IN THE 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.	)	Case No. 1:96CV01285 (Judge Robertson)

DEFENDANTS' RESPONSE TO THE OSAGE NATION'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Defendants respectfully submit this response to the Osage Nation's Proposed Findings of Fact and Conclusions of Law (July 12, 2008) [Dkt. 3551] (Osage PFFCL). The Osage Nation is a late, permissive intervenor in this action and has very limited standing to address one narrow issue. Minute Order (June 24, 2008). The Osage Nation's limited role, in turn, circumscribes which of the Tribe's proposed findings and conclusions the Court should properly consider. In light of these antecedent issues, Defendants begin their response with proposed conclusions of law that define the Osage Nation's role.

DEFENDANTS' RESPONSE TO THE OSAGE NATION'S PROPOSED CONCLUSIONS OF LAW

I. THE OSAGE NATION HAS LIMITED STANDING TO ADDRESS TRIBAL INTERESTS; IT HAS NO STANDING TO REPRESENT ANY INDIVIDUAL INTERESTS

1. The Osage Nation was granted permissive intervention by the Court to provide briefing on how the Tribe's money should be treated in this case. See Tr. 1468:5-19 (Court).

2. The Tribe's first proposed conclusion of law asserts that "[f]unds in the tribal account and income derived therefrom belong to the Osage Nation, not individuals." Osage PFFCL at 7. The Tribe further asserts that, "[a]fter funds from the Osage tribal account have been distributed (as required by statute on a quarterly basis) out of the tribal trust account to other accounts, they belong to individuals." Id. As demonstrated below, however, the Osage Nation cannot represent the interests of individuals, and the Tribe's claim to ownership of funds held in the tribal account is an issue that is neither appropriate nor relevant to this case.

3. The Osage Nation makes clear that its own interests are not part of this case but are the subject of other, wholly separate proceedings, stating, "The line between this case and the Osage

Nation's damages case in the [Court of Federal Claims] is a simple one: it is the line between tribal funds and individual funds, i.e., the line between (a) the tribal trust account itself and (b) headright distributions debited out of the tribal account" for payment to individual headright holders. Osage PFFCL at 3-4.

4. By the Tribe's own admission, the Osage Nation has no interest in this case in any funds once they have been disbursed from "the Osage tribal account" for distribution to "individuals." Id. Having so disclaimed an interest in these funds, the Osage Nation lacks standing to assert any right on behalf of individual headright holders. See Lewis v. Casey, 518 U.S. 343, 357 (1996) (no standing exists without proof of personal injury), cited in Franklin v. District of Columbia, 163 F.3d 625, 633 (D.C. Cir. 1998) ("[B]eyond the pleading stage, it is not enough that some other, unidentified member of the class suffered harm from the inadequacy.").

5. The Osage Nation makes no representation that it is authorized to speak for the individual headright holders, and it has successfully contended in other proceedings that the Tribe's interests are "materially adverse" to those of individual headright holders. Osage Tribe v. United States, 81 Fed. Cl. 340, 348-49 (2008) (disqualifying former tribal counsel from representation of individual headright holders). Thus, the Osage Nation not only lacks standing to speak for individual headright holders but also lacks impartiality with respect to those interests.

6. The only interests at stake in this case are those belonging to the named plaintiffs and to the members of a certified class that four of the named plaintiffs represent. This Court's Order of February 4, 1997, certified "a plaintiff class consisting of present and former *beneficiaries of Individual Indian Money accounts* (exclusive of those who prior to the filing of the Complaint herein had filed actions on their own behalf alleging claims included in the Complaint)." Order

of February 4, 1997 at 2-3 [Dkt. No. 27] (emphasis added). The certified representatives and their class counsel speak for all members of the class, and the Osage Nation has established no grounds to interfere with that representation.

II. THE SUBJECT OF THIS ACTION IS LIMITED TO THE ACCOUNTING FOR INDIVIDUAL INDIAN MONEY ACCOUNTS, NOT ALL INDIAN MONEY

7. This case has had five trials and numerous appeals with no change in the class definition, and the entire focus throughout the case has been upon the accounting obligation that the government, pursuant to the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (1994 Act), owes to those who have or had Individual Indian Money (IIM) accounts. The Department of the Interior's accounting plans, consequently, have reasonably involved efforts to reconcile transactions and prepare historical statements of account with respect to individual IIM accounts.

8. Not one decision of this Court has ever questioned or criticized any of Interior's accounting plans because they failed to account for transactions occurring *outside* an Individual Indian Money account. See, e.g., Cobell XX, 532 F. Supp. 2d at 96 (concluding that "direct payments" were properly excluded from Interior's 2007 accounting plan, because "[t]he funds that must be accounted for pursuant to the 1994 Act are 'all funds *held* in trust.' 25 U.S.C. § 4011(a) (emphasis added)").

9. The Osage Nation asserts that funds disbursed from the Osage tribal trust to individuals are held in trust by the United States, Osage PFFCL at 6-7, but no record evidence supports that position and the Tribe cites none. See id. This issue also appears to be the subject of litigation in another forum. See Osage Tribe, 81 Fed. Cl. at 349 (headright holders as potential intervenors

contending there that the "headright owners are 'the ultimate beneficiaries of this case'"). Indeed, several individuals claiming to be headright interest holders filed a putative class action against the United States in 2006 on behalf of "all Osage Indians who lawfully receive distributions of trust property from the Osage Mineral Estate" in the Northern District of Oklahoma. First Amended Complaint at 9-10, Fletcher v. United States, (No. 02-CV-427 (K)(M)) (N.D. Okla. filed Apr. 4, 2006) (Exhibit A).

