IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF THE CHEROKEE NATION'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. Introduction

The United States is the trustee for the Cherokee Nation (the "Nation"). *See* Statement of Undisputed Fact ("SUF") #1. The United States placed the Nation's money, real and tangible property, and natural and cultural resources under federal management and control. SUF##2-5. The Nation's Trust includes financial accounts and investments, SUF##6, 56, as well as assets such as land, salt deposits, oil, gas, timber, minerals, and stone and the revenue generated from those resources, SUF##2-3, 5. Much of the Nation's property was taken into try by the United States in an attempt to declare in the early 1900s that the Nation no longer existed.

As trustee, the United States must be "judged by the most exacting fiduciary standards," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (followed for this principle in *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) ("*Cobell VI*"), including "accounting for Indian Trust Funds and accurately maintaining the trust corpus," SUF#67. This is "[t]he most fundamental fiduciary responsibility of the government . . . ." SUF#68.

The Nation asserts: (1) the United States failed to provide the required accounting for the Cherokee Nation's Trust Funds that have been held by the United States *qua* trustee for the Cherokee Nation; (2) the United States cannot account for its (mis)management of the Nation's Trust, as required, *inter alia*, by 25 U.S.C. §§ 162a, 4011, and 4044; and (3) the United States acted contrary to its statutory obligations by failing or refusing to account. Imbedded in each of these claims are allegations that the United States failed or refused to account for the Nation's Trust, ECF No. 2-1 ¶¶ 134, 141, 147-49, 158-60, 164-66, and a demand for a meaningful accounting, *id.* ¶¶ 133, 139-40, 143.[1]

[1] The Nation's claims that the United States breached other statutory and fiduciary obligations with respect to the Nation's Trust Fund, *see* ECF No. 2-1, are not addressed in this motion.

In response, the United States claims that it performed "all accountings to Plaintiff required by law." *See* Dunmore Decl., ECF No. 65-2 ¶ 2. The United States further asserts that the administrative record[2] it produced in this case includes "all documents the Department of the Interior directly and indirectly relied upon in providing all accountings to Plaintiff required by law during the applicable time frame." *Id.*; *see also* ECF No. 55-1 at 11 ("Federal Defendants' administrative record evidences the performance of the agency's obligations."). As described by the United States, the administrative record generally contains "the Tribal Reconciliation Project Report and other associated background documents, Periodic Statements of Performance, and Annual Audit Letters that were provided to the Cherokee Nation." Dunmore Decl., ECF No. 65-2 ¶ 2. The "Agreed-Upon Procedures and Findings Report" issued by the consulting firm Arthur Andersen LLP (and colloquially referred to as "the Arthur Andersen Report") was notoriously limited, and in no way satisfies the trust accounting obligation. It does not contain even the most basic elements of the accounting that is due to the Nation: a description of the trust corpus, an accurate starting and ending balance, an accurate statement of the transactions, and the supporting documentation necessary to show the accuracy of the accounting.

Although the United States has admitted time and again that the Arthur Andersen Report is not an accounting, it asserts in this case that the Nation is entitled to nothing more than the meager information contained in the Arthur Andersen Report and the subsequent account statements—called "Periodic Statements of Performance"—that came after it. To meaningfully advance resolution of this case, the Nation asks the Court to issue an order that the Arthur Andersen Report does not satisfy the United States' fiduciary accounting obligation owed to the Nation.

[2] The Nation disputes that the "administrative record" produced by the United States is complete or constitutes a proper basis for determination of the Nation's claims in this case.

II. Standard of Review

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought," Fed. R. Civ. P. 56(a), and an order for "summary judgment can be entered on narrow, factual issues" or a portion of a claim, *United States ex rel. Landis v. Tailwind Sports Corp.*, 234 F. Supp. 3d 180, 191 (D.D.C. 2017). Here, the Nation moves on the narrow issue of whether the Arthur Andersen Report satisfies the United States' accounting obligation, which the United States has conceded previously is proper for resolution on summary judgment. *See* Transcript of Hearing before Magistrate Robinson (June 19, 2020) at 13 ("It is federal defendants' position that whether an adequate accounting has been provided is a question of law that can be decided on motions for summary judgment"); Transcript of Initial Scheduling Conference (Feb. 18, 2020), filed at ECF No. 48-2, at 6:3-4 ("Federal defendants believe the core legal issue . . . is whether the federal defendants have provided an accounting"). Summary judgment must be entered if the Court determines "there is no genuine dispute as to any material fact and the [Nation] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

