IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on May 28, 2015)

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' BRIEF IN OPPOSITION TO PLAINTIFF TRIBE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

This Court should deny plaintiff, the Quapaw Tribe of Oklahoma's, motion for partial summary judgment as to its treaty education annuity payments claims, allegedly unauthorized disbursement transactions claims, and allegedly unposted trust fund deposit claims because genuine disputes as to material facts and law preclude partial summary judgment. As explained in greater detail herein, some of plaintiff's claims are outside this Court's subject matter jurisdiction; portions of the claims are barred by the doctrine of claim preclusion; others of the claims are barred by the statute of limitations; and, in any event, genuine issues of material fact preclude partial summary judgment as to the remainder of the claims. Thus, the Court should deny plaintiff's motion for partial summary judgment in full.

II. STANDARD OF REVIEW

Plaintiff must clear a high hurdle before it can obtain summary judgment. Under the Indian Tucker Act, plaintiff bears the burden of proof of to establish a breach of trust. *See Confederated Tribes of Warm Springs Reservation v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001) (discussing evidentiary presumptions "once the beneficiary has shown a breach of the trustee's duty and a resulting loss"); *Confederated Salish and Kootenai Tribes v. United States*, 467 F.2d 1315, 1322 (Ct. Cl. 1972) ("normal Indian claim in which the claimant has the burden of showing" breach). When the summary judgment movant has the ultimate burden of proof on an issue, it must show by evidence that it is entitled to judgment, and if it does not do so, the non-moving party need not come forward with opposing evidence. *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1368 (Fed. Cir. 2006). Thus, if plaintiff, as movant, fails to demonstrate entitlement to judgment as a matter of law by undisputed evidence, plaintiff's motion should be denied, even if the United States were to produce no evidence of its own to negate plaintiff's claim. *Zenith Electronics Corp. v. PDI Commc'n Sys, Inc.*, 522 F.3d 1348,

1363 (Fed. Cir. 2008).

It is only if plaintiff submits sufficient evidence to meet its burden of proof that the burden shifts to the United States to come forth with evidence creating a genuine issue of material fact. *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987). In that instance, the United States may defeat plaintiff's motion for summary judgment by presenting evidence such that a reasonable fact-finder could return a verdict for the United States. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III. RESPONSES TO PLAINTIFF'S ALLEGEDLY UNDISPUTED FACTS

Plaintiff's Allegedly Undisputed Fact 1:

The 1833 Treaty between the Quapaw Tribe and the United States provides:

> The United States also agree to appropriate one thousand dollars per year for education purposes to be expended under the direction of the President of the United States; . . . the above appropriation for education purposes to be continued only as long as the President of the United States deems necessary for the best interest of the Indians.

Response to Plaintiff's Allegedly Undisputed Fact 1:

Undisputed.

Plaintiff's Allegedly Undisputed Fact 2:

From 1932 through 2015 the United States did not make this annual treaty payment of $1,000, and the President has never deemed it unnecessary.

Response to Plaintiff's Allegedly Undisputed Fact 2:

Disputed.

For Fiscal Year 1933, Congress appropriated funds for education purposes for Quapaw, specifically

> [f]or aid to the common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations and the Quapaw Agency in Oklahoma, $400,000, to be expended in the discretion of the Secretary of the Interior and under the rules and

regulations to be prescribed by him.

Department of the Interior Appropriations Act of April 22, 1932, 47 Stat. 91, 107.

Additional appropriations for Quapaw education for Fiscal Year 1934 through Fiscal Year 1984 are identified on the attached Appendix A, incorporated herein by reference.

Plaintiff's Allegedly Undisputed Fact 3:

The Government's Tribal Trust Funds Reconciliation Project (Arthur Andersen) Report found that the Government made three unauthorized disbursements from the Quapaw Tribe's trust account totaling $31,680.80.

Response to Plaintiff's Allegedly Undisputed Fact 3:

Disputed.

As part of the agreed-upon procedures engagement between the Bureau of Indian Affairs and its contractor, Arthur Andersen, LLC, during the Tribal Trust Fund Reconciliation Project ("TRP") (which the Bureau of Indian Affairs undertook in response to Section 304 of the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act"), Pub. L. No. 103-412, § 304, *codified at* 25 U.S.C. § 4044), Arthur Andersen

> verified (i.e., traced and agreed) non-investment disbursements posted to each of the Tribe's accounts, to the extent documentation was provided, as to amount, date and account number to U.S. Treasury ("Treasury") processed SF1166 documents (Voucher and Schedule of Payment), Treasury reports (GOALS) of processed SF1166's, journal vouchers and/or other relevant disbursement documentation. We also verified (i.e., traced or agreed), to the extent source documentation was provided, the posted disbursement transactions as to amount, date and account number to the requests for withdrawal from the Tribe and/or the Bureau . . . .

Agreed-Upon Procedures and Findings Report at 2, ECF No. 83-2.

Accordingly, Arthur Andersen (and, in turn, the Bureau of Indian Affairs) made no judgment as to whether any disbursement transactions were "unauthorized." As part of the TRP, the government undertook to reconcile disbursement transactions and classified disbursement

transactions as either "reconciled" or "unreconciled." *See id.* at 9.

As to plaintiff's trust accounts, Arthur Andersen examined and reconciled five disbursement transactions (totaling $35,656.38). *Id.* There were no unreconciled disbursement transactions. *Id.*

Arthur Andersen reconciled three disbursement transactions to a "L" code. *Id.* Under a "L" code

> [t]he disbursement was to the Tribe in care of Superintendent or third party (Bank) and did not have both Tribal and other governmental signed authorization.

