UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,
Plaintiffs,

v.

DIRK KEMPTHORNE, Secretary of the Interior, et al.,
Defendants.

Civil Action No. 96-1285 (JR)

THE OSAGE NATION'S MOTION TO INTERVENE

The Osage Nation, a federally recognized sovereign Indian nation, moves to intervene in this case for the limited purpose of protecting its ownership interest in the Osage mineral estate and in the Osage mineral income at all times *before* the statutorily required segregation and distribution of such funds to headright owners. *After* such distribution (such as by transfer to IIM accounts), the funds are owed to Osage headright owners. Funds that have been distributed out of the tribal account but have not yet been disbursed to individuals should indeed be considered in calculating any restitutionary award. Thus, Osage headright owners are certainly members of the plaintiff class. But, until distribution, the Osage mineral income constitutes tribal funds, not IIM funds. None of the current parties are adequate advocates for the Osage Nation's interest in this regard.[1]

By treating the Osage mineral estate and mineral income as tribal assets, federal law protects them from allotment and alienation, preserving the long-term viability of the trust and the interests of Osage headright holders into the future. And the Osage Nation has a constitu-

[1] The Plaintiffs have stated that they oppose this motion. The United States has stated that it is unable to take a position on the motion at this time.

tional duty to defend these tribal assets on behalf of the Osage headright holders entitled to future distributions of mineral income. The Osage Nation's Constitution, Art. XV, § 4, provides:

> The Mineral Estate of the Osage Reservation is reserved to the Osage Nation. The government of the Osage Nation shall have the perpetual obligation to ensure the preservation of the Osage Mineral Estate. The government shall further ensure that the rights of members of the Osage Nation [who own headrights] to income derived from that Mineral Estate are protected.

In furtherance of that duty, the Osage Nation is currently suing the United States for breach of trust in the Court of Federal Claims, No. 99-550 (into which has been consolidated No. 00-169), for (among other things) failure to collect all mineral royalties due and failure to invest mineral income prudently.[2]

The Osage Nation's ownership of the Osage mineral revenue before the statutory quarterly distribution is the interest by which this motion to intervene must be measured. Under Fed. R. Civ. P. 24(a)(2), the Court must grant intervention if four requirements are met: (1) the movant "claims an interest relating to the property or transaction that is the subject of the action," (2) the movant "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," (3) the "existing parties" may not "adequately represent that interest," and (4) the motion to intervene is "timely." Fed. R. Civ. P. 24(a)(2); *see Williams & Humbert Ltd. v. W & H Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 74 (D.C. Cir. 1988); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). As discussed below, each of these requirements is satisfied here.[3]

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[2] A related case in which the Osage Nation seeks equitable relief is pending before this Court as No. 1:04-cv-283, and has been stayed by consent pursuant to your Honor's order dated April 24, 2008.

[3] Although Fed. R. Civ. P. 24(c) states that a motion to intervene "must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought,"

I. THE OSAGE NATION'S INTEREST IN PRE-DISTRIBUTION MINERAL INCOME RELATES TO THE FUNDS AT ISSUE IN THIS REMEDIES PHASE.

The first requirement is met here because the Osage Nation seeks to intervene to protect an interest that plainly "relat[es] to" the funds now at issue in this action. In their recent briefing on remedies, the parties have put in issue the ownership of the Osage mineral revenue that is on deposit and awaiting distribution to headright holders. Plaintiffs argue that "the Osage mineral estate income is at all times the vested property interest of individual Osage headright owners . . . ." Pls. Mem. at 33. According to the Plaintiffs, when the United States collects Osage mineral royalties and deposits them, it "collect[s] the trust funds *of Osage headright owners* and deposit[s] them in the Treasury." Pls. Reply at 46 (emphasis added). During the ongoing trial, the Plaintiffs have presented testimony that the mineral income in the tribal trust account belongs to headright holders as soon as it is collected. *See* Tr. at 169, 171 (Testimony of Mona Infield). The Osage Nation's interest in Osage mineral income not only "relat[es] to" this action, but is directly at issue.

