IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-1836-PAB-CBS

HOMER FLUTE,
ROBERT SIMPSON, JR.,
THOMPSON FLUTE, JR., *and*
DOROTHY WOOD, *on behalf of themselves and others similarly situated,*
Plaintiffs,
v.

UNITED STATES,
THE DEPARTMENT OF THE INTERIOR, *and*
THE BUREAU OF INDIAN AFFAIRS,
Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

In all of American history there is no episode more contemptible nor more abhorrent than the depredations of the United States cavalry on the banks of Sand Creek in Colorado Territory during the early morning hours of November 29, 1864. The "Sand Creek Massacre" was a tragedy and a disgrace.

But nothing, not even something as egregious as the Sand Creek Massacre, is a warrant for eternal litigation. Congress sought to make reparations for the tragedy as early as 1865. Twice more, in the following century, Congress provided the victims, the Cheyenne and Arapaho Tribes ("the Tribes"), an opportunity to present to a federal court any grievances they possessed, including the very same grievance advanced in this lawsuit, namely, that the United States failed to honor commitments made in 1865.

Plaintiffs' effort to breathe new life into a century-old claim will fail for several reasons. First, this Court lacks subject matter jurisdiction because Plaintiffs lack standing and because Plaintiffs have identified no statute that effectively waives the United States' sovereign immunity on the facts of this case. Plaintiffs' claims are therefore subject to dismissal under Fed. R. Civ. P. 12(b)(1).

Second, Plaintiffs' claims are barred by res judicata and for this reason as well are subject to dismissal under Fed. R. Civ. P. 12(b)(1).

Third, Plaintiffs' claims are barred by applicable statutes of limitations and are therefore subject to dismissal under both Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

Fourth, Plaintiffs' request for an "accounting" fails to state a claim on which relief can be granted under Fed. R. Civ. P. 12(b)(6).

Plaintiffs' Complaint tries to obscure these deficiencies by dressing Plaintiffs' claims up as claims for breach of "trust" and thereby engrafting recent laws dealing with actual tribal trust fund accounts that in fact have no relevance to the events of 1864-65. If it were true that the United States were responsible for any actual trust funds for Plaintiffs, any claims relating to the management of those funds, including any claim for an accounting, has been conclusively resolved by a court-approved class action settlement. But it is not true. Plaintiff has nowhere alleged that the moneys they are concerned about were ever embodied in a trust fund or funds, and invocation of irrelevant trust-related statutes cannot revive claims that expired long ago, that have already been resolved, and as to which this Court lacks jurisdiction in the first place.

II. STATEMENT OF FACTS

A. **The 1864 Sand Creek Massacre**.

On November 29, 1864, Colonel John M. Chivington led approximately 700 U.S. volunteer soldiers to a village of about 500 members of the Cheyenne and Arapaho Tribes (the "Tribes") camped along the banks of Big Sandy Creek in southeastern Colorado. Although the Cheyenne and Arapaho people believed they were under the protection of the U.S. Army, Col. Chivington's troops attacked and killed about 150 people, mainly women, children, and the elderly. Ultimately, the massacre was condemned following three Federal investigations. Complaint (ECF No. 1) ¶¶ 35-69.[1]

[1] *See generally* S. Rep. 109-20 (2005), Committee on Energy and Natural Resources. The Committee reported favorably on Senate Bill 57 introduced by Senators Allard and Salazar to authorize lands into trust in Colorado in furtherance of the Sand Creek Massacre National Historic Site Establishment Act of 2000. During the 108th Congress, the Committee considered identical legislation (S. 2173) sponsored by Senator Campbell. The Committee favorably

B. **The 1865 Treaty of Little Arkansas**.

The Act of October 14, 1865 (14 Stat. 703), commonly known as the Treaty of Little Arkansas attempted, among other things, to provide reparations for the wrongs committed by members of the United States Army against the Cheyenne and Arapaho Indians at Sand Creek. Article 6 of the treaty stated that "[t]he United States [desires] to express its condemnation of, and, as far as may be, repudiate the gross and wanton outrages perpetrated against certain bands of Cheyenne and Arapahoe Indians, on the twenty-ninth day of November, A.D. 1841 [sic], at Sand Creek, in Colorado Territory . . . [and desires] to make some suitable reparation for the injuries then done. . . ." The reparations provided by Article 6 included land grants of 320 acres to four named chiefs and grants of 160 acres "to each other person of said bands made a widow, or who lost a parent" at Sand Creek. The Treaty appended a "schedule" listing all eligible widows and orphans. Finally, the treaty directed the Secretary to:

> pay in United States securities, animals, goods, provisions, or such other useful articles as may, in the discretion of the Secretary of the Interior, be deemed best adapted to the respective wants and conditions of the persons named in the schedule hereto annexed, they being present and members of the bands who suffered at Sand Creek, upon the occasion aforesaid, the sums set opposite their names, respectively, as a compensation for property belonging to them, and then and there destroyed or taken from them by the United States troops aforesaid.

14 Stat. 703, Article 6.[2]

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reported and the bill passed the Senate, but the House of Representatives did not consider the bill prior to the *sine die* adjournment of the 108th Congress.

[2] The remaining articles of the Treaty of Little Arkansas promoted peace (Art. 1); set aside land for a reservation (Art. 2); designated areas for Indians to remain until they are removed to the reservation (Art. 3); allowed the United States to build roads through the reservation and establish military posts (Art. 4); granted specific Cheyenne and Arapaho Indians each 640 acres in fee simple (Art. 5); agreed to expend a small per capita payment to the Indians annually for 40 years (Art. 7); consented to urge other portions of the Tribe to join in the Treaty (Art. 8); and, upon ratification, abrogated all former treaties (Art. 9).

C. **The 1867 Treaty of Medicine Lodge Creek**.

The remedial provisions of the Treaty of Little Arkansas, quoted above, were abrogated by the Treaty of October 28, 1867 (15 Stat. 593), known as the Treaty of Medicine Lodge Creek. Article 10 of the 1867 Treaty provided:

> In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under the treaty of October fourteenth, eighteen hundred and sixty-five, made at the mouth of Little Arkansas, and under all treaties made previous thereto, the United States agrees to deliver at the agency house on the reservation herein named, on the fifteenth day of October, of each year, for thirty years, the following articles, to wit:
>
> For each male person over fourteen years of age, a suit of good, substantial woolen clothing, consisting of coat, pantaloons, flannel shirt, hat, and a pair of home-made socks.
>
> For each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico and twelve yards of cotton domestics.
>
> For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.
>
> And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians on which the estimate from year to year can be based.
>
> And, in addition to the clothing herein named, the sum of twenty thousand dollars shall be annually appropriated for a period of thirty years, to be used by the Secretary of the Interior in the purchase of such articles as, from time to time, the condition and necessities of the Indians may indicate to be proper. And if at any time, within the thirty years, it shall appear that the amount of money needed for clothing, under this article, can be appropriated to better uses for the tribe herein named, Congress may, by law, change the appropriation to other purposes; but, in no event, shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall, annually, detail an officer of the Army to be present, and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

15 Stat. 593, Article 10 (footnotes omitted).

D. **Prior Adjudications of Sand Creek Massacre Claims**.

Claims related to the depredations committed at Sand Creek and to the provisions made in Article 6 of the Treaty of Little Arkansas have been presented to both the Court of Claims (Petition No. K-103) and the Indian Claims Commission ("ICC") (Docket Nos. 329 and 329A).

1. **Court of Claims Petition Number K-103**

Pursuant to a special jurisdiction statute,[3] on March 28, 1929, the Arapahoe and Cheyenne Tribes filed Petition K-103 in the United States Court of Claims seeking compensation for the value of land allegedly misappropriated and requesting a general accounting.[4] The petitioners also made allegations pertaining to the Treaty of Little Arkansas. They acknowledged that the treaty had been concluded and that it required that certain benefits be provided to specific members of the Tribes. Petitioners alleged that the United States had failed to make the agreed-upon expenditures or otherwise perform the treaty.[5] The petition alleged that the United States, by the Treaty of Little Arkansas, had "purported to make reparation and restitution" for the 1864 massacre, but that "the restitution provided in said treaty was never

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[3] Act of June 24, 1926 (44 Stat. 764, Chap. 667), as amended (45 Stat. 380, Chap. 278, March 20, 1929). The 1926 jurisdiction statute amended an earlier statute authorizing suit by the Sioux and specifying the terms of the authorization. 41 Stat. 738, Chap. 222, June 3, 1920. The 1926 Act extended the authorization to the "Arapahoe and Cheyenne Tribes of Indians," extended the time for bringing suit, and stated that suits be brought "under the terms of the Act of Congress of June 3, 1920 . . .". The terms specified in the 1920 Act included that "The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, . . . suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs. . . and any band or bands of said tribe or any other tribe or band or bands of Indians the court may deem necessary to a final determination of such or suits may be joined therein as the court may order."

[4] Petition, *Arapahoe and Cheyenne Tribes of Indians v. United States*, Court of Claims No. K-103 (March 28, 1929) (copy attached as Exhibit 1).

