UNITED STATES COURT OF FEDERAL CLAIMS

Quapaw Tribe of Oklahoma (O-Gah-Pah), a federally recognized Indian nation,	)	
Plaintiff,	)	No. 12-592L
v.	)	Hon. Thomas C. Wheeler
The United States,	)	
Defendant.	)	
Thomas Charles Bear, et al.,	)	
Claimants,	)	No. 13-51X
v.	)	Hon. Thomas C. Wheeler
The United States,	)	
Defendant.	)	

PLAINTIFF/CLAIMANT TRIBE'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff/Claimant, the Quapaw Tribe of Oklahoma (the O-Gah-Pah) hereby files this reply in support of its Motion for Partial Summary Judgment and in response to the United States' Brief in Opposition. The Government has failed as a matter of law to rebut the Tribe's legal positions and is barred from raising factual disputes several years after the accounting processes mandated by federal law were finalized and completed. Partial summary judgment should be granted to the Tribe.

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1. Partial summary judgment in favor of the Tribe is warranted for the Government's breach of its Treaty obligations of $1,000 per year for education purposes since 1932

In the 1833 Treaty between the United States and the Tribe, the Tribe ceded to the Government significant lands and agreed to move to a new home in Northeast Oklahoma in exchange for valuable consideration, some of which was provided for in Article III of the Treaty:

> 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 interests of the Indians.[1]

A. This Court has jurisdiction over the Tribe's claim for the treaty payment because it is money-mandating, as the Government has already conceded

The United States has already conceded that this Court has jurisdiction over this claim:

> Plaintiff cites to the Treaty of 1833 . . . . Plaintiff has further alleged that the United States failed to make this payment from 1932 onward. . . . [T]he United States acknowledges that plaintiff has plead [sic] a cause of action within the Tucker Acts' waiver of sovereign immunity as to this limited claim.[2]

The Government offers no excuse for now changing its position, upon which both this Court and the Tribe have relied. As this Court stated, overruling the Government's motion to dismiss this claim:

> Plaintiff alleges that the Government was obligated to collect certain monies for the Tribe, such as $1,000 annually for education purposes under the Treaty of 1833, but no record can be found of such payments being received. . . . The alleged failure to collect and deposit these sums would be a breach of the Government's fiduciary duty to manage and collect monies due to the Tribe.[3]

The Government's argument that Article 3 of the 1833 treaty is not money-mandating[4] ignores the actual language of the Treaty as well as the proper test for determining when a provision is money-mandating. First, the test prescribed by the Federal Circuit in *Fisher v.*

[1] Treaty with the Quapaw, May 13, 1833, 7 Stat. 424 at art. 3 (Doc. 83-1).
[2] Def.'s Memorandum in Support of its Mot. to Dismiss 12 (Doc. 6-1).
[3] *Quapaw Tribe of Okla. v. United States*, 111 Fed. Cl. 725, 730 (2013).
[4] *See* Def.'s Resp. Br. at 8.

United States[5] states that it is sufficient that "a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages."[6] This Treaty provision is an unconditional promise by the United States "to appropriate one thousand dollars per year for education purposes" for the Quapaw—easily satisfying the *Fisher* test.

The Government's failure to live up to its treaty obligation is a money-mandating breach of its fiduciary duty to the Tribe, giving rise to a claim for damages:

> In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[7]

The Government's argument that "[a]n appropriation permits but does not mandate the payment of money"[8] does little to advance its case. First, under the Indian Canon of Construction, the language of this Treaty is to be interpreted in favor of the Indians.[9] So interpreted, Article 3 means that the United States will not only appropriate this sum but will also pay it out. The Government's presumed reading—that Congress would perform the idle act of appropriating the money but not paying it—would give the Tribe nothing, making this Treaty obligation illusory.[10] The only fair reading (and the one that favors the Indians as it must) is that the United States agrees to both appropriate and pay out the $1,000 annually—a promise giving

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[5] *Fisher v. United States*, 402 F.3d 1167 (Fed. Cir. 2011).
[6] *Id.* at 1173–74.
[7] *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).
[8] Def.'s Resp. Br. at 8–9.
[9] *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.").
[10] *See Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1062 (Fed. Cir. 2002) ("It is axiomatic that a valid contract cannot be based upon the illusory promise of one party . . . .").

rise to money damages for its breach.[11]

The Government's failure to appropriate the sum annually since 1932 in violation of the Treaty has deprived the Tribe of the ability to receive those payments from the Treasury, which indeed is a monetary loss to the Tribe, leaving no doubt that the remedy is money damages—a claim well within this Court's Tucker Act jurisdiction because without appropriation there can (according to the Government's interpretation) be no annual payment to the Tribe of $1,000 for educational purposes.

