IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SISSETON WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION, *et al.*,	)	
Plaintiffs,	)	No. 13-cv-601-TFH
v.	)	Hon. Thomas F. Hogan
JEWELL, *et al.*,	)	
Defendants.	)	

MOTION TO DISMISS

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Pursuant to Rule 12(b)(1) and LCvR 7, defendants, S.M.R. Jewell, in her official capacity as the Secretary of the Interior, and Jacob Lew, in his official capacity as the Secretary of the Treasury, move to dismiss plaintiffs' complaint for lack of subject-matter jurisdiction because defendants have not waived their sovereign immunity from plaintiffs' claims.

I. INTRODUCTION

In this case, plaintiffs, ten Indian tribes, invoke the Administrative Procedure Act's ("APA") waiver of sovereign immunity to advance claims against the Secretary of the Interior and the Secretary of the Treasury based upon "[t]he inherent fiduciary duty of the government." Second Am. Compl. ("SAC") ¶ 38, ECF No. 18-1.[1/] Plaintiffs do not identify any substantive source of law that compels the "complete and accurate accounting[] of each of Plaintiffs' trust accounts" they request as a remedy from this Court. *See id.* ¶¶ 57-64.

The APA, 5 U.S.C. §§ 551, *et seq*., does not vest this Court with subject-matter jurisdiction to review all purported malfeasances of executive agencies. *Califano v. Sanders*, 430 U.S. 99, 104-6 (1977). Instead, the judicial review provisions of the APA, 5 U.S.C. §§ 701-706, provide only a limited waiver of the United States' sovereign immunity for non-monetary claims challenging final agency action or to compel agency action mandated by a source of substantive law other than the APA. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) ("*SUWA*") ("only agency action that can be compelled under the APA is action legally *required*.") (emphasis in original). Defendants have not waived their sovereign immunity from plaintiffs' "inherent fiduciary duty" claims, they do not fall within the scope of the APA, and

[1/] On November 19, 2013, plaintiffs filed an unopposed motion for leave to file a second amended complaint for the limited purpose of adding a new plaintiff. Motion for Leave, ECF No. 18. The only difference between plaintiffs' original complaint, ECF No. 1, their first amended complaint, ECF No. 17, and the proposed second amended complaint is the number of plaintiffs. Thus, defendants' instant motion to dismiss applies equally to all three versions of the complaint. For purposes of this motion, defendants cite to paragraphs in the proposed second amended complaint.

they should be dismissed for lack of subject-matter jurisdiction.

Plaintiffs' complaint further repeatedly refers to "final agency action" (SAC ¶¶ 1, 58, 71), but does not identify any discrete agency action challenged or allegedly unlawfully withheld or unreasonably delayed. This defect alone is fatal to plaintiffs' claims. And, even the most liberal reading of plaintiffs' allegations does not evince a proper APA claim within this Court's subject-matter jurisdiction. If plaintiffs challenge the reconciliation reports and reconciled account balances provided to plaintiffs by the Department of the Interior ("Interior") and called for under Section 304 the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act") (25 U.S.C. § 4044), *see* SAC ¶¶ 61-62, those claims are untimely. If plaintiffs challenge defendants' compliance with the Federal Records Act, *see id.* ¶ 68, those claims are not cognizable in this Court. If plaintiffs challenge over 190 years of tribal trust account management by defendants, *see id.* ¶ 26, and seek structural reform of Interior's Indian trust fund accounting and management systems, *id.* ¶¶ 63-64, those are programmatic challenges well outside the APA's limited waiver of sovereign immunity. If plaintiffs seek money damages, *see id.* ¶ 69, they have brought their case in the wrong court. Because plaintiffs' complaint fails to direct its attack against some particular agency action that has caused them harm and constitutes final agency action, the United States has not waived its sovereign immunity from plaintiffs' claims and they should be dismissed for lack of subject-matter jurisdiction.