10. This Court, however, does not need to consider whether the United States owes a trust (or any other) duty with respect to payments made from the Osage tribal account to headright holders because, even if some duty existed, it is not a duty at issue in this case. This case does not concern all monies ever paid to Indians, but an accounting duty for funds deposited into Individual Indian Money accounts for the benefit of class members. This conclusion is supported by both the class definition – which is self-limited to individuals who have (or had) IIM accounts – and by the 1994 Act, which in relevant part requires an accounting for funds held in trust for individual Indians which are "deposited or invested" pursuant to 25 U.S.C. § 162a. 25 U.S.C. § 4011(a). Payments of money that are not deposited into an IIM account, therefore, do not involve the accounting duty at issue here and, thus, should not be considered in fashioning an alternative remedy for breach of that duty. Thus, to the extent Osage headright payments were never destined for deposit into actual Individual Indian Money accounts, the payments are not part of the accounting obligation at the core of this case and ought not be considered.

III. IT IS UNDISPUTED THAT NOT ALL OSAGE HEADRIGHT PAYMENTS ARE MADE TO MEMBERS OF THE COBELL CLASS

11. Although Plaintiffs count among their collections figure a number allegedly representing all Osage headright payments (except for a small percentage allegedly paid to the Tribe), no evidence exists in the record to demonstrate that all these payments were directed to members of the Cobell class.

12. Indeed, the Osage Nation candidly admits that substantial dollars from its tribal accounts are paid directly to headright holders without deposit into any class member's IIM account: "Historically, the distribution has occurred in one of two ways." Osage PFFCL at 2. "One is by public voucher," where money is drawn from the tribal account to cut checks paid directly to headright holders. Id. "The other method of distribution is for money to be transferred out of the Osage tribal account and into separate accounts designated as IIM accounts for various Indian headright owners." Id. The latter distribution route results in a deposit of funds into the IIM System and thus has some plausible connection to the accounting duty at issue and, in turn, to the alternate remedy now under consideration.[1] The former route, however, involves transactions going directly from a tribal account to individuals – occurring outside the IIM System – and with no demonstrated connection to the accounting duty or the alternate remedy at issue here.

[1] For example, in calculating total collections of the IIM System, Ms. Herman included any Osage annuity money that did, in fact, happen to flow through the IIM System, even if it was not ultimately deposited into an individual IIM account. Tr. 663:2-664:14 (Herman) (explaining that due to an "anomaly" in a few periods, when "Osage was converting into IRMS" and all Osage funds got deposited into an SDA before further distribution, Ms. Herman counted all these funds as part of total IIM collections.).

13. Plaintiffs tendered no proof that the Osage funds paid via the first route (i.e., by checks directly from the tribal account) flow into the IIM System or even belong to members of the plaintiff class. The Osage Nation itself acknowledges that "there is a dispute as to whether headright funds distributed by voucher for subsequent disbursal by check are properly considered part of this case." Osage PFFCL at 5. The Tribe, however, offers no legal or evidentiary support for its conclusory assertion that such funds should nevertheless be counted as collections to the Cobell class, and nothing in the record supports that assertion.

14. Official statements published by the Osage Nation concerning the interaction between Osage annuity payments and Individual Indian Money accounts support the government's contention that a large portion of these payments should not be treated as IIM collections at all. The Tribe's official website contains a "Frequently Asked Questions" section on the Osage headrights, which includes the following:

> *Do only Osages own headrights?*
>
> No. Indians of other tribes, non-Indians, corporations, churches, and others own headrights today.
>
> *How many headrights are currently owned by non-Osages?*
>
> According to the BIA's Osage Agency, approximately 25% of the headrights are currently owned by non-Osages.
>
> * * *
>
> *Does every Osage tribal member have an IIM account?*
>
> No. Osage tribal members who do not have a headright interest or do not receive income from an individual trust or restricted asset do not have IIM accounts.

Does every Osage headright holder have an IIM account?

No. There are Osage tribal members with headright interests who do not have IIM accounts.

Osage Nation Mineral Council, "Frequently Asked Questions and Answers About the Osage Mineral Estate" (http://www.osagetribe.com/mineral/info_sub_page.aspx?subpage_id=6) (July 17, 2008) (original emphasis) (Exhibit B at 1-2). This Court may take judicial notice of these official published statements by the Tribe. See Hamilton v. Paulson, 542 F. Supp. 2d 37, 52 n.15 (D.D.C. 2008) (judicial notice of website material). All these statements support a conclusion to exclude Osage annuity payments that have not been proven to be actually deposited into an IIM account (or, at the very least, into the IIM System). Another official published statement confirms Defendants' assertions that the IIM deposits were directed primarily to IIM accounts for minors and others under legal guardianship.

If a person is an Osage Nation member and a headright holder but not an IIM account holder, can that person get an IIM account?

Yes. The Superintendent of the Osage Agency has discretion to revoke the competency status of any Osage individual, regardless of blood quantum, and qualify the individual to receive an IIM account.

Exhibit B at 2. The Court, therefore, should not consider as part of this case any Osage annuity payments that were not shown to have been deposited into the IIM System.

IV. NO BASIS EXISTS TO CONSIDER THE OSAGE NATION'S ASSERTION THAT ITS HEADRIGHT HOLDERS HAVE CLAIMS SUPERIOR TO OTHER CLASS MEMBERS

15. The Osage Nation further contends that, because headright payments counted by the Court in fixing any class remedy belong to the individual headright holders, those class members holding headright interests somehow have a superior claim to any money that the Court might

award. The proposition is at once improper and premature. It is improper because, as set forth above, the Osage Nation cannot represent or speak for individual headright holders. It is premature because it concerns the distribution of a remedy and not its computation. This hearing is only about whether any money should be awarded to the class as a whole.

