IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, Plaintiff, v. DEPARTMENT OF THE INTERIOR, *et al.*, Federal Defendants.	)	No: 1:19-cv-02154-TNM Judge Trevor N. McFadden

FEDERAL DEFENDANTS' REPLY
IN SUPPORT OF THEIR MOTION TO DISMISS

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I. INTRODUCTION

In its opposition to Federal Defendants' Motion to Dismiss (ECF No. 34-1, "Motion"), Plaintiff asserts that this Court has broad jurisdiction over Plaintiff's claims because they are based upon the invocation of the Administrative Procedure Act ("APA") as a jurisdictional basis and by extension, Plaintiff has stated a cause of action under the APA. ECF No. 39 ("Pl.'s Opp'n") at 7-21. Further, Plaintiff argues that (1) the government has a duty to provide an accounting and an accounting back to the earliest possible date; (2) that Plaintiff's claims pre-dating November 28, 2010 are not barred by the statute of limitations; and (3) that the government's trust accounting duties encompass both trust funds and non-monetary trust resources, such as oil and gas. *Id.* at 23-36. As explained in Federal Defendants' Motion, although Plaintiff's claims are assertedly grounded in the APA, Plaintiff fails to identify a discrete agency action or identify a federal statutory basis for the one-hundred plus year accounting they are seeking, which would permit its claims to move forward under the APA, 5 U.S.C. §§ 701 *et seq*. Even if the Court should find that Plaintiff has stated a valid claim under the APA, Plaintiff's claims are untimely and in any event have been extinguished by the Indian Claims Commission Act ("ICCA"). For these reasons and as explained herein, this Court should reject Plaintiff's opposition and grant Federal Defendants' Motion with respect to Counts I and III and for any claims in Count II that predate July 19, 2013.

II. ARGUMENT

When bringing a lawsuit against the United States, a plaintiff must identify: (1) a source of subject matter jurisdiction; (2) a waiver of sovereign immunity; and (3) a cause of action. *Kialegee Tribal Town v. Zinke*, 330 F. Supp. 3d 255, 263 (D.D.C. 2018) (citing *United American, Inc. v. N.B.C.-U.S.A. Housing, Inc. Twenty Seven*, 400 F. Supp. 2d 59, 61 (D.D.C.

2005)); *see also Am. Rd. & Transp. Builders Ass'n v. Envtl. Prot. Agency*, 865 F. Supp. 2d 72, 80 (D.D.C. 2012) (noting that neither statute relied upon by the plaintiff waived sovereign immunity nor provided a cause of action, and indicated further that the plaintiff needed to identify a source of jurisdiction), *aff'd* per curiam, 2013 WL 599474 (D.C. Cir. Jan. 28, 2013). Although Plaintiff has provided legal argument in its opposition that appears to address some of the defects present in the Complaint related to the waiver of sovereign immunity, Plaintiff has failed to state valid claims in Counts I, II, or III.

A. Apart from the APA, Plaintiff has not identified a valid waiver of sovereign immunity for any its claims.

Plaintiff presents three claims, but did not identify a valid waiver of sovereign immunity for any of them, outside of the APA. *See* ECF No. 1, Complaint ("Compl."). Plaintiffs admit as much in their opposition but argue that they are entitled to rely solely on the APA's waiver of sovereign immunity for each of the Complaint's three causes of action. Pl.'s Opp'n at 7-12. It is true that the D.C. Circuit has interpreted the APA as providing a broad waiver of sovereign immunity, even for non-APA claims. *See Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 620 (D.C. Cir. 2017). Plaintiff's response therefore identifies a sufficient waiver of sovereign immunity. It is worth noting, however that, apart from its invocation of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. (which Federal Defendants address *infra* pp. 3-11), Plaintiff's Complaint did not point to any statute, treaties, or law that clearly and unequivocally waives the United States' sovereign immunity to Plaintiff's Counts I and II claims or that creates a private right of action. *See* Compl. ¶¶ 90-91; 141, 144-153, 165-66; Pl.'s Opp'n 8-11. Of the statutes Plaintiff cites, they do not include language that independently, expressly, and unequivocally waives the government's sovereign immunity or otherwise provides Plaintiff with

a cause of action.[1] *See id*. Therefore, the Court should find that Plaintiff's only viable waiver of the United States' sovereign immunity is the APA.

B. Plaintiff has not pled a cause of action under the APA.

i. Plaintiff has not alleged a final discrete agency action as a cause of action within the meaning of a relevant statute.

Once Plaintiff has advanced a valid waiver of the United States' sovereign immunity, Plaintiff is obligated to advance a cause of action. For an APA cause of action, Plaintiff needs to allege a final discrete agency action within the meaning of a relevant statute. Plaintiff claims that Counts I and II of its Complaint are not based on an APA cause of action. Compl. ¶¶ 131-37 ("Accounting"), 138-154 ("Accounting as a Federal Trust Responsibility"). However, Count I of Plaintiff's Complaint does not identify a single statute, regulation, or other source of law that purportedly gives rise to the obligation Plaintiff is trying to enforce. *Id*. at ¶¶ 131-37. Count II of Plaintiff's Complaint identifies 25 U.S.C. § 4011 and 4044, in addition to 25 U.S.C. § 162a as

