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)

BRIEF OF THE OSAGE NATION AS *AMICUS CURIAE*

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The Osage Nation submits this brief to provide the Court with information about the Osage Nation's statutory rights with respect to the Osage mineral estate, in order to address assertions by the parties in their recent briefing about remedies.[1]

INTEREST OF THE AMICUS CURIAE

The Osage Nation is a federally recognized sovereign Indian nation based in Pawhuska, Oklahoma, on the Osage Reservation. The United States holds in trust certain properties of the Osage Nation pursuant to the 1906 Osage Allotment Act[2] ("1906 Act") as amended. These properties include the mineral rights to the subsurface estate underlying the Osage Reservation, with boundaries co-extensive with present-day Osage County, Oklahoma. In the Plaintiffs' Memorandum in Support of Equitable Restitution and Disgorgement, and in their related reply brief, they have incorrectly attacked two of the Osage Nation's statutory rights with respect to the Osage mineral estate: (1) the Osage Nation's ownership of the mineral estate; and (2) the Osage Nation's ownership of the income from the mineral estate before the statutory, quarterly, pro rata segregation and distribution of that tribal income to Osage "headright" holders. In light of the likelihood that these issues will come before the Court at the upcoming trial, *see* Pretrial Order (May 2, 2008) (Doc. No. 3526), the Osage Nation has an interest in ensuring that the Court is provided with applicable authorities on these points.

By treating the Osage mineral estate and mineral income as tribal assets, federal law protects Osage minerals and funds from allotment and alienation, preserving the long-term

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[1]The former Osage Tribe of Indians of Oklahoma is now officially named the Osage Nation. Constitution of the Osage Nation, Art. I (March 11, 2006) (attached hereto as Exh. A) ("This tribe shall hereafter be referred to as The Osage Nation, formerly known as the Osage Tribe of Indians of Oklahoma."); *see* 73 Fed. Reg. 18553, 18555 (Apr. 4, 2008). Because the statutes at issue use the appellation "Osage Tribe," both terms are used here interchangeably.

[2] "An act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes," Pub. L. No. 59-321, 34 Stat. 539 (1906).

viability of the trust and the interests of Osage headright holders into the future. And the Osage Nation has a constitutional 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 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.[3] The Plaintiffs' position here is contrary to the previous holdings of the Court of Federal Claims in favor of the Osage Nation in that litigation and contravenes established federal law, as shown below.[4]

Notwithstanding the Osage Nation's disagreement with some of the Plaintiffs' arguments, the Plaintiffs are surely correct that the United States should be held liable for *all* funds that should have been distributed to individual Indian headright holders. In support of that proposition, this brief shows that Osage mineral income becomes individual Indian monies at the time it is required to be distributed to Indian headright holders—whether or not those funds actually enter the IIM system. It is not enough for the United States to rely in conclusory fashion

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[3] The Court of Federal Claims recently issued an order (attached as Exhibit B) that sets a schedule for the Osage Nation to file for partial summary judgment and that specifies discovery deadlines in anticipation of a trial on all remaining issues late next year.

[4] 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.

on its own book entries showing that at a particular moment in time, some headright payments were not placed in the IIM system. Rather, the United States should be held liable for proper distribution of all headright funds due to Indian headright holders.

INTRODUCTION

The 1906 Osage Allotment Act as amended reserves the Osage mineral estate to the Osage Nation. It also recognizes the Osage Nation's ownership of the Osage mineral income—the royalties, bonuses, and fees assessed on those who lease the rights to extract and sell minerals from the subsurface estate, such as oil and natural gas. Pursuant to the 1906 Act, a small portion of the tribal mineral income is used to pay congressionally authorized tribal expenditures and any tax payments mandated by federal law. At the end of each fiscal quarter, the remaining mineral income in the tribal trust account is divided among and distributed to Osage headright holders.

The Plaintiffs' opening brief on remedies asserts that "[t]he Osage mineral estate is not owned by the Osage Tribe, but by individual trust beneficiaries who are entitled to a 'headright' share in the proceeds derived from the mineral estate." Pls. Mem. at 33. After the United States challenged this assertion, *see* U.S. Br. at 104-05, the Plaintiffs conceded in their reply brief that the Osage Tribe owns the mineral estate. *See* Pls. Reply at 44 n.57 (discussing "[t]he reservation of the mineral resources to the Osage tribe" and "reservation of the mineral estate to the Osage tribe."). Despite that concession, the Plaintiffs persist in advancing a variation of their opening argument: they claim that "the *revenue* from the mineral estate deposited into Treasury is beneficially owned by individual tribal members and their heirs and not the Osage tribe." Pls. Reply at 27 (emphasis added). This too is incorrect in important respects, as discussed below.

Because ownership of the mineral estate and ownership of the mineral income are related, this brief addresses both. Part I discusses the Osage Nation's ownership of the mineral estate as background for Part II, which in turn shows that the Osage Tribe owns the income from

the mineral estate until it is distributed pursuant to federal statute. No statute gives headright holders any right to the funds until after the end of the fiscal quarter, when the funds are segregated pro rata and either transferred to IIM accounts or paid by check to headright holders. Before that distribution, the funds are subject to being used for congressionally authorized tribal expenses and remain the beneficial property of the Tribe. Then, the United States has a fiduciary duty to ensure that mandatory quarterly headright distributions are credited to individual Indians entitled to those monies.

