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/DAR

FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER

Table of Contents

I. INTRODUCTION 1
II. PROCEDURAL BACKGROUND 3
III. LEGAL BACKGROUND AND STANDARD OF REVIEW 7
A. The Administrative Procedure Act 7
B. Plaintiff's Common Law Claims: 9
C. Fed. R. Civ. P 26(b)(1) 9
IV. ARGUMENT 10
A. The Court should decide the merits of Plaintiff's claims based upon the administrative record lodged with the Court which demonstrates the accounting required by law performed by Interior and provided to Plaintiff. 10
1. D.C. Circuit law dictates that the Court should decide the merits based upon a review of Federal Defendants' administrative record. 11
2. Federal Defendants have lodged an administrative record which demonstrates that it has complied with its obligations to perform an accounting as required by law. 13
B. In the alternative, discovery should be limited to what is relevant and proportional to the needs of the case. 16
1. The importance of the issues and amount in controversy. 19
2. The importance of discovery in resolving the issues. 20
3. The parties' relative access to the information, the parties' resources, and whether the burden or expense of the proposed discovery outweighs its likely benefit. 22
V. CONCLUSION 28

Table of Authorities

Cases

Am. Bioscience, Inc. v. Thompson, 243 F.3d 579 (D.C. Cir. 2001) 8
Arrow Enter. Computing Sols., Inc. v. BlueAlly LLC, No. 5:15-CV-37-FL, 2017 WL 876266 (E.D. N.C. March 3, 2017) 19
Bowen v. Mass., 487 U.S. 879 (1988) 20
Breiterman v. United States Capitol Police, 324 F.R.D. 24 (D.D.C. 2018) 17
Buie v. District of Columbia, No. CV 16-1920 (CKK), 2019 WL 4345712 (D.D.C. Sept. 12, 2019) 10, 17
Burlington Ins. Co. v. Okie Dokie, Inc., 368 F. Supp. 2d 83 (D.D.C. 2005) 21
Califano v. Sanders, 430 U.S. 99 (1977) 8
Camp v. Pitts, 411 U.S. 138 (1973) 3, 8, 11
Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 8
Clark Cty., Nev. v. Fed. Aviation Admin., 522 F.3d 437 (D.C. Cir. 2008) 8
Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999) 2, 12
Cobell v. Norton, 226 F.R.D. 67 (D.D.C. 2005) 20
Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) ("*Cobell VI*") 4, 12
Crawford El v. Britton, 523 U.S. 574 (1998) 20
Ctr. For Auto Safety v. Fed. Highway Admin., 956 F.2d 309 (D.C. Cir. 1992) 8
Ctr. for Biological Diversity v. Zinke, 260 F. Supp. 3d 11 (D.D.C. 2017) 7
Doraiswamy v. Sec'y of Labor, 555 F.2d 832 (D.C. Cir. 1976) 13
Edison Elec. Inst. v. Occupational Safety and Health Admin., 849 F.2d 611 (D.C. Cir. 1988) ... 13
Envtl. Def. Fund, Inc. v. Costle, 657 F.2d 275 (D.C. Cir. 1981) 13
Federal Trade Comm'n v. Staples, Inc., CV No. 15-2115 (EGS), 2016 WL 4194045 (D.D.C. Feb. 26, 2016) 26
Fletcher v. United States, 153 F. Supp. 3d 1354 (N.D. Okla. 2015) 15
Fletcher v. United States, 730 F.3d 1206 (10th Cir. 2013) ("*Fletcher II*") 2, 9, 14, 22
Fletcher v. United States, 854 F.3d 1201 (10th Cir. 2017) (*"Fletcher III"*) 15
Food Lion, Inc. v. United Food and Commercial Workers Int'l Union, AFL-CIO-CLC, 103 F.3d 1007 (D.C. Cir. 1997) 20, 27
Fund for Animals v. Babbitt, 903 F. Supp. 96, 105 (D.D.C. 1995) 13
Fund for Animals v. Williams, 245 F. Supp. 2d 49 (D.D.C. 2003) 13
Fund for Animals v. Williams, 391 F. Supp. 2d 191 (D.D.C. 2005) 8
Gulf Restoration Network v. Bernhardt, No. CV 18-1674 (RBW), 2020 WL 1930470 (D.D.C. Apr. 21, 2020) 7
James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085 (D.C. Cir. 1996) 8, 11
Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) 4
Mannina v. District of Columbia, CV No. 15-931 (KBJ/RMM), ___F.R.D.___, 2020 WL 555371 (D.D.C. Feb. 4, 2020) 26
McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001) 26
Meijer, Inc. v. Warner Chilcott Holdings Co., III, Ltd. 245 F.R.D. 26 (D.D.C. 2007) 28
Menkes v. U.S. Dep't of Homeland Sec., 637 F.3d 319 (D.C. Cir. 2011) 9

Menominee Indian Tribe of Wisc. v. United States, 136 S. Ct. 750 (2016) 2
Natural Res. Def. Council, Inc. v. Train, 519 F.2d 287 (D.C. Cir. 1975) 8
Norton v. *Southern Utah Wildlife Alliance*, 542 U.S. 55 (2004) 7
Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 322 F.R.D. 1 (D.D.C. 2017) .. 10, 17, 19
Rossville Convenience & Gas, Inc. v. Barr, No. CV 18-2630 (ABJ), 2020 WL 1703927 (D.D.C. Apr. 8, 2020) 7
Stark v. Wickard, 321 U.S. 288 (1944) 12
Sterne Kessler Goldstein & Fox, PLLC v. Eastman Kodak Co., 276 F.R.D. 376 (D.D.C. 2011) 27
Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685 (D.C. Cir. 1991) 8
U.S. v. Mitchell ("*Mitchell II*"), 463 U.S. 206 (1983) 9
U.S. v. Navajo Nation, 556 U.S. 287 (2009) (*"Navajo II")* 9
United States ex rel. Shamesh v. CA, Inc., 314 F.R.D. 1 (D.D.C. 2016) 10, 17
United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011) 2, 9, 21
United States v. Kellogg Brown & Root Servs., Inc., 284 F.R.D. 22 (D.D.C. 2012) 20, 21, 26
United States v. Testan, 424 U.S. 392 (1976) 7
Walter O. Boswell Mem'l Hosp. v. Heckler, 749 F.2d 788 (D.C. Cir. 1984) 8
Zelaya v. UNICCO Serv. Co., 682 F. Supp. 2d 28 (D.D.C. 2010) 27

Statutes

25 U.S.C. § 162a 4, 14
25 U.S.C. § 4011 ..... 4, 5, 11, 14
25 U.S.C. § 4044 ..... 5, 11, 14, 21
Administrative Procedure Act, 5 U.S.C. § 701 et seq. 2
5 U.S.C. § 702 7
5 U.S.C. § 706 ..... 7, 8

Federal Rules

Fed. R. Civ. P. 26 (generally) ..... passim
Fed. R. Civ. P. 26(c) 1
Fed. R. Civ. P. 26(b)(1) ..... passim
Fed. R. Civ. P. 26(b)(5)(C) 10
Fed. R. Civ. P. 34 16

Federal Regulations

25 C.F.R. § 115.801 14
25 C.F.R. § 115.803 14

Other Authorities

Restatement (Second) of Trusts § 201 (1959) 12

I. INTRODUCTION

Federal Defendants respectfully request that the Court enter an order pursuant to Fed. R. Civ. P. 26(c) limiting its review in this case to the administrative record and prohibiting traditional civil discovery as it is unnecessary to adjudicate Plaintiff's claims and is not proportional to the needs of the case. Discovery should only be authorized if Plaintiff, by motion, demonstrates by clear evidence that the application of one of the narrow exceptions permitting extra-record evidence is appropriate.