[1] While Plaintiff asserts that its Claims I and II are not predicated upon the APA, and did not plead the APA as a waiver of sovereign immunity, courts in this circuit have overlooked this pleading failure to consider whether the APA's waiver of sovereign immunity applies. *See Z Street, Inc. v. Koskinen*, 44 F. Supp. 3d 48, 64 (D.D.C. 2014). Nonetheless, even if sovereign immunity has been waived, Plaintiff has failed to state a claim because Plaintiff has not alleged any action that Federal Defendants took or failed to take giving rise to its lawsuit in Counts I, II, or III. *See infra* pp. 4-9. Should the Court consider whether Plaintiff has properly pled any other waiver of sovereign immunity, Plaintiff's general reference to "treaties, agreements, and statutes as set out herein" provides no unequivocal waiver of the Federal Defendants' sovereign immunity. Compl. ¶ 141. Plaintiff's reliance on 28 U.S.C. §§ 1331, 1361, 1362 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202 (Compl. ¶ 90) is similarly misplaced because these provisions do not waive Federal Defendants' sovereign immunity. *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) (holding that 28 U.S.C. § 1331, which states that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States[,]" does not constitute a waiver of sovereign immunity); *Stone v. Dep't of Treasury*, 859 F. Supp. 2d 53, 58 (D.D.C. 2012) (holding that the Declaratory Judgment Act, 28 U.S.C. § 2201 does not waive sovereign immunity). Finally, Plaintiff's reliance on the appropriations acts fares no better because nothing in the appropriations rider equivocally and expressly waives Federal Defendants' sovereign immunity. Motion 10.

statutory bases for its cause of action. *Id*. at ¶¶ 138-154. Count III expressly relies on the APA as a cause of action. *Id*. at ¶¶ 155-167. Accordingly, since there is no alternative cause of action identified for Count I, the only other basis for relief is the APA. In short, Plaintiff has plead three claims seeking the same relief under different legal theories. However, none of Plaintiff's three counts state a valid cause of action under the APA.

As a result, Counts I and III must fail because Plaintiff has not challenged any final discrete agency action as required to bring a claim under the APA.[2]

The APA limits those agency actions that are subject to judicial review:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

5 U.S.C. § 704. An agency action is final when (1) the action marks the "consummation of the agency's decisionmaking process" and (2) the action is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). Final agency actions may include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]" 5 U.S.C. § 551(13). The Court, however, is unable to review the allegations at issue in Plaintiff's Complaint because Plaintiff has not identified any discrete

[2] The APA supplies a party's cause of action and is not, as is sometimes stated, a source of jurisdiction. *See, e.g., Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1298 (D.C. Cir. 2007) (citing *Trudeau v. FTC*, 456 F.3d 178,184 (D.C. Cir. 2006) ("the APA's final agency action requirement is not jurisdictional")); *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) ("The judicial review provisions of the APA are not jurisdictional" (citing *Califano v. Sanders*, 430 U.S. 99 (1977)). A dismissal for failure to satisfy the APA's requirements for judicial review of agency action is thus a dismissal for failure to state a claim under Rule 12(b)(6).

agency action, and instead requests an "accounting to the earliest possible date." Pl.'s Opp'n 19, 20, 30. Furthermore, to the extent that Plaintiff alleges that the agency has not met its obligations under the Trust Reform Act, 25 U.S.C. §§ 4011 and 4044, and that statute provides a right of action for Plaintiff's claims to proceed, Federal Defendants are not required under the statutes to provide an accounting as Plaintiff seems to define it nor are they required to provide the "accounting" "to the earliest possible date" as Plaintiff alleges.[3] Thus, Plaintiff is without relief because no statute requires that which Plaintiff seeks.

"A sure sign that a complaint fails the 'final agency action' requirement is when 'it is not at all clear what agency action [plaintiff] purports to challenge.'" *Friends of the Earth, Bluewater Network Div. v. U.S. Dep't of Interior*, 478 F. Supp. 2d 11, 25 (D.D.C. 2007) (quoting *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 595 (D.C. Cir. 2001)). A plaintiff "must direct its attack against some particular 'agency action' that causes it harm, because if a court does not limit its review to 'discrete' agency actions, it risks embarking on the kind of wholesale, programmatic review of general agency conduct for which courts are ill-suited, and for which they lack authority." *Bluewater*, 478 F. Supp. 2d at 25 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)).

In *Bluewater*, the plaintiffs challenged authorizations regarding off road vehicle uses ("ORV") at various parks operated by the National Park Service. In finding that plaintiffs failed to challenge discrete final agency actions when they asserted general challenges to ORV authorizations, the court found that the plaintiffs did not identify any discrete, historical agency action that resulted in the existing authorization of ORV use at a specific park unit. As the court

[3] Plaintiff, in its opposition, clearly states that it does not dispute the results of the Reconciliation Report, which was required to be provided by Federal Defendants under the obligations outlined in 25 U.S.C. § 4044. *See* Pl.'s Opp'n 28 ("As such, the TRP Report deficiencies are not the subject of this case.").

stated, "'[t]he federal courts are not authorized to review agency policy choices in the abstract.'" *Bluewater*, 478 F. Supp. 2d at 24 (quoting *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006)). In *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489–90 (5th Cir. 2014), the United States Court of Appeals for the Fifth Circuit considered the specific issue of whether a tribe can assert a general challenge to the actions of various agencies under the APA, and it concluded that "[b]ecause the Tribe fails to point to any identifiable '*agency action*' within the meaning of § 702 . . . the Tribe has failed to prove that subject-matter jurisdiction exists for this lawsuit" (emphasis added); *see also Osage Producers Ass'n v. Jewell*, 191 F. Supp. 3d 1243, 1249 (N.D Okla. 2016) (finding no jurisdiction to hear "generic challenge to an amorphous group of several hundred administrative decisions"); *Sierra Club v. Peterson*, 228 F.3d 559, 566–67 (5th Cir. 2000) (en banc). Similar to the *Alabama-Coushatta Tribe* plaintiffs, Plaintiff here has failed to identify any agency action which would thus permit this Court's review.

