

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE OSAGE TRIBE OF)
INDIANS OF OKLAHOMA,)
))
Plaintiff,)
))
v.)
))
THE UNITED STATES OF AMERICA,)
))
Defendant.)
_____)

No. 99-550 L (into which has
been consolidated No. 00-169 L)
Judge Emily C. Hewitt

Filed Electronically
December 2, 2008

**PLAINTIFF OSAGE NATION’S MOTION FOR SUMMARY JUDGMENT ON
ALL OIL-ROYALTY UNDERCOLLECTION CLAIMS FOR JULY 1974 TO
DECEMBER 1980 AND JANUARY 1988 TO DECEMBER 2000
AND ALL DEPOSIT-LAG, EXCESSIVE-CASH-BALANCE, AND INVESTMENT-
YIELD CLAIMS FOR ACCOUNTS 7386 AND 7886
FOR UNITED STATES FISCAL YEARS 1973 TO 1992**

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INTRODUCTION

This motion presents for summary judgment, pursuant to RCFC 56, all oil-royalty undercollection claims for production in the periods July 1974 to December 1980 and January 1988 to December 2000,¹ and all deposit-lag, excessive-cash-balance, and investment-yield claims for accounts 7386 and 7886 for United States fiscal years 1973 to 1992. This motion relies on the Court's Tranche One rulings and applies those rulings to additional data. *See Osage Tribe of Indians v. United States*, 68 Fed. Cl. 322 (2005); *Osage Tribe of Indians v. United States*, 72 Fed. Cl. 629 (2006); *Osage Tribe of Indians v. United States*, 75 Fed. Cl. 462 (2007).

Damages for the oil-royalty undercollection claims have been calculated in reliance upon the expert opinion and analysis of Daniel T. Reineke, P.E., the Osage Nation's testifying expert on similar claims in Tranche One. *See* Tranche One Trial Tr. at 58:25-59:2 (Mar. 30, 2006) (the Court, qualifying Mr. Reineke "for purposes of this case as an expert on oil royalty calculation and verification of royalty due"). Mr. Reineke's declaration, expert report, and supporting data are attached as Exhibit 2 to this motion. Mr. Reineke in turn has relied upon data from sources discussed in and attached to his report, primarily a "Joint Data Base" produced by the United

¹ The Court's orders dated May 19, 2008, and August 21, 2008, both provide that for oil-royalty undercollection claims, "[t]he years 1981-1987 will be included in this motion only to the extent that the production of documents by the United States permits. The United States is directed to produce documents on a rolling basis to the greatest practicable extent." It is the Osage Nation's understanding that the United States will soon provide a complete electronic compilation of Osage oil-royalty data for those years, similar to the "Joint Data Base" compiled cooperatively by the United States' and the Osage Nation's respective oil-royalty experts for other years. Assuming that this data is provided soon, it would be the Osage Nation's preference, rather than have the Court adjudicate serial motions, to file an amended motion once the United States provides the additional information, so that the entire 1974 to 2000 period can be adjudicated as a piece according to the schedule already adopted by the Court. In the absence of that data, the motion filed today does not formally present the January 1981 to December 1987 period for judgment; nevertheless, Mr. Dan Reineke, the Osage Nation's oil royalty expert, has provided an oil-royalty underpayment analysis of that period based on currently available data.

States' oil-royalty expert, Mr. Ronnie Martin, in cooperation with Mr. Reineke. The "Joint Data Base" is Exhibit B to Mr. Reineke's report.

Also as in Tranche One, damages for deposit-lag, excessive-cash-balance, and investment-yield claims have been calculated in reliance upon the "the Arthur Andersen Trust Fund Reconciliation Project report prepared for the Osage Tribe," 72 Fed. Cl. at 669 (Arthur Andersen report), as well as historical interest rates from the Federal Reserve's website.

As discussed below, damages due to the Osage Nation for these claims, as of October 31, 2008, total \$254,731,638.²

BACKGROUND

This motion presents only a portion of the claims brought by the Osage Nation in these consolidated cases. The complaints allege breaches of trust over the entire span of the United States' trust relationship with the Osage Nation, which dates from the 1800s to the present. "Defendant United States acts as trustee for certain tribal monies, lands, and other assets belonging to the Osage Tribe, including the Osage surface estate and the Osage mineral estate." No. 99-550, Third Amended Complaint ¶ 3. Osage property that has been under "[t]he United States' involuntary, pervasive management and control . . . includes, but is not limited to[,] funds originally held in trust pursuant to treaty, funds appropriated or allotted pursuant to legislation or statute, lease bonus and rentals, royalties, and income from investments of funds since the early 1800s." No. 00-169, Complaint ¶ 12. The Osage Nation seeks damages in this case not only for uncollected oil royalties, but also for "the value of additional assets of the Osage which have

² Additional damages have accrued since that calculation date and will continue to accrue until a judgment is paid.

