IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION,

Plaintiff,

v.

THE DEPARTMENT OF THE INTERIOR, *et al.,*

Federal Defendants.

Case No. 1:19-cv-02154-TNM

Judge Trevor N. McFadden

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Rules

Other References

ARGUMENT

> The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship. A fiduciary relationship necessarily arises when the Government assumes elaborate control over forests and property belonging to Indians. It is equally clear that the federal government has failed time and again to discharge its fiduciary duties.

Cobell v. Norton ("Cobell VI"), 240 F.3d 1081, 1086 (D.C. Cir. 2001) (internal quotations and citations omitted). The United States' trust obligations arose through its own actions and treatment of Indian tribes. The history of the relationship was described by the D.C. Circuit in *Cobell*, 240 F.3d at 1086-88 (describing successive periods of treaty-making, removal, allotment, termination, and finally self-determination). The history of the relationship between the United States and the Cherokee Nation ("the Nation") is set out in the Complaint, Doc. No. 1 ¶¶ 17-89, and is well known to this Court, *see, e.g.*, *Cobell v. Norton ("Cobell X")*, 283 F. Supp. 2d 66, 73 (D.D.C. 2003) (setting out the Cherokee Nation's removal from Georgia as an example of the United States' early dealings with Indian tribes), *partially vacated on other grounds by Cobell v. Norton ("Cobell XIII")*, 392 F.3d 461 (D.C. Cir. 2004).

The Nation now asks this Court to order the United States to produce an accounting of the Nation's Trust Fund[1] after the Defendants' refusal. These obligations arise from the common law of trusts and were codified in the American Indian Trust Fund Management Reform Act of 1994, Pub. Law No. 103-412, 108 Stat. 4239 (codified at 25 U.S.C. §§ 4001 *et seq.* and amending 25 U.S.C. §§ 161a *et seq.*) (the "1994 Act"). The D.C. Circuit has held that "the 1994 Act [did] not *create* trust responsibilities of the United States," but "lists some of the means

[1] The Cherokee Nation's "Trust Fund," as alleged by the Nation, includes money; proceeds from the sale of land or profits from the 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. *See* Doc. No. 1 ¶ 2.

through which the Secretary shall discharge these preexisting duties." *Cobell VI*, 240 F.3d at 1101 (emphasis original). The duty to provide a complete and accurate accounting to the Nation is part of the United States' *ongoing* trust obligations.

The defenses and arguments made by the United States in its motion to dismiss, Doc. No. 34-1, have been presented and rejected in multiple other trust accounting cases, including in cases in this Court. *See, e.g.*, *Cobell VI*, 240 F.3d at 1094-97 (holding that the APA waives sovereign immunity for the trust accounting claims and that jurisdiction under the APA exists for such claims)[2]; *Sisseton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell*, 130 F. Supp. 3d 391, 394-96 (D.D.C. 2015) (holding that the APA waives the United States' sovereign immunity for trust accounting claims and that "Plaintiffs are entitled to seek enforcement of their statutory rights provided for in the 1994 Act"); *Chickasaw Nation v. Dept. of Interior*, 120 F. Supp. 3d 1190, 1226-30 (W.D. Okla. 2014) (rejecting sovereign immunity and lack of jurisdiction defenses).[3]

Indeed, over ninety trust-accounting claims have been filed in this Court alone by Indian tribes from around the country. For example, claims by forty-two separate tribes were included in *Nez Perce v. Jewell*, Case No. No. 1:06-CV-02239 (JR), and another ten tribe's claims included in *Sisseton Wahpeton*, Civil Action No. 13-00601 (TFH). All of the claims

[2] *See also Cobell v. Babbitt*, 30 F. Supp. 2d 24, 34-35 (D.D.C. 1998) (denying the United States' motion to dismiss for sovereign immunity and lack of jurisdiction); *Cobell v. Babbitt ("Cobell III")*, 52 F. Supp. 2d 11, 18, 20-21 & nn. 7 & 9 (D.D.C. 1999) (reiterating holdings on sovereign immunity and jurisdiction); *Cobell v. Babbitt ("Cobell V")*, 91 F. Supp. 2d 1, 24-28 (D.D.C. 1999) (again rejecting sovereign immunity and jurisdiction arguments).

[3] *See also Otoe-Missouria Tribe of Okla. v. Kempthorne*, No. CIV-06-1436-C, 2008 WL 5205191, at *1-5 (W.D. Okla. Dec. 10, 2008) (denying the United States' motion to dismiss based on statute of limitations, lack of jurisdiction based on the APA, and that jurisdiction is proper in the Court of Federal Claims); *Tonkawa Tribe of Indians of Okla. v. Kempthorne*, No. CIV-06-1435-F, 2009 WL 742896, at *2-5 (W.D. Okla. Mar. 17, 2009) (same); *Seminole Nation v. Salazar*, No. CIV-06-556-SPS, 2009 WL 919435, at *1 (E.D. Okla. Mar. 31, 2009) (same), *all abrogated on other grounds by Gilmore v. Weatherford*, 694 F.3d 1160 (10th Cir. 2012).

consolidated in those two civil actions have been resolved, after the United States' motions to dismiss were denied. *See* Dockets in *Nez Perce*, Civil Action No. 1:06-CV-02239 (JR) & *Sisseton Wahpeton*, Civil Action No. 13-00601 (TFH). To date, the United States has settled the trust accounting and mismanagement claims of more than 100 tribes.[4]

This Court has consistently denied the United States' various motions to dismiss such trust accounting claims. For example, in the most recent Tribal trust accounting case before this Court to be resolved, ten Indian tribes presented claims to compel an accounting for the federal government's mismanagement of their trust funds. *Sisseton*, 130 F. Supp. 3d at 392-93. The Court denied the United States' motion in that case, finding that it had jurisdiction over claims for an accounting, that there was a valid waiver of the United States' immunity, and that the statute of limitations had not run. *See id.* at 394-97. Despite being rejected by the Court, the United States has filed a nearly identical motion in this case, asking the Court to exhume those already rejected arguments. Moreover, the United States fails to distinguish (or even cite) *Sisseton*, and there is no reason for the Court to deviate from its prior decisions and binding D.C. Circuit precedent here. The Court should deny the United States' motion.

I. Relevant Statutory Framework

The United States identifies two relevant statutes: the Indian Claims Commission Act, 60 Stat. 1049, and the statutory provisions reciting the United States' accounting and trust

[4] *See, e.g.*, U.S. DOI Press Release, "Secretary Jewell, Attorney General Holder Announce $554 Million Settlement of Tribal Trust Accounting and Management Lawsuit Filed by the Navajo Nation," *available at* https://www.doi.gov/news/pressreleases/secretary-jewell-attorney-general-holder-announce-554-million-dollar-settlement-of-tribal-trust-accounting-and-management-lawsuit-filed-by-navajo-nation (Sept. 26, 2014); U.S. DOJ Press Release, "United States and Osage Tribe Announce $380 Million Settlement of Tribal Trust Lawsuit," *available at* https://www.justice.gov/opa/pr/united-states-and-osage-tribe-announce-380-million-settlement-tribal-trust-lawsuit (Oct. 21, 2011) (resolving claims "regarding the United States' accounting and management of the tribe's trust funds and non-monetary assets.").

management obligations to individual Indians and tribes codified at, 25 U.S.C. §§ 161a *et seq.* and §§ 4001 *et seq.* Doc. No. 34-1 at 3-6. The United States' recitation fails to provide any of the legislative history or context for the genesis of the 1994 Act, attempting to give a wrong impression that the Indian Claims Commission (the "ICC") adequately compensated the tribes for all breaches of its then-existing trust obligations. This could not be further from the truth.

