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.

DEFENADANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

When Congress learned of the abomination of the Sand Creek Massacre it immediately committed by Treaty to compensate the survivors. 14 Stat. 703 (October 14, 1865) ("Treaty of Little Arkansas," or "the 1865 Treaty.") The following year Congress appropriated funds to fulfill the commitments made in the 1865 Treaty. 14 Stat. 255, 276 (July 26, 1866). The Secretary disbursed those funds in accordance with the discretion Congress had given him and, so far as the record shows, in accordance with the stated wishes of the Cheyenne Arapaho Tribe ("Tribe").[1]

In 1926 Congress again reached out to the Tribe, passing a special jurisdictional statute allowing the Tribe to sue.[2] The Tribe then presented to the Court of Claims the very same claims that it seeks to pursue here. *Id*. at 5-6. The Tribe did not prosecute those claims and they were accordingly dismissed.

When Congress passed the Indian Claims Commission ("ICC") Act the Tribe again asserted exactly the same claims it asserts here (requesting an "accounting" of the Government's performance (or nonperformance) of promises made in the 1865 Treaty), and compensation, notwithstanding the fact that the dismissal of the Tribe's 1929 lawsuit would ordinarily bar any such re-litigation. *See id*. at 31-32. This time the Tribe pursued its claims and secured a fifteen million dollar settlement in exchange for waiving any and all claims that were or could have been brought before the ICC.

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[1] According to 1958 GAO Report, Exh. 10, ECF 17-12, at pp. 60-61, the money and goods were disbursed to the Tribe (rather than to the individual survivors) at the request of the Tribe.

[2] See Defendants' Memorandum in Support of Motion to Dismiss (ECF No. 17-1) ("Def. Mem.") at 5 n.3.

If plaintiff were correct that the 1865 Treaty somehow created a trust in Plaintiffs' ancestors' benefit, and if that benefit were heritable, any claims relating to that trust were *again* settled in the *Cobell* litigation, in which the government paid billions of dollars to resolve a class action brought on behalf of individual Indians who had land or money in trust with the United States. And regarding Plaintiffs' request for an "accounting" of its alleged (but unidentified) trust funds, the Government Accounting Office has twice provided an accounting. *Id*. at 10-14.

We reject the suggestion that the United States' record of behavior towards the survivors of the Sand Creek victims has been dishonorable.

The Sand Creek Massacre was horrible. But unless the horror of that event empowers the court to cast aside all applicable law Plaintiffs' lawsuit cannot succeed. The implication of Plaintiffs' case is that any time Congress appropriates money for the benefit of an Indian a trust is spontaneously created that exempts the claims of the beneficiary (or of his descendants, *ad infinitum*) from the normal limits on the federal courts' jurisdiction and from the normal limits on a party's right to pursue claims that have already been resolved. As discussed in detail below, that argument is flawed in many ways. The Court should dismiss Plaintiffs' Complaint.

II. ARGUMENT

A. Plaintiffs Fail to State a Claim for an "Accounting" Because the Treaty of Little Arkansas Did Not Create a Trust

To survive dismissal under Rule 12(b)(6) a plaintiff must "nudge[ ] their claims across the line from conceivable to plausible. . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). 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). The notion that by the Treaty of Little Arkansas the United States imposed trust responsibilities upon itself is not plausible and must be rejected as a matter of law.

Plaintiffs' memorandum (ECF No. 26) ("Pl. Opp.") repeatedly asserts that the 1865 Treaty created a trust but nowhere points to any language in the treaty that could plausibly be so construed. And the only cases Plaintiffs cite that are at least arguably relevant, *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*) and *Fletcher v. United States*, 2013 WL 5184985 (10th Cir. Sept. 17, 2013) (*Fletcher II*), do not support Plaintiffs' case, as demonstrated by the decision in *Wolfchild v. United States*, 559 F.3d 1228 (Fed.Cir.2009) (*Wolfchild III*).[3]

First, the Treaty itself (14 Stat. 703) in no way suggests that a trust was intended. It provides that land and goods will be given to the survivors of the victims at Sand Creek. *Id*. § 6. The land is evidently to be given in fee with no separation of legal and equitable interests. Both the land and the goods were to be provided as a one-time "reparation" for the wrongs suffered. *Id*. When the Secretary transferred goods he retained control over nothing; the goods themselves were delivered to the Tribe and the remaining cash was returned to the Treasury as "surplus" funds. Compl. ¶ 66; *see also* 1934 GAO Report (ECF 17-11) at 100.

