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' REPLY IN
SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Rules

Other Authorities

Federal Defendants have shown why this case should be confined to the administrative record and why Plaintiff's requests for over 200 years of discovery are improper, unnecessary, and not proportional to the needs of this case. Plaintiff offers little by way of a substantive opposition, and instead contends that its three causes of action for an "accounting" are somehow disassociated from one another, that discovery has previously been ordered by this Court, and that discovery is needed for what effectively amounts to a remedy. While this Court has recognized that "some discovery will be appropriate," Scheduling Order, ECF No. 49 at 1, the Court has also stated that it "cannot make conclusions concerning the proper scope of discovery, however, without the reports that Defendants claim are sufficient or a detailed explanation of what is missing by Plaintiff." *Id*. Plaintiff's opposition, however, does not attempt to detail what is missing from the administrative record, demonstrate that extra-record review is necessary, explain why over 200 years of discovery materials would be appropriate, or describe how those materials would be proportional to the needs of this case. This is particularly telling in light of Plaintiff's concession on the related 12(c) motion that they are not trying to advance common law claims. Their claims are now admittedly limited to alleged statutory violations and Federal Defendants' accounting work—which is set forth in the 100,000 page administrative record—that was undertaken pursuant to those statutes.

Federal Defendants have complied with any obligation under the law to provide an accounting, and Plaintiff has not demonstrated that its requested discovery of documents going back to 1785 bears on their claims for an accounting. Instead, Plaintiff suggests that it is Federal Defendants' burden to demonstrate why the requested discovery is not proportional to the needs of the case under Fed. R. Civ. P. 26. This is an incorrect recitation of the burden, and, in any event, Federal Defendants' Motion demonstrated why Plaintiff's requested discovery is not

necessary or proportional. Indeed, Federal Defendants have shown that (1) the administrative record sets forth what Federal Defendants have done to comply with their statutory directives; (2) that traditional discovery is unnecessary given the administrative record (which Plaintiff has not alleged is in anyway incomplete or missing documents); and (3) Plaintiff's requested discovery would be an immense, time-consuming and expensive burden that would not elucidate or otherwise aid in resolving the alleged statutory violations asserted by Plaintiff. For these reasons, the Court should limit its review to the administrative record to determine if Federal Defendants have complied with any statutory obligation to provide Plaintiff an accounting. This can be done in short order on cross motions for summary judgment. Plaintiff believes that the accounting that has been provided does not comply with the statute's requirements. Federal Defendants strongly disagree. The Court can resolve this issue on summary judgment, based upon its review of the administrative record. To the extent Plaintiff may believe extra-record discovery is appropriate they could have at any time sought to make the requisite showing, but failed to do so. At bottom, Federal Defendants have shown that Plaintiff is not entitled to traditional discovery and therefore respectfully request that the Court enter a protective order to deny traditional discovery so that this case can move to summary judgment, and be concluded.

I. The Administrative Record Evidences the Accounting Required by Law to be Provided to Plaintiff, and Thus Should Form the Basis for the Court's Review of Plaintiff's claims.

A. The Complaint's Three Counts All Seek an "Accounting" Based on Statutory Law as Plaintiff Now Admits and Cannot Be Read in Isolation from One Another.

As was discussed in Federal Defendants' Motion for a Protective Order, Federal Defendants' 12(c) Motion, and as admitted by Plaintiff in their opposition to the 12(c) Motion, Federal Defendants' obligations as a trustee are defined by statute. ECF No. 55-1 ("Mot.") at 9

(citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011)), ECF No. 54-1 at 4-6, ECF No. 60 at 4-5. Common law "traditional trust principles cannot displace what statutes and regulations mandate." *Fletcher v. United States* ("*Fletcher II*"), 730 F.3d 1206, 1208 (10th Cir. 2013). 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." *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 302 (2009). *See also Cobell v. Babbitt*, 91 F. Supp. 2d 1, 30 (D.D.C. 1999), *aff'd and remanded sub nom. Cobell v. Norton*, 240 F.3d 1081, 1096-99 (D.C. Cir. 2001) (recognizing that the sources of law giving rise to plaintiff's common law claims for breach of trust for financial mismanagement are grounded in statute).