The 1994 Act did not appear out of a vacuum, but instead was the result of decades of investigation by the United States to attempt to determine the proper balance of accounts held by the United States in trust for Indians and tribes. *See Cobell X*, 283 F. Supp. 2d at 76-81 (describing Congressional and governmental investigations into the handling of Indian trust accounts leading up to the 1994 Act); *Cobell VI*, 240 F.3d at 1089-90 (same). Between 1978 (when the United States argues that the "Indians gain[ed] their day in court," Doc. No. 34-1 at 5) and the passage of the 1994 Act, the Government Accounting Office issued at least 25 reports on BIA's trust fund reform failures and the House and Senate held countless hearings regarding the same. In addition, in 1992, the Committee on Government Operations approved and submitted a report to the House of Representatives entitled, "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund." H.R. Rep. No. 102-499, at 1 (1992).[5] The Committee noted that it was "particularly troubled by BIA's efforts—undertaken only grudgingly—to implement repeated congressional directives designed to provide a full and accurate accounting of the individual and tribal account funds." *Id.* at 2. The Report provides a litany of BIA's refusals to implement required reforms to its management of Indian trust funds and, indeed, efforts made in direct contradiction of the requirements imposed by Congress. *Id.* at 2-5. The Committee advised that "[t]he most fundamental fiduciary responsibility of the

[5] *Available at* https://www.justice.gov/jmd/ls/legislative_histories/pl103-412/houserept-102-499-1992.pdf.

government, and [BIA], is the duty to make a full accounting of the property and funds held in trust for the 300,000 beneficiaries of Indian trust funds." *Id.* at 7. As a result, the Committee recommended that Congress take legislative action to attempt to resolve BIA's "accountability problem." *Id.* at 62-65. "Congress passed the [1994 Act] to further codify and solidify some of defendants' fiduciary obligations. Importantly, the act primarily codified the narrow issue involved in this case and the ultimate relief sought by plaintiff[]—an accounting of [its] trust fund money." *Cobell III*, 52 F. Supp. 2d at 18.

The 1994 Act supplemented earlier legislation and specifically requires that the Secretary of Interior (the "Secretary") "shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe . . . ." Pub. Law No. 103-412 § 102, 108 Stat. 4240 (codified at 25 U.S.C. § 4011(a)). This Court and the D.C. Circuit have both made clear that "all funds" referenced in the 1994 Act "mean[s] all funds—whenever deposited," and that "'[s]hall account' mean[s] shall account for those funds—all of them." *Cobell v. Norton*, No. CIV.A.96-1285(RCL), 2002 WL 163098, at *15 (D.D.C. Feb. 1, 2002); *see also Cobell VI*, 240 F.3d at 1102 ("'All funds' means *all funds*, irrespective of when they were deposited" and thus requires "a complete historical accounting of the trust fund assets." (emphasis original)). The Secretary is also required to provide periodic statements of performance for all funds, Pub. Law No. 103-412 § 102, 108 Stat. 4239 (codified at 25 U.S.C. § 4011(b)), and a reconciled balance for each tribe's trust fund, *id.* § 304, 108 Stat. 4239 (codified at 25 U.S.C. § 4044).

The 1994 Act also articulates that certain "affirmative action" is required by the Secretary to fulfill the United States' trust responsibilities, including: providing adequate accounting systems and controls; timely reconciliation and statement of performance; statement of accurate

cash balances; establishment of consistent written policies and procedures for trust fund management and accounting; provision of adequate staffing, supervision and training; and appropriate management of natural resources located within the boundaries of Indian reservations and trust lands. *Id.* § 101, 108 Stat. 4239 (amending 25 U.S.C. § 162a(d)).

II. Standard of Review

In considering a motion to dismiss, both for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6), the court "must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiffs," and then "may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Fitts v. Fed. Nat'l Mortg. Ass'n*, 44 F. Supp. 2d 317, 320-21 (D.D.C. 1999) (internal quotation omitted). A plaintiff need not prove its case at the motion to dismiss stage; it is enough that the allegations, assumed to be true, "nudge[] the claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). Here, the Nation's claims are more than plausible.

Treaties and federal agreements with tribes should also be liberally construed to favor Indians, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943), and "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). *See also South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("doubtful expressions of legislative intent must be resolved in favor of the Indians"); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 174 (1973) (ambiguous expressions in treaties and statutes are resolved in favor of the tribes and their members). These canons provide "for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when

Indian rights are to be abrogated or limited." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002) (quoting Felix Cohen, *Handbook of Federal Indian Law* 225 (1982)).

III. This Court Has Jurisdiction to Hear the Nation's Claims and the Nation Has Stated a Valid Claim for Relief under Federal Rule 12(b)

For the reasons set out below, none of the defenses or arguments made by the United States merit dismissal of the Nation's claims or requested relief in this case. The arguments made by the United States in this case largely reiterate and duplicate arguments already considered in other similar tribal trust accounting cases involving other tribes and Indians. These arguments have not been successful in other cases, in this Court, in this Circuit, or in other courts around the country. There is no basis for this Court deciding otherwise now.

A. United States Has Waived Its Sovereign Immunity.

Despite the overwhelming weight of law to the contrary, the United States still argues here that the Nation's trust case should be dismissed on the basis of sovereign immunity. Courts time and again have found the United States waived its sovereign immunity through the Administrative Procedure Act ("APA") for actions like this one. APA section 702, "Right of Review," unambiguously provides:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. Where, as here, a plaintiff seeks to enforce a duty of the United States and requests relief other than money damages, *see infra* § III.C, the APA's waiver of sovereign immunity applies, regardless of whether the underlying claim is "under the APA or not." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328-29 (D.C. Cir. 1996); *Cobell VI*, 240 F.3d at 1094 (explaining that the APA section 702 waiver applies to claims based in "common law trust

principles" in addition to statutory breach of trust claims); *Quaid v. Kerry*, 161 F. Supp. 3d 70, 73 (D.D.C. 2016) (holding that sovereign immunity is waived for all claims seeking declaratory and injunctive relief)[6]. The D.C. Circuit has "repeatedly and expressly held in the broadest terms that the APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 620 (D.C. Cir. 2017).

"There is a 'strong presumption' of reviewability of agency decisions under the APA," *Sisseton*, 130 F. Supp. 3d at 394 (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)), and courts regularly find the APA waives sovereign immunity for tribal trust accounting claims. *See, e.g.*, *Cobell VI*, 240 F.3d at 1094-95; *Chickasaw Nation*, 120 F. Supp. 3d at 1226; *Otoe-Missouria*, 2008 WL 5205191, at *3-4; *Tonkawa Tribe*, 2009 WL 742896, at *3; *Gilmore v. Salazar*, 748 F. Supp. 2d 1299, 1304-05 (N.D. Okla. 2010), *aff'd sub nom. Gilmore v. Weatherford*, 694 F.3d 1160 (10th Cir. 2012). The waiver of sovereign immunity provided by APA section 702 covers at least two types of claims: (1) non-monetary claims that an agency either failed to take required action or that it acted in violation of a legal duty not found in the APA and (2) claims for violations of the procedural requirements under the APA (primarily § 704 and § 706).

i. Sovereign Immunity Is Waived for Claims that the United States Violated Its Statutory and Common Law Trust Accounting and Management Obligations (Counts I and II).

Section 702 of the APA waives the United States' sovereign immunity where the plaintiff alleges that it has "suffered legal wrong because of agency action," or where the plaintiff is

[6] *See also Cobell III*, 52 F. Supp. 2d at 18 n.7 (explaining that APA section 702 waives sovereign immunity for trust accounting claims that are both "'statutory' (*i.e.* under the [APA]) and 'non-statutory' (*i.e.* non-APA review).").

"adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Both apply here.

The Nation's claims in Counts I and II are for enforcement of a duty that is found outside of the APA as rooted in common law trust requirements and codified by Congress at 25 U.S.C. §§ 162a, 4011, and 4044. *See* Complaint ¶¶ 101, 137, 142, 157, 167, & Relief Requested. The 1994 Act provides that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe . . . which are deposited or invested pursuant to The Act of June 24, 1938," 25 U.S.C. § 4011(a), and to produce monthly statements and an annual audit of all such funds, 25 U.S.C. § 4011(b). Accordingly, in this case "[t]he Nation seeks an Order from this Court compelling the United States to provide an accounting for all elements of the Trust Fund that is held or have been held by the United States *qua* trustee for the Nation, including without limitation those elements described as examples of the Trust Fund," Doc. No. 1 ¶¶ 137, 142, and to appropriately manage the Fund, *id.* ¶¶ 154, 167. *See also infra* § III.B.i.

Of course, the 1994 Act did not create the United States' trust obligations, including the duty to account. As the D.C. Circuit has advised, the 1994 Act "recognized the federal government's preexisting trust responsibilities." *Cobell VI*, 240 F.3d at 1090; *see also id.* at 1101 (explaining that the 1994 Act "did not *create* trust responsibilities of the United States," but rather provides a list of "some of the means through which the Secretary shall discharge these preexisting duties."); *Sisseton*, 130 F. Supp. 3d at 394-95 (same).