Second, the 1866 appropriation act likewise gives no hint of congressional intent to create a trust. The relevant language reads as follows:

> *Arapaho and Cheyenne Indians of the Upper Arkansas River.* For reimbursing members of the bands of Arapaho and Cheyenne Indians who suffered at Sand

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[3] The *Wolfchild* litigation resulted in six published opinions. *Wolfchild III* represents the result of the first of two appeals to the Federal Circuit. *See also Wolfchild v. United States*, 62 Fed.Cl. 521 (2004) (*Wolfchild I*); *Wolfchild v. United States*, 68 Fed.Cl. 779 (2005) (*Wolfchild II*); *Wolfchild v. United States*, 96 Fed.Cl. 302 (2010) (*Wolfchild IV*); *Wolfchild v. United States*, 101 Fed.Cl. 54 (2011) (*Wolfchild V*); *Wolfchild v. United States*, 2013 WL 5405505 (Fed. Cir., Sept. 27, 2013) (*Wolfchild VI*).

> Creek, November twenty-ninth, eighteen hundred and sixty-four, to be paid in United States securities, animals, goods, provisions, or such other useful articles as the Secretary of the Interior may direct, as per sixth article treaty of October fourteenth, eighteen hundred and sixty-five, thirty-nine thousand and fifty dollars.

14 Stat. 255, 276 (July 26, 1866).

The absence of any indication that Congress intended to create a trust is dispositive. The Supreme Court has been at pains to emphasize that the United States' fiduciary obligations to Indians are strictly a matter of statute. Most recently, in *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), the court held that the common law fiduciary exception to the attorney-client privilege does not apply to the United States. In so holding the court emphasized that "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law . . .". 131 S. Ct. at 2318. The court could not have been more clear:

> [T]he applicable statutes and regulations "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." When "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." *The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute*.

Id at 2325 (citing *Mitchell II*, 463 U.S. at 224, *United States v. Navajo Nation*, 556 U.S. 287, 301, 302 (2009) (*Navajo II*), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475-76 (2003)) (footnotes omitted) (emphasis added).

Plaintiffs appear to take comfort from the observation in *Mitchell II* that, where the government exercises control over tribal assets that is "comprehensive" (463 U.S. at 209) "pervasive" (*id*. at 225 n.29) and "elaborate" (*id*. at 225), congressional intent to create a tribal trust can be inferred "even though nothing is said expressly in the authorizing or underlying

statute . . . about a trust fund." *Id*. (citation omitted). But the foundation for the holding in *Mitchell II* was the fact that, in statutes and regulations enacted over almost a century, Congress and Interior had repeatedly made clear their understanding and intent that the Secretary manage the tribe's assets in trust and be answerable for breach of trust. *Id*. at 219-225. *See id*. at 225 ("[T]he statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources . . ."). Clear evidence of Congressional intent is the key, as the court again emphasized in *Jicarilla*: "although the settlor has called the transaction a trust[,] no trust is created unless he manifests an intention to impose duties which are enforceable in the courts." 131 S. Ct. at 2325 n.6 (quoting Restatement (Second) of Trusts, § 25, Comment a) (1957).[4]

Because the "statutes and regulations at issue" in *Mitchell II* "clearly establish[ed] fiduciary obligations," 463 U.S. at 225, the case is of no relevance where, as here, neither the Treaty invoked nor the appropriations act implementing that treaty give the slightest hint that Congress intended to create even a "bare" trust. The same is true of *Fletcher II*, in which the foundational statute "clearly creates a trust relationship—and not just a trust relationship between the federal government and the Osage Nation, but also between the federal government and the individual Osage headright owners who are plaintiffs in this case." 2013 WL 5184985 at *2; *see also id*. ("Over the years both Congress and this court have repeatedly recognized that, in this