ARGUMENT

The Osage Nation's common ownership of the mineral estate and the mineral income allows the tribal government to protect the income and to seek to maximize the distributions to its headright holders. Plaintiffs would essentially treat these tribal trust assets as having been allotted in severalty. Their incorrect stance conflicts with federal law and threatens the Osage Nation and its headright holders.

I. THE OSAGE MINERAL ESTATE WAS NOT ALLOTTED, AND IS OWNED BY AND IS HELD IN TRUST FOR THE OSAGE NATION.

The Osage Nation's current statutory rights in both the Osage mineral estate and the mineral income are rooted in the 1906 Act. It was enacted at the height of the federal government's now-repudiated policy of allotment, pursuant to which tribal lands and other tribal resources were divided and parceled out to tribal members in an attempt to destroy tribal governments and tribal cultures, and to assimilate Indians into mainstream America. Allotment first started to gain official momentum in 1854, when the Commissioner of Indian Affairs began a systematic effort to persuade tribes to accept allotment of tribal lands in severalty. Kenneth Bobroff et al., *Cohen's Handbook of Federal Indian Law* (hereinafter "*Cohen*") § 16.03 (Nell Jessup Newton et al. eds., Am. Indian Law Ctr. Inc., 2005) (1941). In 1887, Congress abandoned

the policy of seeking tribal consent to allotment by enacting the General Allotment Act, 24 Stat. 388 (1887), which authorized the allotment in severalty of reservation lands. *Cohen* § 16.03[2][c]. Allotments under the GAA were to be held in trust for the allottees for 25 years; at the end of the 25-year period, the allottee was to receive the allotment in fee without restrictions. 25 U.S.C. § 348; *Cohen* § 16.03[2][b]. The Osage Nation was excluded from the GAA, but its lands were later allotted by similar provisions in the 1906 Osage Allotment Act. Notably, as discussed below, the Act did not allot the Osage mineral estate, which subsequent statutes have preserved in its unallotted state.

"By the 1920s, federal officials acknowledged that the allotment policy had not only failed to serve any beneficial purpose for Indians, but had been terribly harmful." *Cohen* § 16.03[2][c] (footnotes omitted). Between 1887 and 1934, the tribal lands of 118 reservations were allotted, totaling 36 million acres; by the end of that period, already two-thirds of all such lands were owned by non-Indians. *Id.* Beginning in the 1920s, as the ill effects of the allotment system became apparent to Congress, the trust periods for pending allotments were routinely extended beyond the original 25 years, in order to postpone or prevent an unrestricted allotment in fee. In 1990, Congress applied an indefinite statutory extension to all allotments. *Id.* Congress has continued to repudiate the allotment policy; it is currently the policy of the United States "to reverse the effects of the allotment policy on Indian tribes." 25 U.S.C. § 2201; *Cohen* § 16.03[2][c].

The Osage Allotment Act allotted then-existing tribal funds as well as tribal lands, but it did not allot the mineral estate underlying those lands. "The 1906 Act retained the valuable Osage mineral estate *in trust for the tribe*." *Cohen* § 4.07; *accord id.* § 17.03 ("The mineral estate of the Osage is entirely reserved to the tribe . . . ."). "The 1906 act made no allotment of

the mineral estate in the land; it remained tribal property." *Taylor v. Tayrien*, 51 F.2d 884, 887 (10th Cir. 1931). Because Congress doubted that the mineral estate could be "equitably divided," the 1906 Act instead "provided that minerals under lands to be allotted were reserved to the Osage Tribe and were not to be sold. The necessary effect of this was to withhold the minerals from division, . . . for the use and benefit of the tribe, not disturbing the tribe's communal equitable estate in them." *Adams v. Osage Tribe*, 59 F.2d 653, 656 (10th Cir. 1932).

The first four sections of the 1906 Act set out the basic scheme for what is and is not to be allotted, and to whom. Section One specifies at length how the "roll" of tribal members is to be created; it ends by providing that "the tribal lands and tribal funds of [the Osage] tribe shall be equally divided among the members of said tribe as hereinafter provided." 34 Stat. at 540. Section Two describes how the surface estate is to be allotted, noting that the mineral estate is "reserved to the tribe." *Id.* Section Three unambiguously reserves the undivided mineral estate for the Osage Tribe: "[T]he oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe . . . ." 34 Stat. at 543. It also states that "royalties [are] to be paid to the Osage tribe." *Id.*

Section Four specifies how tribal funds are to be handled, in two main paragraphs. Paragraph One states that moneys already in trust at the time of the statute's enactment were to be moved from the tribal account into segregated individual accounts as soon as practicable and held in trust for 25 years, with the income thereon payable quarterly to the individual members. 34 Stat. at 544. And just as Paragraph One describes how income on allotted shares of the existing national funds were to be distributed, Paragraph Two makes income from the unallotted mineral estate and from tribal land sales payable quarterly to the individual members. It provides that the royalties paid to the Tribe and the proceeds of tribal land sales are "moneys of said [*i.e.*,

the Osage] tribe," and that they must be "placed in the Treasury of the United States to the credit of the members of the Osage tribe" and "distributed to the individual members . . . *in the manner and at the same time that payments are made of interest on other moneys*," *i.e.*, interest income on segregated shares of the national funds. *Id.*

Before the 1906 Act was amended, it provided that the Osage Tribe's ownership of the undivided mineral estate would terminate after 25 years, and that the estate would then be allotted among the surface owners. *See* 1906 Act § 2. But, when the allotment policy fell into disfavor, Congress extended the Osage Nation's undivided mineral rights three times, the last time in perpetuity. These statutory extensions, enacted in 1921[5], 1938[6], and 1978[7], each provide that "the oil, gas, coal, or other minerals covered by [the lands allotted by the 1906 Act] are reserved to the Osage Tribe."