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the D.C. Circuit has held that this procedural requirement should be dispensed with when warranted, and has "adopt[ed] flexible interpretations of Rule 24 in special circumstances." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045-46 (D.C. Cir. 1998) (reversing district court's denial of intervention motion that lacked a pleading), (citing *Textile Workers Union of Am., CIO v. Allendale Co.*, 226 F.2d 765, 767 (D.C. Cir. 1955) (en banc) ("Obviously tailored to fit ordinary civil litigation, these provisions require other than literal application in atypical cases."), and *id.* at 768 ("[F]ailure to come within the precise bounds of Rule 24's provisions does not necessarily bar intervention if there is a sound reason to allow it."). "[T]his Court and other courts have not be[en] hypertechnical . . . in making sure that . . . potential intervenors do file a pleading." *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 (D.C. Cir. 2004) (quoting the United States' concession at oral argument with approval). "In any event, 'procedural defects in connection with intervention motions should generally be excused by a court.' . . . [W]e find no reason to bar intervention based solely upon this technical defect [of lack of a pleading], if defect it be." *Massachusetts v. Microsoft Corp.* 373 F.3d 1199, 1236 (D.C. Cir. 2004) (quoting *McCarthy v. Kleindienst,* 741 F.2d 1406, 1416 (D.C. Cir. 1984)). Given the limited purpose for which the Osage Nation seeks intervention—protecting its ownership interests in specific assets only recently implicated in this complex and lengthy case—a pleading should not be deemed necessary.

II. DISPOSING OF THIS ACTION MAY IMPAIR THE OSAGE NATION'S INTEREST IN PRE-DISTRIBUTION MINERAL INCOME.

The second requirement of Rule 24(a)(2) is met as well; there is no question that the Osage Nation "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Indeed, as just noted, the Plaintiffs' remedy arguments, as now framed, seek to impair the Osage Nation's interest in the mineral income. Plaintiffs seek to increase the recovery of non-Osage class members at the expense of the Osage Nation and its headright owners, by including the Osage revenues in their calculations as of the time of collection instead of the time of distribution and then dividing any resulting restitutionary award per capita among all class members.

Last week at trial, the Court inquired of Plaintiffs' counsel (Mr. Gingold), "What I want to know is whether the Plaintiffs' position is that all Native Americans are entitled to an undifferentiated share of all the money that may have been held for the Osage." Tr. at 369. At first, Plaintiffs' counsel did not give a direct answer to the inquiry. But, when pressed by the Court, counsel acknowledged that the Plaintiffs seek to have unaccounted-for Osage funds—funds that should have been distributed quarterly to headright holders—awarded instead per capita to all members of the plaintiff class:

> MR. GINGOLD: We believe . . . it is proper to distribute the funds on a per capita basis. To the extent that an individual—
>
> THE COURT: Have you told the Osage about that?
>
> MR. GINGOLD: Yes, as a matter of fact we did. We went down to the Osage when we filed this action in 1996. We met with the Osage individuals in the Osage tribe and they endorsed us, and Ms. Cobell and I and others were down there. Yes, we did, your Honor.

Tr. at 370-71 (spelling corrected). If Plaintiffs' position were adopted, the net effect on the Osage would be to redistribute funds on which the Tribe has a claim and which should have been

used for headright payments, and to divert those funds to a lump-sum restitutionary award divided equally among all class members.

III. THE OSAGE NATION'S INTEREST IS NOT ADEQUATELY REPRESENTED BY ANY PARTY.

The third requirement is met here, too, because the interest of the Osage Nation in the Osage mineral income is not adequately represented by the existing parties within the meaning of Fed. R. Civ. P. 24(a)(2). Because the Plaintiffs directly contest the Osage Nation's position regarding ownership of mineral revenue, the only party left to represent the Osage Nation's interest is the United States. But the United States has already shown that it will not be an adequate advocate for the Osage Nation's interest in the Osage mineral income. It has not vigorously defended that interest in briefing; the United States' remedies brief does not include the many authorities cited in the Osage Nation's unfiled amicus brief.