II. STANDARD OF REVIEW

Defendants move to dismiss plaintiffs' complaint for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). When challenged on the issue, the party asserting subject-matter jurisdiction bears the burden of establishing that the Court does in fact have

subject-matter jurisdiction over the dispute. *Moms Against Mercury v. Fed. Drug Admin.*, 483 F.3d 824, 828 (D.C. Cir. 2007).

As this is a "facial attack" to plaintiffs' failure to invoke a waiver of sovereign immunity, in evaluating this motion, the Court should "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979)) (internal citation omitted). The Court need not accept as true, however, "a legal conclusion couched as a factual allegation," nor an inference unsupported by the facts set forth in the complaint. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006). If the Court, at any time, determines it lacks subject-matter jurisdiction, the case should be dismissed. Fed. R. Civ. P. 12(h)(3).

III. STATUTORY BACKGROUND

A. The Administrative Procedure Act.

The reach of the APA's waiver of sovereign immunity is not without limit. Several of those limitations are relevant here.

First, the statute itself imposes certain requirements to state a claim within the APA's purview. Specifically, the APA only permits judicial review of federal agency actions by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. § 702. That "relevant statute," in turn, has to be a statute other than the APA. To be reviewable under the APA, the discrete, non-discretionary, agency action must also be final. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Whether there has been "agency action" or "final agency action" within the meaning of the APA is a threshold question; if this requirement is not met, the action is not reviewable. *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir.

2006). To be entitled to judicial review under the APA, plaintiffs must allege that a discrete, non-discretionary, agency action required by law is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(a); *SUWA*, 542 U.S. at 63-64.

Second, judicial review under the APA for agency inaction is limited to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706; *see also* 5 U.S.C. § 704 (APA review limited to "final agency action[s] for which there is no other adequate remedy in a court are subject to judicial review"). The agency action to be compelled must be "a ministerial or non-discretionary act, or to take action upon a matter, without directing how it shall act." *SUWA*, 542 U.S. at 64 (internal quotation marks and citation omitted). Furthermore, "when an agency is compelled by law to act, but the manner of its action is left to the agency's discretion, the 'court can compel the agency to act, [although it] has no power to specify what th[at] action must be.'" *Kaufman v. Mukasey*, 542 F.3d 1334, 1338 (D.C. Cir. 2008) (citing *SUWA*, 542 U.S. at 65).

Finally, plaintiffs cannot use the APA to bring a collective challenge to a sweeping group of actions. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 892-93 (1990). The Supreme Court requires that under the terms of the APA, a plaintiff must "direct its attack against some particular 'agency action' that causes it harm." *Id.* at 891.

B. The 1994 Act.

The 1994 Act (Pub. L. No. 103-412, 108 Stat. 4248 (1994)) was Congress's means to set forth Interior's historical reconciliation and prospective accounting obligations for tribal trust funds. *See* H.R. REP. 103-778 (1994) at 8-9 ("The [1994 Act] sets out the Secretary of the Interior's responsibilities to American Indian trust fund account holders . . . ."). In the 1994 Act, Congress directed the Secretary of the Interior to provide plaintiffs with account balances reconciled as of September 30, 1995, for each of plaintiffs' tribal trust fund accounts based upon

"as full and complete accounting as possible."[2/] 25 U.S.C. § 4044. Prospectively, the 1994 Act compelled Interior to "prepar[e] and supply[] account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis." 25 U.S.C. § 162a(d)(5); 25 U.S.C. § 4011(b).

More specifically, Section 4044 required Interior to provide a report to Congress "identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995," and to describe to Congress the methodology by which Interior reconciled those tribal trust accounts. Section 4044 further required Interior to obtain from tribes an attestation that they accepted their reconciliation report and reconciled account balances as of September 30, 1995. Finally, Section 4044 called upon the Secretary to report to Congress on her efforts to resolve any disputed account balances. Plaintiffs acknowledge that they received a reconciliation report and reconciled account balances from Interior in 1996, in response to Section 4044. SAC ¶ 46.

