No. 2021-1625

United States Court of Appeals for the Federal Circuit

WILLIAM FLETCHER, TARA DAMRON, RICHARD LONGSINGER, KATHRYN REDCORN,
Plaintiffs – Appellants

v.

UNITED STATES,
Defendant – Appellee

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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

SECONDARY SOURCES

Plaintiffs/Appellants ("Appellants") submit this brief in reply to the Answering Brief of the United States, *et al.*, filed July 14, 2021 (herein the "Government's Brief"). Appellants' Opening Brief, filed June 1, 2021 is called herein "Opening Brief" and all terms defined there have the same meaning in this reply brief.

INTRODUCTION

In apparent abandonment of its prior legal arguments before the Court of Claims that Appellants did not identify fiduciary obligations of the United States creating trust duties, the United States now argues that Appellants did not provide enough factual detail regarding how the United States failed to perform those fiduciary obligations. This is but another round in the United States' game of judicial "Whack-a-Mole" where, as part of *yet another* motion to dismiss proceeding in this two-decade saga, the United States raises legal arguments that have previously been rejected or are inconsistent with its former litigation positions – all in an attempt to avoid facing the substance at bar (*i.e.* its fiduciary obligations). For instance, nearly two decades ago the United States argued that headright holders are required parties to the *Osage Tribe* litigation, *Osage Nation v. United States*, 57 Fed. Cl. 392, 394 (2003) ("*Osage I*") ("Defendant argues that the headright holders, not the Tribe, suffer any damages that result from the mismanagement of mineral royalties because, as required by statute, the funds are ultimately distributed to those

individuals."), while at the same time arguing in the *Fletcher* litigation that it does not owe trust duties to headright holders, *Fletcher v. United States*, 730 F.3d 1206, 1213 (10th Cir. 2013) ("*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)."). Similarly, after the United States lost before the Tenth Circuit, it continued raising its failed argument on remand:

> 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* . . .

Fletcher v. United States, 153 F.Supp.3d 1354, 1362 (N.D. Okla. 2015).

Now, again, as part of this litigation before the Court of Claims, the United States raised numerous arguments it already lost before the Tenth Circuit and Northern District of Oklahoma. For instance, before the Court of Claims the United States *again* argued that its settlement with the Osage Nation waived Appellants' breach of trust claims. The United States originally raised this defense in a footnote of its Answer Brief to the Tenth Circuit:

> it is questionable whether . . . Plaintiffs could pursue a claim for an accounting [because the settlement agreement between the United States and the Osage Nation] waives on behalf of the Osage Nation and

> Headright Holders all claims . . . including all claims regarding the United States' obligation to provide a historical accounting."

See Appx. at 394, n.5. Regarding the defense, the Tenth Circuit stated:

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

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

Regardless, when the parties returned to the Northern District of Oklahoma on remand, the United States continued to assert its already-lost argument that the Osage Nation's settlement waived individual headright holders' claims. And, just like the Tenth Circuit did, the Northern District of Oklahoma rejected the argument:

> [T]he 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. Although the settlement agreement states that the Osage Nation "has the authority to act for…and to bind Headright Holders with respect to matters relating to the Osage Mineral Estate," [*id.* at 2], the government here offers no evidence or authority to substantiate this assertion.
>
> ***
>
> 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.[1] Further, even if it did, such a grant would conflict with—and thus be preempted by—federal law, which assigns separate accounting rights to the plaintiffs and the tribe. *See Winton v. Amos*, 255 U.S. 373, 391 (1921) ("Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property."); *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) ("Congress in the exercise of its plenary power over Indian affairs may divest Indian tribes of their inherent sovereign authority.").
>
> The individual Osage headright owners were not a party to the settlement agreement at issue. Indeed, the Court of Federal Claims denied them the opportunity to intervene in the case. *See Osage Tribe*, 85 Fed. Cl. at 166-79. Because the Osage Nation lacks authority to waive the plaintiffs' individual accounting rights, they are not bound by the tribe's settlement agreement with the federal government.

Fletcher, 153 F.Supp.3d at 1365, 1368.

This is not just limited to the disputes between the parties to this instant litigation but, rather, seems to be a pattern of the United States in defending every Indian breach of trust lawsuit it faces. For example, this past spring, the D.C. District

[1] It is worth noting, the very authorities the United States relied upon in the Court of Federal Claims are the same authorities the Northern District of Oklahoma found were insufficient. *Compare* Appx. at 538-539. Regardless, the parties agree that the United States' settlement with the Osage Tribe is ultimately not an issue on appeal because the Court of Claims did not rely upon it in reaching its decision. *See* Government's Brief at 56-57.