The United States' lack of vigor in defending the Osage Nation's interest is not happenstance. In the Osage Nation's pending litigation against the United States in the Court of Federal Claims, the United States continues to take the opposite position—that the Osage Nation lacks any interest in the Osage mineral estate and the income derived therefrom. There, the United States has challenged the Osage Nation's standing to sue for mismanagement of mineral-related assets, arguing that the undistributed money in the tribal trust account belongs to headright owners. In rejecting that argument, the Court explained:

> The mineral royalties . . . go first into a tribal trust fund account where they stay for at least one quarter of a calendar year before being transferred to individual headright owners. The responsibility of the government is to the tribal trust fund account. The tribal trust fund is then responsible for the ultimate distribution to the individual headright owners. . . . Although the Tribe may have no further interest or claim to the funds once they are distributed to the headright owners, the court finds that the Tribe does have both an interest in and a claim to the funds when those funds are within the tribal trust account that was established by the 1906 Act.

Osage Nation v. United States, 57 Fed. Cl. 392, 395 (2003). In a recent appeal in that case that was ultimately dismissed without prejudice, the United States noted this issue for review. *See* Docketing Statement for the United States, Fed. Cir. No. 2007-5120, at 5 (June 18, 2007) (attached as Exhibit A). It must be assumed that the United States intends to raise the point in any future appeal. Therefore, the United States has every incentive in the case before this Court to frame its arguments in ways that minimize or avoid any conflicts with its position in the Court of Federal Claims litigation. That is borne out by the United States' brief on remedies: to minimize any Osage-related liability, the United States seeks to show only that (1) funds outside the formally designated "IIM system" are not part of this case, (2) the Osage trust account is outside its definition of the "IIM system," and (3) only part of the distributed Osage trust funds ever enter the "IIM system."

In sum, because the United States is formally opposing in other litigation the very interest the Osage Nation seeks to intervene to protect, it is an understatement to say that the United States' representation of that interest here may be inadequate.

IV. THIS MOTION IS TIMELY BECAUSE IT HAS ONLY RECENTLY BEEN ARGUED THAT THE OSAGE NATION LACKS AN OWNERSHIP INTEREST IN OSAGE MINERAL INCOME.

"[T]imeliness is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *United States v. British Am. Tobacco Australia Servs., Ltd.,* 437 F.3d 1235, 1238, (D.C. Cir. 2006) (quoting *United States v. Am. Tel. & Tel. Co.,* 642 F.2d 1285, 1295 (D.C. Cir. 1980)). "[A] court should be more reluctant to deny an intervention motion on grounds of timeliness if it is intervention as of right than if it is permissive intervention." *Am. Tel. & Tel.*, 642 F.2d at 1295. Although the inception of this suit

is now in the distant past, the purpose for which the Osage Nation seeks intervention was implicated only very recently, and intervention is necessary to protect the Osage Nation's rights. It was only in the Plaintiffs' opening brief on remedies dated March 19, 2008, that any issue regarding the ownership of Osage mineral income was first raised. Indeed, the issue of whether restitutionary compensation for failure to account for those funds should be awarded in this case could not have arisen before the remedies phase.

The Osage Nation has acted promptly in responding to this recently raised issue. After Plaintiffs raised the issue in their opening brief on remedies, the Osage Nation attempted to persuade them to clarify and correct their analysis in their reply brief. When Plaintiffs failed to do so, the Osage Nation immediately began preparing an amicus curiae brief and a motion for leave to file such a brief. The motion was filed on May 29, 2008, and was denied less than a week ago. Thus, the Osage Nation filed this motion to intervene as soon as reasonably possible. It is common sense that "[t]he timeliness of a motion to intervene is determined, not by reference to the date on which the suit began or the date on which the would-be intervenors learned that it was pending, but rather by reference to the date when the movants learned that intervention was needed to protect their interests." *NAACP v. New York,* 413 U.S. 345, 374 (1973) (Brennan, J., dissenting). Moreover, there is no prejudice to the parties, because this issue will not be fully joined until post-trial briefing.

Finally, even if the Court does not agree that Rule 24(a)(2) is satisfied here, permissive intervention is warranted under Rule 24(b)(1)(B), because, as evidenced by the Osage Nation's

own current litigation against the United States, the Osage Nation "has a claim or defense that shares with the main action a common question of law or fact."[4]

CONCLUSION

The Court should enter an order granting the Osage Nation status as an intervenor in this case for the limited purpose of protecting its ownership interest in the Osage mineral estate and in Osage mineral income.

