IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Grace M. Goodeagle et al., Plaintiffs, v. United States, Defendant.	No. 12-431L Hon. Thomas C. Wheeler
Quapaw Tribe of Oklahoma (O-Gah-Pah), a federally recognized Indian nation, Plaintiff, v. United States, Defendant.	No. 12-592L Hon. Thomas C. Wheeler
Thomas Charles Bear et al., Claimants, v. United States, Defendant.	No. 13-51X Hon. Thomas C. Wheeler

PLAINTIFFS'/CLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON REMAINING QUAPAW ANALYSIS CLAIMS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Grace M. Goodeagle et al.,	)	
Plaintiffs,	)	No. 12-431L
v.	)	Hon. Thomas C. Wheeler
United States,	)	
Defendant.	)	
Quapaw Tribe of Oklahoma (O-Gah-Pah), a federally recognized Indian nation,	)	No. 12-592L
Plaintiff,	)	Hon. Thomas C. Wheeler
v.	)	
United States,	)	
Defendant.	)	
Thomas Charles Bear et al.,	)	
Claimants,	)	No. 13-51X
v.	)	Hon. Thomas C. Wheeler
United States,	)	
Defendant.	)	

PLAINTIFFS'/CLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON REMAINING QUAPAW ANALYSIS CLAIMS

On April 13, 2016 and again on June 20, 2016, the Government produced expert reports and rebuttal reports for 15 expert witnesses, attacking nearly every conclusion the Quapaw Analysis reaches. But, as this Court ruled on October 1, 2015, granting partial summary

judgment on three of the claims determined in the Quapaw Analysis,[1] after extensive briefing by the parties, "[t]his Court will not permit Defendant to impeach this detailed report [the Quapaw Analysis], when it could have produced documents or raised its concerns at a much earlier time. The Quapaw Analysis is binding upon the United States."[2]

The Court rested this holding in part on the fact that the Quapaw exchanged their statutory right to require the United States, as trustee, to provide an accounting of their trust assets in return for preparation of the Quapaw Analysis, which was prepared in strict compliance with the Government's manual for trust fund accounts under the supervision of the U.S. Department of Interior's Office of Historical Trust Accounting, using federal funding.[3] The parties also agreed that the final product was to be deemed the Quapaw's accounting—"an analysis (the Quapaw Analysis") of Interior's management of certain TTFAs [Tribal Trust Fund Accounts] and certain non-monetary land and natural resources assets held in trust on behalf of the Tribe and eight individual members of the Tribe."[4] The Court's October 1, 2015 holding further rests on case law and trust principles, which establish that the Government cannot now selectively revise the Quapaw Analysis for its own benefit and to the Quapaw's detriment, nor argue now that the report it provided to the Quapaw as their only accounting is flawed.[5] This

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[1] *Quapaw Tribe of Okla. v. United States*, 123 Fed. Cl. 673, 678 (2015).
[2] *Id.*
[3] *See Quapaw Tribe*, 123 Fed. Cl. at 678 ("The parties settled that case in 2004 on terms that resulted in the preparation of the Quapaw Analysis, accepted by the Department of Interior in November 2010"); *Quapaw Tribe of Okla. v. United States*, 120 Fed. Cl. 612, 615 (2015) (describing how the team responsible for preparing the Quapaw Analysis "undertook a comprehensive examination of files and documents made available by the Office of Historic Trust Accounting and other agencies to determine whether and to what extent the Department of Interior met its fiduciary obligations to the Tribe and individual trust beneficiaries").
[4] Settlement Agreement Between the Quapaw Tribe of Oklahoma (O-Gah-Pah) and the United States Department of the Interior art. I, ¶ 1 (2004) (*Quapaw Tribe* Doc. 117-1).
[5] *Quapaw Tribe*, 123 Fed. Cl. at 678 ("The Court will not permit Defendant to impeach this detailed report, when it could have produced documents or raised its concerns at a much earlier

Court's ruling on the binding nature of the Quapaw Analysis is also law of the case, and therefore partial summary judgment is now appropriate on the remaining claims analyzed in the Quapaw Analysis.[6]

Accordingly Plaintiffs/Claimants, collectively ("the Quapaw"), move this Court for entry of partial summary judgment in their favor on the remaining claims determined in the Quapaw Analysis. These consist of two claims of the Quapaw Tribe, concerning the Catholic Forty and the Industrial Park lands, and three claims brought by individual tribal members, concerning their agricultural lands, their town lots, and the Pioneer Chat pile. The Quapaw file this motion in an effort to limit the trial set to commence on October 11, 2016, to only those claims for which there are disputed material facts, and so are not appropriate for summary disposition. To be sure, although resolution of the claims at issue in this motion can reduce the number of issues to be resolved at trial, significant claims remain to be tried, including claims not analyzed in the Quapaw Analysis because the QIS team lacked sufficient documents and information to do so, including rights of way, mining royalties, and environmental damages.

Factual and Procedural Background

1. Based on the Quapaw Analysis, the Tribe moved for partial summary judgment on annual educational treaty payments, the Arthur Andersen report, and unreconciled Tribal transactions

On April 3, 2015, the Quapaw Tribe filed a motion for partial summary judgment, asking this Court to hold as a matter of law that the Government had breached its fiduciary duties owed to the Quapaw by failing to deposit funds into the Tribe's trust accounts, failing since 1932 to make annual educational payments owed to the Tribe under the Treaty of 1833, and making unauthorized withdrawals from the Tribe's accounts as detailed in the Government's Tribal Trust

time. The Quapaw Analysis is binding upon the United States").

[6] *See id.*

Fund Reconciliation Project report prepared by Arthur Andersen. The Quapaw Information Systems, Inc. (QIS) team analyzed all of these claims, and included a detailed discussion of these claims in the Quapaw Analysis.

The Tribe grounded its motion on the work performed by the QIS (Quapaw Information Services) team, which reported in the Quapaw Analysis that with respect to the annual educational payments, it had "found no record that any such annual educational treaty payments had been made from 1932 to the present."[7] As for the unauthorized disbursements from the Tribe's trust accounts as reported by Arthur Andersen LLP in the congressionally mandated Tribal Trust Funds Reconciliation Project, the QIS team "confirmed" Arthur Andersen's numbers, which had been offered to the Tribe as "a 'reasonable estimate' of the trust accounts in the absence of proper accounting."[8] And the Quapaw relied on the QIS team's review of the Tribal trust accounts between 1939 and 2006, and its conclusion reported in the Quapaw Analysis that specific transactions should have been but were not credited to the Tribe's trust accounts: "[T]he Project Team developed a spreadsheet based on transactional data from the resources available. This spreadsheet identifies transactions posted to the Tribal Trust Accounts and transactions in which monies should have been received, or were received, but that cannot be verified (as posted) to the Tribal Trust Accounts."[9]

2. The Court ordered supplemental briefing on the binding effect of the Quapaw Analysis

Before ruling on the Tribe's motion for partial summary judgment, the Court ordered the parties to file supplemental briefing on the binding effect of the Quapaw Analysis and the Arthur

[7] Pl.'s Mot. for Partial Summ. J. at 7 (Apr. 6, 2015) (*Quapaw Tribe*, Doc. 83).
[8] Pl.'s Mot. for Partial Summ. J. at 12 (Apr. 6, 2015) (*Quapaw Tribe*, Doc. 83) (quoting *Osage Tribe of Indians of Okla. v. United States*, 96 Fed. Cl. 390, 451 (2010)).
[9] Pl.'s Mot. for Partial Summ. J. at 14 (Apr. 6, 2015) (*Quapaw Tribe*, Doc. 83) (quoting Quapaw Analysis at 101–02 (*Quapaw Tribe*, Doc. 14-1)).

Andersen Report:

> In reviewing the merits of this motion, the Court finds that the outcome depends heavily on the issue of whether the findings in the 2010 Quapaw Analysis and the 1995 Arthur Anders[e]n report are binding on the Government, or whether the Government may offer other evidence to rebut Plaintiff's claims regarding mismanagement of the trust accounts. The resolution of this issue before trial may have a bearing on other claims as well.[10]

In its supplemental brief, the Quapaw Tribe argued that the Government is precluded from coming forward with new evidence not previously provided to Arthur Andersen or the QIS team, if that evidence is intended just to revise conclusions reached in the Arthur Andersen Report or the Quapaw Analysis:[11]

> What the Government cannot now do is to seek to snipe at particular conclusions reached in its own "prior, objective report," as this Court described the Arthur Andersen Report in *Osage*, nor can it rely on evidence or records not previously produced to Arthur Andersen or to the QIS team for the Quapaw Analysis—to attempt to revise the "reasonable estimates" contained in either Report.[12]

The Quapaw further pointed out that the Quapaw Analysis resulted from the Tribe's suit for an accounting and reconciliation of the Government's management of its trust fund accounts, and that in exchange for federal funding for and oversight of the preparation of the Quapaw Analysis, the Quapaw waived any right to any other accounting:

> The Quapaw Analysis resulted from a 2004 settlement of the Tribe's suit to compel the United States to provide an accounting and asset history of tribal trust funds. But because "Interior's ability to provide historical accountings to tribes such as the Quapaw was limited by severe budgetary constraints," which "severely constrained Interior's ability to provide any meaningful tribal accountings," the Government agreed to "enter into a contract with Quapaw Information Services as