The Government's claim that the Treaty "permits the President of the United States (or his designee) to expend, or not expend, the $1,000 appropriation in his sole discretion"[12] is also flat wrong. The Treaty states that the $1,000 is "to be expended under the direction of the President" for "educational purposes"[13]—limiting the President's discretion regarding what the funds may be used for and to whom they may be paid. And while the President has the authority to terminate this payment "for the best interest of the Indians,"[14] the President has never done so, as the Government concedes.[15] The Government's citation to *Doe v. United States*[16] is unavailing; *Doe* involved a statute authorizing payment of a reward for information leading to a

[11] Article III states that the United States "agree" to make the annual education appropriations. It does not say that the Government "may" or "can" or "is authorized to" make such appropriations. *See Cherokee Nation of Okla. v. United States*, 69 Fed. Cl. 148, 158 (2005) (holding that "[i]f the language and effect of the statute is mandatory, then the court possesses jurisdiction . . . If, on the other hand, the language of the statute is permissive in scope and effect, the statute does not grant jurisdiction to hear the case."); *Roberts v. United States*, 745 F.3d 1158, 1163 (Fed. Cir. 2014) (holding that language such as "may" or "authorized" or "at the discretion of the Secretary" is permissive and therefore not money-mandating and distinguishing other mandatory language.).
[12] Def.'s Resp. Br. at 9.
[13] Treaty with the Quapaw, May 13, 1833, 7 Stat. 424 at art. 3 (Doc. 83-1).
[14] *Id.*
[15] *See* Yates Dep. 137:20–138:11 (Dec. 4, 2014).
[16] *Doe v. United States*, 100 F.3d 1576 (Fed. Cir. 1996).

customs penalty or property seizure of up to 25% in the discretion of the Customs agency.[17] The Federal Circuit held this provision to be money mandating because "this satisfies the requirement under *Eastport* that 'the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum.'"[18]

In *Quick Bear v. Leupp*,[19] the Supreme Court held that appropriations made to honor treaty obligations are the property of the Indians, not the Government, and so are quite different from ordinary appropriations (that do remain the property of the Government):

> The gratuitious [sic] appropriation of public moneys for the purpose of Indian education has always been made under the heading, 'Support of Schools;' whilst the appropriation of the 'treaty fund' has always been under the heading, 'Fulfilling Treaty Stipulations and Support of Indian Tribes;' and that from the 'trust fund' is not in the Indian appropriation acts at all. One class of appropriations relates to public moneys belonging to the government; the other to moneys which belong to the Indians and which is administered for them by the government.[20]

Just as in *Quick Bear*, the Quapaw education annuity was appropriated annually prior to 1932 separate from general appropriations in a statute titled: "An Act making appropriations to carry into effect certain Indian treaties, and for other purposes."[21] And as the Government's Exhibit 5 reveals, these pre-1932 annuity payments were segregated from other appropriations:

> For the fiscal years 1929 through 1931, Congress, in further providing for the stipulations of Article 3 of the Treaty of May 13, 1833, appropriated, by annual appropriations, an aggregate of $6,840 . . . which was set up and carried on the books of the United States Treasury under the heading "Fulfilling Treaties with Quapaws, Oklahoma."[22]

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[17] *Doe*, 100 F.3d at 1578.
[18] *Id.* at 1582 (quoting *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)).
[19] *Quick Bear v. Leupp*, 210 U.S. 50 (1908).
[20] *Quick Bear*, 210 U.S. at 77.
[21] *See, e.g.*, 4 Stat. 706 (1834). With respect to the Quapaw, the Act states as follows: "To carry into effect the treaty with the Quapaws, of thirteenth May, eighteen hundred and thirty-three, viz: . . . For education, one thousand dollars."
[22] Def.'s Resp. Br. Ex. 5 at 70 (Doc. 92-2).

