UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, *Plaintiff,* v. THE DEPARTMENT OF THE INTERIOR, *et al.*, *Defendants.*	**Case No. 1:19-cv-02154-TNM**

PLAINTIFF CHEROKEE NATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

The Federal Defendants' Motion for a Protective Order [DN55] ("Motion") should be denied for at least four reasons. First, their arguments continue to mischaracterize and misrepresent the claims asserted by the Cherokee Nation ("the Nation"). Second, Federal Defendants' position that the Tribal Reconciliation Project ("TRP") and 1996 Arthur Andersen report constituted an accounting that relieves Federal Defendants of participating in discovery in this case is unfounded and has been rejected by this Court multiple times, including in this case. Third, Defendants' alternative request to limit discovery should be rejected because they have refused to confer and—in fact—have consistently refused all requests by the Nation to discuss its discovery requests and ideas to prioritize and potentially streamline discovery in this case. Fourth, the alternative relief should be denied because the Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion for Protective Order [DN55-1] ("Motion Memo") fails to show that the requested discovery is not proportional.

I. Discovery is needed to address the many issues raised in this case, including the required scope and methodology of the accounting.

The Nation's claims arise under both federal substantive law and the Administrative Procedure Act ("APA"). The Nation requests a full and meaningful accounting in this case, and restoration of the trust where the Federal Defendants fails or refuses to meaningfully account. The Federal Defendants' position—that they have already provided an accounting for the Nation's APA claim and that they can avoid discovery under the non-APA federal law claims—would allow them to play a shell game. They assert – as the trustee entirely responsible for all of the Nation's funds since 1906 – that they will only provide a limited reconciliation from 1972 to 1995, and will call that an "accounting." Beyond the fact that every court faced with that argument has rejected it, the Federal Defendants also wants to refuse to allow the Nation to obtain any information showing what the corpus of the trust fund was and how it should be restored. Those claims exist under the Nation's substantive federal law claims, and are not dependent upon the APA. The Federal Defendants attempts to pigeon hole this as a one-size-fits-all APA case should be rejected.

The Nation has asserted three claims for relief. Count I applies applicable federal trust requirements governing the United States' relationship to Indian Tribes, demanding an accounting of all trust resources that the Federal Defendants have held or currently hold *qua* trustee for the Nation. Count II demands that the Federal Defendants provide an accounting that, at the minimum, comports with all statutory directives including 25 U.S.C. § 4011, 25 U.S.C. § 4044, and 25 U.S.C. § 162a. Count III asserts that any conclusion by the Federal Defendants that an "accounting" was rendered by the TRP is arbitrary and capricious or otherwise not in accordance with law, in violation of the APA. On all claims for an accounting the Nation seeks restoration of the trust for the USA's failure to account, which will require the Court to exercise

its equitable powers to craft an injunction that balances the needs of the case. *See, e.g.*, *Cobell v. Salazar*, 573 F.3d 808, 813 (D.C. Cir. 2009) (*Cobell XXII*) ("The unique nature of this trust requires the district court to exercise equitable powers in resolving the paradox between classical accounting and limited government resources. It must mould its decree to the necessities of the particular case.") (internal citation, quotation, and brackets removed).

Counts I and II are not based on "review on an administrative record," but rather claim violations of the Federal Defendants' trust responsibilities that arise from the special trust relationship that the United States has asserted over Indian tribes, and which are grounded in federal law. As this Court in Sisse*ton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell* held, tribes are "entitled to seek enforcement of their statutory rights provided for in the 1994 Act." 130 F. Supp. 3d 391, 395 (D.D.C. 2015) (Hogan, J.). Those claims do not arise out of the APA and are not for review on an administrative record. Moreover, the Court in *Sisseton* would clearly have required discovery had the claims not been stayed and settled. *Id.* at 397 (noting that the parties had "not yet had the opportunity to develop a record through discovery" on certain issues raised in the United States' motion to dismiss and reserving the issue "for a later stage of the proceedings after the parties have had the opportunity for discovery").

The claims asserted by the Nation raise issues requiring discovery, including the proper scope of the accounting that is required, the corpus of the trust to be restored, and the appropriate methodology to employ to make these determinations. At a minimum, this must include discovery to identify the money-generating assets that have been held by the Federal Defendants in trust for the Nation, the revenue produced by those assets, the disposition of any funds, and the status of the assets themselves. Each of these is at issue in this litigation, and is the subject of the Nation's pending discovery requests to which the Federal Defendants are refusing to respond.