[10] Order for Supplemental Briefing (Aug. 12, 2015) (*Quapaw Tribe*, Doc. 106).
[11] *See* Pl.'s Suppl. Br. at 13 (Sept. 4, 2015) (*Quapaw Tribe*, Doc. 112) ("What the Government cannot now do is to seek to snipe at particular conclusions reached in its 'own prior, objective report,' as this Court described the Arthur Andersen Report in *Osage*, nor can it rely on evidence or records not previously produced to Arthur Andersen or to the QIS team for the Quapaw Analysis—to attempt to revise the 'reasonable estimates' contained in either Report" (internal citation omitted)).
[12] Pl.'s Suppl. Br. at 14 (Sept. 4, 2015)

> contractor to 'identify, select, and analyze documents, and prepare an analysis (the "Quapaw Analysis"), of Interior's management' of the Quapaw Tribe's Tribal Trust Fund Account . . . ."[13]

In the parties' settlement agreement, they agreed that the Quapaw Analysis was to be deemed an accounting from which the Tribe could determine the nature and extent of its losses from the Government's trust fund mismanagement.[14]

In its supplemental reply brief, the Quapaw further explained that "while the Government could offer (but has not offered) a more accurate, impartial analysis, the Government could not introduce new evidence to challenge specific conclusions reached in [the Quapaw Analysis]."[15] "The Government is precluded from coming forward with new evidence not previously provided to Arthur Andersen or the Quapaw Information Systems ("QIS") team, if that evidence is intended just to revise conclusions reached in the Arthur Andersen Report or the Quapaw Analysis."[16] For the Government to now revise the Quapaw Analysis to its own benefit would be at odds with the Government's statutory and fiduciary duty to provide the Quapaw with an impartial report or accounting of its management of the Quapaw's trust funds.[17]

3. The Court ruled that the Quapaw Analysis was binding

On October 1, 2015, the Court granted summary judgment to the Tribe on all three claims, rejecting the Government's attempt to rebut the findings set forth in the Quapaw Analysis and the Arthur Andersen Report, stating:

> These accounting endeavors were undertaken with the full support and cooperation of the United States. There comes a point when finality must be applied. If there are newly discovered documents that cause the Government to question the conclusions reached in the Quapaw Analysis or the Arthur Andersen report, the

[13] Pl.'s Suppl. Br. at 5 (Sept. 4, 2015) (*Quapaw Tribe*, Doc. 112)
[14] *Goodeagle v. United States*, 111 Fed. Cl. 716, 721 (2013).
[15] Pl.'s Suppl. Reply at 1 (Sept. 25, 2015) (*Quapaw Tribe*, Doc. 117).
[16] Pl.'s Suppl. Reply at 1 (Sept. 25, 2015) (*Quapaw Tribe*, Doc. 117).
[17] Pl.'s Suppl. Reply at 2 (Sept. 25, 2015) (*Quapaw Tribe*, Doc. 117).

> Government should have produced these documents earlier. The public's interest in ending decades-old disputes with Native American Tribes outweighs the continued expenditure of time and resources to account for every last nickel. Allowing the Government to continue opposing the Arthur Andersen Report and the Quapaw Analysis is contrary to the purpose and spirit of the legislation and settlement agreement that caused them to occur.[18]

Later in that decision, the Court further rejects the Government's attempt to impeach the Quapaw Analysis's conclusion with respect to the unauthorized transactions analyzed in the Report, stating:

> As noted in Section II above, finality must attach to the Quapaw Analysis. The Court will not permit Defendant to impeach this detailed report, when it could have produced documents or raised its concerns at a much earlier time. The Quapaw Analysis is binding upon the United States.[19]

4. The Quapaw Analysis also analyzed and reported the Tribe's losses on the Catholic Forty and the Industrial Park lands

The Quapaw Analysis investigated and determined two more claims of the Tribe, in addition to the three claims this Court resolved in its October 1, 2015 Order. Those claims involved two parcels of land owned by the Tribe, one (a 40-acre parcel) known as the "Catholic Forty," the other (a 568.02-acre parcel) called the Industrial park.

A. The Catholic Forty losses

"Catholic Forty" is the name given to a 40-acre tract of Quapaw land that the United States improperly deeded to the Catholic Church in 1908, depriving the Tribe of its use and profits. The Quapaw Analysis states:

> This land was set aside for The Tribe's benefit, although it was in the Catholic Church's possession for some 80 years. The church used this land for school and church purposes (Pictures 93-95) until 1927, then participated in mining operations and other activities on the tract until 1975.[20]

[18] *Quapaw Tribe of Okla. v. United States*, 123 Fed. Cl. 673, 678 (2015).
[19] *Quapaw Tribe of Okla. v. United States*, 123 Fed. Cl. 673, 678 (2015).
[20] Quapaw Analysis at 37.

The Quapaw Analysis determined that the Tribe had suffered four types of losses from the Catholic Forty property:

- The Catholic Church was paid a base royalty for a mining lease applicable to the Catholic Mission Land in the amount of $4,524.32 in 1937.
- Chat sales applicable to the Catholic Mission Land were determined to be $7,336.27 prior to 1969, and additional chat sales were determined to be $2,824.63 for the year 1969.
- Loss Due to Additional Costs Anticipated to Return the Catholic Mission Land Cemetery to Trust Status $57,500.
- Agricultural leasing losses of $155,189.

B. Industrial Park losses

The Quapaw Tribal Trust Lands also include approximately 568.02 acres of land commonly known as the Industrial Park. The Industrial Park land was purchased for the Quapaw in 1937 under the Oklahoma Indian Welfare Act and placed in trust for the Tribe.[21]

But the Quapaw Analysis found that the rents the Bureau of Indian Affairs (BIA) obtained for the Industrial Park property fell far behind inflation and economic development:

> The unique fact about this allotment is that for some 43 years, from 1956 to 1998, the Industrial Park rental ranged from $0.59 per acre on Lease #1062 (Pictures 01–05) to $16.53 per acre on Lease #1955 (Pictures 06–10). These rentals were below average, and below market value, and they increased by only 3.57% over a 43-year period.[22]

Among the findings of the Quapaw Analysis, which studied two five-year lease cycles from 1959 to 1969, were BIA's failure to collect amounts due on leases it had issued:

- The file does not show that the 1966 rental payment, in the amount of $2,646.38, was made.
- Tribal (7480) Statement of Account reports are missing from the file, thus the Tribe has no record of having received rent totaling $13,231.90

[21] Quapaw Analysis at 45; *see also* 25 U.S.C. §§ 501–510.
[22] Quapaw Analysis at 46.

on this lease (not counting late fees).

As a result of BIA's mismanagement, the Quapaw Analysis identified two types of losses the Tribe had suffered on the Industrial Park property:

- The Government granted an uncompensated 30-year right-of way across the Industrial Park property from November 1963 to November 1993, with a principal value of $1,720.

- The Tribe also suffered losses from the Government's failure to lease, or lease for inadequate compensation, of 434.1 acres of agricultural lands on the Industrial Park property, with a principal value of $541,541.[23]

5. The Quapaw Analysis also determined three claims of Individual tribal members

The Quapaw Analysis also examined a sampling of thirteen allotments owned by members of the Quapaw Tribe, and determined that they had suffered three types of losses as a result of the United States' failure to perform its statutory and fiduciary duties:

A. Agricultural leasing losses

- The Project Team performed more detailed analyses of agricultural land leasing during two lease "life cycles" for thirteen sample allotments during various periods of time. The two lease life cycles for these thirteen allotments took place within the period of 1984 to 2006.[24]

- The Quapaw Analysis concludes that for several allotments during the life cycle time periods, Interior violated several statutory or regulatory standards, which included failing to advertise land, failing to conduct new appraisals, setting unfair rentals, and exhibiting tenant preference.[25]

- Those findings demonstrated that BIA had failed in its trust obligations by covering portions of the agricultural land with chat and mining waste,[26] entering into sub-market leases,[27] failing to collect rent when due,[28] and failing to attempt to lease or make productive use of the land,[29] resulting in significant losses to the

[23] Expert report of S. Jay (April 13, 2016) (attached as Ex. 1).
[24] *Id*. at 122–27.
[25] *See, e.g., id*. at 62.
[26] *E.g.*, Quapaw Analysis at 52, 56, 63–64, 66.
[27] *E.g.*, Quapaw Analysis at 53, 57–58, 59–62, 67–69.
[28] *Id.*
[29] *Id.*

Quapaw owners.[30]

As a result, the Quapaw Analysis determined that the owners of these 13 allotments suffered a principal loss (without interest or investment earnings) of $3,185,277,[31] which can be extrapolated to determine damages for other Quapaw allotments.[32]

B. Town lot losses

- Most lots were on Indian allotments and made up the towns of Cardin, Century, Commerce, Douthat, Hockerville, Picher, and Tar River.

- By 1928, there were 14,500 town lots on trust allotments.[33] The number of leasable lots decreased over time as chat piled up on many of the lots. By 1926, 50% of the 14,500 lots were covered by chat.[34] A 1933 letter estimates that only 6,000 town lots "in the mining district" could be rented due to chat piling.[35] Both a 1943 letter[36] and a 1954 government report of a complete survey indicated that "one-half [4,046] of the 8,092 [original] lots" were covered with chat in those years.[37] This report estimated that 4,000 lots were leasable in 1954.[38]

- "Hundreds of thousands of dollars in rents have been lost to the Indians owning the lands on which these towns are located . . . ."[39]

As a result, the Quapaw Analysis calculated the principal losses, without interest or investment earnings, for these 1,611 town lots at $18,219,943—a finding that can be extrapolated to all of the 14,500 town lots on Quapaw lands.