Dated: 18 June 2008

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Attorneys for the Osage Nation

[4] Rule 24(b) is particularly flexible and has often provided a basis for granting intervention for a limited purpose where no pleading is attached to the motion. "In particular, we have eschewed strict readings of the phrase 'claim or defense,' allowing intervention even in 'situations where the existence of any nominate 'claim' or 'defense' is difficult to find.' The force of precedent therefore compels a flexible reading of Rule 24(b)." *Nat'l Children's Ctr.*, 146 F.3d at 1046 (quoting *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967)).

CERTIFICATE OF SERVICE

I certify that on June 18, 2008, I caused copies of the Osage Nation's Motion to Intervene with Exhibit A to be sent to the following counsel of record by first-class mail, postage prepaid:

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EXHIBIT A

U.S. Department of Justice

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June 18, 2007

Ms. Jan Horbaly
Clerk
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: Osage Tribe v. United States,
Fed. Cir. No. 2007-5120

Dear Ms. Horbaly,

Enclosed for filing are the original and one copy of the Docketing Statement for the United States, defendant-appellant in this appeal. As noted in the accompanying certificate of service, a copy has been served on counsel of record.

Thank you for your attention to this matter.

Sincerely,

John A. Bryson
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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2007-5120

Osage Tribe

v.

United States

DOCKETING STATEMENT

This Docketing Statement must be completed by all counsel and filed with the court within 14 days of the date of docketing. When the United States or its officer or agency is a party, this Docketing Statement must be completed by all counsel and filed with the court within 30 days of docketing.

Name of party you represent United States

Party is (select one) ☒ Appellant/Petitioner ☐ Cross-Appellant
☐ Appellee/Respondent ☐ Intervenor

Tribunal appealed from and case no. CFC, Nos. 99-550 & 00-169

Date of judgment/order 3/16/07 Type of case Breach of fiduciary duties

Relief sought on appeal Reversal and dismissal of action

Relief awarded below (if damages specify) Damages of approx. $1.8 million

Briefly describe the judgment/order appealed from CFC found United States liable for failure to calculate and collect royalty payments under four oil leases for five representative months and for failure to invest royalty income properly.

Nature of judgment (select one)

☐ Final judgment, 28 USC 1295

☒ Rule 54(b)

☐ Interlocutory order (specify type) _____

☐ Other (explain - see Fed. Cir. R. 28(a)(5)) _____

Name and docket no. of any related cases pending before this court N/A

Brief statement of the issues to be raised on appeal See attached sheet.

Have there been discussions with other parties relating to settlement of this case?

☒ Yes ☐ No

If "yes," when were the last such discussions?

☐ Before the case was filed below?

☒ During the pendency of the case below?

☐ Following the judgment/order appealed from?

If "yes," were the settlement discussions mediated? ☐ Yes ☒ No

If they were mediated, by whom? _____

Do you believe that this case may be amenable to mediation? ☐ Yes ☒ No

If you answered no, explain why not Settlement negotiations have not been successful, and the parties need answers to the legal questions presented in this appeal to be able to forge an acceptable compromise.

Provide any other information relevant to the inclusion of this case in the court's mediation program _____

I certify that I filed an original and one copy of this Docketing Statement with the Clerk of the U.S. Court of Appeals for the Federal Circuit and served a copy on counsel of record, this 18th day of June, 2007, by: first class mail, postage prepaid.

(manner of service)

John A. Bryson
Name of counsel

Signature of counsel

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Attachment to docketing statement for *Osage Tribe v. United States*, Fed. Cir. No. 07-5120

Non-binding statement of potential issues on appeal

1. Whether the tribe had standing to bring a claim for damages with respect to all the headright owners' interests in royalty distributions.

2. Whether the other headright owners were required to be joined under Rule 19, Rules of the CFC.

3. Whether the Indian Claims Commission Act barred claims accruing before August 13, 1946.

4. Whether the United States has a money-mandating duty to calculate and collect royalties on Osage oil and gas leases.

5. Whether the United States failed to collect royalties based on the "highest offered price."

6. Whether the United States should have collected royalties for price-controlled oil production based on the unregulated price for such oil.

7. Whether the CFC abused its discretion in failing to assess and limit use of Mineral Management Service data to establish the "highest offered price."

8. Whether the CFC directed use of an incorrect rate of return for calculating investment damages.

9. Whether the CFC directed use of an incorrect method of calculation of the interest element of damages.

10. Whether the CFC improperly allowed discovery of privileged documents.