Mr. Reineke's current estimate of oil-royalty undercollection damages for the 1981 to 1987 period is \$65,895,783, which would raise total damages to \$320,627,421.

been used, wasted, mismanaged, as may be proven at trial, from the inception of the trust, to date.” No. 00-169, Complaint at 21. This amount includes “investment interest due the Osage trust account, as mandated by federal law, which money was earned or was to be earned by the proper accounting and timely deposit of monies and assets belonging to the Osage.” *Id.*

The broad temporal and substantive scope of these cases led the parties and the Court in 2005 to define a sample of claims as “Tranche One,” to be tried through judgment as a precedent upon which to base further proceedings in the case, and as the vehicle for obtaining appellate rulings on some of the major issues in the case through Rule 54(b). During the Tranche One proceedings, the Court decided a sampling of claims for breaches of trust duties arising from the 1906 Act, various investment statutes, and a number of agency regulations. The Tranche One claims focused on two broad duties of the trustee: the duty to collect royalties and the duty to invest funds prudently. The specific claims presented were derived from “four oil and gas leases for the following five months: January 1976, May 1979, November 1980, February 1986, and July 1989.” 72 Fed. Cl. at 631 (footnote omitted).

In its Tranche One decisions, the Court rejected some of the Osage Nation’s claims of breach of trust and upheld others. The Court ultimately entered a judgment in favor of the Osage Nation for \$1,876,878.30 on the Tranche One claims. Judgment dated Mar. 16, 2007 (Dkt. 270). These damages were based on five distinct breaches of trust found by the Court in its liability opinion dated September 21, 2006. Although the Tranche One judgment was initially appealed by the United States, the United States successfully moved the Federal Circuit to dismiss the appeal for lack of jurisdiction.

The claims presented for judgment in this motion are founded on the Court's rulings in Tranche One. This motion applies each of the five holdings in the context of a temporally broader set of data.

The first two kinds of breach relate to the duty to collect oil royalties in accordance with the regulations incorporated into all Osage oil leases.³ The regulations specify that the royalties due "may be expressed by the formula: Royalty Due = Royalty Rate x Volume x Royalty Value." 72 Fed. Cl. at 636. The royalty rate is the fraction of oil production due as royalty; the volume is the gross number of barrels produced; and the royalty value is the dollar amount, computed according to regulation, at which a royalty barrel is valued. In Tranche One the specific regulation at issue was the 1974 version of 25 C.F.R. § 183.11(a)(2), which requires the United States to ensure that royalty value is "the actual selling price [of the royalty barrels], or the highest posted or offered price by a major purchaser in the Kansas-Oklahoma area whichever is higher on the day of sale or removal." 25 C.F.R. § 183.11(a)(2) (1974), *quoted in* 72 Fed. Cl. at 638 (emphasis in decision). With respect to this duty, "[t]he court held that the United States breached its fiduciary duties because it failed to collect royalties based on the highest offered prices," 75 Fed. Cl. at 466 (citing 72 Fed. Cl. at 671), the "offered price" breach. The Court also held that, during the applicability of price controls for crude oil, "[t]he Osage Agency incorrectly applied the royalty value formula under 25 C.F.R. § 226.11 to the maximum legal price for the first three Tranche One months, rather than to the 'actual selling price, or the highest posted or offered price by a major purchaser in the Kansas-Oklahoma area,'" 75 Fed. Cl. at 466 (citing 72 Fed. Cl. at 661), the "regulated price" breach. The Court awarded damages for both kinds of

³ None of the Tranche One leases had any gas production, so the Court was not presented with and did not rule on any claims relating to gas royalties.

breach in an amount equal to “the difference between the minimum royalty due under the regulations and the reported royalty paid.” 75 Fed. Cl. at 469.

The other three kinds of breach relate to the United States’ duty to invest prudently. Based on the applicable statutes, regulations, and agency policies, the Court held the United States liable for failing to deposit funds in an interest-bearing account within one business day of receipt (deposit lag); for keeping on hand more uninvested cash than the \$25,000 maximum its own policies allowed (underinvestment); and for failing to achieve the investment returns that its own standard of prudence and statutory mandates required (investment underperformance). The Court awarded damages for deposit lag in the amount of additional interest that would have been earned if the United States had deposited all royalties within one business day of receipt. Damages for underinvestment and for investment underperformance were calculated together in a single analysis that measured the deficit between actual investment earnings and “the expected return of a combination of 3-month CD rates (80%) and 3-month T-bill rates (20%) on average daily balances in excess of \$25,000.” 72 Fed. Cl. at 671 (quotation and citation omitted).

Because the offered-price and regulated-price claims in Tranche One were derived from the 1974 oil royalty regulation just quoted, Part I of this motion presents other claims for oil production during the period in which that regulation was in effect and for which the Joint Data Base currently includes all the necessary data (July 1974 to January 1981 and January 1988 to August 1990). It also presents such claims for the subsequent period, September 1990 through December 2000. Although the regulation was changed in 1990 and again in 1994, those changed regulations can be construed as a matter of law here. The 1990 and 1994 regulations, though not applied directly in Tranche One, were discussed at length in the Court’s Tranche One liability

decision as support for the Court's construction of the 1974 regulation. *See* 72 Fed. Cl. at 639-41.

The deposit-lag, underinvestment, and investment underperformance claims in Tranche One were derived from data in the Arthur Andersen report and were based on regulatory and statutory standards in force during the 20-year period covered by the report. Accordingly, Part II below presents all such claims over that entire span (fiscal 1973 to fiscal 1992).

