IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 1:13-cv-01836-PAB-CBS

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
THE DEPARTMENT OF THE ARMY,
THE DEPARTMENT OF DEFENSE,
THE DEPARTMENT OF THE INTERIOR, *and*
THE BUREAU OF INDIAN AFFAIRS,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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For over a century, the United States challenged the ability of the descendants of the Sand Creek Massacre to seek compensation under the Treaty of Little Arkansas ("the Treaty"). The instant Motion to Dismiss is only the latest episode in this saga, and the arguments set forth by the Defendant agencies are neither new nor unexpected. This is, sadly, yet another chapter in the United States' ironic and steadfast defense of an indefensible position; that the victims of the most "contemptible" and "abhorrent … depredations of the United States cavalry" deserve nothing. Memorandum in Support of Defendants' Motion to Dismiss ("U.S. Memo.") at 1. Not even, it now seems, an opportunity to be heard in the courts of the United States. The fact that the United States' solemn obligations are set forth in a Treaty – ratified by the United States Senate – makes its defense disgraceful.

Plaintiffs Homer Flute, Robert Simpson, Jr., Thompson Flute, Jr. and Dorothy Wood (herein the "Plaintiffs"), individual Indians, by and through counsel, thus submit this Response in Opposition to the Defendants' Motion to Dismiss [Doc. No. 17]. Plaintiffs' claims are legally cognizable and withstand judicial scrutiny. In opposition to the United States' Motion, Plaintiffs respectfully state as follows:

STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff[s]." *See Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (quoting *David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996)). The allegations must be sufficient enough to

"raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007). In interpreting the Supreme Court's holding in *Bell Atlantic*, the Tenth Circuit has held that a court "should look to the specific allegation in the complaint to determine whether they plausibly support a legal claim for relief." *Alvarado*, 493 F.3d 1215 at n.2 (citing *Iqbal v. Hasty*, 490 F.3d 143 (2nd Cir. 2007) (interpreting *Bell Atlantic* and *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197 (2007))). In other words, the Plaintiffs need not prove their case at this time; rather, they need only allege a plausible claim for relief. Here, Plaintiffs' claims are more than plausible.

Under the Indian Canons of Construction, "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("[D]oubtful expressions of legislative intent must be resolved in favor of the Indians"); *Fletcher v. United States*, 2013 U.S. App. LEXIS 19171 at *11 (Sept. 17, 2013) ("within the narrow field of Native American trust relations statutory ambiguities must be resolved in favor of the Indians") ("*Fletcher II*"). The canon further provides "for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Nat'l Labor Relations Bd. v. Pueblo of San Juan*¸ 276 F.3d 1186, 1194 (10th Cir. 2002) (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976)). Treaties and federal agreements with tribes should also be liberally construed to favor Indians. *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943).

Ambiguous expressions in treaties and statutes are resolved in favor of the tribes and their members. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973). Additionally, the familiar "*Chevron* deference" that courts normally grant to a federal agency's interpretation of statutes it administers is applied with "muted effect" in cases involving Indians. *See Cobell v. Salazar*, 573 F.3d 808, 812 (D.C.Cir. 2009) ("*Cobell XXII*").

It is against this legal backdrop that the Plaintiffs' claims must be judged.

FACTUAL BACKGROUND

The United States introduces hundreds of pages of historical documents in support of its Motion to Dismiss. Taken as a whole, the exhibits support the Plaintiffs' positions on each of the issues presented, setting forth the historical context of governmental neglect, denial and mismanagement.

I. The Plaintiffs' well-pleaded allegations.

In the early morning on November 29, 1864, United States Colonel John Chivington, commanding the Colorado First and Third cavalries, attacked and murdered over 150 unarmed Indians camped on Sand Creek in the Colorado territory. Complaint ¶¶ 22, 36-44 [Doc. No. 1]. So egregious was the unprovoked attack and the resulting treatment of both the survivors and the dead, the United States Congress saw fit to recognize the Sand Creek Massacre as "a gross and wonton outrage" against those Cheyenne and Arapaho Indians gathered there. *Id*. ¶ 60. That recognition – in the 1865 Treaty of Little Arkansas – included an agreement to pay to the descendants of the Massacre's victims sums certain of money and lands as "reparation for the injuries then done." *Id*. On July 26, 1866, the United States Congress appropriated money to

reimburse the "members of the bands of Arapaho and Cheyenne Indians who suffered at Sand Creek." *Id*. ¶ 64. The amount of money appropriated was insufficient to compensate the descendants under the terms of the Treaty. *Id*. Nonetheless, only some part of that insufficient appropriation was alleged to be disbursed, and *none* of those monies were distributed to individual Indians as required by the Treaty. *Id*. ¶¶ 65, 66. At the direction of Special Indian Agents of the United States Department of the Interior, and contrary to the terms of the Treaty itself, those monies were allegedly disbursed to the tribal governments of the Cheyenne and Arapaho and Apache Tribes of Indians. *Id*. ¶ 65. Though the United States promised a mere $53,000 recompense for the barbarities committed, none of those monies or properties have ever been paid to the descendants. *Id*. No full accounting has ever been provided to the individual descendants of the victims of Sand Creek, the Plaintiffs and members of Plaintiffs' putative class. *Id*. at ¶¶ 102-104.

Some of the lands identified in Article V of the Treaty may have been given to individuals in the State of Colorado. *Id*. ¶ 69; U.S. Memo., Ex. 2 at 8. Aside from those, no other effort has been made to transfer lands to individual Indians. Complaint ¶ 69. And, as with the monies owed, no full accounting of land disbursements has ever been concluded. *Id*.

Plaintiffs and members of the Plaintiffs' putative class are descendants of the victims of the Sand Creek massacre who were promised reparations in the Treaty of Little Arkansas. *Id*. ¶ 1. Plaintiffs filed this action on July 11, 2013, seeking an accounting of the reparations promised to their ancestors, which continue to be held in trust by the

United States, and other injunctive and declaratory relief related to the accounting. *Id*. ¶¶ 79-89.