Section 4011 addressed Interior's prospective accounting obligations. It directed the Secretary of the Interior to account for the daily and annual balances of all funds held in trust by the United States for the benefit of individual Indians and Indian tribes that are deposited or invested pursuant to the Act of June 24, 1938, and to provide periodic statements of performance going forward. 25 U.S.C. § 4011.

C. Public Law No. 109-158.

Indian tribes were provided with reconciliation reports and reconciled account balances in 1996. *See* SAC ¶ 46. In 2002, Congress passed additional legislation regarding the Section 4044 reports. Aware that some tribes were filing suits to preserve their objections to the

[2/] Plaintiffs omit "as possible" in their complaint. *See* SAC ¶ 6. This is significant, since this Circuit has recognized that the statute does not require "the best imaginable accounting without regard to costs." *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("*Cobell XVI*")

reconciled account balances, Congress amended the 1994 Act to extend the date that tribes would be deemed to have received their reports and reconciled account balances. *See* An Act to Encourage the Negotiated Settlement of Tribal Claims, Pub. L. No. 107-153, 116 Stat. 79 (2002) (codified at 25 U.S.C. § 4044 note). This legislation essentially deferred the deadline for tribes to "dispute[] the balance of the account holder's account as reconciled [and/or] . . . dispute[] the Secretary's reconciled balance," 25 U.S.C. § 4044(2)(B), by extending the statute of limitations until December 31, 2005. Congress's expressly stated purpose in passing this legislation was to encourage settlement negotiations between tribes and the United States. Congress noted that the extension was to provide tribes with "the opportunity to postpone the filings of claims, or to facilitate the voluntary dismissal of claims, to encourage settlement negotiations with the United States." Pub. L. No. 107-153, § 1(b); *see also* S. REP. NO. 107-138 (2002). The extension also allowed for the creation of a process to settle trust fund accounting claims. *See* 148 CONG. REC. H704-01 (Mar. 6, 2002) (statement of Rep. Hansen).

In 2005, Congress extended, for an additional year, the date on which tribes would be deemed to have received their reports and reconciled account balances by another amendment to the 1994 Act. *See* An Act to Amend Public Law 107-153 to Modify a Certain Date, Pub. L. No. 109-158 (2005). This final extension provided, in part:

> Notwithstanding any other provision of law, for purposes of determining the date on which an Indian tribe received a reconciliation report for purposes of applying a statute of limitations, any such report provided to or received by an Indian tribe . . . shall be deemed to have been received by the Indian tribe on December 31, 2000.

IV. PLAINTIFFS' COMPLAINT

Plaintiffs are ten Indian tribes. SAC ¶¶ 12-21. Although they do not identify any specific trust funds in their complaint, each tribe avers it is "the beneficiary of one or more trust accounts held by the United States as trustee." *Id.* Plaintiffs claim that they have "never

received a complete and accurate trust accounting" of their trust funds. *Id.* Nonetheless, plaintiffs acknowledge that, in 1996, they received from Interior reconciled account statements for Fiscal Years 1973 to 1992 and copies of account statements for Fiscal Years 1993 to 1995, prepared in response to the 1994 Act. *Id.* ¶ 46.

Plaintiffs claim they have suffered unknown harm as a result of defendants' alleged failure to provide "complete and accurate accountings of their trust accounts including funds and assets." *Id.* ¶ 57. Plaintiffs do not define in their complaint what constitutes that "complete and accurate" accounting and ask this Court to judicially determine "the standards governing complete and accurate accountings of Plaintiffs' trust accounts." *Id.* ¶ 64.

Plaintiffs assert that the duty to provide a "complete and accurate" accounting stems from an "inherent fiduciary duty." *See id.* ¶¶ 5, 7, 39, 40, 42, 56, 60. Plaintiffs also claim that this "inherent fiduciary duty" is codified or reaffirmed in the 1994 Act (including 25 U.S.C. §§ 162a and 4011) and other trust management statutes (including 25 U.S.C. §§ 161, 161a, and 161b). SAC ¶¶ 34-35.