Plaintiff filed this action to compel an accounting of its trust funds and non-monetary trust resources. Corrected Complaint ("Compl."), ECF No. 2-1, ¶¶ 137, 142, 154, 167. Plaintiff titles each of the Complaint's three counts as "Accounting" claims and each count alleges that Plaintiff never received an adequate accounting. *See* Compl., "First Count: Accounting"; "Second Count: Accounting as a Federal Trust Responsibility"; "Third Count: Accounting as an Administrative Procedure Act Claim." Plaintiff asserts that the requested accounting is part of the federal trust responsibility and required by common law, is mandated by various treaties and statutes, and invokes the Administrative Procedure Act ("APA"). Compl. ¶ 133-36, 141, 153, 165; Parties' Joint Statement, ECF No. 46 at 2 ("Plaintiff . . . seeks a meaningful accounting of its assets held in trust by the United States and its agencies under common law, statutes, and the Administrative Procedure Act."); Parties' Suppl. Joint Statement, ECF No. 48 at 6 (Plaintiff stating that "this Court ultimately will be asked to enter an order requiring the United States to account for the Cherokee Nation's Trust."). Each cause of action boils down to the same claim: that Plaintiff is entitled to an accounting of all of its trust assets and that any accounting it has received did not comply with that required by law. *See* Parties' Joint Statement, ECF No. 46 at 2 (Plaintiff stating that it "seeks a meaningful accounting of its assets held in trust by the

United States and its agencies under common law, statutes, and the Administrative Procedure Act."). The extent of any accounting duty is an issue of statutory law and whether Federal Defendants complied with that duty should be decided on the administrative record. The Supreme Court has directly stated that "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law . . . ." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011); *accord Menominee Indian Tribe of Wisc. v. United States*, 136 S. Ct. 750, 757 (2016) ("We do not question the 'general trust relationship between the United States and the Indian tribes,' but any specific obligations the Government may have under that relationship are 'governed by statutes rather than the common law.'"). Similarly, as was recognized by the Tenth Circuit in *Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013) (Gorsuch, Circuit Judge) ("*Fletcher II*"), the confines of the United States' obligation to account to Plaintiff are defined by statute. 730 F.3d at 1209. And, as stated by this Court in *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999) wherein plaintiffs also sought an accounting, "Plaintiffs have alleged various statutory violations, and, in substance, the focus of their claims is to enforce the statutory right to an accounting." *Id*. at 24. Where a plaintiff states claims both within and outside the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, all of plaintiff's claims arise from "the statutory scheme giving defendants pervasive control of plaintiffs' . . . trust money." *Id*. Thus, "Plaintiffs' actionable rights in this case stem from and are shaped by three bodies of law. In all three cases, plaintiffs' substantive rights are created by—and therefore governed—by statute. *Id*. at 29-30.

In this vein, the proper lens to be applied is the review of the agency's administrative record which has already been submitted. *See id*. at 37 (stating that "the focal point of this court's APA review 'should be the administrative record already in existence, not some new

record made initially in the reviewing court.'") (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973). But, whether looked at through the lens of the APA or not, the proper way to answer the relevant question of whether the accounting that Interior has provided is in compliance with statutory directives is a focus on the applicable legal requirements and whether or not Interior's actions met those requirements. If Plaintiff believes that the administrative record is incomplete or if it believes it is entitled to extra-record evidence after its review of the administrative record, Plaintiff can so move the Court. There is no basis or need to engage in over two hundred years of discovery to determine if Federal Defendants complied with their statutory directives. That can all be achieved through a review of the final agency action and administrative record on summary judgment. Because this case can and should be decided efficiently and without undue delay on the administrative record and because Plaintiff can challenge the completeness of the administrative record or move for discovery on the administrative record, the Court should issue a protective order that prohibits traditional Rule 26 discovery as it is not necessary to adjudicate Plaintiff's claims and Plaintiff's discovery request for over two hundred years of documents is not proportional to the needs of the case.

II. PROCEDURAL BACKGROUND

Plaintiff filed its initial three-count complaint on July 19, 2019, seeking declaratory and injunctive relief. ECF Nos. 1, 2-1 (Errata). In Count I, Plaintiff seeks an order compelling Federal Defendants to provide an accounting for Plaintiff's Trust Funds that were created by treaty, other agreements, or by congressional or administrative action. Compl. ¶¶ 132, 137. Plaintiff's second and third Counts seek an injunction requiring Federal Defendants to perform a host of actions, including, a full and complete accounting as possible of the Nation's funds, assets and natural resources to the earliest possible date, provision of adequate systems for

accounting, management of natural resources, and restoration of funds for which Federal Defendants cannot account. *Id*. ¶¶ 154, 167.

Federal Defendants moved to dismiss for failure to state a claim and for lack of jurisdiction. ECF No. 34. The Court denied Federal Defendant's motion because Plaintiff had advanced a statutory responsibility under 25 U.S.C. §§ 162a and 4011 and that the United States' duties are interpreted "in light of the common law of trusts and the United States' Indian policy." Mem. Op. and Order, ECF No. 42 at 5. However, the Court noted that Plaintiff "cannot seek wholesale improvement of the Government's operations through a lawsuit." *Id*. (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). It concluded that "[a]t this early stage in the case" the Government's trust obligations fit the bill of "where an agency is under an unequivocal statutory duty to act . . . that triggers 'final agency action' review." *Id*. (quoting *Cobell v. Norton,* 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("*Cobell VI*") (citation omitted)).

The Parties submitted a joint 26(f) statement on February 11, 2020, the Court held a status conference on February 18, 2020, and the case was referred to Judge Robinson on the same day. Parties' Joint Statement, ECF No. 46; Min. Orders, Feb. 18, 2020. Following referral, this Court issued a discovery scheduling order requiring that the parties serve initial disclosures by April 13, 2020, commence propounding of discovery by April 20, 2020, and file any motions for a protective order to limit the scope of discovery by May 20, 2020. ECF No. 49.

On April 13, 2020, Federal Defendants served their initial disclosures and administrative record on Plaintiff, and lodged an index to the certified administrative record, which evidences the accounting provided to Plaintiff as required by law. ECF No. 51; Corrected Index, ECF No. 53-1. The administrative record contains background materials that the Department of Interior ("Interior") relied upon in the Trust Reconciliation Project, including testimony provided by

agency officials. *See* ECF No. 51-1; Corrected Index, ECF No. 53-1, Part A, "Chronology," at Sections 32-40. The administrative record also includes Cherokee-specific reconciliation reports provided to Plaintiff that were generated from the Trust Reconciliation Project, as required by 25 U.S.C. § 4044, dating from 1973 through 1997; annual audit reports provided to Plaintiff, as required by §§ 4011, dating from 1997 through 2008; and periodic statements of performance for the Tribe's assets, as required by 25 U.S.C. § 4011, dating from 1996 to September 30, 2019. *Id*., "Cherokee Nation of Oklahoma, Administrative Record Documents," "Reconciliation Report," "Annual Audits," "Periodic Statements of Performance." In total, the administrative record consists of over 100,000 pages.