STANDARD OF REVIEW

Rule 56(a) provides that “[a] party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.” Under Rule 56(c), the Court should grant the motion “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” The Court “should, to the extent practicable, determine what material facts are not genuinely at issue,” and “issue an order specifying what facts—including items of damages or other relief—are not genuinely at issue.”

As shown below, in light of the Court's Tranche One rulings, there is no “genuine issue” with respect to the United States' liability for the claims presented for judgment in this motion and the damages flowing therefrom. The Osage Nation therefore asks the Court to enter judgment awarding damages for the breaches of trust detailed in this motion and the accompanying exhibits.

ARGUMENT

I. THE UNITED STATES IS LIABLE FOR \$228 MILLION IN DAMAGES FOR BREACHES OF ITS TRUST DUTY TO COLLECT ROYALTIES FOR OSAGE OIL PRODUCTION FROM JULY 1974 TO DECEMBER 1980 AND FROM JANUARY 1988 TO DECEMBER 2000.

The Court's Tranche One decisions establish that the Osage Agency systematically collected less than the full amount of royalties due under the 1974 regulations during the Tranche One months, due to that agency's failure to enforce a correct interpretation of those regulations. There is no genuine issue that this systematic undercollection persisted during the entire period the 1974 regulations were applicable (through August 13, 1990). Further, data that was compiled jointly by the Osage Nation and the United States shows that in some months between August 14, 1990 and December 2000, the United States failed to collect the full royalty due under modified, narrower versions of the 1974 regulations.

Moreover, the amount of damages for such undercollection is not reasonably subject to dispute, because, as discussed below and as shown in Mr. Reineke's expert report, a straightforward application of this Court's rulings to available data yields damages totaling \$228,159,540 through October 2008. This calculation meets the standard articulated by the Court that "[t]he Osage Tribe is entitled to damages reasonably estimated based on existing information."⁴ 72 Fed. Cl. at 670.

⁴ As a point of clarification, this motion does not include any claims regarding the duty to collect late-payment fees and penalties, oil leasing fees and bonuses, or any other non-royalty payments or fees mandated by applicable laws, regulations, and lease provisions governing oil production from the Osage mineral estate. Rather, in accordance with the Court's orders granting the Osage Nation's request regarding the scope of this motion, the only duty-to-collect claims in this motion are "oil *royalty* undercollection" claims. Other claims are reserved for further proceedings.

A. The United States Owed the Osage Nation a Duty to Collect the Full Royalties Due Under the Applicable Regulations

The Court has already ruled that the United States had a duty as trustee to collect the correct royalty due under the leases and regulations on a monthly basis. “Defendant’s duty necessarily includes verification that the royalty paid is the amount contractually owed under the terms of the lease.” 68 Fed Cl. at 328. “[T]he defendant, as trustee, has a specific duty to verify that ‘all moneys due’ under the terms of the mineral leases were in fact paid to the government and deposited to the account of the trust beneficiary.” *Id.* “The statutes and regulations at issue here clearly establish a fiduciary duty to verify that lessees fulfill their contractual obligations to the Tribe by verifying the accuracy of payments made.” *Id.* at 333.

More specifically, the United States was required at all times to calculate and collect oil royalties in accordance with the royalty value regulation in force at the time of production. All oil leases on the Osage reservation are “subject to the rules and regulations prescribed by the Secretary of the Interior” 68 Fed. Cl. at 331 (citing section 3 of the 1906 Act). The Court has noted that among the “provisions that have remained consistent throughout the history of [the Osage oil-royalty] regulations” is the requirement that all leases “shall be subject to the current regulations of the Secretary, all of which are made a part of such leases” (except that subsequent regulations may not unilaterally change “the term of [an existing] lease, rate of royalty, rental, or acreage”). *Id.* at 332.

Determining whether the United States has complied with this duty involves comparing the royalties the United States actually collected with the royalties due under the regulations, consistent with the construction of those regulations in the Court’s Tranche One decisions.

B. Mr. Reineke Has Calculated the Difference Between the Royalties Collected by the United States and the Royalties Due, Using Data Gathered Jointly by the United States and the Osage Nation.

This motion includes periods under the 1974 regulation, the 1990 regulation, and the 1994 regulation. As the Court has noted, in each of these regulatory periods, the same three pieces of data are necessary to calculate the correct royalty due for a given lease in a given month. These three pieces “may be expressed by the formula: Royalty Due = Royalty Rate x Volume x Royalty Value.” 72 Fed. Cl. at 636. If the royalty due, thus calculated, is higher than the amount collected by the United States for the month and lease in question, the United States is liable in damages for the difference. The only variation in the regulation over the three periods in question was in how to calculate royalty value. Whereas the 1974 regulation required use of the highest posted or offered price by a major purchaser in Kansas or Oklahoma, the 1990 regulation narrowed the relevant geographic area to Osage County, and the 1994 regulation eliminated any reference to offered prices.