The Nation's Complaint alleges breach of the trust duties owed by the United States to the Nation, including as codified at 25 U.S.C. § 162a and 25 U.S.C. §§ 4011 & 4044. In particular the Nation has alleged that it was wronged by Defendants' failure and refusal to

provide a full and complete accounting of all assets in the Nation's Trust Fund. The Nation alleges that the United States' illegal and ongoing failure to provide a full and complete accounting "constitutes an illegal deprivation of the Nation's interests and has impermissibly impacted the Nation's ability to govern itself and its people, and to provide greatly needed services and economic development in the Nation's community." Doc. No. 1 ¶ 134. The Nation thus has "suffered legal wrong," 5 U.S.C. § 702, from Defendants' actions.

In addition, the Nation has alleged that the Department of Interior ("Interior") "has failed to provide to the Nation any of the accounting required by 25 U.S.C. § 4011 and 25 U.S.C. § 4044, and the United States has failed to provide the accounting required by the treaties, agreements, and statutes as set out herein," Doc No. 1 ¶ 141, and has not fulfilled any of its duties to the Nation set out in 25 U.S.C. § 162a, *id.* ¶¶ 144-52. The Nation is "adversely affected [and] aggrieved" by Defendants' failure to comply with the statutory trust accounting and management requirements. Such claims fall squarely within the waiver of sovereign immunity found in APA section 702.

In addition, the Nation seeks non-monetary relief: an accounting of the Trust Fund held and/or managed by the United States and an order requiring the United States to continue to meet its management obligations, as found in common law and set out at 25 U.S.C. §§ 162a, 4011, and 4044. *See* Doc. No. 1 ¶¶ 137, 142, 154, 167, & Relief Requested. *See infra* § III.C (showing that all relief requested by the Nation, including restoration of any lost funds, is non-monetary relief under the APA). All requirements for waiver of the United States' sovereign immunity are met. *Mackinac Tribe v. Jewell*, 87 F. Supp. 3d 127, 142 (D.D.C. 2015) ("The APA's waiver of sovereign immunity is available to all who satisfy the applicable statutory criteria"), *aff'd* 829 F.3d 754 (D.C. Cir. 2016). There is "*no doubt* that § 702 waives the Government's immunity

from actions seeking relief 'other than money damages.'" *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006) (internal quotation omitted); *see also Hubbard v. EPA*, 809 F.2d 1, 11 (D.C. Cir. 1987); *Droneburg v. Zech*, 741 F.2d 1388, 1390–91 (D.C. Cir. 1984).

This Court has held, and the D.C. Circuit has affirmed, that the waiver of sovereign immunity in APA section 702 "clearly evidence[s] the federal government's consent to suit" in tribal trust accounting cases. *See, e.g., Sisseton*, 130 F. Supp. 3d at 394; *Cobell VI*, 240 F.3d at 1094–95[7]; *see also Chickasaw Nation,* 120 F. Supp. 3d at 1226-30 (granting waiver for claims based in part on 1924 Act which granted jurisdiction for claims between Chickasaw and Choctaw tribes and the United States). As recently recognized by this Court, "Plaintiffs here, just like the Plaintiffs in the *Cobell* litigation, 'seek to enforce their statutory right to an accounting as that phrase is meant under the provisions of 25 U.S.C. § 162a(d)(1)-(7) and 25 U.S.C. § 4011.'" *Sisseton*, 130 F. Supp. 3d at 394 (quoting *Cobell V*, 91 F. Supp. 2d at 27-28. The Nation makes the same request, based on the same statutory trust accounting requirements, as the plaintiffs in *Sisseton* successfully made.[8]

ii. Sovereign Immunity Is Waived for Claims that the United States Violated the Administrative Procedure Act (Count III).

The APA also provides a waiver of sovereign immunity for claims alleging that the United States failed to comply with the procedural requirements of the APA, including where a "person suffer[s] legal wrong because of agency action [pursuant to the APA]," 5 U.S.C. § 702,

[7] *See also Cobell III*, 52 F. Supp. 2d at 18.

[8] *See also infra* § III.B.ii; *Alabama-Coushatta Tribe v. United States*, 757 F.3d 484 (5th Cir. 2014); *see also Muniz–Muniz v. U.S. Border Patrol*, 741 F.3d 668, 673 (6th Cir. 2013) (collecting cases) ("[o]ther circuits . . . are unanimous in their conclusion that a plaintiff who seeks non-monetary relief against the United States need not also satisfy the requirements of § 704 of the APA before there is a waiver of sovereign immunity."); *cf. United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001) ("It is true . . . that section 702 has been held to provide a general waiver of sovereign immunity in all civil actions seeking equitable relief on the basis of legal wrongs for which governmental agencies are accountable.").

or for agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or] without observance of procedure required by law," 5 U.S.C. §§ 706(2)(A) & (D). *See, e.g.*, *Alabama-Coushatta Tribe*, 757 F.3d 484 at 489 (5th Cir. 2014) (holding that the APA waiver of sovereign immunity "applies when judicial review is sought pursuant only to the general provisions of the APA [itself]") (internal quotations omitted).

The Nation alleges that the United States' failure to provide an accounting is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," within the meaning of APA section 706. *See* Doc. No. 1 ¶ 166. In particular, Defendants have failed to comply with specific legal requirements to provide an accounting and to properly manage the Nation's Trust Fund. *See id.* ¶¶ 155-64. Through its failure to fulfill its trust obligations set out in the various treaties, statutes, agreements, regulations, orders, and common law trust requirements, the federal government has acted "not in accordance with law" and "without observance of procedure required by law." *Id.* ¶ 165; 5 U.S.C. § 706(A) & (D).

Where tribal trust accounting claims rest upon allegations that the United States violated applicable law and took action that was arbitrary and capricious or failed to take action when required to do so, the APA's waiver of sovereign immunity applies. *See, e.g.*, *Sisseton*, 130 F. Supp. 3d at 394-96; *Otoe-Missouria*, 2008 WL 5205191, at *3 (failure to provide accountings "establish[es] that Defendants have acted, at a minimum, in a manner not in accordance with law" under § 706(2)). As this Court has made clear, once the APA's waiver of sovereign immunity is triggered, "that waiver is not limited to APA cases and hence it applies regardless of whether the elements of the APA cause of action are satisfied." *Chacoty v. Pompeo*, 392 F. Supp. 3d 1, 12 (D.D.C. 2019) (quoting *Trudeau*, 456 F.3d at 187) (internal quotations and alterations omitted). Here, the Nation alleges that the Federal Defendants have acted arbitrarily

and capriciously, and in contravention of the accounting requirements in the 1994 Act, and so the waiver of sovereign immunity applies.

B. This Court Has Jurisdiction to Hear the Nation's Claims Based on the Administrative Procedure Act.

The APA section 702 provides that "[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 authorized to judicial review thereof." 5 U.S.C. § 702. The APA separately provides that a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "without observance of procedure required by law," 5 U.S.C. § 706(2)(D).

i. The Nation Has Stated a Cause of Action "Within the Meaning of a Relevant Statute" To Satisfy the Court's Exercise of Jurisdiction under Administrative Procedure Act Section 702.

The United States contends that the Nation's claims, particularly Count III, fail because they are not protected by a rights-creating statute or regulation, and that this deprives the Court of jurisdiction under APA section 702. *See* Doc. No. 34-1 at 12-14. This argument is wrong for two reasons. First, jurisdiction under the second sentence of APA section 702 does not require a rights-creating statute or regulation. *See Cobell VI*, 240 F.3d at 1094–95 ("That plaintiffs rely upon common law trust principles in pursuit of their claim is immaterial, as here they seek specific relief other than money damages, and federal courts have jurisdiction to hear such claims under the APA."); *Otoe-Missouria*, 2008 WL 5205191, at *5 ("Whether the duty to account for the non-monetary assets held in trust arises from statute or common law, it does exist for the reasons set forth earlier in this opinion."); *Tonkawa Tribe*, 2009 WL 742896, at *4 & n.3 (noting the trust accounting action was brought under the APA, "other federal statutes[,] and

federal common law"). *Cf. Trudeau*, 456 F.3d at 187 ("APA § 702's waiver of sovereign immunity permits not only [plaintiff's] APA cause of action, but his nonstatutory and First Amendment actions as well."). As shown above, *supra* § III.A, the APA waiver of sovereign immunity applies here, which is "effectively a grant of jurisdiction . . . ." *Mackinac Tribe*, 87 F. Supp. 3d at 135.