[5] *Id.*, Art. VIII.

made."[6] The petition alleged that a proper accounting by the United States [would show that the Tribes are] entitled to a substantial sum of money," and specifically prayed that the court order the United States to perform an "accounting" and pay "compensation."[7]

The United States responded to the petition, in pertinent part, by stating that, to compensate for injury done at Sand Creek "in addition to the regular annuities" "the sum of $39,050" was appropriated; that "the Indian Office show[s] an expenditure . . . of $24,041.38 for merchandise, etc."; that "[t]he balance of $15,050.62, not being required for the satisfaction of claims for losses, was covered into the surplus fund of the Treasury in 1872"; and that "[i]n addition to the amount so appropriated, certain survivors of this massacre were given land in the State of Colorado."[8]

Petition No. K-103 was dismissed on January 6, 1941 for lack of prosecution.[9]

2. **Indian Claims Commission Docket Nos. 329 and 329A**

On August 10, 1951, the Cheyenne-Arapaho Tribes of Indians of Oklahoma filed a petition in the ICC suing on its own behalf and as representatives of a number of other tribal

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[6] *Id.*, Art. XXIII.

[7] *Id.*

[8] Report of the Interior Department in Response to the Petition, Ct. Cl. No. K-103 (Feb. 8, 1935) (Copy attached as Exhibit 2) p. 34.

[9] 92 Ct. Cl. 607 (1941) (Copy attached hereto as Exhibit 3); see GAO Digest of Tribal Claims (Excerpted copy attached hereto as Exhibit 4) at 3 (Docket K-103 "[d]ismissed January 6, 1941, 92 C. Cls., 607, for lack of prosecution"); 81 Cong. Rec. 9003 (August 16, 1937) Debate on S. 1622 (Copy attached as Exhibit 5) at 9004 (discussion of proposed new jurisdictional bill for the Tribes which was not enacted, noting that if the bill were enacted the Tribes would likely bring "claims similar to those" brought in K-103 and there "abandoned".)

entities.[10] In the original petition under ICC Docket 329, the Petitioners alleged, "[i]n violation of its obligations of the Treaty of 1861,[11] defendant failed to protect petitioner in the use and enjoyment of the reservation set aside by said treaty, and on November 29, 1864 defendant by its Army, without provocation, while the Indians were at peace and under a pledge of protection, attacked a village of Southern Arapahoes and Cheyennes at Sand Creek and indiscriminately slaughtered defenseless men, women and children, and destroyed their property."[12] In the petition's formal claims for relief (*id*. ¶ 30) recited:

> *Sand Creek Massacre*. Petitioner repeats paragraph 14(a) and further alleges that said attacks were committed directly upon it and the said losses sustained directly by it.

Petitioners alleged that under the 1865 Treaty of Little Arkansas the United States agreed to provide the Tribes a reservation and to pay "annuities for 40 years in an amount equal to $20 per capita before removing to the [Tribes'] reservation and $40 per capita thereafter."[13] Petitioners alleged that, by the 1867 Treaty of Medicine Lodge Creek the government "cancelled all payments under the 1865 treaty,"[14] committed "to supply certain services and annuities," and "revoked" "[a]ll prior treaties and treaty rights . . ." [15] Petitioners alleged that the United States

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[10] Those other tribal entities (Along with the Northern Cheyenne Tribe of Indians of the Tongue River Reservation, Montana and the Northern Arapaho Tribe of Indians of the Wind River Reservation, Wyoming) were likewise listed as petitioners suing on their own behalf and on behalf of the others.

[11] "Treaty With the Arapahoe and Cheyenne," 12 Stat. 1163 (February 18, 1861).

[12] *Cheyenne-Arapahoe Tribes v. United States*, Indian Claims Commission Docket 329, Petition (August 10, 1951) (Copy attached hereto as Exhibit 6) ¶14.

[13] *Id.* at 15.

[14] *Id.*

[15] *Id.* ¶16.

"has failed to carry out its obligation under Article VI of said Treaty of 1865 to provide certain grants and benefits therein thereby further injuring petitioners."[16]

Finally, Petitioners alleged that the United States had failed to account for "[m]oneys and goods [that] have been due petitioner under the treaties and agreements recited herein, and under all appropriation Acts pursuant thereto,"[17] and prayed that defendant . . . "make a full and complete accounting and that petitioner be awarded judgment in the amount shown to be due under such an accounting . . . for just compensation for, or the fair and reasonable value of, lands . . ."[18]

These same claims were carried over into Petitioner's Docket 329-A Severed Petition, filed on June 23, 1961 by the Cheyenne-Arapaho Tribes of Indians of Oklahoma.[19] As in the original petition in Docket 329, Petitioners in 329-A recounted the Sand Creek Massacre.[20] Otherwise the petition alleged that the Treaty of Little Arkansas had been "revoked" by the 1867 Treaty of Medicine Lodge Creek.[21] And as in the original petition in Docket 329, the severed petition sought an accounting of amounts due petitioners under the treaties of 1861, 1865 and 1867. Petitioners alleged that "[m]oneys and goods have been due petitioner under the treaties and agreements recited herein" and prayed that the United States be ordered to "make a full and

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[16] *Id*. ¶ 31 (c).

[17] *Id.* ¶35(a).

[18] *Id*. ¶36.

[19] *Cheyenne-Arapahoe Tribes v. United States*, Indian Claims Commission Docket 329/329A, Severed Petition (June 23, 1961) (Copy attached as Exhibit 7).

[20] *Id*. ¶ 16.

[21] *Id*. ¶ 14 ("[A]ll prior treaties and treaty rights were revoked.")

complete accounting and that petitioner be awarded judgment in the amount shown to be due under such an accounting."[22]

3. The compromise and settlement of all claims in ICC dockets 329 & 329A

All claims that were presented or could have been presented by the Petitioners in ICC Docket Numbers 329 and 329A were resolved by a compromise settlement in 1965 for a total payment of $15 million. On August 12, 1965, the Defendant accepted the Petitioner's offer of settlement ". . . for $15,000,000.00, in settlement of all claims pleaded in Docket 329, subsequently severed into Dockets 329-A and 329-B." *Cheyenne-Arapaho Indians of Oklahoma v. United States*, 16 Ind. Cl. Comm. 162, 165 (1965) (Copy attached hereto as Exhibit 8). The stipulation of settlement provided that "[e]ntry of final judgment in said amount shall finally dispose of all rights, claims or demands which the petitioner has asserted or could have asserted with respect to the subject matter of these claims, and petitioner shall be barred thereby from asserting any such right, claim or demand against defendant in any future action." *Id*., 16 Ind. Cl. Comm. at 171-72. In its letter to tribal counsel approving the settlement, the Bureau of Indian Affairs stated that [t]he proposed settlement . . . will be a final disposition of all rights , claims, or demands which the petitioner has asserted or could have asserted with respect to the subject matter of the claims in Dockets Nos. 392-A and 329-B." *Id*. at 176.

This compromise settlement was presented to the Cheyenne-Arapaho Tribes, with the "notice of special meeting was mailed to 1542 enrolled members of the Tribes, they being all of the eligible voters; and the fact of the special meeting was publicized by the press, radio and

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[22] *Id*. ¶ 20.

television media both as a news item and as paid advertising." *Id.* at 167. The majority of the tribal members present at the September 18, 1865 tribal meeting voted in favor of approving the proposed settlement and the relevant portions of the tribal resolution are as follows:

> WHEREAS, the Cheyenne-Arapaho Tribes of Indians of Oklahoma have been prosecuting the following claims before the Indian Claims Commission: . . . (c) A claim in Docket No. 329-A for a general accounting . . . following the trial of the issues in Docket 329-A in May, 1865 . . . to settle and compromise all issues and all claims of the Cheyenne-Arapaho tribes of Indians for the sum of $15,000,000.00, said amount to be net after all offsets to which the United States might have been entitled in Docket Nos. 329-A and 329-B . . . .[23]

Final judgment was entered on October 18, 1965, *id.* at 167-69, and Congress appropriated the funds to satisfy the final judgment by the Act of October 31, 1965.[24] The settlement funds were distributed in accordance with the Act of October 31, 1967.[25]

E. Prior Accountings of Plaintiffs' Claims.

On two separate occasions the United States has performed an accounting of Plaintiffs' claims relating to the Sand Creek Massacre.

1. **1934 GAO Report in Connection with Court of Claims Docket No. K-103**

Although Docket K-103 was ultimately dismissed for lack of prosecution, while it was pending the General Accounting Office (GAO) prepared and submitted an accounting report to

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[23] *Id.* at 167-69.

[24] Pub.L. 89-309 (79 Stat. 1152) (1965). Therein Congress stated, "*Provided*, that no judgment herein appropriated for shall be paid until it shall become final and conclusive against the United States by failure of the parties to appeal or otherwise . . . ."

[25] Pub.L. 90-117 (81 Stat. 337) (1967).