16. The Osage Nation's contentions in this regard are also problematic for the Court's ability to order any remedy. The Tribe's assertion that headright holders have a superior claim to any sums awarded by the Court poses a serious conflict among class members. It brings doubt about the commonness of the class issues and whether the class representatives (none of whom has been shown to hold an Osage headright) are typical of the class overall. Such asserted conflicts of interest among class members would also jeopardize the adequacy of class counsel.

17. It would, therefore, be inappropriate and contrary to the interests of justice to include all Osage headright holders among the Cobell class or to count all headright payments as IIM collections whether or not they were actually deposited into an IIM trust account or otherwise part of the IIM System.

DEFENDANTS' RESPONSE TO THE OSAGE NATION'S PROPOSED FINDINGS OF FACT

The Osage Nation proposes three findings of fact, to which Defendants respond as follows.

1. The proposed finding that "approximately $1.506 billion has been distributed out of the Osage tribal account and held by the United States as trustee on behalf of . . . headright owners," is not supported by the record and includes hundreds of millions of dollars that do not belong to Cobell class members and that were not held in trust for

such class members. As demonstrated above in the conclusions of law, it would be error to count all payments from the Osage tribal account as collections to the Cobell class.

However, the $1.506 billion figure also overstates the total dollar amount of payments from the Osage tribal account for the period at issue. That figure is disputed by Defendants, and the evidence of record confirms that Ms. Herman found significant problems in the website calculations. The website data switches from fiscal year to calendar year and duplicates some payments while excluding others. Tr. 692:2-6 (Herman) (fiscal versus calendar data); see DX-372 at 00165 (noting discrepancies). For this reason, she used the website for only part of the time frame (see DX-372 at 00206) and relied on an Osage Tribal Report covering January 1880 - December 1975 (see DX-372 at 00199-204). Ms. Herman noted these differences in her table at DX-372 at 00165.

That total also includes a significant $15.7 million error in Plaintiffs' Osage payments calculation for fiscal 2007. Plaintiffs' Osage annuity total for fiscal year 2007 erroneously includes receipts from fiscal 2008. Defendants document and explain the error in response to Plaintiffs' Proposed Findings of Fact. Defendants Response to Plaintiffs' Proposed Findings of Fact ¶ 69 (July 21, 2008) (incorporated herein by reference).

2. The proposed finding that "[a]ll headright distributions to individual Indians from the Osage tribal account are held for the benefit of the individual Indian headright holders pending disbursement," is a conclusion of law, not one of fact, and is also erroneous. As demonstrated above, this class action involves only the claims of people who (as of February 4, 1997) have or had IIM accounts and the accounting for those individual IIM

accounts. Defendants acknowledge, as the Osage Nation also does, that only some headright payments were ever intended, in practice, to be deposited into an IIM account, and Defendants have appropriately included those monies among total IIM collections.

No evidence exists, however, to indicate that the rest of the Osage payments – those made directly out of the tribal account to other headright holders – was ever intended for deposit into individual IIM accounts or that all these interests even belong to members of the Cobell class. Published official statements by the Osage Nation prove that the contrary is true. See Exhibit B at 1 ("Indians of other tribes, non-Indians, corporations, churches, and others own headrights today") ("approximately 25% of the headrights are currently owned by non-Osages"). Plaintiffs' own fact witness, Ms. Infield, confirmed that some headrights are owned by non-Indians, some charity organizations, and some faith-based organizations that have inherited headright shares over time. See also Tr. 163:10-17 (Infield).

In contrast, Michelle Herman also testified about her investigation to determine what component of Osage annuity payments was actually deposited into individual IIM accounts and presented undisputed annual figures for the value of IIM deposits coming from the Osage tribal account. See DX-371 (Column C). Neither the Osage Nation nor Plaintiffs dispute Ms. Herman's figures as to the dollar amounts of Osage money that actually entered the IIM System.

3. The proposed finding that the "United States lacks sufficient records in many years to show what amount of Osage headright distributions were disbursed by check," is not correct. First, the "sufficiency" of any evidence is a conclusion of law, not fact, and

is on that basis improper. Second, Defendants adduced extensive facts at trial both by testimony and documents to show total disbursement of dollars from the IIM system. See, e.g., DX-372 (including all other source documents exhibits referenced in DX-372). Third, the proposed finding incorrectly assumes that checks are the only relevant form of disbursement.

Finally, the Tribe's proposed finding is based on a false premise that Defendants were required to prove disbursements made directly from the Osage tribal account. Tribal trust fund transactions are generally not part of the IIM System and so were not counted in calculating either the total collections or total disbursements of funds into and out of the IIM System. The entire 12-year history of this case has focused solely on accounting for transactions involving individual IIM accounts. See Cobell v. Babbitt, 30 F. Supp. 2d 24, 40 (D.D.C. 1998) (Plaintiffs "ask this Court solely for a declaration of the defendants' trust duties and an accounting of money already existing in the account"). The tribal funds that were included among IIM collections were: monies deposited into special "Tribal IIM" accounts, see, e.g., DX-371 (Column E); tribal funds that were deposited into other types of Special Deposit Accounts (SDA), Tr. 474:17-475:8 (Herman), DX-481 (example of tribal money in an SDA or "S" account), DX-475 (tribal money in a "P" account); and tribal monies that were ultimately deposited into individual IIM accounts, see, e.g., DX-371 (Columns C & D). This approach applied to both collections and disbursements. See DX-371 n.5 ("Disbursements represent all outflows from the Individual Indian Money (IIM) system. These outflows include but are not limited to transfers to the Tribal Trust, checks, and electronic funds transfers.").