C. Pioneer chat pile losses

Chat is a valuable mining by-product used primarily in highway construction.[40]

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[30] *Id.*
[31] Ex. 1, Expert Report of S. Jay at 13.
[32] *See* Quapaw Analysis at 2.
[33] Quapaw Analysis at 94.
[34] Town_Lot_ReferenceDocs, at Pic. 7.
[35] *Id*. at Pic. 16.
[36] *Id*. at Pic. 13.
[37] TribalTrustAccount_ReferenceDocs, at Pic. 55.
[38] *Id*. at Pic. 56.
[39] Quapaw Analysis Doc. 50147 – November 23, 1942.
[40] *See Goodeagle,* 111 Fed. Cl. at 719.

- To determine whether the Quapaw had received from the Secretary all of the compensation they were due for the lease or sale of chat, the Quapaw Analysis team selected the Pioneer chat pile, located on the Francis Quapaw Goodeagle allotment, and examined BIA records of chat sales over a 30-year period from 1952–1982.[41]

- Based on the available information, the Quapaw Analysis determined that the Quapaw had not been paid adequately, and sometimes not at all, for chat taken from the Pioneer chat pile. "[T]he Project Team was able to develop a loss analysis related to the removal of chat from the Pioneer Chat Pile for the years 1952 to 1982 . . . ."[42]

As a result of the Government's actions, the Quapaw Analysis determined that the Indian owners of the Pioneer chat pile had suffered principal losses, without interest or investment earnings, of $1,848,651.40[43]—an amount that can easily be extrapolated to the other chat piles on Quapaw lands.

6. The Government's expert witnesses

On April 13, 2016, and on June 20, 2016, the Government produced expert reports and rebuttal reports for a total of 15 expert witnesses. Six of these reports are devoted in substantial part to challenging the methodologies and conclusions of the Quapaw Analysis, ignoring this Court's holding that the Quapaw Analysis is binding on the Government.

A. Gregory J. Chavarria

Chavarria's report largely duplicates the exhibits he prepared in support of the Government's earlier motion for partial summary judgment, presenting analysis this Court has already rejected, plus some newly-added criticisms of the Quapaw Analysis:

> I have been retained as an expert witness by the United States Department of Justice (DOJ) to provide my expert opinion regarding the following claims enumerated by me:
> **Claim 1:** The Agreed-Upon Procedures and Findings Report for Quapaw Tribe of

[41] Quapaw Analysis at 131.
[42] *Id.*
[43] Ex. 1, Expert Report of S. Jay at 12.

> Oklahoma prepared by Arthur Andersen (Andersen Report) identified $31,680.80 in unauthorized disbursements from the Tribe's trust accounts resulting in claimed damages of $163,837.97.
> **Claim 2:** The Quapaw Tribe is owed $70,330.71 for transactions that were not credited to the Tribe's trust accounts, as set forth in the Quapaw Analysis, resulting in claimed damages of $956,661.91.
> **Claim 3:** 1954 Indian Claims Commission Judgment Funds were not distributed to intended individual recipients and should have been transferred directly to the Tribe resulting in claimed damages of $7,312,851.90.
> **Claim 4:** Treaty of 1833 Educational payments were discontinued without authorization resulting in claimed damages of $2,897,007.04.
> **Claim 5:** Industrial Park unpaid encumbrances of $108,963.64 are calculated as a result of claimed uncompensated Right of Way (ROW) for a pipeline across tribal trust land.[44]

B. Darren Hudson

Similarly the Government asked Hudson "to prepare an opinion relating to Plaintiffs' valuation of agricultural lands, pecans, and hunting leases on the Quapaw lands."[45] As Hudson observes, the Plaintiffs' valuation

> rel[ies] on certain of the methodologies found in the Quapaw Information Services, Inc. (QIS) report entitled *An Analysis of Historical Federal Management of Quapaw Trust Assets* ("QIS Analysis"). More specifically, the QIS Analysis relied upon by Plaintiffs uses a variety of methods and data to address potential loss calculations for lost agricultural, hunting, and pecan opportunities.[46]

Hudson devotes his entire report to summarizing claimed flaws in the Quapaw Analysis, concluding:

> Based on the information provided in the QIS report and the data I was able to secure independently along with my expert judgment on the issues, I conclude that the QIS report is an unreliable calculation of potential lost income from agriculture, recreation, and pecans. In general, the report overstates prices, yields, net revenues, and leasing values based on the best available alternative data and analysis.[47]

[44] Chavarria Rep. at 2–3 (Apr. 13, 2016) (foonotes omitted).
[45] Hudson Rep. at 1 (Apr. 13, 2016).
[46] Hudson Rep. at 1 (Apr. 13, 2016) (internal footnote omitted).
[47] Hudson Rep. at 14 (Apr. 13, 2016).

C. John Lizak

The Government asked Lizak "to review and opine on the reliability of (1) the data relied upon, (2) the methods used, and (3) the conclusions reached with respect to the chat (construction aggregate) components of QIS's report."[48] As Lizak observes, "[t]he Plaintiffs' [the Quapaw Analysis] analysis of chat losses focuses on the Pioneer chat pile."[49]

Lizak devotes nearly all of his report to critiquing the data and methodology of the Quapaw Analysis, concluding that "the data deficiencies and methodological errors identified above render the Plaintiffs' claim regarding the total value of the chat removed from the Pioneer pile between 1952 thru 1982 as unreliable."[50]

D. Timothy Riddiough

The Government asked Riddiough to review the Quapaw Analysis and "evaluate the claimed losses stemming from the alleged mismanagement of 2,559 town lots."[51] Riddiough states that "I understand that Plaintiffs rely on the Quapaw Analysis as the basis for their town lot damages claim."[52]

Riddiough devotes nearly his entire report to undermining the methodology and conclusions of the Quapaw Analysis with respect to town lot rental income, as the headings to his report make clear:

B. The Quapaw Analysis is Unreliable and Overstates Purported Damages

a. The Quapaw Analysis Ignores Supply and Demand Realities

b. The Quapaw Analysis Makes Several Assumptions That are Baseless

[48] Lizak Rep. at 2 (Apr. 13, 2016).
[49] Lizak Rep. at 20 (Apr. 13, 2016).
[50] Lizak Rep. at 3 (Apr. 13, 2016).
[51] Riddiough Rep. ¶ 2 (Apr. 13, 2016).
[52] Riddiough Rep. ¶ 33 (Apr. 13, 2016).

> . . .
>
> c. The Quapaw Analysis Ignores Heterogeneity in Land
>
> d. The Quapaw Analysis Understates the Amount of Rental Income Actually Received[53]

E. Cliff J. Sunda

Sunda's expert report also is targeted at rejecting the Quapaw Analysis:

> I have been retained by counsel for the defendant in this case, the United States of America, to review and comment on Plaintiffs' damages claims, which are summarized in a spreadsheet titled "Corrected Supplemental Damages Disclosure, September 11, 2015". That spreadsheet, in turn, references the "Quapaw Analysis", a report authored by Quapaw Information Systems, Inc. (QIS) in 2010. In particular I was asked to: 1) estimate the change in volume over time within chat piles using remote sensing techniques, 2) review and comment on the reliability of the chat volumes discussed in the Quapaw Analysis, and 3) map out the change in restricted status over time for allotted land.[54]

F. N. Shirlene Pearson

On June 20, 2016, the Government provided its expert rebuttal reports, which included a report by Pearson, also aimed at attacking the Quapaw Analysis:

> The stated purpose of the Quapaw Analysis was to "prepare an analysis of selected assets that would result in a representative sampling" of the various allottees and land at issue, and from the way the report uses the results of their sample, it is reasonable to conclude that the report's authors are claiming that they achieved their goal. I disagree. It is my expert opinion that the Quapaw Analysis failed to substantiate that this goal was achieved. Therefore, the results from it should not be used to extrapolate damages for lands that were not evaluated.
>
> * * *
>
> Some of the underlying analyses in the Quapaw Analysis . . . are themselves based on inappropriate extrapolation methods. In particular, in estimating town lot damages, the authors of the Quapaw Analysis rely on a single land appraisal of eighteen town lots on one block in the Comba Addition of the Slim Jim allotment to extrapolate the value of 2,559 town lots within four different allotments over an eighty-five year period. The Quapaw Analysis provides no justification that the sample drawn is "representative" of the town lots at issue, and thus no statistically

[53] Ex. 4, Riddiough Rep. at ii (Apr. 13, 2016).
[54] Ex. 5, Sunda Rep. at 1 (Apr. 13, 2016).