Despite its admission that common law claims cannot stand as a matter of law and that each of its claims are based in statute, Plaintiff attempts, unsuccessfully, to disassociate its three claims for an "Accounting" from one another. Plaintiff asserts that its "Count I applies applicable *federal trust requirements* governing the United States' relationship to Indian Tribes, demanding an accounting . . ." ECF No. 57 ("Pl.'s Opp'n") at 2 (emphasis added). By Plaintiff's own admission, those "requirements" can only come from statute. Like Count I, Plaintiff asserts that "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." *Id.* And in in Count III, Plaintiff "asserts that any conclusion by the Federal Defendants that an 'accounting' was rendered by the TRP [Trust Reconciliation Project] is arbitrary and capricious or otherwise not in accordance with law, in violation of the APA." *Id.* Counts II and III, like Count I, allege statutory violations. Plaintiff does not dispute that Federal Defendants assert that they carried out each of their statutory obligations by issuing

final agency actions (i.e. any legally required "accountings") and, more importantly, Plaintiff does not dispute that Federal Defendants have made clear that all materials relied upon in issuing those accounting are in the administrative record. If Federal Defendants have failed to comply with their statutory duty, that will be borne out on summary judgement based on the administrative record. Again, Plaintiff offers no supportable rationale as to why additional discovery is needed.

Plaintiff does not seriously attempt to differentiate between their three claims in order to obtain discovery. Instead, they merely assert that "Counts I and II are not based on 'review of an administrative record,' but rather claim violations of Federal Defendants' trust responsibilities that arise from the special trust relationship that the United State has asserted over Indian Tribes, and which are grounded in federal law." Pl.'s Opp'n at 3. But the referenced "federal law," is, of course, statutory law, as Plaintiff admits. *Id*. at 2. Plaintiff next speculates that the *Sisseton* court would have allowed discovery if the case proceeded based on one line in the *Sisseton* court's order that noted that the parties had not yet been able to develop a record. *Id.* at 3. In reality, no administrative record was filed in *Sisseton* and no decision was made on how the case would be adjudicated. The *Sisseton* court was not ruling on a discovery dispute between the parties as is presented here, but rather, was acknowledging that at the motion to dismiss stage, the court was not equipped to make a ruling on a statute of limitations defense. *Sisseton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell,* 130 F. Supp. 3d 391, 397 (D.D.C. 2015). Nothing in *Sisseton* implies that the court would have ordered discovery if the case had proceeded, and Plaintiff's suggestion that the dicta from the *Sisseton* case should form a basis for this Court to engage in discovery, should be rejected. The fact that Plaintiff relies so heavily on dicta from *Sisseton* in an effort to avoid an APA posture is telling. 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. *See Cobell v. Babbitt*, 91 F. Supp. 2d 1, 30 (D.D.C. 1999). Therefore, the *Cobell* court determined that the "court's review will proceed on the administrative record." *Id*. at 38. *See also El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014) (claim lies "only where a plaintiff can identify specific trust duties in a statute, regulation, or treaty. And this analysis overlaps with the APA's requirement that a plaintiff allege "that an agency failed to take a *discrete* agency action that it is *required to take.*'") (emphasis in original) (quoting *SUWA,* 542 U.S. at 64, 124).

Plaintiff's reliance on district court cases in the Tenth Circuit in support of its request for discovery fares no better. *See* Pl.'s Opp'n at 6 (citing *Chickasaw Nation v. Dep't of the Interior*, *Otoe-Missouria Tribe v. Salazar*, and *Seminole Nation of Okla. v. Salazar*). Importantly, each of these three cases preceded the Tenth Circuit's decision in *Fletcher v. United States,* 854 F.3d 1201 (10th Cir. 2017) (*"Fletcher III"*). There, the Tenth Circuit affirmed that Federal Defendants' obligations are defined by statute, and affirmed the district court's decision that the case should be resolved first through judicial review of the accountings that were provided. *See* Mot. at 14-15 (citing *Fletcher III,* 854 F.3d at 1205-07).

B. Plaintiff's Request for Discovery Presupposes That It Succeeded on the Merits and is Entitled to a Remedy.

Plaintiff bases its need for discovery upon the ultimate relief requested—an accounting—and upon an assumption that Plaintiff will succeed on the merits. Plaintiff first has to succeed on the merits/summary judgment portion of the litigation—and garner a determination that Federal

Defendants have not complied with their statutory obligations. But Plaintiff seeks discovery for a remedy based on the presumption that they've already succeeded on the merits.

