plaintiffs vaguely argue that the district court's accounting remedy is not "meaningful," and ultimately contend that the court should have ordered an "accounting" for the longest period

possible, at a level of detail well beyond that necessary to give them "some sense of where money has come from and gone to," *Fletcher II*, 730 F.3d at 1215, on the apparent premise that such an "accounting" is compulsory absent an affirmative governmental demonstration of impossibility. *See* Br. at 16 (arguing that the government should "account fully for the period beginning in 1906" or "bear the burden to show that it literally cannot do so."). That premise is 100% wrong. To the contrary, this Court made it clear in *Fletcher II* that the district court was not bound to order such a "green eye-shade death march through every line of every account over the last one hundred years." *Id.* at 1214.

Plaintiffs' omission is telling, as the balancing of equitable considerations that this Court directed in *Fletcher II* is a matter entrusted to the sound discretion of trial courts, and here, the record shows that the district court weighed the proper factors and tailored its accounting remedy to the unique particulars of this case. *Fletcher II*, 730 F.3d at 1214 (district court has "considerable discretion" to mould the nature and scope of the accounting to the necessities of the case); *McKinney*, 817 F.2d at 670 (application of equitable doctrines "rests in

the sound discretion of the district court"); *Amphibious Partners, LLC v. Redman*, 534 F.3d 1357, 1361 (10th Cir. 2008) (same). Nothing more was required.

### A. The Accounting Remedy is Appropriately Tailored to the Scope and Purpose of Plaintiffs' Accounting Claim.

Consistent with this Court's guidance to "focus the inquiry in ways designed to get the plaintiffs what they need most without imposing gratuitous costs on the government," the district court began its analysis by setting forth "the specifics of plaintiffs' request." *Fletcher II*, 730 F.3d at 1214 (emphasis added); App. 544. On this point, the district court correctly explained that Plaintiffs have repeatedly represented—to both it and to this Court—that their purpose for seeking an accounting is to determine whether the United States has made headright distributions to individuals or entities ineligible to receive them and thereby improperly diminished their share. App. 544. Likewise, Plaintiffs have repeatedly represented that the temporal scope of their claims is limited to the pendency of this lawsuit. App. 545 and n.12.

As set forth above, when this Court first considered this case in 2005 and found that the district court had jurisdiction, it relied in part on Plaintiffs' representation that their requested relief runs only from the date of filing their original complaint. *Fletcher I*, 160 Fed.Appx. at 797. Thereafter, the Plaintiffs amended their complaint consistent with their representation to this Court in the *Fletcher I* oral argument. In the Third Amended Complaint, the Plaintiffs stated:

> The Plaintiffs do not seek money damages in this lawsuit, but instead seek an accounting and the restoration of any and all trust assets the Defendants wrongfully depleted by improperly distributing the trust property generated from the Osage Mineral Estate during the pendency of this litigation. As set out below, this malfeasance resulted in the Federal Defendants annual misdirecting substantial amounts of SECTION 4 ROYALTY PAYMENTS to improper recipients, all in violation of the 1906 Act § 4.

S.App. 39; *see also id.* ("According to the law of this case, as set out by the Tenth Circuit Court of appeals, this claim is for equitable relief and not money damages and extends back to the date of the filing of this complaint."); S.App. 44 (alleging that "there has been no accounting . . . regarding the distribution of SECTION 4 ROYALTY PAYMENTS to individuals who are not Osage Indians (or heirs)" and that this alleged "failure to account and audit . . . has occurred during the pendency of

this lawsuit, and immediately prior to its commencement"); S.App. 46 (alleging that various actions and failures to act occurred "during the pendency of this lawsuit"); S.App. 48 ("Upon information and belief, Plaintiffs allege that Federal Defendants have not paid the proper amounts of funds under section 4 of the 1906 Act to the proper persons.").

Plaintiffs also asked the district court to certify the Plaintiff class as "[a]ll Indians who currently, or during the pendency of this litigation have received Section 4 Royalty payments . . .", and the district court granted that request. S.App. 61.

The procedural history and allegations set forth above illustrate that the temporal scope of Plaintiffs' request for relief extends only back to the filing of their original complaint. It also illustrates that Plaintiffs have pled and litigated their accounting and misdistribution claims commensurately. More specifically on the latter point, Plaintiffs have been candid that they seek an accounting in order to obtain facts that will allow them to eventually litigate their misdistribution claim. At a December 2010 district court hearing, for example, Plaintiffs' counsel stated that it would be appropriate to "bifurcate" the accounting

and misdistribution claims, and to proceed on the accounting claim first, because "[Plaintiffs] concede . . . that many non-Osages are entitled to receive" headright distributions, but "we don't know which ones they are and there's no way to determine that until an accounting is provided." S.App. 58, 60. More recently, in the *Fletcher II* oral argument before this Court, Plaintiffs' counsel explained the temporal and substantive scope of the accounting they seek in the following exchange:

> Judge: . . .With respect to identity theft or probate mistakes or some mistake in 1947, is it your position that the trustee must track that down and prove up the bona fides of each recipient back to an unknown time?
>
> Mr. Aamodt: Well, your Honor –
>
> Judge: It's not just receipts and disbursements, it's the bona fides of the recipient.
>
> Mr. Aamodt: The good news in the question is, is the earliest point is 1908. But I think the answer to your question is no, that's not what we're looking for. What we're looking for is with respect to the payments that are being made, whether or not they are being made to persons that the United States now can say that they understand that they're making them to the right people.
>
> Judge: Okay. So we can go back to the last quarter for now being made, we don't have to go back earlier? Let's say the last quarter, and the trustee gives you then the names of the recipients and the amounts received and for that matter the

> amounts of income in the trust; that still not enough for you, is it, you want to know the bona fides of the recipients in the last quarter.
>
> Mr. Aamodt: Oh, your Honor, in terms of time, I think we'd like to see it back to the filing of the complaint in 2002.
>
> Judge: Okay, fair enough. But my question goes to bona fides. You want the trustee to prove up the bona fides of recipients in a designated distribution.
>
> Mr. Aamodt: I think upon receiving the accounting that my clients are due, they may challenge the bona fides of particular individuals.

S.App. 66-68.

On appeal, Plaintiffs assert that the district court was wrong to take the interrelationship of their misdistribution and accounting claims into account, and to tailor its remedy accordingly, because their misdistribution claim is not currently "active in this litigation." Br. at 16. Relatedly, they characterize their counsel's exchange with this Court in the *Fletcher II* oral argument as an "out-of-context colloquy." Br. at 18. This argument is disingenuous given that Plaintiffs have repeatedly represented that they seek an accounting in order to obtain facts relevant to their misdistribution claim, and that their misdistribution claim was *dismissed without prejudice* for *insufficient factual allegations*. Indeed, this Court explicitly recognized Plaintiffs'

purpose for seeking an accounting in *Fletcher II*, and warned of the potential discrepancy between that objective and the limits of an accounting action:

> We don't doubt that the plaintiffs ultimately hope to prove that the government has sent money to persons ineligible to receive headright shares under the various amendments to the 1906 Act—and, in this way, improperly diminished their pro rata share. But in an accounting action, trust beneficiaries are entitled only to information that is 'reasonably necessary to enable [them] to enforce [their] rights under the trust.' They are not entitled to information that only loosely relates to their own personal beneficial interests, or to information that is unlikely (because it is so old, or so *de minimis*, say) to have a meaningful effect on their beneficial interests.

*Fletcher II*, 730 F.3d at 1215. (internal citation omitted).

Related to the foregoing, the accounting remedy fashioned by the district court is consistent with the scope of Plaintiffs' accounting claim in the additional respect that it is in the nature of an *accounting*. On appeal, Plaintiffs characterize the tribal trust case in the Court of Federal Claims involving the Osage Nation as an "accounting action" and contend it "reveals a great deal about the information available to the Government that predates 2002." Br. at 5 n3 and 23. But that case was not—and in the Court of Federal Claims could not have been—an *accounting* case. It was instead a money damages action involving,

among other claims, the government's fiduciary duty to collect and invest revenues owed to the Osage Nation pursuant to oil and gas leases. *See Osage Tribe v. United States*, 93 Fed. Cl. 1, 4-5 (2010). That is not the situation here. In addition to the warning set forth above, this Court also warned in *Fletcher II* that Plaintiffs' accounting right did not entitle them to information disproving every breach of trust theory they may later want to pursue:

> But in an accounting action, trust beneficiaries are entitled only to information that is "reasonably necessary to enable [them] to enforce [their] rights under the trust." Restatement (Second) of Trusts § 173 cmt. c . . .To say that plaintiffs have a right to an accounting, then, is to say that it must give some sense of where money has come from and gone to—not to say that it must disprove through a title search or otherwise any breach of trust theory the plaintiffs may later choose to posit.

*Fletcher II*, 730 F.3d at 1215.

Plaintiffs fare no better when they assert that their accounting right entitles them to "the kind of information that auditors are entitled to when they audit, *e.g.*, the joint accounting records of oil and gas operating companies," and that such "detailed 'backup' data" is "[t]he most basic requirement of an accounting." Br. at 27. An equitable accounting is traditionally understood to be the rendering of an account,

frequently through a "report of all items of property, income, and expenses." *Accounting*, Black's Law Dictionary (10th ed. 2014). This Court's explanation that Plaintiffs' accounting right entitles them to information sufficient to give "some sense of where money has come from and gone to" is consistent with this traditional understanding, as is the district court's order implementing this guidance. *Fletcher II*, 730 F.3d at 1215. This Court did not require the district court to fashion an "accounting" modeled on an audit of an oil or gas operating company, and Plaintiffs are simply wrong that the district court was bound to do so.

As set forth *supra* at 29, the district court's accounting remedy requires the government to provide the following details: the date and dollar amount of each receipt and distribution; a brief description of the source of each trust receipt; the name of the beneficiary to whom each trust distribution was made; for headright distributions, the respective headright share of each headright owner at the time of distribution; and the amount of interest income generated from the tribal trust account and the date at which it was credited to the account. App. 548. This

level of detail is appropriate and in the nature of a traditional equitable accounting.