Had the Government continued to fulfill its Treaty obligation, $1,000 would have been added to this account annually—whereupon it would have become the property of the Quapaw Tribe.[23] The remedy for the Government's failure to make this deposit since 1932 is money damages—and this is a claim over which this Court has Tucker Act jurisdiction.

B. The Treaty claim is not barred by the statute of limitations because it did not accrue until completion of the Quapaw Analysis

Although "[t]he statute of limitations begins to run when the 'claim first accrues,'"[24] the Government fails to recognize that this claim for the $1,000 educational payment did not accrue until the Quapaw received an accounting identifying this claim in 2010. The Consolidated Appropriations Act in effect at the time this case was filed provided that:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss . . . .[25]

In *Shoshone Indian Tribe of the Wind River Reservation v. United States*,[26] the Federal Circuit held that the language "shall not commence to run" means that the claim does not accrue until a final and complete accounting is rendered.[27] The Federal Circuit further noted the important distinction between a delay in the accrual of a claim and the tolling of limitations.[28] The accrual of the claim means that it first comes into existence at the time the required accounting is final and complete as opposed to tolling that merely interrupts the running of the

[23] *See Quick Bear*, 210 U.S. at 77.
[24] Def.'s Resp. Br. at 15 (quoting 28 U.S.C. § 2501).
[25] Pub. L. No. 112-74, 125 Stat. 786, 1002 (2011).
[26] *Shoshone Indian Tribe of the Wind River Reservation v. United* States, 364 F.3d 1339, 1346–47 (Fed. Cir. 2004).
[27] *Id.* at 1347.
[28] *Id.* at 1346–47.

limitations period.[29] Congress thus has provided that the claim does not come into existence until the accounting is final and complete.[30]

The Arthur Andersen report did not even mention this claim. Rather, it is the Quapaw Analysis that caused the Tribe's claims to accrue, as the 2004 agreement settling the Tribe's accounting suit against the Government makes clear:

> The Parties further agree 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] TTFA's 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.[31]

The Quapaw Analysis was accepted by the Government and deemed complete on November 19, 2010.[32] The Quapaw Analysis determined (as the Arthur Andersen report had not) that the Government failed to pay the education annuity since 1932.[33] Thus, the Tribe's treaty claim did not accrue until November 2010. This case was filed on September 11, 2012, and the claim is therefore timely.

The Government's argument that the 2004 Settlement Agreement did not toll the statute of limitations misinterprets the Appropriations Act riders and applicable law. First, as set forth in *Shoshone*, the Appropriations Act riders did not toll limitations, but established that trust claims do not accrue until the accounting is final and complete. Second, the *Shoshone* court

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[29] *Shoshone*, 364 F.3d at 1346–47. The CFC decision being affirmed, *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, 51 Fed. Cl. 60 (2001), further described that "[t]he distinction between 'tolling' and 'accrual' is evident in the definition of the words. 'Accrue' is '[t]o come into existence as an enforceable claim or right.' 'The term accrue in the context of a cause of action means to arrive to commence,' whereas, a 'tolling statute' is defined as a 'law that interrupts the running of a statute of limitations in certain situations . . . .'" (internal citations omitted). *Id*. at 67 n.8.

[30] *See Shoshone Indian Tribe*, 364 F.3d at 1344 (quoting Pub. L. No. 108-7 (2003)).

[31] Def.'s Resp. Br. Ex. 11 at 116 (Doc. 92-3).

[32] Compl. at 7 (Doc. 1).

[33] Quapaw Analysis at 103 (filed under seal at *Goodeagle v. United States*, No. 12–431L, Doc. 14).

expressly held that the appropriations acts are a proper waiver of sovereign immunity for Indian breach of trust claims in this Court.[34]

The Government's final argument—that the failure to make treaty payments did not concern trust funds—is incorrect for several reasons. First, Article III of the Treaty expressly states that the appropriation was to be spent "at the direction of the President,"[35] evidencing an express trust through which the funds were to be controlled by the Government and spent for the Tribe's benefit.[36] Second, whenever the Government manages treaty payments for Tribes, it acts as a trustee and is subject to "the most exacting fiduciary standards."[37] Finally, the court in *Shoshone* held that the phrase "losses to or mismanagement of trust funds" includes situations where money was due but not deposited to tribal trust accounts.[38] The Tribe's claim that the required appropriations were not made since 1932 falls squarely within the Appropriations Act riders.

