IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on September 11, 2015)

GRACE M. GOODEAGLE, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	No. 12-431L Hon. Thomas C. Wheeler
QUAPAW TRIBE OF OKLAHOMA, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. 12-592L Hon. Thomas C. Wheeler
THOMAS CHARLES BEAR, *et al.*, Claimants, v. UNITED STATES OF AMERICA, Defendant.	No. 13-51X Hon. Thomas C. Wheeler

UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR DISCOVERY RELIEF

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I. INTRODUCTION

Between November 12, 2013, and April 16, 2015, (the fact discovery period in these cases), the United States produced to plaintiffs six Microsoft Access databases, three Microsoft Excel spreadsheets, one Concordance Passport database, and 1,412,068 document images (822,334 documents). During that time, the United States also responded to two Rule 30(b)(6) deposition notices, containing a combined twenty-seven topics, and submitted to four Rule 30(b)(6) depositions. While plaintiffs would lead this Court to believe that they propounded well-defined and narrowly tailored discovery requests, the reality is that, as set forth in specific detail below, the Unites States has made a thorough and conscientious effort to respond to plaintiffs' extremely broad and far-reaching discovery requests within the allowable time period.

Plaintiffs' motion to compel the United States to organize and label 822,334 documents to correspond to plaintiffs' thirty-three requests for production should be denied because the United States complied with Rule 34. The United States reviewed documents at more than nine locations, expended thousands of hours, and spent millions of dollars to respond to plaintiffs' requests for production in these cases. *See* June 30, 2014, Status Report, ECF No. 44 in *Quapaw Tribe*. The United States engaged plaintiffs in its search efforts, and shared search terms with plaintiffs. Consistent with its earliest representations to the Court and counsel, the United States produced documents responsive to plaintiffs' discovery requests on a rolling basis. *Id.*

As a result of its efforts, the United States produced documents from public repositories, active Indian trust records maintained in the usual course of business by the Bureau of Indian Affairs' Miami Agency, electronically stored information, and documents with searchable descriptive metadata from Federal Records Centers and the American Indian Records Repository ("AIRR"). A detailed review of the different document collections produced by the United States in these cases reveals that the United States complied with Rule 34.

Plaintiff's request for evidentiary sanctions because the parties agreed that the United States would not produce a witness on certain Rule 30(b)(6) topics, which were overly broad, cumulative, and otherwise objectionable, should also be denied. The United States produced a Rule 30(b)(6) deponent that testified, by agreement of the parties, to an agreed-upon set of topics and he was fully prepared to answer questions on those designated topics at his deposition. As detailed herein, the United States' deponent provided substantive testimony on all topics in plaintiffs' revised deposition notice. Despite the clear understanding between the parties as to the scope of the deposition prior to its commencement, plaintiffs ignore that agreement in their pursuit of this motion. Not only did plaintiffs agree to revise the topics of their Rule 30(b)(6) deposition notice, there is also no legal basis to "reinstate" Rule 30(b)(6) deposition topics that plaintiffs have abandoned or withdrawn.

While the substance of plaintiffs' requested relief against the United States should be denied, the United States respectfully submits that, given plaintiffs' concession that they have failed to comply with the Court's pretrial orders on damages, the portion of plaintiffs' motion seeking to amend the scheduling orders should be granted, consistent with the parties' agreement.

II. RELEVANT FACTUAL BACKGROUND

A. Plaintiffs' Requests for Production.

Plaintiffs propounded a total of thirty-three requests for production in these cases. In addition to the twenty-nine requests attached to plaintiff's motion, *see* Motion for Discovery Relief ("Mot.") Exhibits ("Ex.") 5 (ECF No. 108-5 in *Quapaw Tribe*) and 7 (ECF No. 108-7 in *Quapaw Tribe*), plaintiffs omit from their instant motion the tribe's second set of requests for production and plaintiffs' second/tribe's third set of requests for production. Appendix of Exhibits ("App.") Ex. 1 and 2. A fair summary of the totality of all three sets of plaintiffs'

requests for production is that plaintiffs requested production of all Quapaw-related trust management documents for both individual tribal members and the tribe from 1893 to the present.

Plaintiffs' discovery requests are exceptionally broad. For example, plaintiffs include the following definition in their requests for production:

> "Relating to" is to be construed in its broadest sense to include information or documents that constitute, concern, pertain to, mention, discuss, evidence, establish, refer to (directly or indirectly), reflect, comment on, tend to support or refute a legal contention, or summarize the subject of the request.

Mot. Ex. 5 at 3.

Plaintiffs' individual request are equally broad and are largely repetitive. For example:

> 9. All correspondence, reports, notes, memoranda or other documents relating to the failure of land users to pay amounts due for use of Quapaw allotted lands.
>
> * * * *
>
> 12. All documents (including databases) relating to Quapaw Tribal members' IIM accounts.
>
> * * * *
>
> 20. All copies of the BIA Manual, Directives, federal regulations, policies or other guidance, at the beginning of each decade from 1890 to the present, that describe the roles and responsibilities of BIA and BIA officials for trust, restricted, or fee property located on the Quapaw reservation.
>
> * * * *
>
> 24. For the time period 1894 to the present, any and all laws, regulations, policies, procedures, and instructions in effect relating to the maintenance, storage, retention, and destruction of the documents and information relating to the assets and accounts of the members of the Quapaw Tribe.

Id. at 5-7. And:

> 1. All documents (including data bases, accountings or reports) relating to the Government's receipt, deposits, investment, retention, disbursement or transfer of any money received for the benefit of the Quapaw Tribe, including all Quapaw Tribal Trust Accounts (TTAs).

> 2. All documents (including any data bases or reports) relating to the Government's receipt or investment of any funds held in trust for the Quapaw Tribe by the United States.
>
> 3. All documents reflecting any amounts owed, paid, or received on behalf of the Quapaw Tribe in connection with the creation or existence of any right-of-way, easement or other usufructuary right on any Quapaw tribal land.

Mot. Ex. 7 at 2.

Plaintiffs did not propound narrowly-tailored requests for production whereby a discrete set of documents could be produced in response to each individual request. Instead, plaintiffs chose to pose broad, all encompassing requests whereby they requested all documents that "refer to (directly or indirectly)" "all" "assets and accounts of the members of the Quapaw Tribe," "funds held in trust for the Quapaw Tribe," and "usufructuary right(s) on any Quapaw tribal land" for the period 1894 to the present. *See* Mot. Exs. 5 and 7. Using the definitions set forth in plaintiffs' requests for production, almost all documents produced in discovery are "related to" or responsive to each request for production. The requests for production at issue in plaintiffs' motion are very broad and encompass hundreds of thousands of documents maintained by the United States covering over 120 years of history.

B. The United States' Approach to Responding to Plaintiffs' Requests for Production.

Although the United States has repeatedly been criticized (including by plaintiffs herein) for allegedly failing to preserve Indian trust documents, the fact is that the Department of the Interior has preserved and maintained a colossal amount of Indian trust records. As noted by the United States District Court for the District of Columbia, the Department of the Interior has centralized over forty-three miles of Indian trust records at the AIRR in Lenexa, Kansas, and in excess of 10,000 cubic feet of Mineral Management Service and United States Geological Service Indian records are housed at the Federal Records Centers. *Cobell v. Kempthorne,* 532 F.

Supp. 2d 37, 45-46 (D.D.C. 2008). Thus, it was likely that most of the documents requested by plaintiffs existed, it was simply a matter of identifying the repositories where those documents were likely to be housed, searching those repositories, and producing responsive documents.

The United States and its litigation consultants determined that documents responsive to plaintiffs' broad requests for production were likely to be located at several different repositories. Those repositories were the National Archives (in Washington, D.C., College Park, Maryland, and Fort Worth, Texas), the Federal Records Centers in Fort Worth, Texas, and Lakewood, Colorado, the Bureau of Indian Affairs Miami Agency, the AIRR, the Office of the Special Trustee for American Indians (including documents maintained on the Accounting Reconciliation Tool ("ART") accessible by the Office of Historical Trust Accounting ("OHTA")), and the Ottawa County Courthouse. Some of the repositories were public—specifically, the National Archives and the Ottawa County Courthouse—and plaintiff and Quapaw Information Systems, Inc. ("QIS") had every opportunity to search those very repositories, but apparently chose not to do so. Nonetheless, in good faith, the United States undertook to search for responsive documents at these public repositories and agreed to produce responsive, publicly available documents to plaintiffs.