Plaintiff's Requested Discovery:

Plaintiff served sixteen requests for production on April 20. *See* Ex. 1, Plaintiff's Requests for Production. Plaintiff's requests seek documents dating back over two hundred years, and include requests of *all* documents regarding any payments of money or goods made by the United States to Plaintiff pursuant to *any* treaty, Act of Congress, or Presidential Proclamation. *See id*., Request 1 (requesting "[a]ll documents regarding any payments of money or goods made by the United States to the Cherokee Nation pursuant to any treaty, including those set forth in the Complaint, Doc. No. 2-1, ¶¶ 17-48"); Compl. ¶ 18 (as example, "[t]he first treaty between the Nation and the United States is the Treaty of Hopewell, 7 Stat. 18 (Nov. 28, 1785")); Ex. 1, Requests 2-3 (seeking documents regarding any payment of money or goods pursuant to an Act of Congress and any Presidential Proclamation, including those set forth in the Complaint).

Plaintiff also seeks documents regarding the United States' appointment of principal chiefs. *See* Exhibit 1, Request 4. Requests 5 through 9 include, without any time limitation, all

documents regarding transactions for Cherokee Nation Lands, transactions for Cherokee Nation Resources, documents regarding Plaintiff's known financial accounts, documents relating to an accounting of Plaintiff's Trust Fund, and periodic statements of Plaintiff's trust fund provided to Plaintiff. Plaintiff also seeks all audits, reconciled account statements, documents concerning the balances, receipts or disbursements, and statements of account performance of the Trust Fund.[1] *See id*., Requests 10-14.

Finally, Plaintiff seeks transcripts of testimony related to the trust reconciliation process that resulted in the Arthur Andersen tribal reconciliation reports and testimony by any of the Defendants or their agents related to: policies and procedures for the management and/or accounting of Indian trust funds; training and supervision of staff for the management and/or accounting of Indian trust funds; creation of the Office of Special Trustee; processes and procedures involved in collecting Indian trust fund documents; General Accounting Office Reports related to Indian trust fund matters; Office of Inspector General Reports related to Indian trust fund matters; Reports of the Commissioner to the Five Civilized Tribes to the Secretary of the Interior; and Annual Reports of the Office of the Superintendent for the Five Civilized Tribes. *See id*., Requests 15 and 16. Plaintiff has previously stated that "[d]iscovery is needed to answer two questions that will permeate Plaintiff's proposed Phase I" and that includes "[w]hat is the proper scope of the accounting of the Cherokee Nation's Trust, and what is the appropriate methodology to employ?" Parties' Supplemental Joint Statement, ECF No. 48 at 2.

[1] Plaintiff defines "Trust Fund," as "assets and resources of the Cherokee Nation that generated or could have generated monetary income, including: money; proceeds from sale or conveyance of lands; profits from land; money from surface leases for agriculture; surface, oil and gas mining leases; coal leases; sand and gravel leases; businesses and town lots; income from property owned by the Nation; buildings; the Nation's records; and money resulting from Treaties or other agreements." Ex. 1, Requests for Produc. at 5.

III. LEGAL BACKGROUND AND STANDARD OF REVIEW

A. The Administrative Procedure Act

Under 5 U.S.C. § 702 of the Administrative Procedure Act ("APA"), a person aggrieved by agency action has the right to seek judicial review. The terms of the United States' consent to be sued in court "define that court's jurisdiction to entertain the suit," *United States v. Testan,* 424 U.S. 392, 399 (1976), and the APA provides a limited grant of sovereign immunity. *See Rossville Convenience & Gas, Inc. v. Barr*, No. CV 18-2630 (ABJ), 2020 WL 1703927, at *6 (D.D.C. Apr. 8, 2020); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Pursuant to that limited waiver, APA cases are to be decided based solely on the administrative record. 5 U.S.C. § 706. Section 706(1) authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed" and "provides relief for a failure to act." *Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 19-20 (D.D.C. 2017) (quoting *Norton* v. *Southern Utah Wildlife Alliance*, 542 U.S. 55, 62 (2004). "Notably, however, only certain *types* of agency failures can support a claim under § 706(1)." *Ctr. for Biological Diversity,* 260 F. Supp. 3d at 20 (emphasis in original). "It is well established that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*" *Id*. (emphasis in original) (quoting *Southern Utah Wildlife Alliance,* 542 U.S. at 64).

Section 706(2) requires "'district courts to hold unlawful and set aside agency action, findings, and conclusions' that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Gulf Restoration Network v. Bernhardt*, No. CV 18-1674 (RBW), 2020 WL 1930470, at *6 (D.D.C. Apr. 21, 2020). A district court must uphold an agency

decision "so long as the agency 'engaged in reasoned decisionmaking and its decision is adequately explained and supported by the record.'" *Id*. (quoting *Clark Cty., Nev. v. Fed. Aviation Admin.*, 522 F.3d 437, 441 (D.C. Cir. 2008).

"Section 706 of the APA directs a court evaluating an agency action to 'review the whole record or those parts of it cited by a party.'" *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 196 (D.D.C. 2005) (quoting 5 U.S.C. § 706; *Ctr. For Auto Safety v. Fed. Highway Admin*., 956 F.2d 309, 314 (D.C. Cir. 1992); *Natural Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975)). A court's review must "be based on the full administrative record that was before the [agency] at the time [it] made [its] decision," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001), and a court may not "attempt to create 'some new record made initially in the reviewing court.'" *Ctr. for Auto Safety*, 956 F.2d at 314 (citing *Camp v. Pitts*, 411 U.S. at 142); *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991).

"To ensure fair review of an agency action, therefore, the court should have before it neither more nor less information than did the agency when it made its decision." *Fund for Animals*, 391 F. Supp. 2d at 196 (quotation omitted). A court's review of "more than the information before the [agency] at the time [of its] decision risks our requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations." *Id*. (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). Cases brought under the APA are subject to a six-year statute of limitations. *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1093-94 (D.C. Cir. 1996). "In agency cases, limited extra-record discovery is only appropriate when there has been a strong showing of bad faith or improper

behavior or when the record is so bare that it prevents effective judicial review." *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 339 (D.C. Cir. 2011).

B. Plaintiff's Common Law Claims:

Federal Defendants' relationship with and duties to Native American Tribes is defined by "applicable statutes and regulations." *Jicarilla*, 564 U.S. at 177. "[T]raditional trust principles cannot displace what statutes and regulations mandate" and "traditional trust principles may help illuminate the meaning of a specific, applicable, trust-creating statute or regulation.'" *Fletcher II*, 730 F.3d at 1208 (quoting *Jicarilla,* 564 U.S. at 177). Background trust principles cannot be used to "override" the language of statutes and regulations "defin[ing] the Government's . . . obligation[s]" to a tribe or tribal members. *Id*. at 185. Once federal law imposes such duties, the common law "could play a role." *U.S. v. Navajo Nation*, 556 U.S. 287, 301 (2009) (*"Navajo II")*. But the applicable statutes and regulations "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *U.S. v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 224 (1983). When Plaintiff "cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." *Navajo II*, 556 U.S. at 302.