[4] The plaintiffs in *Mitchell* were 1,465 individuals that owned interests in allotments on the Quinault Reservation. The Court in *Mitchell I* had held that the Allotment Act's creation of plaintiffs' interests had created a "bare trust." *Mitchell II*, 463 U.S. at 224. The issue in *Mitchell II* was whether the government assumed trust duties beyond those of a bare trust. *Id*. Plaintiffs here have not even alleged the factual predicate for a bare trust.

way, the 1906 Act created a trust relationship between the government and individual headright owners") (footnote and citations omitted). Plaintiffs' citation to *Mitchell II* and *Fletcher II* only serves to highlight the fact that in this case there is *no* evidence of Congress's intent to create fiduciary duties, let alone judicially enforceable fiduciary duties.

The Federal Circuit's decision in *Wolfchild III* confirms the fact that Plaintiffs' accounting claim cannot succeed. The *Wolfchild* saga dates back to 1862 when the Minnesota Sioux rebelled against the United States. A number of Minnesota Sioux, the "loyal Mdewakantons," refused to join the uprising. On several occasions Congress appropriated funds and directed the purchase of lands for then-destitute groups of loyal Mdewakantons. At issue in the litigation were "three pieces of legislation . . . [by which] Congress [in 1888, 1889, and 1890] appropriated funds . . . to be used for the benefit of the [loyal] Mdewakantons . . .". *Wolfchild III*, 559 F.3d at 1233. The Secretary had used some of the appropriated funds to buy land for the use of three Mdewakanton communities. *Id*. at 1234. "Title to those lands was taken in the name of the United States, and the deeds contained no trust designation or other limitation on title." *Id*.

The history of *Wolfchild* is convoluted, but its application to Plaintiffs' suit is straightforward. The plaintiffs in *Wolfchild* were descendants of loyal Mdewakantons who claimed that they were being wrongfully denied their share of trust revenues. The plaintiffs' entitlement turned on the question whether the 1888, 1889, and 1890 appropriations acts had created a trust for the benefit of the loyal Mdewakantons. The District Court held "that the Appropriations Acts created a trust for the loyal Mdewakantons and their descendants." *Id*. at 1237. The Court of Appeals reversed.

The court began by noting that the appropriations acts at issue said nothing about creating a trust and that "[w]hile it is true that a statute need not contain the word 'trust' in order to create a trust relationship, the failure to use that term gives rise to doubt that a trust relationship was intended." *Id*. at 1238, citing Cohen, *Handbook of Federal Indian Law* § 5.05[1][b], at 429-30 (Nell Jessup Newton *et al*., eds., 2005). That was "particularly true," the court continued, "where, as here, Congress used the term 'trust' in other contemporaneous statutes dealing with the same subject matter, but did not use that term or any close proxy in the [appropriations acts at issue]."[5] The court concluded that the appropriations acts in issue created no trust.

> [A] trust is created "only if the settlor properly manifests an intention to create a trust relationship." Restatement (Third) of Trusts § 13 (2003). The Appropriations Acts manifest no such intention on the part of Congress. Although the Appropriations Acts impose some limited restrictions as to how the appropriated funds are to be spent, those restrictions are consistent with the kinds of directions that are routinely contained in appropriations statutes dictating that the appropriated funds are to be spent for a particular purpose. The simple statutory directives as to the expenditures authorized by the Appropriations Acts do not evidence an intention on Congress's part to create a legal relationship between the Secretary of the Interior and the 1886 Mdewakantons in which the Secretary was assigned particular duties as trustee and the Mdewakantons were given enforceable rights as trust beneficiaries. If the minimal directives given to the Secretary as to the expenditure of funds were sufficient to convert the Appropriations Acts into trust instruments, it would seem that other similar, contemporaneous appropriations for the support of other groups of Indians could also be characterized as creating trust responsibilities, even though in none of those instances is there any objective evidence of congressional intention to create a trust.

The court reaffirmed this holding in *Wolfchild VI*. 2013 WL 5405505 at *6.

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[5] *Id*., citing General Allotment Act of 1887, ch. 119, § 5, 24 Stat. 388, 389 (providing that United States will hold allotted land "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made"); Act of May 1, 1888, ch. 213, art. 6, 25 Stat. 113, 115 (United States to hold land "in trust"); Act of Mar. 2, 1889, ch. 405, § 11, 25 Stat. 888, 891 (same).