Arthur Andersen and the Bureau of Indian Affairs considered transactions classified with a "L" code to be reconciled. *Id.* As explained in greater detail by Mr. Chavarria, one of the government's expert witnesses in these cases and a former Arthur Andersen partner involved in the TRP:

> Q. Okay. Understood.
>
> And if a -- one of these source documents was missing, it would be considered unreconciled, is that correct?
>
> A. No, that is not correct.
>
> Q. Oh, dear.
>
> A. It is reconciled, but there is disclosure on this page with regard to what documents were used for the reconciliation.
>
> As an example, the SF 1166 is an indication that the funds were disbursed from Treasury and the account, then, has been reduced by those amounts. If it is a processed, completed schedule, that account was considered reconciled, but there was disclosure with regard to what documents might not have been included and considered in that reconciliation --
>
> * * *
>
> -- which is this Code "L."
>
> * * *
>
> There were -- there were -- there were only five disbursement transactions

> throughout this time period in the tribal trust accounts for Quapaw: two of them are reported here, it was reconciled to a level of "C."
>
> * * *
>
> Three of them are reported here as reconciled to a level of "L." And the "L" as described here means the disbursement was to the tribe in care of superintendent or a third party, and it says in parentheses "bank," and did not have both tribal and other government-signed authority.
>
> What that means is that the reconciler was looking for a document that was signed by the government and the tribe, and if it didn't include both signatures, then that was reported here as an "L," and that's what this means.

Chavarria Depo. pp. 127:7-128:22; Appendix of Exhibits ("App.") Ex. 1.

Since the congressionally-mandated deadline to complete the TRP (May 31, 1996), the United States has located and produced to plaintiff, as part of fact discovery in these cases, additional documents related to the three "L" code disbursement transactions identified in plaintiff's Agreed-Upon Procedures and Findings Report. Specifically, the United States has located tribal authorization for withdrawal of a $25,000 disbursement as well as a GOALS report confirming payment. Chavarria Decl. ¶ 8; App. Ex. 2. The United States has confirmed that an $8.80 disbursement coded as "L" was, in fact, a transfer to the tribe's Individual Indian Money ("IIM") account and is identified as posted to that account. *Id.* And, the United States has discovered that the remaining $6,672 disbursement was reversed and the funds were returned to plaintiff's trust account. *Id.*. Accordingly, that transaction was ultimately not a disbursement transaction.

In sum, plaintiff has presented no evidence of any "unauthorized" disbursements from its trust accounts.

Plaintiff's Allegedly Undisputed Fact 4:

The Government has never paid the Tribe this $31,680.80 in unauthorized disbursements from the Quapaw Tribe's Trust Account.

Response to Allegedly Undisputed Fact 4:

Disputed.

The United States incorporates herein, by reference, its response to plaintiff's allegedly undisputed fact 3, *supra*.

Plaintiff's Allegedly Undisputed Fact 5:

The Quapaw Analysis identified an additional $70,330.71 in unreconciled transactions from Tribal trust accounts.

Response to Plaintiff's Allegedly Undisputed Fact 5:

Disputed.

The Quapaw Analysis did not identify "unreconciled transactions." Instead, it asserts that

> [i]n cross-referencing with other source documents provided, $70,331 dollars [*sic*] worth of potential deposits were identified as never having been officially posted to Quapaw tribal accounts Q-32/7480 . . . .

Quapaw Analysis at 36; ECF No. 14 (under seal).

After reviewing the Quapaw Analysis, the linked spreadsheet, and the supporting information provided with the Quapaw Analysis, the United States was unable to determine how Quapaw Information Systems (the creator of the Quapaw Analysis) identified transactions that it believes or alleges should have been posted to plaintiff's trust accounts. Chavarria Decl. ¶ 9-10. The "source documents provided" are not identified in the Quapaw Analysis and cannot be reconstructed without additional information. *Id.* Because Quapaw Information Systems has been dissolved, Berrey Depo. p. 50:2-6, App. Ex. 3, the United States has no means to ascertain what "source documents" form the basis of the Quapaw Analysis's list of "potential deposits."

Nonetheless, the United States has determined, from its own review of plaintiff's trust account records, that were made available to but either ignored by Quapaw Information Systems or not located by Quapaw Information Systems, that tens of thousands of dollars identified as

"never officially posted" in the Quapaw Analysis were, in fact, posted to plaintiff's trust accounts.

Although plaintiff cites to the United States' initial response to plaintiff's request for admission number 15, Mot. at 15, (dated August 27, 2014) it does not cite to the United States' supplemental response, dated October 24, 2014. App Ex. 4. In that supplemental response, the United States provided ledger sheets for account Q-32 which demonstrated postings that the Quapaw Analysis erroneously identified as "never officially posted." *Id.*

As set forth in Mr. Chavarria's declaration, the historical accounting records produced in discovery, TRP materials, and the Trust Account Database[1/] prepared for plaintiff verify postings of $58,162.67 to plaintiff's trust accounts that the Quapaw Analysis identified as "never officially posted." Chavarria Decl. ¶¶ 11-12.

Of the remaining $12,168.04, insufficient information is available from the Quapaw Analysis to determine if these are actual amounts due to plaintiff or if these amounts can be explained by other reasons. *Id.* ¶ 13.

Plaintiff's Allegedly Undisputed Fact 6:

The Government has never paid the Tribe the $70,330.71 in unreconciled transactions from Tribal trust accounts.

United States' Response to Allegedly Undisputed Fact 6:

Disputed.

The United States incorporates herein, by reference, its response to plaintiff's allegedly undisputed fact 5, *supra*.

[1/] The Trust Account Database ("TAD") "consists of readily available electronic data from Interior's various historical Tribal Trust and IIM System account data sources."

IV. ARGUMENT

A. Plaintiff Is Not Entitled to Summary Judgment on Its Treaty Education Annuity Payment Claims.

1. Plaintiff is not legally entitled to damages for any unappropriated education annuity payments.

The Court should deny plaintiff's motion for partial summary judgment as to its education annuity payment claims because the Court lacks subject-matter jurisdiction over those claims. It is well settled that a statute is not money-mandating—and a claim that the United States breached such a statute is not within the Court of Federal Claims' subject-matter jurisdiction—when the statute confers on the United States complete discretion about whether to pay an individual or group. *McBryde v. United States*, 299 F.3d 1357, 1362 (Fed. Cir. 2002); *Doe v. United States*, 100 F.3d 1576, 1582 (Fed. Cir. 1996). A discretionary statute is only money-mandating in breach if "the statute (1) provides clear standards for paying an award, (2) states a precise amount to be paid, and (3) compels payment once certain conditions precedent are met." *Roberts v. United States*, 745 F.3d 1158, 1163 (Fed. Cir. 2014) (citation omitted). Here, the Treaty of 1833 provision at issue does not mandate the payment of any funds to plaintiff and is not money-mandating in breach.