Plaintiff baldly asserts that "[t]he 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." Pl.'s Opp'n at 3. These justifications are premature because they go to the merits and potential remedy assuming Plaintiff's claims are sustained on summary judgment. The proper scope of the accounting is an issue of law based on what is required under the statue invoked by Plaintiff, in particular the 1994 Act (25 U.S.C. §§ 4011 and 4044). *See* Compl. ¶¶ 141, 144, 153 (Count 2); Pl.'s Opp'n at 2; ECF No. 60 ("Pl.'s Opp'n to Motion to Dismiss") at 5-7. There is no amount of discovery that can dictate what the statue requires. Similarly, there is no trust corpus to be restored unless and until Plaintiffs win on the merits and are granted that remedy. Accordingly, there is no basis for discovery for that purpose, at least at this time. The same is true for "the appropriate methodology to employ" for any accounting. That too is an issue of law based on what is required under the 1994 Act, or any other relevant statute. Here too, no amount of discovery will inform the Court or parties as to what methodology is required by law. What's more, the administrative record contains the materials relied upon by Interior in issuing the accountings. Plaintiff has not challenged the administrative record or shown that they are entitled to discovery outside of the administrative record. Moreover, if the accounting is ultimately deemed insufficient or not otherwise supported by the administrative record, Plaintiff can argue in support of the proper remedy and whatever remand they believe Interior is required to undertake. Discovery on these issues now is, at a minimum, premature.

Plaintiff has not attempted to demonstrate that there is a reason for the Court to look beyond the administrative record other than to suggest that discovery is warranted 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." Pl.'s Opp'n at 3. Without an identification as to how the agency's administrative record is incomplete or should be supplemented by extra-record evidence, the Court should deny Plaintiff's notion that discovery is appropriate beyond the Court's review of the administrative record. *See, e.g.*, *Conservation Force v. Salazar*, No. 1:10-CV-1262 BJR, 2012 WL 11947683, at *2 (D.D.C. Feb. 6, 2012) (denying motion for limited discovery, noting that supplementation of an administrative record is the exception not the rule, and plaintiffs bear the burden of showing record is insufficient). Similarly, without a finding that any required accounting fails to comply with the statute, Plaintiff's rationale advances no valid basis for discovery.

C. Plaintiff's Argument that the Arthur Anderson Reconciliation is not an Accounting is a Question on the Merits.

Plaintiff also argues that the Arthur Anderson reconciliation report is not an accounting. *See* Pl.'s Opp'n at 5-6 ("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, that they cannot be used to determine whether the beginning balances are correct."). Plaintiff further suggests that "every entity that has reviewed the TRP has concluded that the TRP does not constitute an accounting and does not provide accurate account balances." *Id*. at 5 citing *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."). But even if that is true, it is an issue for the merits.

Plaintiff cannot presuppose its desired outcome to obtain discovery. Plaintiff's proposition that discovery should proceed because the TRP was not an "accounting" is a legal determination that should be decided on the Parties' cross motions for summary judgment. Whether or not other courts, including the *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 52 (D.D.C. 2008), court have determined that the TRP is or is not an accounting is of no import because this case involves a different plaintiff and different claims. *See Cobell*, 532 F Supp. 2d at 39-40 (case involving individual Native American Plaintiffs regarding their individual Indian money accounts). And, *Cobell* is not applicable on the limits of the tribal accounting because as was noted previously, the *Cobell* plaintiffs were individuals who brought claims regarding their individual Indian Money Accounts, not the accounting that was provided as a result of the TRP, as Plaintiff, as a Tribe, has asserted here. In addition, Plaintiff's definition of an accounting is immaterial. The question is whether Interior's accounting documents complied with any statutory directive. Again, no discovery is needed to answer the question as Interior's accounting materials are in the administrative record.