C. The Tribe's Indian Claims Commission judgment did not determine this claim and therefore claim preclusion does not apply

The Government's argument that "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"[39] is incorrect, as the record of that case shows. The Government misreads paragraph 22 of the Tribe's Petition in that case, which refers to a $1,000-per-year annuity provided in the 1818 Treaty that the Tribe was induced to relinquish: "Plaintiffs further

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[34] *Shoshone Indian Tribe*, 364 F.3d at 1346–47.
[35] Treaty with the Quapaw, May 13, 1833, 7 Stat. 424 at art. 3 (Doc. 83-1).
[36] *See United States v. Mitchell*, 463 U.S. 206, 225 (1983) (holding that express trust obligations are created when Government holds and manages tribal monies, even if word "trust" does not appear in statute or treaty).
[37] *Seminole Nation*, 316 U.S. at 297.
[38] *Shoshone Indian Tribe*, 364 F.3d at 1348–49.
[39] Def.'s Resp. Br. at 10.

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 Quapaw debts."[40] But that Petition alleges nothing regarding the educational purposes annuity in Article 3 of the 1833 Treaty (which coincidentally happens to also be $1,000 per year), and that claim was certainly not litigated in the ICC case (as the Government claims).

The Tribe's Indian Claims Commission petition stated two causes of action. The Indian Claims Commission described the Tribe's first cause of action as a claim for "the value of 34,755,448.24 acres of land lying west of the Mississippi river and between the Arkansas, Canadian and Red rivers ceded by the plaintiff tribe to the defendant by treaty dated August 24, 1818 (7 Stat. 176)."[41] The Tribe's second cause of action was "recovery of the value at $2.00 per acre of 1,163,604.75 acres of land . . . which the plaintiff tribe ceded to the defendant by the treaty of November 15, 1824 (7 Stat. 232)."[42]

Claim preclusion only applies if "the second claim is based on the same set of transactional facts as the first."[43] Here, the Tribe's claim before the Indian Claims Commission for inadequate compensation for its land is not based on the same set of transactional facts as its claim before this Court today for failure to appropriate $1,000 per year for a treaty obligation.

In *Round Valley Indian Tribes v. United States*,[44] this Court faced a nearly identical set of facts to the facts here and determined that claim preclusion did not apply. In *Round Valley*, the Attorney General of California filed a claim against the United States under the Jurisdictional

[40] Petition ¶ 22, *Quapaw Tribe of Indians v. United States*, ICC Docket No. 14.
[41] *Quapaw Tribe of Indians v. United States*, 1 Ind. Cl. Comm. 469, 475 (1951).
[42] *Id.* at 475.
[43] *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000).
[44] *Round Valley Indian Tribes v. United States*, 97 Fed. Cl. 500 (2011).

Act of 1928, "by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated for its own purposes."[45] The Court of Claims held the United States liable and awarded final judgment in favor of the Round Valley.[46]

Years later, the Round Valley Tribes filed a complaint in this Court alleging "breaches of trust duties in regard to the management by [the Government] of the trust funds of the Round Valley Tribe[s] from 1855 to present."[47] The Government (represented by Stephen Terrell) made the same argument it now makes in this case: "The Tribes improperly seek to re-litigate claims that were or could have been addressed in *Indians of California by Webb*."[48] This Court flatly rejected the Government's argument, holding that the Round Valley Tribes' breach of trust claims had not been previously brought because they were not based on the same transactional facts:

> The [current] Complaint alleges that the Government has mismanaged the Tribes' trust funds in breach of the Government's duty as trustee. . . .
>
> In contrast, the [prior] action . . . [was a claim] on behalf of the Indians of California for "lands taken from them in the State of California by the United States without compensation . . . ." Therefore, the court has determined that the December 27, 2006 Complaint in the case pending in the United States Court of Federal Claims is not based upon the same transactional facts . . . .[49]