The United States developed research plans for each repository and conducted searches at each repository in order to provide plaintiffs with the documents they had requested. The largest repository of potentially responsive documents was the AIRR. In response to informal requests from plaintiffs' counsel, and in light of discussions at the September 11, 2014, status conference, on September 12, 2014, counsel for the United States shared with plaintiffs' counsel the search terms and parameters used by the United States to identify boxes at the AIRR likely to contain documents responsive to plaintiffs' discovery requests. App. Ex. 3. Plaintiffs never provided

any substantive response to or suggestions about the United States' box identification process. Thus, it is disingenuous for plaintiffs to claim that the United States' discovery efforts were "chiefly to identify and retrieve potentially responsive documents for the benefit of the Government not for the Quapaw." Mot. at 24.

C. The United States' Document Productions.

In total, the United States produced six Microsoft Access databases, three Microsoft Excel spreadsheets, one Concordance Passport database, and 1,412,068 document images (822,334 documents) as part of its initial disclosures, in response to informal data requests from plaintiffs, and in response to plaintiffs' thirty-three requests for production. The United States consistently advised plaintiffs that it would produce documents on a rolling basis. *See* June 30, 2014, Status Report. Yet plaintiffs have waited until after the close of fact discovery to bring their instant motion.

Where feasible, the United States categorized document productions to correspond to plaintiffs' requests for production. In all instances, the United States described, with reasonable particularity, the types of documents contained in each production.

1. Initial disclosures.

On December 13, 2013, the United States produced documents to plaintiffs as part of its Rule 26 initial disclosures. By rule, these documents did not need to be categorized by request for production (as no requests for production had then been propounded). These productions consisted of 2,888 images (66 documents):

Date of Production	Volume	Images	Documents
12/16/2013	FMS920_001	2,648	57
	RDE920_001	217	5
	ADE920_001	23	4
		2,888	**66**

2. Ottawa County Courthouse.

The United States reviewed recorded instruments maintained at the Ottawa County Courthouse, a public document repository equally accessible to plaintiffs, for patents, certificates of competency, removals of restriction, and encumbrances of land within the former Quapaw Reservation for the period from allotment through 1921, when the first round of restrictions on alienation on allotted land expired. While reviewing records at the Ottawa County Courthouse, the United States also uncovered some documents post-dating 1921 that pertained to Quapaw allotments. Those documents, to the extent they were located, were also copied. Finally, the United States also discovered plat maps of land within the former Quapaw Reservation at the Ottawa County Courthouse. The United States sought to obtain copies of all relevant maps.

Because all documents at the Ottawa County Courthouse were in deed books or were over-sized plat maps, the United States photographed relevant pages or maps. Those photographs were converted to single-page .tiff images. The United States documented the deed book from which each image was taken, and each .tiff image when produced to plaintiffs was accompanied by metadata, including a "FileTitle" field noting the deed book from which the image came.

The United States copied all documents at the Ottawa County Courthouse as they were kept in the usual course of business. In total, the United States produced 12,510 images (9,630 documents) from the Ottawa County Courthouse:

Date of Production	Volume	Images	Documents
1/28/2015	GB_QUAPAW007	414	325
2/26/2015	GB_QUAPAW008	509	362
2/26/2015	GB_QUAPAW010	1,541	1,342
2/26/2015	GB_QUAPAW011	3,091	2,602
2/26/2015	GB_QUAPAW012	1,780	1,153
3/6/2015	GB_QUAPAW013	3,530	2,721
3/6/2015	GB_QUAPAW014	1,569	1,049

3/6/2015	GB_QUAPAW015	76	76
		12,510	**9,630**

The metadata fields produced with the Ottawa County Courthouse documents were:

Startbates
Endbates
DocTitle
FileTitle
Source
Volume

These, and all metadata produced by the United States, were text fields that are therefore searchable. When loaded into a database (there are several commercially available document management databases available), these metadata fields allow the recipient to search fields for specific document types. For example, a recipient could search the "FileTitle" field for a specific deed book to identify all documents that deed book.

3. National Archives.

The United States reviewed documents housed at the National Archives in Washington, D.C. ("NARA I"), College Park, Maryland ("NARA II"), and Fort Worth, Texas. The Archivist may accept for deposit in the National Archives documents "determined by the Archivist to have sufficient historical or other value to warrant their continued preservation. . . ." 44 U.S.C. § 2107. Upon acceptance of documents for retention in the National Archives, the legal custody of the documents passes from the agency to the National Archives and Records Administration ("NARA"). 36 C.F.R. § 1235.22. Archived documents are publicly accessible, and the National Archives Catalog is searchable on-line. *See* http://www.archives.gov/research/catalog (last visited September 1, 2015).

The United States reviewed records at the National Archives for archived records pertaining to the Quapaw Tribe, Quapaw Indians, and the former Quapaw reservation. In total,

the United States produced 53,856 images (20,965 documents) from the National Archives:

Date of Production	Volume	Images	Documents
2/25/2014	QUAPAW_NARA001	9,771	4,652
5/28/2014	QUAPAW_NARA002	14,301	4,091
6/24/2014	GB_QUAPAW001	5,497	2,492
	GB_QUAPAW002	5,649	548
	GB_QUAPAW003	8,922	3,058
7/14/2014	GB_QUAPAW004	6,126	4,926
1/14/2015	GB_QUAPAW005	3,062	968
1/28/2015	GB_QUAPAW006	230	161
2/26/2015	GB_QUAPAW009	298	69
		53,856	**20,965**

The metadata fields produced with the National Archives documents were:

Startbates
Endbates
DocTitle
FileTitle
Source
Volume

4. The Bureau of Indian Affairs Miami Agency.

The United States reviewed documents at the Bureau of Indian Affairs Miami Agency for documents responsive to plaintiffs' requests for production or relevant to plaintiffs' claims in these cases. Bureau of Indian Affairs agency offices provide numerous services to Indian tribes and individual Indians within their jurisdiction, and the Quapaw Tribe falls within the jurisdiction of the Bureau of Indian Affairs Miami Agency. Relevant here, the Miami Agency has historically provided services to the Quapaw Tribe and its members from the following programs, among others: realty; probate; fire; self-determination; and appraisals. Longan Decl. ¶ 2; App. Ex. 4. In 2009, the Quapaw Tribe entered into a self-governance agreement, *see* Pub. L. No. 93-638, 88 Stat. 2203 (1975), with the Bureau of Indian Affairs for all tribal services except chat sales performed pursuant to the Tar Creek Superfund Operable Unit 4 decision. *Id.* ¶ 3.

Accordingly, since 2009, the Quapaw Tribe has been managing trust functions for the tribe and its members and has been responsible for maintaining associated trust records.

The Miami Agency maintains "active" Indian trust records. *Id.* ¶ 4. In other words, the Agency maintains Indian trust records necessary for the day-to-day operation of the Bureau of Indian Affairs. Once records are no longer needed for day-to-day operations, those records become "inactive" Indian trust records and the Miami Agency works with the Office of Trust Records ("OTR") to retire those inactive records to the AIRR. *Id.* Thus, all records at the Miami Agency are maintained in the "usual course of business." RCFC 34(b)(2)(E)(i).