Furthermore, this Court has certainly not ruled on whether Plaintiff received any accounting to which it is entitled. Plaintiff remarkably attempts to suggest that this Court has found the TRP is not an accounting because Judge McFadden stated in a status conference that Federal Defendants have been "relying on a theory that other courts have struck down or disagreed with that I already disagreed within your motion to dismiss." ECF No. 48-2, Feb. 18, 2020 Tr., 8:10-18. Judge McFadden's statement, however, concerned his dismissal on jurisdictional grounds, not whether what the agency provided in the administrative record is or is not an accounting required by law. As Federal Defendants noted in their Motion, this case is similar to *Fletcher v. United States*, 153 F. Supp. 3d 1354, 1356 (N.D. Okla. 2015), where

plaintiffs also sought an accounting. Mot. at 14-15. The entirety of the accounting question was heard on the administrative record. Notably, not only was the administrative record appropriate to fully adjudicate the case, the court also had no problem fashioning the appropriate remedy based on the limited claims that were sustained. Upon plaintiffs' appeal, the Tenth Circuit affirmed, holding that the case should be resolved first through judicial review of the accountings the agency provided. *Fletcher III,* 854 F.3d at 1205-07. Plaintiff argues that Fletcher "was significantly more straightforward than what will be required here. *Fletcher* involved one resource, one known financial account, and one legal question. 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." Pl.'s Opp'n at 7 (parentheticals omitted). That the number of accounts and resources may differ does not in any way change the calculus as to whether discovery is necessary to adjudicate Plaintiff's claims. The materials provided by Interior will either comply with the statutory directives or they will not. Plaintiffs will have a full opportunity to present any arguments it chooses on whether any portions of the accounting materials complied with the law. This is true whether there is one account or many.

Plaintiff seeks the very "green eye-shade death march" rejected by *Fletcher*. *See* Mot. at 22 (quoting *Fletcher II,* 730 F.3d at 1214, "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."). Further, should Plaintiff continue to believe that the record is incomplete, it is Plaintiff's burden to demonstrate *how* the record is incomplete. *See, e.g.*, *Safari Club Int'l v. Jewell*, 111 F. Supp. 3d 1, 4 (D.D.C. 2015) ("Plaintiffs bear a 'heavy burden' in

seeking to … supplement the record.") (citation omitted). Discovery is not needed, nor has Plaintiff demonstrated that review beyond the administrative record is necessary because the record is incomplete or that one of the exceptions permitting extra-record review is applicable. If the Federal Defendants' accountings are insufficient, Plaintiff can make their showing on summary judgment, citing the evidence from the administrative record.

II. Federal Defendants have not violated L. Civ. Rule 7(m).

Plaintiff's assertion that Federal Defendants have "refused to confer" and thus the Court should deny their motion for a protective order is striking in its fallacy and is telling as to the lack of legal and practical substance of Plaintiff's opposition. Pl.'s Opp'n at 8. Throughout the litigation, undersigned counsel has been very pleased with the working relationship with Plaintiff's counsel. Upon the denial of the motion to dismiss through and including last week, counsel has conferred dozens of times from February 11 to the present in order to reach mutual agreement on the topic of discovery via phone conferences, email, and draft Joint Status reports regarding discovery. Indeed, the very discovery issues raised in this motion were highlighted, discussed, and subject to untold rounds of conferral in advance of both Meet and Confer Statements, ECF Nos. 46 and 48, and were the very subject of a Court hearing. Feb. 18, 2020 Min. Entry. That hearing was followed by additional rounds of phone calls, emails, and even a March 11, 2020 letter sent by Federal Defendants. The instant motion was occasioned by a Court order that accepted Federal Defendant's proposal to bring these discovery issues before the Court, and Federal Defendants were directed to file this motion by a date certain set by the Court. ECF No. 49 at 2. While Federal Defendants strive to be measured in their response to Plaintiff's "no conferral" allegation, we are constrained to report that the allegation is patently false, which is clear from the docket in this case. *See* ECF No. 46, 48, 48-2, 49.

Plaintiff's attempt to support their "no conferral" claims by suggesting that Federal Defendants maintain a "scorched earth 'no discovery' position." Pl.'s Opp'n at 8. This too is unavailing and incorrect. As set forth in this motion, Federal Defendants have not taken a "no discovery" position. Federal Defendants maintain that if Plaintiff is entitled to discovery outside of the administrative record (which Federal Defendants agreed to compile and produce in a short time frame, well before there was any Court order requiring them to do so), it must first make the requisite showing consistent with this Circuit's clear precedent. Plaintiff has not attempted to do so.