C. Fed. R. Civ. P 26(b)(1):

Fed. R. Civ. P. 26(b)(1) was amended and effective on December 1, 2015 to provide that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *See*

United States ex rel. Shamesh v. CA, Inc., 314 F.R.D. 1, 8 (D.D.C. 2016). "On motion or on its own, the court must limit the frequency or extent of discovery if it determines that the proposed discovery is outside the scope permitted by Rule 26(b)(1)." *Id.* at 9 (D.D.C. 2016) (citing Fed. R. Civ. P. 26(b)(5)(C)).

Under Rule 26, discovery must be relevant and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Courts in this Circuit consider six factors to determine if a discovery request is relevant and proportional, including: (1) the importance of the action; (2) the amount in controversy; (3) the parties' relative access to the information; (4) the parties' resources; (5) the importance of discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. *See Buie v. District of Columbia*, No. CV 16-1920 (CKK), 2019 WL 4345712, at *6 (D.D.C. Sept. 12, 2019) (quoting *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 6 (D.D.C. 2017)). The party requesting discovery bears the burden to show that discovery is warranted under the six-factor proportionality test. *United States ex rel. Shamesh*, 314 F.R.D. at 8 ("In cases where a relevancy objection has been raised, the party seeking discovery must demonstrate that the information sought to be compelled is within the scope of discoverable information under Rule 26.").

IV. ARGUMENT

A. The Court should decide the merits of Plaintiff's claims based upon the administrative record lodged with the Court which demonstrates the accounting required by law performed by Interior and provided to Plaintiff.

Plaintiff brings this action for an accounting. Although Plaintiff contends that only Count 3 is an APA claim, each count should proceed based upon record review because the APA provides the basis for this Court's review and all three claims are, at their core, grounded in an alleged duty to provide an accounting. Compl. "First Count: Accounting;" "Second Count:

Accounting as a Federal Trust Responsibility;" "Third Count: Accounting as an Administrative Procedure Act Claim;" ¶¶ 133 (Count 1); 141, 144, 153 (Count 2); 166 (Count 3).

Plaintiff asserts that "Count 1 demands, based on common law and applicable trust requirements governing the United States' relationship to Indian Tribes, an accounting of all trust resources that the United States has held or currently holds *qua* trustee for the Cherokee Nation." Parties' Joint Statement, ECF No. 46 at 2. In Count 2, Plaintiff contends that the United States has failed to meet the statutory requirements of 25 U.S.C. §§ 4011, 4044, and 162a to provide an accounting. *Id*. Plaintiff's third count alleges that the Federal Defendants' prior efforts to determine the accurate balance of the Cherokee Nation's Trust Fund is arbitrary and capricious or otherwise not in accordance with law. *Id*. at 3. Where Plaintiff has invoked the Court's jurisdiction pursuant to the APA, the statute defines the scope and standard of judicial review. *Camp*, 411 U.S. at 140-42. It is well-established that a party who seeks discovery outside the administrative record bears the burden of showing that one of the narrow exceptions to the rule limiting the review to the administrative record applies and that additional information is needed. *James Madison Ltd.*, 82 F.3d at 1095. Here, Federal Defendants' administrative record evidences the performance of the agency's obligations. Because Plaintiff has not demonstrated why extra-record evidence discovery is warranted in this case, the Court should bar any discovery beyond the agency's administrative record which includes the accountings and all documents Interior directly or indirectly relied upon in providing the accounting to Plaintiff.

1. D.C. Circuit law dictates that the Court should decide the merits based upon a review of Federal Defendants' administrative record.

In total, Plaintiff's claims stem from an alleged duty Federal Defendants have to provide an accounting of Plaintiff's assets. As has been recognized in this Circuit, although Plaintiff seeks traditional civil discovery, Plaintiff's claims must first proceed upon the review of the

administrative record evincing Federal Defendants' actions to comply with its legal obligations. Should Plaintiff believe that the administrative record is incomplete or warrants the addition of extra-record evidence, Plaintiff bears the burden of moving for the appropriate relief by establishing the standards required to complete the record or admit extra-record evidence.

The D.C. Circuit has recognized this limitation in a similar case, a case brought by individual Native American plaintiffs for common law claims against the Department of Interior and the Department of Treasury for breach of trust for financial mismanagement. *See Cobell v. Babbit*, 91 F. Supp. 2d 1, 30 (D.D.C. 1999), *aff'd and remanded sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). There, the court recognized, and the D.C. Circuit affirmed, that the source of law giving rise to such claims are grounded in statute. Here too, Plaintiff cannot pursue rights allegedly granted to them by the common law of trusts, but that are separate from statute. *Cobell*, 91 F. Supp. 2d at 28-30. Put another way, Plaintiff cannot state common law claims for breach of trust against federal officials for either financial mismanagement, as in *Cobell*, or an accounting, as Plaintiff seeks here. *Id*. at 28. "There is no such thing as a common law of judicial review in the federal courts." *Id*. at 29 (quoting *Stark v. Wickard,* 321 U.S. 288, 312 (1944)). "Whatever the scope of the government's legal duties . . . the source is statutory law," and as such, "[t]he extent of [a trustee's] duties and powers is determined by the trust instrument and the rules of law which are applicable." *Cobell*, 91 F. Supp. 2d at 30 (quoting Restatement (Second) of Trusts § 201 (1959)). Plaintiff "must point to rights granted by statute if they are to be enforced against the government. There is simply no persuasive basis for doing so on a purely common-law basis." *Id*. And, as the *Cobell* court noted, it does not matter whether Plaintiff relies upon a traditional statutory analysis of their rights against the government through the APA and non-statutory review, or whether they claim to be beneficiaries of a trust.

In either instance, the Court's review and Plaintiff's rights are derived from and determined by statute. *Id*. Therefore, the *Cobell* court determined that the "court's review will proceed on the administrative record."[2] *Id*. at 38.

Similar to the administrative record review upon which *Cobell* proceeded, courts in this Circuit have repeatedly heeded the Supreme Court's admonition to limit the scope of its review of an agency's alleged failure to comply with the law based upon the administrative record. *See Doraiswamy v. Sec'y of Labor,* 555 F.2d 832, 842 (D.C. Cir. 1976) (affirming district court's limitation of review to the record and prohibiting discovery); *Envtl. Def. Fund, Inc. v. Costle,* 657 F.2d 275, 286 (D.C. Cir. 1981) (affirming district court's limitation of the scope of its review to the administrative record); *Edison Elec. Inst. v. Occupational Safety and Health Admin.,* 849 F.2d 611, 617-18 (D.C. Cir. 1988) ("neither party is entitled to supplement the record with . . . evidentiary material that was not before the agency."); *Fund for Animals v. Babbitt,* 903 F. Supp. 96, 105 (D.D.C. 1995) (limiting review to th[e] record and barring plaintiffs from filing information not contained in the record as it appeared before the agency at the time of its decision). In these cited cases, the courts concluded that the administrative record provided all the information upon which the agency relied upon in reaching its decision and there was no reason to consider extra-record information to determine whether the agency decision was arbitrary or capricious. Once lodged, the administrative record is afforded a presumption of regularity "absent clear evidence to the contrary." *Fund for Animals v. Williams,* 245 F. Supp. 2d 49, 55 (D.D.C. 2003).