Court chastised the United States for continuously arguing that an early financial report from the firm Arthur Andersen fulfilled the United States' accounting responsibilities to tribes despite numerous courts having expressly rejected that very proposition:

> Like a zombie, the Andersen Report will not die. A litany of courts have attempted to euthanize it. *See supra*. Yet, it continues to haunt its victims. To allow this horror story to continue would ignore the Government's "distinctive obligation" to protect a frequently "exploited people." *Seminole Nation*, 316 U.S. at 296, 62 S.Ct. 1049. Once and for all, the Andersen Report must be buried, for it is an incomplete audit that does not provide an adequate accounting of the trust.

Cherokee Nation v. United States Dep't of the Interior, 2021 WL 1209205 at *6 (D.D.C. Mar. 31, 2021).

At some point the rubber must meet the road and the United States must move on from its failed arguments. Until that time, it is difficult to accept the United States' assertions at face value and assume they are made in good faith. Or, viewed from a different perspective, how many times must Mr. Fletcher win on these very issues before it actually counts for something?

ARGUMENT

I. The United States Agrees That Headright Holders Have Standing To Protect Their Distributions.

As noted in Appellants' Opening Brief, the Court of Claims' decision in the instant action was based largely on its (mis)application of *Osage Tribe of Indians of Oklahoma v. United States*, 85 Fed. Cl. 162 (2008) ("*Osage VI*"). However, the

Court of Claims wholly ignored relevant portions of the same *Osage Tribe VI* which recognize that headright holders "may still have recourse to an appropriate court to compel distribution in accordance with applicable law." 85 Fed. Cl. at 173 (quoting *Cheyenne-Arapaho Tribes of Indians of Okla. v. United States*, 1 Cl. Ct. 293, 296 n. 4 (1983)). The United States does not attempt to defend this blind spot in the Court of Claims analysis. Instead, the United States concedes that "headright holders [have] standing with respect to claims relating to distribution of headright payments." *See* Government's Brief at 48.

The dispute between the parties which persists – and central to the matter at bar – is whether Appellants' claims of mismanagement are the result of obligations owed to headright holders. That issue was briefed at length in Appellants' Opening Brief and is further addressed below.

II. The United States' Factual Defenses Do Not Merit Dismissal.

The United States contends[2] that "there are *no factual allegations* [in the Complaint] about deposits of interest that were made and *no explanation* why any statute or regulation required larger deposits" and the Complaint "offers no explanation why any statute or regulation required a lower tax payment." *See*

[2] Should the Court find that Appellants' factual allegations provide insufficient detail on how the United States breached its duties and damaged Appellants, Appellants would ask that the Court to remand the action and allow them to file an Amended Complaint providing those expanded details.

Government's Brief at 22; *see also id*. at 28 (contending that the Complaint needed to "specifically allege that the [interest] deposits into the Trust Account were less than that required rate."). Additionally, the United States contends that "the Complaint does not specifically refer to even *one* deposit into or payment from the Trust Account that might serve as a basis for a mismanagement claim." *Id*. at 27; *see also id*. at 41 ("Plaintiffs have not adequately alleged that the government failed to faithfully perform duties specified in any relevant statue.").

Pleading rules require "that a plaintiff provide a 'short and plain statement of the claim showing that the pleader is entitled to relief,' which requires that the complaint 'give the defendant fair notice of what the … the claim is and the grounds upon which it rests.'" *ABB Turbo Systems AG v. Turbousa, Inc.*, 774 F.3d 979 (Fed. Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007)); *see also* Ct. Fed. Cl. R. 12(b)(6). To avoid dismissal, a complaint's *factual allegations* must "raise the right to relief above a speculative level." *Twombly*, 550 U.S. at 555. This requirement "does not require 'detailed factual allegations,'" instead the pleading need only contain "*factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 555 U.S. 662, 678, 129 S. Ct. 1937 (2009) (emphasis added). District courts are not to make the analysis "too demanding of specificity [or] too intrusive in making factual assessments." *Turbousa*, 774 F.3d at 986 (reversing

dismissal on the plausibility of plaintiff's claim). Ultimately, a plaintiff need only "nudge[his or her] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Finally, the courts "take all factual allegations in the complaint as true and construe them facts in the light most favorable to the non-moving party." *Jones v. United States*, 846 F.3d 1343, 1351 (Fed. Cir. 2017).