The district court's decision to tailor its accounting remedy to the purpose and scope of Plaintiffs' accounting claim is particularly sound in light of Plaintiffs' failure to articulate an alternative formulation of "what they need most" for the district court's consideration, much less demonstrate that such alternative is a more appropriate objective than the purpose and scope of their accounting claim. At a hearing held on October 23, 2015, the district court asked Plaintiffs' Plaintiffs' counsel to articulate "a fairly particularized sense, and understanding of what's needed to pursue that which [Plaintiffs] want to pursue" in order to fashion the accounting. S.App. 71. The Plaintiffs did not provide a cogent response to the district court's question, either in their counsel's response at the hearing or in any subsequently filed papers. S.App. 72-73. At the same hearing, the district court asked Plaintiffs' counsel whether there was a need to call witnesses; Plaintiffs' counsel replied that Plaintiffs saw "no need" for witnesses as long as the district court was comfortable relying on the papers Plaintiffs provided. S.App. 70.

On appeal, Plaintiffs contend that they provided the requested input when they moved for Rule 59(e) relief from the court's judgment and submitted a proposed judgment, Br. at 15, but that was too late. It is well-established that Rule 59(e) "'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008); *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (same); *Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991) (same). Moreover, even if the Plaintiffs' Rule 59(e) motion had been proper, it, like their Opening Brief, fails to articulate an alternative benchmark, much less to demonstrate that such alternative was more appropriate than the scope and purpose of their accounting claim. App. 553-74.

### B. The Accounting Remedy Appropriately Avoids Imposing Gratuitous Costs on the Government.

Consistent with this Court's guidance, the district court also considered "speed, practicality, and cost" in fashioning its accounting remedy, so as to avoid "imposing gratuitous costs on the government." *Fletcher II*, 730 F.3d at 1214; App. 546-48 (applying guidance to the facts of the case). On this side of the equation, the court appropriately

considered whether the Plaintiffs' hoped-for end justifies the means of the accounting they now seek going back to 1906, and concluded that it does not. As the court explained, "[t]he likelihood that plaintiffs will be able to successfully attack [past headright] transfers in such a way as to meaningfully increase their beneficial interest is remote." App. 547.

The district court's conclusion is correct for two reasons. First, the statutory scheme governing headright transfers makes it unlikely that Plaintiffs could succeed in proving any illegal transfer because: (1) before 1978, Osage Indians could alienate headrights by intestate succession or, with the Secretary's approval, by will; and (2) since 1978, Osage Indians have not been able to transfer any headright interest other than a life estate to non-Osage Indians, and upon the termination of that life estate, the interest vests *by statute* in Osage Indian remainderman or reversionary interest holders or, if none exist, in the Osage Nation, not the remaining headright owners. App. 547 n.16; *see also supra at* 7-10 (statutory background). Second, even assuming Plaintiffs could prove an illegal transfer, the likelihood that it would result in anything more than a *de minimis* impact on their beneficial interests is remote. App. 547 n.16. By way of example, the court

explained that, based on a quarterly headright distribution of $7,975 per headright (the average quarterly distribution between 2006 and 2013), proof of the improper transfer of one full headright (out of the total 2,229) and redistribution of that share among rightful headright holders, would only increase their distributions by $3.58 per quarter, per headright. App. 547 n.16. As to both points, the district court's analysis is sound. Moreover, both points echo observations made by this Court in *Fletcher II*:

> [Plaintiffs] are not entitled to information that only loosely relates to their own personal beneficial interests, or to information that is unlikely (because it is so old, or so *de minimis*, say) to have a meaningful effect on their beneficial interests . . .Neither does the plaintiffs' accounting right necessarily mean that they will even be able to attack through collateral litigation headright transfers long ago approved according to statutorily prescribed processes—processes that already have in place means for objectors to challenge proposed headright transfers.

*Fletcher II*, 730 F.3d at 1215.

The district court acted within its discretion in considering whether the ends justify the means, particularly in this instance where the means are 100% taxpayer funded. *See Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) (finding that the 1994 Act did not "grant courts the same discretion that an equity court would enjoy in dealing

with a negligent trustee" to order "the best imaginable accounting without regard to cost," because the accounting it required was "to be funded entirely at the taxpayers' expense."); *see also Cobell v. Salazar*, 573 F.3d 808, 810 (D.C. Cir. 2009) ("It would indeed be 'nuts' to spend billions to recover millions. A court sitting in equity may avoid reaching that absurdity.") (citation omitted).

## CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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## STATEMENT REGARDING ORAL ARGUMENT

The Plaintiffs have requested oral argument. The United States favors oral argument if it would be helpful to the Court in deciding this appeal.

*s/ Anna T. Katselas*
ANNA T. KATSELAS

## CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the applicable volume limitations because it is proportionally spaced and contains 10,445 words. I certify that the information on this form is true and correct to the best of my and knowledge and brief formed after a reasonable inquiry.

*s/ Anna T. Katselas*
ANNA T. KATSELAS

## ECF CERTIFICATIONS

I hereby certify that:

- There is no information in this brief subject to the privacy redaction requirements of 10th Cir. R. 25.5; and
- The hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically; and
- This brief was scanned with System Center Endpoint Protection, version 1.229.1557.0, updated October 12, 2016, and according to the program the brief is free of viruses.

*s/ Anna T. Katselas*
ANNA T. KATSELAS

# ATTACHMENTS

Pursuant to 10th Circuit Rule 28.2(B)

1. Opinion and Order, December 30, 2015 (ECF No. 1280)
2. Judgment, December 30, 2015 (ECF No. 1281)
3. Opinion and Order, March 11, 2016 (ECF No. 1306)
4. Amended Judgment, March 11, 2016 (ECF No. 1307)

# ATTACHMENT 1

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| WILLIAM S. FLETCHER, *et al.*, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 02-CV-427-GKF-PJC |
| | ) | |
| THE UNITED STATES OF AMERICA, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

**OPINION AND ORDER**

In the early twentieth century, large quantities of oil and gas were discovered on lands belonging to the Osage Nation. Shortly thereafter, Congress enacted the Osage Allotment Act of 1906, *see* Act of June 28, 1906, Pub. L. No. 59–321, 34 Stat. 539 ("Osage Allotment Act" or "1906 Act"), which severed the mineral estate underlying Osage lands from the surface estate, placed the mineral estate in trust, and directed the Secretary of Interior to collect and distribute royalty income every quarter to persons on the 1906 tribal membership roll. The right to receive such royalty payments is called a "headright."

The sole remaining claim in this long-running case concerns the federal government's duty to account to individual Osage headright owners. Certified as a class in 2014, plaintiffs are Osage Indians who receive headright payments pursuant to the 1906 Act. They brought this claim pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, against the United States of America, the Department of Interior, Sally Jewell in her official capacity as Secretary of the Interior, the Bureau of Indian Affairs, and Kevin Washburn in his official capacity as Assistant Secretary of the Interior–Indian Affairs (collectively, "the government"), seeking an accounting of tribal trust funds held on their behalf. In particular, plaintiffs request an accounting of the Osage tribal trust account—an account within the United States Treasury

which holds Osage royalty income prior to its distribution to the headright owners. In response, the government maintains that the account at issue is held in trust for the Osage Nation only and that, as such, plaintiffs are not entitled to the accounting they seek. For the reasons stated in this Opinion and Order, the court holds that the plaintiffs are entitled to accounting of the Osage tribal trust account in accordance with the requirements set forth herein.

## I. Background

"In 1872, Congress established a reservation for the Osage Nation in present day Oklahoma." *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010) (citing Act of June 5, 1872, ch. 310, 17 Stat. 228). In 1904 and 1905, large quantities of oil and gas were discovered on the reservation. *See* Cohen's Handbook of Federal Indian Law § 4.07[1][d][ii], at 311 (Neal Jessup et al., eds., 2005) [hereinafter, "Cohen's Handbook"]. To manage the Osages' newfound wealth, Congress enacted the Osage Allotment Act which, as previously mentioned, placed the mineral estate underlying Osage lands in trust, directed the Secretary of Interior to collect royalty income, and required the Secretary to distribute such income (with interest) to tribal members on a quarterly, pro rata basis. *See* 1906 Act, § 4.[1] The government's trusteeship over the Osage

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[1] Section 4 of the 1906 Act reads in relevant part as follows:

> [A]ll funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States ….
>
> [A]ll the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians … shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe….
>
> [T]he royalty received from oil, gas, coal, and other mineral leases upon [Osage] lands … shall be placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this Act, and the same shall be distributed to the individual members of said

mineral estate was originally set to last twenty-five years, *see* 1906 Act §§ 3, 4, but has since been extended "in perpetuity," *see* Pub. L. No. 95-496, § 2(a), 92 Stat. 1660 (1978).

As previously mentioned, the right to receive quarterly trust distributions is referred to as a "headright." *Taylor v. Tayrien*, 51 F.2d 884, 886 (10th Cir. 1931). Under the 1906 Act, there are 2,229 headrights—one for each person on the 1906 tribal membership roll. *See Big Eagle v. United States*, 300 F.2d 765, 765 (Ct. Cl. 1962); *see also* 1906 Act §§ 1, 4. Today, "[m]ost persons of Osage Indian ancestry own no headrights, and thus receive no tribal income. Some persons own more than one headright, or own fractional shares of headrights, and some headrights are owned by non-Osages." Cohen's Handbook, *supra*, at 313. "This fractionalization is a result of succession to headrights by inheritance and devise. Succession by non-Indians is now severely limited, but during earlier periods there were fewer restrictions." *Id.* at 313 n.873 (citation omitted).

Prior to distribution, royalty income collected under the 1906 Act is held in a U.S. Treasury account, titled the Osage tribal trust account. The tribal trust account "was established by the 1906 Act," *Osage Tribe of Indians of Okla. v. United States*, 81 Fed. Cl. 340, 348 (2008), and is the means by which the government carries out its duties to collect, hold, and distribute funds pursuant thereto, [*see* Dkt. #1212-1, Administrative Record, p. 2]. Although some distributions from this account are made by direct check to headright owners, the vast majority are done via transfers to Individual Indian Money ("IIM") accounts. An IIM account is "an

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> Osage tribe…in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osage by the United States….