Second, the Nation's claims for an accounting do arise, in part, under statutes including the 1994 Act. *See* Doc. No. 1 ¶¶ 101, 123, 136, 140, 141, 144. Courts repeatedly have recognized jurisdiction to hear accounting claims under some of the same statutes on which the Nation relies. For instance, in *Sisseton Wahpeton Oyate of Lake Traverse Reservation v. Jewell*, this Court addressed and rejected an identical argument by the United States, and held that the position was "incorrect because Plaintiffs rely upon the statutory obligations found in 25 U.S.C. §§ 162a(d), 4011." 130 F. Supp. 3d at 394 (also noting that D.C. Circuit precedent requires interpretation of statutes "in light of the common law of trusts and the United States' Indian policy," which require that the United States' actions be "judged by the most exacting fiduciary standards."). The Court unambiguously concluded that "Plaintiffs are entitled to seek enforcement of their statutory rights provided for in the 1994 Act." *Id.* at 395.

The Nation's claims are inarguably within the "zone of interests" intended to be protected by these statutes. The "zone-of-interests test is not meant to be especially demanding," and "varies according to the provisions of law at issue." *Permapost Prods., Inc. v. McHugh*, 55 F. Supp. 3d 14, 25 (D.D.C. 2014) (internal quotations omitted). "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209

(2012)) (internal quotations omitted). The zone of interests covered by a statute can be determined by examination of the plain language of the statute, the declaration of goals and policies recited in the statute, or legislative history. *Id.* at 25-26. *Accord FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (agency action is arbitrary and capricious or an abuse of discretion when it frustrates congressional policy or is contrary to the purposes of an act of Congress). The legislative history of the 1994 Act clearly shows that the Nation's claims are within the "zone of interests" that the Act was meant to protect. *See supra* 4-6 (describing history of the 1994 Act). The 1992 Committee Report specifically advised that Congress should take legislative action to solve the intractable problem of lack of BIA accountability to either Congress or the Indian trust beneficiaries. *See* H.R. Rep. No. 102-499, at 62-65. This Court has previously recognized that "Congress passed the [1994 Act] to further codify and solidify some of defendants' fiduciary obligations," including, importantly, the duty to provide a full historical accounting of the Trust Fund. *Cobell III*, 52 F. Supp. 2d at 18. *See also Alabama-Quassarte Tribal Town v. United States*, No. CIV-06-558-RAW, 2010 WL 3780979, at *6 (E.D. Okla. Sept. 21, 2010) (finding that the plaintiff's demand for an accounting of assets held in trust by the United States fell within the "zone of interests" of 28 U.S.C. §§ 1331, 1361, and 1362 and the 1994 Act). *Cf. Trudeau*, 456 F.3d at 187 (finding 28 U.S.C. § 1331 provided a basis for jurisdiction); Doc. No. 1 ¶ 90 (alleging jurisdiction under § 1331).

Other courts agree. For instance, in analyzing 25 U.S.C. § 4011(a), the provision requiring that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe," now-Justice Gorsuch explained:

> By its plain language this provision appears to impose on the federal government a duty to "account for"—to render a reckoning, answer for, explain or justify, *see* 1 *The Oxford English Dictionary* 85 (2d ed.1989)—the daily and annual balances of money it holds in trust. Of course, the government must

> account, answer or explain itself to *someone,* and the plain language of the statute seems to tell us who: to the tribe when the funds are held "for [its] benefit," and to individual tribal members when the funds are held "for [their] benefit."
>
> ***
>
> More evidence still points in the direction of an accounting right. While the Supreme Court has said we may not employ traditional trust principles inconsistent with Congress's statutory directions, the Court has *also* said we *may* refer to traditional trust principles when those principles are consistent with the statute and help illuminate its meaning. *Jicarilla Apache Nation,* 131 S.Ct. at 2325. In the statute before us, Congress has chosen to invoke the concept of an accounting. That concept has a long known and particular meaning in background trust law. It means that "a beneficiary may initiate a proceeding to have the trustee's account reviewed and settled by the court." Alan Newman et al., *The Law of Trusts and Trustees* § 966 (3d ed.2010). Indeed, "[t]he beneficiary of a trust can maintain a suit to compel the trustee to perform his duties as trustee," including his duty to account. *See* Restatement (Second) of Trusts § 199 cmt. a; *see also id.* § 172. So when Congress says the government may be called to account, we have some reason to think it means to allow the relevant Native American beneficiaries to sue for an accounting, just as traditional trust beneficiaries are permitted to do.

Fletcher v. United States, 730 F.3d 1206, 1209-10 (10th Cir. 2013). The Nation's claim for an accounting arises, in part, under these same statutes, *see* Doc. No. 1 ¶¶ 101, 123, 140, 141, 144-52, which courts have consistently found to be rights-conferring and to provide a valid cause of action for tribes to demand a full historical accounting from the United States. The Nation has stated a valid claim for an accounting; the United States has a discrete, non-discretionary duty to account to Indian trust beneficiaries, and that duty has been codified. Because the United States has failed to provide the required accounting, as alleged by the Nation, this Court has jurisdiction under the APA.

ii. The Nation's Claims Are Not a "Programmatic Challenge" and Should Not Be Dismissed for Lack of Final Agency Action.

The United States then argues that Counts II and III involve a broad programmatic challenge to the entire way that the United States handles its day-to-day fulfillment of its trust

obligations, not a specific agency action,[9] and that this deprives the Court of jurisdiction under APA section 702. *See* Doc. No. 34-1 at 14-16. The United States is wrong on both fronts—Counts II and III do not extend beyond the United States' discharge of its trust obligations to the Cherokee Nation, many of which are specifically codified, as cited and described in the Nation's Complaint. Moreover, the United States' actions here constitute "agency action" because the failure to provide the Nation with the accounting that is required under applicable law constitutes a "failure to act" for which the APA specifically is intended to provide redress.

First, this is not a programmatic challenge. The Nation's claims are for "an accounting for all elements of the Trust Funds that are held or have been held by the United States *qua* trustee for the Nation," Doc. No. 1 ¶ 137; *see also id*. ¶¶ 154, 167, not a "general wholesale challenge" to the entire "system of administering and discharging Interior's trust accounting and trust management duties and responsibilities," Doc. No. 34-1 at 15, as the United States (mis)represents. The relief requested by the Nation is for the United States to fulfill its trust obligations to the Nation specifically, including providing a full historical accounting and satisfying the discrete actions set forth at 25 U.S.C. § 4011 and 25 U.S.C. § 162a(d). Each of the components of the Nation's requested relief are required for the United States to satisfy its trust obligations on an ongoing basis to the Nation specifically. The Nation does not ask for wholesale changes to the way Interior discharges its trust obligations generally or to any other tribe or individual. This case is not about "hundreds of federally recognized tribes . . . and hundreds of thousands of Indian individuals," Doc. No. 34-1 at 15-16; it is about the obligations owed by the United States to the Cherokee Nation specifically.

[9] While the United States' system—such that it is—of administering its trust responsibilities may need a wholesale overhaul, that is not the subject of this case.

The Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), does not limit or preclude the Nation's requested relief. As this Court recognized in *Cobell*, *Lujan* is distinguishable from tribal trust accounting cases and does not bar claims by tribes that seek a full accounting and proper trust management of their trust assets:

> *Lujan*, however, is clearly distinguishable from this case. In *Lujan*, the Supreme Court held that no final agency action existed when the plaintiffs challenged the Bureau of Land Management's "land withdrawal review program." That so-called program was not an order, regulation, or universe of orders or regulations. Instead, the "program" was simply the name attached to the general activities of the agency, and the plaintiffs sought to challenge generically all aspects of the program.

Cobell I, 30 F. Supp. 2d at 34 n.10 (internal citations omitted). Like the plaintiffs in *Cobell*, the Nation seeks an order requiring the United States to fulfill its accounting obligations to the Nation, as established by common law and set out in the 1994 Act. *See id.* (explaining that trust accounting cases "do not seek to generically challenge the defendants' actions," but rather are focused on particular systems administered by the defendant agencies that directly impact plaintiffs).

Second, this case involves agency action within the meaning of the APA.[10] APA section 702 provides judicial review of "agency action," which is defined to include an agency's *failure* to act, 5 U.S.C. § 551(13). The United States' failure to provide an accounting is such a failure.