As a trustee, the United States must act according to exacting fiduciary obligations that limit its discretion:

> The Secretary has an overriding duty to deal fairly with Indians. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). This duty necessarily constrains the Secretary's discretion. When faced with several policy choices, an administrator is generally allowed to select any reasonable option. Yet this is not the case when acting as a fiduciary for Indian beneficiaries as "stricter standards apply to federal agencies when administering Indian programs." *Jicarilla* [*Apache Tribe v. United States*], 728 F.2d [1555,] 1567 [(10th Cir. 1984)]. Summarizing federal case law on fiduciary obligations owed to Indian tribes, the Tenth Circuit concluded that where "the Secretary is obligated to act as a fiduciary . . . his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Id.* at 1563. The federal government has "charged itself with moral obligations of the highest responsibility and trust" in its relationships with Indians, and its conduct "should

> therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942); *cf. Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988) (giving "careful consideration to Interior's interpretation" of the Oklahoma Indian Welfare Act, but not deferring to it).

Cobell VI, 240 F.3d at 1099; *id.* at 1101 (holding *Chevron* deference not applicable to DOI's interpretation of the 1994 Trust Management Reform Act); *Cobell v. Norton* ("*Cobell XVI*"), 428 F.3d 1070, 1074 (D.C. Cir. 2005) ("Although plaintiffs' core claim is under the APA, this is not an ordinary APA case," and "the availability of common law trust precepts complicates the application of conventional deference principles to Interior's interpretations of the 1994 Act's historical-accounting provision."); *Jicarilla*, 728 F.2d at 1563 (Seymour, J., concurring in part) ("If the Secretary is obligated to act as a fiduciary . . . then his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.").

In actions for an accounting, the burden is on the United States to establish that it has provided an accounting that satisfies its legal obligations. *W. Mtn. Apache Tribe of Ariz. v. United States*, 26 Cl. Ct. 446, 448-49 (1992), *opinion corrected* (July 17, 1992), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993) ("The burden of establishing the propriety of disbursements from tribal trust funds rests with the Government."). In this case, the United States seeks to satisfy its burden by relying on the Arthur Andersen Report, and the subsequent account statements that stem from that report. *See* Dunmore Decl., ECF No. 65-2.

III. Undisputed Facts

A. The Nation's Trust

The United States created the Nation's Trust through its own actions. The Nation's Trust includes money owed to the Nation under treaty promises, judgments obtained against the United States, other appropriations, and revenue generated by the Nation's assets held or maintained by

the United States. SUF##3,5-6, 27, 44. Land and resources held in trust, reversionary interests in property, and assets managed or leased by the United States are also part of the Trust. *See* Restatement (Third) of Trusts § 2 (2003) (defining "Trust" to include any kind of property) & § 40 ("a trustee may hold in trust any interest in any type of property").

There is good reason for the Nation to be concerned about the state of its Trust. "Almost as long as there have been Indian trust funds, there have been issues raised concerning the investments of and payments from these funds." SUF#6. As early as 1828, U.S. officials recognized that "[t]he derangements in the fiscal affairs of the Indian department are in the extreme. One would think that appropriations had been handled with a pitchfork. . . . There is a screw loose in the public machinery somewhere." *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 16 (D.D.C. 1999) ("*Cobell III*"); *see also* SUF#7.

Over the intervening 200 years, little improved. By 1982, the DOI Inspector General had issued thirty-one reports detailing deficiencies in the administration of Indian Trust funds, SUF#75, and concluded there were "recurring and longstanding problems" in this area, SUF#76. "[Y]ear after year, report after report, . . . disclosed an appalling array of management and accountability failures in DOI's trust accounting and management program." SUF#75. The reports filed by DOI pursuant to the 1982 Federal Managers' Financial Integrity Act, Pub. Law No. 97-255, 96 Stat. 814 § 2, revealed "serious, longstanding financial management problems at BIA," but very little interest or progress by BIA in correcting them. SUF#77. DOI's Inspector General found "shocking problems with BIA's accounting practices that were so pervasive that reported information was totally unreliable," SUF#79.