> valid extrapolation to all 2,559 town lots can be done with this sample. Use of this sample in this manner carries with it the risk of producing seriously erroneous results.[55]

Standard of Review

Summary judgment under RCFC 56 is proper where the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[56] The court may decide issues of law and of statutory interpretation on summary judgment.[57] "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment . . . ."[58] To create a dispute over an issue of material fact, "the party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient."[59] But "[e]ven when material facts are in dispute, . . . summary adjudication may be appropriate if, with all factual inferences drawn in favor of the nonmovant, the movant would nonetheless be entitled to judgment as a matter of law."[60] For, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial."[61]

"The 'law of the case' rule ordinarily precludes a court from re-examining an issue

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[55] Pearson Rebuttal Rep. at 3–4 (June 20, 2016) (internal footnote omitted).
[56] *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1243 (Fed. Cir. 2007).
[57] *Santa Fe Pac. R.R. Co. v. United States*, 294 F.3d 1336, 1340 (Fed. Cir. 2002).
[58] *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)).
[59] *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835–836 (Fed. Cir. 1984).
[60] *Young Dental Mfg. Co. v. Q3 Special Prods.*, 112 F.3d 1137, 1141 (Fed. Cir. 1997), *reh'g denied* June 19, 1997.
[61] *Scott*, 550 U.S. at 380 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587 (1986)).

previously decided by the same court, or a higher appellate court, in the same case"[62] and "encompasses both a court's explicit holdings, and those matters that are decided by necessary implication."[63] "The doctrine rests upon the important public policy that '[n]o litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time or changes in the composition of the court will provide a more favorable result the second time.'"[64]

The burden of proof lies with the party challenging law-of-the-case:

> [A party] bears a very heavy burden when it asks a court to contravene the law of the case doctrine; in the absence of superseding change in the law or properly presented new facts, it may be overcome only when a strong showing of clear error is made. "A mere suspicion of error, no matter how well supported, does not warrant reopening an already decided point . . . . Only if [the court] were convinced to a certainty that [the] prior decision was incorrect would [it] be warranted in now reexamining [it]."[65]

Argument

I. This Court's holding that the United States is bound by the conclusions reached in the Quapaw Analysis is sound, and is law of the case

This Court has previously described the creation of the Quapaw Analysis:

> In 2002, the Tribe filed suit in the U.S. District Court for the Northern District of Oklahoma in a case captioned *Quapaw Tribe of Oklahoma (O-Gah–Pah) v. U.S. Department of the Interior,* No. 02–CV–129–H(M) (N.D. Okla.). The Quapaw Tribe requested an accounting of the historical federal management of the Tribe's

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[62] *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir. 1982); *see also Arizona v. California*, 460 U.S. 605, 618 (1983) ("Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."); *Banks v. United States*, 741 F.3d 1268, 1276 (Fed. Cir. 2014) ("The law-of-the-case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16 (1988))).

[63] *Carson Harbor Village, Ltd. v. Unocal Corp.*, No. CV 96-3281, 2003 WL 22038700, at *2 (C.D. Cal. Aug. 8, 2003).

[64] *Lost Tree Village Corp. v. United States*, 115 Fed. Cl. 219, 226 (2014), *aff'd* 787 F.3d 1111 (Fed. Cir. 2015) (quoting *Gindes v. United States*, 740 F.2d 947, 949 (Fed. Cir. 1984)).

[65] *Int'l Elecs. Corp. v. United States*, 2 Cl. Ct. 570, 573 (1983) (internal citation omitted) (quoting *Northern Helex Co. v. United States*, 225 Ct. Cl. 194, 201, 634 F.2d 557, 561 (1980)), *aff'd* 727 F.2d 1120 (Fed. Cir. 1983) *and aff'd* 770 F.2d 176 (Fed. Cir. 1985).

> trust assets. On November 5, 2004, the Quapaw Tribe entered into a settlement agreement with the United States whereby the parties agreed that Quapaw Information Systems, Inc., a not-for-profit Tribal entity, would prepare an analysis of the Government's management of Tribal assets ("the Quapaw Analysis"). The Tribe agreed to dismiss its lawsuit and to waive any rights to an accounting of its trust assets up to and including the date of the settlement agreement. Upon completion of the Quapaw Analysis, the Tribe would be deemed to have been furnished with an accounting of the Tribe's trust assets. In entering into this settlement agreement, the Quapaw Tribe reserved all claims for money damages arising from past events and transactions. The settlement did not purport to compromise or waive the claims of any tribe member for money damages.
>
> Between 2004 and 2010, Quapaw Information Systems investigated and prepared the Quapaw Analysis. The team performing this review undertook a comprehensive examination of files and documents made available by the Office of Historic Trust Accounting and other agencies to determine whether and to what extent the Department of Interior met its fiduciary obligations to the Tribe and individual trust beneficiaries. On June 1, 2010, Quapaw Information Systems completed and transmitted the Quapaw Analysis Report to the Government. On November 19, 2010, the Department of Interior accepted the report as complete. Plaintiff claims that the Quapaw Analysis identified many pervasive breaches of the Government's fiduciary duty to the Quapaw Tribe.[66]

On August 12, 2015, the Court ordered the parties to file supplemental briefing on "whether the findings in the 2010 Quapaw Analysis . . . are binding on the Government, or whether the Government may offer other evidence to rebut Plaintiff's claims regarding mismanagement of the trust accounts."[67] The Court stated that "[t]he resolution of this issue before trial may have a bearing on other claims as well."[68]

The Quapaw filed their supplemental brief on September 4, 2015, arguing:

> The Government is precluded from coming forward with new evidence not previously provided to . . . the Quapaw Information Systems ("QIS") team, if that evidence is intended just to revise conclusions reached in . . . the Quapaw Analysis. What the Government could offer—but has not—is a more accurate, impartial analysis.[69]

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[66] *Quapaw Tribe of Oklahoma v. United States*, 120 Fed. Cl. 612, 614–15 (2015) (internal citations omitted).
[67] Order for Suppl. Briefing (Aug. 12, 2015) (*Quapaw Tribe*, Doc. 106).
[68] Order for Suppl. Briefing (Aug. 12, 2015) (*Quapaw Tribe*, Doc. 106).
[69] Pl.'s Suppl. Br. at 1 (Sept. 4, 2015) (*Quapaw Tribe*, Doc. 112).

The Government filed its supplemental response on September 18, 2015, arguing that "[t]his Court previously held that the United States was not bound by the conclusions in the Quapaw Analysis and held that evidence produced in discovery that refutes the conclusions of the Quapaw Analysis can create genuine issues of material fact for trial."[70]

But the Court rejected the Government's argument, and held that, in the interest of finality, the Government could not undermine the methodology and conclusions contained within the Quapaw Analysis.[71] The Court explained why the Government cannot continue to litigate these issues indefinitely:

> The Court also rejects the Government's attempt to take issue with the Quapaw Analysis . . . . These accounting endeavors were undertaken with the full support and cooperation of the United States. There comes a point when finality must be applied. If there are newly discovered documents that cause the Government to question the conclusions reached in the Quapaw Analysis . . . , the Government should have produced those documents earlier. The public's interest in ending decades-old disputes with Native American Tribes outweighs the continued expenditure of time and resources to account for every last nickel. Allowing the Government to continue opposing. . . the Quapaw Analysis is contrary to the purpose and spirit of the legislation and settlement agreement that caused them to occur.[72]

In reaching its decision on the Quapaw's claim for other transactions reported in the Quapaw Analysis, the Court held that the Quapaw Analysis was binding on the Government:

> [F]inality must attach to the Quapaw Analysis. The Court will not permit Defendant to impeach this detailed report, when it could have produced documents or raised its concerns at a much earlier time. The Quapaw Analysis is binding upon the United States.[73]

In compliance with the contract, the QIS team first delivered a Preliminary Factual Findings Report to the Government explaining all factual findings on which the Quapaw

[70] Def.'s Suppl. Br. at 13 (Sept. 18, 2015) (*Quapaw Tribe*, Doc. 116).
[71] *Quapaw Tribe*, 123 Fed. Cl. at 678.
[72] *Quapaw Tribe*, 123 Fed. Cl. at 678.
[73] *Quapaw Tribe*, 123 Fed. Cl. at 678.

Analysis would be based;[74] prepared Monthly Earned-Value Management Reports that track the efficacy of the management and operation of the work;[75] created an ongoing Quality Control program that included at least OHTA's quality control standards,[76] which QIS submitted to OHTA for inspection; and prepared the Quapaw Analysis Methodology Briefing and Document Collection Plan.[77] A Steering Committee was established consisting of two OHTA representatives and two Tribal representatives who met to review QIS's progress and address any issues on Contract performance.[78] OHTA also had the right to advise the QIS team of any additional Quality Control requirements over the life of the contract, including inventory verification, document handling reviews, image quality reviews, consistency checks, and analysis reviews.[79] QIS also prepared and submitted to OHTA drafts of the Quapaw Analysis on August 30, 2009 and November 17, 2009.[80] OHTA provided comments and criticisms of these drafts.[81]

The Government's Rule 30(b)(6) spokesman, Michael Estes, admitted that the Quapaw Analysis described ways in which the Government's management of Quapaw assets had not lived up to the fiduciary standards that applied to them:

> Q. Does the Quapaw Analysis describe . . . Inconsistencies in the way the government managed the tribe's assets, as compared with the analysis criteria?
> A. Yes, I believe it does.[82]

[74] QIS Contract § F.2(h) (*Quapaw Tribe* Doc. 112-3).
[75] *Id.* at § F.2(f).
[76] *Id.* at § C.1(g)(4).
[77] *Id.*
[78] *Id.* at § C.1(g)(2)(d)
[79] *Id.* at § C.1(g)(4).
[80] *See* Estes Dep. Tr. at 124:5–125:22 (attached as Ex. 2).
[81] Ex. 2, Estes Dep. Tr. at 124:5–125:22.
[82] Ex. 2, Estes Dep. Tr. at 67:4–15.