[10] There also is no requirement of "final agency action" for the waiver of sovereign immunity under APA section 702 to apply, as the United States wrongly suggests, Doc. No. 34-1 at 14. *Trudeau*, 456 F.3d at 187 (holding that APA § 702's "waiver applies regardless of whether the [government's action] constitutes 'final agency action.'"); *Alabama-Coushatta Tribe*, 757 F.3d at 489 ("When judicial review is sought pursuant to a statutory or non-statutory cause of action that arises completely apart from the general provisions of the APA [t]here is no requirement of 'finality' for this type of waiver to apply."); *Muniz–Muniz*, 741 F.3d at 673 ("Other circuits . . . are unanimous in their conclusion that a plaintiff who seeks non-monetary relief against the United States need not also satisfy the requirements of § 704 of the APA before there is a waiver of sovereign immunity."); *United Tribe of Shawnee Indians*, 253 F.3d at 549 ("section 702 has been held to provide a general waiver of sovereign immunity in all civil actions seeking equitable relief on the basis of legal wrongs for which governmental agencies are accountable.").

See, e.g., *Alabama-Quassarte Tribal Town*, 2010 WL 3780979, at *6 (holding the United States' refusal to provide an accounting based on its contention that it held no assets in trust for the plaintiff was agency action within the meaning of APA section 702).

The United States' position is in direct conflict with established precedent and the specific purpose of the relevant portion of section 702, which Congress enacted to "remove technical barriers to the consideration on the merits of citizens' complaints against the Federal Government, its agencies, or employees." *Muniz-Muniz*, 741 F.3d at 673 (internal quotations omitted). As such, the United States' argument that the Court lacks jurisdiction under APA section 702 should be rejected.

iii. The Court Has Jurisdiction over the Nation's Claims Raised Under the Administrative Procedure Act Section 706

The United States next argues that the Court must dismiss counts II and III under APA section 706. The United States misconstrues APA section 706, and its motion must be denied as contrary to binding precedent.

The United States' argument that the Nation has failed to identify any discrete duties it is required to take is patently wrong. The Complaint specifically requests that the Court order the United States to provide a full and complete accounting to the earliest possible time as required by treaties between the parties, the common law, and as codified in 25 U.S.C §§ 4011 and 4044. *See* Doc. No. 1 ¶¶ 154, 167.

Moreover, the requirement that agency actions be final before review under APA section 706 is ripe "is a 'pragmatic' and 'flexible' one." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1279 (D.C. Cir. 2005) (internal citations omitted). "An agency action is deemed final if it is 'definitive and has a 'direct and immediate . . . effect on the day-to-day business'" on the party challenging the agency action.'" *Hunter v. FERC*, 569 F. Supp. 2d

12, 17 (D.D.C. 2008), *aff'd*, 348 F. App'x 592 (D.C. Cir. 2009) (internal quotations and citations omitted). And because "'agency action' encompasses a 'failure to act,' . . . if a failure to act amounts to 'consummated agency action' that APA views as final, notwithstanding the fact that the agency 'did nothing,' a party can seek relief under Section 706(2) of the APA." *Ikon Glob. Mkts., Inc. v. Commodity Futures Trading Comm'n,* 859 F. Supp. 2d 162, 169 (D.D.C. 2012) (quotations and citations omitted); *accord In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (agency's undue delay is contrary to law). The agency action or inaction alleged here—failure to provide complete trust accountings and failure to correct and/or make whole trust accounts—is final.

Indeed, numerous courts, including the D.C. Circuit, have held that APA section 706(2) provides a cause of action for Indian trust accounting cases. *See, e.g.*, *Otoe-Missouria*, 2008 WL 5205191, at *3 (failure to provide accountings "establish[es] that Defendants have acted, at a minimum, in a manner not in accordance with law" under § 706(2)); *Cobell VI*, 240 F.3d at 1095-97 (holding that Indian trust beneficiaries have a valid claim under Section 706 of the APA in seeking an accounting when the United States has not provided one pursuant to § 4011(a)). Here, Defendants have acted in contravention of the accounting requirements in the 1994 Act and in common law. The Nation is entitled to a full and complete accounting to the earliest possible date, and this Court has jurisdiction to enforce that discrete statutorily required duty which has, to this point, been unlawfully withheld or unreasonably delayed.

The United States relies heavily on *Norton v. Southern Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55 (2004), to argue that the Nation's claims do not meet the requirements of APA section 706. Doc. No. 34-1 at 16-19. But, the decision and reasoning in *SUWA* do not apply here. *SUWA* involved an APA claim based on alleged deficiencies to comply with broad

wilderness area land use plans. The Court declined to get involved in "abstract policy disagreements which courts lack both the expertise and information to resolve" and which presented "the prospect of pervasive oversight by federal courts." 542 U.S. at 66-67. Here, by contrast, the Nation is simply asking for an accounting of its trust resources by its trustee, as has been recognized by numerous courts, including this one, as a duty of the United States.

The D.C. Circuit specifically has held that the "completed universe" of agency actions can establish final agency action for APA purposes, and the format of the orders is "less central to the analysis" than "whether 'the scope of the controversy has been reduced to manageable proportions, and its factual components fleshed out, by concrete action that harms or threatens to harm the complainant.'" *Seeger v. U.S. Dep't of Def.*, 306 F. Supp. 3d 265, 288 (D.C. Cir. 2018) (quoting *Lujan*, 497 U.S. at 873). Therefore, the United States' assertion that the Nation's claims should be dismissed because there is not "a single final agency action" must be rejected. The Nation has identified a host of requirements that the United States is obligated to undertake in fulfillment of its trust accounting obligations.

C. The Nation's Demand for Trust Restoration Is Not a Claim for "Money Damages."

The United States also asserts that the Nation cannot bring a trust-based claim for "restoration of those of its trust funds for which the United States cannot account" because it is "aimed at obtaining monetary relief," and thus should be brought in the Court of Federal Claims instead of this Court. Dkt. 34-1 at 19-20. While the Court of Federal Claims is authorized to hear certain claims against the United States, including those "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. § 1491(a)(1), this case does not involve a request for damages. Instead, the Nation seeks restoration of missing funds, if any are revealed

as part of the full accounting that the United States is obligated to produce to the Nation. *See* Doc. No. 1 ¶¶ 154(10), 167(10), & Relief Requested.

It is well established that where a plaintiff seeks "an award of funds to which it claims *entitlement under a statute*, the plaintiff seeks specific relief, not damages." *Resolute Forest Prod., Inc. v. U.S.D.A.*, 219 F. Supp. 3d 69, 75 (D.D.C. 2016) (internal quotations and citations omitted) (emphasis original). Equitable relief, which does not qualify as "damages," "may include an order providing for the reinstatement of an employee with backpay, or for 'the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions.'" *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (internal citations omitted).[11] "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages,'" *id.*, and the United States' attempt to confuse the issue and conflate the Nation's claims with an action for damages must be rejected.

This Court is adept at determining the difference between money damages and restitution, including in Indian trust accounting cases. In *Cobell* , for example, the Court rejected an attempt by the United States to recast the plaintiffs' request for restoration of proper account balances as a request for damages. *Cobell V*, 91 F. Supp. 2d at 27-28. The Court reasoned that the United States' fulfillment of its statutory duty to provide an accounting might "support some future monetary claim (but not necessarily 'money damages'), which, because this is plaintiffs' own money, will only be compensatory to the extent that the money is missing from the trust." *Id.* at 28. The District Court further held that the United States' failure to properly account for

[11] Damages, on the other hand, are "intended to provide a victim with monetary compensation for an injury to his person, property, or reputation . . . ." *Bowen*, 487 U.S. at 893.

the trust funds at issue was "a breach of trust, the remedy for which is the restitution of withheld or misplaced money to the beneficiary's account. That money is *not* a substitute remedy for a failed accounting: it is the trust property itself. It is the very thing to which the beneficiaries were entitled." *Cobell v. Kempthorne ("Cobell XXI")*, 569 F. Supp. 2d 223, 243 (D.D.C. 2008) (internal quotations omitted) (emphasis added), *vacated and remanded on other grounds sub nom*. *Cobell v. Salazar ("Cobell XXII")*, 573 F.3d 808 (D.C. Cir. 2009); *see also Cobell I*, 30 F. Supp. 2d at 39-40.