Plaintiff makes the correlation that Counts II and III do not present impermissible programmatic challenges because they only allege certain failures as it pertains to Plaintiff's trust funds and trust assets. Pl.'s Opp'n 16-17. Yet, the requested relief in Count II repeatedly references programmatic initiatives that go to the whole of Interior's administration of beneficiaries' trusts. For example, Plaintiff's utilization of the phrases "[p]rovide adequate systems for accounting for and reporting" (¶¶ 154(2) and 167(2)); "[p]rovide adequate controls over receipts and disbursements" (¶¶ 154(3) and 167(3)); "[e]stablish consistent, written policies and procedures for trust fund management and accounting" (¶¶ 154(7) and 167(7)); and "[p]rovide adequate staffing, supervision, and training for trust fund management and

accounting" (¶¶ 154(8) and 167(8)) inherently invoke general agency conduct and belies invocation of a discrete action. Plaintiff's Complaint seeks a wholesale programmatic challenge.

Likewise, the Court here cannot review agency action on the merits, let alone make the necessary threshold evaluations of an APA case if it does not know what agency action is being challenged. Thus, Plaintiff's "allegations [are] of past, ongoing, and future harms, seeking wholesale improvement and cover actions that have yet to occur . . . . Such allegations do not challenge specific agency action." *Alabama-Coushatta Tribe*, 757 F.3d at 489-91 (citations omitted). Because Plaintiff fails to point to any identifiable agency action under Sections 702 and 704 of the APA that Federal Defendants were obligated to perform and did not, Plaintiff's claims should be dismissed.

Plaintiff's legal challenge in this case is distinguishable from the cases upon which it relies. *See* Pl.'s Opp'n 2-3, 8, 9, 11 (citing *Sisseton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell,* 130 F. Supp. 3d 391 (D.D.C. 2015)). Plaintiff relies on *Sisseton* to suggest that this Court and the D.C. Circuit has affirmed that the waiver of sovereign immunity in § 702 of the APA evidences the government's "consent to suit" in tribal trust cases. Pl.'s Opp'n 11. In *Sisseton*, the court found that plaintiffs challenged the reconciliation reports required under the 1994 Act. 130 F. Supp. 3d at 396. Here, Plaintiff does not challenge the Trust Reconciliation Project Report that was required to be provided under the 1994 Act, and as such, cannot rely on Sisseton to demonstrate that Federal Defendants are required to provide an accounting to the earliest possible date. Pl.'s Opp'n 28. Plaintiff's programmatic claim is not synonymous with the type of claim allowed to proceed under *Sisseton*.[4]

[4] Plaintiff also cites *Fletcher v. United States*, 730 F.3d 1206, 1209-10 (10th Cir. 2013), a case that is inapposite. Pl.'s Opp'n. 16. The *Fletcher* plaintiffs in their Third Amended Complaint, alleged that they were entitled to an accounting pursuant to 25 U.S.C. §§ 162a and 4011 for

Plaintiff relies upon *Chickasaw Nation v. Department of the Interior*, 120 F. Supp. 3d 1190, 1226-30 (W.D. Okla. 2014), but this out-of-circuit case does not establish precedent. Notwithstanding its inapplicability to the present case, the *Chickasaw* court, as a basis for its waiver of sovereign immunity, relied on a series of appropriations acts that expired in 2014 and do not toll Plaintiff's claims. *See infra* pp. 10-11, 16, 20 (addressing the inapplicability of *Otoe-Missouria*).

Furthermore, Plaintiff argues that its claim to provide an accounting to the earliest possible date is within the zone of interests to be protected by Trust Reform Management Act, 25 U.S.C §§ 4011 and 4044 and the United States' ongoing trust obligations. Compl. ¶¶ 138-54. As was recognized by the Supreme Court, in order for a cognizable claim of breach of trust against the government to proceed, a tribe must "identify a substantive source of law that establishes specific fiduciary or other duties and allege that the Government has failed to perform those duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). *See also Navajo Nation v. U.S. Dep't of the Interior*, No. CV-03-00507-PCT-GMS, 2019 WL 3997370, at * 2 (D. Ariz. Aug. 23, 2019) (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) ("[w]hen [a] Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, neither the Government's control over Indian assets nor

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Section 4 Royalty Payments distributed from the Osage Mineral Estate. *Fletcher v. U.S.*, No. 02-CV-427-GKF-FHM , 2012 WL 1109090, at *4, 7 (N.D. Okla. March 31, 2012). The *Fletcher* plaintiffs' claim is different from Plaintiff's claims. The *Fletcher* plaintiffs identified that they were entitled to receive an accounting pursuant to a statutory obligation, not applicable here, which created a particular right for a specific agency action—Section 4 Royalty Payments. Here, Plaintiff broadly argues that it is entitled to "as full and complete accounting as possible of the Nation's funds, assets[,] and natural resources to the earliest possible date," an accounting that Plaintiff has not established Federal Defendants are required to make. Compl. ¶ 154, 167, 167. Without a discrete action for which Federal Defendants are obligated to provide by statute, Plaintiff's claims fail.

common-law trust principles matter . . . . The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("While it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations." (citations omitted)).