Other Osage-related statutes reinforce the Osage Tribe's ownership of the mineral estate. For example, in 1909, Congress authorized the sale of "surplus lands," *i.e.*, lands allotted to individual Osage tribal members over and above their 160-acre homesteads. See Act of Mar. 3, 1909, Pub. L. No. 60-309, 35 Stat. 778; 1906 Act § 2. In authorizing these sales, Congress provided "[t]hat the sales of the Osage lands shall be subject to *the reserved rights of the tribe in oil, gas, and other minerals*." 35 Stat. 778.

Every court that has addressed the question has held that the Osage mineral estate is held in trust for the Osage Tribe. "The oil, gas, coal and other mineral rights were reserved to the tribe . . . ." *McCurdy v. United States*, 246 U.S. 263, 266 (1918); *accord Tayrien*, 51 F.2d at 890.

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[5] Act of Mar. 3, 1921, Pub. L. No. 66-360, 41 Stat. 1249.

[6] Act of June 24, 1938, Pub. L. No. 75-711, § 3, 52 Stat. 1034, 1035; *see* U.S. Br. at 125.

[7] Act of Oct. 21, 1978, Pub. L. No. 95-496, § 2(a), 92 Stat. 1660 (extension "in perpetuity"); *see* U.S. Br. at 104-05.

"The mineral estate was not allotted but remained tribal property held in trust by the federal government." *Akers v. Hodel*, 871 F.2d 924, 930 (10th Cir. 1989) (emphasis added); *accord West v. Okla. Tax Comm'n*, 334 U.S. 717, 721 (1948) (dicta) ("Section 3 of the [Allotment] Act stated that the minerals covered by [the Osage Reservation] were to be reserved to the Osage Tribe . . . ."); *Osage Tribe v. United States*, 72 Fed. Cl. 629, 632 (2006) ("Section 3 of the 1906 Act reserved oil, gas, coal and other minerals to the Tribe . . . .").

Although the Plaintiffs admit in their reply brief that the Osage Nation owns the mineral estate, they go on to argue that the income from the estate does not belong to the Osage Nation. They seek to turn the Osage Nation's ownership of the minerals into a meaningless fiction, arguing 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 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. Plaintiffs ignore the 1906 Act's mandate that "royalties [are] to be paid to the Osage tribe." As shown in the next part, the Tribe's ownership of the minerals income is recognized by the 1906 Act and related amendments and statutes; it is the Plaintiffs' contrary position that is fiction.

II. INCOME FROM THE OSAGE MINERAL ESTATE BELONGS TO AND REMAINS THE PROPERTY OF THE TRIBE UNTIL IT IS DISTRIBUTED AT THE END OF EACH QUARTER TO HEADRIGHT HOLDERS.

Royalties from the Osage mineral estate belong to the Tribe while they are in the Osage tribal trust account before the quarterly segregation and distribution to headright holders. The statutory scheme that recognizes this tribal ownership is discussed in detail below, but can be summarized as follows.

When the mineral estate produces income, such as when a lessee pays royalties, the income must be paid to the United States as trustee for the Osage Nation. The United States is

required to receive and deposit these funds on the Osage Nation's behalf. To comply with this duty, the United States directs the funds to the Osage tribal trust account. While the funds are on deposit in the tribal trust account, they are owned beneficially by the Tribe (*e.g.*, Congress refers to them as tribal monies). Congress has authorized payments from the tribal account for tribal mineral-related expenses and other purposes discussed below.

At the end of each fiscal quarter, the mineral revenues remaining in the account after tribal expenditures must be divided pro rata among, and distributed to, the Osage headright holders. The United States places a pro rata share of tribal funds to the credit of each headright holder by either (1) transferring the money to the headright holder's segregated (IIM) account, or (2) delivering a check to the headright holder. At the time of segregation, and not before, ownership of mineral revenues vests in the various headright holders. [8]

A. The Tribe Owns the Mineral Income, and the Headright Holders Are Entitled to a Quarterly Distribution of the Income that Remains After Deductions for Congressionally Authorized Expenditures and Congressionally Mandated Taxes.

The 1938 amendment to the Osage Allotment Act provides, in language still in effect today, that the royalties and other income from the mineral estate belong to the Osage Tribe, and that individual members have a right to a distribution:

> [T]he oil, gas, coal, or other minerals, covered by [the land allotted by the 1906 Act, *i.e.*, the Osage mineral estate] . . . are reserved to the Osage

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[8] There were originally 2229 members on the roll of the Osage Tribe pursuant to the 1906 Act, and each received a single headright. In the intervening years, headrights have been fractionated, bequeathed, and otherwise alienated, so it is not uncommon for a headright holder to possess a fractional headright interest either less than or greater than one full headright. (For example, in *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948), the decedent's estate at issue included "[o]ne and 915/2520ths Osage mineral headrights." *Id.* at 718.) When funds are distributed "pro rata" to headright holders, they are distributed in proportion to each holder's respective headright interests. *See Big Eagle v. United States*, 300 F.2d 765, 765-66 (Ct. Cl. 1962) (a headright is "a right to 1/2229th share" of the distributable mineral income).