Plaintiff also misunderstands the difference between a legitimate discovery dispute and a refusal to confer. For the reasons stated throughout these proceedings since the Court's dismissal motion denial, Federal Defendants have maintained the position that Plaintiff is not entitled to traditional civil discovery. Maintaining that position is not a refusal to confer[1]. Local Civil Rule 7(m) provides that "[b]efore filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel in a good-faith effort to determine whether there is any opposition to the relief sought, and, if there is, to narrow the areas of disagreement." Plaintiff disagrees with Federal Defendants' position, which is precisely why Federal Defendants noted in the Parties' Joint Supplemental Statement that "[g]iven the Parties' differences, Federal Defendants recognize that their discovery disputes cannot appropriately be resolved via a Rule 26(f) Statement, and, instead, should be resolved via motion practice." ECF

[1] The double standard Plaintiff espouses is particularly stunning given that Plaintiff has maintained for months that it is entitled to over 200 years of painstaking, expensive, and inefficient and unnecessary archival discovery, yet it still has not offered a legal justification for that position.

No. 48 at 12. The fact that serious discovery dispute remain does not mean that 7(m) was violated.

A. Federal Defendants Have Conferred About Plaintiff's Electronically Stored Information Protocol Request and Request for a Trust Accounting Database.

Plaintiff suggests that it is common practice for Federal Defendants to produce an electronic Trust Account Database, "commonly referred to as a TAD." *See* Pl.'s Opp'n, Ex. 1, at 1; Pl.'s Opp'n at 9. That is incorrect. Plaintiff mentions litigation Trust Account Databases ("TADs") created specifically for prior lawsuits involving different tribes (Pl. Opp'n at 8), but no such litigation TAD has been created here. For context, the Office of the Special Trustee for American Indians ("OST") has, at the direction of the Solicitor following negotiations and agreement of litigants in then-pending lawsuits, prepared litigation TADs that were used in limited instances by specific litigants in specific lawsuits filed in the U.S. Court of Federal Claims. In addition to litigation TADs, and also at the direction of the Solicitor's Office, OST has prepared settlement TADs for the Solicitor's and the Justice Department's use in exploring settlement opportunities in pending lawsuits. No litigation TAD has been created for this litigation. And, while Interior has prepared certain settlement TAD materials for the Solicitor's and Justice Department's internal use in defense of a previously filed action, we do not read Plaintiff to be seeking any privileged or otherwise protected material in discovery. In any event, any work on a settlement TAD would be protected from disclosure by the work product doctrine.

Plaintiff further suggests that "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* Pl.'s Opp'n, Ex. 1, at 1; Pl.'s Opp'n at 9. Plaintiff mischaracterizes the Office of the Special Trustee for American Indian's ("OST") Fiscal Year 2012 Annual Report to Congress.

The report states that OST's "Office of Historical Trust Accounting (OHTA) employees were part of an interagency workgroup that was tasked . . . to calculate amounts to use in *settlement negotiations* with tribes concerning claims about trust fund accounting and natural resource management." Pl.'s Opp'n, Ex. 1 at 12 (emphasis added). The report goes on to state that the "team compiled and analyzed account data to create over 170 TADs for tribes" and that "[i]nformation from six accounting systems and data sources were combined into each database that covered up to 64 years (July 1, 1946 to September 30, 2010) of trust fund activity." *Id*. The 2012 Annual Report does not suggest that it is "common practice" for Federal Defendants to produce an electronic database or TAD. Pl.'s Opp'n at 9. Indeed, the report notes that the TADs were created to use for purposes of settlement negotiations with specific tribes and that the TADs were created from the compilation of various account information pertinent to each tribe. *Id*. at Ex. 1 at 12. This case is not in a settlement posture as were the cases cited by OST's Fiscal Year 2012 Annual Report, and no TAD has been created for purposes of producing it for litigation or discovery.

Plaintiff further argues that it has raised the issue of producing electronic databases as a first step "that could potentially reduce the need for paper discovery," but that Federal Defendants have not responded. Pl.'s Opp'n at 9-10. Yet again, Plaintiff has mischaracterized Federal Defendants' communications. Plaintiff first raised the issue of producing a Trust Accounting Database, or "TAD," on April 23, 2020 via a phone call with Federal Defendants' counsel. In response to counsel's request for a TAD for this litigation, Federal Defendants' counsel responded via e-mail on April 27, 2020, that TADs are not created or maintained in the agencies' ordinary course of business, and when they are created, they are subject to various privileges, are not discoverable, and that in any event, a TAD had not been created for this