II. Additional Facts Introduced by the United States

A. The 1867 Treaty of Medicine Lodge Creek

Over two years after the Treaty of Little Arkansas was ratified, and exactly two years after the Congressional appropriation of monies for its obligations under Article VI, the United States Senate ratified the Treaty of Medicine Lodge Creek ("the Medicine Lodge Treaty"). *Id*. ¶¶ 61, 64. The Medicine Lodge Treaty did not change the terms of the Article VI reparations from the Treaty of Little Arkansas. *Id*. ¶ 62. As specifically stated in the treaty, the compensation to be paid was "[i]n lieu of all sums of money or other annuities provided to be *paid to the Indians herein named*...." 15 Stat. 593, Article 10 (emphasis added). The treaty then identified all members of signatory tribes indiscriminately, rather than the individuals identified as Sand Creek victims and their descendants. *Id*. Thus, the operative provisions of that treaty were specifically designed to supersede the promises made in Articles II and VII – the cession of lands, establishment of a reservation, and disbursement of annual annuities for persons being removed – not the obligations made to individuals in Articles V and VI. As the United States acknowledged in 1935, "[t]he provisions of the [Treaty of Little Arkansas], *as to certain appropriations*, were superseded by the treaty of October 28, 1867." U.S. Memo., Ex. 2 at 9.

The Medicine Lodge Treaty was never properly concluded. Complaint ¶ 62. The United States' statement that the Cheyenne and Arapaho Tribes acknowledged that the

1865 Treaty was abrogated by the Medicine Lodge Treaty is false.[1] In the tribes' petition to the Indian Claims Commission, they note that "[s]aid treaty was never executed by [the Petitioner], or any representative of it, or by anyone who had the right or power to cede any of its lands." U.S. Memo., Ex. 6 at 14. And, in their Severed Petition filed in 1961 regarding the same treaties, the tribes again argued that the Medicine Lodge Treaty was defective for a number of reasons. *Id*., Ex. 7, ¶ 15.

B. Tribal Petitions Concerning the Treaty of Little Arkansas

The United States discusses two petitions made by various tribes seeking review of the United States' obligations under several treaties, including Treaty of Little Arkansas. These petitions are merely red herrings that do not preclude Plaintiffs' claims here. The first, Petition K-103 before the United States Court of Claims, was filed in 1929 by "the Arapahoe and Cheyenne Tribes of Indians, residing in the States of Wyoming, Montana, and Oklahoma." *Id*., Ex. 1 at 1. The Plaintiffs were not parties to the action, which was dismissed in 1941 when the tribes failed to prosecute their claims. *Id*., Ex. 3. The United States' characterization of this event as a "dismissal of the Plaintiffs' claims" is thus incorrect. *Id*. at 31.

In 1951, the tribes filed a similar petition before the Indian Claims Commission. Again, the claims were brought on behalf of tribal governments and, again, the Plaintiffs

[1] To the extent the United States will argue that any of the Petitioners' statements in previous proceedings before the Court of Claims or the Indian Claims Commission should be considered an admission by the Plaintiffs, we note that the Plaintiffs were not parties in any of those proceedings.

were not parties.[2] *Id*., Ex. 6 at 1. The claims brought by and for the tribes were settled in 1965, after presentation of the settlement terms at a tribal meeting in Watonga, Oklahoma on September 18, 1965. *Id*., Ex. 8, ¶ 65. The terms were presented by two attorneys for the tribes and included the presentation of "a written analysis of the compromise to the Indians...." *Id*. In that briefing, the treatment of claims for the descendants of the Massacre victims was specifically addressed; "[i]t is the opinion of your attorneys that no part of the $15,000,000 settlement is for the Sand Creek massacre and that the Southern Cheyenne and Arapaho Tribes have no compensable claim for the Sand Creek massacre…." Exhibit A at 5. The attorneys – who had negotiated the settlement agreement – explained the basis for excluding individual claims from the tribes' settlement.

> The massacre did not involve all of the Southern Cheyenne-Arapaho Tribes. It involved a small part of the tribes. Article 6 of the Treaty of 1865 refers to: "the gross and wanton outrages perpetuated against certain bands of Cheyenne and Arrapahoe Indians, on the twenty-ninth day of November, A.D. 1864, at Sand Creek." If the Southern Cheyenne-Arapaho Tribes could recover for the massacre, all the members of the tribes must share in the award. All of the members of the tribes were not injured by the massacre. Therefore the tribes, as an entity bringing suit, do not have a

[2] The petitioners were identified as the Cheyenne-Arapaho Tribes of Indians of Oklahoma, suing on its own behalf and as representative of the Confederated Tribes of Cheyenne and Arapaho Indians of the Upper Arkansas, also known as the Southern Cheyenne and Arapaho Tribes of Indians, and on behalf of the Cheyenne and Arapaho Tribes of Indians: Northern Cheyenne Tribe of Indians of the Tongue River Reservation, Montana, suing on its own behalf and as representative of the Northern Cheyenne Tribe of Indians, and on behalf of the Northern Cheyenne and Northern Arapaho Tribes of Indians, and on behalf of the Cheyenne and Arapaho Tribes of Indians; Northern Arapaho Tribe of Indians of the Wind River Reservation, Wyoming, suing on its own behalf and as representative of the Northern Arapaho Tribe of Indians, and on behalf of the Northern Cheyenne and Northern Arapaho Tribes of Indians, and on behalf of the Cheyenne and Arapaho Tribes of Indians. U.S. Memo., Ex. 6 at 3.

> valid claim for the massacre. *It is clear and unmistakable that the "Sand Creek Massacre Claims" are individual in nature and must be brought by descendants of those Cheyenne-Arapaho Indians killed at Sand Creek.*

Id. (emphasis added). The Plaintiffs' claims were not, and could not have been, settled by this petition.

While not a petition that concerned the Treaty of Little Arkansas, the complaint filed in *Cobell v. Salazar* also involved the mismanagement of funds held in trust for individual Indians, and also sought an accounting of trust funds held in Individual Indian Money accounts ("IIM accounts").[3] U.S. Memo. at 14. A settlement of that class action was approved on June 27, 2011. The settlement agreement specifically identifies the two classes to which the settlement applies. Both the "Historical Accounting Class" and "Trust Administration Class" are defined to include individuals who held IIM Accounts. *Id*., Ex. 11 ¶ 16, 35.