The United States produced 108,614 images (19,283 documents) from the Miami Agency:

Date of Production	**Volume**	**Images**	**Documents**
4/7/2014	G04920_001 - Miami Agency Docs	46,693	4,434
7/18/2014	G04920_002	58,412	14,234
4/13/2015	G04920_003 (MAAF001)	3,509	615
		108,614	**19,283**

The metadata fields produced with the Miami Agency documents were:

Startbates
Endbates
DocTitle
FileTitle
Source
Volume

5. Federal Records Centers.

Because plaintiffs requested documents related to chat sales and chat royalties, the United States reviewed retired Minerals Management Service ("MMS") and United States Geological Service ("USGS") records housed at the Federal Records Centers in Denver, Colorado, and Fort

Worth, Texas. As indicated by the United States when it produced these documents, because of plaintiffs' broad requests for production and request for all documents "relating to" chat sales, all documents produced from the Federal Records Centers were responsive to requests for production numbers 1, 2, 3, 4, 5, 7, 8, 9, 20, and 21 in *Goodeagle* and *Bear*, and request for production number 1 in *Quapaw Tribe* and *Bear*. Exhibit 9 (ECF No. 108-9 in *Quapaw Tribe*).

MMS, and USGS before it, organized mineral leases by company name or form type. Autobee Decl., ¶ 4, App. Ex. 5. Quapaw chat leases do not have unique lease prefix codes. *Id.* ¶ 4. Also, solid mineral leases administered by MMS within Oklahoma were coded with the mining prefix "M67." *Id.* ¶ 5. Thus, when the United States identified document images for production, it was unable to immediately distinguish between records associated with Quapaw chat sales and other mineral royalties for other tribes within the Eastern Oklahoma Regional Office or other solid mineral sales by other tribes in Oklahoma. *Id.* ¶¶ 5-7. Additionally, MMS records often contain payment information for multiple tribes on the same document. *Id.* ¶ 7. Because these productions, and only these productions, were likely to contain certain non-responsive documents pertaining to other tribes or Indians, the United States produced additional metadata with the Federal Records Centers productions, so that the documents could be searchable and readily reviewed to assess responsiveness. Specifically, the United States produced the following fields with these productions:

Startbates
Endbates
DocumentDate
DocumentType[1/]
Title
FolderTitle
Author

[1/] For Volumes 1 and 2.

Recipient[2/]
Source
Volume

Based upon representations made by plaintiffs in their motion, this additional metadata permitted plaintiffs to identify those pages within the United States' Federal Records Centers productions that pertain specifically to Quapaw Indians. *See* Mot. at 15-19.

The United States produced 8,025 images (7,308 documents) from the Federal Records Centers:

Date of Production	**Volume**	**Images**	**Documents**
9/2/2014	RDE920_002	7,967	7,250
4/14/2015	RDE920_003	58	58
		8,025	**7,308**

6. Electronic and Special Productions.

The United States produced six Microsoft Access databases, three Microsoft Excel spreadsheets, and one Concordance Passport database (all electronic files) in response to formal and informal requests from plaintiffs. This electronically stored information included Trust Account Databases (containing electronic transaction records for trust accounts), chat ownership spreadsheets, and the document database produced to the tribe with the Agreed-Upon Procedures and Findings Report prepared for the Bureau of Indian Affairs by Arthur Andersen.

Electronically stored information need not be organized or labeled to correspond to a particular discovery request. Instead, it may be produced "in a reasonable usable form or forms." RCFC 34(b)(2)(E)(ii). Plaintiffs have not alleged that they are unable to access, manipulate, or use the electronically stored information produced by the United States. The United States also produced overview documents for certain electronically stored information productions and it

[2/] Folder Title, Author, and Recipient metadata was only available for Volume 2.

Bates numbered those overview documents for recordkeeping and organizational purposes.

Additionally, during the course of discovery, plaintiffs made specific document requests, such as a request for re-production of a database produced to QIS as part of the Quapaw Analysis contract, the "Herd/DOI Mining Collection." These requests were not part of plaintiffs' Rule 34 requests for production. The United States made productions in response to this, and other specific requests, by plaintiffs. *See* App. Ex. 6. (collection of cover letters).

Plaintiffs made several requests for documents at depositions. When the United States produced those documents, it identified what documents were being produced and what request at a deposition was being responded to. *Id.*

Finally, the United States produced certain documents in conjunction with its responses to plaintiffs' interrogatories, *see* RCFC 33(d), and its responses to plaintiffs' requests for admission. Those documents were assigned Bates numbers, again for recordkeeping and organizational purposes.

The United States produced 42,230 images (9,748 documents) in conjunction with electronically stored information productions or in response to specific document requests (formal and informal) from plaintiffs:

Date of Production	**Volume**	**Images**	**Documents**
1/14/2014	Individual IIM Accounts with 930 Prefix PDF	9	1
	Quapaw DOJ Encumbrance Docs.xls		
	Quapaw Tracts DOJ.xlsx		
2/7/2014	Quapaw Chat Owners Docs (PDFs)	89	2
2/25/2014	Quapaw 1959 Payment Roll (PDF)	68	1
	BIA OST Policies and Procedures	342	25
5/6/2014	TAD and Overview/Foreword	98	2

	PDFs		
7/2/2014	Docs included in Govt's Response to Plaintiff's First Set of Interrogatories	7	3
7/8/2014	DOI920_001 - DOI Mining Collection	40,166	9,391
10/20/2014	920 Database, TAD Overview and Foreword, Excel Spreadsheet	101	2
10/24/2014	Documents Produced with RFA Responses	8	2
11/13/2014	OHTA-QIS Contract Docs	143	16
11/21/2014	Chavarria Transcripts from Osage	340	3
12/1/2014	Non-Investment Disbursement Transaction Results	2	1
3/23/2015	DEP920_001	728	293
4/6/2015	TAD Overview, Foreword, and 4 TAD DBs	99	2
4/15/2015	DEP920_002	30	4
		42,230	**9,748**

7. AIRR.

The United States also reviewed documents at the AIRR to locate documents responsive to plaintiffs' discovery requests and relevant to plaintiffs' claims in these cases. As discussed above, the United States shared with plaintiffs its search terms used to identify boxes at the AIRR likely to contain documents responsive to plaintiffs' discovery requests. App. Ex. 3. Plaintiffs never provided any substantive comments to the United States on these search terms.

The United States produced 1,183,946 images (755,344 documents) from the AIRR:

Date of Production	**Volume**	**Images**	**Documents**
8/7/2014	ALX920_001	11,374	8,002
8/15/2014	ALX920_002	28,243	17,610
9/12/2014	ALX920_003	16,783	10,662
11/7/2014	ALX920_004	14,343	10,661
12/12/2014	ALX920_005	22,540	17,076
12/19/2014	ALX920_006	49,453	33,656
	ALX920_007	32,822	21,502

1/9/2015	ALX920_008	37,555	26,631
3/6/2015	ALX920_009	77,332	53,659
3/11/2015	ALX920_010	82,249	55,023
3/19/2015	ALX920_011	115,418	70,982
3/30/2015	ALX920_012	179,929	88,067
4/1/2015	ALX920_013	219,154	137,430
4/6/2015	ALX920_014	149,131	99,106
4/7/2015	Two ART PDFs	3	2
4/14/2015	ALX920_015	94,299	75,634
	ALX920_016	30,006	13,395
4/15/2015	ALX920_017	23,312	16,246
		1,183,946	**755,344**

The metadata fields produced with AIRR documents were:

Startbates
Endbates
DocumentDate
FolderTitle
Title
Source
Volume

These fields should be familiar to plaintiffs. QIS, as part of the Quapaw Analysis "cropped, color corrected and coded [document images] according to the standards outlined in OHTA's Coding and Imaging Manual ("CIM")." Quapaw Analysis at 3 (ECF No. 14 in *Quapaw Tribe* (under seal)). These metadata fields are described in the Coding and Imaging Manual and, relevant here:

> **[DocumentDate.]** A document may contain multiple dates. However, we will code the "primary" date in the Document Date field. Dates will be maintained as numeric, 8-digits in length, and formatted as YYYYMMDD. YYYY represents the 4-digit year, MM the 2-digit month, and DD the 2-digit day. This format also allows for chronological sorting of the documents.
>
> * * * *
>
> **[FolderTitle (*i.e.*, "Package Title").]** The title recorded on a file folder. This information will be captured when the physical folder or other grouping (e.g., redwell, binder) corresponds to a package and has a title on the folder.