To the extent that the records have been lost or destroyed (another violation of the Federal Defendants' trust duties to the Nation), alternative methods may be required. But those methods, too, can only be developed following discovery. Without discovery, the Court will be unable to ensure that the Nation receives a full and complete accounting, nor will it be possible to restore to the Nation the trust funds managed exclusively by the Federal Defendants.

The Nation has served a set of document requests consistent with repeated attempts to identify and discuss the information that the Nation and the Court will need to evaluate the required accounting. The document requests seek to identify the trust *res*, which includes many money-generating assets that the Federal Defendants have controlled, managed, or outright taken, as well as to identify what happened to those assets and to the money revenues that they generated. In addition, numerous treaties and statutes provided for payments to be made to the Nation, and discovery is required to ensure the accounting reflects those payments. Without that information the Nation and the Court are left unable to measure assess the accounting.

Instead of engaging with the Nation on its discovery requests, the Federal Defendants have simply responded, "no discovery." Their position is unsupported by any precedent, and this Court has itself already recognized that discovery is necessary and appropriate in this case. As such, the Nation requests that the Court remind the Federal Defendants—once again—that they need to participate in discovery by denying the Motion. Pursuant to Fed. R. Civ. P. 26(c)(2), the Nation further requests that the Court order the Federal Defendants to respond to the Nation's discovery.

II. The premise of the Motion— that the only issue in this case is whether the Arthur Andersen Trust Reconciliation Project constitutes an accounting—is incorrect.

As part of the TRP, Arthur Andersen was hired to attempt to reconcile the tribal trust for all tribes for the dates from July 1, 1972 to September 29, 1992. *Cobell v. Kempthorne*, 532 F.

Supp. 2d 37, 51 (D.D.C. 2008) (*Cobell XX*), *vacated and remanded on other grounds*, 573 F.3d 808 (D.C. Cir. 2009) (*Cobell XXII*). Arthur Andersen found this task almost entirely impossible, and the TRP was terminated before completion in 1995. *Id.* For the Nation, the TRP culminated in 1996 with a report that included certain statements of the Nation's known financial accounts. Federal Defendants never revisited the need to establish accurate account balances for the Nation's financial accounts, but instead have simply provided periodic financial statements that perpetuate the fundamental failings of the TRP.

The Nation has alleged that the Arthur Andersen report and subsequent financial statements cannot satisfy the Federal Defendants' duty to account for many reasons including, critically, that they cannot be used to determine whether the beginning balances are correct. Complaint, DN2-1 at ¶¶124-130. The Nation has previously briefed this Court on the numerous shortcomings of the TRP. *See* DN48 at 7-9. Suffice to say, every entity that has reviewed the TRP has concluded that the TRP does not constitute an accounting and does not provide accurate account balances. *See id.* at 7-8; *see also, e.g.*, *Cobell XX*, 532 F. Supp. 2d at 52 ("The tribal reconciliation project was not an audit, but a contract governed by 'agreed upon procedures'–in other words, a contract in which the client defines the scope and nature of the project.").

In this case, upon the Federal Defendants suggestion that the TRP report constitutes the required accounting, this Court stated that is "a theory that other courts have struck down or disagreed with that I already disagreed with in [denying Federal Defendants'] motion to dismiss." *See* DN48-2 (2/18/20 Tr.) at 8:10-18. Despite this, the Federal Defendants have provided an administrative record consisting of the TRP materials and subsequent financial statements, and now ask the Court to deny discovery based on their theory that the TRP was an adequate accounting. Motion Memo. at 14. The inadequacy of the TRP has been consistently

noted and Federal Defendants' position rejected many times. Without knowing what assets the Federal Defendants controlled, managed, and owed to the Nation—all issues that need discovery to be answered—it is impossible to define the scope of the accounting needed to satisfy the Federal Defendants' trust duties to the Nation. The Nation asks this Court to use its equitable powers to order restoration of the trust at the conclusion of this case—which requires that the parties present the Court with a full picture of the assets that should have been included, but were not, in the TRP.

These issues have arisen in many other tribal trust accounting cases and, in those cases, discovery was permitted. *See Sisseton*, 130 F. Supp. 3d at 397; *Cobell v. Norton*, 226 F.R.D. 67, 92-93 (D.D.C. 2005); *Chickasaw Nation v. Dep't of the Interior*, Case No. 5:05-cv-01524-W, Doc. No. 100 (Order) (May 4, 2010); *id.*, Doc. No. 180 (Order) (May 8, 2014); *Otoe-Missouria Tribe v. Salazar*, Case No. 5:06-cv-01436-C, Doc. No. 70 (Scheduling Order) (Apr. 2, 2009); *Seminole Nation of Okla. v. Salazar*, Case No. 6:06-cv-00556-SPS, Doc. No. 88 (Scheduling Order) (July 6, 2009). Consistent with this line of cases, the Court has already recognized that discovery is necessary and appropriate in this case. *See* DN48-2 (2/18/20 Tr.) at 11:7-9; 3:11-17.