Against this backdrop, Congress undertook a series of investigative hearings in the late 1980s and 1990s, SUF#74, and, starting in 1987, issued a series of directives to BIA to reconcile

the Indian Trust Funds, SUF#81. BIA largely resisted Congress's demands, instead offering a series of empty promises and excuses. *See* SUF#80 ("Although many significant problems continue to be cited by the inspector general, by GAO, by OMB, by independent accounting firms and by this subcommittee, the BIA remains quick to promise, but slow to perform."). By 1992, Congress reported that BIA had made only "marginal progress" in improving its practices that had been "undertaken only grudgingly" after Congress demanded change. SUF#84.

In 1992, Congress issued the seminal report,[3] "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," H.R. No. 102–499 (1992) (included as Exhibit 7). That report documented "significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds." SUF#83 (quoted in *Cobell III*, 52 F. Supp. 2d at 16-17). The Subcommittee concluded:

> The Bureau of Indian Affairs [BIA] has failed to fulfill its fiduciary duties to the beneficiaries of the Indian trust fund. The Bureau's management of the Indian trust fund has been grossly inadequate in numerous important respects. The Bureau has failed to accurately account for trust fund moneys. Indeed, it cannot even provide accountholders with meaningful periodic statements on their account balances. It cannot consistently and prudently invest trust funds and pay interest to accountholders. It does not have consistent written policies or procedures that cover all of its trust fund accounting practices. Under the management of the Bureau of Indian Affairs, the Indian trust fund is equivalent to a bank that doesn't know how much money it has.

SUF#82. The Subcommittee also found that:

- The BIA's supervision and control of the Indian trust fund is not adequate to fulfill the government's fiduciary duties. Exhibit 8 at AR-000295 (Finding #2).
- There was a "failure to correct longstanding financial management problems," *id.* at AR-000296 (Finding #7), and even "tolerated the deepening crisis in the Indian Trust

[3] *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 53 (D.D.C. 1999) ("*Cobell I*"), *aff'd Cobell VI*, 240 F.3d at 1090–91.

Fund management," despite "longstanding recognition and condemnation of BIA's poor performance," *id.* at AR-000296 (Finding #9).

- "BIA's "continuing refusal to reconcile audit and certify all Indian Trust Fund accounts was arbitrary, capricious unreasonable and contrary to the clear Congress intent as expressed in five successive federal laws governing the BIA's annual appropriations from 1987 to 1991. The Bureau initiated such audit and reconciliation effort only after concerted pressure by the Subcommittee." *Id.* at AR-000297 (Finding #16).

- BIA had failed to implement numerous recommendations from the Inspector General, OMB, the Comptroller General, and the Committee on Government Operations. *Id.* at AR-000296 (Finding #8). If long-standing problems were not corrected, "no substantial benefits" would be "derived from reconciling and auditing" the Indian trust fund accounts. *Id.* at AR-000297 (Findings ##18-19).

- "Continuing mismanagement and incompetence in the supervision and control of Indian trust funds present a clear danger to the American taxpayer, who must bear the financial burden of compensating trust fund holders for BIA's breach of fiduciary duties." *Id.* (Finding #20).

The subsequent reports from the Inspector General and GAO were no better. "In its December 1993 Federal Managers' Financial Integrity Act report, Interior continued to list BIA programs, including its trust fund financial management systems and controls, as one of Interior's two highest-risk areas," and concluded that the "account balances lack credibility." SUF#90. GAO testified there were continued "trust fund management problems" including "an inability to accurately account for land ownerships and natural resource assets and their associated revenues," plus institutional weaknesses that "permeate every facet of the trust fund business cycle" that prevented BIA from providing accurate account balances to tribes. SUF#89.

In 1991, BIA contracted with Arthur Andersen to reconcile the Indian trust funds, *see* SUF#73, and in 1992 contracted with Coopers & Lybrand LLC to perform an independent certification of the reconciliation, *id.* In 1992, Arthur Andersen reported that "tribal accounts could probably be reconciled for periods where records are available" and gave an initial assessment. SUF#87. The Arthur Andersen scope of work was limited twenty-nine separate times. SUF#94.

B. The Arthur Andersen Report

In 1994, Congress passed the American Indian Trust Fund Management Reform Act of 1994, Pub L. 103-412, 108 Stat. 4239 (Oct. 25, 1994) (the "1994 Reform Act"). Among other things, it required DOI to submit a report by May 31, 1996, "identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995." *Id.* § 304 (codified at 25 U.S.C. § 4044). On the May 31, 1996 deadline, DOI submitted a report to Congress that Congress deemed insufficient to meet the requirements of section 304 of the 1994 Reform Act in part because it did not include reconciled account balances. SUF#99. DOI also sent to each tribe a summary of the results of the reconciliation of that tribe's accounts for the period from 1972 to 1993, with some additional information for 1994 and 1995. SUF#91.