The Complaint explicitly states that the Nation is *not* presenting a claim "for money damages in this action because the Nation has never been provided the accounting that would support such a claim. However, the Nation reserves the right to bring such a claim for money damages in the future should an accounting demonstrate such a claim or claims to be appropriate, and if restitution of the Cherokee Trust fund in this litigation does not provide complete relief to the Nation for the United States' refusal to account." Doc. No. 1 ¶ 137 n.7. Rather, the Nation has requested, as part of this action, that the United States be ordered to produce a full and complete accounting, provide full and complete statements of the Nation's trust fund on an ongoing basis, assure the accuracy of those statements going forward, and to "[r]estore those Cherokee Trust Funds for which the United States cannot account." Doc. No. 1 ¶¶ 154, 167. Based on the four corners of the Nation's Complaint in this matter, the United States' argument that this Court lacks jurisdiction due to a claim for money damages must be rejected as contrary to established and binding precedent.

D. The Nation's Claims Are Not Time-Barred.

The United States argues that the Indian Claims Commission Act ("ICCA") extinguished all claims accruing before 1946, including those by the Nation. *See* Doc. No. 34-1 at 20-21.

Alternatively, the United States argues that the Nation's claims are barred by the six-year statute of limitations found in 28 U.S.C. § 2401, which should run either from the date the Nation was deemed to have received the results of Interior's Trust Reconciliation Program ("TRP") Report, or which should bar any claim accruing earlier than six years before the Nation filed this case.

i. The Indian Claims Commission Act Did Not Extinguish the Nation's Claims

The Indian Claims Commission Act, 60 Stat. 1049 (1943) ("ICCA"), established the Indian Claims Commission, with jurisdiction to hear certain claims against the United States, and provided that "[n]o claim accruing after the date of the approval of this Act shall be considered by the Commission," ICCA § 2 (60 Stat. 1049-50) (Aug. 13, 1946), but likewise required that all claims falling under the Commission's jurisdiction be brought to the Commission within five years, *id.* § 12. The Nation's trust accounting claim does not fall within the scope of the claims the Commission was authorized to hear and is not barred by the ICCA.

Although "Congress deliberately used broad terminology in the [ICCA] in order to permit tribes to bring all potential historical claims and to thereby prevent them from returning to Congress to lobby for further redress . . . the ICCA only bars claims involving allotments or other property, claims involving title, claims to equitable relief, claims for damages, and related constitutional and procedural claims *that accrued before 1946 and were not brought by August 13, 1951*." *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1152 (10th Cir. 2015) (citing *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Engineers*, 570 F.3d 327, 331-332 (D.C. Cir. 2009)) (internal quotations omitted) (emphasis original). The Nation's claim for an accounting did not accrue prior to 1946, but instead "arises from *current* violations of its . . . rights," including its right to a full and complete accounting, and thus the ICCA could not have extinguished its claim. *Little Traverse Bay Bands of Odawa Indians v. Whitmer*, 365 F.

Supp. 3d 865, 877 (W.D. Mich. 2019) (finding that the tribe's claim was for current violations of its treaty rights, not a claim arising from the treaty itself, and thus was not barred by the ICCA five-year statute of limitations).

Generally speaking, "[a] cause of action for breach of trust traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Pelt v. Utah*, 611 F. Supp. 2d 1267, 1283 (D. Utah 2009) (quoting *Shoshone Indian Tribe of the Wind River Reservation v. United States ("Shoshone II")*, 364 F.3d 1339, 1348 (Fed. Cir. 2004); and citing *Cobell v. Norton*, 260 F. Supp. 2d 98 at 105 (D.D.C. 2003), *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973), and Bogert, Bogert, & Hess, Law of Trusts & Trustees § 964 (2008)); *Shoshone Indian Tribe of Wind River Reservation v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012). "Repudiation of a trust occurs when the trustee expressly terminates the fiduciary relationship or takes actions inconsistent with the terms of the trust (for example, by claiming or taking the corpus of the trust as its own and denying any obligation to the beneficiary)." *Pelt*, 611 F. Supp. 2d at 1285 (citations omitted); *Shoshone II*, 364 F.3d at 1348 (a trustee may repudiate the trust by express words or by taking actions inconsistent with its responsibilities as trustee) (citing cases). "But even given acts constituting repudiation, no accrual occurs unless the beneficiary knows, or should have known, of the trustee's repudiation of the trust." *Pelt*, 611 F. Supp. 2d at 1285. Here, there has been no such repudiation. Doc. No. 1 ¶ 114. Without such repudiation, the claim does not accrue, and could not have been extinguished by the ICCA.

This Court previously evaluated and rejected this very argument:

> Based on the evidence presented in defendants' motion, including the statements of material fact alleged by defendants to be undisputed, the Court finds that defendants have neither repudiated the existence of the IIM trust nor repudiated plaintiffs' right to enjoy the benefits of the trust. Instead, defendants have

> consistently chosen the coward's route by failing to provide the IIM beneficiaries with the information that the beneficiaries were entitled to by law, while simultaneously insisting that they were fully complying with their fiduciary obligations to the beneficiaries.

Cobell, 260 F. Supp. 2d at 108-09. Because the United States has not repudiated the trust, the claim did not arise prior to 1946 and falls outside of the ICCA.

It is clear that Congress agrees with this interpretation. In a series of Appropriations Acts, Congress expressly provided that the statute of limitations "shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected Indian tribe . . . has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." *See, e.g*, Pub. Law No. 113-76, 128 Stat. 5, 305-306 (2014). This language has been held to relate specifically to the ICCA. For example, in *Otoe-Missouria*, the federal defendants moved to dismiss the claims based on this same theory—that the five-year statute of limitations in the ICCA barred the plaintiff's trust accounting claims. 2008 WL 5205191, at *5. The court rejected this argument, holding instead that the Appropriations Acts suspended all statutes of limitation that might otherwise apply, including in the ICCA. *Id*.[12] Thus, the court denied the defendant's motion to dismiss on this issue. *Id.*

The United States wrongly urges the Court to ignore the tolling language because it was not included in the most recent Appropriations Act. But, the United States fails to acknowledge that Appropriations Act language *can* apply beyond the fiscal year for which it is enacted depending on Congressional intent and the statutory language. *See Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991). Regarding Indian trust accountings, the House of

[12] The United States also argues that the Appropriations Acts do not waive sovereign immunity. Doc. No. 34-1 at 12-15 (relying primarily on *Flute v. United States*, 808 F.3d 1234 (10th Cir. 2015)). However, the court in *Flute* merely held that the Appropriation Acts, standing alone, did not waive sovereign immunity. 808 F.3d at 1240. *Flute* does not apply where, as here, sovereign immunity has been waived by the APA. *See supra* § III.A.

Representatives made abundantly clear that the tolling language was meant to "protect the rights of tribes and individuals until reconciliation and audit of their accounts has been completed," an event that was unlikely to—and in fact did not—occur during the fiscal year. H.R. Rep. No. 103-158 (1993). The tolling language is not facially limited in time, and there is no indication that it should sunset at the end of the fiscal year. In the event there is any ambiguity in the language of the Appropriations Act, the tolling provision must be construed in favor of the Nation to preserve its claims. *Pueblo of San Juan*, 276 F.3d at 1194.

Additionally, other courts have rejected this claim by the United States that the tolling provision of the various Appropriations Acts is limited to fiscal year for the individual acts. For instance, in *White Mountain Apache Tribe v. United States*, the Court of Federal Claims rejected the nation that the tolling provisions expires at the end of the fiscal year, concluding that "the plain language of the Act does not limit claim filings to the year in which the Act was enacted but rather . . . the tolling does not begin until the Tribe receives an accounting." *See* Attachment A, Opinion and Order at 11 (Cl. Ct. Jan. 5, 2018); *see also Wyandotte Nation of Kansas v. United States*, 858 F.3d 1392, 1397 (Fed. Cir. 2017) (noting that the Appropriations' Acts "extend the statute of limitations to pursue accounting breach of trust claims under [the 1994 Act] until after 'the affected Indian tribe . . . has been furnished with an accounting of such funds.'"). Just this month, the Court of Claims found that, at most, the omission of the tolling language in the Appropriations Act beginning in 2015 results in the running of the statutory period beginning at the end of fiscal year 2014, which would extend the statute of limitations until 2021. *See Ute Indian Tribe of the Uintah and Ouray Indian Reservation v. United States*, --- Fed. Cl. ---, 2019 WL 5688826 at *16 (Nov. 4, 2019) (rejecting the United States' argument that the

Appropriations Acts did not apply to the tribe's claims, and holding instead that "the [Appropriations Acts] statute of limitation is to run six years from 2014.").