Treaty interpretation, like statutory or contract interpretation, begins with the plain language of the treaty. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1821). By its plain language, Article III of the Treaty of 1833 sets forth the following.

First, it requires Congress "to appropriate one thousand dollars per year for education purposes." An "appropriation" is a license from Congress "to incur obligations and to make payments from [the] Treasury for specified purposes." 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-5 (3d ed. 2004) ("Red Book"); *see also Andrus v. Sierra Club*, 442 U.S. 347, 359 n.18 (1979). An appropriation permits but does not mandate

the payment of money.

Second, Article III of the Treaty of 1833 permits the President of the United States (or his designee) to expend, or not expend, the $1,000 appropriation in his sole discretion: "to be expended under the direction of the President of the United States . . . only as long as the President of the United States deems necessary for the best interests of the Indians." In fact, between Fiscal Years 1887 and 1923, the Executive Branch of the United States expended $39,085.53 on Quapaw education. Annual expenditures varied from $84.34 (Fiscal Year 1929) to $1,972 (Fiscal Year 1909). App. Ex. 5. This discretionary spending authority should be contrasted with other provisions of the Treaty of 1833 which left no discretion as to the amount, payee, or nature of payments, such as the Article IV requirement that the United States "pay the debts of the Quapaw Indians according to the annexed schedule to the amount of four thousand one hundred eighty dollars . . . ."

Because the treaty affords the President complete discretion about whether to pay an individual or group, there is a presumption that this treaty provision is not money-mandating in breach. *Doe*, 100 F.3d 1582. Plaintiff cannot overcome this presumption. First, the treaty does not state a precise amount to be paid. Instead, it permits payment "under the direction of the President" up to the annual appropriation of $1,000. Second, the treaty does not limit how the funds might be expended other than requiring payments "for education purposes." Third, the treaty provides no specification about the person(s) to be paid and the expenses to be made. As a result, the United States made payments over time for, *inter alia*, books, clothing, furniture, salaries, building repair, direct payments to the Quapaw Treasurer, and board and tuition. App. Ex. 5. Finally, the treaty does not compel payment of the entire $1,000 appropriation. In short, the education annuity payment provision of Article III of the Treaty of 1833 "does not reveal

congressional intent to provide the damage remedy [plaintiff has] claimed in this action." *Samish Indian Nation v. United States*, 419 F.3d 1355, 1365 (Fed. Cir. 2005) (finding failure to enter into self-determination contract claims outside the court's subject-matter jurisdiction). Because this Court lacks subject-matter jurisdiction over plaintiff's treaty education annuity payment claims, the Court should deny plaintiff's motion for partial summary judgment as to those claims.

2. Plaintiff's claims for education annuity payments for Fiscal Year 1932 through Fiscal Year 1948 are barred by the doctrine of claim preclusion.

Even if the Court has jurisdiction over plaintiff's education annuity payment claims, plaintiff's claims for damages for the period from 1932 through November 3, 1947, (which includes Fiscal Year 1948) are barred by the doctrine of claim preclusion. These cases are the second instance in which plaintiff has asserted claims for money damages against the United States arising from the education annuity payment provisions of the Treaty of 1833. Plaintiff previously brought the same claims against the United States under the Indian Claims Commission Act and those claims were prosecuted to final judgment on the merits. A such, all requisite elements of claims preclusion have been met and plaintiff's pre-Fiscal Year 1949 education annuity payment claims are barred.

On November 3, 1947, plaintiff sued the United States under Section 2 of the Indian Claims Commission Act. App. Ex. 6; *see also Quapaw Tribe of Okla. v. United States*, ___ Fed. Cl. ___, 2015 WL 1737281, *4 (April 16, 2015) ("the ICC judgment was made in favor of the Quapaw Tribe"). Plaintiff could have, and should have, brought its pre-Fiscal Year 1949 education annuity payment claims in that petition. Under the doctrine of claim preclusion, it is prohibited from advancing those claims now.

Under the doctrine of claim preclusion or *res judicata*, parties and their privies are barred

from bringing a subsequent lawsuit based on claims that were or could have been litigated in a prior action that went to judgment. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Claim preclusion reaches not only those matters that were previously litigated and decided, it also bars subsequent litigation on matters that were never litigated but could have been advanced in the earlier suit. *Sharp Kabushiki Kaisha v. Thinksharp, Inc.*, 448 F.3d 1368, 1370 (Fed. Cir. 2006). For claim preclusion to be based on a judgment in which a claim was not previously litigated, there must be (1) an identity of parties or their privies; (2) a final judgment on the merits of the prior claim; and (3) the second claim must be based on the same transactional facts as the first and should have been litigated in the prior case. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n. 5 (1979). If these elements are met, claim preclusion applies, even if plaintiff intends to present new evidence, new grounds, or new theories that were not presented in the prior actions. *PCL Const. Servs., Inc. v. United States*, 84 Fed. Cl. 408, 422 (2008) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 25(1) (1982)).

a. The parties were the same in Docket 14 as in these cases.

The defendant in Indian Claims Commission Docket 14 ("Docket 14") was the United States. App. Ex. 6. The defendant in both *Quapaw Tribe* and *Bear* is the United States. Compl. ¶ 2, ECF No. 1 in *Quapaw Tribe*; Compl. ¶ 11, ECF No. 4 in *Bear*. There is an identity of party defendant between Docket 14 and these cases.

A plaintiff in Docket 14 was "the Quapaw Tribe of Indians." App. Ex. 6. This Court has held that the Quapaw Tribe was a plaintiff in Docket 14 and that "the ICC judgment was made in favor of the Quapaw Tribe." *Quapaw Tribe of Okla.*, 2015 WL 1737281 at *4. The Quapaw Tribe of Oklahoma is a plaintiff in these cases. Compl. ¶ 1 in *Quapaw Tribe*; Compl. ¶ 10 in *Bear*. There is an identity of party plaintiff between Docket 14 and these cases.

b. Docket 14 resulted in a final judgment on the merits.