The Act diverts a small portion of royalty income to the Osage Nation, but provides that "all else [be] 'placed ... to the credit' of headright owners and distributed to them personally." *Fletcher v. United States*, 730 F.3d 1206, 1209 (10th Cir. 2013) (second alteration in original) (citing 1906 Act, § 4(3)–(4)).

interest bearing account for trust funds held by the Secretary that belong to a person who has an interest in trust assets." 25 C.F.R. § 115.002. Unless restricted in some way, an account holder may freely withdraw funds from his or her IIM account. *See id.*

## II. Procedural History

This case has a long and complicated history. Originally filed in 2002 as a dispute over the tribal voting rights of non-headright-owning Osage Indians [*see* Dkt. #1, p. 6], the case later evolved into an action over the government's allegedly wrongful distribution of Osage royalty income to non-Osages and its failure to account to the headright owners, [*see* Dkt. #985-1, pp. 27-31, 33]. Today, however, plaintiffs' only remaining claim is their request for an accounting.

Plaintiffs first asserted their accounting claim in 2006, as part of their First Amended Complaint. [*See* Dkt. #24, pp. 9, 11]. In May 2011, after litigating issues related to plaintiffs' other causes of action, the government moved to dismiss this claim along with, what was then, the plaintiffs' Third Amended Complaint.[2] [Dkt. #1126]. As to the accounting claim, the government argued that dismissal was warranted because (1) there was no trust relationship between the federal government and headright owners and (2) the statutes on which plaintiffs relied did not afford them the right to an accounting. [*Id.* at 8-12].

This court rejected the government's first argument, but accepted its second. As an initial matter, the court concluded that the 1906 Act created a limited trust relationship between the federal government and the Osage headright owners but that this relationship "differ[ed] from the trust relationship between the federal government and the Osage Nation." [Dkt. #1162, p. 10

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[2] For a description of the procedural history of this case between the filing of plaintiff's First Amended Complaint and the government's Motion to Dismiss the plaintiffs' Third Amended Complaint, see this court's Opinion and Order, dated March 31, 2012, [Dkt. #1162, pp. 1-4].

n.6]. Specifically, the court determined that the government's trust relationship with the Osage headright owners only took effect upon distribution and that, prior to distribution, royalty funds were held in trust for the Osage Nation only. [*See id.* at 10 n.6, 11, 13]. Based on this limited trust relationship, the court held that plaintiffs could not seek an accounting:

> To establish that an agency was required to provide the plaintiffs with an accounting, plaintiffs must "identify a legal obligation imposed on Defendants to account for the funds held in trust." *Otoe-Missouria Tribe of Oklahoma v. Kempthorne*, 2008 WL 5205191, *2 (W.D. Okla. 2008).
>
> In the Third Amended Complaint, plaintiffs allege they are entitled to an accounting pursuant to 25 U.S.C. §§ 162a and 4011. [Dkt. #985-1, p.26, ¶ 46]. By its explicit terms, Section 162a(a) applies "to the funds of the Osage Tribe of Indians, and the individual members thereof, only with respect to the deposit of such funds in banks." None of the failures to account alleged by plaintiffs relate to the *deposit* of funds in banks. Rather, the alleged failures to properly manage and account for monies relate to *distributions* from the Osage Mineral Estate, not deposits.…
>
> Similarly, Section 4011 imposes a requirement to account only for funds "deposited or invested pursuant to section 162a." No such funds are implicated in this lawsuit. Plaintiffs' allegations of mismanagement focus on distributions. Section 4011 does not impose an obligation upon the Federal Defendants to account to the plaintiffs.
>
> Insofar as plaintiffs allege in Paragraph 59 of the Third Amended Complaint that the Federal Defendants bear certain accounting and administrative responsibilities pursuant to Section 4 of the 1906 Act and Section 162a(d), the Court addresses those alleged responsibilities. Due to the nature of the trust relationship between the federal government and headright owners, plaintiffs' demands for an accounting or audit are misplaced. Headright owners receive quarterly payments in proportion to their fractional ownership of headrights. Plaintiffs do not allege the headright payment amounts have ever been miscalculated (as opposed to their claims that the headrights have been passed to improper individuals). Unlike the trust account held for the Osage tribe, there is no underlying trust account with a balance for headright owners to examine. Because headright owners do not have headright "accounts," it is impossible for the Government to give them access to a daily balance of an account. Headright owners are simply paid a percentage of the funds from the tribal trust account at the end of each quarter. As previously discussed, the more complex trust responsibilities such as collecting royalty payments, investing proceeds, collecting interest, and calculating disbursement amounts are all part of the federal government's trust relationship with the Osage Nation, not with the individual headright owners. [*Osage Nation v. United States*, 57 Fed. Cl. 392, 395 (2003)]. Simply put, the accounting obligations set forth in Section 162a(d) (e.g. trust fund balances, timely reconciliations, accurate cash balances, periodic statements to

> account holders of account performance) have no application to the unique relationship between the federal government and headright owners.

[*Id.* at 12-14 (footnotes omitted)].

On appeal, the Tenth Circuit reversed. It agreed with this court's holding that the 1906 Act creates a trust relationship between the federal government and the individual Osage headright owners but rejected this court's determination that plaintiffs could not seek an accounting under 25 U.S.C. § 4011(a):

> By its plain language [§ 4011(a)] appears to impose on the federal government a duty to "account for"—to render a reckoning, answer for, explain or justify, *see* 1 *The Oxford English Dictionary* 85 (2d ed.1989)—the daily and annual balances of money it holds in trust. Of course, the government must account, answer or explain itself to *someone*, and the plain language of the statute seems to tell us who: to the tribe when the funds are held "for [its] benefit," and to individual tribal members when the funds are held "for [their] benefit." As we've seen, the trust funds at issue in this case—collected and disbursed under the terms of the 1906 Act—are being held for the benefit of individual members of the Osage Nation. So it would seem that—in our case at least—Congress has chosen to afford individual tribal members the statutory right to seek and obtain an accounting, just as plaintiffs contend.

*Fletcher v. United States*, 730 F.3d 1206, 1209–10 (10th Cir. 2013) (hereinafter, *Fletcher II*) (alternation in original) (emphasis in original).

The court of appeals rejected this court's interpretation of § 4011(a) as limiting the government's accounting responsibilities to funds which are deposited or invested. "[Section] 162a(a) through (c)," the court explained, "speak to the Secretary's investment options, not to the nature of scope of the Secretary's accounting obligations." *Id.* at 1212. In other words, nothing in § 162a limits the Secretary's fiduciary obligations to the Osage headright owners, "let alone circumscribe[s] the accounting promised by § 4011(a)." *Id.* at 1211. The court stressed that its understanding of the statute was informed not only by its text and structure, but also by its overarching purpose:

> Under the district court's reading, the government's accounting obligations extend only to trust fund deposits but *not* withdrawals. The Secretary has to account to headright owners for what goes into their trust fund, but not what comes out. But what could possibly be the point of that? Half of an accounting may be closer to no accounting at all—an assurance deposits are properly handled seems pretty nearly pointless without a corresponding assurance disbursements are too.…We can well imagine Congress choosing either to grant or deny the right to request an accounting, but no one has advanced any reason why it might adopt an almost useless halfway measure for tribes and individual tribal members alike.

*Id.* at 1212–13.

Although not an issue on appeal, the circuit court's opinion did offer guidance as to what the government must do to discharge its accounting duty. It emphasized that this court has "considerable discretion to mould the nature and scope of the accounting" that is due and that the court "must seek to balance … considerations of completeness and transparency on the one hand, and speed, practicality, and cost, on the other." *Id.* at 1214 (internal quotation marks omitted). The court of appeals concluded by noting the possibility that the government could discharge its accounting duty by providing the headright owners with the same accounting it had provided the tribe. *See id.* at 1215-16 ("It may very well be within the district court's considerable discretion simply to order the government to share with the plaintiffs something like it has already shared with the Nation.").[3]

On remand, the government submitted an administrative record containing, among other documents, statements from the IIM accounts for plaintiffs William Fletcher and Charles Pratt from 2006 to 2013 as well as redacted monthly statements of the Osage tribal trust account for

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[3] Although the government previously told the Tenth Circuit that it had provided the Osage Nation with an accounting, [*see* Dkt. #1219-3, Tenth Circuit Oral Argument Transcript, pp. 24, 29], the government has since acknowledged that it neither produced nor provided such an accounting as part of its settlement with the Nation, [*see* Dkt. #1279, Oct. 2015 Hearing Transcript, p. 45].

that same period. Since the Tenth Circuit's remand, the court has received two rounds of briefing on the scope of the government's accounting duty and, on October 23, 2015, held its final hearing on the merits.

## III. Discussion

As previously mentioned, plaintiffs brought this case pursuant to the APA. "Under the APA, [this court] cannot set aside an agency decision unless it fails to meet statutory, procedural or constitutional requirements, or unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001).

The parties' briefs raise three issues for consideration. First, the parties disagree over whether the plaintiffs are entitled to an accounting of the Osage tribal trust account (as plaintiffs contend) or are limited to an accounting of their respective IIM accounts (as the government contends). Second, assuming plaintiffs are entitled to an accounting of the tribal trust account, the government submits that the Osage Nation waived the headright owners' rights to seek such an accounting based on the tribe's settlement agreement with the federal government in the Court of Federal Claims. Finally, assuming that plaintiffs are not barred from seeking an accounting, the court must determine the scope of the accounting that is due. The court addresses these issues in turn.

### *A. Determining the Relevant Account*

*Fletcher II* clearly dictates that plaintiffs are entitled to an accounting. On remand, the parties disagree over whether this means an accounting of the Osage tribal trust account or the plaintiffs' respective IIM accounts. For their part, plaintiffs request an accounting of the tribal trust account which, they contend, holds funds on their behalf pursuant to the 1906 Act. The

government disputes this assertion. It contends that funds while in the tribal trust account are held in trust solely for the Osage Nation and that it is only upon distribution that those funds are held for the benefit of the headright owners. Consequently, in the government's view, only the Osage Nation may seek an accounting of the tribal trust account, whereas plaintiffs are merely entitled to an accounting of their respective IIM accounts.