In their refusal to budge from their no discovery position, the Federal Defendants continue to misrepresent the holdings in both *Cobell* and *Fletcher*. The Federal Defendants rely on *Cobell V* to argue that *Cobell* was limited to a review of the administrative record. *See* Motion Memo at 16-17. However, in *Cobell* the United States' argument that the case should be limited to review of an administrative record was repeatedly rejected. *See Cobell*, 226 F.R.D. at 92-93; *Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999) (*Cobell II*) (holding the United States in contempt for failing to make good faith efforts to comply with the court's discovery orders); *Cobell v. Norton*, 226 F. Supp. 2d 1, 159 (D.D.C. 2002) (*Cobell VII*) (holding that the *Cobell*

plaintiffs were entitled to discovery), *vacated in part on other grounds*, 334 F.3d 1128 (D.C. Cir. 2003). The Federal Defendants' reliance on *Fletcher* is similarly misplaced. As an initial matter, the accounting required in the *Fletcher* case was significantly more straightforward than what will be required here. *Fletcher* involved one resource (oil and gas headrights), one known financial account, and one legal question (whether non-Osage members were receiving oil and gas royalties). In contrast, the Nation's case involves multiple resources, multiple known and potentially currently unknown financial accounts that have been or should have been held in trust by the Federal Defendants for the Nation, and more numerous (and complex) legal questions regarding the Federal Defendants' failure to account for the Nation's complete Trust Fund over many decades. In addition, the issue of whether a tribal trust accounting case is limited to record review was never raised with, or addressed by, the Tenth Circuit. Indeed, the Tenth Circuit indicated that on remand it would be within the equitable power of the district court to authorize and manage discovery. *Fletcher v. Salazar*, 730 F.3d 1206, 1215 (10th Cir. 2013) (stating that beneficiaries were entitled to information that is reasonably necessary to enable them to enforce their rights under the trust, and that there would be some parameters around that).

Like in *Cobell* and other trust accounting cases, this Court will ultimately be asked to assess the required accounting, including delineating the scope of the accounting and approving a methodology that appropriately balances the Nation's right to a full and complete accounting of all its revenue generating assets held in trust by the Federal Defendants with the realities of what documentation remains available. The Nation's document requests are aimed at answering the crucial questions about scope and methodology. Under the Federal Rules and binding precedent, the Nation is entitled to the discovery it seeks.

III. The Federal Defendants have refused Plaintiffs' repeated requests to confer.

The Federal Defendants alternatively ask the Court to limit discovery based on relevance and proportionality. *See* Motion Memo at 16-29. This request should be denied because the Federal Defendants have thus far refused to confer about discovery due to their scorched earth "no discovery" position. As such, their request to limit discovery should be denied based on their failure to comply with LCvR 7(m).

Had the Federal Defendants conferred with the Nation the parties could have made significant progress on numerous discovery issues the Federal Defendants raise. For example, one small issue the Federal Defendants raise is to ask the Court to limit the Nation's Requests #15-16 "to that which is not publicly accessible and is within the custody and control of Federal Defendants." Motion Memo at 27-28. At best this assertion shows that Federal Defendants' motion is premature. However, the Federal Defendants know full well that the Nation already has collected a significant volume of records from the publicly available archives and repositories and has offered to share those with the Federal Defendants to create a common data set for use in this case. Their assertion now that the Nation's document requests are overbroad because they seek documents in the public domain—many of which may have been collected by the Nation already—is contrary to the repeated requests and suggestions made by the Nation to coordinate and cooperate in discovery in this case.

The Nation has also tried to confer with the Federal Defendants about how to properly manage the discovery that is needed in this case.[1] While the document requests seek a substantial amount of information, the Nation would prefer to work with the Federal Defendants

[1] Notably, much of the work that will be required in discovery in this case is due in large part to the Federal Defendants' seizure of all of the Nation's governmental records and subsequent failures to properly maintain them. The appalling conditions in which the Federal Defendants stored Indian Trust records was well documented in the *Cobell* case.

to prioritize the most important information in hopes to streamline the discovery that is needed in this case. On multiple occasions, counsel for the Nation has requested the opportunity to meet and confer with the Federal Defendants only to be turned down each time based on the Federal Defendants' hard-line "no discovery" position.