To ascertain royalty collected, royalty rate, and volume for all periods at issue, Mr. Reineke relied on the “Joint Data Base” developed in cooperation with Ronnie Martin, the United States’ oil royalty expert. Royalty rates must be specified in the leases and any amendments thereto, while volumes and royalties are evidenced by the United States’ records of receipts, such as purchasers’ reports, lessees’ reports, deposit tickets, or production reports or summaries. As described by Mr. Reineke in his declaration and report, Mr. Martin used such records to compile data for the 1974 to 2000 period for these variables. As Mr. Reineke explains, he and Mr. Martin gathered this data from historical records. This data consists of facts as to which there is no genuine issue.

Royalty value, by contrast, must be calculated according to the formula specified by regulation, using available data. Mr. Reineke has explained and attached his calculations of

royalty value for oil produced during the periods at issue here. Most of the facts relied upon by Mr. Reineke in calculating royalty value come from the Joint Data Base, while some offered prices for 1981 to 1990 were obtained through subpoenas to Koch Industries, Inc. The accuracy of these records is not genuinely at issue. The Osage Nation is entitled to judgment as a matter of law in the amounts calculated by Mr. Reineke, as detailed below.

1. Royalty Value Under the 1974 Regulations

The 1974 regulations, which were applied in Tranche One, specify that royalty value

shall be based on the actual selling price, or the highest posted or offered price by a major purchaser in the Kansas-Oklahoma area whichever is higher on the day of sale or removal. Where different prices are paid simultaneously for oil from a lease and the highest such price exceeds the higher of the aforementioned prices, then that price shall be the basis of royalty on all oil from said lease.

25 C.F.R § 183.11(a)(2) (1974), *quoted in* 72 Fed. Cl. at 638 (emphasis in decision). By its terms, this requires that the royalty-value calculation take into account all major purchasers' posted prices and offered prices in Kansas and Oklahoma on the day in question, as well as the actual per-barrel price of the royalty oil.

As was seen in Tranche One, the United States did not contemporaneously collect a full set of the posted and offered prices implicated by the regulation. *See, e.g.,* 75 Fed. Cl. at 471 (“[D]efendant is not allowed to benefit . . . from the lack of accurate accounting information that it failed [to] collect.”). Here, Mr. Reineke dealt with this situation in two different ways, depending on the time period at issue.

a. Royalty Value During Price Controls (July 1974 to December 1980)

To calculate royalty values in the period when price controls were in effect, *i.e.,* July 1974 to December 1980, Mr. Reineke computed royalty value by taking the highest of (1) “the highest posted . . . price by a major purchaser in the Kansas-Oklahoma area on the date of sale or

removal”; and (2) where available, the “highest . . . offered price by a major purchaser in the Kansas-Oklahoma area on the date of sale or removal.” Mr. Reineke used a list of major purchasers from the Joint Data Base attached as Exhibit B to his report. Once the highest from these eligible 40-degree prices was determined, Mr. Reineke’s final step in calculating royalty value was to adjust this price to reflect the gravity of the royalty oil.

Although the available production data from the Osage Agency for this period contains only the month, not the day, of sale or removal, this did not result in any inaccuracy in Mr. Reineke’s analysis, because it was industry practice in the 1970s to maintain posted and offered prices constant throughout each calendar month.

An example of a royalty-value calculation during this period is provided by Mr. Reineke at page 10 of his report.

b. Royalty Value After Price Controls (January 1981 to August 13, 1990)

To calculate royalties for the period under the 1974 regulations when price controls were no longer in effect, *i.e.*, January 1981 to August 13, 1990, Mr. Reineke performed calculations similar to those for the prior period, but looked at a broader set of offered-price data obtained from Koch Industries, Inc. by subpoena. Also, for the portion of this period included in this motion (January 1988 to August 13, 1990), production data from the Osage Agency included date of sale information. (As noted above, the Osage Nation hopes to receive electronic information for 1981 to 1987 from the United States imminently, and expects that this data will include the date of sale.)

Following the language of the regulation as applied by this Court in Tranche One, Mr. Reineke compared the “actual selling price” of each sale of royalty oil with three “posted or offered price[s]” eligible under the royalty-value regulation: (1) the highest posted price by any

major purchaser in Kansas or Oklahoma, from the Joint Data Base; (2) the highest price paid in Osage County by any major purchaser, from the Joint Data Base; and (3) the highest offered price by Koch Industries, Inc. (which was always a major purchaser during this period) in Kansas or Oklahoma.

Mr. Reineke adjusted each price to a 40-degree price, so that all comparisons were made among industry-standard of 40-degrees. From among these 40-degree prices, he chose the highest, and then gravity-adjusted that price to the gravity of the royalty oil at issue, using the oil purchaser's gravity adjustment scale. An example of this calculation is provided by Mr. Reineke at page 12 of his report. As discussed by Mr. Reineke in his report, this is the same basic gravity-adjustment method used in computing the Joint Submission on Damages dated February 15, 2007 (Dkt. No. 251) upon which the Court relied in entering judgment in Tranche One.