Congress.[26] Volume One of that report detailed certain disbursements made by the United States for the benefit of the Petitioners, expressly addressed Petition K-103, and explained the actions that Congress had taken pursuant to the 1865 Treaty of Little Arkansas with respect to the Sand Creek Massacre:

> [F]or a period of two years only, made annual appropriations, aggregating $191,050, pursuant to or in connection with the aforesaid Treaty of October 14, 1865. The said sum of $191,050 included $39,050 to be paid to Cheyenne and Arapahoe Indians as compensation for depredations committed at Sand Creek, Colorado Territory, in 1864 . . . No further appropriations were made by Congress pursuant to the stipulations of said treaty, inasmuch as all sums of money or other annuities stipulated to be paid to the Cheyenne and Arapahoe Tribes of Indians under the Treaty of October 14, 1865, were abrogated by the provisions of Article 10 of the Treaty of October 28, 1867, 15 Stat. 593 [Treaty of Medicine Lodge Creek].[27]

2. **1958 GAO Report in connection with ICC Docket Nos. 329 and 329-A**

On November 7, 1958, the GAO certified another report providing an accounting of payments and expenditures made relevant to the Cheyennes and Arapahoes as part of the ICC Docket Numbers 329 and 329-A proceedings.[28] Reference to its December 13, 1934 report (which provided an accounting of the Tribes' treaties through to June 30, 1930) the GAO acknowledged that the 1958 report covered "the period September 17, 1851 to June 30, 1951,"

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[26] *In re: Petition of The Arapahoe and Cheyenne Tribes of Indians residing in the States of Wyoming, Montana, and Oklahoma, Court of Claims No. K-103*. General Accounting Office, December 13, 1934 (Copy attached hereto as Exhibit 9).

[27] *Id*. at pp. 33-34.

[28] The report was entitled, "General Accounting Office Report Re: Treaties of September 17, 1851, February 18, 1861, October 14, 1865, October 17, 1865, October 28, 1867, May 10, 1868, and Agreement of September 26, 1876, Cheyenne and Arapaho Tribes of Indians, Indian Claims Commission, Nos. 329 and 348," and was prepared in the Indian Tribal Section of the Claims Division of the General Accounting Office. Copy attached hereto as Exhibit 10.

and "[w]ith the exception of the additional period of time covered, it is substantially the same as the Court of Claims report on petition No. K-103, insofar as it related to the aforesaid treaties and agreement."[29]

In its 1958 report, the GAO again noted that "Congress made appropriations aggregating $191,050 to fulfill the stipulations contained in the October 14, 1865 treaty. Of this amount, $39,050 was appropriated to fulfill that provision of article 6 which called for the payment of compensation for the depredations committed at Sand Creek in 1864."[30] The GAO further reported, "[o]f the $39,050 appropriated as compensation for the Sand Creek Massacre, $24,041.38 was disbursed, and the balance of $15,008.62 was returned to surplus by surplus warrant No. 531, dated August 30, 1872."[31]

Additionally, the accounting report noted that the disbursements were "made for the Cheyenne and Arapaho Tribes jointly with the Apache Tribe, rather than for the individual members of the Cheyenne and Arapaho Tribes, as called for by article 6 of the October 14, 1865 treaty."[32] On December 8, 1866, Special Indian Agents Chas. Bogy and W.R. Irwin wrote a letter to Louis V. Bogy, Commissioner of Indians Affairs about these disbursements.[33] The letter explained that the disbursement to the Tribes (rather than to individuals) was done at the request of the Tribes themselves.

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[29] Exh. 10 at pp. 2-3.

[30] *Id.* at pp. 59-60.

[31] *Id.* This surplus warrant was listed in the Indian Office Ledger 17, folio 17; also included in item (n), page 73 of this report.

[32] 1958 GAO Report, Exh. 10, pp. 60-61.

[33] According to the GAO report (Exh. 10 at p. 61), this letter is on file at the National Archives, 1865, paper No. 5, page 10.

> It was contemplated that the goods to be distributed as indemnity for the losses sustained at the Sand Creek Massacre, should be given to the individuals who suffered, but the Indians decided among themselves that this would be impracticable; that it would engender strife, and they decided to have the distribution made to them collectively as a tribe.[34]

The accounting report goes on to say that, regarding the terms of Article 6 of the October 14, 1865 Treaty, "the records disclose that the merchandise, arms and ammunition, and other articles purchased with the aforesaid sum of $24,041.38 were distributed to the Cheyenne, Arapahoe, and Apache Tribes of Indians of the Upper Arkansas Agency."[35] The GAO concluded that "[n]o further appropriations were made to fulfill the provisions of the October 14, 1865 treaty," because the "appropriations were discontinued pursuant to [A]rticle 10 of the treaty of October 28, 1867."[36]

The GAO also found that in "addition to the $191,050 appropriated to fulfill the stipulations of the October 14, 1865 treaty (under the heading, 'Fulfilling treaties with the Arapahoes and Cheyennes of Upper Arkansas River')" there was also $40,000 appropriated in fulfillment of articles 4 and 5 of the February 18, 1861 treaty, under the same heading, "as well

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[34] Exh. 10 at p. 61.

[35] *Id*. at p. 61.

[36] *Id*. at p. 62. The report quoted the following language from Article X:

> ARTICLE X. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under the treaty of October fourteenth, eighteen hundred and sixty-give, made at the mouth of the Little Arkansas, and under all treaties made previous thereto, the United States agrees to deliver at the agency house on the reservation herein named, on the fifteenth day of October, of each year, for thirty years, the following articles, ***

Id. at p. 63. The GAO noted that an accounting of the treaty of October 28, 1867 was included in section "C" of this report.

as a transfer of $110,017.62 appropriated to fulfill the various provisions of the 1861 treaty."[37] Additionally, the GAO explained that the records of their office failed to "disclose sufficient information to permit the segregation of disbursements for each of the aforesaid treaties separately, except those disbursements made pursuant to article 6 of the treaty of October 14, 1865."[38] Consequently GAO found it necessary to "designate disbursements made from the heading, 'Fulfilling treaties with Arapahoes and Cheyennes of Upper Arkansas River' as having been made pursuant to the treaties of February 18, 1861, October 14, 1865, and October 17, 1865, except for disbursements provided for by article 6 of the October 14, 1865 treaty."[39]

F. Prior Adjudication of Individuals' Accounting Claims in *Cobell*

1. **The *Cobell* Complaint and Amended Complaint.**

The original *Cobell* complaint, filed on June 10, 1996, alleged that officials of the United States violated their fiduciary duties as trustee to individual Indians and sought an accounting of their trust funds held in Individual Indian Money ("IIM") accounts. *Cobell v. Salazar*, 573 F.3d 808, 809 (D.C. Cir. 2009) ("Cobell XXII"). On December 21, 2010, with leave of court, and pursuant to the jurisdictional grant of the Claims Resolution Act of 2010 (Pub. L. 111-291; 124 Stat. 3064) (2010), plaintiffs filed an amended complaint. *Cobell* Amended Complaint, Nos. 08–5500, 08–5506 (ECF No. 3671).

The *Cobell* Amended Complaint asserted three causes of action: (1) that the United States be compelled to provide a historical accounting to IIM beneficiaries; (2) that the class plaintiffs be awarded "restitution, damages, and other appropriate legal and equitable relief" for the United

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[37] *Id*. at p. 63.

[38] *Id*. at p. 63.

[39] *Id.* Statement #5 of the report (page 67) shows specific Article 6 disbursements.

States' alleged mismanagement of plaintiffs' IIM trust funds; and (3) that the class plaintiffs be awarded "restitution, damages, and other appropriate legal and equitable relief" for the United States' alleged mismanagement of plaintiffs' trust lands and other non-monetary trust assets. *Cobell* Am. Compl. at ¶¶ 43-52. The amended complaint alleged that plaintiffs' claims arose from "gross breaches of trust by the United States. . . . with respect to the money, land, and other natural resource assets of more than 450,000 individual Indians" (*id.* at ¶ 1); that the United States mismanaged plaintiffs' funds, land, and resources (*id.* at ¶ 3); that the United States owed certain fiduciary obligations to individual Indians with respect to their trust funds and lands including, but not limited to, the fiduciary obligations enumerated by Congress in the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act"), codified at 25 U.S.C. § 162a(d). *Id.*, ¶¶ 19, 20, 22. Plaintiffs also alleged that the "United States has failed to keep adequate records," *id.* at ¶ 9(a), and that it "failed to account to the trust beneficiaries with respect to their money." *Id.* at ¶ 4(c). The *Cobell* Amended Complaint was filed pursuant to the terms of a settlement agreement. Settlement Agreement, Terms of Agreement (Copy attached hereto as Exhibit 11) ¶ B.3.a.

2. **The *Cobell* Settlement Agreement.**

The *Cobell* Settlement Agreement established two settlement classes, the Historical Accounting Class, *id*. ¶ A.16, and the Trust Administration Class, *id*. ¶ A.35. The Historical Accounting Class was a non-opt-out class. *Id.* ¶ C.2.a. Upon final approval of the settlement, the members of the Historical Accounting Class "shall be deemed to have released, waived and forever discharged the United States . . . from the obligation to perform a historical accounting of his or her IIM Account or any individual Indian trust asset . . . ." *Id.* ¶ I.1. Also upon final approval of the settlement, the Historical Accounting Class "shall be deemed to be forever barred

and precluded from prosecuting any and all claims and/or causes of action for a Historical Accounting Claim that were, or could have been, asserted in the [Amended] Complaint . . ." *Id.*

3. **Authorizing Legislation.**

On December 8, 2010, Congress passed the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064. The Claims Resolution Act, among other things, "authorized, ratified, and confirmed" the *Cobell* settlement (§ 101(c)(1)); conferred subject-matter jurisdiction on the United States District Court for the District of Columbia over the *Cobell* Amended Complaint (§ 101(d)(1)); and permitted certification of the Trust Administration Class "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure" (§ 101(d)(2)(A)).