A review of the 1866 appropriation act Plaintiffs invoke demonstrates the weight of the *Wolfchild* court's reasoning and also reveals that Plaintiffs' theory courts absurd results. The 1866 appropriation for the Tribe is only one of several *hundred* specific appropriations made for well over one hundred distinct tribes and bands. 14 Stat. 255. Similar appropriations were made over a period of many years.[6] If Plaintiffs' theory were correct, Congress over these decades created *thousands* of separate trust accounts without once using the word "trust" and without once giving any clue that establishing trusts – and trusts for the management of which the United States would be answerable in damages – was Congress's purpose. As the *Wolfchild VI* court noted, Plainitiffs' theory would create massive practical difficulties. *Wolfchild VI*, 2013 WL 5405505 at *6 ("If claimants' view about descendants and proceeds were right, simply sorting out who was owed money, as well as when they were to be paid and how (instructions absent from the statutes), would, by the early 1980s, have imposed a tremendous burden on the Department of the Interior and, then, on any court called on to review Interior's actions.") And the fact that the appropriation Plaintiffs invoke was intended to discharge a treaty commitment makes no difference, as the vast majority of the appropriations set out in these statutes are similarly treaty-driven. Fn. 6, *supra*.

Plaintiffs repeatedly invoke the Indian Canons of Construction. The purpose of those Canons is to guide the courts in the interpretation of ambiguous statutes. But Plaintiffs do not and cannot point to any ambiguities in the statutes they rely upon, which give no indication that

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[6] *See*, *e.g.*, 9 Stat. 574 (February 27, 1851); 13 Stat. 541 (March 3, 1865); 12 Stat. 512 (July 5, 1862); 12 Stat. 774 (March 3, 1863); 13 Stat. 161 (June 25, 1864); 13 Stat. 541 (March 3, 1865); 14 Stat. 492 (March 2, 1867); 15 Stat. 198 (July 27, 1868); 16 Stat. 13 (April 10, 1869).

Congress even considered establishing a trust for the benefit of Plaintiffs' ancestors. The Canons are not intended to empower courts to create trusts out of thin air.

B. Even if We Assume that the 1865 Treaty *Did* Create a Trust, Plaintiffs' Claims Fail for a Multitude of Reasons

1. Sovereign Immunity

This issue is controlled by *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*) and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("*SUWA*"). In *Mitchell I* Congress had set aside land in trust for the benefit of several allottees of the Quinault tribe. The allotment act did not waive sovereign immunity, the Court held, because it "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." 445 U.S. at 542. *See also Navajo II*, 556 U.S. at 291 (even if it is clear that Congress created a trust, sovereign immunity is not waived unless the statute "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties ... impose[d]."). In *SUWA* the Court held that Congress's imposition of generalized stewardship responsibilities on the administration does not activate the APA's waiver of sovereign immunity because it does not define "*discrete* agency action that [an agency] is *required to take*" that may be compelled under Section 706(1). 542 U.S. at 64 (emphasis in original). Here the Treaty Plaintiffs invoke does not direct the Secretary to manage anything (*Mitchell I*), and does not direct the Secretary to provide the accounting Plaintiffs seek to compel (*SUWA*).

Plaintiffs' effort to avoid sovereign immunity also cites Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, and *Fletcher v. United States*, 160 F. App'x 792 (10th Cir. 2005) (*Fletcher I*). But *Fletcher I* did not involve alleged misconduct that long predated the APA, and Section 702 is not retroactive. Plaintiffs' answer to these problems – that they they

seek a "current" accounting – fails because there is no current trust corpus. When Congress appropriated funds for Plaintiffs' ancestors the Secretary disbursed some of the funds and returned the remainder to the Treasury. ECF 17-11 at 59; ECF 17-12 at 59-60; Compl. ¶ 66.