Plaintiffs seek two forms of relief. First, plaintiffs seek declaratory judgments that defendants have not provided them "complete and accurate" accountings, *id.* ¶ 62; and that the materials provided to plaintiffs by Interior in compliance with the 1994 Act did not constitute a "complete and accurate" accounting, *id.* In addition, the tribes seek a declaration by the Court defiing the requirements of a "complete and accurate" accounting. *Id.* ¶ 63. Second, plaintiffs seek mandatory injunctions: compelling defendants to provide "complete and accurate accountings," *id.* ¶¶ 67, 73; ordering defendants to "preserve any and all documents concerning Plaintiffs' trust accounts," *id.* ¶¶ 68, 74; and compelling defendants "to correct Plaintiffs' trust fund balances," *id.* ¶¶ 69, 75.

V. ARGUMENT

A. Defendants Have Not Waived Their Sovereign Immunity from Plaintiffs' "Inherent Fiduciary Duty" Claims.

The Supreme Court has repeatedly emphasized that "Congress may style its relations with the Indians as a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." *United States v. Jicarilla Apache Nation*, 564 U.S. ___, 131 S. Ct. 2313, 2323 (2011) (citing *United States v. Mitchell*, 445 U.S. 535, 542 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206, 224 (1983) ("*Mitchell II*")). Indian tribes cannot simply rely upon "inherent" or common law duties imposed on a private trustee to state a claim against the United States or its agencies; instead, tribes must point to specific statues and regulations that "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Id.* at 2325 (quoting *Mitchell II*, 463 U.S. at 224). "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.'" *Id.* at 2325 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009) ("*Navajo II*")). Thus, plaintiffs do not have a freestanding breach of trust cause of action against defendants based upon "inherent fiduciary duties." Plaintiffs must identify a rights-creating statute or regulation upon which to base their claims. They have not done so in their complaint.

This point is well settled in this Circuit and other Circuits. The common law allows no claims for breach of trust by plaintiffs against defendants. *See Cobell v. Babbitt*, 91 F. Supp. 2d 1, 29 (D.D.C. 1999) ("*Cobell V*"); *see also Cobell v. Norton*, 240 F.3d 1081, 1104 (D.C. Cir. 2001) ("*Cobell VI*") ("No common law claim for an accounting is cognizable. . . ."); *Cobell v. Norton*, 392 F.3d 461, 472 (D.C. Cir. 2004) ("*Cobell XIII*") ("Insofar as plaintiffs may have said

that [they could invoke all the rights that a common law trust entails against the government in this case], they were wrong."); *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006) (concluding that tribes have no common law action for breach of trust independent of statutory rights). District courts do not possess the discretion of a "private-law chancellor" in fashioning a remedy. *Cobell v. Norton*, 428 F.3d 1070, 1077 (D.C. Cir. 2005) ("*Cobell XVI*"). Plaintiffs' repeated references to "inherent fiduciary duty" do not bring plaintiffs' claims within the purview of the APA. As such, this Court lacks subject-matter jurisdiction over those claims.

B. Plaintiffs' Failure to Act Claims Are Not Based upon an Obligation Required by Law.

The gravamen of plaintiffs' complaint is their allegation that defendants have failed to provide them with a "complete and accurate trust accounting." *See* SAC ¶¶ 12-21. Under the APA, this Court may only "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), that is legally required. *SUWA*, 542 U.S. at 63-65. Thus, to state a claim under the APA, and invoke its waiver of sovereign immunity, plaintiffs must show that the "complete and accurate trust accounting" they seek is "demanded by law." *Id.* Plaintiffs have not done so in their complaint.

Plaintiffs admit that, in 1996, they received the reconciliation reports called for in Section 4044 of the 1994 Act. SAC ¶ 46 (acknowledging receipt, but challenging the accuracy, of the reconciled account balance and reconciliation report). Plaintiffs do not allege in their complaint that Interior has failed to provide periodic statements of performance to plaintiffs for their trust accounts since October 1, 1995. Thus, plaintiffs do not allege that defendants have failed to provided them with an accounting "demanded by law." *SUWA*, 542 U.S. at 65.[3/] Accordingly, plaintiffs have not properly invoked the APA's waiver of sovereign immunity to compel agency

[3/] To the extent plaintiffs argue a "complete and accurate" accounting is required by the common law or an "inherent fiduciary duty" they are incorrect. *See* Part V.A, *supra*.

action unlawfully withheld or unreasonably delayed.