4. **Class Certification.**

On February 4, 1997, the District Court certified *Cobell* as a class action under Fed. R. Civ. P. 23(b)(1)(A) and (b)(2). Order of Feb. 4, 1997 (*Cobell*, ECF No. 27). The certified class consisted of "present and former beneficiaries of Individual Indian Money accounts (exclusive of those who prior to the filing of the Complaint herein had filed actions on their own behalf alleging claims included in the Complaint)." *Id.* at 2-3. This is the Historical Administration Class.

On July 27, 2011, the District Court re-certified and gave final approval to the Historical Accounting Class, Order of Dec. 21, 2010 (*Cobell* ECF No. 3670) at 1-2, and certified the Trust Administration Class consisting, in pertinent part, of individual Indians who had an IIM account at any time after approximately 1985 or, as of September 30, 2009, had a recorded or other demonstrable beneficial ownership interest in land held in trust or restricted status. *Id.* at 2.

5. **Class Notice.**

Notice of the settlement, which, among other things, informed Trust Administration Class members of their opt-out rights, was mailed to "[a] list of all readily identifiable Class Members whose names and addresses were readily available and provided by the Department of the Interior . . ., or whose addresses could be reasonably obtained through advanced legal research." Declaration of Katherine Kinsella ("Kinsella Decl."), May 16, 2011, *Cobell* ECF No. 3762-2, ¶ 11. Notice of the settlement was also provided in print media, *id*. at 20-22, 43-46, by radio, *id*. at 23-24, 34-42, 47, on the internet, *id*. at 25-26, and on television, *id*. at 27-33.

6. **Fairness Hearing and Final Approval of Settlement.**

On June 20, 2011, the District Court held a fairness hearing on the proposed Settlement Agreement. *Cobell v. Salazar*, No. 96-cv-1285, 2011 WL 10676927 at *2 (D. D.C. July 27, 2011) , *aff'd* 679 F.3d 909 (D.C. Cir. 2012). On June 27, 2011, the District Court granted final approval to the Settlement Agreement (as amended). *Id.* The District Court found, among other things, "that the terms of the settlement are 'fair, reasonable and adequate' from the perspective of absent class members" and that

> [T]he proposed settlement satisfie[s] due process by affording adequate notice to class members, a meaningful opportunity for class members to participate and be heard, a reasonable opportunity for members of the Trust Administration Class to exclude themselves from the settlement, and adequate representation of the classes by the class representatives and class counsel.

Id. at *2. The District Court further found that "[t]he best notice practicable has been provided class members, including individual notice where members could be identified through reasonable effort." *Id.* at *3.

Final judgment in *Cobell* was entered on August 4, 2011. *Cobell*, Judgment in a Civil Action (ECF No. 3853). The District Court's final judgment was affirmed by the United States

Court of Appeals for the District of Columbia on May 22, 2012. *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012) ("*Cobell XXIII*"); *Good Bear v. Salazar*, Nos. 11-5270, 11-5271, 11-5272, 2012 WL 1884702 (D.C. Cir. May 22, 2012). The Settlement Agreement became effective on November 24, 2012, after all possible appeal periods expired. *Cobell*, Order of Dec. 11, 2012 (ECF No. 3923).

III. ARGUMENT

A. Standard of Review Governing Motions to Dismiss

Because the jurisdiction of federal courts is limited, there is a presumption against federal jurisdiction, and the party invoking federal jurisdiction bears the burden of proof. *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1016 (10th Cir. 2013). Courts have no authority to create equitable exceptions to jurisdictional requirements. *Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008). A challenge to subject matter jurisdiction can be either "facial" or "factual."

> First, a party may make a facial challenge to the plaintiff's allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint. In addressing a facial attack, the district court must accept the allegations in the complaint as true. Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends.

E.F.W. v. St. Stephen's Indian High Sch., 264 F.3d 1297, 1303 (10th Cir. 2001) (quotation and citations omitted). Even in a facial challenge, allegations that contradict properly-considered documents need not be accepted as true. *Peterson v. Martinez*, 707 F.3d 1197, 1206 (10th Cir. 2013). But where the court is presented with a factual attack on the complaint, "a district court may not presume the truthfulness of the complaint's factual allegations." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Instead, "[a] court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under

Rule 12(b)(1)." *Id*. Sovereign immunity is a question of subject matter jurisdiction that can be challenged by a motion to dismiss under Fed. R. Civ. 12(b) (1). *E.F.W.*, 264 F.2d at 1302-03.

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) all well-pleaded allegations of the complaint are accepted as true and viewed in a light most favorable to the nonmoving party. To survive dismissal under Rule 12(b)(6) for failure to state a claim, plaintiffs must "nudge[ ] their claims across the line from conceivable to plausible. . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While factual assertions are taken as true, legal conclusions are not. *Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice") (alteration in original), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). A plaintiff is "not required to set forth a prima facie case for each element, [but] is required to set forth plausible claims." *Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

Claim preclusion defenses, such as *res judicata*, may be considered by way of a Rule 12(b)(1) motion to dismiss. *See Gupta v. Thai Airways Int'l Ltd*, 487 F.3d 759, 763-65 (9th Cir. 2007). Generally, the affirmative defenses of "*res judicata*, estoppel, or any other matter constituting an avoidance . . . must be affirmatively [plead]. [Fed. R. Civ. P. 8(c)(1)]"; *Zeligson v. Hartman-Blair, Inc.*, 135 F.2d 874, 876 (10th Cir. 1943). Therefore, consideration of these

issues is often left for post-answer dispositive motions. An affirmative defense can, however, "be adjudicated on a motion to dismiss so long as (i) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (ii) those facts suffice to establish the affirmative defense with certitude." *Rodi v. S. New Eng. Sch. of Law*, 389 F.3d 5, 12 (1st Cir. 2004).

In evaluating a defense of *res judicata* the court is not limited to the pleadings. *Merswin v. Williams Companies, Inc*., 364 F. App'x. 438, 441 (10th Cir. 2010) ("When entertaining a motion to dismiss on the ground of *res judicata*, a court may take judicial notice of facts from a prior judicial proceeding when the r*es judicata* defense raises no disputed issue of fact") quoting *Q Int'l Courier, Inc. v. Smoak*, 441 F.3d 214, 216 (4th Cir. 2006); *see also Tal v. Hogan*, 453 F.3d 1244, 1264-65 n. 24 (10th Cir. 2006); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004) (noting that "[n]umerous cases [involving dismissal on the pleadings] ... have allowed consideration of ... items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case ... without converting the motion into one for summary judgment").

B. Plaintiffs Lack Standing

Plaintiffs sue in their individual capacities, not as authorized representative of the Tribes. Compl. ¶ 2. Because they are not the Tribes' authorized representatives, they lack standing to sue on behalf of the Tribes or to vindicate tribal rights. *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938 (D.C. Cir. 2012) ("*Timbisha Shoshone II*") (dismissing suit seeking to vindicate tribal rights where individual plaintiffs were not the tribe's authorized representatives).
It is true that the Treaty of Little Arkansas included provisions for the benefit of private individual tribe members. But it is a fundamental presumption that "'[i]nternational agreements,

even those directly benefitting private persons, generally do not create rights or provide for a private cause of action in domestic courts.' " *In re Request from U.K. Pursuant to Treaty*, 685 F.3d 1, 11 (1st Cir. 2012), *quoting Medellín v. Texas*, 552 U.S. 491, 506 n. 3 (2008) (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907 cmt. a, at 395 (1986)). Several courts of appeals have held that "treaties do not generally create rights that are privately enforceable in the federal courts." *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc); *see also Mora v. New York*, 524 F.3d 183, 201 & n. 25 (2d Cir. 2008) (collecting cases from ten circuits holding that there is a presumption that treaties do not create privately enforceable rights in the absence of express language to the contrary); *Ozaltin v. Ozaltin* 708 F.3d 355, 360 n. 6 (2nd Cir. 2012) ("Importantly, even when a treaty is 'self-executing' in the sense that it creates binding federal law, the treaty still may not confer a private right of action to enforce rights recognized under the treaty") citing *Medellin*, 552 U.S. at 506 n. 3).