The United States relies on *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Engineers*, 570 F.3d 327, 333 (D.C. Cir. 2009), for its position that the ICCA bars the Nation's trust accounting claims here. Doc. No. 34-1 at 21. But, in *Oglala*, the court held that the tribe could not revisit the fairness and validity of 120-year-old quitclaim deeds that allegedly were procured by fraud or duress. 570 F.3d at 333. The court declined to look behind certain statutes and presidential proclamations to evaluate claims that "would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity." *Id.* (quoting ICCA § 2(3)). Those claims based on the United States' lack of honorable dealings with the tribes and procurement of "agreements" by untoward or illegal means prior to 1946 were required to have been brought in the ICC. Here, in contrast, the Nation is not seeking rescission or revision of any of the Nation's agreements with the United States, but rather enforcement of the United States' obligations to account to the Nation and properly handle the Nation's Trust Fund.

ii. The Nation's Claims Are Not Barred by the Six-Year Statute of Limitations.

The United States also argues that the statute of limitations found at 28 U.S.C. § 2401 should bar claims that accrued prior to July 19, 2013 (six years before the Complaint was filed), and suggests this *may* include any claims the Nation brings challenging the TRP Report, Doc. No. 34-1 at 22. The United States' arguments on the statute of limitations are misguided. First, the Nation has demanded an accounting from the United States, and the TRP Report is not an accounting. As such, the TRP Report deficiencies are not the subject of this case.

In addition, the Act setting a date on which Congress determined that the Indian tribes received their "reconciliation" reports from Interior is not a statute of limitations. While it sets a date on which reconciliation reports would be deemed to have been received by the tribes, it specifically adds that this provision "is solely intended to provide recipients of reconciliation reports with the opportunity to postpone the filing of claims, or to facilitate the voluntary dismissal of claims, to encourage settlement negotiations with the United States." Pub. Law No. 107-153, 116 Stat. 79 (2002), *as amended by* Pub. Law No. 109-158, 119 Stat. 2954 (2005).

The legislative history further shows that this provision was included in an abundance of caution to ensure that the United States would not argue the tribes' claims were untimely. The Senate Report cautioned that "it is not at all clear that the reconciliation reports at issue did in fact provide tribes with notice sufficient to commence the running of the statute of limitations," S. Rep. No. 107-138 at 3 (2002); *see also* S. Rep. No. 109-201 at 2 (2005), and the House Committee refused to take a "position on whether the reconciliation reports did, in fact, trigger the statute of limitations," *Sisseton*, 130 F. Supp. 3d at 397. Indeed, Representative Hansen noted that "[t]he Government Accounting Office has given Congress real reason to doubt that these reports constitute a sufficient accounting to satisfy the Federal Government trust obligation." U.S. House of Representatives, Con. Rec. Mar. 6, 2002, at H704. To construe the resulting statutory language as extinguishing the Nation's claims here would be contrary to Congress's intent in enacting that provision.

This Court already has rejected this argument, yet Defendants fail to acknowledge or distinguish this adverse precedent. In *Sisseton*, the United States argued in a motion to dismiss that the tribe's trust claims all accrued on December 31, 2000, relying on the Settlement of Tribal Claims Acts. 130 F. Supp. 3d at 396-97. The Court denied the motion, implicitly rejecting the

argument that the Settlement of Tribal Claims Acts established an accrual date of December 31, 2000, and expressly reserving ruling on whether the reconciliation report triggered accrual, noting that factual issues remained. *Id.*[13]

The language concerning delivery of the TRP Reports in the 1994 Act thus was meant as a precaution, an attempt to prevent any argument by the United States that the tribes' claims were extinguished and to preserve the tribes' rights to demand a complete accounting and later bring a claim for restoration of the accounts if necessary to restore their contents. To construe it as extinguishing the Nation's claims here would be contrary to established law, the plain language of the provision, and Congress's intent in enacting it.[14]

Moreover, the United States' past failure to provide an accounting does not absolve it of its *current* obligation to provide a complete accounting back to the earliest possible date:

> Contrary to appellant's claims, Section 102 of the 1994 Act makes clear that the Secretary owes . . . trust beneficiaries an accounting for '*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 the Act of June 24, 1938. 'All funds' means *all funds,* irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938). Therefore, the 1994 Act reaffirms

[13] This Court has held that the statutes cited by the United States in its motion here, Doc. No. 34-1 at 22, do not bar claims for trust accounting. The Court evaluated the provisions in question and lamented that "the statute of limitations ran out on *something* on December 31, 2006, but it is not clear what," and denied the United States' motion to dismiss on statute of limitations grounds. *Nez Pierce Tribe v. Kempthorne*, Civil Action No. 06-2239 (JR), 2008 WL 11408458, at *2 n.2 (D.D.C. Dec. 1, 2008) (emphasis added).

[14] To interpret the 1994 Act as the United States requests would also amount to a disfavored repeal of applicable law by implication. *Hunter v. F.E.R.C.*, 711 F.3d 155, 159 (D.C. Cir. 2013). This is especially true in instances such as here where the implied repeal would affect the Court's jurisdiction, *Blair-Bey v. Quick*, 151 F.3d 1036, 1046 (D.C. Cir. 1998). In addition, "statutes passed for the benefit of . . . Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1912)) (alterations omitted). Defendants' argument that, in enacting legislation to protect tribes from arguments about "possible" running of a statute of limitations, Congress impliedly repealed the existing favorable law protecting beneficiaries from the running of limitations statutes must fail.

> the government's preexisting fiduciary duty to perform a complete historical accounting of trust fund assets.

Cobell, 2002 WL 163098, at *3; *see also Otoe-Missouria Tribe*, 2008 WL 5205191, at *2 (rejecting the United States' argument that the accounting should be limited in scope, and holding that "it is clear that Congress intended a reconciliation of the account to determine what the proper balance *should be* and to require proper accounting and reconciliation to continue in the future." (emphasis added)). The United States' interpretation would run afoul of the canon that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Blackfeet Tribe*, 471 U.S. at 766; *Choctaw Nation*, 318 U.S. at 431-32; *Catawba Indian Tribe, Inc.*, 476 U.S. at 506 ("doubtful expressions of legislative intent must be resolved in favor of the Indians"); *McClanahan*, 411 U.S. at 174 (ambiguous expressions in treaties and statutes are resolved in favor of the tribes and their members), and must be rejected.

Moreover, even if the Court were to credit the United States' argument, any claims would be tolled by the Appropriations Acts—which provide that the statute of limitations does not begin to run on claims for mismanagement of trust funds until the United States provides a complete historical accounting, *see supra* at 26-27—and also tolled by the United States' illegal and wrongful control of the Nation's government and resources. Accrual of claims against the United States is suspended when a plaintiff can show either that the United States "has concealed its acts with the result that plaintiff was unaware of their existence or . . . that its injury was 'inherently unknowable' at the accrual date." *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (citation omitted); *see also Chickasaw Nation*, 120 F. Supp. 3d at 1229-30 (finding that the Chickasaw and Choctaw Nations' claims had not begun to accrue due to the Nations' allegations of control by the United States). Due to the United States' wrongful and illegal actions with respect to its control over the Cherokee Nation's government, the Nation's claims

against the United States are tolled due to the United States' "deliberate attempts to frustrate, debilitate, and generally prevent [the Nation's government] from functioning." *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.C. Cir. 1976).

During the United States' wrongful control of the Nation's government, it allowed the Nation's records and other information to be destroyed or lost, while the information that *was* preserved was dispersed to various unidentified archives, repositories, and libraries. The Nation has taken steps to recreate its historical record, but the wrongful and illegal action of the United States has made it much more difficult. As set forth in the Complaint, the United States, from at least 1907 to 1976, "illegally refused to recognize tribal governmental actions, refused to release tribal funds, and misinterpreted the law to justify their position that the chiefs of the Five Tribes could only be appointed by federal officials." *See* Doc. No. 1 ¶¶ 93-94. During this time:

> the Nation were [*sic*] denied the basic rights common to any democracy in that they were deprived of the right to choose their own public officials by free and open elections. They were [*sic*] also denied the right to remove officials who failed in their duties. And, importantly to this action, the United States controlled the Tribe's government and made all choices concerning the Nation's Trust Funds. These actions were all found to be contrary to law in *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.C. Cir. 1978).

See Doc. No. 1 ¶ 95. The United States would go so far as to appoint "chiefs" for a day when they required a signature for the Nation on a formal document. *Id*. ¶¶ 97-98. This practice has been described as "bureaucratic imperialism" specifically and intentionally aimed at preventing the Nation from functioning. *Harjo*, 420 F. Supp. at 1130.