As is typical of the United States' treatment of Indians' and tribes' accounting claims, the United States has moved to dismiss Plaintiffs' claims on no fewer than six independent grounds, arguing that: (1) Plaintiffs lack prudential standing to bring this action to receive an accounting of their trust fund; (2) the United States has not waived its immunity from suit; (3) Plaintiffs' claims are precluded by previous actions that did not involve the trust fund at issue, or the claims Plaintiffs bring here; (4) that the Medicine

[3] The formation of these IIM accounts resulted from the failed assimilation of Native Americans in the early 1900s through allotment of tribal lands to individual Indians in fee. *See Cobell v. Norton*, 240 F.3d 1081, 1087 (D.C. Cir. 2001) ("*Cobell VI*"). After the proposed assimilation failed, the United States took the unalloted lands into trust for the benefit of individual Indian beneficiaries. *Id*. The exploitation of these lands formed the basis of the IIM accounts at issue in *Cobell*. *Id*.

Lodge Treaty—which was never properly concluded, and did not relate to the trust fund at issue—extinguished any duties owed to Plaintiffs and their ancestors; (5) that the statute of limitations has run on Plaintiffs' unaccrued claims; and (6) Plaintiffs have failed to state a claim. As explained herein, each of the United States' arguments lack merit and further illustrate the United States' refusal to perform its trust responsibilities to Plaintiffs and members of Plaintiffs' putative class.

ARGUMENT AND AUTHORITIES

I. Plaintiffs bring this action to enforce their own individual rights to an equitable accounting.

The United States first asserts that Plaintiffs—as individual Indian beneficiaries—"lack standing to sue on behalf of the Tribe or to vindicate tribal rights." *See* U.S. Memo. at 20. Essentially, United States argues that Plaintiffs are not the "real party in interest" as required by Fed. R. Civ. P. 17(a). Rule 17 requires that an action be brought by the person who, according to governing substantive law, is entitled to enforce the right. *See RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1073 (10th Cir. 2009); *see also Passman v. Companhia de Navegacao Maritima Netumar*, 544 F. Supp. 451 (E.D.Pa. 1982).

Here, Plaintiffs are not suing "on behalf of the Tribes or to vindicate tribal rights." *See* U.S. Memo. at 20. As discussed herein, federal law grants to the Plaintiffs – as individual Indian beneficiaries – the right to call the United States to account. Thus, the United States' reliance on *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935 (D.C. Cir.

2012), in which a faction of a Tribe sought recognition as its tribal council, is misplaced.[4] Here, that is clearly not the case.

Notwithstanding Defendants' fundamental misstatement of Plaintiffs' claims, the 1865 Treaty of Little Arkansas and subsequent Congressional appropriations created a trust responsibility between the United States and the individual descendants of the victims of the Sand Creek massacre.[5] The operative language in the Treaty is clear. In Article 6, the United States agreed to pay reparations to the surviving families of those "who suffered at Sand Creek," as follows:

> The United States being desirous to express its condemnation of, and, as far as may be, repudiate the gross and wanton out-rages perpetrated against certain bands of Cheyenne and Arrapahoe Indians, on the twenty-ninth day of November, A. D. 1864, at Sand Creek, in Colorado Territory, while the said Indians were at peace with the United States, and under its flag, whose protection they had by lawful authority been promised and induced to seek, and the Government being desirous to make some suitable reparation for the injuries then done, ... [t]he 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

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[4] Additionally, the United States' reliance on *In re Request from U.K. Pursuant to Treaty*, 685 F.3d 1 (1st Cir. 2012), *United States v. Li*, 206 F.3d 56 (1st Cir. 2000); *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008), and *Ozaltin v. Ozaltin*, 708 F.3d 355 (2d Cir. 2012) is equally misplaced because none of these cases involve individual Indians, or breach of trust claims against the United States. As explained herein, there is a long precedent – and specific statutory authority – that provide individual Indian beneficiaries a cause of action against the United States for breach of its trust responsibilities.

[5] In its' Motion, the United States admits that the treaty specifically identified "eligible widows and orphans" who were beneficiaries of the reparations that were eventually held in trust by the United States. *See* U.S. Memo. at 3.

> then and there destroyed or taken from them by the United States troops aforesaid.

Treaty of Little Arkansas, 14 Stat. 703 at 889 to 890, Art. 6 (signed Oct. 14, 1865, and ratified by the United States Senate May 22, 1866) (emphasis added).

Then, in furtherance of these obligations, on July 26, 1866, Congress appropriated thirty-nine thousand fifty dollars ($39,050) "[f]or reimbursing members of the bands of Arapaho and Cheyenne Indians who suffered at Sand Creek." *See* 1866 Appropriations Act, 14 Stat. at 276. Simply put, it stretches credulity to suggest that the obligations created by the Treaty and Congress's subsequent appropriations were *not* to individual Indians.

The United States Supreme Court has held that:

> a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). '[Where] the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.'

United States v. Mitchell, 463 U.S. 206, 225 (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980)) ("*Mitchell II*").[6]

[6] The United States' does not address *Mitchell II*, a Supreme Court case that involved the government's Indian trust responsibilities, but instead relies upon *In re Segovia*, 404 B.R. 896 (N.D. Cal. 2009), a district court case from another circuit that involves trust formation between private individuals.

Since the Treaty called for payment to specifically identified individuals, and Congress subsequently appropriated the funds to pay the individual decedents of the victims of the Sand Creek pursuant to Treaty of Little Arkansas, those funds were necessarily held "in trust" until they are ultimately distributed to the proper beneficiaries; an event which has never occurred. *See* Complaint at ¶¶ 64-65. Accordingly, as individual Indian beneficiaries, Plaintiffs may "sue for an accounting, just as traditional trust beneficiaries are permitted to do." *Fletcher II*, 2013 U.S. App. LEXIS 19171 at *11 (holding that individual Osage Indians, in addition to the Osage tribe itself, may bring claim for an accounting under 25 U.S.C. § 4011(a)).[7]

II. The United States waived its Sovereign Immunity from Suit.

A. Section 702 of the Administrative Procedures Act.

As the United States admits, Plaintiffs' Complaint sounds in breach of trust, including the request that the United States account to Plaintiffs. *See* U.S. Memo. at 34. It is the law of the Tenth Circuit that Section 702 of the Administratives Procedures Act (herein the "APA") provides the necessary waiver of sovereign immunity for breach of trust claims brought by Native Americans, including accounting claims. *See Fletcher v.*

[7] *Fletcher II* also directly contradicts the United States' claim that "Indian treaties create tribal, not individual rights." *See* U.S. Memo. at 21. *Fletcher II* involved an Act that solely related to the division of lands and funds of the Osage Nation. *Fletcher II*, 2013 U.S. App. LEXIS 19171 at *2. Regardless, the 10th Circuit found that the Act clearly "creates a trust relationship – and not just a trust relationship between the [United States] and the Osage Nation, but *also* between the [United States] individual Osage headright owners." *Id*. at *6. Accordingly, the United States' reliance on *Dry v. United States*, F.3d 1249 (10th Cir. 2000), *Hebah v. United States*, 428 F.2d 1334 (Ct. Cl. 1970), *Blackfeather v. United States*, 190 U.S. 368 (1903), is misplaced.