> Tribe . . . , *and all royalties and bonuses arising therefrom shall belong to the Osage Tribe of Indians*, and shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law, after reserving such amounts as are now or may hereafter be authorized by Congress for specific purposes.

Act of June 24, 1938, Pub. L. No. 75-711 § 3, 52 Stat. 1034, 1035 (emphasis added). This language was retained from the 1921 and 1929 amendments.[9] These amendments are consistent with the original language of the 1906 Act, which provides in Section Three that the mineral estate is "reserved to the Osage Tribe," and that "the royalties [are] to be paid to the Osage tribe." Section Ten of the 1906 Act likewise refers to royalties as "tribal funds." Similarly, when Congress enacted the 1921 amendment to authorize payment of a gross production tax on gas and oil, it provided that the tax is to be paid "from the amount *received by the Osage Tribe of Indians* as royalties from production of oil and gas." Act of Mar. 3, 1921, § 5, 41 Stat. 1249, 1250. The Osage Nation "*as a Tribe*, own[s] the oil and gas royalties"; the 1906 Act provides that "the royalties [are] to go *into the common funds of the Tribe* . . . held by the Government." *Osage Tribe v. United States*, 1944 WL 3652, 4-5 (Ct. Cl. 1944). As the Court of Federal Claims has held in the Osage Nation's pending breach of trust suit against the United States, mineral income "constitute[s] in large measure the 'moneys due, and all moneys that may become due, or may hereafter be found to be due' that the United States agreed to hold *in trust for the Osage*

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[9] *See* Act of Mar. 2, 1929, Pub. L. No. 70-919, § 1, 45 Stat. 1478; Act of Mar. 3, 1921, 41 Stat. 1249 ("the oil, gas, coal, or other minerals . . . are reserved to the Osage Tribe, . . . and all royalties and bonuses arising therefrom shall belong to the Osage Tribe of Indians, and shall be disbursed to members of the Osage Tribe"); *accord, e.g.*, *Tayrien*, 51 F.2d at 890 (the 1929 Act "reaffirms and extends the title of the tribe [to the mineral estate] and expressly says that the royalties and bonuses 'shall belong' to the tribe."); *Tapp v. Stuart*, 6 F. Supp. 577, 578 (D. Okla. 1934) (quoting the same language from the 1929 amendment).

Tribe in section 4 of the 1906 Act." *Osage Tribe v. United States*, 68 Fed. Cl. 322, 331 (2005) (emphasis added).

The statutory language quoted above shows that a headright is a right to a distribution from tribal funds: the royalties are "paid to" and "belong to" the Osage Tribe, and are "disbursed" to Osage headright holders. A headright is "a right to 1/2229th share *of the distributable income* from the minerals." *Big Eagle v. United States*, 300 F.2d 765, 765-66 (Ct. Cl. 1962) (emphasis added). The Solicitor General for the Interior, in an opinion later approved and followed by the agency as well as the Tenth Circuit Court of Appeals, characterized a headright as "a *prospective* right *to share in the periodical distributions* of royalties received from leasing the [mineral estate], after certain authorized deductions therefrom had first been made." Op. of the Solicitor Gen'l of the Dep't of the Interior, M-8370 (August 15, 1922), available at http://thorpe.ou.edu/sol_opinions/p51-75.html#m-8370 (emphasis added); *accord Tayrien*, 51 F.2d at 89; *Taylor v. Jones*, 51 F.2d 892, 893-94 (10th Cir. 1931) (characterizing a headright as "a mineral interest from which [the headright holder] derives quarterly payments" and as "a future interest in tribal property").

The leading treatise, too, describes a headright as a right to a distribution of tribal funds:

> The most distinctive feature of the Osage scheme is the use of the 1906 Act roll as the permanent basis for per capita distributions of *tribal* income and property. Osage Indians born since the 1906 Act roll closed do not acquire the usual rights of persons born into an Indian tribe to share in distributions of tribal property. Rather, the 1906 Act converted *the right to receive tribal property distributions* into a restricted tenancy in common in the persons on the 1906 roll. *This right*, which *has come to be called an Osage headright*, passes to the heirs, devisees, and assigns of owners.

Cohen § 4.07 (emphases added). The Plaintiffs selectively quote this passage from the treatise to advance their incorrect proposition that the *tribal trust account* is itself a "restricted tenancy in common," *see* Pls. Mem. at 34. But as the full quote above makes clear, it is only *the right to*

receive distributions from the tribal account—not the tribal account itself—that is a tenancy in common. Until time of the distribution, the funds remain the property of the Tribe alone.

B. The Statutory Requirement that Some Mineral Income Be Used to Pay Tribal Expenditures and Taxes *Before* the Remaining Income Is Distributed Shows that a Headright Is a Right to Future Distributions.

An important aspect of the 1906 Act is the provision for tribal expenses to be paid from the mineral royalties *before* they are segregated and distributed to headright holders. "[S]ome of the mineral income is used for Council expenses or other tribal purposes as the [Osage government] determines. But the statutory scheme requires that most of the income be distributed per capita, and *Congress controls the amounts retained for tribal purposes*." *Cohen* § 4.07 (emphasis added). As previously noted, the 1906 Act as amended provides that "all royalties and bonuses . . . shall belong to the Osage Tribe of Indians," and that the United States distributes these tribal moneys to headrights only "*after reserving such amounts as are now or may hereafter be authorized by Congress for specific purposes.*" Act of June 24, 1938, 52 Stat. at 1035 (emphasis added). The 1906 Act "set[s] aside from the royalties received from oil and gas" annual amounts to pay for the education of Osage children and for "an emergency fund for the Osage tribe." 1906 Act § 4, 34 Stat. 539, 544. Also, as noted above, Congress has from time to time mandated that certain taxes be paid from these funds.