The Arthur Andersen Report covered six reconciliation procedures, identified as: (1) transactions, (2) investment yields, (3) deposit lag times, (4) system reconciliation, (5) special procedures, and (6) lease receipts. SUF#109.

Transactions: This task involved reviewing BIA's general ledger and confirming the listed receipts and disbursements with source documentation. SUF#110. Although Arthur Andersen started with the general ledger entries, the completeness of the general ledger was not confirmed, SUF#111, and BIA was unable to determine whether all receipts and disbursements were included on the general ledger, SUF#115. For the Nation, Arthur Andersen could only confirm 12% of the disbursements on the general ledger with source documentation. SUF#116. For all non-investment transactions, 14% of the transactions were unreconciled, representing 10% of absolute dollars for non-investment transactions. SUF#117. The United States has admitted that disbursements that lack complete backup documentation are particularly concerning. SUF#118.

Investment Yield Analysis: Arthur Andersen compared tribes' interest earning to the BIA benchmark rate (the annual average for all tribal funds invested)[4]. Investment yields outside of the benchmark range were further investigated. SUF#119. Arthur Andersen proposed some adjustments to the Nation's investment yields to make up for poor investment yields on the Nation's accounts. SUF#121.

Deposit Lag Times: This task consisted of reviewing the time between when BIA received funds and when BIA deposited funds for a tribe. SUF#122. For the Nation's receipts, Arthur Andersen concluded that 2 of them had lag times over 30 days. SUF#123. No adjustments were proposed for the Nation's account balances to correct for these lag times. SUF#124.

System Reconciliation: Arthur Andersen was supposed to compare different systems within BIA and against U.S. Treasury records to determine whether BIA's general ledger was reliable. SUF#125. But, Arthur Andersen never completed the comparison of BIA's Finance System records to the BIA's Integrated Records Management System, only completed one-year of reconciliation of the Finance System to U.S. Treasury Records, and only reconciled BIA's Finance System to the trust fund investment system for 26 tribes (which did not include the Cherokee Nation). SUF#126. GAO cautioned that starting with BIA's Finance System (the "general ledger"), without any assurance that transactions actually had been recorded in the general ledger, called the reliability of all system reconciliation tasks into question. SUF#127.

Special procedures: This task was not conducted for the Nation. SUF#128.

Lease Receipts ("Fill-the-Gap Procedures"): Arthur Andersen identified this task to verify tribal income from oil, gas, and coal royalties, timber and other surface leases, and grazing,

[4] BIA's overall investment procedures, policies, training, supervision, etc. has been documented as chronically poor, *see* SUF#120, and so this benchmark is of little utility in determining whether funds were properly invested.

hunting, fishing, and other rights-of-way. SUF#129. No leases with less than $25,000 in annual collections were reviewed. SUF#132. Of the leases with over $25,000 in annual collections, only 10.7% of such leases were tested. SUF#132. None of the Nation's leases were reviewed by Arthur Andersen. SUF#133. The fact that BIA could not identify the total revenues that should be generated by the leases, or even the number of active leases, was a "major concern" of the United States Special Trustee. SUF#134.

The United States has taken the position that the 1996 Arthur Andersen Report and subsequent periodic statements satisfy all accounting duties owed to the Nation. But the Arthur Andersen Report is not an accounting. It only reviewed certain transactions into and out of certain monetary accounts for a relatively short period of time; it did not generate reliable account balances; and it does nothing to account for non-monetary property in the Nation's Trust. The United States should not be permitted to hide behind the Arthur Andersen Report any longer.

Since the issuance of the Arthur Andersen Report, the United States has stated that:

- The United States has not yet "conduct[ed] a complete audit or provide[d] the level of assurance to account holders that was expected." SUF#141.
- The TRP "provides a less than complete accounting of the state of the Tribal trust funds." SUF#142.
- The Arthur Andersen Reports were a "less than complete accounting of the state of the Tribal trust funds." SUF#143.
- "Despite five years of effort and the expenditure of $21 million, the [AA] Project provides a less than complete accounting of the state of the Tribal trust funds." SUF#144.
- "[T]he poor condition of the records and systems did not allow the federal government to conduct a complete audit or provide the level of assurance to account holders that was expected." SUF#145.