Estes also admitted that "OHTA deems the Quapaw Analysis an acceptable final deliverable."[83]

Although the Government knew that, under the settlement agreement, the Quapaw waived the right to an accounting and that the Quapaw Analysis would be deemed to be their accounting, the Government gave no hint that it harbored reservations about any aspect of the multiple drafts of the Quapaw Analysis it had approved. The Government, as trustee, should not now be allowed to tell the Tribe after the fact that the Quapaw Analysis is binding only on the Tribe, and the Government is free to retroactively attack its methods and findings.

This Court has previously dealt with Tribal Trust Reconciliation Project reports, relying on them in other Indian breach-of-trust cases. In *Osage Tribe of Indians v. United States*,[84] this Court determined that, absent an actual accounting of trust revenues, the Tribal Reconciliation Report serves as a "reasonable estimate" of what a full accounting would show:

> [T]he parties must rely on the data generated for the Arthur Andersen Trust Fund Reconciliation Project (TRP) report . . . prepared by the contractor for the United States as a "'reasonable estimate' . . . of the data the Osage Tribe would have obtained had data been available from [Bureau of Indian Affairs] BIA records."[85]

Nor may the Government dispute the methodology of the Tribal Reconciliation Reports because "[i]n the past, [the Government] offered plaintiff the Andersen Report as a 'reasonable estimate' of the trust accounts in the absence of proper accounting."[86] Accordingly, the Government

> as trustee in breach, is not entitled to employ its vast resources to cherry pick data that is entirely favorable to the government. Although defendant had previously imposed "time and cost" constraints upon Arthur Andersen's TRP, defendant has now authorized Mr. Chavarria to undertake "at least some of this time-consuming analysis" "given the claims raised in this litigation." It appears now, as it appeared

[83] Ex. 2, Estes Dep. Tr. at 64:10–16.
[84] *Osage Tribe*, 93 Fed. Cl. 1 (2010).
[85] *Osage Tribe*, 93 Fed. Cl. at 26 (quoting *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629, 669–70 (2006)).
[86] *Osage Tribe*, 96 Fed. Cl. at 451.

to the court in *Osage IV*,

> that while plaintiff has repeatedly pressed the government for a more complete accounting of the tribal trust records for the Osage and other tribes, the government has refused on the grounds that such exercises would not be cost-effective. However, now that performing a more thorough analysis of the data may financially benefit the government, it has picked a few of the gaps in the investment analysis where it thinks it can gain ground, and revised those based on a small selection of documents that Arthur Andersen was told not to analyze when preparing the Andersen Report.[87]

As the Federal Circuit held in *Confederated Tribes of Warm Springs Reservation of Oregon v. United States*,[88] "improper accounting procedures followed by the BIA" are the responsibility of the United States, not the Tribes.[89] The United States cannot now walk away from its own "prior, objective report"[90] nor can it rely upon records not produced to Arthur Andersen—or to plaintiffs in this litigation—to attempt to impeach its own report.[91] Therefore, as in *Osage Tribe*, the Quapaw Tribe may rely on the Andersen Report and the Quapaw Analysis's review of the Andersen Report.[92]

II. The Quapaw Analysis concludes that the Tribe suffered losses on the Catholic Forty and the Industrial Park lands as alleged in the Tribe's Second Cause of Action

The Quapaw Analysis investigated and determined two of the Tribe's Claims, in addition to the three claims this Court resolved in its October 1, 2015 Order. Those claims involved two parcels of land owned by the Tribe, one (a 40-acre parcel) known as the "Catholic Forty," the other (a 568.02-acre parcel) called the Industrial park.

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[87] *Id.* at 450 (quoting *Osage Tribe*, 93 Fed. Cl. at 34) (internal quotations, alterations, and citations omitted).
[88] *Confederated Tribes of Warm Springs Reservation of Ore. v. United States,* 248 F.3d 1365 (Fed. Cir. 2001).
[89] *Id.* at 1375.
[90] *Osage Tribe*, 96 Fed. Cl. at 451.
[91] *Id.*
[92] *See Osage Tribe*, 96 Fed. Cl. at 456 ("The court, guided by *Warm Springs,* holds that plaintiff has met its burden of proving . . . that its reliance on the Andersen Report's statements of interest to estimate a portion of its damages is reasonable.").

A. The Catholic Forty losses

The Quapaw Analysis reports that

> The Catholic Mission Land is a 40-acre tract of land. Of this, 24.44 acres are pasture land, 15 acres are covered with mine wastes or "chat," and 0.56 acres are a Quapaw Indian cemetery. This land was set aside for The Tribe's benefit, although it was in the Catholic Church's possession for some 80 years. The church used this land for school and church purposes (Pictures 93-95) until 1927, then participated in mining operations and other activities on the tract until 1975.[93]

For many years Quapaw children were schooled on the reservation by Roman Catholic priests and nuns. The Quapaw Analysis states that "[i]n 1893, the National Council of the Quapaw Tribe made an indenture to the Catholic Church under which forty (40) acres of Tribal land was set aside for the benefit of the Quapaw People, as long as the land was used for school purposes."[94] But in 1908 the Secretary of Interior, as trustee for the Tribe, signed a patent deed giving fee title to the Catholic Church, free and clear of any restrictions on use. Although the school closed in 1927, the Tribe did not regain possession of the property until 1975.[95]

The Quapaw Analysis states:

> The Quapaw Tribe was unaware that a fee patent was issued in 1908 on the SW NE Sec.6-T28N-R24E, which extinguished the trust title and the reversionary clause, as prescribed by the original indenture given by the Quapaw Council to the Bureau of Catholic Indian Missions. The Secretary of the Interior thus appears to have disregarded his duty to restore title of the Catholic Mission Land to the Tribe after the school and church no longer existed. The Tribe repeatedly contacted Catholic Church officials for return of ownership of their land. The Project Team could find no efforts or support offered by the DOI. While it held the property, the church removed lead and zinc ore from the premises, sold chat, and left a huge pile of chat on the property. The BIA made a chat lease in 1977 on these 40 acres. The agreement was never carried out, and there has not been any government supervised activity on this property since then. Eventually, the Tribe was able to have the tract (excepting the cemetery) returned to trust status. Today, however, due to the Church's 68-year span of ownership, the tract is an unusable wasteland.[96]

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[93] Quapaw Analysis at 37.
[94] *Id.*
[95] *Id.*
[96] Quapaw Analysis at 37.

All of the royalties from mining and chat sales on the Catholic Forty went to the Church, and not the Tribe. Accordingly, the Quapaw Analysis concluded:

> [T]he royalty realized by the Catholic Church from removal of lead, zinc and chat from 1937 to 1975 is a valid damage due and owing to the Tribe. The Project Team has thus calculated the amount of lead and zinc that was known to be removed from the premises of this 40-acre tract, as well as the amount of chat sold.[97]

In all, the Quapaw Analysis determined that the Tribe had suffered four types of losses from the Catholic Forty property:

- The Catholic Church was paid a base Royalty for a mining lease applicable to the Catholic Mission Land in the amount of $4,524.32 in 1937.
- Chat sales applicable to the Catholic Mission Land were determined to be $7,336.27 prior to 1969, and additional chat sales were determined to be $2,824.63 for the year 1969.
- Loss Due to Additional Costs Anticipated to Return the Catholic Mission Land Cemetery to Trust Status $57,500.
- Agricultural leasing losses of $155,189.

For the Catholic Forty and all other tribal and individual Indian lands, agricultural Losses for Basic Agriculture, Recreational Lands and Pecan Enterprise in the Quapaw Analysis was determined using various models to estimate either rental rates or net income per acre for the various types of acreage. A rental enterprise model was used for basic agriculture, a recreational lease enterprise model for recreational lands, and a pecan enterprise model for pecans. The initial step in preparing each model was to estimate the amount of acreage for each type of crop or revenue source. This was accomplished by analyzing aerial photographs of the subject property. The second step was to determine a representative rental rate or net income rate for each acreage type. Estimation of rental rates for basic agriculture was accomplished from

[97] *Id.*

information from the Ottawa and Cherokee Extensions, real estate agents and Oklahoma State University. Rates used represented the average rate from the various research sources for the year 2006. A rental rate of $35 was established for basic agriculture products. Rental rates for recreational use were based on a study of recreational lease rates from the Nobel Foundation. A rental rate of $7.73 was used for recreational acreage. The pecan enterprise model, used for pecan losses, was sourced from studies conducted by the Sustainable Agriculture Research Education Program. Such studies indicated a net income yield of approximately $100 per acre for native pecan acreage. A net income rate of $100 per acre was utilized for the pecan enterprise model.

The number of acres for recreation use was estimated to be 28.6 acres at a rental rate of $7.73 from 1975 through 2006, adjusted by the appropriate price index.

Basic agriculture acreage on the Catholic Mission lands was estimated to be 33.6 acres. The loss from 1975 to 2006 was computed by applying the basic agriculture rental rate in 2006 of $35, adjusted by the Producer's Price Index (PPI), to convert to dollar value rental rates for a particular year, by the acreage amount. The number of acres for Pecan Enterprise was estimated to be 6.4 acres at a net income rate of $100 per acre from 1975 through 2006, adjusted by the appropriate price index.