The Plaintiffs ignore this aspect of the statutes that govern the mineral royalties, arguing that "no discretion has been granted to the trustee to distribute funds to anyone other than the individual headright owners." Pls. Mem. at 34 (emphasis removed). Here, as is typical of Plaintiffs' analysis of the law governing Osage mineral royalties, Plaintiffs have arrived at the wrong conclusion through a selective reading of the statutes. At the time of the quarterly distribution, the trustee has no discretion to distribute funds to anyone other than the headright holders; but until then, the funds are subject to the will of Congress in favor of the Tribe.

Many congressional appropriations acts have set aside royalties for tribal purposes, and in so doing have described the mineral income in the tribal trust account as "Osage tribal funds"[10] or as "the funds held by the United States in trust for the Osage Tribe,"[11] or both.[12] A few refer to the account as "money on deposit to the credit of the Osage Tribe of Indians in Oklahoma"[13] or as "the oil and gas royalties and bonuses accruing and to accrue to the Osage Tribe of Indians."[14] These acts appropriate money for such collective tribal purposes as expenses for oil and gas production, education of Osage children, pay of tribal officers, paving streets adjoining Osage tribal property, official travel by the Osage Tribal Council, attorneys' fees and expenses in minerals-related lawsuits, and employment of a curator for the Osage Museum.

Thus, royalties awaiting distribution are tribal funds, and a headright holder's right to a distribution is subject to the will of Congress. If Congress at all times before the quarterly distribution can authorize spending for tribal expenses, then headright holders have no vested interest in minerals income until the distribution date. "The 1906 act made no allotment of the mineral estate in the land; it remained tribal property. The individual Indian had only an *inchoate* right to receive his share of the *net* returns therefrom, *subject to the will of Congress*." *Tayrien*, 51 F.2d at 887 (emphasis added). "[T]he right of individuals to participate in the

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[10] Act of Feb. 27, 1925, Pub. L. No. 68-497, § 2, 43 Stat. 1008, 1009; Act of Mar. 4, 1931, Pub. L. No. 71-869, 46 Stat. 1552, 1569.

[11] Act of Jan. 24, 1923, Pub. L. No. 67-394, 42 Stat. 1174, 1196.

[12] Act of Aug. 9, 1937, Pub. L. No. 75-249, 50 Stat. 564; Act of May 10, 1939, Pub. L. No. 76-67, 53 Stat. 685.

[13] Act of June 30, 1919, Pub. L. No. 66-3, 41 Stat. 3, 20; Act of June 5, 1924, Pub. L. No. 68-198, 43 Stat. 390; Act of Jan. 12, 1927, Pub. L. No. 69-541, 44 Stat. 934; Act of Mar. 7, 1928, Pub. L. No. 70-100, 45 Stat. 200; Act of May 14, 1930, Pub. L. No. 71-216, 46 Stat. 279; Act of Mar. 4, 1931, Pub. L. No. 71-869, 46 Stat. 1552 ("funds on deposit in the Treasury to the credit of the Osage Tribe of Indians").

[14] Act of Jan. 31, 1931, Pub. L. No. 71-583, 46 Stat. 1047.

income [from the tribal mineral estate] is a property right," *In re Irwin*, 60 F.2d 495, 497 (10th Cir. 1932), but "an Osage Indian has no *present* property right in the properties now owned by his tribe," *Tayrien*, 51 F.2d at 891 (emphasis added). *See also id.* at 890 (noting "the power existent in Congress to increase the charges against the fund, to decrease the quarterly payments, to re-impose restrictions, [or] to curtail the right of descent").

C. Headright Holders' Rights to Mineral Income Vest at the Time of the Mandatory Quarterly Segregation and Distribution.

The 1906 Act as amended, case law, and administrative opinions all confirm that royalties remain tribal funds until the quarterly distribution date.

In addition to the statutes quoted above showing that royalties and other mineral income belong to the Osage Tribe until distributed, the 1921 amendment to the 1906 Act provides that the pro rata share due to each headright is calculated as of the end of the fiscal quarter: Interior "shall cause to be paid *at the end of each fiscal quarter* to each adult member of the Osage Tribe having a certificate of competency *his or her pro rata share*, either as a member of the tribe or heir of a deceased member, *of* the interest on trust funds, the bonus received from the sale of leases, and *the royalties received during the previous fiscal quarter*." 41 Stat. 1250 (emphasis added); *accord Tayrien*, 51 F.2d at 888. Because the 1921 amendment requires that the pro rata share be calculated on a quarterly basis at the time of distribution, it refutes the Plaintiffs' argument that royalties are at all times required to be held pro rata on behalf of individual headright holders.