2. Royalty Value Under the 1990 Regulations

In Tranche One, the Court summarized the difference between the 1974 regulations and the 1990 regulations as follows:

The 1990 Regulations reduced the geographic reference area from “the Kansas-Oklahoma area” to Osage County Oklahoma. See 25 C.F.R. §§ 226.1(h), 226.11(a)(2) (1991). The 1990 Regulations also changed somewhat the wording of the formula for royalty value but retained the three elements in the 1974 Regulations for establishing royalty value: selling price, offered price, and posted price. The new regulations stated, in part, that

[u]nless the Osage Tribal Council, with approval of the Secretary, shall elect to take the royalty in kind, payment is owing at the time of sale or removal of the oil, except where payments are made on division orders, and settlement shall be based on the highest of the *bona fide selling price, posted or offered price by a major purchaser (as defined in § 226.1(h)) in Osage County, Oklahoma, who purchases production from Osage oil leases.*

25 C.F.R. § 226.11(a)(2) (emphasis added). Under the new definition, “[m]ajor purchaser means any one of the minimum number of purchasers taking 95% of the oil in Osage County, Oklahoma.” 25 C.F.R. § 226.1(h). The new definition of major purchaser also included a provision that removed crude oil transfers or

sales between affiliates and other forms of related businesses from the calculation of who was considered a major purchaser. *Id.* (“Any oil purchased by a purchaser from itself, its subsidiaries, partnerships, associations, or other corporations in which it has a financial or management interest shall be excluded from the determination of a major purchaser.”).

72 Fed. Cl. At 639-40.

As with previous periods, the major purchasers were identified from the list from the Joint Data Base. To calculate royalty value for the period when this regulatory language was in effect, Mr. Reineke used the same basic process as for previous periods, but compared the following values: the actual selling price, the highest posted price in Osage County by a major purchaser, and the highest price that was offered and paid in Osage County by a major purchaser, adjusted for gravity as above. Although the regulation calls for all “offered prices” by major purchasers, the only such prices obtainable were from actual sales where the offered prices were accepted.

An example of this calculation is provided by Mr. Reineke at pages 12-13 of his report.

3. Royalty Value Under the 1994 Regulations

In Tranche One, the Court summarized the further evolution of the Osage regulations as follows:

The Bureau of Indian Affairs proposed a further regulatory change in November 1993 that would remove the “offered price” term from the calculation of royalty value. See 58 Fed.Reg. 59,142 (Nov. 5, 1993) (“The purpose of this proposed rule is to amend 25 C.F.R. [§] 226.11(a)(2) to eliminate premium, bonus, or other like payments from consideration in the calculation of the royalty price or crude oil in Osage County.”). The proposed § 226.11(a)(2), as amended, provided that

(2) Unless the Osage Tribal Council, with approval of the Secretary, shall elect to take the royalty in kind, payment is owing at the time of sale or removal of the oil, except where payments are made on division orders, and settlement shall be based on the actual selling price, but at not less than the highest posted price by a major purchaser (as defined in [25 C.F.R.] § 226.1(h)) in Osage

County, Oklahoma, who purchases production from Osage oil leases.

58 Fed. Reg. 59,142. . . . The final 1993 Regulations were published on April 28, 1994 in the form proposed. See 59 Fed. Reg. 22,104 (Apr. 28, 1994) (amending 25 C.F.R. § 226.11(a)(2)).

72 Fed. Cl. at 641.

In applying this regulation, Mr. Reineke again used the major purchasers identified in the Joint Data Base. To calculate royalty value for the period when this regulatory language was in effect, Mr. Reineke used the same basic process as for previous periods, but compared only the actual selling price and the highest posted price actually paid in Osage County by a major purchaser, adjusted for gravity. An example of this calculation is provided by Mr. Reineke at page 13-14 of his report.

C. Summary of Oil Royalty Undercollection Damages Through October 2008

Using the methods and data just described, Mr. Reineke initially calculated that the United States failed to collect the full amount of royalties due under the applicable regulations from July 1974 to December 2000 in the amount of \$37,122,701.10 (Exhibit 2.J, referenced in Mr. Reineke's report), of which \$27,538,737.51 occurred during the periods from July 1974 to December 1980 and from January 1988 to December 2000 (Exhibit 7 to the motion for summary judgment). Then, after his charts had already been finalized, he calculated an additional amount due of \$332,215.18 (Exhibit 2.L, referenced in Mr. Reineke's report) during the July 1974 to December 1980 interval, to take into account a bonus paid by Sun (*see* Exhibit 2.K, referenced in Mr. Reineke's report). If the royalty amounts of \$27,538,737.51 and \$332,215.18 had been collected when due and invested continuously in 7-year Treasury bills, the trust would have had, in total, \$228,159,540.18 as of October 31, 2008 (Exhibit 7 to the motion for summary judgment). This damages amount includes the original undercollection and the lost investment

return on the trust moneys not collected, calculated in accordance with the method approved in Court's February 15, 2007, opinion. That decision accepted the historical rates for 7-year Treasury bills (rolled over every seven years after the date of the original damages) as a reasonable approximation of the return the United States was required as trustee to earn on "moneys due" that it failed to earn or collect. (The calculation of multipliers reflecting 7-year Treasury bill returns through October 31, 2008, is set out in Exhibit 6.)