CPA Jay summarizes the principal amounts of the Catholic 40 losses, not including interest or investment earnings (which will be proved at trial):

Mining Royalties Lost on Catholic Mission Land	$4,524
Chat Sales Lost on Catholic Mission Land	$10,161
Reclamation cost of Catholic Mission Land	$57,500

Agricultural Lands Losses $541,541[98]

Total $613,726

B. Industrial Park losses

The Quapaw Tribal Trust Lands (that is, lands not allotted to individuals) include approximately 568.02 acres of land held in trust for the benefit of the Quapaw Tribe. The land was purchased for the Quapaw in 1937. The current use of the property is for various tribal governmental facilities and enterprises. The Tribal Industrial Park includes the main Tribal fire station and ambulance center, the Tribal housing department, a Tribal convenience store, the Quapaw Counseling Services Clinic, a Tribal water tower, and the Quapaw Casino and RV Resort.[99]

The Quapaw Analysis found that the rents BIA obtained for the Industrial Park property fell far behind inflation and economic development:

> The unique fact about this allotment is that for some 43 years, from 1956 to 1998, the Industrial Park rental ranged from $0.59 per acre on Lease #1062 (Pictures 01-05) to $16.53 per acre on Lease #1955 (Pictures 06-10). These rentals were below average, and below market value, and they increased by only 3.57% over a 43-year period.[100]

Among the findings of the Quapaw Analysis, which studied two five-year lease cycles from 1959 to 1969, were BIA's failure to collect amounts due on leases it had issued:

- The file does not show that the 1966 rental payment, in the amount of $2,646.38, was made.

- Tribal (7480) Statement of Account reports are missing from the file, thus the Tribe has no record of having received rent totaling $13,231.90 on this lease (not counting late fees).

[98] Ex. 1, Expert Report of S. Jay at 13.
[99] Quapaw Analysis at 45.
[100] Quapaw Analysis at 46.

As a result of BIA's mismanagement, the Quapaw Analysis identified two types of losses the Tribe had suffered on the Industrial Park property:

- The Government granted an uncompensated 30-year right-of way across the Industrial Park property from November 1963 to November 1993, with a principal value of $1,720.[101]

- The Tribe also suffered losses from the Government's failure to lease, or lease for inadequate compensation, of 434.1 acres of agricultural lands on the Industrial Park property, with a principal value of $541,541.[102]

These agricultural losses were determined by applying a sophisticated agricultural production model to usable agricultural land, as determined from aerial photographs. Basic agriculture acreage on the Industrial Park lands was estimated as 434.1 acres, and the loss from 1937 to 2006 was computed by multiplying the basic agriculture rental rate in 2006 of $35, adjusted by the Producer's Price Index (PPI) to the acreage amount. In addition, the number of acres in the Tribal Industrial Park for recreational use was estimated to be 115 acres at a rental rate of $7.73, with adjustment for the appropriate price index from 1937 through 2006.

CPA Jay summarizes the principal-only losses the Tribe suffered on the Industrial Park land:

Industrial Park Right of Way and Easements	$1,720
Agricultural Lands Losses	$541,541
Total $543,261[103]	

The Tribe will present evidence at trial of the investment earnings that would have accrued on these principal amounts had they been properly collected and invested.

[101] Ex. 1, Expert Report of S. Jay at 13.
[102] *Id.*
[103] *Id.*

III. The Quapaw Analysis also determined for a representative sample of individually owned allotments the losses of agricultural lease income and town lot rents, as well as lost revenue from the Pioneer chat pile

In addition to the Tribe's claims, the Quapaw Analysis investigated and determined the losses suffered by the individual owners of a sampling of 13 individual allotments due to lost agricultural production and lost rents that should have been collected for town lots, with a view that these findings could then be extrapolated to the remaining allotments still owned by members of the Quapaw Tribe. As reported by CPA Stephen Jay,[104] the principal amounts of those losses (without interest or investment income) determined by the Quapaw Analysis were:

Agricultural production losses	$3,185,277
Town lot rent losses	$18,219,943

In addition, the Quapaw Analysis determined that the owners of the Pioneer chat pile had lost $1,848,651 in principal (without interest or investment income)[105]—a representative sample that can be extrapolated to determine lost income from the other chat piles on Quapaw lands.

(The Quapaw Analysis also includes a calculation of interest on these sums, but this Court has held that the Quapaw are not entitled to interest but rather to the earnings they would have received if the sums had been invested by BIA.[106] The Quapaw will therefore present expert testimony at trial on the correct amount of investment earnings due.)

A. Lost agricultural leasing income (Goodeagle Fourth Cause and Bear Third Cause of Action)

As early as 1891 Congress gave the Secretary of Interior authority to grant agricultural leases on unallotted Indian lands,[107] and extended this authority in 1921 to allotted lands as

[104] *See* Ex. 1, Expert of S. Jay (April 13, 2016).
[105] Ex. 1, Expert Report of S. Jay at 12.
[106] *Quapaw Tribe of Oklahoma v. United States*, 123 Fed. Cl. 673, 678 (2015).
[107] 25 U.S.C. § 397.

well.[108] For Quapaw agricultural lands, the Secretary of Interior was required by regulation to approve all agricultural leases,[109] require rent at no less than the appraised market value,[110] limit the lease to five years[111] (later raised to ten), require a performance bond from the lessee,[112] require that the crops grown are collateral for payment of the rent,[113] and take action to collect any delinquent rent.[114] But the Quapaw Analysis determined that Interior breached its trust duty by violating several statutory or regulatory standards, including failing to advertise land, failing to conduct new appraisals, setting unfair rentals, and exhibiting tenant preference.[115] For example, the Project Team "found only one lease that had a bond recalled to satisfy rental," and concluded that "[b]onds were inadequate and waived."[116] Thus,

> The Project Team identified the management of the surface land or land for agricultural purposes as an issue because the examination of the leases, permits, and contracts made between 1957 and 2004 reveal a plethora of cases that illustrate the DOI's failure to uphold its fiduciary duty on non-monetary trust assets located on selected Quapaw Tribal and Individual trust lands.[117]

As with the Tribe's Industrial Park property, the allotments owned by individual members of the Quapaw Tribe were (and some still are) highly productive agricultural lands. Yet, as the Quapaw Analysis determined,

> [t]he farming and grazing leases were made for Quapaw lands for $1 per acre in 1895 and were advertised in 1933 by the agency for that same amount. By 1945 the surface leases were still at that price. Lease files from 1946 to 1958 on a majority of the allotments were never provided to the Project Team. There were years characterized in many instances by the lack of any compliance with federal trust

[108] 25 U.S.C. § 393.
[109] Quapaw Analysis, Appendix 6A, 25 C.F.R. § 171.4 (1938).
[110] Quapaw Analysis App. 6, 25 C.F.R. § 171.9 (1938).
[111] Quapaw Analysis App. 6AI, 25 C.F.R. § 171.19 (1938).
[112] Quapaw Analysis App. 6O, 25 C.F.R. § 171.16 (1938).
[113] Quapaw Analysis App. 6R, 25 C.F.R. § 171.21 (1938).
[114] Quapaw Analysis App. 6Q, 25 C.F.R. § 171.18 (1938).
[115] *See, e.g.*, *id*. at 62.
[116] *Id*. at 51.
[117] Quapaw Analysis at 50.

> standards, or by the construction of improvements on the Indian leaseholds without proper authorization or documentation. The surface acres under lease dwindled rapidly as chat was piled on the hay meadows and cropland.[118]

Although BIA "Archival and Agency records allowed the Project Team to reconstruct 165 leases and three revocable permits," this was not easy:

> The Project Team finds it necessary to comment on the management of the records at the Miami Agency. The lease files and the Allotment files furnished to the Project Team (MIA and MIM Collections) at the Agency, were in general disarray. There was no continuity as to the order of the actions that took place, portions of the general provisions are missing and misfiled in other file folders, and correspondence between the Agency, the lessees and the lessors is predominately absent. Evidence of payment history was not consistently kept in the files. The Project Team was compelled to search collections from other repositories when reconstructing a lease file pursuant to 25 C.F.R. Part 162.[119]

Using the available documents, the Quapaw Analysis investigated and made individualized findings as to each of the 13 allotments, linking electronically to the documents relating to each allotment.[120] Those findings demonstrated that BIA had failed in its trust obligations by covering portions of the agricultural land with chat and mining waste,[121] entering into sub-market leases,[122] failing to collect rent when due,[123] and failing to attempt to lease or make productive use of the land,[124] resulting in significant losses to the Quapaw owners.[125]

To determine the revenue losses suffered by the allotment owners, Stephen Jay explains that the Quapaw Analysis used models to develop reasonable rental rates for three types of common agricultural uses on Quapaw lands: basic agriculture (hay, row crops), recreation

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[118] Quapaw Analysis at 7.
[119] Quapaw Analysis at 50.
[120] Quapaw Analysis at 52–93.
[121] *E.g.*, Quapaw Analysis at 52, 56, 63–64, 66.
[122] *E.g.*, Quapaw Analysis at 53, 57–58, 59–62, 67–69.
[123] *Id.*
[124] *Id.*
[125] *Id.*