For example, the Nation has raised the issue of whether the Federal Defendants would produce electronic databases as a first step that could potentially reduce the need for paper discovery. Electronic databases are an important tool in managing information relating to the Nation's trust funds since they are well-suited to the listing and coding of substantial amounts of transactions. *See, e.g.*, *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 18-20 (D.D.C. 1999) ("*Cobell V*") (discussing the role of database systems, including the Trust Fund Accounting System ("TFAS") being implemented by the OST and the Trust Asset and Accounting Management System ("TAAMS") being implemented by the BIA). In fact, a significant project underpinning the TRP reports was the preparation of a Concordance database by Arthur Andersen.[2]

In tribal trust accounting cases, it has been common practice for the United States to produce an electronic database, commonly referred to as a trust account database or "TAD." By 2012, the Office of the Special Trustee for American Indians had created over 170 TADs for tribes for use in both settlement processes and in litigation. *See* Letter with attachments from Anne Lynch to Dedra Curteman dated May 19, 2020 (attached hereto as Exhibit 1), at p.1 & Att. A cited therein. Based on the information available to the Nation, a TAD was produced in all of the hundred-plus tribal trust accounting cases that have been resolved the past few decades.

[2] Despite the fact that the Arthur Andersen Concordance database underpins the TRP report, the Federal Defendants have thus far refused to produce it. It is not part of the "administrative record" touted in the Motion.

In addition, this Court ordered the parties to confer as soon as practicable on a document production protocol for electronically stored information. *See* DN49 at 3. Given the importance of electronic databases, the Nation a conferral letter noting Federal Defendants' assertion that a Cherokee-specific TAD has not yet been created, but asking that the sources of information that would be used to compile a TAD (including, at a minimum, the six electronic databases listed in the conferral letter) be produced. *See* Exhibit 1 at 2. Federal Defendants have yet to respond.

Despite this, the Federal Defendants do not even mention electronic databases in the Motion, spending the entire discussion of burden on production of records from the American Indian Records Repository ("AIRR"). Not only does the Motion fail to acknowledge that the Nation has suggested that there could be ways to share the burden of reviewing and producing documents from the AIRR, the burden of producing records from the AIRR has no bearing on the burden of producing electronic databases or other readily accessible and producible information. Again, had the Federal Defendants participated in a conferral process, the issue of electronic databases could have been discussed and resolved, as could some arrangement on how best to minimize the AIRR related burdens of concern to the Federal Defendants. However, since there was no conferral, the Motion is premature and should be denied.

IV. The Federal Defendants' have not met their burden to show the requested discovery is not proportional.

The Federal Defendants request to limit discovery also fails to establish that the requested discovery is not proportional. Initially, the Federal Defendants incorrectly claim that it is the Nation's burden to show that discovery is warranted under the six-factor proportionality test. Motion Memo at 17 (citing *United States ex rel. Shamesh v. CA, Inc.*, 314 F.R.D. 1, 8 (D.D.C. 2016)). While a party seeking discovery must demonstrate relevancy, the burden of showing why discovery should not be had under the proportionality test is on the objecting party:

> 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. *Meijer, Inc. v. Warner Chilcott Holdings Co., III, Ltd.*, 245 F.R.D. 26, 30 (D.D.C. 2007) (citing *Alexander v. FBI*, 194 F.R.D. 316, 325 (D.D.C. 2000)); *see also* Fed. R. Civ. P. 26(b)(1) advisory committee's notes to 2015 amendment ("[T]he change does not place on the party seeking discovery the burden of addressing all proportionality considerations" and "the parties' responsibilities would remain" as they were under previous iteration of the rules). Once the relevancy of the material sought has been established, the objecting party then bears the burden of "showing why discovery should not be permitted." *Alexander*, 194 F.R.D. at 326 (quoting *Corrigan v. Methodist Hosp.*, 158 F.R.D. 54, 56 (E.D. Pa. 1994)).

Id. at 8; *see also Oxbow Carbon & Minerals LLC v. Union Pac. R.R.*, 322 F.R.D. 1, 6 (D.D.C. 2017) ("To be sure, however, 'the amendments to Rule 26(b) do not alter the basic allocation of the burden on the party resisting discovery to—in order to successfully resist a motion to compel—specifically object and show that . . . a discovery request would impose an undue burden or expense or is otherwise objectionable.'") (quoting *Mir v. L-3 Commc'ns Integrated Sys., L.P.*, 319 F.R.D. 220, 226 (N.D. Tex. 2016)); *Cobell v. Norton*, 226 F.R.D. 67, 92 (D.D.C. 2005) ("Generally, the party moving for a protective order under Federal Rule of Civil Procedure 26(c) bears the burden of establishing good cause for the entry of the protective order.") (citing *Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 845 (D. D.C. 1996)).