Based on the Court's Tranche One holdings, the analysis in this brief, and the facts and opinions in Mr. Reineke's affidavit and report, the Osage Nation requests that the Court enter judgment for the Osage Nation for \$228,159,540.18 in damages as of October 31, 2008, caused by the United States' failure to collect all oil royalties due from July 1974 to November 1980 and from January 1988 to December 2000.

II. FOR FISCAL YEARS 1973 TO 1992, THE UNITED STATES IS LIABLE FOR \$854,630.95 IN DAMAGES CAUSED BY ITS FAILURE TO MAKE DEPOSITS TO ACCOUNT 7386 PROMPTLY AND FOR \$25,717,467.30 IN DAMAGES CAUSED BY ITS FAILURE TO INVEST THE FUNDS IN ACCOUNTS 7386 AND 7886 PRUDENTLY AND IN ACCORDANCE WITH LAW.

As trustee of the Osage mineral estate, the United States was required to invest royalties prudently and to comply with all applicable legal requirements, "including the federal statute governing the investment of Indian trust funds, 25 U.S.C. §§ 161a, 161b, 162a, applicable regulations, and applicable case law and common law." 72 Fed. Cl. at 662. Whenever the United States' "failure to act as a prudent investor or a failure to comply with applicable legal requirements . . . results in a loss of investment income to the Osage Tribe," the United States is liable in damages for the breach. *Id.*

The United States has never provided the Osage Nation with an accounting of trust revenues. In the absence of such an accounting, the Osage Nation relies here, as it did in Tranche One, on "data derived from the Arthur Andersen Trust Fund Reconciliation Project

report prepared for the Osage Tribe (Arthur Andersen report),” 72 Fed. Cl. at 669 (referring to PX 476), as “a ‘reasonable estimate’ of the data the Osage Tribe would have obtained had data been available from BIA records.” 72 Fed. Cl. at 670. Congress required BIA to conduct that project in an effort to correct longstanding problems in accounting for trust funds. PX476-0003. The project began in 1991 when BIA entered into a contract with Arthur Andersen. Tr. 376:24-388:5 (Parris); Tr. 1899:23-1900:9 (Chavarria). It lasted over five years and cost the United States over \$21 million. Tr. 386:7-12 (Parris); PX513-0003.

The analysis that follows applies the Court’s Tranche One holdings to the entire period covered by the Andersen report, fiscal 1973 to fiscal 1992, and to the entire 7386 account. This analysis shows that the United States committed similar breaches in other months and years, causing damages through October 2008 of \$854,631 for deposit lag and \$25,717,467 for underinvestment and investment underperformance.

A. The United States Has Caused Damages of \$854,631 by Failing to Make Deposits to Account 7386 Within One Business Day During Fiscal Years 1973 to 1992.

In Tranche One, “[t]he court held that defendant is liable for investment income lost as a result of its failure to meet its own policy objective of depositing royalty payments within 24 hours or no later than the next business day following receipt of payment.” 75 Fed. Cl. at 466 (citing 72 Fed. Cl. at 655). This legal standard is equally applicable to the entire period covered by the Arthur Andersen report. The policy objective that established this standard, 42 BIAM Supplement No. 3, Release 3, was issued on June 5, 1972, *see* JX 020-0001, and the Arthur Andersen report begins with fiscal 1973 on July 1, 1972. Thus, the United States is liable for any failure during fiscal 1973 to fiscal 1992 to “deposit[] royalty payments within 24 hours or no later than the next business day following receipt of payment.” 75 Fed. Cl. at 466.

The United States has never provided the Osage Nation with complete records showing when each royalty payment was received and deposited in fiscal 1973 to fiscal 1992, and it is doubtful whether such records still exist. In Tranche One, the Osage Nation relied on the summary page for each fiscal year in the Andersen Report statements of account, and the “summary of deposit lag time results” at Attachment E-2 of the Andersen report, *see* PX 476-0058, which shows that some checks were days, weeks, or even over a month late. For this motion, the Osage Nation has used the electronic database underlying the Andersen report. The original version of this database is attached to this motion as Exhibit 4.B. A modified version of this database representing the Osage Nation’s analysis of deposit lag on a transaction-by-transaction basis is attached as Exhibit 14.

As an initial step, the Osage Nation filtered this database to retain only the deposits that were not Electronic Funds Transfers. The parties agreed in Tranche One that EFTs were denominated by location codes other than “G” in the transaction description field, so the Osage Nation eliminated all such deposits from consideration here. *Cf.* Tr. at 1838:9-1839:23 (Chavarria). Most of these deposits have entries in the columns for the estimated payment receipt date (denoted “trCash_Rec”) and the estimated deposit date (denoted “trOther_Id”).⁵ There is no material dispute at this stage that these values are reasonable estimates of, respectively, the dates that the indicated payments were first received by the United States, and the dates those payments were deposited. *Cf., e.g.,* Tr. at 1836-1837 (Chavarria) (discussing his reliance on the dates “that Andersen used in their analysis, . . . from my experience in having done that work.”). Using these dates, a rough number of lag days can be calculated for each

⁵ The meaning of the column headings is explained in a chart accompanying the database; that chart is attached here as Exhibit 4.C.

deposit.⁶ A simple subtraction of one number from the other yields the number in the column labeled “RAW LAG.” In instances where the raw lag would otherwise be negative or there is a date missing, the raw lag is set to zero.