The 1921 amendment imposed what have been termed "competency" restrictions on distributed headright funds, and a close reading of the statute reinforces the distinction between the tribal status of undistributed mineral income and the individual ownership of distributed income. Section Four of the 1921 amendment provides that Osages must obtain a certificate of

"competency" if they are to be "paid at the end of each fiscal quarter" a full pro rata share of the mineral income. 41 Stat. at 1250. By contrast, those Osages who lack certificates (and who also do not have a guardian) are to be paid no more than $1,000 at the end of each fiscal quarter ($500 in the case of a minor under 21 years old). *Id.* The Secretary of Interior is required by statute "to invest the remainder" in specified investments "for the benefit of each individual member." *Id.*

There are two provisos to this section, which together highlight the distinction between tribal funds (before the quarterly distribution) and individual, restricted trust funds (placed to an individual's credit at the quarterly distribution):

> *Provided,* That *at the beginning of each fiscal year* there shall first be reserved and set aside *out of the Osage tribal funds* available for that purpose a sufficient amount of money for the expenditures authorized by Congress out of the Osage funds for that fiscal year:
>
> *Provided further,* That all just existing *individual obligations* of adults not having certificates of competency outstanding upon the passage of this Act, when approved by the Superintendent of the Osage Agency, *shall be paid out of the money of such individual as the same may be placed to his credit in addition to the quarterly allowance* provided for herein."

Id. (emphases added). Under the first proviso, royalties collected at beginning of the fiscal year (after the cutoff for the previous year's final quarterly distribution) are "Osage tribal funds" that can be "set aside" for tribal expenditures but not for "individual obligations" (by negative implication from the second proviso). Under the second proviso, when a pro rata share is segregated at the end of each fiscal quarter for an Osage without a certificate, then any surplus (above the $1000 quarterly allowance) is credited to the individual Indian and thereafter is used to pay for that Osage's "individual obligations" incurred before the passage of the Act. *See also* 25 C.F.R. Part 117, "Deposit and Expenditure of Individual Funds of Members of the Osage Tribe of Indians Who Do Not Have Certificates of Competency."

Plaintiffs, however, argue to the contrary that royalties must *always* be credited to individual headright holders, from the moment the royalties enter the tribal account. According to Plaintiffs, section 4 of the 1906 Act denies the Osage Tribe ownership of mineral royalties on deposit at Treasury in the tribal account. Pls. Reply at 44-45. In so arguing they rely on the following language:

> [T]he royalty received from oil, gas, coal, and other mineral leases . . . shall be placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interests on other moneys held in trust for the Osages by the United States, except as herein provided.

1906 Act § 4, 34 Stat. at 544.

The Plaintiffs have plucked this language from its context and have read into it additional language that is not there. Royalties must indeed be "placed in the Treasury of the United States to the credit of the members of the Osage Tribe," but that is what occurs at every quarterly distribution. Either the money is credited to an IIM account belonging to the headright holder or is disbursed by check payable to the order of the non-Indian headright holder when cashed against the United States Treasury. Nothing in the 1906 Act or its amendments gives a headright holder any rights to the funds *before* the distribution that follows the end of the fiscal quarter.

Indeed, a careful reading of the 1906 Act refutes the Plaintiffs' position: it provides that royalties are to be "paid to the tribe" (§ 3) and are treated "as *other* moneys of said tribe" (§ 4), so they are tribal moneys before being placed "to the credit of the members" and distributed. Tribal ownership can occur only if the funds paid by lessees are first credited to the Tribe before being credited to the headright holders, which is of course precisely what happens. And in any event, under the 1921, 1929, and 1938 amendments to the 1906 Act quoted above, none of which

are cited by the Plaintiffs, the matter is clarified beyond any need for exegesis: the royalties "belong to the Osage Tribe" (1921, 1929, 1938), and segregation of funds to the credit of individuals occurs only "at the end of each fiscal quarter" for the royalties "received [by the Tribe] during the previous fiscal quarter" (1921). *See supra* II.A.

A long line of cases and administrative opinions beginning in the 1920s addressed the distinction between tribal funds and headright distributions in the context of deciding whether and how mineral revenues can be alienated or taxed at an individual level. In 1945 the Assistant Secretary of Interior approved an opinion of the Solicitor that explained: "The [mineral] income itself belongs to the tribe. When it is received it is placed in the Treasury of the United States *and the individual interest of the owner of the headright does not vest until the Secretary of the Interior has segregated the pro rate share of the individual from the tribal funds.*" Op. of the Solicitor Gen'l of the Dep't of the Interior, M-33564 (September 6, 1945), available at http://thorpe.ou.edu/sol_opinions/p1326-1350.htm#m-33564.

This authoritative 1945 opinion stands on a series of precedential court and administrative decisions, such as *Taylor v. Tayrien*, 51 F.2d 884, 887 (10th Cir. 1931). In *Tayrien*, the court summarized the distribution rights of headright holders thus: "[T]he tribal council executes a mineral lease, approved by the Secretary of the Interior, for a royalty determined by the president; . . . royalties therefrom are placed in the United States Treasury; out of them are paid certain fixed charges; the balance is divided, and a share credited to [each headright holder]." *Id.* at 886.

In *Tayrien*, the question was "whether the [bankruptcy] trustee may appropriate and sell, as an asset of the estate, the right of [the] bankrupt Osage Indian to receive such [headright] payments as may be passed to his credit from now until 1959, or until such date as Congress may

by future legislation fix for termination of the trust period." *Id.* It was stipulated "that there were no *quarterly annuity payments to the credit of* the bankrupt at the time of his adjudication, but that since the adjudication 'there have accumulated and will accrue in the future from said Osage headrights quarterly annuity payments.'" *Id.* (emphasis added).