The rule applies to treaties with Indian tribes no less than to other treaties. *Dry v. U.S.*, 235 F.3d 1249, 1256 (10th Cir. 2000) ("It is well-settled that '[t]he very great majority of Indian treaties create tribal, not individual, rights . . . .'"), quoting *Hebah v. United States*, 428 F.2d 1334, 1337 (Ct.Cl.1970).[40] *See also Blackfeather v. United States*, 190 U.S. 368, 377 (1903)

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[40] The Court of Claims in *Hebah* created an exception to this rule where an individual tribe member invokes the "bad man" provision often included in mid- to late nineteenth century treaties, under which the United States promised to compensate individual Indians who were killed or injured by white malfeasors. 428 F.2d at 1337-38; *see also Richard v. U.S.*, 98 Fed. Cl. 278, 283-84 (Fed. Cl. 2011), *reversed on other grounds*, 677 F.3d 1141 (Fed. Cir. 2012) (following *Hebah* in another case involving a "bad man" treaty provision); *Elk v. U.S.*, 87 Fed. Cl. 70, 78 (Fed.Cl. 2009) (same); *Garreaux v. U.S.*, 77 Fed. Cl. 726, 735 (Fed. Cl. 2007) (same).

Hebah also grounded its decision in contract, finding plaintiff to be a third-party beneficiary. 428 F.2d at 1338. But this theory cannot help Plaintiffs here, because third party beneficiary status requires that the contract reflect the intention of the parties to give the claimant "the direct

("The United States, as the guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts either expressed or implied, compacts, or treaties with individual Indians so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians"); *Hebah*, 428 F.2d at 1337 ("This principle has been carried into effect even where a treaty provided for financial payments to specified beneficiaries out of annuities paid to the tribe; the holding was that, nevertheless, individual rights against the Federal Government were not created by the treaty"), citing *Sac and Fox Indians of Miss. in Iowa v. Sac and Fox Indians of Miss. in Okla.*, 220 U.S. 481, 484, 486, 487, 489 (1911) and *Seminole Nation v. United States*, 93 Ct. Cl. 500, 518-519 (1941), *rev'd in part on other grounds*, 316 U.S. 286 (1942).

Express language in a treaty creating private rights can overcome this presumption, *see Mora*, 524 F.3d at 188, but there is no such language in the Treaty of Little Arkansas. Accordingly, to the extent Plaintiffs' lawsuit seeks to enforce that treaty, which was executed by the Tribes, not by individuals, they lack standing to do so.[41]

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right to compensation or to enforce that right against the promisor." *Baudier Marine Elecs. v. United States*, 6 Cl.Ct. 246, 249 (1984), *aff'd without opinion*, 765 F.2d 163 (Fed.Cir.1985) (citing *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). No such intention can be gleaned from the Treaty of Little Arkansas.

[41]. Similarly the "Indian Tucker Act," 28 U.S.C. § 1505 (2006)), which permits contract claims for damages, applies only to tribal plaintiffs and not individual tribal members. *See Fields v. United States*, 423 F.2d 380, 383 (Ct. Cl. 1970) ("[S]ince the instant case is one brought by individual Indians and not a tribe, band, or identifiable group of Indians, we feel that defendant is correct in asserting that section 1505 does not apply to the present case."). Therefore, the Indian Tucker Act cannot serve as a basis for jurisdiction in this case.

Nor can Plaintiffs escape this result by claiming that they are seeking to vindicate tribal, collective interests. *Tribal* claims seeking recompense under the Treaty of Little Arkansas were conclusively litigated and resolved in the Tribes' lawsuit before the Indian Claims Commission. As the Tenth Circuit has noted, it was Congress's intent that this "grant of jurisdiction to the Commission be as broad as possible[.]" *Navajo Tribe of Indians v. State of N.M.*, 809 F.2d 1455, 1465 (10th Cir. 1987). The stipulation of settlement in the Tribes' ICC suit against the United States provided that "[e]ntry of final judgment in said amount [$15 million] shall finally dispose of all rights, claims or demands which the petitioner has asserted or could have asserted with respect to the subject matter of these claims, and petitioner shall be barred thereby from asserting any such right, claim or demand against defendant in any future action." *Cheyenne-Arapaho Indians of Oklahoma v. United States*, 16 Ind. Cl. Comm. at 171-72. Tribal claims under the Treaty of Little Arkansas are thus barred by *res judicata*.

C. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Claims

"Federal courts are courts of limited jurisdiction; they must have a statutory basis for their jurisdiction." *Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994). The existence of subject matter jurisdiction is a mandatory threshold inquiry that must precede any merit based determination in a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-5 (1998). Plaintiffs (Compl. ¶ 6) invoke a dizzying array of statutes as conferring jurisdiction over their suit, but none survives scrutiny.

1. **Unless Sovereign Immunity is Unequivocally Waived by Congress, the United States is Immune From Suit**

The United States is immune from suit except as it has consented to be sued. *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "The existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S.

206, 212 (1983). The federal government consents to be sued only when it "'unequivocally expresses'" its intention to waive the government's sovereign immunity. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). Courts may not resort to legislative history to supply the necessary unequivocal expression. *Id*.; *Department of the Army v. Federal Labor Relations Authority A*, 56 F.3d 273, 277 (D.C. Cir. 1995) ("This [unequivocal] expression must appear on the face of the statute; it cannot be discerned in (lest it be concocted out of) legislative history.").

"A waiver of sovereign immunity cannot be implied . . . ." *Irwin*, 498 U.S. at 95 (internal quotations and citations omitted). Thus, the Congress does not waive the government's sovereign immunity by merely granting, as the Congress for example did in 28 U.S.C. § 1331, a federal court jurisdiction to hear a claim. *See Nordic Village*, 503 U.S. at 38 (the Congress' grant of "exclusive jurisdiction" to district courts in bankruptcy cases "of all of the property . . . of the debtor" in 28 U.S.C. § 1334(d) did not constitute a waiver of the government's sovereign immunity). The fact that the "Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim. The issues are wholly distinct." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 787 n.4 (1991).

Waivers of the United States' sovereign immunity are to be strictly and narrowly construed. *Nordic Village*, 503 U.S. at 34; *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). The burden is on the plaintiff to find and prove an "explicit waiver of sovereign immunity." *Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990); *see also McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936) (holding that because the plaintiff sought relief, "it follows that he must carry throughout the litigation the burden of showing that he is properly in court").

A suit against a federal agency or officer which seeks relief against the sovereign is, in effect, a suit against the sovereign. *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 687-88 (1949). Thus, the principles of sovereign immunity apply whenever a federal agency is sued. *Id.*; *see Beller v. Middendorf*, 632 F.2d 788, 796-98 (9th Cir. 1980), *overruled on other grounds* by *Lawrence v. Texas*, 539 U.S. 558 (2003).

2. **Department of Interior Appropriations Acts do not Waive Sovereign Immunity or Confer Jurisdiction as to Plaintiffs' Claims**

Plaintiffs cite nineteen Department of the Interior Appropriations Acts as conferring jurisdiction to hear Plaintiffs' claims. Compl. ¶ 6. But this Court is not given jurisdiction by any of the provisions cited, which instead serve a very narrow purpose. As the court explained in *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1029 (Fed. Cir. 2012) ("*Shoshone IV*"), "Congress has enacted within a series of appropriations acts covering the United States Department of the Interior provisions which suspend accrual of the statute of limitations for certain tribal trust claims. These provisions apply only to a 'claim . . . concerning losses to or mismanagement of trust funds . . .'" (citations mitted).[42] For at least two reasons these saving provisions do not confer jurisdiction over Plaintiffs' claims.

First, nothing in the language Congress adopted remotely suggests an intent to confer jurisdiction. As to those claims that come within their purview – strictly limited to trust fund

[42] The original version of the saving provision, adopted in 1990, provided that "notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with the accounting of such funds[.]" Pub.L. No. 101–512, 104 Stat.1915, 1930 (1990). The clause "from which the beneficiary can determine whether there has been a loss" was added to the end of the provision in 1991. Pub.L. No. 102–154, 105 Stat. 990, 1004 (1991). Congress added "including any claim in litigation pending on the date of this Act" in 1993. Pub.L. No. 103–138, 107 Stat. 1379, 1391 (1993).

mismanagement claims – the provisions delay the running of statutes of limitations, but in no other respect does the language imply an intent to waive sovereign immunity. And such intent is not lightly to be inferred. *Dep't of the Army v. Blue Fox, Inc*., 525 U.S. 255, 261 (1999) ("We have frequently held, however, that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign. . . . Such a waiver must also be 'unequivocally expressed' in the statutory text" (citations omitted)).

Second, this case does not involve claims of trust fund mismanagement. The Appropriations Act provisions Plaintiffs cite "appl[y] to losses or mismanagement of trust funds *only*." *Shoshone IV*, 672 F.3d at 1034 (emphasis added). It does not apply to a suit alleging breach of treaty commitments. Plaintiff does not allege that the United States has mismanaged funds held in trust for the Tribes or for the individual plaintiffs.

3. **None of the Sections of Title 28 That Plaintiff Cites Confers Jurisdiction**

Plaintiffs also claim that the district court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction), 1343 (civil rights and elective franchise), 1361 (action to compel a federal officer), and 1362 (jurisdiction over suit by Indian tribes). However, none of the Title 28 jurisdiction and remedy statutes cited by the plaintiffs waives the sovereign immunity of the United States under the facts of this case. *See generally Murray v. United States*, 686 F.2d 1320 (8th Cir 1982); *Fostvedt v. United States*, 978 F.2d 1201, 1203 (10th Cir. 1992) (Section 1331 does not waive sovereign immunity); *Salazar v. Heckler*, 787 F.2d 527 (10th Cir. 1986) (Section 1343 does not waive sovereign immunity); *McQueary v. Laird*, 449 F.2d 608, 611 (10th Cir. 1971) (Section 1361 does not waive the United States' sovereign immunity); and *Scholder v. United States*, 428 F.2d 1123 (9th Cir. 1970) (Section 1362 does not waive sovereign immunity).