Given the factual inquiry necessary to determine whether the Nation's claims may have accrued, dismissal of the case based on the statute of limitations is not proper. *See Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981) ("There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can

raise factual setoffs to such an affirmative defense."). This Court has declined to credit the United States' statute of limitations arguments at the motion to dismiss stage in other trust accounting cases. *Cobell I*, 30 F. Supp. 2d at 45; *Sisseton*, 130 F. Supp. 3d at 397 (denying the United States' motion to dismiss on statute of limitations, reasoning that the "parties have not yet had the opportunity to develop a record through discovery on when Plaintiffs' claims accrued, and the factual issues related to accrual preclude deciding the issue of the statute of limitations at the motion to dismiss stage."). The United States fails to distinguish this authority.

Here, the Nation's claims are not time barred, and the United States' arguments otherwise contradict established law of this Circuit and the precedent of this Court and should be rejected.

E. The United States Is Required to Account for Non-Monetary Assets.

In its motion, the United States requests that the Court dismiss all non-monetary claims from the definition of the Cherokee Nation's Trust Fund, such that the United States would be relieved from its obligation to account for those assets. *See* Doc. No. 34-1 at 24. Such a result would impermissibly excuse the United States from ensuring the accuracy of the accounting that it is required by statute to provide to the Nation.

When the United States assumed the role of trustee for the Cherokee Nation, the Nation controlled valuable resources. Over time, the United States took control of these resources, and "held and managed – and continues to hold and manage – vast resources for the Nation including, *inter alia*, money; proceeds from the sale of land or profits from the 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." Doc. No. 1 ¶ 2. These resources were valuable in and of themselves, but were widely recognized as such because

of their ability to generate revenue for the Nation. As early as 1791, the United States was purchasing land from the Cherokee Nation, *id.* ¶ 19, making the Nation's natural resources one of its earliest sources of revenue.

Each of the resources alleged by the Nation to be part of the Trust Fund, *see* Doc. No. 1 ¶¶ 2, 112, is a money-generating resource, *id.* ¶ 116, for which the United States has failed to account, *see, e.g.*, *id.* ¶ 113, 135. "[W]hen the United States received funds in respect to transactions involving the Nation's property interests, the appropriate financial and accounting records were not created by the United States to accurately record or disclose such transactions and dealings involving the Nation's properties and assets." *Id.* ¶ 116. As a result, the Nation has filed this action to require a full and complete historical accounting that accurately reflects details of transfers, deposits, and all other transactions involving the Nation's properties held in trust by the United States. *See also Cobell VI*, 240 F.3d at 1086 ("The federal government-Indian trust relationship dates back over a century. The trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long.").

Failing to include the resources that formed the base of the Nation's ability to generate revenue would result in an exercise that cannot amount to a complete and comprehensive accounting because there would be no way to determine if the starting balance or the receipts recorded by the United States are accurate. *See Cobell v. Norton*, No. CIV. A. 96-1285(RCL), 2001 WL 777076, at *1 (D.D.C. July 11, 2001) ("No prospective Indian Trust accounting responsibilities pursuant to the 1994 Act's requirements can be accomplished unless an accurate historical accounting is timely completed to provide the balances on which to base any future accountings for trust beneficiaries."). Because appropriate management results in revenue generation for many of the resources at issue, the two are inextricably linked. *See* Doc. No. 1 ¶ 9

(alleging that the United States is obligated to "properly manage assets held in trust for the Nation and to account for, manage, and reconcile the Nation's corresponding trust accounts and records."). Congress acknowledged this connection between natural resources and the duty to properly hold and manage money on behalf of tribes by explicitly directing that the United States "[a]ppropriately manag[e] the natural resources located within the boundaries of Indian reservations and trust lands," in the enumerated requirements governing the "Deposit, Care, and Investment of Indian Moneys." 25 U.S.C. § 162a(d); *see also* Doc. No. 1 ¶ 121. *Cf. Cobell VI*, 240 F.3d at 1101 (noting that these provisions were added in the 1994 Act, signifying the relevance of natural resources to the accounting duty).

Thus, any accounting must include the non-monetary assets of the Nation that have the potential to generate revenue, and which have monetary value. Such an accounting of the Nation's money-generating assets, in addition to the known financial accounts, is required by statute as part of a comprehensive accounting. Indeed, 25 U.S.C. 162a requires that periodic statements of performance for trust funds include the beginning balance and all receipts and disbursements for the period, recognizing that an accounting is only accurate if it correctly reflects each of these items. Any accounting that does not include the Nation's valuable non-fiscal resources would be incomplete and would not show the appropriate balances or receipts that the United States obtained (or should have obtained under a prudent investor standard) for the Nation. The Nation's Complaint specifically alleges that the United States failed to provide information sufficient to determine "whether the beginning balances are correct, whether stated income from the Nation's assets is correct, whether money was collected and invested timely and properly, or whether interest in proper amounts was distributed." Doc. No. 1 ¶ 129.

Inclusion of non-monetary assets in the accounting required to be provided to the Nation also is required by applicable precedent. In the seminal breach of trust case, *Cobell*, this Court held that non-monetary trust assets in the form of allotted lands were themselves the "trust corpus" or "trust assets" or "trust property" that was held in trust by the United States on behalf of individual Indians and were an indispensable element of the trust. *Cobell X*, 283 F. Supp. 2d at 176-77.

Other courts agree. For example, in *Chickasaw Nation v. Department of Interior*, the Western District of Oklahoma found that the "duty to account encompasses trust assets, including non-monetary assets." 120 F. Supp. 3d at 1225. In *Otoe-Missouria*, the court was clear on the existence of a duty to account for non-monetary assets:

> the obligations of the United States to the Indian tribes in general, and Plaintiff in particular, are well established. It is clear that the United States acts as a trustee for Plaintiff and that at least some of the corpus of the trust is non-monetary. Whether the duty to account for the non-monetary assets held in trust arises from statute or common law, it does exist . . . .

2008 WL 5205191, at *5 (holding that non-monetary trust assets are properly covered by the accounting requirements of the 1994 Act). Likewise, in *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 989 (Ct. Cl. 1980), the Navajo Nation filed an accounting claim and disputed an accounting report and argued that the report failed to account for certain statutorily mandated sales of fire-damaged timber on tribal lands. *Id.* at 988. The Court of Federal Claims held that the United States had a duty "to account for its management of plaintiff's timber, including an accounting for proceeds of sales of fire-damaged timber." *Id.* at 989. *See also supra* § III.E (discussing accounting requirement that all transactions were fair, voluntary, and free from oppression or undue influence, and that the results of the same were fair).

IV. Conclusion

For the foregoing reasons, the Cherokee Nation respectfully requests that the Court deny the United States' motion to dismiss the Complaint. The United States does not provide any basis for departing from established D.C. Circuit precedent and prior decisions of this Court in similar trust accounting cases. Indeed, well over 100 Indian tribes have successfully sued the United States seeking an accounting for trust funds similar to the accounting the Nation seeks in this case, and yet the United States has failed to cite even one case where it prevailed in a Tribal trust accounting case on any of the arguments for dismissal that it raises here.

Respectfully submitted this 18th day of November, 2019

Sara E. Hill (*admitted pro hac vice*)
Attorney General
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-0948
Tel: 918-456-0671
Fax: 918-458-5580
Email: sarah-hill@cherokee.org

Chad C. Harsha (*admitted pro hac vice*)
Secretary of Natural Resources
CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-0948
Tel: 918-453-5369
Fax: 918-458-6142
Email: chad-harsha@cherokee.org

s/ Anne E. Lynch
Anne E. Lynch, DC Bar No. 976226
Michael D. Goodstein, DC Bar No. 469156
VAN NESS FELDMAN LLP
1050 Thomas Jefferson Street NW
Seventh Floor
Washington, DC 20007
Tel: 202-298-1800
Email: alynch@vnf.com
mgoodstein@vnf.com

Jason B. Aamodt
Krystina E. Phillips
Dallas L.D. Strimple
INDIAN AND ENVIRONMENTAL LAW GROUP
204 Reunion Center
Nine East Fourth Street
Tulsa, OK 74103
Tel: 918-347-6169
Email: jason@iaelaw.com
krystina@iaelaw.com
dallas@iaelaw.com

David F. Askman
Michael M. Frandina
ASKMAN LAW FIRM LLC
1543 Champa Street, Suite 400
Denver, CO 80202
Tel: 720-407-4331
Email: dave@askmanlaw.com
michael@askmanlaw.com

Counsel for Plaintiff Cherokee Nation