2. **Jurisdiction**

We have addressed the argument that Section 702 of the APA confers jurisdiction. We here note that Plaintiffs have apparently abandoned their claim that this Court is granted jurisdiction by 28 U.S.C. §§ 1331 (federal question jurisdiction), 1343 (civil rights and elective franchise), 1361 (action to compel a federal officer), or 1362 (jurisdiction over suit by Indian tribes). Plaintiff has also abandoned 28 U.S.C. § 1346, the Federal Tort Claims Act. *See* 28 U.S.C. §§ 1346(b), 2671 *et seq*.

Plaintiff argues that recent Interior appropriations acts confer jurisdiction, citing *Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 364 F.3d 1339, 1346 (Fed. Cir. 2004). Pl. Opp. at 15. But nothing in the appropriations acts purports to be a grant of jurisdiction; instead, their only purpose is to set a condition precedent on the running of statutes of limitation on existing claims for mismanagement of funds actually and currently held in trust. The language Plaintiffs quote from *Shoshone Indian Tribe of Wind River Reservation* is not to the contrary. It is true that "[s]tatutes that toll the statute of limitations" on claims against the United States implicate sovereign immunity (*id*.), because time limits on claims against the government act as limits on the waiver of sovereign immunity. Nothing in the case suggests that the appropriations acts are an independent grant of jurisdiction or an independent waiver of sovereign immunity.

3. **Standing**

In support of their argument that the Treaty of Little Arkansas created rights enforceable by individual tribe members, Plaintiffs rely upon *Fletcher v. United States*, 2013 WL 5184985

(10th Cir. September 17, 2013) (*Fletcher II*). But *Fletcher II* sheds no light on the issues raised by Defendants' Motion to Dismiss. The only issue in *Fletcher II* was whether plaintiff "headright" owners had a statutory right to an accounting of funds collected into trust and distributed to headright owners pursuant to the 1906 Osage Act. 34 Stat. 539 (June 28, 1906). The court's finding that individuals possess enforceable rights was founded on an interpretation of the 1906 statute (which has no bearing here), *see* 2013 WL 5184985 at *2; it was not, as Plaintiffs suggest, a generalized pronouncement on the rights of individual Indians. And because the statute at issue in *Fletcher II* was not a treaty, *Fletcher II* has no bearing on the principle that treaties create collective rights that are not enforceable by individuals.

Also, Plaintiffs lack standing for the separately dispositive reason that there is no indication in the Treaty of Little Arkansas or in the 1866 appropriation act that Congress intended to confer any benefits on the *descendants* of the specific beneficiaries of those acts. As was true in *Wolfchild VI*, which is squarely on point, "[t]he statutes neither mention 'descendants' of [the] designated Indians nor say anything about proceeds that may or may not accrue from what was bought with the appropriated funds. The only express mandates in the Acts, in other words, begin and end with the expenditure of money appropriated in those Acts, for the benefit of the Indians specified in those Acts." 2013 WL 5405505 at *5.

4. **Statute of Limitations**

Plaintiffs' core allegation is that commitments made in the 1865 Treaty of Little Arkansas were not honored. Compl. ¶¶ 65-69. If that allegation is true its truth was fully known more than a century ago. Any claim based on that allegation is time-barred.

Plaintiffs' defense against the statute of limitations rests upon the savings provisions contained in several appropriations acts. Assuming, implausibly in our view, that those appropriations acts were intended to revive long-stale claims, they do not by their terms apply.

The relevant language states that the statute of limitations will not begin to run "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*." 123 Stat. 2904 (October, 30, 2009) (emphasis added). Plaintiffs needed no such accounting to "determine whether there has been a loss" if the alleged nonperformance of the 1865 treaty is a fact. Actual awareness of the alleged nonperformance is confirmed, if confirmation were needed, by the fact that the same claims were made in the Tribe's 1929 lawsuit and in its ICC lawsuit.

Beyond this, Plaintiffs have *twice* received an accounting sufficient to "determine whether there has been a loss",[7] in the 1934 and 1958 GAO reports. Accordingly, the appropriations acts do not revive Plaintiffs' claims.