Defendants were not called upon as part of this trial to prove check disbursements that have been made from accounts in the tribal system, and so no inferences may be drawn from this trial concerning what check disbursement records exist as to tribal trust accounts.

Dated: July 21, 2008

Respectfully submitted,

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

WILLIAM S. FLETCHER, CHARLES A. PRATT, JUANITA W. WEST, CORA JEAN JECH, BETTY WOODY, Individually, and on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 02-CV-427(K)(M)**
THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, Secretary of the Interior; THE BUREAU OF INDIAN AFFAIRS; Assistant Secretary of the Interior – Indian Affairs,	)	**CLASS ACTION ATTORNEY LIEN**
Defendants.	)	

FIRST AMENDED COMPLAINT

1. The Plaintiffs, William S. Fletcher, Charles A. Pratt, Juanita W. West, Cora Jean Jech, and Betty Woody (collectively the "Plaintiffs"), on their own behalf and on behalf of all others similarly situated, make the following claims for relief against the Department of the Interior; Dirk Kempthorne, Secretary of the Interior; The Bureau of Indian Affairs; and the Assistant Secretary of the Interior – Indian Affairs (collectively the "Defendants" or the "USA"):

INTRODUCTION

2. The Plaintiffs bring this claim because the Defendants have breached statutorily imposed trust obligations owed to the Plaintiffs by failing to distribute Osage mineral royalties *only* to persons who are Osage Indians by blood, and those who may by statute be allowed to receive distributions of trust property. The Defendants have also breached

their statutorily imposed trusteeship obligations by failing to account to the Plaintiffs and Class Members as to the distribution of Osage mineral royalties to recipients who are not Osage Indians.

A. *Basis for Plaintiffs' Claims against Their Trustee*

3. In 1906, the U.S. Congress passed a law permitting development of the large, and very valuable, oil and gas deposits comprising the mineral estate located on the Osage Tribe's lands (herein the "Osage Mineral Estate").[1] *See*, An Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory and for Other Purposes, 34 Stat. 539 (June 25, 1906) (herein the "1906 Act"). A trust was imposed in section 4 of the 1906 Act whereby the royalties ("Royalty" or "Royalties," as the case may be) received by the United States from the production of minerals by third parties on the Osage Mineral Estate, *after* deducting and withholding some portion of the Osage Mineral Estate royalty for Osage Tribal purposes, were to be distributed from a trust to Osage Indians by blood (hereinafter "Osage Indians") as beneficiaries. *See* **Exhibit A**, the 1906 Act § 4 (as amended).[2]

4. The quarterly per capita distribution of SECTION 4 ROYALTY PAYMENTS to Osage Indians fulfilled an important governmental purpose and provided a benefit to the Osage Indians. According to the expressions of congressional intent compelling this legislation, Osage Indians, then and now, were dispossessed of their original homelands and required to abandon their communal notions regarding the ownership of property. In addition, the Plaintiffs and those similarly situated have, for the most part, had their certificates of

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[1] A copy of all relevant statutes is attached hereto as "**Exhibit A**."

[2] Hereafter, these specific mineral interest Royalty payments to Members will be referred to as "SECTION 4 ROYALTY PAYMENTS."

competency revoked. The Defendants' administration of SECTION 4 ROYALTY PAYMENTS on their behalf was intended to provide a unique benefit to the Plaintiffs, *i.e.*, a trust that was to ensure the Plaintiffs and other class member's sustenance.[3]

5. When the Osage Nation was required to give up its homeland under the 1906 Act, the federal government attempted to provide an economic legacy to the Osage Indians in the form of the SECTION 4 ROYALTY PAYMENTS based on the consumption of mineral resources within the Osage Nation. However, whether by design or defect, the Defendants ignored the requirements of federal law constraining the trust distribution from the SECTION 4 ROYALTY PAYMENTS only to Osage Indians. By distributing SECTION 4 ROYALTY PAYMENTS from the Osage Mineral Estate to recipients who are not Osage Indians, the Defendants have frustrated the Congressional purposes for statutorily creating a limited trust meant to only benefit the Plaintiffs and those similarly situated.

B. ***Plaintiffs' Claims to Prevent Wrongful Trust Distributions***

6. Pursuant to the federal statutes cited in this First Amended Complaint, the Plaintiffs (*i.e.,* the putative class members) make no claim against the Osage Nation or the Osage Mineral Estate itself; nor is there any dispute with the amounts which the Osage Nation has obtained from the Osage Mineral Estate. Instead, the Plaintiffs' claims relate only to the Defendants' practice(s) with regard to the method used to determine statutorily proper recipients of such trust property distributions.

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[3] The specific abuses that further necessitate this protection represent a moral trough in our nation's history; however, they are well-known and will not be cataloged again containing all substantive sections cited herein.

7. 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. As set out below, this malfeasance resulted in the Defendants annually misdirecting substantial amounts of SECTION 4 ROYALTY PAYMENTS to improper recipients, all in violation of The 1906 Act § 4 (as amended).