Plaintiff also invokes 28 U.S.C. § 1346, the Federal Tort Claims Act ("FTCA"). *See* 28 U.S.C. §§ 1346(b), 2671 *et seq.*[43] But any FTCA claim is jurisdictionally defective for failure to exhaust administrative remedies. The FTCA requires that "an action shall not be instituted upon a claim against the United States for money damages" unless the claimant first pursues an administrative claim. 28 U.S.C. § 2875(a). The Act mandates that plaintiffs present a claim to the appropriate administrative agency. *See Ahmed v. United States*, 30 F.3d 514, 516-17 (4th Cir. 1994). The presentation of such an administrative claim is the jurisdiction prerequisite to the filing of a suit in the United States district courts under the FTCA. *Staggs v. U.S. ex rel. Dept. of Health and Human Services*, 425 F.3d 881, 884 (10th Cir. 2005); *Cadwalder v. United States*, 45 F.3d 297, 300 (9th Cir. 1995). There can be no waiver of this requirement. *Estate of Trentadue ex rel. Aguilar v. U.S.*, 397 F.3d 840, 852 (10th Cir. 2005). Allegations of presentment must be included in the plaintiff's complaint. *Moya v. United States*, 35 F.3d 501, 504 (10th Cir. 1994).

An administrative claim must be composed of a written notice that contains: (1) sufficient information for the agency to investigate the claims, and (2) a sum certain amount of damages sought. *Cizek v. United States*, 953 F.2d 1232, 1233 (10th Cir. 1992). Constructive or actual notice of the potential claim and information related thereto does not vitiate the requirement of

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[43] The FTCA authorizes money damages suits against the United States for injury or loss of property, or personal injury or death caused by the negligent or wrongful acts or omissions of any employee of the United States who was acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1).

the presentation to the agency of a sum certain demand for damages. *Kendall v. Watkins*, 998 F.2d 848, 852-53 (10th Cir. 1993). Failure to state a sum certain subjects the case to dismissal for want of subject matter jurisdiction. *Id*.

The fact that the Plaintiffs in this case claim to represent a group of persons with similar circumstances does not relieve the representatives and the class from the requirement of satisfying the administrative claim prerequisite. In other words, an administrative claim and sum certain must be submitted to the agency for each claimant no matter how large the class of individuals filing claims that arise out of the same incident. *In re Agent Orange Product Liab. Litig.*, 818 F.2d 194, 198 (2nd Cir. 1987). The Plaintiffs have made no showing that they have presented any valid administrative claims to the appropriate federal agency. Accordingly, any and all claims that purport to fit under the provisions of the FTCA must be dismissed for lack of subject matter jurisdiction.

Any invocation of the FTCA suffers from additional jurisdictional defects. The FTCA statute of limitations for the filing of an initial administrative claim is two years. *Suarez v. United States*, 22 F.3d 1064, 1067 (11th Cir. 1994); *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985); *Wadsworth v. United States*, 721 F.2d 503, 506 (5th Cir. 1983). The limitations period, because serving as a limit on the United States' waiver of sovereign immunity, is jurisdictional. *Harvey v. United States*, 685 F.3d 939, 947 (10th Cir. 2012). The Supreme Court and the Tenth Circuit strictly enforce this limitation period. *United States v. Kubrick*, 444 U.S. 111 (1979); *Gustavson v. United States*, 655 F.2d 1034, 1036 (10th Cir. 1981); *Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976) (insanity does not toll the statute of limitations). Further,

Section 1346(b)(1), specifically provides that the tortious acts complained of must have accrued on or after January 1, 1945, which the Plaintiffs' claims clearly precede. 28 U.S.C. 1364 (b)(1).[44]

4. **The APA Does Not Waive Immunity for Plaintiffs' Claims**

Plaintiffs' complaint seeks, primarily, injunctive relief. Compl. ¶¶ 78-84, 106, 108. But the United States is immune from injunctive relief, and Plaintiffs' invocation of the APA (Compl. ¶¶ 90-105) cannot overcome that immunity.

The concerns that underlie the courts' strict observance of the United States' sovereign immunity are strongest when injunctive relief is sought. "[T]he interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. . . ." *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 704 (1949) (quoting *Decatur v. Paulding*, 39 U.S. 497, 516 (1840)). If the Congress has not consented to suit, the federal courts have no jurisdiction to either "restrain the government from acting, or to compel it to act." *Larson*, 337 U.S. at 704; *Price v. United States*, 42 F.3d 1068, 1071 (7th Cir. 1994) ("The government's waiver of sovereign immunity is a jurisdictional prerequisite to a bankruptcy court's order."). The public policy supporting this rule is that the government should not be impeded in its performance of duties essential to governing the nation, unless the Congress has given its consent. *Larson*, 337 U.S. at 704.

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[44] In addition, Plaintiffs' essential grievance – that the United States did not honor treaty obligations – dose not state an FTCA claim because the challenged acts did not arise "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 510 (9th Cir. 2005) (allegations of treaty violations do not state a claim under the FTCA).

As the Tenth Circuit noted in *United States v. Murdock Machine & Engineering Co. of Utah*, 81 F.3d 922, 929-30 & n.8 (10th Cir. 1996), the Supreme Court has consistently protected the United States' immunity from injunctions. *Sherwood*, 312 U.S. at 586; *Hatahley v. United States*, 351 U.S. 173, 176, 182 (1956); *Naganab v. Hitchcock*, 202 U.S. 473, 475-76 (1906); *Hill v. United States*, 50 U.S. 386, 388-90 (1850). The court in *Murdock Machine* also explained why the APA does not waive the United States' immunity on the facts of this case. *See generally Murdock Machine*, 81 F.3d at 929-30 & n.8.

Effective October 21, 1976, Congress amended § 10(b) of the APA, 5 U.S.C. § 702, to provide a general waiver of the government's sovereign immunity from injunctive relief. See ***U****nited States v. Mitchell*, 463 U.S. 206, 227 n. 32, (1983) (Congress generally waived the government's immunity from suit for injunctive relief in § 702). But Section 702 does not apply to the instant case, however, because the operative facts transpired long before the October 1976 effective date of § 702. As the Tenth Circuit held in *Murdock Machine*, "Section 702 does not apply retroactively because nothing in the statute or its legislative history suggests that Congress intended the amendment have retroactive effect." 81 F.3d at 929-30 & n.8.[45]

D. Plaintiffs' Claims are Barred by *Res Judicata*

"Under *res judicata*, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in the prior action." *Wilkes v. Wyo. Dep't of Emp't Div. of Labor Standards*, 314 F.3d 501, 503–04 (10th Cir.2002) (quotation and emphasis in original omitted). "Under Tenth Circuit law,

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[45] Nor can Plaintiffs find support for their request for a writ of mandamus in the All Writs Act, 28 U.S.C. § 1361, because section 1361 is not a consent to suit by the sovereign. *McQueary*, 449 F.2d at 611, *accord Smith v. Grimm*, 534 F.2d 1346, 1352 n.9 (9th Cir. 1976).

claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir.2005). Sometimes characterized as a fourth requirement, sometimes as creating an exception to the general rule, application of *res judicata* also requires that "the plaintiff must have had a full and fair opportunity to litigate the claim in the prior suit." *Nwosun v. Gen. Mills Rests., Inc.*, 124 F.3d 1255, 1257 (10th Cir.1997). "*Res judicata* is not a jurisdictional bar; it is an affirmative defense," and, thus, would not defeat subject matter jurisdiction of this or the district court. *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 479 (10th Cir.2002). "Res judicata is an affirmative defense on which the defendant has the burden to set forth facts sufficient to satisfy the elements ." *Nwosun*, 124 F.3d at 1257.

1. **The 1941 Dismissal of Plaintiffs' Claims is *Res Judicata***

Rule 41(b) permits an involuntary dismissal of an action, on a defendant's motion, if a plaintiff fails to prosecute or to comply with a court order. Fed. R. Civ. P. 41(b). A dismissal under Rule 41(b) or any other dismissal "—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits" unless "the dismissal order states otherwise." *Id*. According to the Rule's plain language, the courts routinely hold that dismissal for want of prosecution is an adjudication on the merits and bars suit on the same or similar allegations. *Johnson v. Ala. Dept. of Human Resources*, 508 F. App'x 903, 906-07 (11th Cir. 2013); *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 777 (6th Cir. 2009); *LeBeau v. Taco Bell, Inc.*, 892 F.2d 605, 607 (7th Cir.1989); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001); *Nielsen v. United States*, 976 F.2d 951, 957 (5th Cir. 1992).