litigation. One day prior to the filing of Federal Defendants' motion for a protective order, Plaintiff's counsel sent additional correspondence, proposing to confer on the issue of an ESI protocol and to confer on the issue of a TAD, despite Federal Defendants' counsel previously stating that a TAD for this case is not maintained in the agencies' ordinary course of business. In the correspondence, Plaintiff's counsel noted that a TAD is comprised of "six databases" that counsel believes are maintained in the agencies' ordinary course of business, and thus should be discoverable. Pl.'s Opp'n, Ex. 1, at 2. According to Plaintiff, this information includes: "a Concordance database created by Arthur Andersen for the Tribal Reconciliation Project, which includes data for all tribes covering the time period from July 1, 1972, to September 30, 1993; a database from the Trust Funds Management System (Finance) used by the Bureau of Indian Affairs, which includes data for all tribes covering the time period from October 1, 1993 to March 31, 1995; a database from the OmniTrust ES (OMNI) used by the BIA, which includes data for all tribes covering the time period from April 1, 1995, to February 28, 1999; a database from the Trust Fund Accounting System (TFAS) used by the BIA, which includes data for all tribes covering the time period from March 31, 1995, through the present; a database used in connection with the Individual Indian Money (IIM) accounts; and a database created by Treasury to cover the time period going back to 1943." Pl.'s Opp'n, Ex. 1, at 2. Setting aside that the data sets cover a time period that is not relevant to the litigation and far beyond any time frame for which Plaintiff would be entitled to discovery, the data sets are not, as Plaintiff suggests, a repository for Cherokee-specific information. The data sets encompass information from many account holders, and does not pertain only to the Plaintiff. Further, there is not a simple search option to distill Plaintiff-specific information as Plaintiff suggests. OHTA would have to identify which information within each dataset is related or potentially related to Plaintiff. This

work is further challenged because some account names and numbers do not necessarily indicate whether an account is related to a specific tribe or tribal entity and some accounts also hold jointly related funds, which would need to be further identified to determine which transaction information is related solely to the Plaintiff. The search would involve a methodic, resource-intensive, and time-consuming process. Most importantly, the information within these data sets that was relied upon by Federal Defendants in providing the accounting is contained in the administrative record. In any event, Plaintiff is not entitled to decades' worth of information simply because it may exist in electronic form.

With respect to Plaintiff's proposed ESI protocol, Federal Defendants' counsel is reviewing the draft protocol and will work with Plaintiff's counsel to reach resolution on a draft protocol. Notably, Plaintiff's counsel did not send it until 60 days following the Court order directing them to do so and, in any event, the ESI protocol may not be necessary depending on the outcome of this motion. Nonetheless, Federal Defendants will certainly respond in due course. Federal Defendants have conferred throughout this litigation consistent with their obligations under Local Civ. Rule 7(m).

III. Plaintiff Has Not Demonstrated that Traditional Civil Discovery is Relevant or Proportional to the Needs of the Case.

Finally, Plaintiff suggests that the alternative relief to limit discovery should be denied because Federal Defendants have failed to demonstrate why the requested discovery is not proportional. However, Plaintiff bears the burden to show that discovery is relevant and proportional. Nonetheless, Federal Defendants have explained why the discovery is not proportional to the needs of the case.

"Where a relevance objection has been raised, the moving party seeking to compel discovery must demonstrate that the information sought to be compelled is discoverable."

Breiterman v. United States Capitol Police, 324 F.R.D. 24, 30 (D.D.C. 2018) (internal quotations and citation omitted). Once the showing of relevance has been made, the "burden shifts to the non-moving party to explain why discovery should not be permitted." *Id*. Courts have discretion under Fed. R. Civ. P. 26(b)(1) to limit discovery, which states that discovery must be relevant 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 id*. at 32; Fed. R. Civ. P. 26(b)(1). *See also Meijer, Inc. v. Warner Chilcott Holdings Co., III, Ltd.,* 245 F.R.D. 26, 30 (D.D.C. 2007); *United States ex rel. Shamesh v. CA, Inc.*, 314 F.R.D. 1, 8 (D.D.C. 2016). Plaintiff's only justification in support of its extremely broad discovery demands is that Federal Defendants "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 . . . [r]ather this case concerns a fiduciary relationship . . ." Pl.'s Opp'n at 11-12. Federal Defendants, of course, have never suggested that this is a breach of contract case. And the alleged nature of Plaintiff's relationship with Federal Defendants does not establish that Plaintiff's requested discovery is relevant to the needs of the case. As Federal Defendants have established over and over, this is an accounting case and Federal Defendants' obligations are confined to statutes. While Plaintiff has walked away from earlier statements that its claims were grounded in common law, it does not do so here. Plaintiff seeks traditional discovery spanning hundreds of years that is well beyond any accounting duty that arises in statute and in any event, is well beyond its claims for an accounting. *See Breiterman*, 324 F.R.D. at 31 (quoting *Hardrick v. Legal Servs. Corp.*, 96 F.R.D. 617, 618 (D.D.C. 1983) ("Courts need not tolerate fishing expeditions, discovery abuse