8. 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. *See Fletcher v. USA*, 2005 WL 3551108 (10th Cir. 2005). *See* **Exhibit B.**

STATEMENT OF JURISDICTION AND PARTIES

9. The Plaintiffs' claims arise under U.S. Const. Amend. V; 5 U.S.C. § 702 and 706, and 28 U.S.C. §§ 1343, 1346, 1361 and 1362, all as more fully set forth below. This Court has jurisdiction by reason of these aforementioned laws and under Title 28, United States Code, Section 1331.

10. Plaintiffs are descendants of individuals who were listed on the rolls of the Osage Tribe, and are Osage Indians. The Plaintiffs have been deprived of SECTION 4 ROYALTY PAYMENTS as a result of the Defendants' illegal distribution of such trust assets to persons who are not Osage Indians.

11. The Department of the Interior (the "Interior") is a United States agency with the responsibility to provide for oversight and superintendence of federally recognized Indian tribes, a part of which is encompassed in Interior's trust responsibility to Osage Indians.

Dirk Kempthorne has recently been appointed as the Secretary of Interior, but has not yet been confirmed by the Senate, and is being named in his official capacity.

12. The Bureau of Indian Affairs (the "Bureau") is a sub-bureau, and an agency within Interior that has the responsibility for executing upon and faithfully discharging substantial trust responsibilities owed to Osage Indians. There is currently no officially named Assistant-Secretary for Indian Affairs.

COMMON ALLEGATIONS

This section contains allegations common to all for which relief is sought. Paragraphs 1 through 12 are incorporated by reference.

A. *The Defendants' Erroneous Statutory Interpretation of Section 4*

13. An Osage Indian is a person who descends from those persons named in the rolls of members prepared under section 1 of the 1906 Act.

14. The United States government by federal statute took on to itself the authority for the management of the Osage Mineral Estate and the distribution of Royalties to Osage Indians. The right to receive a distribution of Royalties from the Osage Mineral Estate was erroneously linked by the Defendants to the ownership of a so-called "headright." The key distinction for the instant controversy is that ownership of a headright is not determinative of an individual's entitlement to receive a distribution of SECTION 4 ROYALTY PAYMENTS from the Osage Mineral Estate pursuant to the 1906 Act § 4 (as amended). The Osage Mineral Estate and the distributions required under Section 4 of the 1906 Act involves a closed trust established by federal law and is specifically

intended only to benefit Osage Indians (and in some limited circumstances the "heirs" of Osage Indians who would not be Osage Indians under the original 1906 Act).[4]

15. By 1948, the term "headright" became understood to mean a right to receive a distribution of royalties flowing from the Osage Mineral Estate. Erroneously treating the owner of a headright as possessing rights legally equivalent to, and interchangeable with, the rights of an Osage Indian appears to be the root cause of the Defendants' malfeasance harming the Plaintiffs as alleged in this Amended Complaint.

16. With certain very limited exceptions, an Osage Indian's right to receive trust distributions of SECTION 4 ROYALTY PAYMENTS was restricted against alienation and the Osage Indians receiving such distributions are largely required by the Defendants to agree that their certificates of competency are revoked before such payments commence. Accordingly, the Plaintiffs and Class Members whose certificates of competency have been revoked are the personal wards of the Defendants.

17. To date, there has been no accounting provided to the Plaintiffs by the Defendants regarding the distribution of SECTION 4 ROYALTY PAYMENTS to any person or entity, including those recipients who are not Osage Indians.

B. Defendants Breach of Trust by Distributing Royalties to Non-Members

18. The Defendants have breached their trust responsibilities and acted in violation of federal law by improperly distributing SECTION 4 ROYALTY PAYMENTS to persons who are not Osage Indians (or heirs).

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[4] The term "heir" as used in federal law referring to SECTION 4 ROYALTY PAYMENTS does not have the same meaning that it might under Oklahoma or other state law. Instead the term "heir" is confined narrowly to Osage Indians, their spouses, and Indians by blood. ***See*** **Exhibit A.**

19. The federal obligation to distribute the subject trust assets only to "members of the Osage Tribe of Indians" can be found where Congress stated, in relevant part, that the Royalties from mineral extraction:

> [S]hall 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 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…."

See, the 1906 Act § 4, ¶ 2. The statute has never been codified, but has been amended to provide that a member of the Osage Tribe may, with federal approval, devise his right to receive SECTION 4 ROYALTY PAYMENTS to a certain limited group of persons of Indian Blood, spouses, and for a life estate interest to others.

20. The exclusive right of an Osage Indian to receive trust distributions of SECTION 4 ROYALTY PAYMENTS has never lapsed since the closed trust benefit was created in 1906. Furthermore, Congress expressly recognized the Plaintiffs' exclusive right as Osage Indians to receive SECTION 4 ROYALTY PAYMENTS in perpetuity.

FIRST COUNT
BREACH OF THE FEDERAL TRUST RESPONSIBILITY

21. Paragraphs 1 through 20 are incorporated by reference.

22. Plaintiffs complain against Defendants and for a first claim for relief allege:

23. Congress created a closed trust involving the Osage Mineral Estate. This act created a fiduciary relationship between the Plaintiffs and the Defendants by statute that dedicated to the Defendants elaborate and extensive control over the administration of the royalties to be distributed from the Osage Mineral Estate.

24. The Defendants have breached their trust obligations to the Plaintiffs and others similarly situated by improperly distributing trust assets comprised of the SECTION 4 ROYALTY PAYMENTS to persons who are not Osage Indians, all in violation of The 1906 Act § 4, ¶ 2 (as amended).