Although the Tenth Circuit's opinion does not specifically address this issue, its analysis suggests a clear result. "[T]he 1906 Act creates a trust relationship running directly between the government and individual Osage headright owners…." *Fletcher II*, 730 F.3d at 1213. The plaintiffs' right to an accounting arises from the application of 25 U.S.C. § 4011(a) to this trust relationship.[4] *See id.* at 1209-10, 1213. Under § 4011(a), the government must account "to the tribe when … funds are held for its benefit and to the individual tribal members when … funds are held for their benefit." *Id.* at 1209 (alterations omitted) (internal quotation marks omitted). As the court's opinion makes clear, funds "collected and disbursed under the terms of the 1906 Act…are … held for the benefit of individual members of the Osage Nation." *Id.* at 1209-10. Put differently, "the 1906 Act requires the Secretary to hold Osage mineral wealth in trust for *individual* Osage headright owners." *Id.* at 1213 (emphasis in original). Accordingly, under § 4011(a), plaintiffs are entitled to an accounting of funds "collected and disbursed under the terms of the 1906 Act." *See id.* at 1209-10.

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[4] Section 4011(a) reads, "The Secretary [of the Interior] shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title." 25 U.S.C. § 4011(a).

The Osage tribal trust account fits this description.[5] The tribal trust account "was established by the 1906 Act," *Osage Tribe*, 81 Fed. Cl. at 348, and is the means by which the government carries out its duties to collect, hold, and distribute funds pursuant thereto, [*see* Dkt. #1212-1, Administrative Record, p. 2 ("[P]ursuant to the 1906 Act the revenues from the Osage Mineral Estate are … placed in the Osage Tribal Trust Account….[P]ursuant to the 1906 Act the revenues in the Osage Tribal Trust Account are … distributed to the Headright Holders.")]. No other account exists to carry out these functions. [*See* Dkt. #1266, Defendants' Brief, p. 7 ("[T]here is just one tribal trust account related to this case, and funds are segregated from this account when they are distributed to the headright holders on a quarterly basis." (internal quotation marks omitted))]. Thus, it necessarily follows that plaintiffs are entitled to an accounting of the tribal trust account.

The government's alternative proposal is unpersuasive. First, the 1906 Act does not say anything about IIM accounts. Nothing in the Act contemplates or requires the existence of such an account, nor does the Act impose any management obligations on the government after trust distributions are made. As just mentioned, plaintiffs' right to an accounting arises from the application of § 4011(a) to the trust relationship created under the 1906 Act. *See Fletcher II*, 730 F.3d at 1209-10, 1213. It thus makes little sense to say that this right applies only to accounts having nothing to do with the 1906 Act.[6]

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[5] The Osage tribal trust account holds funds pursuant to 25 U.S.C. § 162a, [*see* Dkt. #1266, Defendants' Brief, p. 19 (agreeing with plaintiffs that the tribal trust account is held under § 162a)]; *see also Osage Tribe of Indians of Okla. v. United States*, 93 Fed. Cl. 1, 26 (2010), and thus is subject to the accounting duty set forth in § 4011(a).

[6] This conclusion is bolstered by the fact that this case has never been about IIM accounts. Such accounts only became an issue in this case on remand when the government took the position that the accounting right acknowledged in *Fletcher II* only pertains to the plaintiffs' respective

Second, the government's position here merely revives an argument that the Tenth Circuit has already considered and rejected. In the government's view, only the Osage Nation may seek an accounting of the tribal trust account because, while in that account, funds are held in trust for the Osage Nation only. The Tenth Circuit rejected this same argument in *Fletcher II*:

> The government recognizes that the 1906 Act creates a trust relationship running directly between the government and individual Osage headright owners, but it suggests one of the usual fiduciary duties attendant to a typical trust relationship here belongs *only* to someone else (the tribe). Of course, it's not impossible Congress could have chosen to rearrange normal trust principles in this way, but the government identifies *nothing* in the text or structure of the relevant laws suggesting such a design. To the contrary, § 4011(a) indicates that the government's accounting duty applies to all funds "held in trust ... for the benefit

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IIM accounts. Plaintiffs, however, have never requested such an accounting. Rather, they consistently have sought an accounting of funds held and disbursed under the 1906 Act, or, to use the government's words, "an accounting of what every other [headright] recipient receives." [Dkt. #1219-3, Tenth Circuit Oral Argument Transcript, p. 25; *see also* Dkt. #985-1, Third Amended Complaint, p. 33 (requesting an accounting of all distributions from the Osage Mineral Estate made pursuant to § 4 of the 1906 Act)]. Given this procedural history, it seems unlikely that the Tenth Circuit reversed in order to provide plaintiffs with an accounting that they do not want and have never requested.

The government makes much of the fact that plaintiffs previously have disclaimed seeking an accounting of the Osage tribal trust account. [*See* Dkt. #1221, p. 3-4]. These statements, as the government itself acknowledges, were "driven by Plaintiffs' prior belief that a third type of account existed to which they could seek an accounting," namely, a "segregated fund." [Dkt. #1266, Defendants' Brief, p. 12]. Plaintiffs' belief was premised on the text of the 1906 Act, which at one point states that royalty income "shall be segregated…and placed to the credit of" tribal members and then, shortly thereafter, states that such funds "shall be distributed" to the tribal members. 1906 Act. § 4(1), (2). Based on this language, plaintiffs believed that segregation and distribution were separate steps and thus that there was a separate "segregated account" holding royalty income prior to distribution. It was only after the government's submission of the administrative record and its brief on the merits that it became clear that "'segregation' and 'distribution' occur together such that there is no separate 'segregated: tribal trust account.[']" [Dkt. #1266, p. 7].

Plaintiffs had no way of knowing this information prior to the government's filings. Their understanding of how the government manages funds under the 1906 Act was reasonable based on the text of the statute. Thus, given that plaintiffs have always sought an accounting of funds held and disbursed under the 1906 Act, the court will not deny them that accounting simply because they initially did not understand the arrangement by which those funds are administered or what to call the account at issue.

> of an Indian tribe *or an individual Indian.*" In turn, the 1906 Act requires the Secretary to hold Osage mineral wealth in trust for *individual* Osage headright owners. Taken together, these provisions suggest a trust relationship and an attendant accounting duty running directly between the government and individual Osage headright owners like the plaintiffs before us. We cannot detect so much as a whiff suggesting they grant accounting privileges *only* to the tribe….[E]ven if we could somehow conjure up the sort of ambiguity the government seems to assume but never identifies, it would still have to be resolved in the plaintiffs' favor.

*Id.* at 1213 (emphasis in original). As this analysis makes clear, plaintiffs and the Osage Nation are entitled to the *same* accounting privileges. Both derive their accounting rights from the *same* combination of § 4011(a) and the 1906 Act. *See id.* at 1209 (noting that the 1906 Act "creates a trust relationship [both]…between the federal government and the Osage Nation, [as well as] … between the federal government and the individual Osage headright owners who are plaintiffs in this case"). Nothing in these provisions, or the Tenth Circuit's opinion, suggests that plaintiffs and the tribe stand on a different footing in this regard or that somehow their respective accounting rights differ.[7] *See id.* at 1213. Indeed, the Tenth Circuit held exactly the opposite,

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[7] The government's argument is premised on various decisions from the Court of Federal Claims in *Osage Tribe of Indians v. United States*. That case involved claims by the Osage Nation against the federal government for mismanaging trust funds held in the Osage tribal trust account. Specifically, the government now relies on a series of decisions issued during the course of that litigation, holding that the Osage Nation is the *only* direct beneficiary of the tribal trust account. *See Osage Tribe of Indians of Okla. v. United States*, 85 Fed. Cl. 162, 170–71 (2008) ("[T]he Tribe, not the headright holders, is the direct trust beneficiary.…[The individual headright holders] are not a party to the trust relationship which exists between defendant [United States] and plaintiff [Osage Nation].… [T]he 1906 Act created a trust relationship between plaintiff-Osage Tribe and defendant. Moreover, the court has specifically found that the trust relationship exists exclusively between the Tribe and defendant." (citations omitted) (internal quotation marks omitted)); *Osage Nation*, 57 Fed. Cl. at 395 (concluding that the "headright holders are not in fact 'the real parties in interest' because the Tribe, not the headright holders, is the direct trust beneficiary"); *Osage Tribe*, 93 Fed. Cl. at 40 ("By definition, Osage tribal funds become individual moneys only *after* segregation and distribution…." (emphasis in original)).

*see id.*, at one point even suggesting that the court could resolve this matter simply by ordering the government to provide plaintiffs with the same accounting it had given the tribe, *see id.* 1215-16.

Finally, the government's contention fails for the basic reason that leaves the headright owners with an "almost useless" accounting right. *See id.* at 1213. *Fletcher II* rejected any interpretation of § 4011(a) or the 1906 Act that would render "pointless" the accounting received by the individual Osage headright owners. *See id.* at 1212. In particular, the court rejected the idea that "the government's accounting obligations extend only to trust fund deposits but *not* withdrawals." *Id.* "Half of an accounting," the circuit court reasoned, "may be closer to no accounting at all." *Id.*

Here, if this court were to follow the government's approach, the individual Osage headright owners would only be entitled to a summary of their respective IIM account statements. Such a right is virtually pointless. As a practical matter, IIM accounts are nothing more than a conduit for facilitating trust distributions to the headright owners. *See Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 39-40 (D.D.C. 2008) (noting that "IIM accounts exist to receive [trust] income … and then to distribute it to account holders when account balances

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Although this line of authority certainly supports the government's position, the court cannot follow these decisions here given that they contradict binding Tenth Circuit precedent and the law of the case. *Fletcher II* clearly dictates that plaintiffs are beneficiaries of the trust relationship created under the 1906 Act. *See* 730 F.3d at 1213 ("[T]he 1906 Act creates a trust relationship running directly between the government and individual Osage headright owners….[T]he 1906 Act requires the [government] to hold Osage mineral wealth in trust for *individual* Osage headright owners." (emphasis in original)); *see also id.* at 1209-10 (noting that funds "collected and disbursed under the terms of the 1906 Act…are … held for the benefit of individual members of the Osage Nation"). Because the funds in the Osage tribal trust account are collected and disbursed under the terms of the 1906 Act, *Fletcher II* indicates that plaintiffs are entitled to an accounting of that account.

reach a certain threshold (usually fifteen dollars)"), *vacated on other grounds by* 573 F.3d 808 (D.C. Cir. 2009); 25 C.F.R. § 115.002 (noting that an IIM account holder with an unrestricted account "may determine the timing and amount of disbursement from the account"). Funds deposited in such accounts generally are disbursed (via check or direct deposit) as soon as they are received. [*See, e.g.*, Dkt. #1212-3, Administrative Record, p. 77 (showing that headright income deposited in Charles Pratt's IIM account was paid to him by check on the same day it was received)].[8] Thus, the accounting proposed by the government often will accomplish nothing more than telling each plaintiff the dollar amount of his or her quarterly distribution. Such an accounting gives plaintiffs no meaningful way of determining whether the government has paid them the correct amount or whether it has mismanaged funds prior to distribution.[9] In short, limiting plaintiffs to an accounting of their respective IIM accounts results in the same "useless halfway measure" that the court roundly rejected in *Fletcher II*.