(hunting and fishing licenses) and pecan orchards:

> Agricultural Losses for Basic Agriculture, Recreational Lands and Pecan Enterprise in the Quapaw Analysis was determined using various models to estimate either rental rates or net income per acre for the various types of acreage. A rental enterprise model was used for basic agriculture, a recreational lease enterprise model for recreational lands, and a pecan enterprise model for pecans. The initial step in preparing each model was to estimate the amount of acreage for each type of crop or revenue source. This was accomplished by analyzing aerial photographs of the subject property. The second step was to determine a representative rental rate or net income rate for each acreage type. Estimation of rental rates for basic agriculture was accomplished from information from the Ottawa and Cherokee Extensions, real estate agents and Oklahoma State University. Rates used represented the average rate from the various research sources for the year 2006. A rental rate of $35 was established for basic agriculture products. Rental rates for recreational use were based on a study of recreational lease rates from the Nobel Foundation. A rental rate of $7.73 was used for recreational acreage. The pecan enterprise model, used for pecan losses, was sourced from studies conducted by the Sustainable Agriculture Research Education Program. Such studies indicated a net income yield of approximately $100 per acre for native pecan acreage. A net income rate of $100 per acre was utilized for the pecan enterprise model.[126]

To determine the amounts that should have been earned on the agricultural lands on each of the 13 allotments, the Quapaw analysis categorized the acreage on each according to its usability for basic agriculture, recreation or pecan trees,

> And applied the rental rates in 2006 of $35 for basic agriculture acreage or $7.73 for recreational acreage, or the pecan net income rates of $100 per acre to estimate each loss claim. The rates had been established at a 2006 price and therefore were adjusted by either the Consumer Price Index (CPI) for the years 1895 to 1912 or the Producer's Price Index (PPI) for the years 1913 to 2005, to convert 2006 dollar values to the amount for the appropriate year.[127]

After deducting the amounts actually collected in agricultural rent according to BIA records, the Quapaw Analysis determined that the principal agricultural losses for these 13 allotments, without interest or investment income, was $3,185,277.[128]

[126] Ex. 1, Expert Report of S. Jay at 7.
[127] Ex. 1, Expert Report of S. Jay at 7–8.
[128] *See* Ex. 1, Expert Report of S. Jay at 13.

B. Town lot rental losses (Goodeagle and Bear Third Cause of Action)

To accommodate the mining boom of the early 1900s several new towns (Picher, Cardin, Douthat) were platted on Quapaw lands for miners' houses, businesses, and mill sites for the ore. The Quapaw analysis states that the discovery of valuable lead and zinc on the Quapaw Reservation attracted thousands of miners to Quapaw lands, beginning in 1902.[129] From 1912–1917, non-Indians entered into five to ten-year business leases with Indians for nominal rent (usually $1 per acre), subdivided the area into town lots for homes and business buildings, and subleased the lots for a considerable profit.[130] In 1918, the Indian Office (later BIA) took over town lot leasing activities.[131] Many tenants obtained town lot permits from the Quapaw Agency for several lots, subleased the lots, and pocketed the rent.[132]

> BIA issued annual town lot permits on these Quapaw trust lands. The amount of rent set for each lot varied depending on the location and the types of buildings on the lot.[133] A 1928 report states that 7,200 of the 14,500 lots were rented to "storekeepers, mine workers, and others," and rent ranged from $6 to $180 per year.[134] A 1943 letter from a field aid refers to a map of the Picher Mining District showing all subdivisions in the district and states that 50% of 8,092 "sub-divided" lots (4,046) were leased at the time.[135]

The Quapaw Analysis reports that originally, there were 8,092 town lots "in the mining district," none of which were recorded.[136] Most lots were on Indian allotments and made up the towns of Cardin, Century, Commerce, Douthat, Hockerville, Picher, and Tar River.[137] By 1928,

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[129] Quapaw Analysis at 94 (2010).
[130] TribalTrustAccount_ReferenceDocs, at Pic. 54. The majority of town lots are 50 by 120 feet with some lots being 25 feet wide. *See* Mineral Lands Management_Chat Piles at Pic. 4.
[131] TribalTrustAccount_ReferenceDocs, at Pic. 54.
[132] Town_Lot_ReferenceDocs, at Pic. 14.
[133] MiscDocs_reBIA, at p. 42.
[134] *Id*.
[135] Town_Lot_ReferenceDocs, at Pic. 13.
[136] TribalTrustAccount_ReferenceDocs, at Pic. 55.
[137] *Id*. at Pic. 54.

there were 14,500 town lots on trust allotments.[138] The number of leasable lots decreased over time as chat piled up on many of the lots. By 1926, 50% of the 14,500 lots were covered by chat.[139] A 1933 letter estimates that only 6,000 town lots "in the mining district" could be rented due to chat piling.[140] Both a 1943 letter[141] and a 1954 government report of a complete survey indicated that "one-half [4,046] of the 8,092 [original] lots" were covered with chat in those years.[142] This report estimated that 4,000 lots were leasable in 1954.[143]

Nor did BIA collect much of the rent due on these town lots. A 1926 BIA report states:

> "The matter of collection of delinquent rentals has been receiving attention of this office since April 1924. Very little progress was made during the calendar year 1924. However, during the calendar year of 1925, through increased activity and a more intimate and personal knowledge and attention given this matter, we have increased the collection at approximately 50% . . . " There are ". . . over 14,000 town lots in the various towns . . . however, approximately half of the lots are covered by chat piles, sludge ponds and other mining activities . . . ."[144]

In a 1942 letter the Superintendent of the Quapaw Agency reported:

> the town lot problems have "no parallel...due to lack of personnel, hundreds of thousands of dollars in rents have been lost to the Indians owning the lands on which these towns are located . . . .[145]

And the 1953 annual report to the Commissioner of Indian Affairs states "at no time prior to 1947 was the Department in a position to collect for more than 50% of the lots on which rent was due, due to insufficient personnel . . . ."[146]

The Secretary's failure to collect rent on town lots, while allowing up to half the town

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[138] Quapaw Analysis at 94.
[139] Town_Lot_ReferenceDocs, at Pic. 7.
[140] *Id*. at Pic. 16.
[141] *Id*. at Pic. 13.
[142] TribalTrustAccount_ReferenceDocs, at Pic. 55.
[143] *Id*. at Pic. 56.
[144] Quapaw Analysis Doc. 147663 – January 11, 1926.
[145] Quapaw Analysis Doc. 50147 – November 23, 1942.
[146] Quapaw Analysis Doc. 162349 – 1953 Annual Report to Commissioner.

lots to become unusable due to mining waste, violated the Secretary's trust duty to make these trust lands productive.[147] The Quapaw Analysis found that "the records—or lack thereof—reveal a pattern of neglect in the management of this trust property for the benefit of its Indian owners that has been allowed to continue since 1918:"[148]

> Adequate and accurate records were never maintained on these lots. The community that came to be known as the City of Picher, Oklahoma, was the heart of the "mining district." When lead and zinc were discovered in 1902, miners began squatting in tents, cabins and houses in and around this area. No rental was collected for the trust owners prior to 1918.[149]

The Quapaw Analysis team painstakingly analyzed the 3,500 town lot cards that Interior provided, which were BIA's only record of rental rates and receipts, and determined that, as of 2006, there were significant amounts of unpaid rent on most town lots:

> The Project Team has made comparisons of the actual rental payments (Official Receipts) against the town lot cards that were made available. There were 14,500 town lots on trust allotments by 1928. The Project Team did not receive any type of payment history for years 1949 to 1962 or from 1982 to present, and it only received 3,500 town lot cards in all. There were very few active permits in 2006 and the majority of those had huge amounts of back rent due.[150]

In addition, many of the town lots were unleasable for housing or businesses because BIA allowed the mining companies to deposit chat and mining waste on them:

> Another issue concerning the town lots is the chat piles that were dumped on these trust allotments. The lots in these additions to the town of Picher have been unleaseable since the early 1900's. Therefore, no revenue has been received for over 80 years. (The lessees that had mining leases were not held responsible by DOI for reclamation of the surface land nor were their bonds forfeited for any cleanup effort.)[151]

The Quapaw Analysis found that

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[147] *See Quapaw Tribe*, 123 Fed. Cl. 673.
[148] Quapaw Analysis at 94.
[149] *Id.*
[150] *Id.*
[151] *Id.*

- The property known as Picher remained a mining camp. The BIA did not sell the surface under the tents, cabins and houses located on the lots. The town was sub-divided into several additions. The majority of them were on trust allotments. The BIA issued permits and collected trespass for the use of the surface only. There were as many as 14,500 town lots in and around the mining district. By 1925, the chat was piling upon the surface of these allotments. Hundreds of lots became the surface beneath the chat piles and the BIA ceased collecting rental or trespass on these lots. This trespass has continued for 80 years and still exists today.[152]

- Trespass was rampant; the Agency never established a workable method of controlling the collection of rental for the trust owners.[153]

- Beginning as early as 1925 and continuing through 1941, the Miami Agency issued eviction notices to town lot tenants to vacate the premises for the storage of tailing from mills (chat) (Pictures 004-006).[154]

- Many of the lots were covered in chat. Aerial photographs were used to determine the ratio of developed to undeveloped lots.[155]

- The Agency actually reduced rental values by half in 1931 and 1932.[156]

To determine the extent of losses resulting from this breach of trust regarding town lots, the Quapaw Analysis team selected the Slim Jim allotment, with 948 town lots, as a representative sample of the 14,500 town lots located on Quapaw lands,[157] then determined the lost rent for these 948 sample town lots:

> The first step in the analysis was to track all monies received each year for the lots in each of the blocks of the Comba and Short Additions for the years 1922 to 1983. These monies received were recorded in an Excel worksheet by block and lot number and then totaled by year.
>
> Next the Quapaw Analysis reviewed rental rate data from historical documents in order to establish a rental value for the lots. The Quapaw Analysis used actual data from a 1978 appraisal of town lot values in the Comba Addition to establish a base line rental value. The base line rental value utilized was $150 for developed lots and $47.50 for undeveloped lots. The appraisal values factored in a vacancy rate of

[152] Quapaw Analysis at 95.
[153] *Id.*
[154] *Id.*
[155] *E.g.*, Quapaw Analysis at 78, 80, 83, 84, 91.
[156] Quapaw Analysis at 96.
[157] Quapaw Analysis at 128–130.