The Tribes' petition in Court of Claims Docket K-103 stated the same claims as Plaintiffs seek to press here, namely, that the United States did not fulfill its promises in the Treaty of Little Arkansas to provide reparations for the Sand Creek Massacre, and requesting an accounting of reparations made (or not made). Exh. 1, Art.s VIII, XXIII; *see also* Exh. 4 at p. 3. The dismissal of those claims bars their assertion here.

2. **The Settlement of the *Cobell* Litigation Bars any Trust Mismanagement or Accounting Claims by Operation of *Res Judicata***

Plaintiffs allege that money intended to provide compensation for injuries done in 1964 was somehow held "in trust" for the benefit of Plaintiffs (or their ancestors). Compl. ¶¶ 85-89. That allegation is factually untenable; as GAO has twice determined,[46] funds appropriated under the Treaty of Little Arkansas were either disbursed or returned to the Treasury. No trust account was created, and Plaintiffs do not allege otherwise.

But even if it could somehow be argued that the United States has at any time held moneys in trust for Plaintiffs' benefit, any claim relating to that money has been fully and finally settled in the *Cobell* litigation. "Generally, court-approved settlements receive the same *res judicata* effect as litigated judgments." *Hoxworth v. Blinder*, 74 F.3d 205, 208 (10th Cir. 1996) *citing In re Medomak Canning*, 922 F.2d 895, 900 (1st Cir. 1990); *Foster v. Hallco Mfg. Co*., 947 F.2d 469, 476 (Fed.Cir. 1991). "A trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." *Shoels v. Klebold*, 375 F.3d 1054, 1060 (10th Cir. 2004), quoting *United States v. Hardage*, 982 F.2d 1491, 1496 (10th Cir. 1993).

"[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Fed. Reserve*

[46] Exh. 9 at pp. 33-34; Exh. 10 at pp. 59-60.

Bank of Richmond, 467 U.S. 867, 874 (1984). The binding effect of a class judgment is not diminished when the judgment is pursuant to a settlement agreement. *See Ortiz v. Fireboard Corp*., 527 U.S. 815, 848-49 (1999) (District Court's certification requires heightened attention where settlement class is certified because of "the justifications for binding the class members"); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 378 (1996) ("court would afford protective effect to the settlement judgment . . . notwithstanding the fact that [class members] could not have pressed their Exchange Act claims in the Court of Chancery"); *Wyly v. Weiss*, 697 F.3d 131, 143 (2nd Cir. 2012) (members of certified settlement class are bound by settlement order). It is beyond cavil that unnamed members of a class action are bound "even though they are not parties to the suit." *Smith v. Bayer Corp*., 131 S. Ct. 2368, 2380 (2011).

Here, both the Settlement Agreement and the District Court's judgment in *Cobell* expressly waive and release Plaintiff's claims. The Settlement Agreement waives, releases, and forever discharges the United States from liability for and forever bars and precludes Plaintiffs "from prosecuting, any and all claims and/or causes of action that were, or should have been, asserted in the Amended Complaint when it was filed . . . by reason of, or with respect to, or in connection with, or which arise out of" claims for alleged breach of trust and mismanagement of trust funds, Land Administration Claims, and statutory and common law claims for a historical accounting, including claims arising under the Trust Reform Act, "through the Record Date of any and all IIM accounts and any assets held in trust . . . including . . . Land and funds held in any account." Exh. 11 ¶¶ A.14, 15, 21.

Plaintiff now seeks to litigate in this case the very same claims that were "waived, released, and forever discharged" in the Cobell settlement. Plaintiffs here assert that the defendants allegedly failed to account for the reparations "held in trust for the benefit of Plaintiffs and their Ancestors" and have failed to ascertain the names of persons to whom reparations are still due and owing. These claims are for and with respect to the claims presented in the *Cobell* Amended Complaint, namely, that the "United States has failed to keep adequate

records," *Cobell* Amended Complaint (*Cobell* ECF No. 3691) ¶ 9(a), and that it "failed to account to the trust beneficiaries with respect to their money." *Id*. ¶ 4(c). Consequently, to the extent that Plaintiffs' claims do involve money that was actually held in trust, any claim related to accounting for those funds has been waived and released in *Cobell*. *See, generally, Villegas v. U.S.*, No. 12-0001, 2013 WL 3990809 at *11-13 (E.D.Wash., August 05, 2013) (dismissing breach of trust and accounting claims against the United States on the basis of, among other things, the preclusive effect of the *Cobell* settlement).

E. The Allegations that Defendants Violated the Terms of the Treaty of Little Arkansas Fail to State a Claim for Which Relief May be Granted

Count One of Plaintiffs' complaint asks the Court to enforce (by mandamus) the government's alleged duty to "to ascertain the names of persons to whom reparations are still due and owing, as provided in Paragraph 6 of the Treaty of Little Arkansas . . .". Compl. ¶ 83. Count Two alleges that the government has a generalized trust responsibility "to account to Plaintiffs for the management of reparations which were and are held by Defendants for Plaintiffs' benefit . . .". *Id*. ¶ 87. Count Three, invoking Section 706(1) of the APA, alleges that the government's "failure to pay" reparations promised by the Treaty of Little Arkansas, and failure "to account to the Plaintiffs" regarding those alleged reparations, "constitute agency action unlawfully withheld or unreasonably delayed in violation of 5 U.S.C. § 706(1). Id. ¶¶ 95, 96, 104. The gravamen of all three counts is the demand for an "accounting."

Alleged violations of the Treaty of Little Arkansas are not actionable, first, because the relevant provisions of that Treaty (if not the entirety of the Treaty) was abrogated two years later (1867). In their ICC petition the Tribes themselves asserted that, by the 1867 Treaty of Medicine

Lodge Creek, the government "cancelled all payments under the 1865 treaty,"[47] committed "to supply certain services and annuities," and "revoked" "[a]ll prior treaties and treaty rights . . .". [48] The 1934 GAO report concurred: "[A]ll sums of money or other annuities stipulated to be paid to the Cheyenne and Arapahoe Tribes of Indians under the Treaty of October 14, 1865, were abrogated by the provisions of Article 10 of the Treaty of October 28, 1867, 15 Stat. 593 [Treaty of Medicine Lodge Creek]."[49] Plaintiffs cannot sue to enforce treaty obligations that were nullified over a century ago.

Plaintiffs' request for an "accounting" fails for the additional reason that it cannot satisfy the requirements for a viable claim under Section 706(1) of the APA, as the Supreme Court has recently clarified. The controlling decision is that in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("*SUWA*").

In *SUWA*, the plaintiff SUWA brought suit against the Bureau of Land Management ("BLM") for failing to comply with a directive in the Federal Land Policy and Management Act ("FLPMA") to manage certain public lands "in a manner so as not to impair the suitability of such areas for preservation as wilderness" (non-impairment mandate). *SUWA*, 542 U.S. at 59 (quoting 43 U.S.C. § 1782(c)). SUWA's lawsuit alleged, *inter alia*, that BLM was in violation of FLPMA's non-impairment mandate by allowing off-road vehicles ("ORVs") to degrade lands classified as wilderness study areas which were awaiting formal wilderness designation by Congress. *Id*. at 60. SUWA sought relief under Section 706(1) of the APA which allows a court

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[47] Exh. 6 (ICC Petition, Docket 329) ¶ 16; *see also* Exh. 7 (ICC Petition, severed Docket 329A) ¶ 14.

[48] *Id.*

[49] Exh 9 at pp. 33-34; *see also* Exh. 10 (1958 GAO Report) at 62-63.

to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), where an agency has failed to act in accordance with a legal duty. *Id.* at 59-60. SUWA sought a declaration that BLM was in violation of the non-impairment mandate, and an injunction ordering compliance with the non-impairment mandate. *Id.* Although the district court dismissed these claims, a divided panel of the Court of Appeals for the Tenth Circuit held that the district court had jurisdiction to award this form of relief under the APA. *See Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002), *rev'd*, 542 U.S. 55 (2004).

Upon review, the Supreme Court unanimously rejected the Tenth Circuit's application of the APA for two principal reasons. First, the Court examined Section 702 of the APA, which limits judicial review to suits challenging "agency action" as it is defined in Section 551(13) of that statute. *SUWA* at 62. The Court emphasized that the specific categories of "agency action" given in Section 551(13) all "involve circumscribed, discrete agency actions." *Id.* Applying this analysis to SUWA's claims, the Court concluded that SUWA's challenges to BLM's alleged failure to manage wilderness study areas in compliance with FLPMA's non-impairment mandate was not a challenge to "agency action," as defined in the APA, but rather was a challenge to the continuing, day-to-day administration of wilderness study areas by BLM. A challenge to such ongoing management activities is not cognizable under the APA, the Court held, because day-to-day management is not "discrete agency action," as defined in the APA. *Id*. at 66-67.