Here, Plaintiff alleges that the Trust Reform Management Act of 1994 created a duty for Federal Defendants to provide an accounting and an accounting to the earliest possible date, an obligation that is not established in statute. However, Plaintiff has not identified a specific fiduciary duty grounded in statute that supplies a cause of action for the type of accounting that they seek. Plaintiff does not claim that Interior has failed to provide the requisite Trust Reconciliation Project report, rather, Plaintiff claims only that the Trust Reconciliation Report is inaccurate. *See* Pl.'s Opp'n 28. On this basis alone, Plaintiff's claims under the APA, 5 U.S.C. §§ 702, 704, and 25 U.S.C. §§ 4011 and 4044 cannot proceed.

ii. Plaintiff fails to state a valid claim under 5 U.S.C. § 706.

Plaintiff alleges that its trust accounting claims are based upon Section 706 of the APA, which allows courts "to compel agency action unlawfully withheld or unreasonably delayed," and that therefore this Court can compel Federal Defendants to provide a "full and complete" historical trust accounting to Plaintiff. Pl.'s Opp'n 19. Plaintiff's allegations lack merit and should be rejected.

In order to satisfy Section 706 of the APA, Plaintiff first has to demonstrate that it has a cause of action under the APA, and that under the facts of this case, Plaintiff is entitled to the "full and complete" accounting that is not otherwise contemplated by Sections 4011 and 4044 of

the Trust Fund Management Reform Act. Plaintiff cannot satisfy these requirements. Thus, Plaintiff is not entitled to review under Section 706 of the APA. *See Norton v. S. Utah Wilderness All. ("SUWA")*, 542 U.S. 55, 64 (2004); *see also Alabama-Coushatta Tribe of Texas*, 757 F.3d at 491; *Sierra Club*, 228 F.3d at 565.

Plaintiff does not claim that Interior has failed to provide the requisite periodic statements of performance, daily balances, or the Trust Reconciliation Report for Plaintiff's trust accounts. Compl. ¶¶ 129, 149; Pl.'s Opp'n 28. Rather, Plaintiff claims only that the collective statements that it has received and continues to receive from Interior are not accurate. In other words, Plaintiff presents essentially the type of legal challenge that the Supreme Court has rejected. Plaintiff's request for a "full and complete" historical accounting of the entirety of its monetary and non-monetary trust assets, "extend[ing] back to the earliest possible date," is a programmatic challenge that falls outside the ambit of the APA's waiver of sovereign immunity. *See* Motion 18 (citing, *inter alia*, *SUWA*, 542 U.S. at 64); *see also Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988) ("The agency has acted . . . . Petitioners just do not like what the Commission did . . . . Our acceptance of petitioners' argument would make a nullity of statutory deadlines. Almost any objection to an agency action can be dressed up as an agency's failure to act."). Thus, "[u]nder the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." *SUWA*, 542 U.S. at 64 (internal citations omitted) (emphasis in original). Plaintiff fails to do that here. Accordingly, its challenge is unsustainable.

In support, Plaintiff cites another out-of-circuit case in the Western District of Oklahoma—*Otoe-Missouria*—which is dissimilar to Plaintiff's claims. Pl.'s Opp'n 20. There, the Court found that while the Interior Department sent the tribe a Trust Reconciliation Project

Report in 1996 that met its obligations under Section 4044 of the Trust Fund Management Reform Act, the tribe denied that it received the report. No. 06-1436-C, 2008 WL 5205191, at *2 (W.D. Okla. December 10, 2008). Thus, the Court held that "Plaintiff is entitled to pursue this action under § 706(1), as Plaintiff may compel Defendants to perform the discrete activity of accounting for the funds held in trust as required under § 4044." *Id*.

Here, Plaintiff states that its claim is for "an accounting from the United States, and the TRP Report is not an accounting. As such, the TRP deficiencies are not the subject of this case." Pl.'s Opp'n 28. Plaintiff essentially claims that Interior's accounting information is not accurate, but does not allege a discrete activity that Federal Defendants were required to make under the 1994 Act. *See* Motion 18 (noting that, in *SUWA*, the Supreme Court held that a plaintiff can proceed under § 706(1) only where the "plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*"). Additionally, the factual issue about whether the defendants had complied with their statutory obligations was predicated on the tribe denying that it ever received a TRP report.

Plaintiff further submits that *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1279 (D.C. Cir. 2005) is applicable to this case, Pl's Opp'n 19, thought its argument is unfounded. The *National Ass'n* plaintiffs challenged specific decisions taken by the Corps of Engineers under its nationwide permit process for activities involving certain discharges of dredged or fill material. *Id*. at 1275. Here, Plaintiff has not identified a discrete agency action required by statute for the agency to perform, and not performed by the agency, upon which to focus its attack. Therefore, this Court should reject Plaintiff's argument that it can proceed with its claims under the APA.