United States, 160 F. App'x 792, 797 (10th Cir. 2005) ("*Fletcher I*"); *Fletcher II*, 2013 U.S. App. LEXIS 19171 at *13.

The United States attempts to skirt its *continuing* responsibility to account to Plaintiffs by claiming that "Section 702 does not apply retroactively," and the "operative facts transpired long before" the enactment of the APA. U.S. Memo. at 30. While the trust responsibilities of the United States to Plaintiffs were created long before the enactment of the APA, Congress adopted legislation after the passage of the APA to confirm that the United States' duty to account is a *continuing* trust duty.[8]

In 1994, Congress passed legislation requiring the Department of the Interior to provide "as full and complete accounting as possible of the account holder's funds *to the earliest possible date*." 25 U.S.C. § 4044(2) (emphasis added). According to the district court in *Otoe-Missouria*, through the 1994 act "Congress intended a reconciliation of the account to determine what the proper balance should be and to require proper accounting and reconciliation to continue into the future." *Otoe-Missouria*, 2008 WL 5205191, at *2 (W.D. Okla. Dec. 10, 2008).

25 U.S.C. § 162a(d) is particularly instructive. Also adopted in 1994, the statute identifies several categories of information that, at a minimum, must be provided by the Secretary of the Interior in an accounting for Indian trusts, including the funds at issue here. These categories include accounting for whether the United States is: (1) providing

[8] Accordingly, since this case involves the continuing trust duty to account for the United States' management of Plaintiffs' trust fund, the United States' reliance on *United States v. Murdock Machine & Engineering Co. of Utah*, 81 F.3d 922 (10th Cir. 1996) is clearly misplaced.

adequate systems for accounting for and reporting of trust fund balances; (2) providing adequate controls over receipts and disbursements; (3) providing periodic, timely reconciliations to assure accuracy of accounts; (4) determining accurate cash balances; (5) preparing and supplying the Nations with periodic statements of their account performance, including making balances of such accounts available on a daily basis; (6) establishing consistent, written policies and procedures for trust fund management and accounting; (7) providing appropriate staffing, supervision, and training for trust fund management and accounting; and (8) assuring the appropriate management of the natural resources held in trust. *See* 25 U.S.C. §162a(d).

The United States lastly attempts to frame its treaty-imposed obligations as "discretionary," noting that the Treaty grants some discretion to the Secretary of the Interior to implement the Treaty's requirements. U.S. Memo. at 38-9. Incredibly, the United States contends that "the obligations here created are discretionary." *Id*. While it is true that the *manner* in which payments were to be made under the Treaty was to be determined by the Secretary, the *obligation* to do so clearly is not. Indeed, because the Treaty may have been interpreted to allow payments, *in lieu* transactions, or some other form of reparations, the language reinforces the need for an accounting.

The United States had – and continues to have – a duty to account to Plaintiffs, including after passage of the APA. Nothing in *SUWA* suggests otherwise. Failure to provide an accounting is clearly actionable under the APA's waiver of sovereign immunity. *See Fletcher I*, 160 F. App'x at 797.

B. The Appropriations Acts.

Plaintiffs need not rely solely upon 5 U.S.C. § 702 for jurisdiction before this court. The U.S. Department of the Interior's "Appropriations Acts" independently waive the United States' immunity to permit Plaintiffs to compel an accounting. *Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 364 F.3d 1339, 1346 (Fed. Cir. 2004) ("Statutes that toll the statute of limitations, resurrect an untimely claim, defer the accrual of a cause of action, or otherwise affect the time during which a claimant may sue the Government also *are considered a waiver of sovereign immunity*.") (emphasis added) (*citing Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003)). The Appropriations Acts are a series of acts passed by Congress waiving the United States' sovereign immunity and deferring accrual of potential claims until an Indian beneficiary receives a meaningful accounting of funds held in trust. *Shoshone Indian Tribe*, 364 F.3d 1339. The most recent appropriations act provides:

> [N]otwithstanding any other provision of law, *the statute of limitations shall not commence to run on any claim*, including any claim in litigation pending on the date of the enactment of this Act, *concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting* of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 111-88, 123 Stat. 2904 (2009) (emphasis added). Since 1991, Congress has passed several subsequent acts with similar language protecting both tribal and individual Indian claims. [9]

[9] *See* Pub. L. No. 102-154, 105 Stat. 990 (1991); Pub. L. 102-381, 106 Stat. 1374 (1992); Pub. L. No. 103-138, 107 Stat. 1379 (1993); Pub. L. No. 103-332, 108 Stat. 2499 (1994); Pub. L. No. 104-134, 110 Stat. 1321 (1996); Pub. L. No. 104-208, 110 Stat.

The United States argues that the Appropriations Acts "do not confer jurisdiction over Plaintiffs' claims" for two reasons: (1) the Acts, while delaying the running of statutes of limitations, do not "imply an intent to waive sovereign immunity;" and (2) that Plaintiffs' claims do not involve allegations of trust fund mismanagement. U.S. Memo. at 26. No weight should be afforded to either argument.

First, the Federal Circuit in *Shoshone* specifically held that "[s]tatutes that toll the statute of limitations, resurrect an untimely claim, defer the accrual of a cause of action, or otherwise affect the time during which a claimant may sue the Government also *are considered a waiver of sovereign immunity*." *Shoshone*, 364 F.3d at 1346 (emphasis added). The United States concedes that the Appropriations Acts "delay the running of statutes of limitations." U.S. Memo. at 26. Accordingly, they must also be "considered a waiver of [the United States'] sovereign immunity." *Shoshone*, 364 F.3d at 1346.