Federal Defendants have failed to meet their burden. In keeping with their prior filings, they grossly misstate the Nation's claims and the importance of the issues raised in this case. This is not a breach of contract matter as Federal Defendants imply. *See* Motion Memo at 19 (citing *Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC*, No. 5:15-CV-37-FL, 2017 U.S. Dist. LEXIS 30558, at *2 (E.D.N.C. Mar. 3, 2017)). Rather, this case concerns a fiduciary relationship in which "the United States as trustee has undertaken an obligation 'of the highest responsibility and trust'." *Minnesota Chippewa Tribe v. United States*, 14 Cl. Ct. 116, 129 (quoting *Cheyenne-Arapaho Tribes v. United States*, 206 Ct. Cl. 340, 345, 512 F.2d 1390, 1392

(1975) (quoting *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 925 (1965))). In addition, the Nation is not a single individual party, but rather a sovereign government with hundreds of thousands of members who rely on it for essential government services.

Federal Defendants' argument that "the amount in controversy is not applicable because Plaintiff is not seeking monetary relief," Motion Memo at 19, is based on a continuing misunderstanding of the difference between monetary damages and monetary relief, despite the fact that this Court has already held the two are different. *See* DN42 at 6 ("But the Nation is not seeking damages. Compl. ¶ 90. 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)). Given that the Nation is seeking restitution, *see, e.g.*, DN48 at 21, this factor weighs in favor of the Nation.[3]

The argument that discovery should be limited temporally to a six-year time period also is misplaced. Motion Memo at 25-26. The Federal Defendants have already argued that claims pre-dating six-years before the filing of this case should be dismissed on statute of limitations grounds. *See* DN34-1 at 21-24. The Court denied that argument in its order on Federal Defendants' motion to dismiss. *See* DN42 at 6. Because this Court has ruled that the Nation may continue to pursue those claims, it necessarily follows that the Nation can seek discovery outside a six-year period. The Federal Defendants' attempt to relitigate this issue must be rejected.

Finally, the Federal Defendants' argument that the Nation's Request #4 and #15-16 are irrelevant is wrong. Request #4 is vital to the Nation's claims in this case. As set out in the Complaint, the Federal Defendants took complete control of the Cherokee Nation government in

[3] Many of the tribal trust accounting claims have been settled by the Federal Defendants for hundreds of millions of dollars. *See, e.g.*, DN39 at 3 n.4.

1906, confiscating all of its government records. Complaint, DN2-1 ¶¶ 70, 93-99; *see also* The 1906 Act for the Five Tribes, 34 Stat. 137 (Apr. 26, 1906). They would then appoint a "chief" on behalf of the Nation and illegally treat the appointed "chief" as the sole repository of the Nation's authority. DN2-1 ¶¶ 97-99. Even after the Nation regained control of its government, the Federal Defendants returned few, if any, of these records. DN2-1 ¶ 99. The appointed "chiefs" took actions at the behest of the Federal Defendants, including actions that impact the Nation's trust, and the Nation's Request #4 is aimed at obtaining those relevant records.

Similarly Requests #15 and 16 are not irrelevant or disproportional. These seek transcripts of testimony concerning the TRP and other central matters in this case. Federal Defendants argue that they should not be required to produce documents that are already in the public record. But, most deposition transcripts are not a matter of public record but are retained by the parties to the case. To the extent the Federal Defendants believe certain transcripts of Congressional testimony are readily available, that likely could have been resolved through a simple meet-and-confer process. Federal Defendants' assertion that they should not be required to produce transcripts that are outside of their custody and control is a red herring—no party is required to produce documents that they do not possess or control.

Because the discovery propounded by the Nation is relevant and proportional, the Court should deny the Motion and order the Federal Defendants to provide full and complete responses immediately. The continued dilatory tactics by Federal Defendants will only further delay the commencement and completion of discovery. The Nation stands ready to meet-and-confer with the Federal Defendants about the information within the sole possession, custody, and control of the Federal Defendants, and to prioritize production so that the parties can efficiently complete discovery and present the merits of the case.

WHEREFORE, the Nation respectfully requests that the Motion be denied, that pursuant to Fed. R. Civ. P. 26(c)(2) the Court order the Federal Defendants to provide discovery responses to the Nation, and that the Court grant such other and further relief it deems just.

Respectfully submitted this 4th day of June, 2020.

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