The parties litigated Docket 14 to judgment, and the Court of Claims affirmed the Indian Claims Commission's judgment on appeal. *Quapaw Tribe of Okla. v. United States*, 120 F. Supp. 283, 289 (Ct. Cl. 1954); *see also* H.R. REP. NO. 86–593, at 1 ("The Quapaw Tribe was awarded a judgment by the Indian Claims Commission on May 7, 1954 . . . ."). Congress satisfied the final judgment by appropriating the relevant funds on August 26, 1954. Supplemental Appropriation Act, 1955, Pub. L. No. 83-663, 68 Stat. 800, 827-28. A net award of $820,024.46 was deposited into plaintiff's trust accounts in Fiscal Year 1955. App. Ex. 7; *see also United States v. Dann*, 470 U.S. 39, 49 (1985) (deposit of judgment funds in trust accounts "shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy"). There was a final judgment on the merits of the prior claim.

c. Plaintiff's pre-Fiscal Year 1949 education annuity payment claims are based on the same transactional facts as those at issue in Docket 14 and therefore were, could have been, or should have been litigated in that docket.

When determining what claims are barred by a prior final judgment on the merits, the United States Court of Appeals for the Federal Circuit follows the rule delineated by the RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982), which holds that "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Vitaline Corp. v. Gen. Mills, Inc.*, 891 F.2d 273, 275 (Fed. Cir. 1989). Under the doctrines of merger and bar a plaintiff is precluded from litigating a "subsequent assertion of the same transactional facts in the form of a different cause of action or theory of relief." *Young Eng'rs, Inc. v. United States Int'l Trade Comm'n*, 721 F.2d 1305, 1314 (Fed. Cir. 1983). It is not necessary that the identical

claim or cause of action had been pled in the prior action, because the doctrine of *res judicata* or claim preclusion also extends to bar subsequent litigation of claims that should or could have been raised in the prior action. *Federated Dep't Stores, Inc.*, 452 U.S. at 398.

Plaintiff filed Docket 14 under Section 2 of the Indian Claims Commission Act, which provided a broad jurisdictional grant to the Indian Claims Commission. The Act allowed claims based upon:

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

Indian Claims Commission Act § 2, 60 Stat. 1049, 1050 (1946). At the time that Docket 14 was prosecuted, the rules of the Indian Claims Commission, much like the Rules of the United States Court of Federal Claims today, required claimants to liberally set forth all of their claims (even if presented in the alternative) in their petition:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts of defenses. . . . A party may also state as many separate claims or defenses as he has, regardless of the consistency and regardless of the nature of the grounds on which they are based.

25 C.F.R. § 503.7 (1947).

The education annuity payments set forth in the Treaty of 1833 were specifically at issue in Docket 14. To wit, plaintiffs attached the Treaty of 1833 as Exhibit D to their petition and alleged

> 22. Plaintiffs further state that in said Treaty of 1833 they were further overreached and defrauded by the United States in that they were induced to surrender a perpetual annuity of $1,000 a year in return for the promise of the $4,180 a year in return for the promise of the payment of $4,180 in Quapaw debts assumed and $2,000 annually for a period of 20 years.
>
> 23. Plaintiffs state that they are not advised said payment of said $4,180 or said annual annuity of $2,000 for 20 years, *and such other payments as were established to be paid*, were in fact paid, and therefore specifically deny the making of such payments.

App Ex. 6 at QG04ADC0080534 (emphasis added). Moreover, during the litigation of Docket 14, plaintiff received an accounting from the General Accounting Office that addressed the education annuity payments that had been made under the Treaty of 1833. App. Ex. 5. Thus the claim that plaintiff seeks to advance now in the current litigation is the same as the one that was at issue in Docket 14 (and if it was not the same claim, it was one that could have been or should have been advanced by plaintiff in Docket 14).

All of the elements of *res judicata* have been established. *Parklane Hosiery Co.*, 439 U.S. at 327 n. 5. Thus, plaintiff's motion for partial summary judgment regarding education annuity payment claims for the period prior to, and including, Fiscal Year 1948 should be denied.

3. Plaintiff's education annuity payment claims pre-dating September 11, 2006, are barred by the statute of limitations.

This Court should also deny plaintiff's motion for partial summary judgment as to plaintiff's claims for education annuity payments due more than six years prior to the date it filed its complaint as untimely. "Claims by individual Indians or Tribes for breach of trust are subject to the same six-year statute of limitations under 28 U.S.C. § 2501 that applies to other litigation against the United States under the Tucker Act." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1578 (Fed. Cir. 1988). Further, "statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal

redress or relief from the government." *Id.* at 1576.

The statute of limitations begins to run when the "claim first accrues." 28 U.S.C. § 2501. A claim against the United States first accrues on the date when all the events that fix the liability of the government and entitle the claimant to institute the action have occurred. *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988). For Indian breach of trust claims, a claim "traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("*Shoshone II*"). The "knowledge of that repudiation" element of the accrual test set forth by the Federal Circuit is further defined as "placing the beneficiary on notice that a breach of trust has occurred." *Id.* This "on notice" standard is no different than the objective standard commonly applied to the "accrual suspension rule," which states that the accrual of a claim against the United States is suspended until the claimant "knew or should have known" that the claim existed. *Young v. United States*, 529 F.3d 1380, 1383 (Fed. Cir. 2008).

Plaintiff knew or should have known whether Congress appropriated $1,000 for education purposes pursuant to Article III of the Treaty of 1833 when Congress passed its annual appropriation bills for the Department of the Interior. Plaintiff seeks damages in these cases based upon an allegation that Congress "did not make this annual treaty payment of $1,000." Plaintiff's Allegedly Undisputed Fact 2. Thus, plaintiff's claims accrued each year that Congress did not appropriate $1,000 pursuant to the terms of the treaty. Plaintiff knew or should have known of those alleged breaches at the time that Congress passed its annual appropriation bills for the Department of the Interior. Appropriation acts are public laws, *see, e.g.*, Department of the Interior Appropriations Act of April 22, 1932, 47 Stat. 91, and plaintiff knew or should have known the contents of those public laws at the time they were passed. *Harris Corp. v. Ericsson,*

Inc., 417 F.3d 1241, 1263 (Fed. Cir. 2005), *citing Pittsburgh & L.A. Iron Co. v. Cleveland Iron Min. Co.*, 178 U.S. 270, 278 (1900) ("Everyone is presumed to know the law"). Moreover, because the Treaty of 1833 required the $1,000 appropriation to be expended on education, certainly plaintiff or plaintiff's members would know whether education activities were being funded. A school closure for lack of funding is certainly "open and notorious" and would have been known to plaintiff in the year that the funds were not appropriated. Under *Shoshone II* and *Young*, plaintiff's treaty education annuity payment claims accrued in the years that Congress allegedly failed to appropriate $1,000, and plaintiff's claims for payments due more than six years before it filed its complaint are untimely.