Second, the United States' claim that the Appropriations Acts do not apply to this action because Plaintiffs' "claim does not involve claims of trust fund mismanagement," U.S. Memo. at 26, misstates the Plaintiffs' claims and misinterprets the Acts. The Plaintiffs fundamentally disagree that the statute applies only to claims that a "trust fund" has been mismanaged. Rather, if funds are held in trust – whether in a specifically identified account or not – this is adequate to maintain a cause of action under the

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3009 (1996); Pub. L. No. 105-83, 111 Stat. 1543 (1997); Pub. L. No. 105-277, 112 Stat. 2681 (1998); Pub. L. No. 106-113, 113 Stat. 1501 (1999); Pub. L. No. 106-291, 114 Stat. 922 (2000); Pub. L. No. 107-63, 115 Stat. 414 (2001); Pub. L. No. 108-7, 117 Stat. 11 (2003); Pub. L. No. 108-108, 117 Stat. 1241 (2003); Pub. L. No. 108-447, 118 Stat. 2809 (2004); Pub. L. No. 109-54, 119 Stat. 499 (2005); Pub. L. No. 110-161, 121 Stat. 1844 (2007) Pub. L. No. 111-88, 123 Stat. 2904 (2009).

Appropriations Acts.[10] Moreover, the United States' statement is simply incorrect. Plaintiffs have clearly pled that the funds, which continue to be held in trust by the United States, have not been distributed pursuant to the Treaty of Little Arkansas. *See* Complaint ¶¶ 68, 82. That failure to distribute funds pursuant its trust duties is clearly a form of mismanagement.[11] And, as the United States has offered no evidence to the contrary of the allegations in Plaintiffs' Complaint, at a bare minimum, Plaintiffs' allegations are sufficient to withstand a motion to dismiss. *See Alvarado*, 493 F.3d 1215 at n.2.

III. Plaintiffs' Claims are not barred by *Res Judicata*.

"Pursuant to the doctrine of res judicata '[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *Pelt v. Utah*, 539 F.3d 1271, 1281 (10th Cir. 2008) (quoting *Wilkes v. Wyo. Dep't of Employment Div. of Labor Standards*, 314 F.3d 501, 503-04 (10th Cir. 2002)). Because *res judicata*, or "claim preclusion," is an affirmative defense, it is "incumbent upon the defendant to plead *and prove* such a defense." *Pelt*, 539 F.3d at 1283 (emphasis added).

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[10] And, of course, consistent with the Indian Canons of Construction, the language in the Acts should be construed broadly "when the issue is whether Indian rights are reserved or established…" *Pueblo of San Juan*¸ 276 F.3d at 1194.

[11] Furthermore, the failure to account is itself an issue of trust fund mismanagement. *See Fletcher II*, 2013 U.S. App. LEXIS 19171 at *11 (allowing individual Indian beneficiaries to "sue for an accounting, just as traditional trust beneficiaries are permitted to do.").

"Under Tenth Circuit law, claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Id.* at 1281 (quoting *MACTEC Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005)). When defining a cause of action, the Tenth Circuit requests that district courts use the transaction approach: "a cause of action includes all claims or legal theories of recover that arise from the same transaction, event, or occurrence." *Jones v. United States DOJ*, 137 Fed. Appx. 165, 167 (10th Cir. 2005). Even where a defendant establishes that the three elements exist, *res judicata* is not appropriate if the party seeking to avoid preclusion did not have a "full and fair opportunity" to litigate the claim in the prior suit. *MACTEC*, 427 F.3d at 831. In applying these elements to the facts of a specific case, the district court is to view all facts in the light most favorable to the plaintiff. *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000). The United States agrees that this is the standard to be applied to its affirmative defense, but fails to address – much less prove – even one element of its own defense.

A. The *Cobell* settlement does not preclude the claims at issue in this action.

While claims by Indian tribes and individuals proceed through the courts every day, the United States suggests to this Court that any allegations that the "United States has failed to keep adequate records" or "failed to account to the trust beneficiaries with respect to their money" should be precluded by the settlement in *Cobell*. Quite obviously, that is not the case. The United States' sweeping interpretation – seeking to extend the settlement beyond the realm of IIM accounts addressed in *Cobell* to each and

every individual Indian trust claim – cannot withstand scrutiny. While the *Cobell* litigation did end in a "final judgment on the merits," it did not involve the Plaintiffs here, nor their ancestors, nor did it have at issue, or settle, the cause of action raised here.

Initially, of course, the burden is on the United States to prove that the Plaintiffs have or had accounts included in that settlement. It provides *no evidence at all*. Notwithstanding the fact that Defendants failed to meet their burden, it is helpful to understand how *Cobell* differs from this case. Specifically, the *Cobell* agreement settled only those claims of "individual Indian beneficiaries ... who had an IIM Account open during any period between October 25, 1994 and the Record Date." U.S. Memo., Ex. 11, ¶¶ 16, 35. The United States does not claim that Plaintiffs are IIM account holders, nor does it provide any evidence in support of such a contention. Indeed, a glance at the Plaintiffs' Complaint shows that the Plaintiffs' claims have nothing to do with IIM accounts, nor to the time periods at issue in *Cobell*. The United States claim for *res judicata* fails because there is no "identity of parties or privies in the two suits." *MACTEC*, 427 F.3d at 831.

Well after the settlement in *Cobell*, the Tenth Circuit held that the United States is required to account to individual Indian trust beneficiaries of non-*Cobell* trust accounts.[12] *Fletcher II*, 2013 U.S. App. LEXIS 19171. In *Fletcher II*, the individual Indian beneficiaries of the Osage mineral estate are seeking an accounting of their royalty

[12] Before the Northern District of Oklahoma, the United States argued that, should funds from the Osage Mineral Estate pass through IIM accounts, the plaintiffs' claims in *Fletcher* would be the subject of *Cobell*. The United States abandoned that argument on appeal in *Fletcher*.

interests. *Id*. at *3. The United States argued that it only had a duty to account to the Osage Nation and not the individual trust beneficiaries. *Id*. at *12. Rejecting the United States' argument, the Tenth Circuit held that the Act that created the Osage mineral estate specifically created a trust relationship between the United States and individual Osage tribal members, in addition to the trust relationship with the Osage Nation. *Id*. at *13. Additionally, the Tenth Circuit held that 25 U.S.C. § 4011(a) specifically imposes a duty on the United States to account to both tribal entities *and to* individual Indians. *Id.*[13]

Moreover, even if Plaintiffs were IIM account holders, the United States' *res judicata* claim would fail because the accounting in *Cobell* was targeted at a different trust account than the account at issue in this action. The United States fails to provide any evidence that Plaintiffs' funds – obligated in the Treaty of Little Arkansas and appropriated in the 1866 Appropriations Act – were deposited in IIM Accounts.