Plaintiffs also reference Section 4011 of the 1994 Act in their complaint. SAC ¶ 35. Subsection (a) of that provision provides, *inter alia*, that the Secretary of the Interior "shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe . . . ." 25 U.S.C. § 4011(a). This provision of the 1994 Act has no textual temporal scope. It does not, by its terms, compel a historical accounting or any historical reconciliation of trust accounts. In enacting the 1994 Act, Congress spoke in the present tense with respect to Section 4011, explaining that the provision requires the Secretary of the Interior to account for funds "which *are* deposited or invested." H.R. REP. NO. 103-778 at 16 (emphasis added). As such, the general presumption against the retroactive application of Section 4011 applies with full force. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 272-237 (1994). Again, plaintiffs do not allege in their complaint that they have not received periodic statements of performance and daily and annual balances of their trust funds since October 1, 1995.

Furthermore, Congress spoke specifically in Section 4044 as to the historical account reconciliation required for tribal trust accounts. This specific reconciliation requirement in Section 4044 supersedes any more general historical accounting requirement in Section 4011. *Morales v. YWA, Inc.*, 504 U.S. 374, 384-85 (1992). By requiring Interior to provide a reconciled account balance as of September 30, 1995, based upon "as full and complete accounting as possible," Congress specifically resolved the timing and the methodology by which Interior would discharge its retrospective reconciliation and accounting obligations. As held by the Supreme Court, "[w]hen Congress provides specific statutory obligations, we will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated." *Jicarilla*, 131 S. Ct. at 2330. Section 4044, not Section 4011, applies to plaintiffs'

claims.

To the extent that plaintiffs seek to invoke the APA's waiver of sovereign immunity over claims to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), plaintiffs have simply not alleged that any agency action "demanded by law," *SUWA*, 542 U.S. at 65, has been neglected. Defendants have not waived their sovereign immunity from plaintiffs' claims that defendants have allegedly failed to provide a "complete and accurate trust accounting." Thus, those claims should be dismissed for lack of subject-matter jurisdiction.

C. Defendants Have Not Waived Their Sovereign Immunity From Requests for Structural Injunctions.

Plaintiffs seek broad structural relief from this Court including a judicial determination of Interior's accounting obligations (SAC ¶¶ 63-64), a Court-ordered and supervised accounting (*id.* ¶ 67), and a restatement of trust fund account balances (*id.* ¶ 69). Defendants have not waived their sovereign immunity from these claims.

It is well established that "under the APA, courts may only review specific agency action or unreasonable delay by an agency; courts cannot order 'programmatic improvements' . . . or 'compel[] compliance with broad statutory mandates' . . ." *Cobell v. Kempthorne*, 455 F.3d 301, 305 (D.C. Cir. 2006) ("*Cobell XVIII*") (citations omitted). Just as the District of Columbia Circuit rejected individual Indians' requests for structural injunctions judicially directing Interior's record-keeping and accounting obligations, this Court should reject plaintiffs' request for a judicially ordered and supervised accounting of their trust funds. Should plaintiffs identify a discrete agency action challenged or unreasonably delayed, the Court's role in this case is to ascertain whether defendants' actions should be set aside as arbitrary, capricious, or contrary to law, *Wonsover v. Sec. and Exch. Comm'n*, 205 F.3d 408, 412 (D.C. Cir. 2000), or to compel the agency action unreasonably delayed, *Kaufman*, 542 F.3d at 1338. When this Court reviews

agency action under the APA, the appropriate remedy for a violation is "simply to identify a legal error and remand to the agency." *Bennett v. Donovan*, 703 F.3d 582, 589 (D.C. Cir. 2013). The role of this Court is not to direct defendants as to the "standards governing complete and accurate accountings of Plaintiffs' trust accounts." SAC ¶ 63. This Court "has no power to specify what th[at] action must be." *Kaufman*, 542 F.3d at 1338. Because defendants have not waived their sovereign immunity from plaintiffs' mandatory injunction claims (*see* SAC, Prayer ¶¶ 4, 5, 7, 8, 9), those claims should be dismissed for lack of subject-matter jurisdiction.