C. Plaintiff's claims constitute claims for money damages that are not reviewable in this Court.

Even if Plaintiff had identified enforceable trust duties, the breach of those duties could not be brought in this Court because Plaintiff's requests that the Court "[r]estore those Cherokee Trust Funds for which the United States account." Compl. ¶ 167(10). That request is nothing more than a disguised claim for money damages which is not available under the APA. The APA's cause of action applies only where there is "no other adequate remedy" available in another court. 5 U.S.C. § 704; *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 846 F.3d 1235, 1244–45 (D.C. Cir. 2017). Here, however, an adequate remedy for the restoration of funds resides with the Court of Federal Claims. Claims for money damages in the Court of Federal Claims under the Tucker Act (or Indian Tucker Act as the case may be) "is presumptively an 'adequate remedy' for § 704 purposes." *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1349 (Fed. Cir. 2005); *but see Kidwell v. Dep't of Army*, 56 F.3d 279, 284-85 (D.C. Cir. 1995). For Plaintiff's claims that amount to a restoration of trust funds, or money damages, it is Plaintiff's burden to demonstrate the remedies available in the Court of Federal Claims are not adequate. *Consol. Edison Co. of New York v. U.S., Dep't of Energy*, 247 F.3d 1378, 1383 (Fed. Cir. 2001). Plaintiff has not made that showing here, and thus, its requested relief that the Court restore Plaintiff's funds for which the United States cannot account, should be dismissed.

D. Plaintiff's claims are extinguished under the ICCA, and are otherwise time-barred.

Even if the Court were to find that Plaintiff's claims targeted specific agency actions, some of Plaintiff's claims are extinguished by law, while others are time-barred.

i. Plaintiff's claims pre-dating August 13, 1946 are extinguished.

Plaintiff's claims that pre-date August 13, 1946 are barred by the ICCA. *See* Motion 20-21. Plaintiff asserts that Federal Defendant's alleged duty is a continuing one and that a breach

of that duty gives rise to a claim as the breach continues. Pl.'s Opp'n 25-26. Plaintiff's defense is unavailing and has been deemed not to apply to Plaintiff's claims. *Id*. Essentially, Plaintiff's claims amount to challenges to several judgments—the ICCA in 1946 and the account reconciliations made under the 1994 Act. Where a tribe was aware of those judgments many years ago and failed to act, its claims are barred. *See Sisseton-Wahpeton Sioux Tribe, of the Lake Traverse Indian Reservation, N.D. & S.D. v. United States*, 895 F.2d 588, 592–93 (9th Cir. 1990) ("The Tribes, in contrast, had immediate knowledge of the precise share of money Congress found them entitled to as well as Congress' intent to distribute the balance to others . . . . The allocation of funds rather than a demand for payment to the Tribes was the triggering event that commenced the running of the statute of limitations."). Furthermore, Indian beneficiaries, like other plaintiffs, are charged with notice of the facts that would have been uncovered by an inquiry appropriate under the circumstances. *Menominee Tribe of Indians v. U.S.*, 726 F.2d 718, 720-22 (Fed. Cir. 1984).

The ICCA extinguished any claims that were not brought prior to 1951.[5] *Sisseton-Wahpeton*, 895 F.2d at 592–93. The chief purpose was "to dispose of the Indian claims problem with finality" and "to transfer from Congress to the Indian Claims Commission the responsibility for determining the merits of Native American claims." *United States v. Dann*, 470 U.S. 39, 45 (1985). The D.C. Circuit has agreed:

> A court cannot, 120 years later, adjudicate the validity of the quitclaim deeds and agreements between the Sioux tribes and the United States without violating both the letter and the intent of the Indian Claims Commission Act. As the Eighth

[5] Should the Court find that Plaintiff's claims were not extinguished by the ICCA, Plaintiff's claims are nonetheless barred by the six year statute of limitations, as noted *infra* pp. 18-20. Furthermore, Plaintiff's argument that the United States' duty to account extends back to the undefined earliest possible date is baseless because the ICCA extinguished pre-1946 claims and all other claims outside of the six year statute of limitations are barred. *See Dann*, 470 U.S. at 45 (holding that allowing pre-1946 claims to proceed undermines the purpose of the ICCA).

> Circuit stated in rejecting an analogous claim by the Oglala Sioux concerning a different portion of the former Great Sioux Reservation, "Congress has deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy" and thereby barring "any other form of relief." *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 650 F.2d 140, 142–43 (8th Cir. 1981); *see also Six Nations Confederacy v. Andrus*, 610 F.2d 996, 998 (D.C. Cir. 1979).

Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Engineers, 570 F.3d 327, 333 (D.C. Cir. 2009). As the Court explained in *Menominee* and as is the case with the ICCA, "the [Indian Self-Determination Act] and [Contract Disputes Act] establish a clear procedure for the resolution of disputes over ISDA contracts, with an unambiguous 6-year deadline for presentment of claims. The 'general trust relationship' does not override the clear language of those statutes." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S.Ct. 750, 757 (2016). As such, Plaintiff had until August 13, 1951, to put before the Indian Claims Commission any trust accounting and trust mismanagement claims that it had and that pre-dated August 13, 1946.