The United States' arguments in this appeal would create a standard that is "too demanding of specificity [and] too intrusive in making factual assessments." *Turbousa*, 774 F.3d at 986. In their Complaint, and as previously addressed in their Opening Brief, Appellants made detailed allegations regarding the United States' breaches of trust in *distributing* properly-owing royalty payments, including: (1) overpayment of Gross Production Taxes, *see* Appx. At 42; (2) failure to collect interest on royalties once collected and segregated for distribution, but before distribution actually takes place, *see id*.; 1906 Act § 4(1) ("said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto"); and (3) incorrectly calculating tribal operation payments to hide its own miscalculations, *see* Appx. At 43 ("There are numerous instances in which Defendant erred in reporting expenses and simply adjusted revenue as to balance the account of Osage Headright Owners"). The Government's Brief illustrates that these allegations provided *more than adequate* notice of Appellants' claims. *See* Government's Brief at 31-32 (noting how

Oklahoma's Gross Production Taxes were – and are – at times less than the 5% rate which the United States has historically paid), and 29-30 (recognizing that Appellants claim United States has not collected the proper amount of interest).

Despite this, the United States contends that Appellants should be held to a pleading standard that would require them to provide a detailed ledger of every improper transaction: "Plaintiffs would have had to identify with specificity the entries they challenge and the bases for that challenge," Government's Brief at 36; "It does not identify a *single* entry for a deposit (revenues or interest) or disbursement (state gross-production taxes or tribal operation expenses) that was different from the actual receipt or payment," *Id*. at 34. Such detail at the initial pleading stage would make an unscalable wall for litigants. The resulting pleading would look less like a complaint, and more like an expert report. It is likely that the amount of detail for such a pleading would not even be possible without adequate discovery by the parties into the details of the Government's transactions to cover information not provided in the accounting which was produced at the order the Northern District of Oklahoma. For instance, the produced accounting did not provide enough detail to identify every single overpayment of gross production taxes because – allegedly – the United States itself never collected the data necessary to

make the requisite calculations, instead paying a flat 5% on a lease-by-lease basis. Government's Brief at 32-33. For this, the United States faults Appellants.[3]

A. Gross Production Taxes.

i. The United States Admits Plaintiffs Have Plausible Claims Regarding the Payment of Gross Production Taxes.

The United States admits that, at least between July 1, 2015 to June 28, 2018, Gross Production Taxes were two percent (2%) for the first three years of production. *See* Government's Brief at 31-32. Generally, wells are at their most productive in the first few years of operation. For instance, a study in Oklahoma of more than 3,000 horizontal wells found that "more than half of a typical well's projected lifetime oil and gas production will occur during its first three years." Warren Vieth, Oklahoma Watch Study: Oil, Gas Output Plummets Before Taxes Rise, Oklahoma Watch, July 1, 2017 (available at https://oklahomawatch.org/2017/07/01/ok-watch-study-oil-and-gas-output-plummets-before-higher-taxes-kick-in/) (last retrieved Aug. 4, 2021). It is believed, based upon the limited production numbers produced as a part of the United States'

[3] It must be noted, but for Mr. Fletcher prevailing on his accounting claim, no one would never have discovered the United States' malfeasance in the payment of gross production payments. In fact, none of Appellants' claims here accrued until the United States accounted to headright holders. *See Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) (holding that Congress had "deferred the accrual of [Indian trust claims] until an accounting is provided.").

accounting, that most of the producing wells were drilled and began producing in this three-year window.

The United States, however, attempts to excuse its over-payment of gross production taxes on the ground that its regulations do not require lessors to supply the necessary information to accurately calculate gross production taxes to the State of Oklahoma. *See* Government's Brief at 32. However, regulations cannot supersede the statutory obligations. The statute, the Act of April 25, 1940, 54 Stat. 168, provides—clearly and unambiguously—that the amount to be paid out of Appellants' trust is the amount charged by the State of Oklahoma but never more than 5%. That amount varies on a well-by-well basis. Quite simply, the Government's Brief admits that the United States has overpaid gross production taxes to the State of Oklahoma, and to the detriment of headright holders.

ii. Gross Production Taxes Are Frequently Less Than the Statutory Cap of 5%.

The Government's Brief seems to imply that there is only one narrow period of time when gross production taxes could be less than five percent (5%): from July 1, 2015 to June 28, 2018, for newly producing wells. However, that is not the case. For instance, in 1994 Oklahoma passed a law exempting gross production taxes on horizontally-drilled wells for the first two years of production. *See* 1994 Okla. Sess. Law Serv. Ch. 311 (S.B. 841) at § 1001(e). In 1995, this was increased to a one percent (1%) rate on newly drilled wells. 1995 Okla. Sess. Law Serv. Ch. 321 (S.B.