Plaintiffs' right to bring this action for an accounting of the funds held in trust results from a different transaction, implicates different funds, and thus constitutes a separate cause of action. As such, the United States claim for *res judicata* fails because there is no "identity of the cause of action in both suits." *MACTEC*, 427 F.3d at 831.

B. Court of Claims Case K-103 does not preclude Plaintiffs' action.

Court of Claims Case K-103 cannot preclude this action because the Plaintiffs and their ancestors were not parties to Case K-103, and the Arapahoe and Cheyenne Tribes of

[13] "Only when we come to § 162a(d) are traditional trust responsibilities expressly discussed and delineated. And Congress enacted § 162a(d) at the same time and in the same act it imposed the accounting trust obligation found in § 4011(a), many years after it adopted § 162a(a)-(c). *See* American Indian Trust Fund Management Reform Act § 101, 108 Stat. at 4240." *Fletcher II*, at 13.

Indians lacked standing to bring the claims Plaintiffs bring in this action. *See, e.g.*, Ex. A at 5. As noted above, the Treaty of Little Arkansas and the 1866 Appropriations Act created a trust fund for the benefit of individual Indian descendents of the Sand Creek massacre. This right is an individual right and not a tribal right. *See, e.g., Fletcher II* at *19-20 (explaining that 25 U.S.C. § 4011(a) specifically speaks to a responsibility to account to both tribal entities *and* individual Indians depending on the trust beneficiary of the specific trust funds). The claims in Case K-103, on the other hand, were brought by tribes. In its own exhibits, the United States specifically identifies the plaintiffs –the tribes – in Case K-103. Describing the claims, the Assistant Secretary of the defendant Department of the Interior wrote that the United States "recognizes the plaintiffs as the Cheyenne and Arapaho tribes of Indians residing in the States of Wyoming, Montana and Wyoming." U.S. Memo., Ex. 2 at 1.

C. Indian Claims Commission Petitions 329 and 329A do not preclude Plaintiffs' action.

The United States' citation to the tribes' 1951 petition before the Indian Claims Commission suffers the same flaw. The claims asserted were brought on behalf of tribes, not individuals. *Id*., Ex. 6 at 1. This fact was specifically identified in the 1965 settlement of the action, and conveyed to the tribal members approving the agreement. Plaintiff Ex. A at 5. The attorneys who negotiated the settlement agreement with the United States, in the presence of representatives of the Defendant United States Department of the Interior, noted that the settlement did not include individuals' claims for reparations under the Treaty of Little Arkansas. *Id.* "[T]he tribes, as an entity bring

suit, do not have a valid claim for the massacre. It is clear and unmistakable that the 'Sand Creek Massacre Claims' are individual in nature and must be brought by descendants of those Cheyenne-Arapaho Indians killed at Sand Creek." *Id*.

There lacks an "identity of the cause of action in both," between this action and any of the *Cobell* settlement classes, Court of Claims Case K-103, or the tribes' 329 petition in the Indian Claims Commission. By extension, a "final judgment on the merits" is lacking in the instant cause of action. *MACTEC*, 427 F.3d at 831. For these reasons, the United States' affirmative defense of *res judicata* must fail.

IV. The 1867 Treaty of Medicine Lodge Creek did not extinguish the United States' trust responsibilities to the decedents of the Sand Creek Massacre.

The United States contends that the Medicine Lodge Treaty abrogated any responsibility of the United States to make payments to the Plaintiffs in this matter. The Treaty of Medicine Lodge Creek neither invoked the claims at issue in this matter, nor could it have. Initially, the United States utterly fails to satisfy its substantial burden in bringing a motion under Rule 12(b)(6). The Plaintiffs have alleged that the Treaty of Medicine Lodge Creek "did not change the terms of the reparations from the Treaty of Little Arkansas [and] the Medicine Lodge Treaty was never properly concluded." Complaint ¶ 62. That allegation should be accepted as true and construed in the light most favorable to the Plaintiffs. In response, the United States argues that "the Tribes themselves asserted," among other things, that the Treaty was revoked. U.S. Memo. at

49-50. This is untrue. Again, the United States' own exhibits demonstrate the point.[14] In their petition to the Indian Claims Commission in 1951, the Cheyenne and Arapaho Tribes did, in fact, discuss the Medicine Lodge Creek treaty. According to the tribes, the "treaty was never executed by it, or any representative of it, or by anyone who had the right or power to cede any of its lands." U.S. Memo., Ex. 6, ¶ 16(a). The burden rests with the United States to demonstrate that its duty to pay reparations was terminated by the Medicine Lodge Treaty. The United States' own "evidence" rejects its contention, and its motion should therefore be dismissed.

Second, there is no factual dispute that monies were appropriated in July 1866 by the United States Congress to satisfy the obligations identified in Article VI of the Treaty of Little Arkansas. Complaint ¶ 64. Nor is there is any dispute that the Medicine Lodge Treaty was ratified by the Congress on July 26, 1868. 15 Stat. 593. Thus, the funds – albeit likely inadequate to completely fulfill the United States' obligations – and the resulting fiduciary relationship between the United States and the Massacre descendants existed two years prior to the alleged abrogation of the Treaty. The descendants, therefore, have a right to a full accounting of those funds and that right cannot as a matter of fact be impacted by the Medicine Lodge Treaty.

[14] The United States actually cites this petition for the opposite proposition. It is clear that the tribes were simply setting forth provisions from the Treaty of Medicine Lodge Creek. Reading one sentence beyond, however, not only did the Tribes not "themselves assert" that the Treaty was abrogated, they specifically challenged it. U.S. Memo., Ex. 6, ¶ 16(a).

Third, in order for a treaty to be abrogated by another, the relevant provisions in the subsequent treaty must be properly concluded. *See* Vienna Convention on Law of Treaties, Art. 42(2). As discussed above, this never occurred.

V. Plaintiffs' claims are not subject to any statute of limitations until they receive an accounting of their trust fund.