As in *Round Valley*, here the Tribe brought a claim before the Indian Claims Commission for land taken from it by the United States. Now the Tribe brings a claim in this Court for breach of trust—a claim, as in *Round Valley*—that had not accrued when the Court of Claims ruled on

[45] *Round Valley*, 97 Fed. Cl. at 504.
[46] *Id.*; *see also Indians of Cal. by Webb v. United States*, 98 Ct. Cl. 583, 585 (1942).
[47] *Round Valley*, 97 Fed. Cl. at 508.
[48] *Id.* at 512.
[49] *Id.* at 515–16.

the Tribe's land claim in 1954 and is based on distinct transactional facts.[50]

The Court of Claims in *Forrest Village Apartments, Inc. v. United States*[51] set forth a test for determining when two claims are the same:

> [T]he causes of action have been considered the same if: (1) the same principles of substantive and procedural law are applicable to both actions; (2) the same right is alleged to be infringed by the same wrong in both actions; (3) the judgment sought in the second action would infringe rights established in the first; (4) the same evidence would support both actions; or (5) the operative facts are the same in both actions.[52]

Applying that test here leaves no doubt that the Tribe's educational claim is distinct from its ICC claim. In the ICC litigation, the Tribe alleged that its ancestral right to land and property rights were infringed because the compensation provided by the United States was unjust. In the current litigation in the Court of Federal Claims, the Tribe alleges that its treaty rights have been infringed because the United States stopped making required educational payments. Only the latter claim depends on the existence of a treaty; if the United States had simply taken the Tribe's land without a treaty, they could still have brought the former claim before the ICC.

The cases the Government cites do not support its argument for issue preclusion. Contrary to the Government's assertion, *Federated Department Stores, Inc. v. Moitie*[53] had nothing to do with "claims that were or could have been litigated in a prior action."[54] Rather, it held that a plaintiff who failed to appeal the dismissal of his case was bound by that final judgment, even though co-plaintiffs who did appeal obtained a reversal and were able to prosecute their case.

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[50] *See Quapaw Tribe of Indians v. United States*, 128 Ct. Cl. 45 (1954).
[51] *Forrest Village Apts., Inc. v. United States*, 178 Ct. Cl. 490 (1967).
[52] *Id.* at 496 n.2.
[53] *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).
[54] Def.'s Resp. Br. at 11.

Sharp Kabushiki Kaisha v. Thinksharp, Inc.[55] also does not hold, as the Government argues, that res judicata "bars subsequent litigation on matters that were never litigated but could have been advanced in the earlier suit."[56] It actually holds the opposite—that "*res judicata* is not readily extended to claims that were not before the court, and precedent weighs heavily against denying litigants a day in court unless there is a clear and persuasive basis for that denial."[57]

The Government also cites *PCL Construction Services, Inc. v. United States*[58] for the proposition that "identifying newly developed or different evidence is not enough to overcome application of the doctrine of *res judicata*."[59] The Government fails to mention, however, that *PCL Construction Services* relied on the special rule in government contracts cases that "claims under a single contract generally must be brought together," which is not applicable here.[60]

And even in government contracts cases, res judicata does not always bar subsequent claims under a single contract. In *Florida Power & Light v. United States,*[61] a 1999 Federal Circuit case cited by *PCL Construction*, the Federal Circuit determined res judicata did not apply because the contract claims related to different time periods calling for different legal analyses:

> *Res judicata* is inapplicable here . . . . The two sets of claims involve not only different time periods, but also different agencies with different contracting officers and different statutory mandates regarding pricing policy. Those differences may or may not result in a different disposition of the utilities' claims,

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[55] *Sharp Kabushiki Kaisha v. Thinksharp, Inc.*, 448 F.3d 1368 (Fed. Cir. 2006).
[56] Def.'s Resp. Br. at 11.
[57] *Sharp Kabushiki*, 448 F.3d at 1372 (quoting *Kearns v. Gen. Motors Corp.*, 94 F.3d 1553, 1557 (Fed.Cir.1996)).
[58] *PCL Constr. Servs., Inc. v. United States*, 84 Fed. Cl. 408 (2008).
[59] *Id.* at 422.
[60] *Id.* at 416 (emphasis omitted) (citing WRIGHT & MILLER, FED. PRACTICE & PROC. § 4408 (2d ed. 2002)); *see also id.* at 417 ("[T]he presumption that claims arising out of the same contract constitute the same claim for *res judicata* purposes, 'may be overcome by showing that the claims are unrelated.'" (quoting *Phillips/May Corp. v. United States*, 524 F.3d 1264, 1272 (Fed. Cir. 2008))).
[61] *Fla. Power & Light Co. v. United States*, 198 F.3d 1358 (Fed. Cir. 1999).