Plaintiff's education annuity payment claims are not subject to the appropriations act riders enacted by Congress to toll the statute of limitations for certain Indian breach of trust claims. The Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 786 (2011), which was in effect when plaintiff filed these cases, provided, 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.

Div. E, Tit. I, Office of the Special Trustee, 125 Stat. at 1002. Similar language had been included in Interior appropriations acts, with minor revisions over time, since 1990. *See* Pub. L. No. 101-512 (1990).

The appropriations act rider does not apply because the treaty education annuity payments are not "trust funds," and thus are not covered by the tolling provision. In Fiscal Year 1931, the Department of the Treasury's Combined Statements of the Receipts and Expenditures of the United States ("1931 Combined Statement") identified a Department of the Interior

General Fund appropriation for "Fulfilling treaties with — . . . Quapaws, Oklahoma," under the sub-heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes." App. Ex. 8. At the same time, the 1931 Combined Statement identified a separate "Trust Fund[]" for the Quapaw Agency, Oklahoma. *Id.* By contrast, plaintiff's trust fund was an indefinite ("no year") appropriation, while the treaty payments were single-year appropriations. *Id.*

Hence, the treaty education annuity payments are what the Red Book defines as "federal funds." Red Book at 15-280-81. "Federal funds include general fund expenditure and receipt accounts, special fund expenditure and receipt accounts, and intragovernmental, management, and public enterprise revolving fund accounts." *Id.* at 15-281. "Federal funds" are distinguishable from "trust funds," which are "trust fund expenditure accounts, trust fund receipt accounts, and trust revolving fund accounts." *Id.* at 15-282. "The distinguishing characteristic of these accounts is that they represent accounts, designated by law as trust funds, for receipts earmarked for specific purposes and sometimes, but not always, for the expenditure of these receipts." *Id.*

Nothing in the Treaty of 1833 designates or implies that the education annuity payment appropriations were "trust funds." Nor is there a statutory or congressional designation of the education annuity payments as trust funds. Therefore the education annuity payments are not trust funds. *Wolfchild v. United States*, 559 F.3d 1228, 1238 (Fed. Cir. 2009) ("[A] trust is created only if the settlor properly manifests an intention to create a trust relationship."); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, MATTER OF: ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS: USE AND FINAL DISPOSITION OF STATE GOVERNMENT CONTRIBUTIONS FILE, No. B-274855 (Jan. 23, 1997) ("Although contributions to ACIR have been maintained separately from direct appropriations and held in a 'trust fund account' to carry

out authorized purposes, they are not 'held in trust' as those words are commonly used to describe a fiduciary relationship to keep money for the benefit of another."). Because the education annuity payments are not trust funds, the appropriations act rider tolling the statute of limitations for "losses to or mismanagement of trust funds" does not apply to plaintiff's claim. Plaintiff's education annuity payment claims are subject to the six-year statute of limitations and all claims for payments that were due more than six years before plaintiff filed its complaint are untimely.

4. Genuine issues of fact preclude summary judgment on plaintiff's education annuity payment claims.

This Court should deny plaintiff's motion for partial summary judgment as to its education annuity payment claims because there are genuine disputes as to material facts. As set forth above, *see* Section III, *supra*, and Appendix A, Congress appropriated funds for Quapaw education after 1932. Currently, the Bureau of Indian Education, a component of the Department of the Interior, "provide[s] quality education opportunities from early childhood through life in accordance with the Tribes' needs for cultural and economic well-being in keeping with the wide diversity of Indian Tribes and Alaska Native villages as distinct cultural and governmental entities." 25 C.F.R. § 32.3. For Fiscal Year 2014, Congress appropriated $2,378,763,000 for the Bureau of Indian Education. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 299 (2014). Accordingly, genuine disputes as to material facts exist with respect to plaintiff's allegations that "[f]rom 1932 through 2015 the United States did not make this annual treaty payment of $1,000," precluding partial summary judgment. *Anderson*, 477 U.S. at 248.

B. Plaintiff's Motion for Partial Summary Judgment as to Allegedly Unauthorized Disbursement Transactions Should be Denied.

1. Plaintiff's TRP-based claims are untimely.

a. Plaintiff had actual knowledge of its allegedly unauthorized disbursement claims more than six years before it filed its complaint.

Plaintiff's claims for damages based upon allegedly unauthorized disbursements identified in the Agreed-Upon Procedures and Findings Report are untimely and barred by the statute of limitations. In 1996, the Department of the Interior transmitted to plaintiff, *inter alia*, the Agreed-Upon Procedures and Findings Report for plaintiff's trust funds. *See* App. Ex. 9. In plaintiff's Agreed-Upon Procedures and Findings Report, Arthur Andersen identified three disbursement transactions (totaling $31,680.80) as reconciled and classified with a "L" reconciliation code. ECF No. 83-2 at 6. On June 5, 1996, Arthur Andersen representatives met with Chairperson Grace Goodeagle and Tribal Business Committee Member Deena Rae Hughey, to discuss the Agreed-Upon Procedures and Findings Report and other TRP deliverables. App. Ex. 10. Plaintiff's tribal government had reviewed the Agreed-Upon Procedures and Findings Report by no later than 2002. Berrey Depo. pp. 36:22-37:3; 42:24-43:8; App. Ex. 3. Plaintiff actually knew of its allegedly unauthorized disbursement claims long before it filed the complaint in these cases. Therefore, plaintiff's claims based upon information contained in the Agreed-Upon Procedures and Findings Report are patently untimely, and plaintiff's motion for partial summary judgment regarding these claims should be denied.

b. Plaintiff's allegedly unauthorized disbursement claims are not subject to the appropriations act's tolling provision.