and inordinate expense involved in overbroad and far-ranging discovery requests")). Federal Defendants have lodged a 100,000 page administrative record upon which the case can be fully adjudicated. With no time limitation and specific reference to the legal authority upon which Plaintiff relies in its discovery requests, the requests are irrelevant and disproportional to the needs under Fed. R. Civ. P. 26. As Federal Defendants have previously explained, the cornerstone legal question is whether Federal Defendants have provided a legally sufficient accounting. That determination can be made upon a review of the administrative record, before the Parties engage in discovery efforts that would cost the Federal Defendants monetary and personnel resources as well as a significant amount of time—all which outweigh the benefit the discovery can likely provide—given that the Court can adjudicate Plaintiff's claims on the administrative record evincing the accounting that Federal Defendants provided. *See* Gates and Gidner Decls., ECF Nos. 55-3, 55-4. Traditional discovery is not warranted simply because Plaintiff desires to proceed with discovery. *See United States v. Kellogg Brown & Root Servs., Inc.*, 284 F.R.D. 22, 36 (D.D.C. 2012) ("[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 information.").

A. The Proportionality Test Weighs Against Discovery.

As to the first factor for assessing proportionality, Plaintiff makes general statements as to the "importance of the issues" but has failed to elucidate how the asserted issues of importance militate in favor of discovery. As to the amount in controversy, the second proportionality factor, Plaintiff suggests that it is seeking restitution as a result of any Court findings regarding the accounting provided by Federal Defendants, and therefore, the amount in controversy is applicable and weighs in favor of discovery proceeding. Pl.'s Opp'n at 12. In the Parties' Joint Report, Plaintiff was abundantly clear that it seeks an injunction as a remedy. It stated, 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.") ECF No. 46 at 2. Plaintiff cannot play its requested remedy in opposing ways. Plaintiff has requested injunctive relief should the Court find that Federal Defendants did not provide an accounting. Thus, the second proportionality factor weighs against traditional discovery proceeding.

Plaintiff is also silent on the remainder of the proportionality factors, including the importance of discovery in resolving the issues (as we have shown, discovery is completely unnecessary to fully resolving each of the three counts), the parties' relative access to the information, the parties' resources, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Here too, we have shown that discovery is not important in resolving the issue of whether Federal Defendants complied with any statutory duties to provide an accounting. Rather than mandating that Interior spend decades providing Tribes with an accounting back to the beginning of the trust, as Plaintiff requests here, Congress gave Interior 17 months to complete a reconciliation of tribal trust fund accounts. 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 bear on Plaintiff's "trust." Additionally, we have demonstrated the difficulty for Interior to access the information in question, which is housed at the American Indian Records Repository (as well as other federal record centers in various locations), and requires dedicated staff and time to search, tag, image, and code the documents. In total, Federal Defendants estimate that it would take 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, utilizing 40% of OHTA's budget. ECF No 55-3, ¶¶ 13-14; ECF 55-4, Ex. 3, ¶ 7. Such a burden and expense on Interior outweighs its likely benefit when Plaintiff's expansive requests do not bear on the ultimate question of whether Federal Defendants complied with the 1994 Act by providing an accounting as directed by Congress. Plaintiff has failed to respond to these arguments and thus Federal Defendants' motion should be granted for this reason alone. For the reasons described in Federal Defendants' motion, these factors weigh against discovery, and because Plaintiff has not shown that the discovery is proportional, the Court should find that these factors weigh against traditional discovery. *See* Mot. at 20-26.