In fact, Plaintiff availed itself of the ICCA process. *See, e.g., Cherokee Nation v. United States,* 9 Ind. Cl. Comm. 162 (1961) (obtaining an over $14 million dollar judgment on a land claim); *Cherokee Nation v. United States*, 12 Ind. Cl. Comm. 570 (1963); *Cherokee Nation v. United States,* 17 Ind. Cl. Comm. 331 (1966) (obtaining a nearly $4 million award on a land claim); *Cherokee Nation v. United States,* 20 Ind. Cl. Comm. 379 (1969); *Cherokee Nation v. United States,* 20 Ind. Cl. Comm. 380 (1969). Indeed, the ICC even dismissed certain claims brought by the Cherokee, because they had already been adjudicated by the Supreme Court. *See* 2 Ind. Cl. Comm. 50, 65 (dismissing claims in part because they had already been adjudicated in *United States v. "Old Settlers"*, 148 U.S. 427, 431 (1893)). It appears that some of the very transactions that Plaintiff now complains of were previously adjudicated by the ICC. Regardless

of whether Plaintiff's claims are barred by the doctrine of res judicata, or by operation of Section 12 of the ICCA, any claims that Plaintiff asserts in this case and that pre-date August 13, 1946, are extinguished, and therefore this Court lacks jurisdiction over those claims.

Plaintiff asserts that Federal Defendants have not repudiated their trust responsibilities, and that without repudiation, the claim does not accrue, and could not have been extinguished by the ICCA. Plaintiff's Opp. 25. Plaintiff's contention suggests that the requisite accrual entails some formal announcement from the Trustee that the trust has been terminated. However, that is not the standard for accrual purposes. In *Shoshone Indian Tribe of the Wind River Reservation v. United States*, the Federal Circuit found "[a] trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as [a] trustee." 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("*Shoshone II*"). Additionally, the Court deemed the beneficiary's knowledge of the repudiation to be a critical element of repudiation, *i.e.*, the trustee had to "plac[e] the beneficiary on notice that a breach [of trust] has occurred." *Id*.

Citing *Cobell v. Norton*, 260 F. Supp. 2d 98 (D.D.C. 2003), Plaintiff asserts that the United States has taken the "coward's route" by failing to provide Plaintiff with a "full and complete" historical trust accounting. *Id.* at 25-26. Plaintiff's entire Complaint is a concession that they have long had knowledge of Federal Defendants' alleged failures "to provide to the Nation any of the accounting required by 25 U.S.C. § 4011 and 25 U.S.C. § 4044[,] to provide the accounting required by the Treaties, agreements, and statutes as set out herein" (Compl. ¶ 141) and to provide "the Nation with as full and complete accounting as possible of the Nation's funds to the earliest possible date" (*id*. ¶ 167). Thus, Plaintiff admits that it has long been aware of the Government's alleged failures to act consistent with a purported trust duty. Therefore,

under *Shoshone II*, Plaintiff had knowledge of its claims, and Plaintiff's suggestion that without repudiation, its claims could not have been extinguished by the ICCA, is unavailing.

Furthermore, the cited appropriations acts did not toll the statute of limitations on Plaintiff's claims. As explained in Federal Defendants' Motion, Congress provided, in a series of Interior Department appropriations acts between October 1, 1989, and September 30, 2015, that "the statute of limitations shall not commence to run on any claim . . . 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."[6] In the *Otoe-Missouria* decision, cited by Plaintiff, the Western District of Oklahoma relied upon a provision—"including any claim in litigation pending on the date of the enactment of this Act." 2008 WL 5205191 at *4. This provision was subsequently removed from the Interior Department appropriations act for Fiscal Year 2016 (which became effective on October 1, 2015), and no tolling provision has been included in recent appropriations acts. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2526-52, Div. G. Title I; s*ee also Wyandot Nation of Kansas v. United States*, 124 Fed. Cl. 601, 604 (2016) (acknowledging cessation of Appropriations Act riders after fiscal year 2014). Thus, there is no tolling language that is applicable to Plaintiff's claims.

Plaintiff contends that other courts have rejected the claim that the tolling provision of the various appropriations acts is limited to the fiscal year, Pl.'s Opp'n 27, and in support, relies upon *Ute Indian Tribe of the Uintah and Ouray Indian Reservation v. United States*, 145 Fed. Cl.

[6] In 1991, Congress added the clause "from which the beneficiary can determine whether there has been a loss," Pub. L. No. 102-154, 105 Stat. 990, 1004, and in 1993, Congress added "including any claim in litigation pending on the date of this Act," Pub. L. No. 103-138, 107 Stat. 1379, 1391.