20-40%.[158]

After adjusting the rental value for inflation, "revenue for the Slim Jim lots was computed for each year. Actual collections for each year were used to reduce the anticipated town lot revenue in the Slim Jim Allotment."[159]

After determining the losses on the 948 town lots on the Slim Jim allotment, the Quapaw Analysis applied the same methodology to determine the losses on the three other allotments, among the 13 studied, that contained town lots, and calculated the principal losses, without interest or investment earnings, for these 1,611 town lots at $18,219,943—a finding that can be extrapolated to all of the 14,500 town lots on Quapaw lands.

C. Pioneer chat pile losses (Goodeagle First and Second Causes, and Bear Second Cause of Action)

Chat is a valuable mining by-product, defined by EPA regulation as "waste material that was formed in the course of milling operations employed to recover lead and zinc from metal-bearing ore minerals in the Tri–State Mining District of Southwest Missouri, Southeast Kansas and Northeast Oklahoma."[160] EPA regulations allow the profitable use of chat in (A) cement or concrete projects; and (B) transportation construction projects (including transportation construction projects involving the use of asphalt) that are carried out, in whole or in part, using federal funds.[161] Under the Indian Long-Term Leasing Act,[162] and corresponding federal regulations, the Quapaw lead and zinc mining regulations,[163] and the laws and regulations relating to the disposition of federally managed Indian trust property, the United States has

[158] Ex. 1, Expert Report of S. Jay at 10.
[159] Ex. 1, Expert Report of S. Jay at 11.
[160] 40 C.F.R. § 278.1.
[161] Criteria for the Safe and Environmentally Protective Use of Granular Mine Tailings Known as "Chat," 72 Fed. Reg. 39,331 (July 18, 2007).
[162] 25 U.S.C. §§ 396, 415–415d.
[163] 25 C.F.R. Part 215.

ultimate management and control over all aspects of the leasing and sale of chat. The Secretary of the Interior determines whether to consent to a lease and the terms of the lease; performs any and all acts "necessary for the purpose of carrying the provisions of this section into full force and effect"; and, makes all rules and regulations as may be necessary to carry out the legislation, including:

- creating the standardized lease form that must be used;
- finalizing all the key terms of the lease such as assignability, protection of land by lessees, and the length of leases;
- approving or disapproving the price terms and the royalty percentage;
- approving or disapproving any attempt to assign a lease from one lessee to another; and
- receiving all payments owed to the Quapaw —and then as middleman sending the proper amount of royalty payments and bonus payments to the chat owners.[164]

These statutes and regulations create a fiduciary duty under which the Secretary must administer the lease or sale of chat so as to preserve the best interests of the Quapaw owners.[165]

So, to determine whether the Quapaw had received from the Secretary all of the compensation they were due for the lease or sale of chat, the Quapaw Analysis team selected the Pioneer chat pile, located on the Francis Quapaw Goodeagle allotment, and examined BIA records of chat sales over a 30-year period from 1952–1982. This investigation was hampered by BIA's inadequate records for, although the contract required the Interior Department to provide its complete mining collection of documents, the Quapaw Analysis team found this not to be so:

> This collection, according to DOI, equipped the Project Team with every document that was needed for the Mineral Lands Management portion of the Analysis. The

[164] 25 U.S.C. §§ 391–416i.
[165] 25 C.F.R. §§ 212.3 & 162.107(a) (2010).

Project Team was told the collection contained all of the mining records from the Miami Agency, the Bureau of Land Management, the Minerals Management Service and other Interior Department bureaus and agencies that had such records. In fact, the Project Team's research shows that BIA, BLM, and MMS had copies of the permits and leases made on the chat piles, yet when the Project Team attempted to reconstruct these files it was impossible.

The DOI Mining Collection was received in August 2005 and had 499 redactions, which made it essentially useless for the purposes of this Project. It took several months to resolve this issue with all parties so that coding and review of the documents could begin.[166]

Among the findings of the Quapaw Analysis:

- The DOI failed to produce the original mining leases for the Quapaw Tribal members and the assignments to those leases that should have been approved by the Secretary of Interior (Pictures 714-729), which led to further confusion as to who had the jurisdiction, approval authority and the responsibility to conduct the mining operations on Quapaw lands.[167]

- The annual chat volume records from Miami Agency were non-existent after 1985.[168]

- The inspection reports reveal far too little to ascertain the condition of the leaseholds (Pictures 77-123).[169]

- Inspection Reports of trespass, theft, encroachment, and production verification were never acted upon by the BIA (Pictures 175-230).[170]

- A report prepared from Form No. 5425 (Annual Report of Caseload) (Pictures 274-605) found in the DOI Mining Collection shows *reported* tons of chat sold. The figures of the tons of chat *reported* as sold and the money received on the chat sold reveals gross underpayment of royalty and underreporting of tons of chat sold. This tonnage *reported* entails all chat piles. The averaged royalty amount was divided into the average tonnage amount sold which revealed the chat pile owners received an average of $0.06 per ton.[171]

[166] Quapaw Analysis at 99.
[167] Quapaw Analysis at 99.
[168] Quapaw Analysis at 100.
[169] *Id.*
[170] *Id.*
[171] *Id.*

- The verification of minimum royalty payments is absent from the lease files provided.[172]

- The lease management documents, or lack thereof, repeatedly form a pattern of disregard for accuracy in compensation of the trust owners in the mining district. The theft of chat was routinely ignored and little enforcement was executed. The mismanagement continues to this day (Pictures 730-795).[173]

Based on the available information, the Quapaw Analysis determined that the Quapaw had not been paid adequately, and sometimes not at all, for chat taken from the Pioneer chat pile. As CPA Jay states:

> The initial step in the computation of the loss was to estimate a minimum amount of chat that was removed from the Pioneer Chat pile for the Period from 1952 to 1982. This was accomplished by subtracting the amount of chat that was reported on a 1982 tonnage report of 2,426,000 tons from a 1952 tonnage report of 8,000,000 tons. The difference being the estimated minimum amount of chat removed during the period . . . .
>
> The second step was to determine the royalty value per ton in 1982 of $0.25 and the restricted ownership percentage at 82.29%. The royalty value in 1982 was multiplied by the royalty rate in 1982 and the restricted ownership percentage to determine a 1982 dollar loss of $1,146,711. The amount of actual royalties received during the period from 1952 to 1982 was then compiled. The amount was determined to be $7,250.77. This amount primarily received in the years from 1952 to 1956, was converted to 1982 dollars utilizing the Producers Price Index. The result was an adjusted actual royalty received in the amount of $24,089.
>
> Next the actual royalties received in 1982 dollars of $24,089 was subtracted from the estimated 1982 royalties which should have been received of $1,146,711.
>
> The net result was an estimate of lost royalties from the Pioneer Chat Pile of $1,122,623. This amount was then adjusted to year 2006 dollars by utilizing the Producers Price Index. The year 2006 dollar amount was $1,848,651.40.[174]

This result can easily be extrapolated to determine the amount of chat income lost on the other chat piles. (This does not include investment earnings, which the Quapaw will prove at

[172] *Id.*
[173] Quapaw Analysis at 100–101.
[174] Ex. 1, Expert Report of S. Jay at 11–12.

trial.)

Conclusion

The Tribe surrendered its legal right to an accounting in exchange for the Government funded, supervised, and accepted Quapaw Analysis as a final deliverable under the parties' settlement agreement and contract with Quapaw Services, Inc. in 2010. The settlement agreement confirms that the Government intended that the Quapaw Analysis was all the Government ever intended to give the Quapaw in terms of an objective accounting of its management of Quapaw's trust assets required under the supplemental appropriations acts.[175] This court has held that the Quapaw Analysis, which the Quapaw have relied on in seeking relief in this litigation, is binding on the United States. Therefore, the Quapaw ask this Court to grant this motion for partial summary judgment on all remaining claims analyzed in the Quapaw Analysis.

Respectfully submitted,

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[175] U.S. GOV'T ACCOUNTABILITY OFF., GAO/AIMD-96-63, FINANCIAL MANAGEMENT: BIA'S TRIBAL TRUST FUND ACCOUNT RECONCILIATION RESULTS 1 (1996), http://www.gao.gov/assets/230/222488.pdf.

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