In 2002, Congress passed legislation regarding the Agreed-Upon Procedures and Findings Reports and the reconciled account balances prepared by the Department of the Interior pursuant to the 1994 Act. Aware that some tribes were filing suits to preserve their objections to

the reconciled account balances, Congress extended the date on which the tribes were 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). The legislation extended the deadline until December 31, 2005, for tribes to "dispute[] the balance of the account holder's account as reconciled [and/or] . . . dispute[] the Secretary's reconciled balance," pursuant to 25 U.S.C. § 4044(2)(B). Congress's expressly stated purpose in passing the legislation 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 aimed to allow 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 another year, the date on which tribes would be deemed to have received their reports and reconciled account balances. *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:

> [n]otwithstanding 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.

Thus, "for purposes of applying" the six-year statute of limitations, 28 U.S.C. § 2501, plaintiff was "deemed to have . . . received" its Agreed-Upon Procedures and Findings Report and associated materials "on December 31, 2000." That report and the associated materials was an "accounting" from which plaintiff could "determine whether there has been a loss" such that plaintiff was "on notice that a[n alleged] breach of trust has occurred." The undisputed facts

show that plaintiff was well aware of its allegedly unauthorized disbursement claims once it received the Agreed-Upon Procedures and Findings Report. Plaintiff did not require any additional "accounting" or other materials to "determine whether there has been a loss." Thus, plaintiff's claims in these cases regarding allegedly unauthorized disbursement transactions based upon the Agreed-Upon Procedures and Findings Report are untimely and barred by the statute of limitations.

The statute of limitations is jurisdictional and may not be waived. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136-39 (2008). As such, it must be strictly construed. *Hopland Band of Pomo Indians*, 855 F.2d at 1576-77. The Federal Circuit has acknowledged that the appropriations act provisions tolling the statute of limitations amount to a waiver of sovereign immunity. *Shoshone II*, 364 F.3d at 1346 ("By the plain language of the Act, Congress has expressly waived its sovereign immunity . . ."). Thus, the appropriations act must also be strictly construed. Even in cases involving Indian plaintiffs, statutory waivers of the United States' sovereign immunity must be narrowly construed, and the court's jurisdiction must be limited to that which Congress clearly intended. *See, e.g.*, *United States v. Mottaz*, 476 U.S. 834, 851 (1986) ("[E]ven for Indian plaintiffs, a waiver of sovereign immunity cannot be lightly implied but must be unequivocally expressed.") (brackets and internal quotation marks omitted); *Klamath & Moadoc Tribes v. United States*, 296 U.S. 244, 250 (1935) ("The Act grants a special privilege to plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms"); *Blackfeather v. United States*, 190 U.S. 368, 376 (1903) ("As these statutes extend the jurisdiction of the Court of Claims and permit the Government to be sued for causes of action therein referred to, the grant of jurisdiction must be shown clearly to cover the case before us, and if it do[es] not, it will not be implied.").

"Accounting," as used in the appropriations act, has no specialized meaning. Under the Indian Claims Commission Act, the Court of Claims held that Indian tribes that petitioned for an accounting were entitled to information showing "what gains have accrued and what losses have occurred, receipts, expenditures, and allocations between principal and interest." *Red Lake Band v. United States*, 17 Cl. Ct. 362, 374 (1989) (citations omitted). To place an Indian Claims Commission Act case at issue, the United States would file a GAO report that "set forth all receipts and disbursements on behalf of the various tribes. . . ." *Sioux Tribe of Indians of the Cheyenne River Reservation v. United States*, 12 Ind. Cl. Comm. 541, 546 (1963). The GAO report, treaties, agreements, and public laws, and the documents provided with the GAO report, in turn, permitted "petitioners to determine which of the various items, if any, reflect a failure on the part of the defendant to properly account for its actions in the handling of those particular items." *Id.* at 547. Thus, under the Indian Claims Commission Act, an "accounting" consisted of a record of credits, expenditures, interests, and losses (if any).

Here, the Agreed-Upon Procedures and Findings Report and associated materials detail the three disbursement transactions (as to their amount, date, and nature of the disbursements) that are at issue in plaintiff's motion for partial summary judgment. The Agreed-Upon Procedures and Findings Report rivaled or exceeded the GAO reports that were considered an "accounting" in Indian Claims Commission Act cases. At a minimum, it contained the basic information that Congress considered to be an "accounting" under the 1994 Act for disbursement transactions. Certainly it provided the information called for in Section 102, 25 U.S.C. § 4011, for the period Fiscal Year 1978 to Fiscal Year 1995, and that is sufficient to allow plaintiff to "determine whether there has been a loss."

As held by other Circuits, the Department of the Interior's statutory reporting obligation

regarding Indian beneficiaries is "to provide the trust beneficiaries the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." *Cobell v. Salazar*, 573 F.3d 808, 813 (D.C. Cir. 2009). As characterized by the Tenth Circuit, "[p]ut simply, a duty to account is a duty to account, not a duty to respond to and disprove any and all potential breaches of fiduciary duty a beneficiary might wish to pursue once the accounting information is in hand." *Fletcher v. United States*, 730 F.3d 1206, 1215 (10th Cir. 2013). Under any reasonable definition, the Agreed-Upon Procedures and Findings Report and associated materials provided in 1996 constituted an "accounting" commencing the running of the statute of limitations under the appropriations act.[2/]

In sum, plaintiff actually knew of its allegedly unauthorized disbursement transaction claims by no later than 2002, when it had reviewed or completed its review of the Agreed-Upon Procedures and Findings Report and associated materials. By no later than 2002, plaintiff was provided "an accounting of [the three disbursement transactions] from which the beneficiary can determine whether there has been a loss." Because plaintiff did not sue the United States for damages on those claims within six years of 2002, this Court lacks subject-matter jurisdiction over plaintiff's allegedly unauthorized disbursement claims. The Court should deny plaintiff's motion for partial summary judgment as to its allegedly unauthorized disbursement claims as untimely. 25 U.S.C. § 2501.

[2/] To find that the Agreed-Upon Procedures and Findings Report and associated materials constituted an "accounting" for purposes of the appropriations act, this Court need not reach the issue of whether those materials fully discharged Interior's historical reconciliation obligations under the 1994 Act (*i.e.*, the subject of plaintiff's federal district court case). "Accounting," in the appropriations act, is modified by Congress's carefully chosen phrase, "from which the beneficiary can determine whether there has been a loss." 125 Stat. at 1002. Thus, Congress clearly envisioned an "accounting" that is much more informal and much narrower and more limited in scope and detail that the "accounting" demanded by plaintiff (as well as certain other tribes) in district court litigation.

c. Plaintiff's prior district court accounting case settlement does not toll the statute of limitations.