25. The Defendants are required by federal law to account to the Plaintiffs for the management of assets managed by the Defendants for the Plaintiffs' benefit. *See, e.g.,* 25 U.S.C. § 4011. The Defendants have breached this obligation by failing to account to the Plaintiffs and Class Members for all funds held in trust by the United States for the Plaintiffs, which includes all funds resulting from the Osage Mineral Estate and available to be distributed as trust property from SECTION 4 ROYALTY PAYMENTS.

SECOND COUNT
DEPRIVATION OF PROPERTY

26. Paragraphs 1 through 25 are incorporated by reference.

27. Plaintiffs complain against Defendants and for a second claim for relief allege:

28. The Plaintiffs and others similarly situated have been denied by the Defendants' wrongful action or inaction the right to fully participate in distributions from the Osage Mineral Estate because the Defendants have allowed SECTION 4 ROYALTY PAYMENTS to be distributed to many persons who are not otherwise entitled to receive SECTION 4 ROYALTY PAYMENTS from the Osage Mineral Estate.

29. The Defendant's failure to properly manage the Tribe's trust assets, accounts and funds, coupled with Defendants' inability to keep SECTION 4 ROYALTY PAYMENTS from passing into the hands of those who are not Osage Indians, constitutes a deprivation of the Plaintiffs' property by Interior and its sub-agencies in violation of the Fifth Amendment of the United States Constitution.

30. The Defendants' failure to account to the Plaintiffs for all funds held in trust by the United States for the Plaintiffs, which includes all funds resulting from the Osage Mineral Estate, has deprived the Plaintiffs' of their ability to sooner claim that they are entitled to a larger SECTION 4 ROYALTY PAYMENT, further depriving the Plaintiffs' and Class Members of property to which they are entitled.

THIRD COUNT
ADMINISTRATIVE ACTION NOT IN ACCORDANCE WITH LAW AND SHORT OF THE PLAINTIFFS' CONSTITUTIONAL RIGHTS

31. Paragraphs 1 through 30 are incorporated by reference.

32. Plaintiffs complain against Defendants and for a third claim for relief allege:

33. The Defendants have acted, or failed to act, in ways that are not in accordance with law and are contrary to the Plaintiffs' constitutionally and statutorily guaranteed property rights.

34. The Defendants distribution of SECTION 4 ROYALTY PAYMENTS to persons who are not Osage Indians constituted, and continues to constitute, a taking of the Plaintiffs' and others rights to fully share in these trust property distributions that are dedicated exclusively to them as Osage Indians.

35. The Defendants failure to account to the Plaintiffs for all funds resulting from the Osage Mineral Estate is in direct violation of federal laws, including 25 U.S.C. § 4011, which requires such an accounting.

CLASS ALLEGATIONS

36. This action is brought as a class action, pursuant to Fed. R. Civ. P. 23 on behalf of all Osage Indians who lawfully receive distributions of trust property from the Osage

Mineral Estate as determined and calculated by the Defendants, as trustee, pursuant to The 1906 Act § 4 (as amended).

37. The putative members of the Class are so numerous that joinder of all the individual members is impracticable. Originally, there were 2,229 Osage Indians and their interests in the Osage Mineral Estate viz-viz receiving trust property distribution of the SECTION 4 ROYALTY PAYMENTS have become fractionated among many persons over time. It is believed there are more than 5,000 putative class members at this time.

38. The claims of Plaintiffs and the Class raise common questions of law and fact that predominate over any questions affecting only individual putative Class members. These questions include, but are not limited to, the following:

(a) Whether Defendants have properly distributed SECTION 4 ROYALTY PAYMENTS from the Osage Mineral Estate to the proper persons and in the proper amounts; and

(b) Whether Defendants complied with federal statutory trust obligations in making trust distributions of SECTION 4 ROYALTY PAYMENTS to the Plaintiffs and Class Members as Osage Indians.

(c) Whether Defendants have properly accounted to Plaintiffs for all funds held in trust by the United States for the Plaintiffs, which includes all funds resulting from the Osage Mineral Estate and available to be distributed as SECTION 4 ROYALTY PAYMENTS.

(d) Whether the Defendants have breached their fiduciary duties by making distributions trust property from SECTION 4 ROYALTY PAYMENTS to recipients who are not Osage Indians.

39. The Plaintiffs claims are typical, and are in fact identical, to the claims of the Class and are based upon the same factual and legal theories. Specifically, each of the Plaintiffs are entitled to receive trust property distributions of the SECTION 4 ROYALTY PAYMENTS. The wrongful distribution of royalties to persons who are not Osage Indians (and not members of this class) 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.

40. The Plaintiffs will fairly and adequately represent the interests of the Class. Plaintiffs are committed to prosecute this action vigorously and have retained competent counsel experienced in class action litigation of this nature. Plaintiffs are members of the Class and do not have interests antagonistic to, or in conflict with, other members of the Class with respect to this litigation or claims being raised herein.

41. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The prosecution of separate actions by individual Class members could create a risk of inconsistent and varying adjudications, establish incompatible standards of conduct for Defendants and/or substantially impair or impede the ability of Class members to protect their interests.

42. A class action will result in an orderly and expeditious administration of this controversy and of Plaintiffs' and the Class members' claims, and it will save the Court and the parties, economies of time, effort, and expense, as well as assure uniformity of decisions.