Outside of litigation, the United States has never represented the Arthur Andersen Report as an accounting.

C. The United States' Exclusive Possession, Custody, and Control of Records Required to Account for the Nation's Trust

The need for the United States to account is particularly acute in this case. Due to unilateral actions taken against the Nation, the Nation does not know what assets remain in its Trust today, does not have an accurate balance for its financial accounts, and does not know the status of its Trust assets (and what revenue they generated) including for periods of time when they were exclusively controlled by the United States. SUF##45-53. Around the turn of the last century, the United States seized control of the Nation's government and its records. SUF##46-54, 58-65.[5] During the same period, the United States forced allotment on the Nation—a process whereby the United States sought to dissolve the Cherokee reservation, deed individual parcels to individual Cherokee citizens, and sell off the remainder. *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972) ("Allotment is a term of art in Indian law. It means a selection of specific land awarded to an individual allottee from a common holding." (internal citations omitted)); *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 651 (1976) ("The objects of this policy [of allotment of tribal land] were to end tribal land ownership and to substitute private ownership"); *See generally*, American Indian Law Deskbook § 1:12 ("The General Allotment Act period: 1887 to 1934"). The allotment of the Nation occurred between 1902 and 1920, SUF#30, during the period when the United States dominated the Nation's government. SUF##45-53.

[5] The United State knew that proper maintenance of these records was critical, SUF#60, but failed protect the records, SUF##64-65 (citing *Cobell*), only relatively recently consolidating the records that are left at the American Indian Records Repository (the "AIRR"), which was built "to preserve and protect Indian trust records and to accommodate research of those records," *Ak-Chin Indian Community v. United States*, 85 Fed Cl. 397, 398 (2009). The United States has thus far not collected records from the AIRR and has refused to even share with the Nation the index of the Nation's records that are housed at the AIRR. *See generally* ECF Nos. 55 & 64.

In 1906 the United States further impinged on the Nation's sovereignty through a practice of appointing a "chief for a day." In 1906, Congress enacted *An Act To provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes*, 34 Stat. 137 (Apr. 26, 1906)) (the "*1906 Five Tribes Act*"), which, among other things, allowed the President to appoint a principal chief for the Nation in the event of the principal chief's removal, disability, or death. *See* SUF#47 (citing 34 Stat. 137, 139 § 6). Although Congress intended that "the office whose occupant was charged by statute with signing the allotment deeds would at all times be filled," *Harjo v. Kleppe*, 420 F. Supp. 1110, 1127 (D.D.C. 1976), the United States abused this power, regularly appointing a "chief for a day" to do the United States' bidding. These "chiefs" "were appointed by the President and recognized by the United States as the sole embodiment of the government of the Nation with complete power to control all governmental affairs." *Chickasaw Nation v. Dep't of the Interior*, 120 F. Supp. 3d 1190, 1203-04 (W.D. Okla. 2014) (describing the same practice imposed on the Chickasaw and Choctaw Nation). *See also Wheeler v. Dep't of Interior*, 811 F.2d 549, 552 (10th Cir. 1987) ("For several decades, the Department had precluded the tribes from selecting their own form of government, claiming that tribal-formed governments were not valid." (discussing the United States' treatment of the Cherokee Nation)).

At the same time, the United States prohibited the Nation's legislature from meeting more than 30 days in a year. 1906 Five Tribes Act § 28, 34 Stat. at 148. Any act, ordinance, or resolution that the Nation passed had to be approved by the President. *Id.* The United States considered the Nation's government as having been "divested of practically all government functions" and consisting of only a chief and necessary clerical assistants. *Chickasaw Nation*, 120 F. Supp. 3d at 1202 n.11 (citing the 1913 Annual Report of the Commissioner to the Five Civilized Tribes).