For the foregoing reasons, the court concludes that plaintiffs are entitled to an accounting of the Osage tribal trust account.

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[8] *See also Cobell v. Babbitt*, 91 F. Supp. 2d 1, 10 (D.D.C. 1999) ("[F]unds credited to unsupervised IIM trust accounts, if they meet a monetary threshold of $15.00 ($5.00 for oil and gas), are automatically identified and a check file is created."); Office of the Special Trustee for American Indians, *Frequently Asked Questions (FAQs) from IIM Beneficiaries*, U.S. Dep't of Interior, https://www.doi.gov/ost/FAQs#10 (noting that funds are "automatically disbursed" from an unrestricted IIM account when it reaches a balance of $15 (or $5 for oil and gas payments), and that funds are disbursed "regardless of the amount" if the beneficiary chooses direct deposit).

[9] The court does not mean to suggest that plaintiffs are not entitled to an accounting of their respective IIM accounts—they are. *See Cobell v. Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001) (noting that IIM trust beneficiaries are entitled to an accounting of their respective IIM accounts under § 4011(a)). Rather, the court merely holds—consistent with the circuit's decision in *Fletcher II*—that plaintiffs, by virtue of their trust relationship with the government under the 1906 Act, are *also* entitled to an accounting of the Osage tribal trust account.

*B. Effect of Osage Nation Settlement Agreement*

The court next considers whether the Osage Nation's settlement agreement with the federal government bars plaintiffs from seeking an accounting of the Osage tribal trust account. In March 2000, the Osage Nation filed a lawsuit against the United States in the Court of Federal Claims, alleging that the government had failed to collect and invest Osage royalty income in breach of its duties under the 1906 Act. In November 2011, the tribe and the federal government settled the case for $380 million. As part of the settlement agreement, the Osage Nation, "on behalf of itself and the Headright Holders" waived "all claims regarding the United States' obligation to provide a historical accounting or reconciliation of the Osage Tribal Trust Account." [Dkt. #1212-1, p. 11].

Based on this language, the government asserts, as an affirmative defense, that plaintiffs are barred from seeking an accounting of the tribal trust account. In response, plaintiffs submit that they were not a party to the settlement agreement at issue and that the Osage Nation has no authority to settle accounting claims on their behalf.[10] Although the settlement agreement states that the Osage Nation "has the authority to act for…and to bind Headright Holders with respect

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[10] Plaintiffs also contend that the government waived this argument by failing to adequately develop it on appeal. In particular, plaintiffs point to the Tenth Circuit's observation that this argument was "doubly waived—first for a lack of adequate development in briefing, then for being intentionally abandoned at oral argument." *Fletcher II*, 730 F.3d at 1214.

Plaintiffs' contention is unpersuasive. During the last appeal, the argument at issue was raised as an alternative ground for affirmance. An appellee ordinarily need not raise such alternative arguments in order to preserve them on remand. *See Oldenkamp v. United Am. Ins. Co.*, 619 F.3d 1243, 1249 (10th Cir. 2010) ("Although the Oldenkamps could have advanced this argument as an alternative ground for affirming the district court's ruling in their favor, a party is not required to raise alternative arguments."); *Eichorn v. AT&T Corp.*, 484 F.3d 644, 657-58 (3d Cir. 2007) (noting that an appellee is "not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds"). The court, therefore, concludes that the government has preserved this issue and that it is now properly raised.

to matters relating to the Osage Mineral Estate," [*id.* at 2], the government here offers no evidence or authority to substantiate this assertion. Rather, the government contends that to the extent plaintiffs wish to challenge the effect of the settlement agreement, they must first join the Osage Nation as a necessary and indispensable party under Federal Rule of Civil Procedure 19.

The court starts with the government's Rule 19 argument. That provision reads, in relevant part, as follows:

> **(a) Persons Required to Be Joined if Feasible.**
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> **(1)** ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
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> **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or
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> **(B)** 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:
>
> **(i)** as a practical matter impair or impede the person's ability to protect the interest; or
>
> **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
>
> **(2)** ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.
>
> ….
>
> **(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
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> **(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.

Fed. R. Civ. P. 19(a)-(b). "Rule 19 provides a three-step process for determining whether an action should be dismissed for failure to join a purportedly indispensable party. First, the court must determine whether the absent person is 'necessary.' … If the absent person is necessary, the court must then determine whether joinder is 'feasible.'" *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir.) *opinion modified on reh'g*, 257 F.3d 1158 (10th Cir. 2001) (citations omitted). "Finally, if joinder is not feasible, the court must decide whether the absent person is 'indispensable'…." *Id.* Here, joinder of the Osage Nation is not feasible because the Nation possesses sovereign immunity. *See id.* Accordingly, the court will consider whether the tribe is necessary and, if so, whether it is also indispensable.

Starting with Rule 19(a), the government does not offer any explanation as to why the Osage Nation is a necessary party. The tribe certainly is not needed to "accord complete relief among [the] existing parties." Fed. R. Civ. P. 19(a)(1)(A). Plaintiffs are seeking a historical accounting of the Osage tribal trust account. The Osage Nation has already waived its right to seek such an accounting. A decision that plaintiffs are not bound by the tribe's settlement agreement with the federal government accords them all the relief they have requested. The opposite conclusion results in dismissal. In either event, complete relief is accorded.

As for the latter joinder provision, the Osage Nation does not appear to have an interest in this litigation. This case is about *plaintiffs'* accounting rights, not the tribe's. Providing plaintiffs with an accounting in no way undermines or affects the Osage Nation's separate right to an accounting. Based on the record before the court, it appears that the only possible tribal interest at stake in this litigation is the Osage Nation's interest in enforcing the waiver provisions of its settlement agreement against the headright owners. It, however, is by no means clear that the tribe would even claim such an interest. As the government itself acknowledges, the

headright owners were included in the waiver provision at issue "in a belt and suspenders manner." [Dkt. #1279, p. 52]. Moreover, it is unclear what the Osage Nation would lose if this provision were found to be unenforceable against the headright owners. Finally, even if claimed, such an interest appears entirely baseless. *See Citizen Potawatomi Nation*, 248 F.3d at 998 (noting that "Rule 19 excludes … 'claimed interests that are patently frivolous'" (emphasis omitted) (quoting *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999)). As *Fletcher II* makes clear, § 4011(a) grants *both* the Osage Nation *and* the headright owners the right to an accounting of funds held under the 1906 Act. *See* 730 F.3d at 1209. Nothing in this statutory scheme allows the tribe to waive the separate accounting rights of the headright owners, nor does any provision of the Osage Constitution purport to grant such authority. Accordingly, the court concludes that the Osage Nation is not a necessary party under Rule 19(a)(1).

In any event, even if the Osage Nation were a necessary party, it certainly is not indispensable. In making this determination, the court must consider the four factors set forth in Rule 19(b). As to the first factor, even if the Osage Nation could claim an interest in enforcing its settlement agreement against the headright owners, "the potential of prejudice to that interest is offset in large part by the fact that the [government's] interests in defending [the settlement agreement] is substantially similar, if not virtually identical, to those of the [Osage] Tribe."[11] *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001). Further,

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[11] [*See* Dkt. #1279, Oct. 2015 Hearing Transcript, p. 59 ("THE COURT: Do the United States and the Osage Nation share the same interest in maintaining the enforceability of their settlement agreement as against the headright holders, and is there any way in which their interests on this issue differ? MR. KIM: I don't know. I think … the tribe would have to come in and they would have to articulate exactly what the interest is. Then we would know whether they were the same or if there was any difference. I don't think there would be a difference but that's just my speculation.")].

"[b]ecause the potential for prejudice is minimal, '[the court] need not be concerned with the second factor, which addresses the availability of means for lessening or avoiding prejudice.'" *Id.* at 1260 (quoting *Rishell v. Jane Phillips Episcopal Med'l Med. Ctr.*, 94 F.3d 1407, 1412 (10th Cir. 1996)).

Turning to the third factor, the court must consider "whether a judgment rendered in the [tribe's] absence would be adequate." Fed. R. Civ. P. 19(b)(3). This "factor is intended to address the adequacy of the dispute's resolution. The concern underlying this factor is not the plaintiff's interest but that of the courts and the public in complete, consistent, and efficient settlement of controversies, that is, the public stake in settling disputes by wholes, whenever possible." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (citation omitted) (internal quotation marks omitted). Here, it is difficult to see how a judgment rendered in the Osage Nation's absence would be any less adequate than a judgment rendered with the tribe as a party. As previously mentioned, this case involves a dispute over the *plaintiffs'* accounting rights. Because the Osage Nation has already waived its own separate accounting right, the risk that a judgment rendered in the tribe's absence would generate further litigation appears minimal. Accordingly, this factor also weighs against dismissal.