43. Plaintiff does not anticipate any difficulty in the management of this litigation as a class action.

RELIEF REQUESTED

Wherefore, Plaintiffs request on their own behalf, and on behalf of all those persons similarly situated, the following relief:

1. An order compelling the Defendants to provide to the Plaintiffs an accounting of the SECTION 4 ROYALTY PAYMENTS distributed from the Osage Mineral Estate;

2. An order requiring that such accounting determine whether SECTION 4 ROYALTY PAYMENTS distributed from the Osage Mineral Estate have been distributed only to Osage Indians as required by section 4 of the 1906 Act, amended;

3. A reformation of the Plaintiffs and Class Members' trust funds relating to the SECTION 4 ROYALTY PAYMENTS found to be due and owing to them, after an accounting has been completed which shows that the Defendants' failed to abide by the requirements of federal statutes relating to the distribution of Osage Mineral Estate Royalties only to Osage Indians;

4. An order from this Court compelling the Defendants to prospectively distribute trust property from the SECTION 4 ROYALTY PAYMENTS only to Osage Indians.

5. An order from this Court directing the Defendants to pay the Plaintiffs' attorney fees and costs under the Equal Access to Justice Act, 28 U.S.C.A. § 2412.

6. On all of Plaintiff's claims for relief, such other relief as this Court deems necessary and equitable.

Respectfully submitted,

/s/ Jason B. Aamodt
Jason B. Aamodt, Esq., OBA# 16974
J. Randall Miller, Esq. OBA # 6214
K. Lawson Pedigo, Esq. SBA # 15716500[5]
Miller, Keffer, Bullock, Pedigo
222 South Kenosha
Tulsa, OK 74120
(918) 584-2001 - Telephone
(918) 743-6689 - Facsimile
ATTORNEYS FOR THE PLAINTIFFS

Tuesday, April 04, 2006

[5] Mr. Pedigo, an attorney licensed to practice in the State of Texas, has been admitted to practice in the Western District of Oklahoma and will seek and obtain admission in the Northern District of Oklahoma before service of this amended

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

WILLIAM S. FLETCHER, CHARLES A.,PRATT, JUANITA W. WEST, CORA JEAN JECH, and BETTY WOODY, and on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 02-CV-427(K)(M)**
THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, Secretary of the Interior; and THE BUREAU OF INDIAN AFFAIRS;	)	**CLASS ACTION ATTORNEY LIEN**
Defendants.	)	

VERIFICATION

I, **WILLIAM S. FLETCHER**, do hereby verify that the factual allegations set forth in the Amended Complaint styled as set forth above, and filed on Tuesday, April 04, 2006 are to the best of my knowledge true and correct statements.

/s/ WILLIAM S. FLETCHER
Signature

WILLIAM S. FLETCHER
Print Name

Signed and sworn before me this ____ day of _____, 2006

___notarized on original_____
Notary Public

My Commission Expires on the __ day of _____, 20__.

Copies of original signatures and notaries are maintained at the offices of counsel for the Plaintiffs.

---

complaint. Mr. Miller is entering his appearances in this case contemporaneously with the filing of this amended complaint.

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

WILLIAM S. FLETCHER, CHARLES A. PRATT, JUANITA W. WEST, CORA JEAN JECH, and BETTY WOODY, and on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
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THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, Secretary of the Interior; and THE BUREAU OF INDIAN AFFAIRS;	)	**CLASS ACTION ATTORNEY LIEN**
Defendants.	)	

VERIFICATION

I, CHARLES A. PRATT, do hereby verify that the factual allegations set forth in the Amended Complaint styled as set forth above, and filed on Tuesday, April 04, 2006 are to the best of my knowledge true and correct statements.

/s/ CHARLES A. PRATT
Signature

CHARLES A. PRATT
Print Name

Signed and sworn before me this ____ day of _____, 2006

___notarized on original_____
Notary Public

My Commission Expires on the __ day of _____, 20__.

Copies of original signatures and notaries are maintained at the offices of counsel for the Plaintiffs.

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

WILLIAM S. FLETCHER, CHARLES A. PRATT, JUANITA W. WEST, CORA JEAN JECH, and BETTY WOODY, and on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
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THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, Secretary of the Interior; and THE BUREAU OF INDIAN AFFAIRS;	)	**CLASS ACTION ATTORNEY LIEN**
Defendants.	)	

VERIFICATION

I, JUANITA W. WEST, do hereby verify that the factual allegations set forth in the Amended Complaint styled as set forth above, and filed on Tuesday, April 04, 2006 are to the best of my knowledge true and correct statements.

JUANITA W. WEST
Signature

JUANITA W. WEST
Print Name

Signed and sworn before me this ____ day of _____, 2006

___notarized on original_____
Notary Public

My Commission Expires on the __ day of _____, 20__.

Copies of original signatures and notaries are maintained at the offices of counsel for the Plaintiffs.

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

WILLIAM S. FLETCHER, CHARLES A. PRATT, JUANITA W. WEST, CORA JEAN JECH, and BETTY WOODY, and on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 02-CV-427(K)(M)**
THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, Secretary of the Interior; and THE BUREAU OF INDIAN AFFAIRS;	)	**CLASS ACTION ATTORNEY LIEN**
Defendants.	)	

VERIFICATION

I, CORA JEAN JECH, do hereby verify that the factual allegations set forth in the Amended Complaint styled as set forth above, and filed Tuesday, April 04, 2006 are to the best of my knowledge true and correct statements.

/s/ CORA JEAN JECH
Signature

CORA JEAN JECH
Print Name

Signed and sworn before me this ____ day of _____, 2006

___notarized on original_____
Notary Public

My Commission Expires on the __ day of _____, 20__.

Copies of original signatures and notaries are maintained at the offices of counsel for the Plaintiffs.