> Second, even if the funds at issue were trust assets, the claim made here would not be the sort of claim for which a final accounting would be necessary to put a plaintiff on notice of a claim, because claimants knew or should have known that the money was publicly distributed in 1981 and 1982. The [appropriation act] says that the statute of limitations does not commence to run for claims "concerning losses to or mismanagement of trust funds" until the beneficiary receives "an accounting ... from which [it] can determine whether there has been a loss." Consistent with the reason for the enactment, as explained in *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1346–48 (Fed.Cir.2004), the two quoted phrases are properly read together: the claims about "losses" or "mismanagement" that are protected by this provision are those for which an accounting matters in allowing a claimant to identify and prove the harm-causing act at issue; otherwise, the [appropriation act] would give claimants the right to wait for an accounting that they do not need. When a claim concerns an open repudiation of an alleged trust duty, "a 'final accounting' [i]s unnecessary to put the [claimants] on notice of the accrual of [their] claim." *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1355 (Fed.Cir.2011) (relying on *Shoshone*). That description fits this case: claimants did not need an accounting in order to "determine whether there ha[d] been a loss" because the funds at issue were

[7] Defendants continue to maintain that the Secretary does not hold, and has not held, money in trust for the plaintiffs' benefit that arises from Article VI of the Treaty of Little Arkansas or from the 1866 appropriations.

> openly disbursed in 1981 and 1982. For that reason as well, the [appropriation act] does not save this claim from untimeliness.

Wolfchild VI, 2013 WL 5405505 at *7; see also *Fletcher II*, 2013 WL 5184985, at *8 (purpose of an accounting is to provide "some sense of where money has come from and gone to."). Plaintiffs have long known all of the information necessary to bring their current claim that Interior failed to carry out the reparations called for by the Treaty of Little Arkansas.

5. **Merger and Bar: The ICC Settlement**

Plaintiffs argue that the settlement of the Tribes' 1951 petition before the Indian Claims Commission has no effect on Plaintiffs' current claims because the ICC suit asserted tribal claims and instant suit asserts individual claims. Pl. Opp. at 21-22. In support Plaintiffs cite to a memorandum in which the Tribe's attorney opines that the ICC settlement agreement does not include claims arising out of the Sand Creek Massacre. ECF No. 26-1.

Plaintiffs' argument overlooks the fact that the ICC plaintiffs in fact asserted the same claim that Plaintiffs seek to assert here, namely, that the United States "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." ECF 17-8 ¶31(c). The severed petitions were equally clear. Seeking 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 complete accounting and that petitioner be awarded judgment in the amount shown to be due under such an accounting." ECF No. 17-9 ¶ 20.

The stipulation of settlement of the Tribes' ICC suits 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." *Cheyenne-Arapaho Indians of Oklahoma v. United States*, 16 Ind. Cl. Comm. 162, 171-72 (1965) (ECF No. 17-10) (emphasis added). Because the same claims advanced now *were asserted* in the ICC case, they are barred.

The opinion expressed by the Tribe's counsel in his 1965 memorandum essentially takes the position that claims arising out of the 1864 massacre and the government's alleged nonperformance of the 1865 treaty are not claims that "could have been" brought. Counsel's self-serving opinion is not of course binding on the court, and it also does not alter the preclusive effect of the settlement of claims that *were* brought. The opinion is also highly questionable. The jurisdiction of the ICC extended to claims by any "tribe, band, *or identifiable group*" of Indians. The third alternative ("identifiable group") was added by amendment in order to broaden the reach of the ICC, *see Chippewa Cree Tribe of the Rocky Boy's Reservation v. U.S.*, 69 Fed. Cl. 639, 671-73 (2006), and the ICC construed it broadly. *See*, e.g., *Peoria Tribe of Indians of Okla. v. United States*, 169 Ct.Cl. 1009, 1012-13 (1965) (finding that the identification of two scattered families descended from the Wea nation was sufficient to support a determination by the Indian Claims Commission that the Weas constituted a tribe, band, or identifiable group.) If the earlier case had been litigated, the ICC may have determined that the survivors of the victims at Sand Creek were an identifiable group; Congress specifically identified them as a group having a common grievance in the 1865 Treaty and the 1866 appropriation. *See Chippewa Cree Tribe*, 69 Fed. Cl. at 673 ("The controlling question is whether the claimant group can be identified and have a common claim.")