2. Federal Defendants have lodged an administrative record which demonstrates that it has complied with its obligations to perform an accounting as required by law.

[2] Although the *Cobell* court allowed extrinsic evidence to be admitted, this allowance was based upon the government's concession, which is not applicable here.

The basis of Federal Defendants' accounting[3] responsibilities lies in statutes that were enacted as a result of the 1994 Trust Fund Management Reform Act. *See* Compl. ¶¶ 101(J)-(L), 123, 140-41, 144 (citing 25 U.S.C. §§ 162a, 4011, and 4044). The Act established a *prospective* responsibility for the Secretary of the Interior to account "for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title," and under § 4044, required Interior to provide a trust reconciliation report reconciling Plaintiff's account balances as of September 30, 1995. 25 U.S.C. §§ 4011(a), 4044; *see also* 25 C.F.R. §§ 115.801 and 115.803. Federal Defendants have complied with their obligations delineated in the statutes, and this compliance is demonstrated in the agency administrative record provided to Plaintiff on April 13, 2020. ECF No. 51; Corrected Index, ECF No. 53-1.

Although Plaintiff alleges throughout their Complaint that they have not received the accountings required by law, Interior has provided the accountings to Plaintiff as required by law, as is demonstrated by the administrative record. Whether Plaintiff has been provided the accountings required by law is an issue that should be resolved through judicial review of the accountings that have been provided.

As the Tenth Circuit instructed in *Fletcher II*, "a duty to account is a duty to account, not a duty to respond to and disprove any and all potential breaches of fiduciary duty a beneficiary might wish to pursue once the accounting information is in hand." *Fletcher II*, 730 F.3d at 1215. *Fletcher* is particularly instructive here because it presents an analogous scenario: one in which the plaintiffs sought an accounting, and as a basis for review, claimed that Federal Defendants

[3] The term "accounting" is one of art that is subject to multiple and differing interpretations. Federal Defendants' use the term "accounting" to describe what it was legally required to provide to Plaintiff as part of its statutory obligations.

violated the APA. *Fletcher v. United States*, 153 F. Supp. 3d 1354, 1356 (N.D. Okla. 2015). The accounting issue was resolved based upon judicial review of an administrative record containing the accounting materials. The district court considered those materials and made a determination as to whether the government's provided accounting complied with the applicable law. *Id.* at 1371-72. Plaintiffs appealed, suggesting that the accounting did not encompass enough information about the trust's receipts, and that the volumes of oil, gas, and minerals and the corresponding prices, should be disclosed. *Fletcher v. United States,* 854 F.3d 1201, 1206 (10th Cir. 2017) (*"Fletcher III"*). The Tenth Circuit affirmed, noting the case should be resolved first through judicial review of the accountings that have been provided. *Id.* at 1205-07. Similarly here, a determination as to whether Interior provided the legally required accounting to Plaintiff should be decided on judicial review of the accounting actually provided (and the administrative record upon which Interior's accounting decisions were based). Federal Defendants have certified and lodged an administrative record demonstrating that they have complied with their statutory duties to provide an accounting. Here, the Court's review of this case should proceed on the administrative record assembled by Federal Defendants. Indeed, Plaintiff alleges that that Plaintiff is entitled to an accounting of all of its trust assets and that any accounting it has received did not comply with that required by law. Parties' Joint Statement, ECF No. 46 at 2-3. Federal Defendants contend that they have issued a final agency action by providing any accounting and have supported their action with the administrative record. The Court can thus decide based on the relevant statutes what Federal Defendants were required to provide as a matter of law and based on the administrative record whether the Federal Defendants complied with their statutory obligations. No discovery is needed to make that determination. If the Court finds that the accounting provided does not comply with the statutory

directives, the case can then be remanded for compliance. To put it another way, if the administrative record does not support the Federal Defendant's final agency actions (*i.e.* the provided accounting) the Court can fashion the appropriate remedy for any statutory violation. This is precisely what Plaintiff requests in its Complaint. ECF No. 2-1, Compl., ¶¶ 137, 142, 154, 167. Indeed, Judge McFadden, in denying Federal Defendants' motion to dismiss for lack of jurisdiction and failure to state a claim, noted that Plaintiff had met the requisite showing of "final agency action" to proceed with the lawsuit. ECF No. 42. The Court concluded that "[a]t this early stage in the case the Government's trust obligations fit that bill" of "where an agency is under an unequivocal statutory duty to act that, failure to act constitutes, in effect, an affirmative act that triggers final agency action review." *Id*. at 5. Plaintiff's quest for two hundred years of documents is thus a red herring. No discovery is needed to determine if Federal Defendants complied with any accounting obligations as all of the documents Federal Defendants relied upon in issuing the accountings are set forth in the administrative record. If that is somehow insufficient, Plaintiff can make their showing on summary judgment, citing the evidence from the administrative record.

B. In the alternative, discovery should be limited to what is relevant and proportional to the needs of the case.

Notwithstanding that the administrative record should form the basis for the Court's review in this case, Plaintiff seeks discovery through Fed. R. Civ. P. 34.[4] Under Rule 34, parties may serve document requests within the scope of Fed. R. Civ. P. 26(b) which governs the scope of discovery and limits discovery to that which is relevant and proportional to the needs of the

[4] Notwithstanding the arguments advanced herein, Federal Defendants reserve the right to serve additional form objections to Plaintiff's April 20, 2020 Requests for Production within the 45 days allotted by the Court to respond to the requests. ECF No. 49.

case. Plaintiff's April 20, 2020 Requests for Production are disproportional to the needs of the case given that Federal Defendants lodged a 100,000 page administrative record and each of Plaintiff's claims can be fully adjudicated thereon (as discussed above), Federal Defendants' limited ability to access the information requested, Federal Defendants' resources, and that the burden and expense on Federal Defendants to collect the proposed discovery outweighs its likely benefit to Plaintiff, who seeks documents spanning over a two-hundred year time-period and documents that are irrelevant to the core issues in the case. The Court should limit Plaintiff's requests to that which is relevant and proportional to the case—to include documents created within six years from the filing of Plaintiff's complaint that directly bear on Plaintiff's claims.

Under Rule 26, discovery must be relevant and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Courts in this Circuit consider six factors to determine if a discovery request is relevant and proportional. The six factors are: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. *See Buie v. D.C.*, No. CV 16-1920 (CKK), 2019 WL 4345712, at *6 (D.D.C. Sept. 12, 2019) (quoting *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 6 (D.D.C. 2017)); *see also Breiterman v. United States Capitol Police*, 324 F.R.D. 24, 29 n.7 (D.D.C. 2018). Plaintiff bears the burden to show that discovery is warranted under the six-factor proportionality test. *United States ex rel. Shamesh*, 314 F.R.D. at 8 ("[T]he party seeking discovery must demonstrate that the information sought to be compelled is within the scope of discoverable information under Rule 26." (citation omitted)).