D. Plaintiffs' Claims Are an Impermissible Programmatic Challenge.

Plaintiffs seek judicial review of up to 190 years of trust accounting (*see* SAC ¶ 27). Plaintiffs' complaint fails to identify any discrete final agency action challenged. Instead, assuming plaintiffs' complaint is directed at defendants' historical accounting of their trust accounts, historical record-keeping, and prospective accounting obligations, it is a programmatic challenge. This is precisely the type of "programmatic challenge" that the Supreme Court held was outside the APA's limited waiver of sovereign immunity. *Lujan*, 497 U.S. at 892-93. In *Lujan*, the Supreme Court faced a challenge to 1,250 land classifications and withdrawal revocations by the Bureau of Land Management ("BLM"), which the plaintiff in *Lujan* dubbed BLM's "land withdrawal review program." *Id.* at 877. The Supreme Court rejected plaintiff's challenge because the "program" was not an "agency action," much less a "final agency action," within the meaning of the APA:

> The term "land withdrawal review program" . . . does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by [statute].

Id. at 890. Here, plaintiffs challenge over 190 years of Interior's "continuing (and thus

constantly changing)" accounting of Indian trust funds. Moreover, in *Lujan*, the Supreme Court explained that even if one land status determination were a "final agency action," plaintiffs could not predicate their sweeping challenge on that single action:

> [I]t is at least entirely certain that the flaws in the entire "program"—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members.

Id. at 892–93. So too, here, plaintiffs cannot "[lay] before the courts for wholesale correction under the APA" Interior's discharge of its historical accounting obligations. No specific agency action is challenged, but instead plaintiffs challenge the very means by which Interior has historically accounted for Indian trust funds and complied with the 1994 Act, as well as the means by which it currently accounts for Indian trust funds.

The APA's bar on programmatic challenges "is motivated by institutional limits on courts which constrain [their] review to narrow and concrete actual controversies." *Sierra Club v. Peterson*, 228 F.3d 559, 566 (5th Cir. 2000). In limiting review to particular actions, rather than programmatic attacks, courts "avoid encroaching on the other branches of government, [and] continue to respect the expert judgment of agencies specifically created to deal with complex and technical issues." *Id.* This prohibition applies equally to an agency's alleged "failure to act." 5 U.S.C. § 551(13) ("agency action" is defined to include an agency's "failure to act"); *SUWA*, 542 U.S. at 63.

While plaintiffs may have concerns, given the long history and "unique nature of this trust," *Cobell v. Salazar*, 573 F.3d 808, 811 (D.C. Cir. 2009) ("*Cobell XXII*"), plaintiffs' contention is exactly the type of broad programmatic challenge that is prohibited by the APA. *SUWA*, 542 U.S. at 64 (APA precludes broad programmatic attack); *Lujan*, 497 U.S. at 892-93

(litigant cannot seek wholesale improvement of this program by court decree); *Sierra Club*, 228 F.3d at 566 ("past, ongoing, and future timber sales approved by Forest Service" not limited to discrete final agency actions); *Friends of the Earth v. U.S. Dep't of the Interior*, 478 F. Supp. 2d 11, 25 (D.D.C. 2007) (off-road vehicle authorization at eighteen park units not "discrete" agency action). Plaintiffs readily admit in their complaint that they challenge a broad federal program that has spanned decades: "[s]ince, and notwithstanding, the AA project, the federal government has neither accounted completely and accurately for tribal trust accounts nor provided tribal account beneficiaries with complete and accurate trust accountings." FAC ¶ 10. Because plaintiffs' complaint is nothing more than an impermissible programmatic challenge under the APA, defendants have not waived their sovereign immunity from plaintiffs' claims and they should be dismissed.[4/]

E. Plaintiffs' Challenges to Their September 30, 1995, Reconciled Account Balances and Trust Fund Reconciliation Reports are Untimely.