Second, and of equal importance to Plaintiffs' "accounting" claims, the Supreme Court held that Section 706(1) of the APA did not permit a court to award relief for SUWA's non-impairment claim, because only "*discrete* agency action that [an agency] is *required to take*" may be compelled under Section 706(1). *Id.* at 64 (emphasis in original). Put differently, "the only agency action that can be compelled under the APA is action legally *required*." *Id.* at 63

(emphasis in original). Since nothing in FLPMA's non-impairment mandate specifies any particular "legally required" action, the district court was without power under the APA to compel agency action. *Id.* at 65-66. The Supreme Court noted that, although FLPMA's non-impairment mandate "is mandatory as to the object to be achieved . . . it leaves BLM a great deal of discretion in deciding how to achieve it." *Id.* at 66. Accordingly, a plaintiff cannot invoke Section 706(1) of the APA to compel an agency to exercise its discretion in a certain way, because Section 706(1) "empowers a court only to compel an agency to perform a ministerial or non-discretionary act." *Id.* at 64 (quoting Attorney General's Manual on the Administrative Procedures Act 108 (1947)) (internal quotations omitted). Accordingly, challenges to agency processes not amounting to agency action, as that term is defined in the APA, are not within the scope of review under the APA. *Long Term Care Pharmacy Alliance v. Leavitt*, 530 F. Supp. 2d 173, 185-87 (D. D.C. 2008).

Plaintiffs' request for an accounting thus faces numerous insuperable obstacles. First, there can be no duty to account unless there is a trust, and nothing in the Treaty of Little Arkansas (or any other federal statute Plaintiffs cite) remotely suggests that Congress intended to create a trust or assume the responsibilities of trustee. Undertaking financial commitments does not create a trust relationship. *In re Segovia*, 404 B.R. 896, 927 (N.D.Cal. 2009), *aff'd* 404 F. App'x 61 (9th Cir. 2011) (the fact that employer is managing assets in which employee has an interest "does not mean that there is also a trust, or that the employer has accepted the role of trustee") (citation omitted); Restatement (2d) Trusts § 95 (1959) ("The United States or a State has capacity to take and hold property in trust, but in the absence of a statute otherwise providing the trust is unenforceable against the United States or a State"); *Valentini v. Shinseki*, 860 F.Supp.2d 1079, 1106-07 (C.D. Cal. 2012):

> Nowhere in the 1866 Act does Congress state that it will assume fiduciary duties, or that it takes on the duties of a trustee, or that failure to treat donated property in a manner consistent with the conditional donation will give rise to suit. This brings the 1866 Act into contrast with other statutes where Congress has so provided. For instance, 2 U.S.C. § 159 provides: "The [Library of Congress Trust Fund] board may be sued in the United States District Court for the District of Columbia, which is hereby given jurisdiction of such suits, for the purpose of enforcing the provisions of any trust accepted by it." 2 U.S.C. § 159. The 1866 Act does not have similar language.

Second, even if the Treaty can be construed at creating a trust, the United States is not subject to suit, for an accounting or for any other trust function, unless the treaty specifically consents to suit.

> Plaintiffs' briefing attempts to conflate the issue of whether a charitable trust has been created with the issue of whether the Government has assumed enforceable fiduciary duties with respect to the beneficiaries . . . . Plaintiffs cite to numerous cases where donations to the Government were held to have created a charitable trust. The Court agrees that this is such a case. The creation of a charitable trust, however, does not establish that the Government has also assumed enforceable fiduciary duties with respect to that trust.

Valentini v. Shinseki, 860 F.Supp.2d at 1107; Restatement (2d) Trusts § 95 ("The United States or a State has capacity to take and hold property in trust, but in the absence of a statute otherwise providing the trust is unenforceable against the United States or a State.")

Third, *SUWA* teaches that the Court cannot order an accounting under Section 706(1) of the APA unless the Treaty makes a "specific, unequivocal command" that the United States perform accountings. *SUWA*, 542 U.S. at 63 (internal quotations and citations omitted). Because the Treaty does not so much as mention an accounting, it most certainly does not make a specific, unequivocal command that accountings be performed.

Finally, SUWA establishes that even the payments required by the Treaty of Little Arkansas are beyond the reach of Section 706(1) of the APA. Article 6 of the Treaty of Little Arkansas entrusted all non-realty reparations to the Secretary's discretion.

> The United States will also pay in United States securities, animals, goods, provisions, or such other useful articles as may, in the discretion of the Secretary of the Interior, be deemed best adapted to the respective wants and conditions of the persons named in the schedule hereto annexed, they being present and members of the bands who suffered at Sand Creek, upon the occasion aforesaid, the sums set opposite their names, respectively, as a compensation for property belonging to them, and then and there destroyed or taken from them by the United States troops aforesaid.

14 Stat. 703, Article 6. Because the obligations here created are discretionary, Plaintiffs cannot claim that the quoted language imposes a non-discretionary, mandatory, discrete duty that could be the proper subject of an action under Section 706(1) of the APA. Similar to the broad statutory provision at issue in *Norton v. SUWA*, Article 6 "is mandatory as to the object to be achieved, but it leaves [the] . . . [Secretary] a great deal of discretion in deciding how to achieve it." *SUWA*, 542 U.S. at 66. Article 6 is not subject to enforcement under APA Section 706 (1) because it simply does not impose a "specific, unequivocal command . . . . ordering a precise, definite act about which an official had no discretion whatever." *SUWA*, 542 U.S. at 63 (internal quotations, citations, and alterations in original omitted).

F. Plaintiffs' Claims are Time-Barred

1. **FTCA Claims**

To whatever extent Plaintiffs seek to assert claims under the Federal Tort Claims Act ("FTCA") they are time-barred. FTCA provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b). The claim must be brought within two years of accrual, and a claim accrues when the injury becomes known or should have become known. *Robbins v. United*

States, 624 F.2d 971, 972 (10th Cir. 1980). The Supreme Court has narrowly construed any tolling of the statute, *Kubrick*, 444 U.S. at 111, and the Tenth Circuit has adhered to the *Kubrick* holding both in form and in substance. *See e.g., Gustavson v. United States*, 655 F.2d 1034 (10th Cir. 1981); *Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976).

Plaintiffs' FTCA claims are time-barred. Plaintiffs' core grievance – that the United States dishonored commitments made in 1865 -- occurred more than 140 years ago. There can be no argument that Plaintiffs were unaware of the claims they now assert; the Tribes *asserted those same claims* in 1929 and again in 1951.[50]

2. **"Trust" Claims**

Plaintiffs seek to avoid the statute of limitations by invoking trust mismanagement law that has no application to the facts of this case.

First, Plaintiffs allege that "[t]he United States has held, managed and controlled the reparation trust funds identified in Treaty of Little Arkansas, 14 Stat. 703." Compl. ¶ 97. But the Treaty of Little Arkansas says *nothing* about creating a "trust fund;" the word "trust" appears nowhere in the statute. Plaintiffs then compound the confusion by citing the American Indian Trust Management Reform Act of 1994, 25 U.S.C. §§ 4001, et seq. ("1994 Act") for the proposition that the Congress has directed the Secretary of the Interior to provide an accounting of the payments called for by the Treaty of Little Arkansas. Compl. ¶ 99 ("Congress commanded that the Defendants provide such an accounting in . . . , *inter alia*, the . . . 1994

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[50] Nor could Plaintiffs pursue damage claims in the Court of Claims under the Tucker Act, which is subject to a six-year statute of limitations. This court has authority to transfer a matter to the Court of Claims, but under the facts of this case doing so would be pointless. *Punchard v. U.S. Bureau of Land Management*, 180 Fed.Appx. 817, 820 (10th Cir. 2006).

American Indian Trust Management Reform Act of 1994."). But the 1994 Act is irrelevant to this case.

The 1994 Act provides, in relevant part, that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian Tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." *Id.*, § 4011 (a).[51] But Plaintiffs do not allege, and cannot allege, that any of the money appropriated under the 1865 Treaty of Little Arkansas was "deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. § 162a)." *Id*. Plaintiff cannot identify one reparations dollar that has *ever* been "held in trust." Contrary to Plaintiffs' implication, it cannot possibly be accurate to say that, because the United States has fiduciary obligations to Indian tribes, every financial obligation ever undertaken by the United States to a Tribe constitutes the creation of a "trust fund" even though no such fund was ever created or even contemplated.

Moreover, the unambiguous language the 1994 Reform Act limiting the Act to "all funds held in trust" limits the accounting required under the 1994 Act to funds *presently* held in trust as of October 25, 1994. 25 U.S.C. §§ 4011(a), (c). Section 102 does not say that the Secretary shall account for all funds that have ever been or were deposited or invested pursuant to the Act of June 24, 1938, 25 U.S.C. § 162a; instead, Congress again used the present tense and limited the requisite accounting to funds "which *are* deposited or invested" pursuant to the 1938 Act. 25

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[51] In *Cobell v. Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001) ("*Cobell VI*"), the Court of Appeals for the D.C. Circuit held that the 1994 Act imposes an enforceable duty upon Interior to provide an accounting for funds held in trust for individual Indians, including funds deposited prior to passage of the 1994 Act.

U.S.C. §§ 4011(a)-(c) (emphasis added). Plaintiffs' suggestion, that this obligation should be read to require an "accounting" of any and all financial obligations the United States has undertaken from the beginning of time, is absurd.

The 1994 Act does not have any bearing on Plaintiffs' claims, which are untimely.

IV. CONCLUSION

For the foregoing reasons Defendants respectfully request that Plaintiffs' complaint be dismissed in its entirety.

Respectfully submitted,

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