* * * *

> **[Title.]** The title of the document. It can be the specific type of document (e.g., check, EFT, voucher schedule). This information must be entered for each document. If the document is determined at the folder level (e.g., IIM Jacket File, Land Sale file), the document title will reflect the exact file label. For probates, if possible, this would include the deceased account holder's name and account number.

App. Ex. 7. These metadata fields permit the recipient to quickly sort and search AIRR documents by date or by document type (*e.g.*, IIM documents, chat documents, rights-of-way documents, trespass documents, etc.).

D. Plaintiffs' Rule 30(b)(6) Deposition Notices.

On October 8, 2014, plaintiffs served a Rule 30(b)(6) deposition notice requesting testimony on twelve topics (many with multiple sub-topics). App. Ex. 8. The noticed topics were exceptionally broad and included (but were not limited to) agricultural leasing of tribal and restricted fee land (Topic 4); town lot leasing of tribal and restricted fee land (Topic 5); tribal trust fund management (Topic 9); and land characteristics, resources, and leasing histories of tribal and restricted fee land within the former Quapaw Reservation (Topic 12). On November 18, November 19, and December 4, 2014, the United States produced Gregory J. Chavarria, CPA, Michael D. Estes, and Superintendent Paul Yates, respectively, in response to plaintiffs' first Rule 30(b)(6) deposition notice. Plaintiffs' first Rule 30(b)(6) deposition notice is not at issue in plaintiffs' motion.

On March 16, 2015, one month before the close of fact discovery, *see* Amended Scheduling Order, ECF No. 71 in *Quapaw Tribe*, plaintiffs, without obtaining leave of court, propounded a second Rule 30(b)(6) deposition notice on the United States. Mot. Ex. 10 (ECF No. 108-10 in *Quapaw Tribe*). This second Rule 30(b)(6) notice identified fifteen additional topics for examination. *Id.* In response to this deposition notice, the United States designated

Superintendent Yates to address topics 1, 7, 8, and 13, and asserted objections to the remainder of the topics. Mot. Ex. 12 (ECF No. 108-12 in *Quapaw Tribe*).

On April 13, 2015, *three days* before the close of fact discovery, plaintiffs propounded a revised second Rule 30(b)(6) deposition notice on the United States. App. Ex. 9. Plaintiffs did not attach this revised notice to their current motion. As stated by plaintiffs, the revised Rule 30(b)(6) notice "[r]evised Topic Nos. 2 and 3. Topic No. 9 is omitted per the parties' April 7, 2015 agreement. Minor edits were also made to Topics 5, 6, and 11." *Id.* at 4.

As part of the meet-and-confer process, plaintiffs *agreed* to limit their revised Rule 30(b)(6) deposition to "Topic Nos. 1, 2 (2007 to present), 3 (2007 to present), 4, 6, (2007 to present), 7, 8, 10 (2007 to present), and 13." Mot. Ex. 16 (ECF No. 108-16 in *Quapaw Tribe*). Plaintiffs confirmed this agreement in their "Notice of 30(b)(6) Deposition of the United States, represented by Paul Yates," served on April 17, 2015 (mis-dated as March 17, 2015). Mot. Ex. 18 (ECF No. 108-18 in *Quapaw Tribe*).

On April 28, 2015, Superintendent Yates was deposed pursuant to plaintiffs' April 17, 2015, deposition notice. *See* Mot. Ex. 21 (ECF No. 108-21 in *Quapaw Tribe*). Superintendent Yates was specifically produced to provide testimony on all of the Rule 30(b)(6) topics that the parties agreed to, as confirmed by plaintiffs in their deposition notice to Superintendent Yates. There were no open Rule 30(b)(6) topics that remained unaddressed or that were otherwise in dispute.

III. ARGUMENT

A. The United States' Document Productions Complied with Rule 34.

Plaintiffs' request for an order "requiring the Government to organize and label the previously produced documents to correspond to the Quapaw's requests for production," Mot. at 38, should be denied because the obligation to "label [documents] to correspond to the categories

in the request" does not apply to the United States' initial disclosures, responses to plaintiffs' informal or specialized document production requests ("special productions"), the Ottawa County Courthouse productions, and the National Archives productions. Also, the United States permissibly produced documents "as they are kept in the usual course of business," RCFC 34(b)(2)(E)(i) from the Miami Agency. Finally, the United States' productions from the AIRR and Federal Records Center appropriately responded to plaintiffs' broad and duplicative requests, and was in accordance with the long-standing discovery plan developed in these cases. Accordingly, plaintiffs' motion to compel additional categorization under Rule 34 should be denied.

1. Rule 34's organization and labeling requirements do not apply to the United States' initial disclosures, Ottawa County Courthouse productions, or National Archives productions.

Rule 34(b)(2)(E)(i)'s requirement to "organize and label" document productions according to the "categories in the request" does not apply to several document productions made by the United States in these cases. First, the United States produced documents along with its initial disclosures that it had in its possession at that time and that it "may use to support its claims or defenses." RCFC 26(a)(1)(A)(ii). Rule 26 imposes no categorization requirement, nor could it, as initial disclosures are made before parties propound Rule 34 requests for production of documents. Accordingly, the 2,888 images (66 documents) produced by the United States as part of its initial disclosures do not properly fall within the contours of plaintiffs' motion and should not be considered.

Second, the United States does not have possession, custody, or control of the documents housed at the Ottawa County Courthouse. A party is not required to produce in discovery information that is equally available to the party making the request. *See Exner v. Dep't of Justice*, No. 95-5411, 1997 WL 68352, at *1 (D.C. Cir. Jan. 15, 1997) (Freedom of Information

Act litigation mooted because the documents sought had been transferred to NARA and were publicly available); *see also Lamon v. Adams*, No. 1:09-cv-00205-LJO-SKO-PC, 2011 WL 711580, at *3 (E.D. Cal. Feb. 1, 2011) ("Defendant is not obligated to undertake the burden of identifying and retrieving public records that are responsive to Plaintiff's request."); *Parks v. Tait*, No. 08-cv-1-031-4K (JMA), 2009 WL 4730907, at *4 (E.D. Cal. Dec. 7, 2009) (Information equally available to all parties need not be produced); *Valenzuela v. Smith*, No. S 04-0900-FCD-DAD-P, 2006 WL 403842, at *2 (E.D. Cal. Feb. 16, 2006) ("Defendants cannot be compelled to produce documents they do not have and will not be compelled to produce documents that are equally available to plaintiff . . . ."). As set forth above, *see* Section II.B, *supra*, the United States reviewed documents at the Ottawa County Courthouse because plaintiffs and QIS either failed to search for documents there or did an inadequate job of searching for documents at the Ottawa County Courthouse. The publicly available documents at the Ottawa County Courthouse fall outside Rule 34's categorization requirement as they are (and at all times have been) equally accessible to plaintiffs. *Id.* Moreover, the United States copied documents at the Ottawa County Courthouse "as they are kept in the usual course of business." RCFC 34(b)(2)(E)(i). Thus, plaintiffs' request that the United States categorize the 12,510 images (9,630 documents) from the Ottawa County Courthouse should be denied.

Third, the Department of the Interior does not have possession, custody, or control of documents housed at the National Archives and plaintiffshave failed to argue or establish otherwise. *See Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 n. 7 (S.D.N.Y. 1992) ("In the face of a denial by a party that it has possession, custody or control of documents, the discovering party must make an adequate showing to overcome this assertion."). NARA is an independent agency of the United States. 44 U.S.C. §§ 2102, 2903, 2108(a). NARA has

promulgated regulations that provide the "policies and procedures" for submitting a demand to a NARA employee to produce records in connection with a legal proceeding. 36 C.F.R. Part 1251. In this case, instead of requiring plaintiffs to follow the routine procedures for obtaining documents from the National Archives, the United States voluntarily searched for and produced to plaintiffs Quapaw-related documents from the National Archives. Because the National Archives documents are public, those documents do not need to be produced pursuant to Rule 34. *Dushkin Publ'g Grp., Inc. v. Kinko's Serv. Corp.*, 136 F.R.D. 334, 335 (D.D.C. 1991). The National Archives documents were produced as they are stored by the Archivist, are not subject to Rule 34's categorization provisions, and the 53,856 images (20,965 documents) produced from the Archives should not be considered as part of plaintiffs' motion.