The six-year limitations period in 28 U.S.C. § 2401 creates a jurisdictional condition attached to the government's waiver of sovereign immunity. *P & V Enter. v. U.S. Army Corps of Eng'r*, 516 F.3d 1021, 1026 (D.C. Cir. 2008). Limitations and conditions upon which the federal government consents to be sued should be strictly construed in favor of the sovereign. *Al-Aulagi v. Obama*, 727 F. Supp. 2d 1, 41 (D.D.C. 2010) (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957)); *see also Block v. North Dakota*, 461 U.S. 273, 287 (1983) (holding that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, "those conditions must be strictly observed, and exceptions thereto are not to be lightly

[4/] Plaintiffs are not without any recourse if they believe there has been mismanagement of their trust funds. But, any asserted factual basis plaintiffs have for damages as a result of defendants' claimed failure to comply with a specific statutory or regulatory trust management obligation, money-mandating in breach, can only be advanced against the United States in the Court of Federal Claims. *Navajo II*, 556 U.S. at 290-91.

implied"). Here, Congress set the statute of limitations date (December 31, 2006) for plaintiffs' claims and plaintiffs have filed after that date. Plaintiffs' challenges to the adequacy of Interior's reconciliations reports (SAC ¶¶ 47-51, 61-62) and to Interior's alleged failure to obtain certification of those reconciliation reports (*id.* ¶ 44) should be dismissed for lack of subject-matter jurisdiction because they are untimely.

Congress has legislated that "for purposes of applying a statute of limitations, any [reconciliation] report provided to or received by an Indian tribe in response to Section 304 of the [1994 Act] shall be deemed to have been received by the Indian tribe on December 31, 2000." Pub. L. No. 107-153, § 1, 116 Stat. 79 (2002) as amended by Pub. L. No. 109-158, § 1, 119 Stat. 2954 (2005). Thus, plaintiffs' challenges to the adequacy of their reconciliation reports and allegations that the report was not properly certified by independent auditors were barred after December 31, 2006. Plaintiffs knew or should have known of their claims, if any, long before that time, as they received their reports in 1996 (SAC ¶ 46), and were aware of criticisms of those reports long before 2006 (*see* SAC ¶¶ 47-52). Thus, plaintiffs' claims are barred by the statute of limitations and should be dismissed for lack of subject-matter jurisdiction.

Plaintiffs suggest that their complaint is timely in light of a series of Interior appropriations act provisions. *Id.* ¶ 55. Pertinent here, the Consolidated Appropriations Act of 2012[5/], Pub. L. No. 112-74, 125 Stat. 786 (2011), provides, in part, that

> notwithstanding 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.

[5/] At the time plaintiffs' complaint was filed (April 30, 2013), the government was operating under a continuing resolution for Fiscal Year 2013. *See* H.R.J. Res. 117 (Jan. 3, 2013).

Div. E, Tit. I, Office of the Special Trustee, 125 Stat. at 1002. This provision does not apply to plaintiffs' claims.

Plaintiffs' claims in this case do not concern "losses to or mismanagement of trust funds." Instead, plaintiffs seek a "complete and accurate" accounting of their trust funds because they allege that any "losses to or mismanagement of" their trust funds are unknown. SAC ¶ 57. The United States Court of Appeals for the Federal Circuit has interpreted similar appropriations act language as limited to "any claims that allege the Government mismanaged funds after they were collected, as well as any claims that allege the Government failed to collect amounts due and owing." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1351 (Fed. Cir. 2004). Plaintiffs advance neither type of claim in their complaint. They seek an accounting which may or may not evince losses or mismanagement. Thus, by its terms, the appropriations act does not apply here.