This raw lag number must then be adjusted to conform to the Court’s rulings in Tranche One. First, one day must be subtracted from every raw lag number to allow for the one business day permissible under the Court’s ruling. The result of this calculation is in the column “Raw minus 1.” (Negative values are changed to zero.) Second, every deposit before January 1990 is given a minimum of 1.4 lag days. This result is in the column “ADJ LAG.” This 1.4 minimum lag implements the Court’s ruling in Tranche One regarding mailing times from Pawhuska to Muskogee. In Tranche One, the parties stipulated and the Court found that, before a Pawhuska depository was established in January 1990, “all checks deposited with the Osage Agency were sent by certified U.S. mail to the BIA Area Office in Muskogee Oklahoma for deposit.” 72 Fed. Cl. 662. To calculate damages for this breach, the Court accepted “plaintiff’s estimate of ‘one business-day delay for each check mailed’ (resulting in an average lag of 1.4 days to account for weekends).”

The amount of each deposit is multiplied by the number of adjusted lag days and by the average daily expected rate for the fiscal year in which the transaction occurred, to obtain an

⁶ A few of these dates in the database were obviously entered in error; typically the error is in a single digit, and is obvious from either an unusually long lag or a negative number of lag days. A correct date can usually be determined by examining the Bates-numbered documents referenced in the column “trBates_No.” The Osage Nation has corrected these apparent data-entry errors, denoting each changed entry with yellow highlighting. Further, where a date of receipt was missing in the database and could be determined from the Bates-numbered documents, the date was added (also denoted with a yellow highlight).

Moreover, some of the negative “deposit” entries appear to be offsetting accounting entries for a positive entry in the same amount. Where those were found, it was assumed that neither entry should affect deposit-lag damages, and they were deleted.

initial damages figure.⁷ (The average annual and daily expected rates are calculated in accordance with the 80/20 standard discussed in the section below on underinvestment and investment underperformance, and as shown in Exhibits 11 and 12.) These damages are then totaled by month, using the month of deposit. As with other amounts that the United States failed to collect or earn in past periods, the moneys lost due to deposit lag are trust funds under the 1906 Act. The United States had a duty to invest these funds until they were disbursed. Because the United States neither earned the interest nor earned an investment return on the interest, the United States is liable for both, as in Tranche One. This calculation is shown in Exhibit 13.

B. The United States' Underinvestment and Investment Underperformance for Accounts 7386 and 7886—Failure to Earn a Prudent Return on All Funds in Excess of \$25,000—Has Caused \$25,717,467.30 in Damages

In Tranche One, the Court held that the “United States is liable for any failure to achieve the expected return of a combination of 3-month CD rates (80%) and 3-month T-bill rates (20%) on average daily balances in excess of \$25,000.” *Id.* at 671 (quotation and citation omitted). This standard applies throughout the period covered by the Andersen report. “The requirement to invest Indian trust funds in the highest yielding investments available is a legal requirement mandated by the applicable statutes—here, 25 U.S.C. §§ 161a and 162a—and not solely a prudential one.” *Id.* Those statutes were in force throughout the period in the Andersen report. In light of these statutes, “the trustee has the burden of proof to justify less than a maximum return.” *Id.*

⁷ Even transactions with no receipt date or deposit date specified in the database were assigned to a specific fiscal year in the database, and where necessary, that fiscal year field was used to assign the appropriate expected rate to transactions.

With respect to the period containing the years with Tranche One months (1976 to 1989), “BIA policy, as presented by defendant at trial, was to invest cash surpluses in excess of \$25,000 in CDs or in U.S. T-bills.” 72 Fed. Cl. at 667 (citing testimony by the United States’ investment expert, Mr. Lundelius). Also, to the extent liquidity needs exceeded the \$25,000 threshold, such needs could be met through the 20% of funds held in Treasury bills under the United States’ own prudent-investor standard: “Defendant’s expert . . . found the expected rate of 80% CDs and 20% T-bills . . . was the most realistic measure under the conditions presented by the Osage Tribe’s particular investment and disbursement needs.”). 72 Fed. Cl. at 669. In sum, there is no genuine issue that these standards could have been met in the entire Andersen period, United States fiscal years 1973 to 1992. *Cf.* 72 Fed. Cl. at 669 n.28 (agreeing with Plaintiff’s argument that ““An expected rate consisting of CDs and T-bills is a *very* low threshold of prudence” and “[f]ailure to achieve such a rate . . . is especially probative in this case given that the prudent investments were specified by statute and were risk-free.”).

To evaluate whether these standards were met in Tranche One, the Osage Nation presented an analysis of “overall investment results” for the two Treasury accounts associated with oil royalties, based on data from the Arthur Andersen report. 72 Fed. Cl. at 670. To calculate results for a Tranche One month, the Osage Nation first calculated results for the year in which that month occurs, because the data in the Andersen Report is organized on a fiscal-year basis. The Court accepted this analysis and used figures derived from these annual totals to award damages corresponding to the Tranche One leases and months. Thus, for example, “the court directed that damage may be calculated based on the assumption that ‘for each of the Tranche One months, the average daily cash balance was the same as the average daily cash

balance for the year (as nearly as such amount may be determined) in which that Tranche One month occurs.” 75 Fed. Cl. at 466 (quoting 72 Fed Cl. at 671).