2. Rule 34's organize and label requirement does not apply to the United States' electronic or special productions.

Plaintiffs' motion should be denied with respect to the 42,230 images (9,748 documents) produced along with electronically stored information productions or in response to specific document requests from plaintiffs, *see* Section II.C.6, *supra*. First, Rule 34 does not require a party producing electronically stored information to organize or label that information. RCFC 34(b)(2)(E)(ii). "[S]ubparagraph (E)(i) applies *only* to the production of hard-copy documents, while sub-paragraph (E)(ii) *exclusively* governs the production of [electronically stored information] . . . ." *Anderson Living Trust v. WPX Energy Prod., LLC*, 298 F.R.D. 514, 525 (D. N.M. 2014) (emphasis in original) (quoting John K. Rabiej, *Rabiej on Production of ESI*, Emerging Issues 2628 at *1-*2 (July 29, 2008)). Under Rule 34(b)(2)(E)(ii), the United States has the option to produce electronically stored information "in a form or forms in which it is ordinarily maintained or in a reasonably useable form or forms." Plaintiffs do not argue that any of the United States' electronically stored information productions fail to meet this standard.

As for the special production document productions, each collection was produced to plaintiffs in response to a specific request from plaintiffs and was accompanied by a cover letter describing the specific contents of the produced document collection. *See* Cover Letters, App. Ex. 6. Accordingly, those document productions were "organize[d] and label[ed] . . . to correspond to the categories in the request." RCFC 34(b)(2)(E)(i). Plaintiffs' motion should be denied with respect to the United States' electronically stored information productions and special productions.

3. The Miami Agency documents were produced as they are kept in the usual course of business.

Plaintiffs' motion to compel the United States to organize and label the Miami Agency document production to correspond to plaintiffs' requests for production should be denied because those documents were copied and produced as they are kept in the usual course of business. As explained in the Declaration of Michael E. Longan, Indian trust records maintained at the Miami Agency are used by the Agency to fulfill its mission objectives. Longan Decl. ¶ 4. Records are maintained at the Agency only so long as they are needed, and after they are no longer needed by the Agency, the Agency works with OTR to retire inactive Indian trust records to the AIRR. *Id.*. Paper documents at the Miami Agency are stored in folders, with limited exceptions. *Id.* ¶ 5. The Miami Agency maintains certain electronically stored information as well, such as chat ownership spreadsheets and records maintained in the Trust Assets and Accounting Management System ("TAAMS"). *Id.*

The documents copied at the Miami Agency were copied from active files at the Agency as they are kept in the usual course of business. The United States captured, and produced as the metadata field "FileTitle," the file folder information for each document. Accordingly, the 108,614 images (19,283 documents) produced from the Miami Agency do not need to be

organized and labeled to correspond to plaintiffs' requests for production. *Sparton Corp. v. United States*, 77 Fed. Cl. 10, 16-17 (2007). Plaintiffs' motion should be denied with respect to the Miami Agency documents.

4. The United States' AIRR and Federal Records Centers productions comply with Rule 34.

Plaintiffs' motion should also be denied with respect to the United States' document productions from the AIRR and Federal Records Centers. To invoke Rule 34, plaintiffs must first propound requests for production that "describe with reasonable particularity each item or category of items to be inspected." RCFC 34(b)(1)(A). Plaintiffs failed to follow that procedure in this case. Plaintiffs requested "[a]ll documents relating to" broad categories such as payments, royalties, leases, land sales, investments, collections, trust accounts, audits, reconciliations, policies and procedures, and environmental remediation. Mot. Exs. 5 and 7; App. Exs. 1 and 2. "Use of all-encompassing language violates Rule 34." *W. Res., Inc. v. Union Pac. R.R. Co.*, No. 00-2403-CM, 2001 WL 1718368, at *3 (D. Kan. Dec. 5, 2001). "[W]hen a request specifies documents 'relating to' some issue . . . the request provides no basis for determining which documents may or may not be responsive." *Dairyland Power Coop. v. United States*, 79 Fed. Cl. 722, 729 (2007) (citation omitted). Accordingly, "Court's may find requests overly broad when they are 'couched in such broad language as to make arduous the task of deciding which of numerous documents may conceivably fall within [their] scope.'" *W. Res.*, 2001 WL 1718368 at *3 (citation omitted).

(a) The United States' productions comply with Rule 34's electronically stored information production requirements.

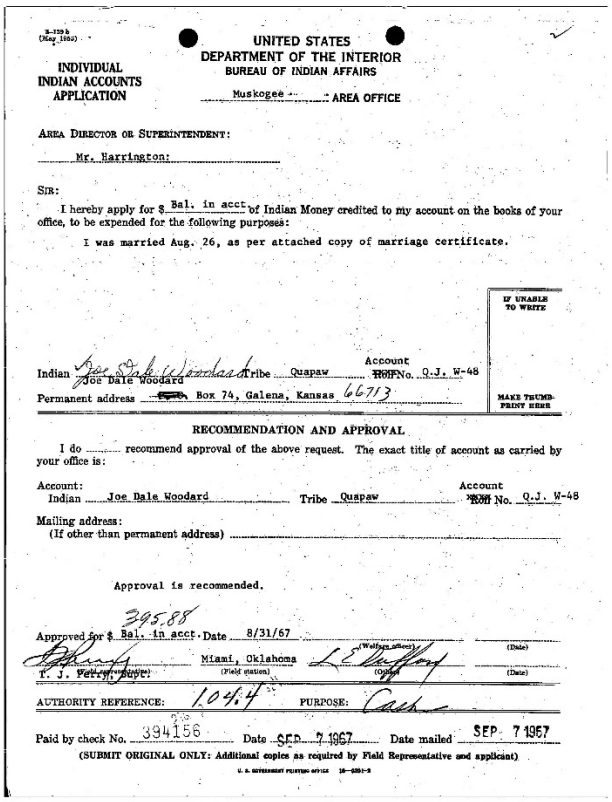
As discussed above, plaintiffs' requests for production contained broad and all-inclusive definitions, such as plaintiffs' definition of "relating to." *See* Section II.A, *supra*. Plaintiffs employed that "relating to" definition in requests numbers 2, 3, 5, 6, 8, 9, 10, 11, 12, 18, 19, 21,

and 24, and the similarly-broad "reflecting" in requests numbers 1 and 7 in the *Goodeagle* and *Bear* requests for production. Mot. Ex. 5. Plaintiffs use "relating to" in requests numbers 1, 2, 4, 5, and 6 in the *Quapaw Tribe* and *Bear* requests for production. Mot. Ex. 7; App. Ex. 1. Plaintiffs use "relating to" in all of plaintiffs' second/tribe's third requests for production of documents. App. Ex. 2. Because the vast majority of plaintiffs' request for production use all-encompassing language and seek documents "relating to" nebulous topics, as opposed to specific documents or documents from a specific custodian, plaintiffs' document production requests are patently overbroad. *W. Res.*, 2001 WL 1718368 at *3.

Although plaintiffs' document requests are overly broad, the United States "has a duty under the . . . rules to respond to the extent that discovery requests are not objectionable." *Id.* at *4 (citation omitted). The United States did so here. It identified documents at the AIRR and the Federal Records Centers that were responsive to the substance of plaintiffs' discovery requests. It searched for all documents related to Quapaw tribal and individual trust funds and assets, and it produced those non-privileged documents it was able to locate.

The United States elected to produce documents from the AIRR and Federal Records Centers to plaintiffs as electronically stored information, specifically, single-page .tiff images with metadata that allows plaintiffs to electronically search those documents.[3/] Those metadata fields provided information about each document, including the date of the document, the folder from which the document was copied, and the document title. For example, the following document was produced from the AIRR:

[3/] The United States could have produced documents in hard copy in hundreds of bankers' boxes. Instead, in good faith, the United States voluntarily incurred the time and expense to convert the documents to an electronic, searchable format.