In holding that the right to future quarterly distributions was not an asset of the bankruptcy estate, the court distinguished *Choteau v. Commissioner*, 38 F.2d 976 (1930), *aff'd* 283 U.S. 691 (1931), as having "dealt only with money actually paid to and in possession of the individual Indian," while "the effort here is to reach future income that may come to the bankrupt from tribal property in which he has no present interest." *Tayrien*, 51 F.2d at 892. Relying on an opinion of the Comptroller General, the court held that "the funds, *so long as they remain tribal funds and not segregated*, may not be paid to the receiver." *Id.* (emphasis added). Thus, *Tayrien* correctly equated the quarterly distribution date as the date on which a headright holder obtains a present right in a pro rata share of the tribal royalties.

Tayrien in turn relied on a variety of administrative opinions to the same effect. An Attorney General opinion from 1921 explained that "the mineral rights were the property of the tribe, subject to the control of the government," "that the members of the tribe had no vested interest in the royalties, and that 'Until they were placed to the credit of the individual Indian, they remained tribal funds.'" 51 F.2d at 891 (quoting 33 Ops. Atty. Gen., 60, 62).

This principle has been reaffirmed in the Osage Nation's ongoing litigation against the United States in the Court of Federal Claims. Earlier in the litigation, the United States challenged the Osage Nation's standing to sue for mismanagement of mineral-related assets, arguing that the money in the tribal trust account belongs to headright holders. Rejecting this contention, 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).

D. Plaintiffs' Case Citations Do Not Support their Argument that Headright Holders Have a Present Vested Interest in the Tribal Trust Account.

The Plaintiffs cite five cases in support of their assertion that "[c]ase law interpreting the Osage legislation confirms that the revenue from the mineral estate deposited into Treasury is beneficially owned by individual tribal members and their heirs and not the Osage tribe." Pls. Reply at 45. But, as shown below, none of the cases they quote held anything of the sort.

First, Plaintiffs rely on the estate-tax case *United States v. Mason*, 412 U.S. 391 (1973), *see* Pls. Reply at 45, but fail to note that the decedent in that case, Rose Mason, was "an Osage Indian who had not received a certificate of competency." 412 U.S. at 393. The United States thus held in trust *for her individually*, pursuant to the 1921 amendment, her unpaid mineral income distributions (*i.e.*, the amount of the distributions to the extent they exceeded $1000 per quarter). *See Mason v. United States*, 461 F.2d 1364, 1367 (Ct. Cl. 1972) (because Mason "never received a competency certificate," "the United States held in trust for her," among other things, "unpaid headrights payments (income from headrights)."). The only issue before the Court was the taxability of such restricted individual assets; there was no suggestion that Mason had any ownership in funds on deposit in the tribal trust account. Plaintiffs here quote some general dicta in the background section of *Mason* for the proposition that headright funds are *always* held in trust for individuals, even before distribution: "The minerals and income were to

be placed in trust for the individual tribal members, subject to periodic distribution from income, until 1984 [when the trust was previously scheduled to terminate], when legal title to the minerals together with the accumulated income would vest in the individual Indians." 412 U.S. at 393. The Court's reference to future vesting of "accumulated income" acknowledges that distributed funds were being accumulated in trust for an individual Indian without a certificate of competency. The statement should be read in conjunction with the nature of the property interest before the Court: headright funds that had been segregated and credited to Mason, not funds still in the tribal trust account. To the extent that the Court's dicta suggests that the mineral estate belongs to individuals, or that the mineral income is held for individuals before the distribution date, it is incorrect.

Second, in a similar manner, Plaintiffs cite general language from a background footnote in *Martin v. Amvest Osage, Inc.*, 2006 WL 1207709 (N.D. Okla. 2006), *see* Pls. Reply at 45, where the court stated in dicta that Interior and the Bureau of Indian Affairs "have a federal trust obligation to administer the Osage mineral estate for the benefit of headright holders." *Id.* at *2 n.4. This is dicta because *Amvest* involved neither the Tribe nor any headright owner; *Amvest* was a dispute between an Osage County surface landowner and a lessee, and the quoted statement was made merely as background. Moreover, the statement does not aid Plaintiffs' theory here that the Osage Tribe lacks ownership of mineral income. The sole support the court in *Amvest* cited for the quoted language is *Quarles v. United States ex rel. Bureau of Indian Affairs*, 372 F.3d 1169, 1172 (10th Cir. 2004). *Quarles* explains that under the 1906 Act, "[t]he Secretary of the Interior is directed to manage oil and gas extraction leases, with the royalties earned from the leases reserved *to the Osage Tribe*." *Id.* (emphasis added).

Third, Plaintiffs cite *Globe Indemnity Co. v. Bruce*, 81 F.2d 143, 150 (10th Cir. 1953), and in so doing mistakenly confuse Osage mineral income (held for the Tribe) with a distinct kind of funds held in trust for individuals under the 1906 Act. In 1906, "the United States held for the tribe a trust fund of $8,373,658.54 received under various treaties as compensation for relinquishing other lands." *McCurdy v. United States*, 246 U.S. 263, 265 (1918). The 1906 Act provided that this trust fund "was to be divided by placing to the credit of each member of the tribe his pro rata share which should thereafter be held for the benefit of himself and his heirs for the period of twenty-five years and then paid over to them respectively (sections 4 and 5)." *Id.* (footnote omitted). These shares have been referred to as "segregated shares of the Osage national fund." *See* Act of Apr. 18, 1912, Pub. L. No. 62-125, § 3, 37 Stat. 86; *see also* 25 C.F.R. § 117.1(g) ("*Segregated trust funds* means those moneys held in the United States Treasury at interest to the credit of an Indian which represent pro rata shares of the segregation of tribal trust funds and the proceeds of the partition of restricted lands.").