but they at least call for a different legal analysis.[62]

Similarly here, the Tribe's prior ICC claim and the Tribe's current educational treaty claim involve different time periods (1818 and 1824 versus 1932 to the present), different agencies of the federal government run by different officials, and different legal mandates (common law and constitutional law versus trust law and Article III of the 1833 Treaty). These different claims call for a different legal analysis and therefore the present claim is not barred by res judicata.[63]

D. No genuine fact issues preclude summary judgment on the Tribe's Treaty claim

The Government does not legitimately dispute that the $1,000 a year education annuity terminated in 1932 and concedes that the President never formally determined it to be unnecessary or unbeneficial to the Tribe. The Government previously conceded that it has not made this appropriation since 1932.[64] The Government's spokesman on this subject, Paul Yates, testified in his Rule 30(b)(6) deposition that these payments have not been deemed unnecessary by the President but yet have not been paid.[65]

> Q. To your knowledge, has the president ever deemed it necessary that that payment not continue?
>
> A. I'm not aware of any fact of that nature.
>
> ***
>
> Q. Has the payment of $1,000 per year for education, required under Article III of the 1833 treaty between the United States and the Quapaw, been made every year since 1833?
>
> A. I'm not aware of that payment being made every year. I'm aware of other

[62] *Fla. Power & Light*, 198 F.3d at 1361.
[63] *Id*.
[64] *See* Yates Dep. 137:20–138:1 (Dec. 4, 2014).
[65] *Id*. 137:20–138:11.

payments being made to the Quapaw Tribe for education.[66]

The Government's opposition brief now argues that this fact is disputed but identifies only other forms of appropriations for Indian education in general.[67]

The Government's attempt now to manufacture a dispute falls far short of doing so. That the Government made general appropriations for Indian education from 1932 to the present does not satisfy the education annuity payments required by Article III of the 1833 Treaty.

As set forth in *Quick Bear*, gratuitous appropriations of public funds for Indian education are fundamentally different from appropriations to fulfill treaty obligations: "One class of appropriations relates to public moneys belonging to the government; the other to moneys which belong to the Indians and which is administered for them by the government."[68] Whatever gratuitous appropriations or payments the Government might have made, they were not appropriations to satisfy the Government's obligation under Article 3 of the Treaty and so raise no triable issue of fact to defeat summary judgment.

The only relevant fact is whether the United States appropriated $1,000 per year for educational purposes as promised in the Treaty—a sum that would have been the property of the Tribe[69]—and the undisputed fact is that Congress did not do so from 1932 onward.

2. Summary judgment is proper on the Tribe's claims for unauthorized disbursements identified in the Arthur Andersen report and the Quapaw Analysis

The Government cannot consistently contend that the statute of limitations has run because "[b]y 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

[66] Yates Dep. 137:20–138:11 (Dec. 4, 2014).
[67] *See* Def.'s Resp. Br. at 2–3 & App. A.
[68] *Quick Bear*, 210 U.S. at 77.
[69] *Id.*

loss,'"[70] then turn around and file a declaration dated 2015 stating that report was wrong (so the Tribe lacked the information necessary to determine its losses).[71] In any event, the Tribe's claim under the Arthur Andersen report falls well within the Congressional Reference, which waives the statute of limitations.[72]

The Government is also not entitled at this late date to impeach its own report by introducing new evidence allegedly proving that report was incorrect. In addition, in *Osage Tribe of Indians of Oklahoma v. United States*,[73] this Court held that the Government cannot impeach its congressionally mandated Arthur Andersen report, having previously represented to Congress and the Tribe that the Andersen Report was "a 'reasonable estimate' of the trust accounts in the absence of proper accounting."[74] For "as trustee in breach, is not entitled to employ its vast resources to cherry pick data that is entirely favorable to the government."[75] Instead, "the parties must rely on the data generated by for the Arthur Andersen Trust Fund Reconciliation Project (TRP) report."[76] The *Osage* court explained its reasoning:

> In the past, defendant offered plaintiff the Andersen Report as a "reasonable estimate" of the trust accounts in the absence of proper accounting. . . . Plaintiff relied upon the Andersen Report, which was intended "to provide a fair and objective report of the state and history of the[ ] trust accounts for the years in question," and lacks the resources to continue to litigate with respect to accounting records that defendant has failed to provide.
>
> Even if plaintiff did possess a wealth of resources, "to the extent that the difficulty in determining the amount of loss suffered by the Tribes is attributable to improper accounting procedures followed by the BIA, the consequences of those difficulties should not be visited upon the Tribes." Further, trust law prohibits a trustee in breach from benefiting from its failure to maintain accounting records

[70] Def.'s Resp. Br. at 23.
[71] *Id.* at Ex. 2 (Chavarria Decl.).
[72] *Bear v. United States,* 112 Fed. Cl. 480 (2013).
[73] *Osage Tribe of Indians of Okla. v. United States*, 96 Fed. Cl. 390, 450 (2010).
[74] *Osage Tribe*, 96 Fed. Cl. at 451.
[75] *Id.* at 450.
[76] *Osage Tribe of Indians of Okla. v. United States*, 93 Fed. Cl. 1, 26 (2010).

by relying upon data that entirely favors the trustee.[77]

The policy considerations here are even stronger than in *Osage*, because the Government had not one, but two opportunities to identify and produce the documents in question during the 15 years of accounting process. The Quapaw have asserted these claims and spent significant time and money in reliance on those accountings, by attempting first to resolve these claims through settlement and now through years of litigation to recover damages for the Government's breaches based on these accountings. And only now does the Government come forward with evidence that it claims disproves the Arthur Andersen and the Quapaw Analysis reports.

Both reports complained that the Government failed to provide documentation.[78] The Government's attempt to blame the Quapaw Analysis team for failing to find these documents, which the Government refused to provide to the team, falls far short of its duty as a fiduciary. The Government, as trustee, was at all times in control of the relevant documents. Its contractor, Arthur Andersen, was forced to rely on documents the Government made available in preparing that accounting report.[79] Section V, Pages 29–33, of the Quapaw Analysis describes that the Arthur Andersen report was used as a starting point, and then identifies additional documents that were requested of the Government, but which the Government refused to provide: "Despite numerous requests to Interior and the Bureau, a number of specific documents and categories of documents requested were never provided to QIS."[80] The Quapaw Analysis also identifies in a chart certain classes of documents that were not produced including, among other things, "tribal

[77] *Osage Tribe*, 96 Fed. Cl. at 451 (internal citations omitted). *See also Confederated Tribes of Warm Springs Reservation of Ore. v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001) ("It is a principle of long standing in trust law 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 the loss falls on the trustee.").
[78] Arthur Andersen LLP, Agreed Upon Procedures and Findings Report for the Quapaw Tribe (Dec. 31, 1995) (Pls./Claimants' Mot. for Partial Summ. J. Ex. 2); Quapaw Analysis at 101–02.
[79] Arthur Andersen LLP, (Pls./Claimants' Mot. for Partial Summ. J. Ex. 2).
[80] Quapaw Analysis at 30.

treasury ledgers," and "TTA documents."[81]

Having put forward Greg Chavarria as its spokesman in a Rule 30(b)(6) deposition to testify that the disbursement transactions at issue "did not have both tribal and other government-signed authority,"[82] the Government may not now repudiate this spokesman's testimony. As this Court has elsewhere observed, "[t]he testimony of a Rule 30(b)(6) witness is binding on the Government."[83]

In short, the Government cannot now come in at the eleventh hour and attempt to impeach the Arthur Andersen Report and the Quapaw Analysis. When asked for documents to disprove these two analyses, Chavarria testified in his Rule 30(b)(6) deposition that none had been identified yet, but that he was still looking for them.[84] The Government is now bound by the Arthur Andersen report and the testimony of its RCFC 30(b)(6) spokesman, and cannot introduce evidence to impeach either on these points,[85] and this Court should enter summary judgment for the Tribe in the sum of $31,680.80 plus investment income the Tribe would have earned on that sum.