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

INDIVIDUAL INDIAN ACCOUNTS APPLICATION

Muskogee AREA OFFICE

AREA DIRECTOR OR SUPERINTENDENT:

Mr. Harrington:

SIR:

I hereby apply for $ Bal. in acct of Indian Money credited to my account on the books of your office, to be expended for the following purposes:

I was married Aug. 26, as per attached copy of marriage certificate.

IF UNABLE TO WRITE

Indian Joe Dale Woodard Tribe Quapaw Account No. Q.J. W-48

Permanent address Box 74, Galena, Kansas 66713

MAKE THUMB PRINT HERE

RECOMMENDATION AND APPROVAL

I do recommend approval of the above request. The exact title of account as carried by your office is:

Account:
Indian Joe Dale Woodard Tribe Quapaw Account No. Q.J. W-48

Mailing address:
(If other than permanent address)

Approval is recommended.

Approved for $ 395.88 Bal. in acct. Date 8/31/67

T. J. Ferry, Supt. Miami, Oklahoma (Field station) (Welfare officer) (Date)

AUTHORITY REFERENCE: 104.4 PURPOSE: Cash

Paid by check No. 394156 Date SEP 7 1967 Date mailed SEP 7 1967

(SUBMIT ORIGINAL ONLY: Additional copies as required by Field Representative and applicant)

QG04ALX0305072

The metadata fields produced with this document were:

DocDate	=	19670907
FolderTitle	=	Woodard, Joe Dale QJ W-48 G0010W48
Title	=	Individual Indian Accounts Application

This document can accordingly be quickly identified—and similar documents identified and sorted—from the provided metadata by a search based on document date, document type, the plaintiff's name (Joe Dale Woodward), or the account number (QJ W-48). "Wildcard" searches (*i.e.*, searches the find data containing certain data fragments, even if in a larger data string) permit even greater search options. For example, if plaintiffs were looking for Account Applications for 1967, they could search "DocDate" with a wildcard "%1967%," and both FolderTitle and Title with a wildcard "%account application%." Such a search would identify

all Account Applications dated 1967, including the above identified document. Or, if plaintiffs were interested in documents related to Mr. Woodward, they could construct a search of the FolderTitle and Title fields for variants of his name (*e.g.*, "Woodward, Joe," "J. Woodward," "J. D. Woodward," *etc.*).

The United States produced AIRR and Federal Records Centers documents as electronically stored information in a useable, searchable form. Thus, the provisions of Rule 34(b)(2)(E)(ii) should apply to the AIRR and Federal Records Centers documents, not Rule 34(b)(2)(E)(i)'s "organize and label" requirement.

On very similar facts, the United States District Court for the District of New Mexico addressed a situation where a responding party converted paper documents ("hard copy" documents) to electronically stored information (scanned .pdfs) for production. *Anderson Living Trust*, 298 F.R.D. at 526. In that situation, the district court observed that

> [t]he Plaintiffs want the benefits of both (E)(i) and (E)(ii). They are dissatisfied at being denied the perks of (E)(i), but they would likely be equally dissatisfied had the Defendants refused their request for electronic production and turned over 20,000 pages of hard copy documents—organized "in the usual course of business" or not.

Id. at 527.

So, too, here, plaintiffs certainly would have been dissatisfied if the United States had delivered to them 1,191,989 pages of paper (the combined images from the AIRR and Federal Records Centers) in hard copy "organized 'in the usual course of business' or not." *Id.* Instead, the United States provided plaintiffs with documents in electronic format with metadata. That is clearly plaintiffs' preference, as they do not want paper documents, they want *more* metadata. *See* Huntzinger Decl. ¶¶ 7-8; Mot. Ex. 2 (ECF No. 108-2 in *Quapaw Tribe*). Thus, the United States satisfied its discovery obligations when it produced AIRR and Federal Records Centers documents as electronically stored information with associated metadata and "[w]ere the Court

to now require [the United States] to effectively produce hard copies, it would violate the (E)(iii) provision that '[a] party need no produce the same electronically stored information in more than one form.'" *Anderson Living Trust*, 298 F.R.D. at 527.

(b) Plaintiffs' overly-brad requests are not amenable to Rule 34's categorization requirement.

Even putting aside the fact that the United States produced AIRR and Federal Records Centers documents electronically, "[t]he Court, then, must conclude that [plaintiff] has caused its own predicament through submitting very expansive document production requests that make no effort to limit documents according to such basic criteria as authorship." *Dairyland Power Coop.*, 79 Fed. Cl. at 729. Categorizing and labeling the 1,191,989 document images (762,652 documents) from the AIRR and Federal Records Centers would be a daunting and difficult task, in light of the fact that plaintiffs' thirty-three requests for production are overly broad and ill-defined. Each document would likely be "related to" a majority of plaintiffs' requests for production. Thus, there could be no meaningful categorization where every document is responsive to large numbers of plaintiffs' individual requests. The United States has supplied plaintiffs with searchable metadata and has described the categories of documents contained in each production. *See* Mot. Exs. 9, 11, 17 (ECF Nos. 108-9, 108-11, and 108-17 in *Quapaw Tribe*). This allows plaintiffs to conduct their own electronic searches of the documents that they have requested. Because the government has identified the categories of documents being produced and has provided searchable metadata, "the government has organized its responses as well as possible under the circumstances [and plaintiffs] will have to contend with the voluminous results of its document requests." *Dairyland Power Coop.*, 79 Fed. Cl. at 729-30. Plaintiffs' motion should be denied in full.

(c) The cases plaintiffs rely upon are distinguishable.

The posture of these cases is significantly different than that presented in *Ak-Chin Indian Community v. United States*, 85 Fed. Cl. 397 (2009). In *Ak-Chin* the United States indicated that it would make boxes at the AIRR available for *plaintiff* to review, inspect, and copy. *Id.* at 398. In other words, the United States proposed that plaintiff bear the time and expense of going through boxes at the AIRR to identify documents it wanted to copy. As Judge Hewitt later held in *Osage Tribe of Indians of Oklahoma v. United States*, 87 Fed. Cl. 338 (2009), imposing such an expense on the plaintiff was inequitable. *Id.* at 339-40. Judge Hewitt therefore held that it was the government's obligation, not plaintiffs, to physically review documents at the AIRR, copy relevant documents, and produce copies to plaintiffs. The United States voluntarily undertook that effort and expense in these cases.

Judge Hewitt did not have an opportunity to address, and made no rulings on, the provision of electronically stored information from the AIRR. *See Ak-Chin*, 85 Fed. Cl. at 399 (holding it improper for government to invite plaintiff to AIRR to review documents at time when no documents from AIRR had been reviewed or produced); *Osage*, 87 Fed. Cl. at 340 (no documents had been produced, government was ordered to bear costs of copying and imaging going forward). Nor did Judge Hewitt have an opportunity to assess whether the government was obligated to categorize documents produced from the AIRR after they had been copied if plaintiffs' requests for production were overly broad and imprecise. *Id.* Finally, Judge Hewitt had no opportunity to assess the situation present here, where the United States has, at its own expense, produced over one million images with searchable metadata in response to thirty-three overly broad requests for production. Judge Hewitt's opinions stand simply for the proposition that the United States may not "open the warehouse doors" at the AIRR in response to plaintiffs' discovery requests. *Ak-Chin*, 85 Fed. Cl. at 399. The United States does not dispute that holding

here. Judge Hewitt's opinions do not address the "back end" of the document production pipeline: when the United States produces document images, categorized by document type, with searchable metadata. That aspect of Rule 34 is addressed by *Dairyland Power Cooperative* and, as set forth above, the United States has complied with its obligations under Rule 34 in light of the nature and over breadth of plaintiffs' requests for production.