Plaintiffs erroneously rely on language in *Bruce* referring to these individual funds (which were part of a decedent's estate): "the United States *took the legal title to the funds and moneys in trust*, but [ ] the beneficial title to the funds and moneys vested in the individual members of the tribe." Pls. Reply at 45 (quoting 81 F.2d at 150). A close reading of *Bruce* leaves no doubt that the italicized language regarding "funds and moneys in trust" refers to segregated shares of the existing tribal funds that the United States took in trust in 1906, not to future headright revenues. *See also, e.g.*, 81 F.2d. at 147-48 ("The trust funds were segregated and credited to the individual members of the Osage Tribe in 1907."). Indeed, with respect to mineral income, *Bruce* explicitly recognizes that such funds do not accrue to a headright holder's credit until the quarterly distribution: the court held that the decedent's estate included "the

quarterly payments that accrued to the credit of the headright of Maude Bruce after her death." *Id.* at 146 (emphasis added); *see id.* at 152; *id.* at 154 ("We conclude the probate court had jurisdiction over the headright of Maude Bruce *and the quarterly payments accruing thereto after her death*, pending the administration and distribution of her estate.") (emphasis added).

Plaintiffs also quote *Bruce* to the effect that Section 6 of the 1906 Act "indicates that *a present equitable interest in the lands, moneys and mineral interests vested in the members of the tribe* and on the death of a member descends to his heirs." Pls. Reply at 45 (quoting 81 F.2d at 150) (emphasis in Pls. Reply). Again, "moneys" here is a reference to the segregated funds, and "mineral interests" is a reference to headrights. Headright holders indeed possess a present interest in their headrights, but not in the tribal trust account. As previously discussed, the headright itself entitles the holder to future quarterly distributions. In other words, the present interest in the headright entitles the holder to future distributions, but gives no interest in the funds on deposit in the tribal account. That is clear from *Bruce* itself, which distinguished, for example, between the decedent's headright (a present interest in future payments) and the accrued quarterly distributions made pursuant to the headright (a present interest in accrued funds). *See, e.g.*, 81 F.2d at 154.

Fourth, Plaintiffs argue that *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948), supports their argument that the mineral revenue is owned by individuals. Again, as with *Mason* and *Bruce*, Plaintiffs have overlooked the precise property interests at issue in the case, none of which were funds in the tribal account. According to the Court, the case involved (1) a fraction of a headright; (2) segregated, undisbursed moneys from headright distributions ("[s]urplus funds in the United States Treasury, representing accruals of income to the decedent from the headrights"); (3) securities purchased with such funds; (4) a segregated share of the proceeds of

tribal land sales; and (5) "[p]ersonal property purchased with "surplus funds." 334 U.S. at 718-19. After summarizing the 1906 Act, the Court held that "[a]pplication of the foregoing provision *to the estate in issue* [i.e. the decedent's estate consisting of the five kinds of property just noted] produces this picture: Legal title to the mineral interests [*i.e.* headright], the funds and the securities constituting the corpus of the trust estate is in the United States as trustee. . . . Beneficial title to these properties was vested in the decedent and is now held by his sole heir the appellant." *Id.* at 723. As in *Mason* and *Bruce*, there was no claim that the decedent's estate had any interest in tribal funds on deposit.

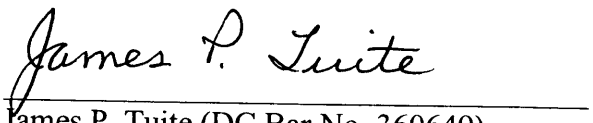
Fifth, Plaintiffs rely on *Hampton v. Commissioner*, 31 B.T.A. 853, 856 (1934), in their efforts to demonstrate that the 1906 Act gives headright owners a present interest in the tribal trust fund. *See* Pls. Reply at 45. But *Hampton* did not actually decide that question. Rather, the Tax Court merely drew unavoidable inferences from the parties' stipulations. The parties "stipulated that the [headright distribution] income received by the petitioner [a headright holder] was 'payment of oil and gas royalties and bonus,' and that she is entitled to a deduction for depletion, . . . based upon the ownership of an interest in the property, that is, the mineral rights, which interest is diminished or depleted by the production of the oil and gas." 31 B.T.A. at 856. Reasoning from this stipulation, the court concluded that the parties had also necessarily stipulated that the headright interest at issue was an interest in minerals and not an income interest: "[I]f petitioner received only income from a trust fund, in the corpus of which she owned no interest, she would not be entitled to the [stipulated] deduction for depletion." *Id.* The parties' stipulation in *Hampton* obviously is of no effect here; this Court must look to the statutes themselves, which are to the contrary.

In sum, the Osage Nation is the owner of the royalties on deposit in the Tribe's own trust account, and the Plaintiffs' incorrect argument must be rejected.

CONCLUSION

To the extent that the Court addresses ownership of the Osage mineral estate or of the income from that estate, the Court should hold that the Osage Nation is the sole beneficial owner of the mineral estate, and that the Osage Nation beneficially owns all mineral income before the quarterly pro rata segregation and distribution to headright holders. Further, the Court should enforce the United States' fiduciary duty to ensure that headright distributions are made properly and are actually received by headright holders.

Dated: 29 May 2008



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