3. The Government cannot create a triable issue of fact by launching a collateral attack on the Quapaw Analysis

As this Court stated, "[i]n this case, the Department of Interior accepted the Quapaw Analysis as a final accounting on November 19, 2010. This is the date the statute of limitations

[81] Quapaw Analysis at 30–33.
[82] Chavarria Dep. 128:15–16.
[83] *Zip-O-Log Mills, Inc. v. United States*, 113 Fed. Cl. 24, 32 (2013).
[84] *See* Chavarria Dep. 177:8–191:5.
[85] *See QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012) ("The rule provides for a variety of sanctions for a party's failure to comply with its Rule 30(b)(6) obligations, ranging from the imposition of costs to preclusion of testimony and even entry of default.").

began to run."[86] Like the Arthur Andersen report, the Government may not now attempt to impeach the Quapaw Analysis that it commissioned, accepted, and, as late as last year, had no criticism of.

The Quapaw Analysis resulted from an accounting suit the Tribe filed in 2002 in the Northern District of Oklahoma alleging that the Arthur Andersen report was not a true accounting and seeking a full and complete accounting as required by the 1994 Act.[87] The case was settled in 2004 by an agreement under which the Tribe "agree[d] to waive any rights it has to obtain from the United States an accounting," and the Government "agree[d] to enter into a contract . . . with the Tribe . . . pursuant to which [Quapaw Information Systems, Inc.], in consultation with the Tribe, shall identify, select, and analyze documents, and prepare an analysis . . . of Interior's management of certain [Tribal Trust Fund Accounts]."[88] The Quapaw Information Systems contract, which was attached to the settlement agreement and incorporated by reference, defined the Quapaw Analysis—the final deliverable required by the contract—as "[t]he Contractor's written report, prepared in consultation with the Tribe, that: (i) includes a limited financial analysis of Interior's management of the Tribe's Tribal Trust Fund accounts."[89] The Contract was "to be carried out by QIS, in collaboration with and under the oversight of OHTA,"[90] incorporating FAR 52.246-04 (Inspection of Services-Fixed Price).[91]

The settlement agreement provided that "the Tribe shall be deemed to have been

[86] *Goodeagle v. United States*, 111 Fed. Cl. 716, 721 (2013); *Quapaw Tribe v. United States*, 111 Fed. Cl. 725, 731 (2013).
[87] *Quapaw Tribe v. Dept. of the Interior, et al.*, No. 02-CV-129 (N.D. Okla.).
[88] Def.'s Resp. Br. Ex. 11 at 116 (Doc. 92-3) (Settlement Agreement ¶¶ 1, 4).
[89] QIS Contract § C.1.
[90] *Id.* § H.4.
[91] *Id.* § E.1.

'furnished with an accounting.'"[92] As recently as August 27, 2014 the Government stated that it lacked information to admit or deny the Quapaw Analysis's conclusion that "at least $70,331, not including interest, is owed to the Quapaw."[93] The Government updated this response on October 24, 2014 to dispute a portion of this sum.

4. Partial summary judgment in the Quapaws' favor is allowed in the congressional reference case

The Government's argument that RCFC 56 is inapplicable in congressional reference cases has been expressly refuted by this court.

> Disposing of congressional reference cases by summary judgment was, at one time, prohibited. Such prohibition no longer exists. Appendix D to the Rules of the Court of Federal Claims now directs the Court to apply the RCFC to the extent feasible in congressional reference cases. Indeed, this Court has held that summary judgment may be proper in a congressional reference case.[94]

Conclusion

For all these reasons the Court should deny the Government's motion for partial summary judgment on the treaty and accounting claims and grant the Quapaw's cross-motion on the same.

Respectfully submitted,

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[92] Def.'s Resp. Br. Ex. 11 at 116 (Doc. 92-3) (Settlement Agreement ¶¶ 1, 4).
[93] Pls.' Br. Ex. 4.
[94] *Kanehl v. United States*, 38 Fed. Cl. 89, 98 (1997) (internal citations omitted).

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