609 (2019). Plaintiff's reliance on *Ute* is misplaced. In *Ute*, the Court of Federal claims held that the government had repudiated any trust duties in 1986 through the filing of an amicus brief to the Supreme Court, and thus, the plaintiff was on notice that the government's subsequent failure to deposit funds arose from its repudiation. *Id*. at 626. Therefore, the court did not reach the issue of whether the Indian Trust Accounting Statute ("ITAS"), enacted in 2014, tolled plaintiff's claims, given the government's express repudiation (and plaintiff's knowledge of its claims) in 1986 of the Tribe's rights or ownership of the public domain lands. *Id*. at 627 (citing *Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013) which found the ITAS inapplicable and held that where "a claim concerns an open repudiation of an alleged trust duty, a final accounting is unnecessary to put the claimants on notice of the accrual of their claim"). Since the *Ute* court recognized that repudiation occurred and that plaintiff was aware of its claim, the Court of Federal Claims determined that the ITAS was inapplicable, and thus, did not reach the question of whether the ITAS tolled plaintiff's claims. Plaintiff is incorrect that *Ute*'s holding is applicable with respect to the ITAS and its tolling of Plaintiff's claims. *See also* Pl.'s Opp'n 27 (citing *White Mountain Apache, v. United States*, No. 17-359 L, Op. and Order (Fed. Cl. January 5, 2018)) (applying its application of the appropriations acts language and the issue of tolling in the context of the Tucker Act, which Plaintiff does not allege as a basis for jurisdiction)).

But even if the appropriations acts are still effective, they are nonetheless inapplicable to Plaintiff's claims in this case. Plaintiff has brought an action for an accounting. They have not brought any claims "concerning losses to or mismanagement of trust funds." As the Tenth Circuit recognized in *Flute, et al. v. United States*, 808 F.3d 1234, 1243 n.6 (10th Cir. 2015), the appropriations acts language, on its face, "is limited to claims for 'losses to or mismanagement'

of trust funds." *Id*. The *Flute* plaintiffs also sought a broad accounting that they argued was owed pursuant to statutes dating back to the 1800s and argued that the appropriations acts tolled the commencement of the statute of limitations for their accounting claim. But the court stated:

> Thus, it is unclear that [the appropriation act] would apply to Plaintiffs' claim for a trust accounting, particularly where Plaintiffs have expressly disavowed any claim for damages stemming from the loss or mismanagement of trust funds. And reading the [appropriation act] to encompass Plaintiffs' claim for an accounting would mean the statute tolls the accrual of claims for a trust accounting until after an accounting has been provided, thereby making the right to seek an accounting eternal."

Id. Plaintiff's right to seek an accounting is not eternal, rather, it is subject to the statute of limitations in 28 U.S.C. § 2401 without tolling.

ii. Plaintiff's claims pre-dating July 19, 2013 are time-barred.

Plaintiff argues that Trust Reconciliation Project report did not constitute the accounting that Plaintiff deems to be required by 25 U.S.C. §§ 4011 and 4044, and that Interior has not provided Plaintiff with as full and complete an accounting as possible of Plaintiff's trust funds to the earliest possible date. Plaintiff's Opp. 28. Plaintiff's averment is baseless. Plaintiff received the TRP report materials in 1996. Given the provision of those materials, Plaintiff has had ample notice, long before July 19, 2013 (that is, six years before Plaintiff lodged this case), of any claims that Plaintiff had or might have had regarding Interior's compliance with Sections 4011 and 4044 of the Trust Fund Reform Management Act.

Plaintiff asserts that this Court has rejected the applicability of a six year statute of limitations and its applicability to Plaintiff's claims. In support, Plaintiff advances *Sisseton* and *Nez Perce Tribe v. Kempthorne*, No. 06-2239 (JR), 2008 WL 11408458, at *2 (D.D.C. Dec. 1, 2008). Both cases are distinguishable. Plaintiff suggests that the *Sisseton* court "implicitly reject[ed] the argument that the Settlement of Tribal Claims Act established an accrual date of

December 31, 2000," Pl.'s Opp'n 29-30, however, that is not an accurate representation of the *Sisseton* holding. In *Sisseton*, the court declined to rule on the statute of limitations and noted that the Committee on Indian Affairs took no position on whether the receipt of the reconciliation reports triggered the statute of limitations. 130 F. Supp. 3d at 396-97. The application of *Nez Perce* similarly fails to advance Plaintiff's case. In that case, the court recognized that there was a statute of limitations that ran on December 31, 2006 and suggested that as relevant to the facts of *Nez Perce*, Congress passed additional appropriations riders to extend the limitations period. 2008 WL 11408458 at *2 n.2. Here, Plaintiff filed its Complaint in 2019, well after the passage of the appropriations riders that were examined in *Nez Perce*, in 2008. Thus, the facts of that particular case are unavailing. Notably the *Nez Perce* plaintiffs also sought an accounting and alleged that the Trust Reconciliation Project Report was insufficient. That case was filed as a putative class action here in the U.S. District Court for the District of Columbia three days before the running of the statute of limitations. The court recognized that the statute of limitations ran on certain claims for any later filed suits. Accordingly, before the court denied class certification, it directed that a court-ordered notice be sent to all putative class members, *e,g.*, all tribes, including Plaintiff, that received the Trust Reconciliation Project Report but were not involved in active litigation. That notice, attached hereto as Attachment A (2008 *Nez Perce* Order), directly referenced the statute of limitations and advised that the tribes' rights could be affected. That notice clearly and unequivocally provides notice of the potential claims that Plaintiffs now bring over ten years later. Plaintiff cannot credibly dispute that it was on notice of its potential claims and cannot reliably claim that its claims should be tolled. Indeed, Plaintiff was provided notice at the direction of the court to advance their claims in light of the end of the limitations period, yet Plaintiff chose not to do so. Nothing in Plaintiff's Complaint or

in its opposition to Federal Defendants' Motion provides a basis to revive their time-barred claims.