Here, this same method for fiscal-year calculations is used. The statements of account for all fiscal years form the basis for this calculation and are included as Exhibit 4.A.

1. Process Overview

As in Tranche One, the basic process used to compute combined annual damages for underinvestment and investment underperformance has three parts:

- a. Actual Credits: calculate the estimated amount actually credited to the accounts in each fiscal year.
- b. Expected Earnings: calculate the amount that should have been earned for each fiscal year.
- c. Difference: calculate the difference between the Actual Credits and Expected Earnings to determine damages for the fiscal year.

2. Process Detail with Explanations (Exhibit 8)

- a. **Actual Credits: Using the Arthur Andersen statements of account, determine how much interest the Government actually credited to the trust accounts during the fiscal year.**

The first page of each Statement of Account shows the amounts of interest paid to the account during the fiscal year. Interest is listed under the heading “RECEIPTS” in three components: “TREASURY INTEREST” (or “OVERNIGHTER INTEREST”); INTEREST ON CDs”; and “INTEREST ON GOVERNMENT SECURITIES.” For each fiscal year, plaintiff added together these three amounts on the Statement of Account for 7386; and in the years 7886 existed, plaintiff also added these same three amounts for that account.

b. Expected Earnings: Applying the Court's ruling, determine how much interest should have been earned during the fiscal year.

Plaintiff calculated expected earnings for the year by first calculating the expected earnings on invested funds (all but the \$25,000 permitted to be left in cash) and then adding to that the expected earnings for the \$25,000 left in cash.

(1) Calculate Expected Return for Balances Above \$25,000.

(a) Calculate balance available for investment.

Plaintiff began by summing the average daily balances for Accounts 7386 and 7886 in each fiscal year. (The average daily balances for these accounts on a fiscal year basis were calculated in Exhibits 9 and 10 using electronic data provided by the United States in discovery.) From this combined average daily balance for the fiscal year, plaintiff subtracted \$25,000 to calculate the average daily balance available for investment. Plaintiff then multiplied the amount available for investment by the appropriate monthly expected rate, "a combination of contemporaneous 3-month CD rates (80%) and 3-month T-bill rates (20%)." 72 Fed. Cl. at 671. The next section explains how this rate was calculated (Exhibit 11).

(b) Calculate expected rate for invested funds.

The appropriate expected rate is "a combination of contemporaneous 3-month CD rates (80%) and 3-month T-bill rates (20%)." 75 Fed. Cl. 477 (quoting 72 Fed. Cl. at 671). As in Tranche One, Plaintiff used the Federal Reserve Statistical Release, available at <http://www.federalreserve.gov/releases/H15/data.htm>, to obtain contemporaneous three-month CD rates and three-month T-bill rates on a month-by-month basis. Also as in Tranche One, discount-basis rates were converted to an investment basis where investment-basis rates were not available. Plaintiff weighted the CD rate at 80% and the three-month T-Bill rate at 20% to obtain the expected rates.

(c) Multiply funds that should have been invested by expected rate.

The expected rate is stated on an annual basis. Multiplying by the amount available for investment produces the annual expected yield on funds available for investment.

(2) Add in the Expected Return for the \$25,000 Allowed to Be Left in Uninvested Cash.

To calculate the expected return on \$25,000 years before 1986, Plaintiff used 4% as the expected rate. For years 1986 forward, Plaintiff used the overnighter rate. The overnighter rates in Exhibit 4.D were obtained from the United States. Plaintiff multiplied the expected rate by \$25,000 and divided by 12 to get the average monthly expected return for such funds. Plaintiff then added this amount to the expected return on invested funds. This sum is the total expected return.

c. Difference: If the actual interest earnings are less than the expected interest earnings for the year, count the difference as damages.

In fiscal years where the United States' actual credits to the Osage Tribe fell short of the expected earnings, the difference is the base amount of damages caused by the United States' failure to (1) invest cash in excess of \$25,000 and (2) obtain the expected minimum rate of return on trust funds.

d. Damages Through October 31, 2008

If the United States had earned all the interest a prudent investor complying with all applicable law would have earned, and had kept those moneys invested at 7-year Treasury bill rates through October 2008, those moneys would now total \$25,717,467.30. The Osage Nation requests that the Court enter this amount as damages for the United States' breaches of its duties to invest all Osage mineral funds in excess of \$25,000 at prudent rates of return.

CONCLUSION

For the foregoing reasons, the Osage Nation requests that summary judgment be entered in its favor for no less than \$254,731,638.43 as of October 31, 2008, for the claims in this motion, as detailed in the “Damages Summary” attached as Exhibit 5, with additional amounts to be calculated at a later date for damages accruing from November 1, 2008 through the date a judgment is paid.

December 2, 2008

Respectfully submitted,

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