Plaintiff makes requests spanning over two-hundred years prior to the filing of its Complaint, to as early as 1785. *See e.g.*, Ex. 1, Request 1 ("*All* documents regarding *any* payments of money or goods … pursuant to *any* treaty, including those set forth in the Complaint"); 2 ("*All* documents regarding *any* payment of money or goods … pursuant to *an* Act of Congress"*)*; 3 ("*All* documents regarding *any* payments of money or goods … pursuant to *any* Presidential Proclamation"); 5-6 ("*All* documents regarding Transactions for Cherokee Nation [Lands and Resources][5] including any accounting records such as receipts for funds received"); 8 ("*All* documents relating to *any* accounting of the Trust Fund"); 9 ("*All* documents relating to *any* periodic statements of the Trust Fund"); 10 ("*All* audits of the Trust Fund[6]").

With no time limitation and specific reference to the legal authority upon which Plaintiff bases its discovery requests, the requests are irrelevant and disproportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Plaintiff's claims challenge whether Federal Defendants have performed an accounting. The cornerstone legal question presented here is whether the accountings Interior has provided are legally sufficient. If Interior has provided and is providing a legally sufficient accounting, the issue can be determined upon the administrative record Interior has lodged. ECF No. 51; Corrected Index, ECF No. 53-1. If Interior has not, then a remand to Interior for an explanation or further accounting may be appropriate. Plaintiff's

[5] Plaintiff defines "Lands" and "Resources" broadly, as "all real property in which the Cherokee Nation has or had an ownership interest (including aboriginal title or land held in trust for the Nation . . ." and "any natural resource in which the Cherokee Nation had or has an ownership interest . . ." April 20, 2020 Requests for Production, ¶¶ 5-6.

[6] Plaintiff defines "Trust Fund" as "the assets and resources of the Cherokee Nation that generated our could have generated monetary income, including: money; proceeds from sale or conveyance of lands; profits from land; money from surface leases for agriculture; surface, oil and gas mining leases; coal leases; sand and gravel leases; businesses and town lots; income from property owned by the Nation; buildings; the Nation's records; and money resulting from Treaties or other agreements." *Id*. at ¶ 10.

proposed discovery into each and every transaction, payment, accounting, audits, accrual of balances, and receipts or disbursements over 200 years does not bear on whether Federal Defendants comported with their obligations to perform the accounting required by law. Plaintiff is essentially seeking every document ever created over the history of the trust relationship between the Plaintiff and Federal Defendants.

1. The importance of the issues and amount in controversy.

The first two factors—the importance of the issues and the amount in controversy—militate against allowing Plaintiff's requests for production to proceed. The first Rule 26 factor requires the court to "examine the significance of the substantive issues [at stake in the litigation] as measured in philosophic, social, or institutional terms." *Oxbow Carbon & Minerals LLC*, 322 F.R.D. at 7 (citing *Arrow Enter. Computing Sols., Inc. v. BlueAlly* LLC, No. 5:15-CV-37-FL, 2017 WL 876266, at *4 (E.D. N.C. March 3, 2017)). As opposed to a discovery issue which could benefit the public at large such as employment practices, free speech, and other matters, the issues at stake here are confined to the Plaintiff and Federal Defendants, and do not have a direct impact beyond the parties involved, and as such, this factor weighs against allowing Plaintiff's request to proceed. *See id*. (citing *Arrow Enter. Computing Sols.,* 2017 WL 876266, at *4 (finding that the factor weighs against allowing discovery where the issues at stake in the case would not "have an impact beyond the parties involved.")). Plaintiff seeks documents concerning the accounting provided by Federal Defendants to Plaintiff, and the document request does not provide an impact beyond the parties in the current litigation. Additionally, the amount in controversy is not applicable because Plaintiff is not seeking monetary relief. Thus, there is no amount in controversy for the Court's consideration. *See* Parties' Joint Statement, ECF No. 46 at 2 (stating that Plaintiff "seeks a meaningful accounting of its assets held in trust . . . and

injunctive relief necessary to ensure that the accounting is accurate and complete and to ensure that the Nation's Trust Fund is properly held and managed going forward."); Mem. Op. and Order, ECF No. 42 at 6 ("But, the Nation is not seeking damages . . . . And even if an adverse judgment against the Government required it to pay money to the nation, that is not a sufficient reason to characterize the relief as money damages." (citing *Bowen v. Mass.,* 487 U.S. 879, 896 (1988)). The first two factors of Rule 26(b)(1) weigh against allowing Plaintiff's requests to proceed.

2. The importance of discovery in resolving the issues.

Plaintiff's broad requests are similar to others that have been made and rejected in this Circuit. In *United States v. Kellogg Brown & Root Servs., Inc.*, 284 F.R.D. 22, 37 (D.D.C. 2012),[7] defendants sought documents relating to all government contracts containing provisions for private security, without any limitation on the contracting parties, which the court determined to be irrelevant and disproportional to the needs of the case. The court recognized that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly" and permits courts to deny discovery if the information requested is irrelevant. *Id*. at 36 (quoting *Crawford El v. Britton*, 523 U.S. 574, 598 (1998); *Food Lion, Inc. v. United Food and Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1012-13 (D.C. Cir. 1997) (denying discovery for information with "no conceivable bearing on the case"); *Cobell v. Norton*, 226 F.R.D. 67, 81 (D.D.C. 2005) ("The Court can only issue [orders to compel] where the information . . . is within the scope of discovery defined by Rule 26.")). Therefore, "[c]ourts test relevance by looking at the law and facts of the case, not simply the expressed desires of a party to see certain

[7] Though the case was decided prior to the 2015 amendments to Fed. R. Civ. P. 26(b)(1), the court applied the relevance rule, still in effect today.

information. *Kellogg Brown & Root Servs., Inc.,* 284 F.R.D. at 36 (citing *Burlington Ins. Co. v. Okie Dokie, Inc.*, 368 F. Supp. 2d 83, 87-89 (D.D.C. 2005). Where defendants ultimately sought information from plaintiffs that strayed away from the core facts of the case—whether the government contracts entered into with defendants violated the False Claims Act—the discovery requests regarding other government contracts were denied. *Kellogg-Brown & Root Servs., Inc.*, 284 F.R.D. at 36.