Plaintiff's district court accounting litigation and the settlement of that case do not toll the statute of limitations. On February 14, 2002, the tribe sued officials of the United States in the Northern District of Oklahoma. Compl., ECF No. 1, in *Quapaw Tribe of Okla. v. Dep't of the Interior*, No. 02-cv-129 (N. D. Okla. filed Feb. 14, 2002). Plaintiff claimed in that case that Interior failed to comply with the 1994 Act and sought an order "requiring Interior to comply with the requirements of 25 U.S.C. §§ 4011 and 4044 as soon as possible, and under the supervision and continuing jurisdiction of this Court." *Id.*, Prayer for Relief ¶ 6.

In 2004, plaintiff and the federal government reached an agreement to settle the case. Under the terms of that settlement agreement, plaintiff waived "any rights it has to obtain from the United States an accounting" of its funds and assets in exchange for a contract between the Department of the Interior's Office of Historical Trust Accounting and plaintiff. Settlement Agreement, Art. I, ¶¶ 1, 4; App. Ex. 11. The parties also agreed that

> as of the date the tribe receives a copy of the Quapaw Analysis, the Tribe shall be deemed to have been "furnished with an accounting of [the Tribe's TTFAs and any of its other trust assets] from which the [Tribe] can determine whether there has been a loss" within the meaning of Pub. L. No. 108-7 (2003), and the similar statutes passed each year since 1990.

Id. ¶ 4. This language does not amount to a tolling provision of the statute of limitations, and does not relieve plaintiff of its obligation to timely file damages claims for allegedly unauthorized disbursement transactions. Plaintiff's arguments to the contrary should be rejected for several reasons.

First, elsewhere in the settlement agreement, the parties agreed that "[n]othing in this Settlement Agreement shall cause or be interpreted to cause a waiver, either express or implied, of the sovereign immunity of the United States or any of the Defendants from suit or otherwise

by any person or entity." *Id.*, Art. III, ¶ 2. The parties also agreed that "Defendants do not waive any defenses they may have in response to any claims that the Tribe may assert in the future." *Id.*, Art. I, ¶ 6. Thus, the express terms of the settlement agreement confirm that the settlement agreement did not toll or waive therein the statute of limitations contained in 28 U.S.C. § 2501.

Second, the mere fact that plaintiff filed a district court action seeking an accounting does not toll the statute of limitations for its damages claims in this Court. In *Ball v. United States*, the Court of Claims held that the pendency of a plaintiff's district court action seeking reinstatement to his former rank in the Navy did not toll the statute of limitations for his subsequent suit in the Court of Claims in which he sought back pay. 137 F. Supp. 740, 744 (Ct. Cl. 1956). The court relied on the fact that the "right to recover on the salary claims was in no way dependent upon a final judgment in [the] reinstatement proceeding. . . ." *Id.*; *accord Casman v. United States*, 135 Ct. Cl. 647, 649-50 (1956) (district court action for injunctive relief and Court of Claims action for back pay held to be "entirely different claims"). In *Shermco Industries, Inc. v. United States*, the Claims Court applied the holding in *Ball* to a contract claim and found that claim untimely because the plaintiff's claim for equitable relief in the district court was not dependent on its claim for damages (or *vice versa*), the plaintiff had a "completely accrued cause of action for monetary relief" before it filed its district court action, and the limitations period "is not tolled even though the pendency of the district court proceeding may have deprived the Claims Court of jurisdiction over" the subsequent claim for damages. 6 Ct. Cl. 588, 593 (1984). The same result is warranted here. Plaintiff is not entitled to any tolling as a result of its district court action. Further, as its district court action was concluded on November 29, 2004, plaintiff's allegedly unauthorized disbursement claims in this case are still untimely, even if plaintiff were afforded some tolling, because plaintiff did not bring these cases

asserting those claims until 2012.

Third, it is well-established that the statute of limitations contained in 28 U.S.C. § 2501 is jurisdictional and may not be equitably tolled. *John R. Sand & Gravel Co.*, 552 U.S. 136. "[E]quitable tolling is not available in actions brought under the Tucker Act." *Banks v. United States*, 102 Fed. Cl. 115, 143 (2011) (citing cases). Thus, there is no equitable basis for tolling the statute of limitations because of plaintiff's prior district court accounting action or the district court settlement agreement.

Finally, because the statute of limitation is jurisdictional, the parties may not toll the statute by settlement agreement or other contract in a separate district court proceeding. The Departments of Justice, the Treasury, or the Interior cannot waive the statute of limitations. *Camacho v. United States*, 494 F.2d 1363, 1368 (Ct. Cl. 1974). Only Congress may waive the United States' sovereign immunity from suit in this Court. *See United States v. Shaw*, 309 U.S. 495, 500-502 (1940) (neither the Judiciary nor the Executive can "extend the waiver of sovereign immunity more broadly than has been directed by the Congress."). The 2004 settlement agreement does not toll or otherwise modify the application of the statute of limitations. Plaintiff's allegedly unauthorized disbursement claims are untimely, and this Court should deny plaintiff's motion for partial summary judgment.

2. Genuine issues of fact preclude summary judgment on plaintiff's allegedly unlawful disbursement claims.

Even if the Court has subject-matter jurisdiction over plaintiff's TRP-based claims, genuine issues of fact preclude summary judgment on those claims. Based on information produced along with the TRP and obtained in and produced to plaintiff in discovery in these cases, the United States has reconciled all three disbursement transactions to a "C" equivalent level. First, the $8.80 disbursement was actually a transfer from one of plaintiff's proceeds of

labor accounts to plaintiff's IIM account. Chavarria Decl. ¶ 8. Thus, that transaction was not a "disbursement," *i.e.*, those funds were not removed from trust. The United States has also confirmed that the $8.80 "disbursed" from the tribe's proceeds of labor account was posted to the tribe's IIM account. *Id*.