Finally, the court must consider "whether the plaintiff[s] would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(4). Here, there does not appear to be any alternative forum in which the plaintiffs could pursue their accounting claims if this case were dismissed. The government does not offer any argument to the contrary. Thus, this final factor also weighs against dismissal. In sum, all of the Rule 19(b) factors favor allowing this case to proceed among the existing parties. Accordingly, the court holds that the Osage Nation is neither necessary nor indispensable under Rule 19.

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

The individual Osage headright owners were not a party to the settlement agreement at issue. Indeed, the Court of Federal Claims denied them the opportunity to intervene in the case. *See Osage Tribe*, 85 Fed. Cl. at 166-79. Because the Osage Nation lacks authority to waive the plaintiffs' individual accounting rights, they are not bound by the tribe's settlement agreement with the federal government.

*C. Scope of the Accounting Due*

Having concluded that plaintiffs are entitled to an accounting of the Osage tribal trust account, the court must determine the specific parameters of the accounting that is due.

Although this was not an issue on appeal, the Tenth Circuit's opinion in *Fletcher II* offers useful guidance. As the court of appeals explained, plaintiffs are entitled to an accounting with "some degree of information about both receipts and disbursement," but it need not involve "[a] green eye-shade death march through every line of every account over the last one hundred years." *Fletcher II*, 730 F.3d at 1214. Rather, this "court may focus the inquiry on ways designed to get plaintiffs what they need most without imposing gratuitous costs on the government." *Id.* In doing so, the court "must seek to balance the often warring (and admittedly incommensurate) considerations of completeness and transparency, on the one hand, and speed, practicality, and cost, on the other." *Id.* From these principles, it logically follows that plaintiffs

> are entitled only to information that is reasonably necessary to enable them to enforce their rights under the trust. They are not entitled to information that only loosely relates to their own personal beneficial interests, or to information that is unlikely (because it is so old, or so *de minimis*, say) to have a meaningful effect on their beneficial interests.

*Id.* at 15 (alterations omitted) (citations omitted) (internal quotation marks omitted).

With this guidance in mind, the court turns to the specifics of plaintiffs' request. The plaintiffs' stated purpose for seeking an accounting is to obtain information that will enable them to prove that the government has paid headright distributions to ineligible recipients and, in that way, improperly diminished their pro rata share.[12] Neither party, however, has provided the

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[12] *See* Dkt. #1219-3, Tenth Circuit Oral Argument Transcript, p. 16-17 ("JUDGE: So what is it you want beyond a list of current recipients or would that do the trick? …. MR. AAMODT: … I think the answer, your Honor, would be that the United States must demonstrate through the records that it has, that it has in good faith paid the right people the right amount of money."); *id.* at 35 ("What we're looking for is with respect to the payments that are being made, whether or not they are being made to persons that the United States now can say that they understand that they're making them to the right people." (statement of Jason B. Aamodt, plaintiffs' counsel)); *id.* at 36 ("I think upon receiving the accounting that my clients are due, they may challenge the bona fides of particular individuals." (statement of Aamodt)); Brief of Plaintiff-Appellant at

court with a specific accounting proposal reasonably calculated to get at this information without imposing gratuitous costs on the public fisc. The government's briefs do not address the issue, and the plaintiffs' proposals are either overly broad or so generalized as to be unhelpful.

Adding to the difficulty, the nature and scope of the accounting sought by the plaintiffs has expanded dramatically over time. Originally, plaintiffs only requested an accounting of trust distributions going back to 2002.[13] They now seek an accounting of *both* receipts *and*

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24-25, *Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013) (No. 12–5078), 2011 WL 8968328 ("Specifically, Plaintiffs seek an accounting relating to whether the United States has properly distributed headright payments only to those who may rightfully hold a headright, whether interest was collected and distributed, and whether the correct amounts were distributed to the correct recipients."); Dkt. #231, Sept. 2009 Hearing Transcript, p. 22 ("Currently that data doesn't exist that I'm aware of, being able to—to be able to tell when a particular headright may have been transferred. I think the thing that gets us that data is one of the plaintiffs' requests of the United States with respect to an accounting. And I think, Your Honor, that if we could get an accounting from the United States with respect to the management of this asset in a reasonable period of time, we could really limit these things." (statement of Aamodt)); Dkt. #1112, Dec. 2010 Hearing Transcript, p. 20 ("[T]he question that we lay out, Judge, of whether or not persons are entitled to receive these monies is not just a simple question of whether or not any non-Osage can obtain. We concede, in fact we plead in our pleadings that many non-Osages are entitled to receive these funds …. The problem that we have in this case is we don't know which ones they are and there's no way to determine that until an accounting is provided." (statement of Aamodt)); *see also* Dkt. #985-1, Third Amended Complaint, p. 33 (requesting an accounting of headright distributions made pursuant to § 4 of the 1906 Act, without any mention of trust receipts); Dkt. #1144, Plaintiffs' Response in Opposition to Federal Defendant's Motion to Dismiss, p. 16 ("The Plaintiffs' claim is against the Federal Defendants for failing to account for the mismanagement of funds coming *out of* the Osage Mineral Estate through the segregated fund." (emphasis in original)); *Fletcher II*, 730 F.3d at 1215 ("We don't doubt that the plaintiffs ultimately hope to prove that the government has sent money to persons ineligible to receive headright shares under the various amendments to the 1906 Act—and, in this way, improperly diminished their pro rata share.").

[13] *See* Dkt. #985-1, Third Amended Complaint, p. 33 (requesting an accounting of headright distributions made pursuant to § 4 of the 1906 Act, without any mention of trust receipts); Dkt. #1219-3, Tenth Circuit Oral Argument Transcript, p. 16 ("JUDGE: … And I'm trying to nail you down a little bit further as to what you really want. Why wouldn't a list of current recipients and amounts do the trick for you? Is that the nature of the accounting you want or do you want to go all the way back to 1906? MR. AAMODT: No. I don't—I'm not interested in going back to 1906."); *id.* at 35 ("JUDGE: Okay. So we can go back to the last quarter for now being made, we

distributions going back one-hundred and nine (109) years, to 1906. [*See* Dkt. #1262, Plaintiffs' Brief, p. 12, 16]. Further, their most recent request for trust receipts is not limited to information about the amount and source of money coming into the account, but rather includes such detailed information as the volume of oil and gas sold, the unit price, and the amount of mineral acreage that is not currently generating income. [*See* Dkt. #1262-1, Affidavit of S. Christopher Lopp, pp. 7-9; Dkt. #1279, Oct. 2015 Hearing Transcript, pp. 73-74].[14] In short, the scope of the accounting requested by the plaintiffs has grown over the course of this litigation to a point where it is now almost completely unmoored from the original purpose for which the accounting was sought.[15]

The circumstances here do not warrant an accounting so broad. Having considered the plaintiffs' stated purpose for seeking an accounting along with the Tenth Circuit's guidance on the issue, the court concludes that an accounting running from 2002 to the most recent quarter strikes the appropriate balance in this case. An accounting spanning this period accords with plaintiffs' prior requests and gives "plaintiffs what they need most without imposing gratuitous costs on the government." *Fletcher II*, 730 F.3d at 1214. Although plaintiffs now demand an

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don't have to go back earlier? Let's say, the last quarter, and the trustee gives you then the names of the recipients and the amounts received and for that matter the amounts of income in the trust; that's still not enough for you, is it, you want to know the bona fides of the recipients in the last quarter. MR. AAMODT: Oh, your Honor, in terms of time, I think we'd like to see it back to the filing of the complaint in 2002."); Dkt. #231, Sept. 2009 Hearing Transcript, p. 23-24 (requesting an accounting of quarterly trust distributions "since 2002 only").

[14] The court refers to Mr. Lopp's affidavit merely as an indication of the information plaintiffs currently request. The court does not rely on the affidavit as evidence.

[15] It is possible that this change in the relief requested is the result of plaintiffs having altered their theory of the case—i.e., their reason for seeking an accounting. Plaintiffs, however, have not communicated such a change to the court, and, even if they had, the court would be disinclined to allow it at this late stage of the litigation.

accounting reaching back to 1906, they have not explained why such information is needed to pursue their misdistribution claim. Plaintiffs may hope to use such information to trace the transfer of headrights over time. [*Cf.* Dkt. #231, Sept. 2009 Hearing Transcript, p. 22 (noting that plaintiffs are seeking an accounting "to be able to tell when a particular headright may have been transferred")]. To the extent that this is their objective, the ends do not justify the cost and burden on the government. The likelihood that plaintiffs will be able to successfully attack these transfers in such a way as to meaningfully increase their beneficial interest is remote.[16] *See*

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[16] Indeed, when considered in light of the relevant statutory scheme, such a challenge appears to bear little chance of success. *Cf. Fletcher II*, 730 F.3d at 1215 (noting that plaintiffs' accounting right does not "necessarily mean that they will even be able to attack through collateral litigation headright transfers long ago approved according to statutorily prescribed processes"). Most of the restrictions that now govern transfer of headrights were enacted in 1978. *See* Cohen's Handbook, *supra*, at 313 n.874, 314 n.878. Before that time, Osage Indians could alienate headrights by intestate succession or, with the Secretary's approval, by will. *See* Act of Apr. 18, 1912, Pub. L. No. 62–125, § 8, 37 Stat. 86, 88; 1906 Act § 6; Cohen's Handbook, *supra*, at 314 n.879. The 1978 Act placed strict limits on the transfer of headrights to non-Osages. *See* Act of Oct. 21, 1978, Pub. L. No. 95–496, § 7, 92 Stat. 1660, 1663 *as amended by* Pub L. No. 98-605, 98 Stat. 3163 (1984) (technical corrections). Under the 1978 Act, Osage Indians may not transfer anything more than a life estate in their headrights to non-Osages. *See id.* Upon the termination of that life estate, the headright interest would then vest in any specified remaindermen or reversionary interest holders, *provided that* such persons are Osage Indians. *See id.* If no such person exists, the headright interest would then vest in the Osage Nation, *not* the remaining headright owners. *See id.* Given this statutory scheme, it appears unlikely that plaintiffs can collaterally attack a headright transfer made after 1978 in such a way as to increase their beneficial interest. Although plaintiffs might possibly make such a claim with regard to a transfer occurring before 1978, they would first have to show (1) that the headright transfer was unlawful (i.e., that it was not approved by the Secretary), and (2) that there is currently no rightful heir to that headright. The prospect of proving such a claim appears remote.