In sum, plaintiffs' motion to have the United States go back and categorize the 762,652 documents produced from the AIRR and Federal Records Centers should be denied. Such an order would be inefficient and burdensome. Plaintiffs would gain little from the exercise, as most documents would be responsive to multiple requests for production in light of the overly broad nature of plaintiffs' requests. The burden on the government, in turn, would be significant. Also, such an endeavor would not serve to "secure the just, speedy, and inexpensive determination of every action and proceeding," RCFC 1, because it would take the government several months to complete this task at great expense to the taxpayer. Plaintiffs' motion should be denied in full.[4/]

B. The United States' Discovery Obligations are Limited to Those Enumerated in the Rules of the United States Court of Federal Claims.

The government has no "extra" or "trustee" obligations to produce documents to plaintiffs. Plaintiffs' attempts to impose upon the United States additional discovery obligations beyond those contained in the Rules are incorrect and should be rejected. *See* Mot. at 22-25; *see also id.* at 2 ("The Government also owes the Quapaw a fiduciary duty as trustee to produce documents from which an accounting can be determined—which is entirely independent of the

[4/] Plaintiffs' request to identify non-responsive documents, Mot. at 15-19, is limited to the Federal Records Centers documents, as discussed above. *See* Section II.C.5, *supra*. Because plaintiffs have already identified non-responsive documents from those productions, Mot. at 15, there is no need for further relief from the Court.

duties owed under Rule 34."). The Supreme Court disposed of this argument in *United States v. Jicarilla Apache Nation*, 564 U.S. ___, 131 S. Ct. 2313 (2011).

In *Jicarilla*, an Indian tribe sought access to government documents that were subject to the attorney-client communication privilege based upon application of the common law "fiduciary exception" to that privilege. *Id.* at 2319. The Supreme Court soundly rejected the tribe's argument, and reiterated that "the Tribe must point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the Government against its wishes." *Id.* at 2325. The Supreme Court found no such applicable statute or regulation, rejected the United States Court of Appeal for the Federal Circuit's reliance on the common law principle that "'the fiduciary has a duty to disclose all information related to trust management to the beneficiary,'" *id.* at 2329 (quoting *In re United States*, 590 F.3d 1305, 1312 (Fed. Cir. 2009)), and confirmed that statutes and regulations "define the Government's disclosure obligation to the Tribe," *id.* at 2329-30.

The required conclusion from *Jicarilla* is that the United States discovery obligations in this Court are defined by the Rules and there is no basis to expand the United States' discovery obligations because plaintiffs are Indians. Plaintiffs' reliance on the common law of trusts and Judge Hewitt's reliance on the common law of trust, Mot. at 22-23, just like Judge Allegra's reliance on the common law of trusts in *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1 (2009), should be rejected. *Hopi Tribe v. United States*, 782 F.3d 662, 670 (Fed. Cir. 2015) ("[a]ny common-law duties applicable to a private trustee when the trustee actually controls trust property are not relevant, unless they are clearly accepted by statute or regulation.").

C. Plaintiff's Rule 30(b)(6) Arguments Should be Rejected.

1. Superintendent Yates was adequately prepared for his deposition.

Superintendent Yates adequately addressed all Rule 30(b)(6) topics for which he was

designated and which are contained in plaintiffs' April 17, 2015, deposition notice. Plaintiffs may be dissatisfied with his answers, but that does not mean that he was not adequately prepared. Superintendent Yates' deposition, Mot. Ex. 21, speaks for itself, but the United States has summarized examples of substantive testimony provided by Superintendent Yates in response to each noticed topic in the attached Appendix A. A review of the deposition notice and the deposition transcript shows that Superintendent Yates was adequately prepared to testify at his deposition.

If plaintiffs, as they did here, ask a Rule 30(b)(6) witness questions that are outside the scope of the topics in the deposition notice, the entity will not be bound by the deponent's answers to those questions. *EEOC v. Freeman*, 288 F.R.D. 92, 99 (D. Md. 2012) (citing *Falchenberg v. N.Y. State Dep't of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008)); *see also EEOC v. Caesars Entm't, Inc.*, 237 F.R.D. 428, 433 (D. Nev. 2006); *Detoy v. City & Cnty. of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000) (holding that witness may be questioned at Rule 30(b)(6) deposition within the scope of relevance under Rule 26, but that only questions within the scope of topics identified with reasonable particularity are binding on the entity). Thus, the fact that plaintiffs asked Superintendent Yates about alleged trespasses that occurred *between 1995 and 1997*, Quapaw Analysis at 53-34, does not mean he was not prepared to discuss trespasses *from 2007 to the present*, as set forth in the notice. *Cf.* Mot. at 35. Plaintiffs' insistence on asking questions about the Catholic 40 land while it was held in fee status, not trust status, *see id.* at 36, also does not mean that Superintendent Yates was not prepared to address the topics actually noticed.

Superintendent Yates was adequately prepared for his deposition and provided substantive responses on behalf of the United States. Plaintiffs have not established that they are

entitled to any additional testimony from Superintendent Yates, or that any sanctions against the United States are appropriate. Plaintiffs' motion should be denied.

2. Plaintiffs' remaining Rule 30(b)(6) topics are overly broad and unduly burdensome.

As discussed above, plaintiffs *agreed* to limit their revised Rule 30(b)(6) deposition to "Topic Nos. 1, 2 (2007 to present), 3 (2007 to present), 4, 6, (2007 to present), 7, 8, 10 (2007 to present), and 13." Mot. Ex. 16 (ECF No. 108-16 in *Quapaw Tribe*). Plaintiffs confirmed this agreement in their "Notice of 30(b)(6) Deposition of the United States, represented by Paul Yates," served on April 17, 2015 (mis-dated as March 17, 2015). Mot. Ex. 18. Plaintiffs now seek evidentiary sanctions for deposition topics they waived and abandoned. This is improper, and the Court should limit its review to Superintendent Yates' testimony in response to his deposition notice.

Even if the Court were to entertain plaintiffs' motion with respect to topics they amended and then withdrew, the Court should deny plaintiffs' request. Rule 30(b)(6) allows a party to name a deponent to testify on the entity's behalf. The party seeking to depose the entity must "describe with reasonable particularity the matters for examination." RCFC 30(b)(6). The entity must then designate a person or persons "to testify on its behalf." *Id.* As a general matter, the designated deponent's testimony regarding the noticed topics is binding on the entity. *See, e.g.*, *Zip–O–Log Mills, Inc. v. United States*, 113 Fed. Cl. 24, 32 (2013) (noting that "testimony of a Rule 30(b)(6) witness is binding on the Government."); *but see A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001) (noting that "testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes" (quoting *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000))). But the obligation imposed by Rule 30(b)(6) is "not infinite."

Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc., 201 F.R.D. 33, 38 (D. Mass. 2001). The principles of Rule 26(b)(2) permit a court to limit discovery, including Rule 30(b)(6) depositions, where "the discovery sought is unreasonably cumulative or duplicative," "obtain[able] from some other source that is more convenient," or creates an undue burden or expense, given the likely benefit. RCFC 26(b)(2)(C).

Because of the binding nature of properly noticed Rule 30(b)(6) testimony, courts are careful to limit overly broad or unduly burdensome requests. For example, in *EEOC v. Pinal County*, 714 F. Supp. 2d 1073 (S.D. Cal. 2010), the court denied the proposed deposition of the Acting Director of the San Diego office of the EEOC in an action brought by an employee against the county, seeking clarification of the EEOC's interpretation of the EEOC determination letter because it was unreasonably cumulative, duplicative, and sought information that could have been obtained from some other source that was less burdensome. *Id.* at 1078. Here, the historical management of Quapaw trust and restricted fee assets will largely, if not exclusively, be gleaned from historical documents uncovered by QIS or produced by the United States in discovery. Thus, both parties are equally qualified to ascertain and assess events that transpired decades ago from available documents.