Furthermore, the time for plaintiffs to challenge the adequacy of their reconciliation reports and Interior's alleged failure to obtain certification of those reconciliation reports was specifically addressed by Congress when it deemed those reports to have been received on December 31, 2000. Again, "[w]hen Congress provides specific statutory obligations, we will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated." *Jicarilla*, 131 S. Ct. at 2330. Similarly, the specific statute addressing plaintiffs' claims trumps a more general statute addressing different claims.

Plaintiffs' complaint effectively claims that the scope and contents of Interior's reconciliation reports, and Interior's alleged failure to have the reconciliation reports certified by an independent auditor, were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2). Those claims are untimely and should be

dismissed for lack of subject-matter jurisdiction.

F. Defendants Have Not Waived Their Sovereign Immunity from Plaintiffs' Monetary Claims in this Court.

Plaintiffs seek "mandatory injunctive relief compelling Defendants to correct Plaintiffs' trust fund account balances in accordance with the standards for complete and accurate accountings, and to make Plaintiffs' accounts whole as if there had been no breaches of trust, negligence, or wrongdoing by Defendants." SAC ¶ 69. This claim is one for money damages, is outside the scope of the APA's waiver of sovereign immunity, and is not within this Court's subject-matter jurisdiction.

The APA's waiver of sovereign immunity expressly excludes claims for "money damages." 5 U.S.C. § 702. This prohibition trains upon the substance of plaintiffs' request and cannot be circumvented by artful pleading. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002). The Court of Federal Claims has exclusive jurisdiction over Indian breach of trust claims for damages against the United States that exceed $10,000. 28 U.S.C. §§ 1491 and 1505; *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 511 (9th Cir. 2005); *see also Rogers v. Ink*, 766 F.2d 430, 434 (10th Cir. 1985) ("A party may not circumvent the [Court of Federal Claims'] exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States."). Indeed, assuming this Court otherwise has subject-matter jurisdiction over plaintiffs' claims, the only relief plaintiffs can obtain in this Court is an equitable accounting. *Cobell XXII*, 573 F.3d at 813.

Whether deemed "damages," "restitution," or some other phrase, plaintiffs' complaint seeks the payment of money by the United States. That claim is outside the APA's waiver of sovereign immunity, is outside this Court's subject-matter jurisdiction, and plaintiffs' request to

"correct" their trust accounts and make those accounts "whole" should accordingly be dismissed.

G. Plaintiffs' Recordkeeping Claims Should be Dismissed.

Plaintiffs seek "mandatory injunctive relief directing Defendants to preserve any and all documents concerning Plaintiffs' trust accounts . . . ." SAC ¶ 68. In this regard, plaintiffs' complaint is not a model of clarity and the basis or bases for this requested relief are lacking. To the extent plaintiffs intend to rely upon federal recordkeeping obligations established by the Federal Records Act of 1950, 44 U.S.C. §§ 2901, *et seq.*, the Supreme Court has held that "[n]o provision of either [the Federal Records Act or the Federal Records Disposal Act, 44 U.S.C. §§ 3301, *et seq.*] . . . expressly confers a right of action on private parties. Nor do we believe that such a private right of action can be implied." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980). Thus plaintiffs' claims related to record retention are outside the scope of this Court's subject-matter jurisdiction and should be dismissed.

VI. CONCLUSION

Plaintiffs seek relief against the government based upon the government's alleged failure to comply with "inherent fiduciary duties" for over 190 years. They seek a structural injunction and monetary damages. Plaintiffs also challenge agency actions that occurred over a decade ago and that Congress deemed to have accrued no later than December 31, 2000. Because many of plaintiffs' claims do not fall within the waiver of sovereign immunity in the APA, because other claims of plaintiffs are untimely, and because plaintiffs' remaining claims are outside this Court's subject-matter jurisdiction, plaintiffs' complaint should be dismissed in its entirety.

Respectfully submitted, November 22, 2013,

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CERTIFICATE OF SERVICE

I certify that, on November 22, 2013, I uploaded the attached document to the Court's CM/ECF system, which will cause service on all counsel of record in this matter.

/s/ Stephen R. Terrell
STEPHEN R. TERRELL