Finally, even if plaintiffs could successfully make out such a claim, the likelihood that it would have anything more than a de minimis impact on their beneficial interest is more remote still. For example, the average quarterly headright payment between 2006 and 2013 was approximately $7,975.00 per headright. [*See* Dkt. #1212, Administrative Record, p. 30]. Based on this figure, if plaintiffs were to show that one full headright (out of the 2,229 outstanding) had been wrongfully transferred and no longer had a rightful recipient—which, given the fractionalization of headrights, is no easy task—that headright share, once redistributed amongst

*Fletcher II*, 730 F.3d at 1215 (noting that plaintiffs "are not entitled to information that only loosely relates to their own personal beneficial interests, or to information that is unlikely (because it is so old, or so *de minimis*, say) to have a meaningful effect on their beneficial interests"); *cf.* Alan Newman et al., The Law of Trusts and Trustees § 962 (3d ed. 2010) (stating that a trustee's duty to comply with a beneficiary's request for information about the trust "is subject to several limitations," including that "the duty extends only to information requests that are reasonable"). Given the time and costs involved with producing a one-hundred-and-nine-year-long accounting, the court concludes that it would be inequitable to order such relief for the purpose of pursing a claim with such a slight chance of success.

As for content, the court holds that the accounting must include a description of each receipt and distribution for the relevant accounting period. In particular, the accounting must include the following information: the date and dollar amount of each receipt and distribution; a brief description of the source of each trust receipt; the name of the beneficiary to whom each trust distribution was made; for headright distributions, the respective headright share of each headright owner at the time of distribution; and finally the amount of interest income generated from the tribal trust account and the date at which such interest was credited to the account.[17]

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the remaining headright owners, would only increase their respective quarterly distributions by approximately $3.58 per full headright.

[17] Although courts ordinarily must refrain from telling agencies *how*, specifically, to carry out a statutory duty, *cf. Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004) ("[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be."), that principle applies with less force where, as here, the agency is acting as a trustee and the court is tasked with fashioning an equitable remedy for the agency's breach of a fiduciary duty. *See Cobell v. Kempthorne*, 455 F.3d 301, 304-05 (D.C. Cir. 2006) ("The narrower judicial powers appropriate under the APA do not apply when the court is fashioning equitable remedies for breaches of fiduciary duties." (alterations omitted) (internal quotation

The accounting set forth above provides plaintiffs with sufficient information to pursue their misdistribution claim and to enforce their rights under the 1906 Act.[18] It allows the plaintiffs to check the government's math, and gives them "some sense of where money has come from and gone to." *Fletcher II*, 730 F.3d at 1215. Most importantly, such an accounting strikes an even balance between the "considerations of completeness and transparency, on the one hand, and speed, practicality, and cost, on the other." *Id.* at 1214.

**IT IS THEREFORE ORDERED** that the government provide plaintiffs with an accounting of the Osage tribal trust account in accordance with the following requirements:

1. The accounting must run from the first quarter of 2002 until the last available quarter;
2. The accounting must be divided and organized either by month or by quarter;
3. The accounting must state the date and dollar amount of each receipt and distribution;
4. The accounting must briefly identify and describe the source of each trust receipt (i.e., the name of the payer/lessee and the contract number for the oil and/or gas lease on which the payment is made);
5. The accounting must state the name of the individual or organization to whom each trust distribution was made;

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marks omitted)). In such cases, courts "retain[] substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy." *Id.* (internal quotation marks omitted); *see also Fletcher II*, 730 F.3d at 1211 n.2, 1214 (concluding that this court "possesses considerable discretion 'to mould' the nature and scope of the accounting" that is due, while also noting that plaintiffs' case was brought pursuant to the APA); *Cobell v. Salazar*, 573 F.3d 808, 813 (D.C. Cir. 2009) ("The proper scope of the accounting ultimately remains a question for the district court….").

[18] Based on the administrative record, it appears that the government already maintains records documenting much of this information. [*See* Dkt. #1212-2 (monthly account statements for Osage tribal trust account from January 2006 to December 2013)]. Should the government chose to do so, those records, if left unreacted and supplemented with the additional information required herein, could serve as the government's accounting.

6. For headright distributions, the accounting must state the headright interest that each beneficiary possessed at the time of distribution;
7. The accounting must state the amount of interest income generated from the tribal trust account and the date on which such interest was credited to the account.

**IT IS FURTHER ORDERED** that, in accordance with the parties' earlier agreement, all documents, data, and other material obtained pursuant to this accounting shall be considered confidential and subject to the protective order previously entered in this case on August 30, 2006 [*see* Dkt. #52].

**IT IS FURTHER ORDERED** that the government's Motion to Strike Extra-Record Material [Dkt. #1265] is granted in part and denied in part. The motion is granted to the extent the government requests that the court not rely on the extra-record material contained in Dkt. #1262-1 as evidence, but denied to the extent it request that the document be stricken entirely. *See supra* note 14.

ENTERED this 30th day of December, 2015.

# ATTACHMENT 2

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| WILLIAM S. FLETCHER, *et al.*, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 02-CV-427-GKF-PJC |
| | ) | |
| THE UNITED STATES OF AMERICA, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

# JUDGMENT

On December 30, 2015, the court determined that plaintiffs are entitled to an accounting of the Osage tribal trust account.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that judgment should be and hereby is entered in favor of plaintiffs and against defendants the United States of America, the Department of Interior, Sally Jewell in her official capacity as Secretary of the Interior, the Bureau of Indian Affairs, and Kevin Washburn in his official capacity as Assistant Secretary of the Interior–Indian Affairs (collectively, "the government"), on plaintiffs' accounting claim.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the government provide plaintiffs with an accounting of the Osage tribal trust account in accordance with the following requirements:

1. The accounting must run from the first quarter of 2002 until the last available quarter;
2. The accounting must be divided and organized either by month or by quarter;
3. The accounting must state the date and dollar amount of each receipt and distribution;

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

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the government provide plaintiffs with said accounting within six months after either the entry of this judgment or the conclusion of any appeal, whichever is later.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that, in accordance with the parties' earlier agreement, all documents, data, and other material obtained pursuant to this accounting shall be considered confidential and subject to the protective order previously entered in this case on August 30, 2006 [*see* Dkt. #52].

ENTERED this 30th day of December, 2015.

# ATTACHMENT 3

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| WILLIAM S. FLETCHER, *et al.*, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 02-CV-427-GKF-PJC |
| | ) | |
| THE UNITED STATES OF AMERICA, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

**OPINION AND ORDER**

Before the court are the Motion to Alter or Amend the Judgment [Dkt. #1289] filed by plaintiffs William S. Fletcher et al., and the Motion to Alter or Amend the Judgment [Dkt. #1285] filed by defendants the United States of America, the Department of Interior, Sally Jewell in her official capacity as Secretary of the Interior, the Bureau of Indian Affairs, and Larry Roberts in his official capacity as Acting Assistant Secretary of the Interior–Indian Affairs (collectively, "the government").

On December 30, 2015, the court entered an order and judgment directing the government to provide plaintiffs with an accounting of the Osage tribal trust account meeting certain set requirements. Both parties now request that the court amend those requirements. For the reasons set forth in this Opinion and Order, the court grants the government's motion and grants in part and denies in part the plaintiffs' motion.

## I. Background

In the early twentieth century, large quantities of oil and gas were discovered on lands belonging to the Osage Nation. Shortly thereafter, Congress enacted the Osage Allotment Act of 1906, *see* Act of June 28, 1906, Pub. L. No. 59–321, 34 Stat. 539 ("Osage Allotment Act" or "1906 Act"), which severed the mineral estate underlying Osage lands from the surface estate,

placed the mineral estate in trust, and directed the Secretary of Interior to collect and distribute royalty income every quarter to persons on the 1906 tribal membership roll. The right to receive quarterly trust distributions is referred to as a "headright." *Taylor v. Tayrien*, 51 F.2d 884, 886 (10th Cir. 1931). Under the 1906 Act, there are 2,229 headrights—one for each person on the 1906 tribal membership roll. *See Big Eagle v. United States*, 300 F.2d 765, 765 (Ct. Cl. 1962); *see also* 1906 Act §§ 1, 4. Today, "[m]ost persons of Osage Indian ancestry own no headrights, and thus receive no tribal income. Some persons own more than one headright, or own fractional shares of headrights, and some headrights are owned by non-Osages." *See* Cohen's Handbook of Federal Indian Law § 4.07[1][d][ii], at 313 (Neal Jessup et al., eds., 2005).

Prior to distribution, royalty income collected under the 1906 Act is held in a United States Treasury account, titled the Osage tribal trust account. The tribal trust account "was established by the 1906 Act," *Osage Tribe of Indians of Okla. v. United States*, 81 Fed. Cl. 340, 348 (2008), and is the means by which the government carries out its duties to collect, hold, and distribute funds pursuant thereto, [*see* Dkt. #1212-1, Administrative Record, p. 2].

Plaintiffs are Osage Indians who receive headright payments pursuant to the 1906 Act. In their Third Amended Complaint, they requested various forms of relief, including an "accounting . . . of the Section 4 Royalty Payments distributed from the Osage Mineral Estate" as well as "[a]n order requiring that such accounting . . . determine whether Section 4 Royalty Payments . . . have been distributed only to Osage Indians (and their heirs) as required by section 4 of the 1906 Act." [*See* Dkt. #985-1, p. 33].[1] On December 30, 2015, the court entered an

[1] Plaintiffs first sought this accounting in 2006, as part of their First Amended Complaint. [*See* Dkt. #24, pp. 11-12 (requesting the same sort of accounting)].

order and judgment directing the government to provide plaintiffs with an accounting of the tribal trust account in accordance with the following requirements:

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

[Dkt. #1280, p. 26-27]. The court allowed the government six months from either the entry of judgment or the conclusion of any appeal, whichever was later, to comply with the court's accounting order. [Dkt. #1281, p. 2].