As another example, in *Sahu v. Union Carbide Corp.*, 262 F.R.D. 308 (S.D. N.Y. 2009), the defendants were not required to prepare witnesses to respond to questions regarding events that took place between fifteen and thirty-five years previously because such an effort would be difficult and costly, and the benefits to plaintiffs would likely be extremely low. *Id.* at 317. The same is true here, only more so. To require the United States to research and prepare a witness, for example, to testify about "[a]ll facts relating to . . . lease payments" for the Industrial Park Property, Topic 11, from allotment in the Nineteenth Century to the present would be

unreasonably burdensome. To respond to Topic 11, the United States would do the exact same thing plaintiffs would have to do: review and summarize historical leasing and accounting documents. The United States' oral summary of documents already produced in discovery would not benefit either party.

The topics in plaintiffs' Rule 30(b)(6) notice are also inappropriate because they demand that the United States supply expert testimony. A deposition under Rule 30(b)(6) allows parties to determine the factual knowledge of litigants that are organizations and so cannot be deposed as fact witnesses in the normal fashion. Opinion testimony, however, is outside the scope of a Rule 30(b)(6) deposition. *See* RCFC 30(b)(6) ("The persons designated must testify about information known or reasonably available to the organization"). In their 30(b)(6) notices, plaintiffs demand much more than information "known or reasonably available to the organization," they seek a witness to compile, summarize, and offer historical opinions on decades to centuries of permitting (Topics 1, 4, 8, 11); to opine on pre-World War II mining activities (Topics 4, 5, 10); to evaluate damages (Topic 6); to provide anthropological opinions (Topic 7); and to summarize decades of land revenue collection (Topics 2, 8, 10, 11). Mot. Ex. 10. These areas will all be the subject of expert opinion testimony from both sides, and plaintiffs' reliance on Rule 30(b)(6) to inquire into expert opinion is misplaced. *See Arkalon Grazing Ass'n v. Chesapeake Operating, Inc.*, No. 09-1394-CM, 2012 WL 1963354, at *3 (D. Kan. 2012) (quashing 30(b)(6) deposition notice and protective order, where noticing party sought testimony concerning the amount of plaintiff's damages, and plaintiff's damages would be determined, in part, from "expert opinions which are not yet due"); *Catalina Mktg. Corp. v. LDM Group, LLC*, No. 09-cv-01114, 2009 WL 3712030, at * 1 (E.D. Mo. 2009) ("The Court finds that topic 9 [of 30(b)(6) deposition notice at issue] calls for expert testimony, and therefore

sustains Plaintiff's objection to the topic. Plaintiff's requested protective order is therefore granted on topic 9").

Plaintiffs' Rule 30(b)(6) topics are also improper because there are less burdensome avenues of discovery available. Without a percipient witness for the vast majority of the noticed topics, any United States' designee will have to learn the relevant information through documents that have already been produced to plaintiffs. Given the expansive scope and volume of information plaintiffs seek and the fact that fact discovery has closed, it is simply not plausible that a designee could prepare himself or herself adequately to respond meaningfully to plaintiffs' topics. *See, e.g., United States ex. rel. Fago v. M & T Mortg. Corp.*, 235 F.R.D. 11, 25 (D.D.C. 2006) ("Without a photographic memory, [the witness] could not reasonably be expected to testify as to the loan numbers ... for sixty-three different loans."). The 30(b)(6) witness will necessarily rely on the documentary evidence already produced to plaintiffs in testifying and will have nothing to add beyond what is in the documents. *Wolfe v. Ford Motor Co.*, No. 06-1217-MLB, 2008 WL 294547, at *2 (D. Kan. Feb. 1, 2008) (denying motion to compel because the desired information "can also be obtained by a review of the documents previously produced by Ford, a source less burdensome and/or less expensive"). At bottom, a 30(b)(6) deposition with respect to the balance of plaintiffs' Rule 30(b)(6) topics would be an exercise in futility.

Plaintiffs effectively abandoned the remainder of the topics in their second Rule 30(b)(6) notice when they agreed to depose Superintendent Yates on a limited set of topics and time periods. Plaintiffs cannot not now seek to "reinstate" those abandoned topics. Moreover, plaintiffs' remaining Rule 30(b)(6) topics are overly broad and it would be unduly burdensome for the United States to prepare witnesses to discuss over 100 years of activity on trust and restricted fee land within the former Quapaw Reservation. Plaintiffs' motion for evidentiary

sanctions based upon the topics in its original second Rule 30(b)(6) notice that were not included in its amended Rule 30(b)(6) deposition notice of Superintendent Yates should be denied.

3. Plaintiffs' remedy, if any, should be a deposition, not evidentiary sanctions.

Should the Court determine that plaintiffs are entitled to additional testimony on any of their March 16, 2015, Rule 30(b)(6) deposition topics, the remedy should be to compel a deposition, not to preclude the United States from presenting evidence at trial. In a similar situation, the United States District Court for the District of Columbia did not permit a party additional Rule 30(b)(6) testimony from a government witness where that party had alternative means of obtaining information about those topics that the designee was unable to answer at the deposition. *Alexander v. F.B.I.*, 186 F.R.D. 137, 141-43 (D.D.C. 1998). Here, the United States negotiated, in good faith, with plaintiffs to limit their Rule 30(b)(6) topics and the parties *agreed* to a Rule 30(b)(6) deposition on limited topics and time periods. The United States produced a witness in response to that Rule 30(b)(6) notice and the witness was fully prepared to testify as to those topics. There is nothing to compel and no basis for evidentiary sanctions.

Evidentiary sanctions are reserved for instances where a witness designated under Rule 30(b)(6) "fails to obey an order to provide or permit discovery." RCFC 37(b)(2)(A). But plaintiffs have not previously obtained an order compelling additional Rule 30(b)(6) testimony from the United States. Plaintiffs' request for evidentiary sanctions should be denied. Plaintiffs' remedy at this time, if any, is a motion to compel, not a request for evidentiary sanctions.

D. The Scheduling Orders Should Be Modified.

Plaintiff failed to comply with the Court's pretrial orders on damages. Accordingly, the parties agree that this Court's second amended scheduling orders, (Second) Amended Scheduling Order, ECF No. 81 in *Goodeagle*, ECF No. 71 in *Quapaw Tribe*, ECF No. 61 in *Bear*, should be

modified to enlarge the damages schedules deadlines by three months. Mot. at 3 ("the Quapaw request up to three additional months to supplement the damages calculations that the Quapaw provided to the Government on July 1, 2015.") Accordingly, this Court should enter an order modifying the scheduling orders as follows:

> 1. Pursuant to the Pretrial Orders on Damages, plaintiffs shall supplement their damages schedules or summaries and figures from books of account or other records on all claims - October 1, 2015;
>
> 2. Pursuant to the Pretrial orders on Damages, exchange of statements admitting or denying accuracy of other party's damages schedules or summaries - January 7, 2016;
>
> 3. Exchange of expert reports - April 13, 2016;
>
> 4. Close of all discovery - July 14, 2016.

Plaintiffs do not oppose "extending the Government's time to respon[d] to any supplemental damages schedules." *Id.* at 3-4. Thus, good cause exists for the Court to amend its scheduling orders. RCFC 16(b)(4).

IV. CONCLUSION

The United States has expended significant time and resources to respond to plaintiffs' broad discovery requests in these cases, which span over 100 years of the Department of the Interior's management of trust and restricted fee assets for the Quapaw tribe and its members. The United States searched for and produced documents at its own expense, including documents from public repositories. The United States produced documents as they are kept in the usual course of business or in a useable and searchable manner. The United States has complied with Rule 34, and plaintiffs' motion to compel the United States to organize and label each and every document to correspond to plaintiffs' thirty-three requests for production should be denied.

Additionally, the United States produced four witnesses in response to plaintiffs' two

Rule 30(b)(6) depositions notices. Those witnesses were prepared to testify as to the designated topics. Although plaintiffs may be dissatisfied with those witness's answers, that is not a basis for evidentiary sanctions. Plaintiffs' request for evidentiary sanctions for Rule 30(b)(6) topics that were superseded by agreement of the parties should be denied.

Finally, the Court should modify its scheduling orders to accommodate plaintiffs' delayed compliance with the Court's pretrial orders on damages.

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