Here, too, Plaintiff seeks information that strays far from the accountings required by law to be provided to Plaintiff. Plaintiff's document requests with no associated time limitation and spanning hundreds of years, do not illuminate whether Federal Defendants complied with any statutory duties to provide an accounting. The administrative record lodged by Interior evidences its required accounting. In directing Interior to complete the Trust Reconciliation Project under the 1994 Act, Congress only provided Interior with limited funding and limited time to complete the project. Congress is the settlor of the trust and delineates trust responsibilities through statutes. *Jicarilla Apache Nation*, 564 U.S. at 183-85. Rather than mandating that Interior spend decades providing Tribes with an accounting back to the beginning of the trust, Congress afforded Interior 17 months to complete three tasks: (1) complete its reconciliation of tribal "trust fund account[s];" (2) obtain an attestation from each tribe that the reconciliation was "as full and complete accounting as possible" or a statement that the tribe disputed its balances; and (3) submit "by May 31, 1996, a report identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995." 25 U.S.C. § 4044. In seeking an accounting under this same Act, Plaintiff now asks the Court to order what the relevant statute specifically refrained from doing—*i.e.* requiring Interior to conduct discovery over 200 years and review and produce virtually every document that could

involve the trust. Indeed, the expansive and unduly burdensome discovery is incompatible with Congress's charge to do as full an accounting as possible in 17 months. Plaintiff's requested discovery should therefore not be permitted because it violates the limited retrospective accounting that Congress directed in the 1994 Act.

3. The parties' relative access to the information, the parties' resources, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Plaintiff's discovery requests would also place a strain on Federal Defendants' resources, and the burden and expense incurred by Federal Defendants outweighs any potential benefit. Plaintiff requests every document that touches on Federal Defendants' management of the Nation's monetary and non-monetary assets from 1785 (the date of the first treaty between the Nation and the United States) to the date of any discovery production, and would result in Federal Defendants engaging in a lengthy and expensive search, collection, imaging, and coding process at multiple National Archives facilities, Federal Records Centers, and Department of Interior sub-agency offices spread throughout the country, as well as a review for responsiveness, confidentiality, and privilege and bates-numbering by Interior and Department of Justice attorneys. "A green eye-shade death march through every line of every account over the last one hundred years isn't inevitable: the trial court may focus the inquiry in ways designed to get the plaintiffs what they need most without imposing gratuitous costs on the government." *Fletcher II*, 730 F.3d at 1214.

Setting aside that Plaintiff's requests will require Federal Defendants to search multiple National Archives facilities, Federal Records Centers, and Department of Interior offices throughout the country, which could yield thousands of pages of documents, Interior estimates that the majority of the identification, collection, and imaging of relevant documents for production will occur at the at the American Indian Records Repository ("AIRR"), a facility built

to archive standards, and which maintains the potentially responsive documents in a secure, climate-controlled environment with controls for particulate matter and ultraviolet light. Ex. 2, Gates Decl., ¶ 3. Due to the nature of the documents stored at the AIRR, access is strictly controlled, and requires an advance appointment to perform research. *Id*. ¶ 4. All research at the AIRR is conducted in monitored rooms. *Id*. ¶ 5. In order to preserve the integrity of the boxes, only one researcher may sit at a table, and s/he may work on only one box and one file at a time. *Id*. Gloves may be required to examine aged and brittle documents, and documents are scanned using a flatbed scanner (without a document feed). *Id*. With the added complication of COVID-19, it is anticipated that additional search procedures will be implemented upon the re-opening of the AIRR, which is currently shut down. These additional measures may further limit access and place additional requirements on the handling of documents at the AIRR. *Id*. ¶ 6.

Given these measures, the Office of Historical Trust Accounting ("OHTA") employs full-time equivalent employees who are able to access the information at the AIRR. But, even with the full-time equivalent employees in place, there are significant constraints on the ability to identify responsive documents at the AIRR due to the method of the organization at the AIRR and Interior's database that is used to conduct searches. *Id*. ¶ 7-8. In searching documents at the AIRR, OHTA initially performs a query of the Box Index Search System ("BISS"), OST's database index of the records that are housed at the AIRR. *Id*. ¶ 7. However, due to how boxes are organized at the AIRR and the coded data in the BISS, Interior cannot query the BISS for the exact documents Plaintiff seeks. *Id*. ¶ 8. Instead, OHTA must consider a variety of criteria to develop a BISS query, including the documents sought, the account names and numbers, and key terms. *Id*.

Once a BISS query is complete and a list of boxes that potentially contain responsive records is identified, the research staff at the AIRR begins searching the boxes to actually identify or "tag" potentially responsive documents. *Id.* ¶ 9. When researchers tag potentially responsive documents in the boxes, those boxes are queued for electronic imaging and "coding" by another OHTA contractor. *Id.* The coding (ascribing certain basic metadata for each document) is essential to the fundamental utility of the documents for both parties. *Id.* The standard coding fields include the document identification number, file/folder title for the file/folder the document originated from (if available), document name or title, document type, form number of the document (if available), and document date. *Id.* ¶¶ 9, 13.

Through an initial query of the BISS, Interior's past experience with tribal trust cases, and Interior's initial work with Plaintiff's case filed in the Western District of Oklahoma in 2016 against Federal Defendants, Interior estimates that there are approximately 4,257 boxes of records likely to contain documents potentially response to Plaintiff's document requests. *Id.* ¶ 11. Typically, it can take between two to four hours for a full-time equivalent employee ("FTE") to search a box for potentially responsive documents. *Id.* ¶ 13. OHTA uses ten contractor FTEs to search identified boxes to tag potentially responsive documents for imaging and coding for all tribal trust cases currently pending in federal district court and the U.S. Court of Federal Claims. *Id.* OHTA has assigned four contractor FTEs to this case for search and tagging purposes. *Id.*

With the utilization of the four contractor FTE to search and tag potentially responsive documents, it would take over a year and a half to complete the initial search of documents potentially responsive to Plaintiff's requests for production. *Id.* ¶¶ 13-14. It would take approximately three and a half years for subsequent imaging and coding by a separate group of contractors, though this could be completed simultaneously with the searching and tagging. *Id.*

After potentially responsive documents are imaged and coded, they are delivered on a rolling basis to the United States Department of Justice ("Justice Department") and the Interior Department in Washington, D.C., and loaded into a document review platform/program, where attorneys then review the documents for responsiveness, confidentiality, and attorney-client and attorney work product privileges. *Id.* ¶ 10. It is estimated that it would take over two years for attorneys at the Interior Department to conduct their responsiveness, confidentiality, and privilege review of the potentially responsive documents, *id.* ¶ 13-14, thus resulting in a period of over five and a half years, at a minimum, to complete the searching and tagging, imaging and coding, and review for responsiveness, confidentiality, and privilege of documents potentially responsive to Plaintiff's requests for production, and utilizing 40% of OHTA's budget. *Id.* ¶ 13-14; Ex. 3, Gidner Decl., ¶ 7.