## II. Discussion

Both parties now move the court to amend its accounting order under Rule 59(e). "Grounds warranting a Rule 59(e) motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1212 (10th Cir. 2012) (alterations omitted) (internal quotation marks omitted). Such a motion "is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citation omitted).

The parties each move to amend different aspects of the court's judgment. The court addresses the parties' motions separately.

A. The Government's Motion

In its motion, the government requests either more time to comply with the court's accounting order or permission to provide identifying information for trust receipts other than the contract number on which the payment was made. According to the government, it currently does not have available the contract or lease number for all trust receipts dating back to 2002. It estimates that retrieving such information will require at least eighteen (18) months. In response, plaintiffs do not object to allowing the government more time to comply with the court's order, but *do* object to the use of any other form of identifying information as a substitute for the contract or lease number. [Dkt. #1295, p.1].[2]

The court has reviewed the parties' filings and agrees that an extension of time is warranted. The court, therefore, amends the judgment to allow the government eighteen (18) months to comply with the court's accounting order.

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[2] Plaintiffs' response brief is not entirely clear. Although it states that plaintiffs "have no objection to a reasonable amount of additional time for the United States to identify the lease number associated with each payment," it later "suggest[s] that the Court might permit the United States at most until the end of June to complete the work needed." [Dkt. #1295, p. 1, 3]. It follows up this suggestion by stating that a June deadline will give the government "the 6 months [it] seeks." [*Id.* at 3]. It is unclear from these statements whether plaintiffs mean June 2016 or June 2017—the first option does not provide the government with any additional time whereas the second provides the government with well over six months additional time. Given this confusion, the court will fall back on plaintiffs' general statement that they "have no objection to [providing the government with] a reasonable amount of additional time," and grant the government's request for eighteen (18) months to comply with the court's accounting order.

B. The Plaintiffs' Motion

The court now turns to the plaintiffs' motion. Plaintiffs move to amend two aspects of the court's judgment. First, they seek to significantly broaden the scope of the court's accounting order. Second, they request that the deadline for complying with the court's order run from the entry of judgment only, rather than the conclusion of any appeal—a provision which they characterize as a "pre-granted" stay. The court addresses these issues in turn.

Plaintiffs first request that the court significantly expand the temporal scope and level of detail required by its accounting order. In molding the scope of the accounting due, the court relied heavily on plaintiffs' stated reason for seeking an accounting and the specifics of their prior requests. In particular, the court noted that "plaintiffs' stated purpose for seeking an accounting [was] to obtain information that w[ould] enable them to prove that the government has paid headright distributions to ineligible recipients," and that "[o]riginally, plaintiffs only requested an accounting of trust *distributions* going back to 2002." [Dkt. 1280, Opinion and Order, p. 21-22 (emphasis added); *see also id.* at 21 n.12 (collecting instances in which plaintiffs stated that their reason for seeking an accounting was to pursue their misdistribution claim); *id.* at 22 n.13 (collecting instances in which plaintiffs stated that they were only seeking an accounting of trust distributions going back to 2002)]. With these objectives in mind, the court proceeded to mold an accounting reasonably calculated to get at this information without imposing gratuitous costs on the government.

Plaintiffs now contend that the court's reliance of their prior representations as a benchmark for shaping the accounting due was improper. They contend that their misdistribution claim is no longer part of this litigation and, consequently, that it should not factor into court's accounting order. Notably, plaintiffs do not propose an alternative benchmark

or objective for shaping the court's order. Rather, they seek an accounting going back to the "earliest possible date" and containing detailed information about both trust distributions *and* receipts. In response, the government maintains that that the court has already addressed the plaintiffs' arguments and that they have not identified any grounds warranting Rule 59 relief.

The court agrees with the government. As set forth in its prior order, the court has already considered and rejected the plaintiffs' request for an accounting "unmoored from the original purpose for which [it] was sought." [*Id.* at 23]. Plaintiffs' latest argument—that the dismissal of their misdistribution claim somehow entitles them to an accounting more expansive than they originally requested—is unpersuasive. Although the court previously dismissed plaintiffs' misdistribution claim, that dismissal was based on the lack of specific factual allegations in their complaint and thus was without prejudice. [Dkt. #1162, p. 14]. Notably, *following this dismissal*, plaintiffs repeatedly told the Tenth Circuit that their reason for seeking an accounting was to determine whether the government had paid headright distributions to ineligible recipients—that is, to investigate and pursue their misdistribution claim.[3] Given this

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[3] [*See* Dkt. #1219-3, Tenth Circuit Oral Argument Transcript, p. 16-17 ("JUDGE: So what is it you want beyond a list of current recipients or would that do the trick? …. MR. AAMODT: … I think the answer, your Honor, would be that the United States must demonstrate through the records that it has, that it has in good faith paid the right people the right amount of money."); *id.* at 35 ("What we're looking for is with respect to the payments that are being made, whether or not they are being made to persons that the United States now can say that they understand that they're making them to the right people." (statement of Jason B. Aamodt, plaintiffs' counsel)); *id.* at 36 ("*I think upon receiving the accounting that my clients are due, they may challenge the bona fides of particular individuals*." (statement of Aamodt) (emphasis added)); Brief of Plaintiff-Appellant at 24-25, *Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013) (No. 12–5078), 2011 WL 8968328 ("Specifically, Plaintiffs seek an accounting relating to whether the United States has properly distributed headright payments only to those who may rightfully hold a headright, whether interest was collected and distributed, and whether the correct amounts were distributed to the correct recipients.")]; *see also Fletcher*, 730 F.3d at 1215 ("We don't doubt that the plaintiffs ultimately hope to prove that the government has sent money to persons

procedural history, it is unclear why (all of the sudden) the dismissal of that claim now requires the court to ignore plaintiffs' repeatedly stated purpose for seeking an accounting. The court does not believe that it does.

To the extent that plaintiffs simply ask the court to disregard their earlier statements and grant an accounting unmoored from any benchmark or objective, the court again declines to do so. The Tenth Circuit has stated that this court has "considerable discretion" to mold the nature and scope of the accounting "in ways designed to get the plaintiffs what they need most without imposing gratuitous costs on the government." *Fletcher v. United States*, 730 F.3d 1206, 1214 (10th Cir. 2013). That is what the court has endeavored to do here. Plaintiffs' proposed accounting is not tied to any clear objective and, in the court's view, is precisely the sort of "green eye-shade death march" that the Tenth Circuit warned this court to avoid. *See id.* Plaintiffs have not identified any defect in the court's accounting order warranting Rule 59 relief. Accordingly, their request to expand the scope of that order is denied.

Plaintiffs next request that the court eliminate the "pre-granted" stay pending appeal set forth in the court's judgment. They contend that a stay pending appeal is not automatic and that the party requesting such relief bears the burden of establishing its entitlement thereto. The government does not specifically respond to this aspect of the plaintiffs' motion.

The power of this court to grant a stay pending appeal is governed by Federal Rule of Civil Procedure 62(c). *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). In addressing a motion under this rule, the court considers the following factors:

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ineligible to receive headright shares under the various amendments to the 1906 Act—and, in this way, improperly diminished their pro rata share.").

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Id.* The burden is on the party requesting a stay to establish their entitlement to such relief. *See Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009); *McCammon v. United States*, 584 F. Supp. 2d 193, 197 (D.D.C. 2008) (noting "that granting a stay pending appeal is always an extraordinary remedy, and that the moving party carries a heavy burden to demonstrate that the stay is warranted" (internal quotation marks omitted)).

In light of this authority, the court agrees with the plaintiffs. "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right . . . ." *Nken*, 129 S. Ct. at 1757 (citation omitted) (internal quotation marks omitted). The government has not moved for a stay pending appeal, and the circumstances here are not so extreme as to warrant the court's granting of such relief on its own initiative. The court, therefore, amends the judgment to eliminate any stay of the court's order.

WHEREFORE, the government's Motion to Alter or Amend the Judgment [Dkt. #1285] is granted, and the plaintiffs' Motion to Alter or Amend the Judgment [Dkt. #1289] is granted in part and denied in part. The plaintiffs' motion is granted with respect to the deletion of the judgment's stay pending appeal and denied to the extent it seeks modification of the court's accounting order.

The judgment is hereby amended to allow the government eighteen (18) months from the filing of the amended judgment to comply with the court's accounting order.

IT IS SO ORDERED this 11th day of March, 2016.

# ATTACHMENT 4

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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|---|---|---|
| WILLIAM S. FLETCHER, *et al.*, | ) | |
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| Plaintiffs, | ) | |
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| v. | ) | Case No. 02-CV-427-GKF-PJC |
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| THE UNITED STATES OF AMERICA, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

**AMENDED JUDGMENT**

On December 30, 2015, the court determined that plaintiffs are entitled to an accounting of the Osage tribal trust account.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that judgment should be and hereby is entered in favor of plaintiffs and against defendants the United States of America, the Department of Interior, Sally Jewell in her official capacity as Secretary of the Interior, the Bureau of Indian Affairs, and Kevin Washburn in his official capacity as Assistant Secretary of the Interior–Indian Affairs (collectively, "the government"), on plaintiffs' request for an accounting contained in their Third Amended Complaint [Dkt. #985-1, p. 33].

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the government provide plaintiffs with an accounting of the Osage tribal trust account in accordance with the following requirements:

1. The accounting must run from the first quarter of 2002 until the last available quarter;
2. The accounting must be divided and organized either by month or by quarter;
3. The accounting must state the date and dollar amount of each receipt and distribution;

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

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the government provide plaintiffs with said accounting within eighteen months (18) after the entry of this judgment.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that, in accordance with the parties' earlier agreement, all documents, data, and other material obtained pursuant to this accounting shall be considered confidential and subject to the protective order entered in this case on August 30, 2006 [*see* Dkt. #52].

ENTERED this 11th day of March, 2016.

**Certificate of Service**

I hereby certify that on October 12, 2016, I served the foregoing Answering Brief for the United States with the Clerk of Court of the United States Court of Appeals for the Tenth Circuit using the appellate ECF system. All participants are registered ECF members.

*s/ Anna T. Katselas*
ANNA T. KATSELAS
Attorney for the United States
October 12, 2016