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

WILLIAM S. FLETCHER, CHARLES A. PRATT, JUANITA W. WEST, CORA JEAN JECH, and BETTY WOODY, and on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 02-CV-427(K)(M)**
THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, Secretary of the Interior; and THE BUREAU OF INDIAN AFFAIRS;	)	**CLASS ACTION ATTORNEY LIEN**
Defendants.	)	

VERIFICATION

I, BETTY WOODY , do hereby verify that the factual allegations set forth in the Amended Complaint styled as set forth above, and filed on Tuesday, April 04, 2006 are to the best of my knowledge true and correct statements.

/s/ BETTY WOODY
Signature

BETTY WOODY
Print Name

Signed and sworn before me this ____ day of _____, 2006

___notarized on original_____
Notary Public

My Commission Expires on the __ day of _____, 20__.

Copies of original signatures and notaries are maintained at the offices of counsel for the Plaintiffs.

FREQUENTLY ASKED QUESTIONS AND ANSWERS

ABOUT THE OSAGE MINERAL ESTATE

What is the Osage Mineral Estate?

The Osage Mineral Estate is the oil, gas, and other mineral sub-surface of the approximately 1.47 million acre Osage Reservation.

Who owns the Osage Nation Mineral Estate?

Section 3 of the 1906 Act establishes that the Osage Nation is the beneficial owner the Osage Mineral Estate. The United States holds title to the Osage Mineral Estate in trust for the Osage Nation. No individual or group of individuals owns the Osage Mineral Estate.

What is a "headright"?

A "headright" is the right to receive a quarterly distribution of funds derived from the Osage Mineral Estate.

Do only Osages own headrights?

No. Indians of other tribes, non-Indians, corporations, churches, and others own headrights today.

How many headrights are currently owned by non-Osages?

According to the BIA's Osage Agency, approximately 25% of the headrights are currently owned by non-Osages.

Who manages the Osage Mineral Estate?

The BIA's Osage Agency manages the Osage Mineral Estate on a day-to-day basis.

Whose responsibility is it to collect funds derived from the Osage Mineral Estate?
The U.S. Department of the Interior acting through the BIA's Osage Agency has the exclusive authority to collect funds from Osage minerals leases. No Osage Nation entity has authority to collect these funds.

If money damages are awarded as a result of the Osage Nation's lawsuit against the United States for mismanagement of Osage tribal trust assets in the U.S. Court of Federal Claims, who will these monies be distributed to?

Unless the U.S. Congress authorizes a different distribution

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Constituent Services
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Judicial Branch
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Mineral Council
Museum
News & Media
Osage Data Center
Palace Grocery Store
Planning Dept
Prevention Programs
PRT
Senior Housing
Social Services Agency
Strategic Planning
TANF Program
TASC Program
Tax Commission

EXHIBIT B
Defendants' Response to the Osage Nation's
Proposed Findings of Fact and Conclusions of Law
Page 1 of 3

Title VI Dept
Tobacco Program
Tourism Dept
Transportation Improvement Program
WIC Dept

scheme, money damages awarded to the Osage Nation from claims against the United States, after proper expenses are paid, will be paid into the Osage tribal trust account then distributed to headright holders, in accordance with Section 4 of the 1906 Act.

Does the Principal Chief, the Osage Nation Congress, the Osage Minerals Council, or some combination thereof have the power to redistribute headrights held by Osages or non-Osages?

No. A headright is a federally-protected property right.

What is the difference between the Osage Nation's lawsuit in the U.S. Court of the Federal Claims, the Osage Nation's lawsuit in the U.S. District Court for the District of Columbia, and the Cobell v. Kempthorne lawsuit?

- **Osage Nation v. United States** in the **U.S. Court of Federal Claims** is a lawsuit alleging federal mismanagement of Osage tribal trust assets, including Osage tribal trust funds, and seeks money damages for such mismanagement.

- **Osage Nation v. United States** in the **U.S. District Court for the District of Columbia** seeks an historical accounting of all Osage tribal trust funds and a delineation of the Federal Government's trust duties to the Osage Nation.

- **Cobell v. Kempthorne** is a class action lawsuit on behalf of all IIM account holders in the U.S. District Court for the District of Columbia seeking an historic accounting of all individual trust funds.

What is an IIM account?

An IIM account is an "Individual Indian Money" account for trust funds held by the Secretary of the Interior that belong to a person who has an interest in trust assets. These accounts are under the control and management of the Secretary.

Does every Osage tribal member have an IIM account?

No. Osage tribal members who do not have a headright interest or do not receive income from an individual trust or restricted asset do not have IIM accounts.

Does every Osage headright holder have an IIM account?

No. There are Osage tribal members with headright interests who do not have IIM accounts.

If a person is an Osage Nation member and a headright holder but not an IIM account holder, can that person get an IIM account?

Yes. The Superintendent of the Osage Agency has discretion to revoke the competency status of any Osage individual, regardless of blood quantum, and qualify the individual to receive an IIM account.

What are the roles of the political branches of Osage Nation government – the Executive and Legislative branches -- in management of the Osage Mineral Estate?

None. But the Osage Nation Congress has power under the Osage

Constitution to enact laws within the Osage Nation's jurisdiction, as long as it does not conflict with federal law.

Why do Osage headright holders no longer elect their own Principal Chief and Assistant Principal Chief under Section 9 of the 1906 Act?

The U.S. Congress enacted P.L. 108-431, the Osage Sovereignty Act, which clarifies that the Osage Nation has the inherent sovereign right to determine its own form of government. As a result, the Osage people changed the form of Osage government from a Principal Chief, Assistant Principal Chief, and eight Tribal Council members elected only by Osage headright holders to the current three-branch Osage Constitution with a Osage Minerals Council elected only by headright holders.