Such burdensome discovery is unnecessary simply for the sake of engaging in discovery when the issues in this case can and should be decided upon the review of the administrative record. In the alternative, should the Court decide that some traditional discovery is appropriate, Plaintiff's requests should be limited and Federal Defendants submit that a reasonable temporal scope of any allowed discovery should be six years preceding the filing of the complaint. As a general matter, a plaintiff is only entitled to bring claims against the federal government if filed within six years of accrual. Going back six years for discovery is therefore eminently reasonable. By applying a six year temporal scope, Plaintiff would receive ample discovery materials and the six year time-period would be more than sufficient for Plaintiff to formulate its arguments. Moreover, the burdens of undertaking discovery would be greatly reduced, and would not strain Interior's resources to provide documents going back hundreds of years, which at a minimum could take upwards of five and a half years to search and tag, image and code, and

review for responsiveness, confidentiality, and privilege. *See* Ex. 2, Gates Decl., ¶ 13-14. Given that the Federal Defendants have already produced a 100,000 page administrative record upon which each of Plaintiff's three counts could be fully adjudicated, this limitation of Plaintiff's requests would lessen the burden placed on Federal Defendant's resources and ensure that Plaintiff's requests are proportional to the needs of the case, given Plaintiff's claims for an accounting. *See Kellogg Brown & Root Serv., Inc.* 284 F.R.D. at 38 ("The Court can only imagine the amount of effort required by the United States to collect, review, check for privilege, and produce the information"); *Federal Trade Comm'n v. Staples, Inc.,* CV No. 15-2115 (EGS), 2016 WL 4194045, *2 (D.D.C. Feb. 26, 2016) (burden outweighed benefit of discovery despite non-movant previously agreeing to produce material); *accord McPeek v. Ashcroft,* 202 F.R.D. 31, 34-35 (D.D.C. 2001); *Mannina v. District of Columbia,* CV No. 15-931 (KBJ/RMM), ___F.R.D.___, 2020 WL 555371, *11 (D.D.C. Feb. 4, 2020). Should the Court allow Plaintiff's requests to proceed without limitation, Federal Defendants will be required to proceed in an unduly burdensome and disproportional process to respond to Plaintiff's unfettered requests. Such a process is an unreasonable use of the Court's and the parties' time, when the discovery can be limited to be aligned with Plaintiff's claims. As such, Federal Defendants respectfully request that the Court limit Plaintiff's discovery requests to documents which bear on Plaintiff's claims within six years of the Complaint's filing.

In addition to the relevance and proportionality objections, Plaintiff's Document Requests #4 and #15-16 are disproportional and irrelevant because the requests bear no relevance to the issues in dispute or are otherwise publicly available or outside Federal Defendants' control or custody.

Plaintiff's Request #4: Plaintiff seeks all documents concerning the United States' appointment of principal chiefs of the Cherokee Nation in its fourth request for production. Ex. 1, at 6. However, Plaintiff has claimed that this action is for an accounting of Plaintiff's assets and resources to the earliest possible date. On its face, Plaintiff's request concerning the United States' appointment of principal chiefs bears no relevance to Plaintiff's action for an accounting, and thus, the Court should deny this request. *See Food Lion, Inc. v. United Food and Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1012-13 (D.C. Cir. 1997) (denying discovery for information with "no conceivable bearing on the case"); *see also Zelaya v. UNICCO Serv. Co.,* 682 F. Supp. 2d 28, 32-35 (D.D.C. 2010); *Sterne Kessler Goldstein & Fox, PLLC v. Eastman Kodak Co.,* 276 F.R.D. 376, 383 (D.D.C. 2011) (denying discovery pertaining to information "not properly at issue" in case).

Plaintiff's Requests #15-16: Plaintiff also seeks "all transcripts of testimony" related to the trust reconciliation process that resulted in the Arthur Andersen tribal reconciliation reports and transcripts of testimony related to various topics outlined in Request 16, including policies and procedures for the management and/or accounting of Indian trust funds, training and supervising of staff for the management and/or accounting of Indian trust funds, creation of the Office of the Special Trustee, processes and procedures involved in collecting Indian trust fund documents, General Accounting Office Reports related to Indian trust fund matters, Office of Inspector General Reports related to Indian trust fund matters, Reports of the Commissioner to the Five Civilized Tribes to the Secretary of the Interior, and Annual Reports of the Office of the Superintendent for the Five Civilized Tribes. Ex. 1, at 6-7. For each of these requests, Plaintiff's request includes "transcripts of testimony," which in many instances, will be publicly available to Plaintiff or outside the custody and control of Federal Defendants. For instance, Federal

Defendants do not have knowledge of all transcripts of testimony related to the trust reconciliation process that resulted in the tribal reconciliation reports, and many of the transcripts of testimony occurred as part of the Trust Reconciliation Project, and resulted in testimony before Congress, which is publicly available to Plaintiff. Thus, as a category, the Court should limit this requested subset of discoverable information to that which is not publicly accessible and is within the custody and control of Federal Defendants. *See Meijer, Inc. v. Warner Chilcott Holdings Co., III, Ltd.* 245 F.R.D. 26, 33 (D.D.C. 2007) (alleged holder of requested information need not produce information that is "not in their possession, custody or control").

V. CONCLUSION

Plaintiff has brought this action for a historical accounting. The crux of this case—whether Federal Defendants have performed the accounting as required by law—can be decided upon the Court's review of the administrative record lodged by Federal Defendants on April 13, 2020. ECF No. 51; Corrected Index, ECF No. 53-1. The administrative record contains all of the materials Federal Defendants directly or indirectly relied upon in issuing the accountings and therefore no amount of discovery will aid in determining whether Federal Defendants complied with their obligations to provide any accounting. If the administrative record does not support the accounting or if the accounting is deficient as a matter of law, the Court can fashion the appropriate remedy. This review comports with other administrative review cases in this Circuit, where courts have proceeded upon a review of the administrative record, or the compilation of agency records which supports the agency action or inaction. Judge McFadden, in denying Federal Defendants' motion to dismiss, noted that Plaintiff had made the requisite showing for the case to proceed by identifying agency inaction, and stated, Plaintiff "cannot seek wholesale improvement of the Government's operations through a lawsuit" and that "where an agency is

under an unequivocal statutory duty to act, failure to act constitutes, in effect, an affirmative act that triggers final agency action review . . . . [A]t this early stage in the case, the Government's trust obligations fit that bill." ECF No. 42 at 5 (citations omitted). Plaintiff has requested an accounting. If the Court were to allow Plaintiff's discovery requests to proceed, Federal Defendants would be required to collect virtually every trust document in existence when there has been no holding that Federal Defendants' accounting is deficient.

In the alternative, should the Court allow discovery to proceed, Plaintiff's April 20, 2020 Rule 34 production requests should be limited, consistent with the relevance and proportionality principles established by Rule 26. Allowing Plaintiff to proceed with its unfettered discovery requests which seek documents that do not bear on Plaintiff's claims and seek documents from over two hundred years ago, does not comport with the Fed. R. Civ. P. 26(b)(1) rules of relevance and proportionality, and would create a greater burden and expense on Federal Defendants than the discovery would provide as a benefit to Plaintiff. This is evidenced by the attached declarations describing the various efforts Interior would need to take over five and a half years to respond to the requests utilizing 40% of OHTA's budget. Federal Defendants respectfully request that the Court limit this case to a review of the administrative record.

Respectfully submitted this 20th day of May 2020.

PRERAK SHAH
Deputy Assistant Attorney General

/s/ Dedra S. Curteman
DEDRA S. CURTEMAN

United States Department of Justice
Environment Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Tel: (202) 305-0446

Fax: (202) 305-0506
Dedra.Curteman@usdoj.gov

Attorneys for Federal Defendants
OF COUNSEL:

DONDRAE MAIDEN
SHANI WALKER
Office of the Solicitor
United States Department of the Interior

THOMAS KEARNS
Office of the Chief Counsel
Bureau of the Fiscal Service
United States Department of the Treasury