Second, the United States has confirmed that the $6,672 disbursement was reversed and the funds were restored to plaintiff's proceeds of labor account x7480. *Id*. Accordingly, this transaction was also not a "disbursement," because no funds ultimately left the tribe's trust account.[3/]

Third, the United States has located a tribal resolution authorizing the withdraw of the final disbursement in the amount of $25,000. Chavarria Decl. ¶ 8. Thus, there are no "unauthorized" disbursements from the tribe's trust accounts during the TRP period.

Plaintiff's argument that the United States is "bound" by the Agreed-Upon Procedures and Findings Report, Mot. at 11-13, is a flawed and insufficient basis for granting summary judgment to plaintiff. First, the Agreed-Upon Procedures and Findings report did not identify any Quapaw disbursement transaction as "unauthorized." *Cf.* ECF No. 83-2 at 6. Instead, the Agreed-Upon Procedures and Findings Report identified all Quapaw disbursement transaction as "reconciled." *Id.* Thus, if the United States is to be "bound" by anything, it would be the fact that the $31,680.80 in disbursement transactions at issue in plaintiff's motion are reconciled.

Additionally, *Osage Tribe of Indians of Oklahoma v. United States*, 93 Fed. Cl. 1 (2010), upon which plaintiff relies, involved the issue of damages after liability had been established.

[3/] Even if the original disbursement was "unauthorized," the tribe has suffered no damages because the full amount of the disbursement was restored to trust status. *See Perry v. United States*, 294 U.S. 330, 355 (1935) ("the Court of Claims has no authority to entertain an action for nominal damages").

See id. at 5 (court found liability for five breaches of the government's fiduciary duties as trustee). Thus, in *Osage*, the Court of Federal Claims was addressing the evidentiary presumption that "once the beneficiary has shown a breach of the trustee's duty and a resulting loss, the risk of uncertainty as to the amount of loss falls on the trustee." *Confederated Tribes of Warm Springs Reservation*, 248 F.3d at 1371. *Osage* therefore has no application to plaintiff's instant motion for partial summary judgment as to liability (not damages).

Further, the court in *Osage* acknowledged its obligation to decide the case based upon evidence, stating that "[w]here reasonable accessible and consistently reliable data exists, the court will, of course, rely on it." 93 Fed. Cl. at 28. Thus, the Court of Federal Claims allowed the government to introduce additional data and evidence to explain areas where the Agreed-Upon Procedures and Findings Report "specifically avoided making the calculations for the time period at issue." *Id.* at 34. Here, the Agreed-Upon Procedures and Findings Report makes no judgment as to damages (if any) owed to plaintiff or whether any disbursement transactions were "unauthorized." Rather, the report simply identified disbursement transactions as "reconciled" or "unreconciled." All evidence related to those reconciled disbursement transactions is relevant and should be considered by this Court in these cases, as in *Osage*. The Court has "an obligation to understand and apply the evidence as best as it can under the circumstance." *Id.* at 32 (quotation marks and citation omitted).

Genuine disputes as to material facts preclude summary judgment on plaintiff's allegedly unlawful disbursement claims. Accordingly, plaintiff's motion for partial summary judgment as to those claims should be denied.

C. Genuine Issues of Material Facts Preclude Summary Judgment on Plaintiff's Allegedly Unposted Deposit Claims.

The Court should deny plaintiff's motion for partial summary judgment as to $70,331

"worth of potential deposits . . . identified as never having been officially posted to Quapaw tribal accounts," Quapaw Analysis at 36, because evidence obtained in discovery in these cases establishes that the vast majority of these "potential deposits" were, in fact, posted to Quapaw trust accounts. For example, the Quapaw Analysis claims that "[t]here is only one IIM card for the Quapaw Tribe Q-32 account from August 1, 1947, until February 27, 1978." Quapaw Analysis at 35. Under the contract between the Department of the Interior and Quapaw Information Systems that led to the Quapaw Analysis, Quapaw Information Systems was as responsible under the contract for developing and executing the "Document Collection Plan" for other categories of documents. App. Ex. 12. Quapaw Information System's failure to perform a reasonable and diligent document search is not a factual or legal basis for granting plaintiff's motion for partial summary judgment.

On October 24, 2014, the United States served its supplemental responses to, *inter alia*, plaintiff's request for admission number 15. App. Ex. 4. Therein, the United States denied plaintiff's request for admission and stated

> As simply an example, the vast majority of "un-posted" amounts identified for the period 1950 to 1977 appear on the ledger sheets for account Q-32 as credits and were therefore "posted."

Id. The United States attached to its supplemental response eight ledger sheets for account Q-32. *Id.* Thus there are genuine issues of material fact as to plaintiff's "unposted" deposit claims and plaintiff's motion for partial summary judgment should be denied. Additional genuine issues of material fact with respect to those claims are set forth in Mr. Chavarria's declaration.

D. The Court Should Deny Plaintiff's Motion in *Bear*.

Partial summary judgment is inappropriate in plaintiff's congressional reference case. Plaintiff's congressional reference case will not result in a judgment, *see* 28 U.S.C. § 2509(b) (precluding judicial review of findings), it will result in a report, 28 U.S.C. § 1492. Thus, it is

not feasible to apply Rule 56 to the claims at issue in plaintiff's motion in plaintiff's congressional reference case. Because there will be no judgment, summary judgment is inappropriate. Rules of the United States Court of Federal Claims Appendix D ¶ 1. Plaintiff's equitable claims, if any, should proceed to trial or hearing, and plaintiff's motion for partial summary judgment in *Bear* should be denied.[4/]

V. CONCLUSION

Wherefore, for the reasons set forth herein, the United States respectfully requests that plaintiff's motion be denied in full.

Respectfully submitted on May 28, 2015,

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[4/] The United States continues to maintain that plaintiff's legal claims for treaty education annuity payments, allegedly unauthorized disbursements, and allegedly unposted deposits are outside the scope of the reference and, accordingly, outside this Court's subject-matter jurisdiction. *See* Motion to Dismiss, ECF No. 7 in *Bear*. Nonetheless, this Court previously held that legal claims dismissed from *Quapaw Tribe*, even after enactment of the House Resolution authorizing the congressional reference case, become equitable claims in *Bear*. *Bear v. United States*, 112 Fed. Cl. 480, 485-86 (2013).

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