Although this Court has not determined whether claims of Indian trust fund mismanagement, such as those raised by Plaintiffs here, are barred by statutes of limitations *prior to* receiving an accounting of the trust fund, other courts in the circuit have. District Courts addressing these issues have and consistently found that such claims are not barred by any statute of limitations. *See Tonkawa Tribe of Indians v. Kempthorne*, No. CIV-06-14350F, 2009 WL 742896, *2 (W.D. Okla., March 17, 2009); *Otoe-Missouria Tribe of Oklahoma v. Kempthorne*, No. CIV-06-1436-C, 2008 WL 5205191, *4-5 (W.D. Okla., Dec. 10, 2008)(hereinafter "*Otoe*").

In *Otoe*, for example, the United States claimed that the Indian Claims Commission Act barred the plaintiff's trust mismanagement claims from before 1946:

> Defendants argue to the extent Plaintiff seeks an accounting relating to management prior to 1946, this Court lacks subject matter jurisdiction. According to Defendants, any claims that Plaintiff could have brought before the Indian Claims Commission ("ICC"), but did not are forever barred. Defendants argue that the…ICCA…, 60 Stat. 1052, vested the ICC with exclusive jurisdiction to hear and determine all tribal trust claims against the federal government that existed as of August 13, 1946.

Otoe, 2008 WL 5205191 at * 4. In rejecting the United States' arguments, the court reasoned that "Congress deferred accrual of the statute of limitations including any limitation arising from the ICCA by passage of the various Tribal Trust Accounting

Statutes…" *Id.* (citing Pub.L. No. 109-54, 119 Stat. 499 (2005)). This same reasoning has also been adopted by the Eastern District of Oklahoma in *Seminole Nation of Oklahoma v. Salazar*, No. CIV-06-556-SPS, 2009 WL 919435, *1 (E.D. Okla. Mar. 31, 2009)("The Court is persuaded by the reasoning in [*Otoe* and *Tonkawa*] and will therefore apply it to this case. Thus, the Court finds that it has subject matter jurisdiction over the [trust accounting] claims asserted by the Tribe…").

The "various Tribal Trust Accounting Statutes" referred to by the *Otoe* Court are provisions contained in a series of Department of the Interior Appropriation Acts which address Indian trust accounting claims. Beginning in 1990, Congress deferred the accrual of such claims pending the actual receipt of an accounting:

> *[N]otwithstanding 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 (1990) (emphasis added). The operative claims accrual language has been repeated in the many successive Tribal Trust Fund Accounting Statutes.[15] The most recent version of the Tribal Trust Accounting Statutes provides:

> *[N]otwithstanding any other provision of law*, the statute of limitations shall not commence to run *on any claim*, including any claim in litigation pending on the date of the enactment of this Act, *concerning losses to or mismanagement of trust funds*, until the affected tribe or *individual Indian* has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 111-88, 123 Stat 2904 (2009) (emphasis added).

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[15] *See* note 6, *infra.*

Significantly, each and every Tribal Trust Accounting Statute employs the "notwithstanding any other provision of law" language. It is well established that "the phrase 'notwithstanding any other provision of law,' or a variation thereof, means exactly that; it is unambiguous and effectively supersedes all previous laws." *Energy Transp. Group, Inc. v. Skinner*, 752 F. Supp. 1, 10 (D. D.C. 1990); *see also Liberty Mar. Corp. v. U.S.*, 928 F.2d 413, 416 (D.C. Cir. 1991). "[A] clearer statement is difficult to imagine." *Liberty Mar. Corp.*, 928 F.2d at 416 (quoting *Crowley Caribbean Transport, Inc. v. United States*, 865 F.2d 1281, 1283 (D.C. Cir. 1989)).

In construing the 2005 version of the Tribal Trust Fund Accounting Statute, the *Otoe* court concluded:

> The plain language of the Act clearly expresses an intent to suspend all statutes of limitations until an accounting has been provided. To the extent there is any ambiguity regarding the scope of the Act, the Indian canons of construction…mandate that ambiguity be resolved in favor of the tribe, which would also defer application of any limitations period. Thus, because Plaintiff asserts it has never received an accounting, its claims have not yet accrued. Likewise, *those claims are not barred by the ICCA.* Defendants' motion will be denied on this issue.

Otoe, 2008 WL 5205191 at *5 (emphasis added); *see also Tonkawa*, 2009 WL 742896 at *2.

Furthermore, the *Otoe* and *Tonkawa* decisions are neither novel nor extraordinary. On the contrary, the *Otoe* and *Tonkawa* decisions are the prevailing judicial view. In *Felter v. Salazar*, 679 F. Supp. 2d 1, 6-8 (D.D.C. 2010), the United States District Court held that the 2003 Tribal Trust Accounting Statute retroactively revived tribal trust accounting claims that would otherwise be barred by 28 U.S.C. § 2401, the very statute

the United States claims precludes Plaintiffs claims here.

Similarly, when construing the Tribal Trust Accounting Statutes, the Federal Circuit in *Shoshone* determined that "[t]he introductory phrase 'notwithstanding any other provision of law' connotes a legislative intent to displace any other provision of law that is contrary to the Act[s]...." *Shoshone,* 364 F.3d at 1346. The court reasoned that the phrase "'shall not commence to run,' unambiguously delays the commencement of the limitations period until an accounting has been completed that reveals whether a loss has been suffered." *Id*. at 1347.

Relying on the holding in *Shoshone*, the court in *Osage Nation v. United States,* 57 Fed. Cl. 392, 398 (Fed. Cl. 2003), found that the Tribal Trust Accounting Statutes effectively preserved pre-1946 claims, notwithstanding the ICCA:

> As in *Shoshone,* the court finds that the language "notwithstanding any other provision of law" is a sufficient signal to indicate congressional awareness of an existing statutory framework and is also a determination to preserve claims "notwithstanding" that framework.

(*citing Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States,* 51 Fed. Cl. 60, 67 (2001)).

A prevailing view exists that the Tribal Trust Accounting Statutes vitiate any jurisdictional bar to tribal trust accounting claims created by contrary statutes of limitations, such as 28 U.S.C. § 2401. And, under the Tribal Trust Accounting Statutes, the statute of limitations "shall not commence to run" on any tribal trust accounting claim until the beneficiary has been furnished with an accounting from which it can determine "whether there has been a loss." "This is simple logic – how can a beneficiary be aware

of any claims unless and until an accounting has been rendered?" *Shoshone*, 364 F.3d at 1347.