Furthermore, Plaintiff misapprehends the language of the most recent and relevant appropriations act. Contrary to Plaintiff's argument, the most recent appropriations act, Pub. L. No. 114-113, 129 Stat. 2242 (2015), did not include the language "including any claim in litigation pending on the date of this Act," upon which by this Court relied in *Otoe-Missouria* to find that the plaintiff's claims in that case were tolled and that there was no ambiguity in the language of the act. *See Otoe-Missouria*, 2008 WL 5205191, at *4 (citing Pub. L. No. 109-54, 119 Stat. 499 (2005)); *see also BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("[A court's] inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (citation omitted); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."). Plaintiff's argument is unpersuasive and should be rejected. Under any construction of Plaintiff's trust funds or non-monetary trust assets-related claims herein, the statute of limitations has run for those claims that pre-dated July 19, 2013. Thus, should any of Plaintiff's claims survive, only those alleged under the statutory duty imposed by 25 U.S.C. §§ 4011 and 4044 (Count II) from July 19, 2013 to the present may proceed.

E. Federal Defendants do not have a duty to account for Plaintiff's non-monetary resources.

As stated above, none of the substantive law that Plaintiff cites establishes a specific fiduciary duty to account for non-monetary resources. Plaintiff argues that, consistent with the ruling in *Otoe-Missouria*, Plaintiff is entitled to an accounting of its non-monetary assets. *See*

Pl.'s Opp'n 36. *See also supra* pp. 10-11, 16, 20 (addressing the inapplicability of *Otoe-Missouria*). Plaintiff's reliance on 25 U.S.C. § 162a(d)(8) is similarly misplaced and should be rejected.

As to the statutory basis of Plaintiff's argument, the United States Court of Federal Claims ("CFC") ruled in *Crow Creek Sioux Tribe v. United States*, 132 Fed. Cl. 408, 411 (2017), that no specific fiduciary duties arise under 25 U.S.C. § 162a(d)(8). The CFC ruled that the "trust relationship between the United States and Indian tribes, while robust, imposes only general obligations except where more specific obligations have been assumed by the government via regulation or statute. 25 U.S.C. § 162a(d)(8) does direct the government to manage the natural resources of Indian tribes, but does not direct any specific actions to be taken by the government in that management." *Id*. Thus, absent statutory authority requiring government to "more affirmatively manage" Plaintiff's natural resources, Plaintiff's claims in this case cannot stand. *Id*.

Moreover, Plaintiff seems to ignore or misconstrue the cases to which it cites, by not acknowledging that the primary issue was whether the government had to account, not for the tribal natural resources themselves, but rather for the proceeds or funds that resulted from the leasing or production of those resources. *See Fletcher*, 730 F.3d at 1209 (holding that the government must account for royalty payments from oil and gas reserves); *Osage Tribe of Indians of Oklahoma v. United States*, 68 Fed. Cl. 322, 331 (Fed. Cl. 2005) (identifying a fiduciary duty to hold in trust monies generated from oil, gas, coal, and other mineral leases); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1350 (Fed. Cir. 2004) (holding that the United States had a fiduciary duty to manage and collect

revenues derived from mining leases). None of these cases evinces a trust accounting duty for a tribe's non-monetary trust resources.

Further, Plaintiff appears to misunderstand the holding in the Western District of Oklahoma's *Otoe-Missouria* decision. The court held in that case that the duty to account for non-monetary assets held in trust exists "for the reasons set forth earlier in this opinion," and it relied upon Section 4044 of the Trust Fund Management Reform Act to identify the government's obligation to account for the account holder's *funds*.[7] *Otoe-Missouria*, 2008 WL 5205191, at *2, 5 (emphasis supplied). The court declined to reach the issue of whether the duty to account for either monetary or non-monetary assets can arise from any common law trust responsibility. *Id.* at *2 ("the Court will examine other sources for Defendants' duty"). For these reasons, the court should reject Plaintiff's claim regarding Federal Defendants' alleged duty to account for Plaintiff's non-monetary resources.

III. CONCLUSION

Plaintiff has not identified a viable cause of action for its claims to proceed, outside of the APA. Assuming that this Court allows Plaintiff to proceed with the APA as Plaintiff's cause of action for all of its claims, Plaintiff has not identified a discrete agency action that Federal Defendants are obligated to perform under 25 U.S.C. §§ 4011 and 4044 that would entitle Plaintiffs to an accounting or an accounting to the earliest possible date. At best, Plaintiff's request for an accounting and an accounting to the earliest possible date is the type of programmatic challenge that has been rejected by the Supreme Court under *SUWA*. Even if the Court were to find that Plaintiff's claims can proceed under the APA, Plaintiff's claims are

[7] *See supra* pp. 10-11 regarding the inapplicability of the *Otoe-Missouria* decision to Plaintiff's trust fund accounting claims.

extinguished under the ICCA because Plaintiff exhausted its claims in that forum long ago. For those claims that are not extinguished, they are time-barred under the applicable six year statute of limitations. For these reasons, the Court should dismiss Plaintiff's claims with respect to Count I and III and Count II claims that predate July 19, 2013.

Respectfully submitted this 13th day of December 2019.

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