6. **Merger and Bar: The *Cobell* Settlement**

Plaintiffs only effort to avoid the preclusive effect of the *Cobell* settlement is to note that the *Cobell* case involved "Individual Indian Money" ("IIM") accounts and to state that "Plaintiffs' claims have nothing to do with IIM accounts . . .". Pl. Opp. at 19. But IIM accounts are the only way the Secretary can hold funds in trust for individual Indians. The Secretary holds Indian trust funds in three types of accounts, (1) tribal accounts; (2) IIM accounts; and (3) special deposit accounts (SDAs). 25 CFR § 115.701 (2001). Plaintiffs are not claiming an interest in a tribal account, and an SDA is defined as "a temporary account for the deposit of trust funds that cannot immediately be credited to the rightful account holders." 25 CFR § 115.002 (2001). Thus Plaintiffs' insistence that they do not have IIM accounts is an admission that the government does not hold money in trust for their benefit.

Also, the claims settled in Cobell were defined broadly enough to include claims relating to *any* funds held in trust by the United States for *any* individual Indian.

> "Historical Accounting Claims" shall mean common law or statutory claims, including claims arising under the Trust Reform Act, for a historical accounting through the Record Date of any and all IIM Accounts *and any asset held in trust or restricted status, including but not limited to Land (as defined herein) and funds held in any account, and which now are, or have been, beneficially owned or held by an individual Indian trust beneficiary* who is a member of the Historical Accounting Class. These claims include the historical accounting through the Record Date of *all funds collected and held in trust by Defendants and their financial and fiscal agents* in open or closed accounts, as well as interest earned on such funds, whether such funds are deposited in IIM Accounts, or in tribal, special deposit, or government administrative or operating accounts.

ECF No. 17-13 at 10 (emphasis added). Plaintiffs have nowhere pointed to a single dollar that the United States holds in trust for their benefit. If there were such funds somewhere, the *Cobell*

settlement extinguished claims relating to the government's management of those funds and any ancillary accounting duty.

7. **The Treaty of Medicine Lodge Creek**

Plaintiffs argue that the Treaty of Medicine Lodge Creek (15 Stat. 593 (October 28, 1867)) did not abrogate the Treaty of Little Arkansas because (a) the Treaty of Medicine Lodge Creek was not properly executed by tribal representatives, and (b) money had already been disbursed pursuant to the Treaty of Little Arkansas when the Treaty of Medicine Lodge Creek took effect. Pl. Opp. at 22-23. Neither point preserves Plaintiffs' claims.

The language of the Treaty of Medicine Lodge Creek clearly states that it is "in lieu" of the Treaty of Little Arkansas and as such, Congress abrogated the 1865 Treaty of Little Arkansas with the Treaty of Medicine Lodge Creek.[8] Plaintiffs' allegation that the Tribes did not properly execute the Treaty of Medicine Lodge Creek is of little moment in light of Congress's plenary power to abrogate Indian treaties. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977), *U. S. v. Sioux Nation of Indians*, 448 U.S. 371, 411 (1980). And, in any event, if the Treaty of Medicine Lodge Creek somehow wronged the Tribes (or Plaintiffs' ancestors) the fact of that wrong has long been known and any claims arising out of it have been long extinguished.

Finally, Plaintiffs are correct that disbursements called for by the Treaty of Little Arkansas were duly made under the 1866 appropriation. But if that appropriation somehow

[8] "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: . . . ." 15 Stat. 593, Article 10 (footnotes omitted).

created a trust, the trust was repudiated when the Secretary returned a substantial portion of the appropriated funds to the Treasury, another fact that has been long known. *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012) (a trustee repudiates a trust "by taking actions inconsistent with his responsibilities as a trustee"). *See also Papasan v. Allain*, 478 U.S. 265, 280 n.12 (1986) "It may be true that a trust beneficiary is not normally time barred from suing a trustee for breach of trust and loss of the corpus until such time as the trustee expressly repudiates the trust. . . . But this does not mean that there is a continuing affirmative obligation on the part of the trustee with respect to the trust corpus and income as opposed to merely liability for a past breach of trust that may still be acted upon") (citation omitted).

III. CONCLUSION

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

Respectfully submitted,

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/s/ Peter Kryn Dykema
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