B. Application of a Six-Year Time Period to Plaintiff's Claims is Proportional.

As for the application of a six-year time period to Plaintiff's claims for a limitation on any discovery that this Court may order, Plaintiff only suggests that the statute of limitations argument has been rejected by the Court, and thus, any such limitation on discovery is also inappropriate. However, the Court's denial of a motion at the dismissal stage is inapposite. Here, Federal Defendants suggest that under Fed. R. Civ. P. 26, if discovery is allowed at all, it should be limited to the past six years, which is proportional to the needs of the case. Plaintiffs have asked for an accounting and their claims have been admittedly narrowed to effectively train on the requirements of the 1994 Act. But regardless if it's the 1994 Act or some other unidentified statute, Plaintiffs have not offered any legal or practical justification as to why over 200 years of discovery would be needed to adjudicate their claims. As opposed to archival discovery spanning over two hundred years' time, a six year temporal scope is reasonable given that Plaintiff is generally limited to bring claims against the federal government only if filed within six years of accrual. Moreover, Plaintiff has not demonstrated that its requested

discovery, with an over two hundred year temporal scope, is proportional. As Federal Defendants have acknowledged, Plaintiff seeks an accounting. Whether Federal Defendants have provided that accounting should be decided on the administrative record, but should the Court find that traditional discovery is warranted, Plaintiff's discovery requests should be limited by applying a reasonable temporal scope of six years from the date of the filing of Plaintiff's complaint.

C. Plaintiff's Requests 4 and 15-16 are Irrelevant.

Finally, Plaintiff suggests that its requests 4 and 15-16 are relevant because the requests bear on the United States' control of the Plaintiff, and that the testimony Plaintiff seeks is in the possession of Federal Defendants. Request 4 does not bear on whether Federal Defendants have provided a legally sufficient accounting, but rather, as Plaintiffs concede, bears on the appointment of various chiefs and the United States' alleged involvement in those appointments. Pl.'s Opp'n at 12-13. The testimony that Plaintiff seeks in requests 15-16 are similarly irrelevant. The requests seek testimony, and now upon Plaintiff's clarification, deposition testimony, related to the trust reconciliation process that resulted in the Arthur Andersen tribal reconciliation reports, as well as transcripts of testimony related to various topics outlined in Request 16. *Id.* at 13. However, once again, whether Federal Defendants provided a legally sufficient accounting does not relate to deposition testimony concerning the trust reconciliation process. Congress set the parameters, through statute, as to the accounting Federal Defendants were required to provide. Deposition testimony in other matters, unrelated to the Plaintiff and the accounting at issue in this case, does not bear on the ultimate question of whether Federal Defendants provided any accounting they were required to provide.

IV. Conclusion

This Court required Plaintiff to identify specifically how the administrative record is deficient. ECF No. 49 at 1. Plaintiff has not made the required showing. Instead, Plaintiff suggests several reasons as to why discovery should proceed, but none of those reasons bear on whether the administrative record is insufficient or whether traditional discovery is relevant and proportional to the needs of the case. Plaintiff first suggests that Federal Defendants have mischaracterized their claims. However, Federal Defendants have explained, case law dictates that the fiduciary relationship between the United States and Plaintiff is defined by statute—nothing more. The statutes Plaintiff has claimed that Federal Defendants have violated, 25 U.S.C. §§ 4011 and 4044—then, present the relevant question here—whether Federal Defendants have complied with the statutes' requirement to provide any accounting. Plaintiff's attempt to rely on other cases to support the notion that review beyond the administrative record is appropriate is of no moment here. The cases stand for the Plaintiff's proposition that the court ordered discovery in the pre-remedy phase of the litigation. *E.g.*, *Cobell*. Or, the cited cases pre-dated the Tenth Circuit's decision in *Fletcher*, which ultimately *affirmed* the district court's review of the accountings provided by the agency.

Plaintiff has done little to nothing to demonstrate how its requests are relevant, and nothing to demonstrate how its requests are proportional to the needs of the case. The monetary burden and amount of time it will take for Federal Defendants to respond to Plaintiff's extensive discovery requests for over 200 years of archival materials is beyond the needs of the case. Plaintiff's requests would require Federal Defendants to spend a disproportionate amount of time and money to engage in discovery when the core legal question can be decided upon the administrative record. If any traditional discovery should proceed, it should be limited to the six

year period prior to the filing of Plaintiff's complaint. For these reasons, Federal Defendants respectfully request that the Court grant their Motion for a Protective Order, ECF No. 55.

Respectfully submitted this 17th day of June 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