VI. Plaintiffs properly pled a claim for an equitable accounting.

The Tenth Circuit held that a court "should look to the specific allegation in the complaint to determine whether they plausibly support a legal claim for relief." *Alvarado*, 493 F.3d at n.2 (interpreting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007)). Applying the *Alvarado* standard, Plaintiffs have alleged that the United States failed to account. *See* Complaint at ¶¶ 86-89 [Doc. No. 1]. Plaintiff's entitlement to an accounting is more than plausible, as restated by the D.C. Circuit Court:

> The plaintiffs are entitled to an accounting under the statute. 25 U.S.C. § 4011(a). The district court sitting in equity must do everything it can to ensure that Interior provides them an equitable accounting. The district court's holding of impossibility contradicts the requirement of an equitable accounting-one that makes most efficient use of limited government resources. Given the realities of congressional appropriations, it would be inequitable for Interior to throw up its hands and stop the accounting. This is what the district court declared Interior should do in *Cobell XX*, leading to the money judgment of *Cobell XXI*. That judgment was substantial, but without an accounting, it is impossible to know who is owed what. The best any trust beneficiary could hope for would be a government check in an arbitrary amount. Even if this did justice for the class, it would be inaccurate and unfair to an unknown number of individual trust beneficiaries. There will be uncertainty in any accounting for this trust. Interior's job is to minimize that uncertainty with a finite budget. Equity requires the courts to assure that Interior provides the best accounting it can.

See Cobell v. Salazar, 573 F.3d 808, 813 (D.C. Cir. 2009). As explained, the United States holds the reparations due to Plaintiffs in trust for their benefit. Pursuant to a federal treaty and a federal statute, the United States was obligated to pay that money to the Plaintiffs and their ancestors. The existence of that trust relationship requires that the

United States provide to them an accounting. *See e.g.* 25 U.S.C. § 4011(a); *Cobell VI*, 240 F.3d at 1095 (holding that the 1994 Act, including 25 U.S.C. § 4011(a), did not create a duty to account, but merely was meant to remedy the United States' failure to account to Indian beneficiaries for over a century); *Fletcher II*, 2013 U.S. App. LEXIS 19171 at *11-13.[16]

Moreover, and substantively, the accounting the United States is required to provide must be "meaningful." The phrase "meaningful accounting" is a term of art. It means something more than "simple notice." *See Chippewa Cree Tribe, et al. v. U.S.*, 69 Fed. Cl. 639, 664 (Fed. Cl. 2006). It is "not some kind of Procrustean bed that may be stretched or shrunk to fit available resources." *Cobell v. Kempthorne*, 532 F.Supp.2d 37, 90 (D.D.C. 2008) (ruling that the Department of Interior's proposed plan to account to individual Indians would "not contain sufficient information for the beneficiary readily to ascertain whether the trust has been faithfully carried out.") ("*Cobell XX*"). "[T]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." *See* Restatement (3d) of Trusts § 173. At a minimum, it means "information sufficient to alert the beneficiar[ies] to possible losses." *Chippewa Cree*, 69 Fed. Cl. At 664.

The United States argues that Plaintiffs have failed to state a claim because "the Court cannot order an accounting under Section 706(1) of the APA unless the Treaty

[16] To the extent that there is any ambiguity as to whether Plaintiffs are entitled to an accounting, under Section 4011 or any other statute, that ambiguity must be resolved in favor of Plaintiffs pursuant to the Indian Cannons of Construction. *See Fletcher II*, 2013 U.S. App. LEXIS 19171 at *17 ("statutory ambiguities in the field of trust relations must be construed for, not against, Native Americans").

makes a 'specific, unequivocal command' that the United States perform accountings." U.S. Memo. at 38 (*citing to Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004)). However, courts have consistently held that the United States' failure to account to Indian trust beneficiaries constitutes discrete "final agency action" that is actionable under Section 706(1) of the APA. *See Cobell VI*, 240 F.3d at 1095 ("[F]ederal government has been under an obligation to discharge the fiduciary duties owed to [Indian] trust beneficiaries for decades."); *Otoe-Missouria*, 2008 WL 5205191, at *5 ("Plaintiff is entitled to pursue this action under [5 U.S.C.] § 706(1), as Plaintiff may compel the Federal Defendants to perform the discrete activity of accounting for the funds held in trust as required under [federal statutes].").

The United States *never* accounted—let alone provided a "meaningful accounting"—to Plaintiffs, members of Plaintiffs' putative class, or any of Plaintiffs' ancestors for the reparations its holds in trust for their benefit. Accordingly, pursuant to 25 U.S.C. § 4011(a) and *Fletcher II*, Plaintiffs properly pled an action for an equitable accounting.

CONCLUSION

True to the history of this contemptible and sordid incident, the United States' Motion to Dismiss is another attempt to hide its head in the sand, denying any responsibility to the victims of the Sand Creek Massacre. Rather than refute the claims set forth in the Complaint, the United States attempts to mold Plaintiffs' claims into something they clearly are not, in the hope that one of its affirmative defenses finds purchase. Plaintiffs, as individual Indian beneficiaries of a trust created by the Treaty of

Little Arkansas and the subsequent Congressional appropriations, have standing to enforce *their* rights under that Treaty and federal statutes. The United States has waived its sovereign immunity for such a claim. *See Fletcher*, 160 F. App'x at 797. Such a claim is plausible and states a claim for which this Court may grant relief. *See e.g.* 25 U.S.C. § 4011(a); *Fletcher II*, 2013 U.S. App. LEXIS 19171 at *11.

The cases relied upon by the United States – *Cobell*, Court of Claims Case K-103, and Indian Claims Commission matters 329 and 329A – do not operate as *res judicata* for Plaintiffs' claims here. None of those cases involved the claims at issue here, nor did they include Plaintiffs or their ancestors as parties. The explicit recognition of that fact, in presentations made to the Cheyenne and Arapaho Tribes almost 50 years ago, is striking. In addition, Plaintiffs' claims are not time barred because any relevant statute of limitations "shall not commence to run" until Plaintiffs are provided a meaningful accounting of thefunds held in trust by the Defendant. *See* Pub. L. No. 111-88, 123 Stat 2904 (2009). Finally, Plaintiffs have properly pled their action for an accounting.

WHEREFORE, Plaintiffs respectfully request that this Court deny Defendant United States' Motion to Dismiss.

Respectfully Submitted,

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s/ David F. Askman

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