495) at § 1001(j)(2). In 2002, this exemption was changed from applying to the first two years of production, to the first four years of production. 2002 Okla. Sess. Law Serv. Ch. 416 (S.B. 947) at § 1001(e). The law remained at this level for newly drilled wells until the 2015 amendment referenced above.[4]

The United States had an obligation to pay the *correct* amount of gross production taxes to the State of Oklahoma pursuant to federal law. If the United States paid too little, presumably the Oklahoma Tax Commission would have had something to say. If the United States paid too much, headright holders – such as Appellants here – would have had something to say. All parties agree that the United States chose to simply pay the *maximum* rate of five percent (5%) on all oilfield production (either out of administrative convenience or due to its failure to collect the data necessary to make the proper calculations), to the detriment of headright holders. Imagine a tax client realizing that his/her accountant had been filing their annual tax returns at the highest possible income bracket and without any consideration of what, if any, deductions might apply – that client would almost assuredly have a claim. While Mr. Fletcher cannot dispatch with his "accountant," he should not be left without any recourse – despite the United States' insistence.

[4] This is to say nothing of other exemptions found in Oklahoma law, such as exemptions for Ultra-Deep Wells, Enhanced Recovery Projects, and Economically at-risk leases.

The overpayment of gross production taxes is a clear breach of the United States' duty to "to distribute funds to individual headright owners in a timely (quarterly) and *proper* (pro rata, with interest) manner." *Fletcher II*, 730 F.3d at 1209 (emphasis added). Consequentially, such breach must be actionable.

B. The United States Seeks Dismissal on Merits Based Arguments.

The United States also concentrates substantial argument against jurisdiction on the merits of its own defenses. As noted above, the United States argues it has fulfilled its trust duties regarding gross production taxes by following its regulations, in contravention to what is required by statute. Similarly, the United States asserts that it collects the proper amount of interest and, as such, Appellants' claims for improper interest collection should be dismissed. *See* Government's Brief at 30 ("the money continues to earn interest (which will be distributed in the following quarter's headright payments) until the headright payments are made, at which point the payments commence to earn interest in the headright holders' individual accounts.").[5] However, the motion to dismiss stage is not the place to be making

[5] It must be noted, there are no such things as "individual accounts" for headright holders. Instead, all management of headright holders' interests take place while funds are in the "Osage Tribal Trust Account." Even when those funds have been segregated for distribution, they remain comingled in the account. That management culminates with the United States providing headright holders with a check for their royalty interests each quarter. This was litigated heavily before the Northern District of Oklahoma where the Court held:

merits-based arguments for dismissal. *See Twombly*, 550 U.S. at 556 ("of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'") (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683 (1994)). The Court should disregard the United States' *factual* contentions that it has complied with its trust obligations and, instead, look to the substantive allegations pleaded by Appellants in their Complaint.

III. Appellants' Legally Protectable Interest Covers All Decisions and Actions Made in Determining the Amount Owed after the Collection of Royalties.

Ultimately, the paramount issue on appeal focuses upon when (or, even, *if*) headright holders have a legally protectable interest over their trust resources, and

> 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.

See Fletcher, 153 F.Supp.3d at 1361-62.

which of the United States' actions may be challenged by headright holders in this action. The United States takes the position that its trust obligations to headright holders begin, and end, when the United States cuts a check. According to the United States, all other trust obligations are owed to the Tribe and not headright holders. Not only would this leave the decisions made by the United States in determining that amount (such as how much to allocate for tribal operations and how much to pay for gross production taxes) beyond the reach of review by any headright holder, but it is an argument the Government already lost in the Tenth Circuit:

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

Fletcher II, 730 F.3d at 1209, 1213 (emphasis added).

Ultimately, the United States owes trust duties to the Osage Nation "when the funds are held 'for [its] benefit,' and to individual [headright holders] when the funds

are held 'for [their] benefit." *Fletcher II*, 730 F.3d at 1209. It is clear that when dealing with the Osage Mineral Estate,[6] *i.e.* when the mineral resources have not been extracted or royalties collected, the trust duties are owed to the Osage Nation. This is what the *Osage Tribe* litigation was about. *See Osage VI*, 85 Fed. Cl. at 165 ("alleging that the United States violated its duty as trustee of the Osage mineral estate by failing to collect all moneys due from Osage oil leases and to deposit and invest those moneys as required by statute and according to the fiduciary duty owed to the Osage Tribe.").[7]

However, once the royalties are collected, the United States begins to prepare the funds for distribution. That is what this case is about, and there is no dispute between the parties that headright holders have a legally protectable interest in *proper* distributions. How that proper distribution is determined includes numerous management obligations by the United States. At the very least, it includes the claims at issue in this action: (1) did the trustee pay the proper amount of Gross

[6] In its brief, the United States recognizes that the Osage Mineral Estate is not the same as the Osage Trust Account, highlighting that the Inspector General's Report, *BIA Needs Sweeping Changes to Manage the Osage Nation's Energy Resources*, "addressed management of the Mineral Estate (including "accounting" for mineral royalties) not of the Trust Account." Government's Brief at 36.

[7] Additionally, and as noted in Appellants' Opening Brief, this is because, when it comes to the Mineral Estate, "the Osage Tribe [that] is the real party in interest," because it "owns the minerals which are the subject of the action." *Id*. at 170.

Production Taxes, *see* Appx. at 42; (2) did the trustee collect interest on royalties once collected and segregated for distribution, but before distribution actually takes place, *see id*.; and (3) did the trustee pay the proper amount for tribal operation payments, *see* Appx. at 43. Each of these three actions directly bears upon whether headright holders will receive their proper share of the funds which were generated *from* the Osage mineral estate – all occurring *after* the development of the Osage Mineral Estate.

Regardless of this clear distinction, the United States continues to asserts that "the real party in interest while the revenues from the Mineral Estate are in the Trust Account is the Osage, not the headright holders," and that its position is supported by all "courts addressing this issue have consistently held." Government's Brief at 47. However, the United States fails to provide any support for such contention. As noted above, the Court of Claims in *Osage VI* clearly provided the distinction outlined by Appellants here. Moreover, the United States lost this argument before the Northern District of Oklahoma. When the United States tried to argue that their only duty was to providing details of the actual distribution, and not the actions leading to that distributions, Judge Frizzel held:

> 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*.

Fletcher, 153 F. Supp. 3d at 1364 (emphasis added). While this holding was in regard to an accounting, accountings are based upon the existence of fiduciary obligations to account for. It is clear that the United States must answer for its actions prior to the exact moment of distribution, despite the United States' reluctance.

IV. The United States' New Argument Against Indian Tucker Act Jurisdiction.

As noted in Appellants' Opening Brief, the Court of Claims held that Plaintiffs did not satisfy the "identifiable group of American Indians" requirement because "previous case law has repeatedly shown that plaintiffs are considered an 'identifiable group of American Indians' when they are unable to sue as a tribe or there is no existing tribal organization in which plaintiffs can assert their claims." *See* Appx. at 12. The Court of Claims then held that, since most of Appellants were members of the Osage Nation, Appellants could not sue as an "identifiable group of American Indians." *Id*. It was the United States which initially presented this argument below (*see* Appx. at 106) but, on appeal, it effectively abandons this argument for a new one. The United States *now* argues that it cannot determine who may or may not be an "Indian." *See* Government's Brief at 43.

In ostensible support for its new position, the United States falls back on a stereotypical and sophomoric racial definition of who may or may not be Indian: referencing a "potentially larger group of headright holders who have some degree

of American Indian ancestry but are not members of any federally recognized tribe." Government's Brief at 43. It is largely recognized that to be an American Indian, one must be a citizen of tribal nation. *See e.g. Cohen's Handbook of Federal Indian Law* § 3.03[1] ("the federal government increasingly associates being an Indian with being a tribal member according to tribal law" and "[w]hen the federal government deals with Indians, it is addressing members or descendants of members of political entities (Indian tribes), not persons of a particular race").[8]

If the United States really cannot determine who is, and is not, an Indian, more serious concerns exist than are raised by Appellants here. Such a position would throw into question the very foundation of the United States' role as trustee in regard to every individual Indian and Indian tribe – affairs over which the United States "has charged itself with moral obligations of the highest responsibility and trust obligations to the fulfillment of which the national honor has been committed." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 131 S. Ct. 2313, 2324 (2011) (citations omitted).

CONCLUSION

For the reasons set forth herein and in the Opening Brief, this court should reverse and remand the decision of the Court of Federal Claims.

[8] These quotes, coming from the very same section relied on by the United States to suggest ambiguity, provide the very clarity which the United States feigned was needed.

Respectfully submitted,

Dated: October 4, 2021

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