The United States' suppression of the Nation's government was specifically "designed to prevent any tribal resistance to [its] methods of administering those Indian affairs delegated to it by Congress," amounting to "bureaucratic imperialism," *Harjo*, 420 F. Supp. at 1130. Many of these actions went beyond, or event directly contradicted, Congressional authorizations. Although the 1906 Five Tribes Act had preserved the Nation's government, the United States' policy towards the Nation "manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved" by the 1906 Five Tribes Act. *Id.* "Throughout this period, the federal officials and agents dominated the lives of the Five Civilized Tribes, using their control over tribal disbursements and resources to ensure that the administration of the Territory during that time conformed to the preferences, values, and priorities of the Interior Department." *Id.* at 1126. Courts have since found that this governmental suppression was illegal. *Cf. Logan v. Andrus*, 457 F. Supp. 1318, 1324 (N.D. Okla. 1978) ("the Court is led to the inescapable conclusion that the Secretary of the Interior was attempting to exercise legislative power when he purportedly abolished the government of the Osage Nation in 1900 and that such action was therefore beyond the scope of his authority and of no legal effect").

In the early 1900s, the Nation's records were disbursed. The Act of May 27, 1908 provided that "every officer, member, or representative of the Five Civilized Tribes, respectively, or any other person having in his possession, custody, or control, any money or other property, including the books, documents, records, or any other papers, of any of said tribes, shall make full and true account and report thereof to the Secretary of the Interior" and that failure to hand over such records would constitute embezzlement. 35 Stat. 312 § 13. The Act of March 27, 1934 then authorized the "Secretary of the Interior to place with the Oklahoma Historical Society, at Oklahoma City, Oklahoma, as custodian for the United States, certain records of the Five Civilized

Tribes" that were in the possession of the Secretary of Interior or the Superintendent to the Five Civilized Tribes. 48 Stat. 501. In addition, the 1906 Five Tribes Act provided that "records of each of the land offices in the Indian Territory," when closed, would be sent to "the office of the clerk of the United States court in whose district said records are now located." 1906 Five Tribes Act § 8. Since the mid-2000s, the United States has been sending retired trust records to the American Indian Records Repository (the "AIRR"). The United States has estimated that there are *4,257 boxes* of documents relevant to this case at the AIRR. *See* ECF No. 55-3 ¶ 11.

After nearly seventy years of illegally suppressing the Nation's right to self-governance, Congress passed Public Law No. 91-495 in 1970 "to Authorize each of the Five Civilized Tribes of Oklahoma to popularly select their principal officer, and for other purposes." 84 Stat. 1091 (Oct. 22, 1970). The Nation adopted a new Cherokee Constitution in 1976, *Vann v. Kempthorne*, 467 F. Supp. 2d 56, 61 (D.D.C. 2006), *rev'd in part*, 534 F.3d 741 (D.C. Cir. 2008) ("In 1976, the Cherokee Nation adopted a new constitution"). By then, the Nation's records of its Trust Fund—to the extent they still existed—had been scattered across the country or lost by the United States.

IV. Argument & Authorities

The United States is the trustee for the Nation. SUF#2. As trustee, the United States must maintain accurate accounts and supporting documentation and provide an accounting on demand to the beneficiary, the Nation. *See* SUF##67-68 ("the most fundamental fiduciary responsibility of the government, and the [BIA], is the duty to make a full accounting of the property and funds held in trust for the 300,000 beneficiaries of the Indian trust funds.").

A. The United States Must Provide a Meaningful Accounting to the Cherokee Nation

The United States owes a fiduciary duty to the Cherokee Nation, which includes a duty to account to the Nation. The United States' duty to provide a full and accurate accounting of the

Nation's Trust Fund was established by treaty, grounded in common law, and recognized, adopted, and articulated by Congress. *See* SUF##67, 71.

1. The United States Is Obligated to Account.

The United States has held and continues to hold the Nation's property and money, and so it has assumed fiduciary obligations. *Cobell VI*, 240 F.3d at 1088; *see also* ECF No. 85 (finding that the United States "has long held in trust significant assets belonging to the Cherokee Nation"). The United States exerted elaborate control over the Nation's assets and property, culminating in the Curtis Act, whereby the United States took control of the Nation's land, oil, coal, asphalt, and mineral deposits, and all of the Nation's money. 30 Stat. 495 (June 28, 1898), section 11. Shortly thereafter, the Federal Defendants took control of the Nation's land records, schools, coal and asphalt, buildings, land, and other resources under the 1906 Five Tribes Act. 34 Stat. 137 (Apr. 26, 1906). The Federal Defendants even deliberately attempted to prevent the proper functioning of the Nation's government. *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.C. Cir. 1976).

The United States expressly promised an accounting to the Cherokee Nation in various treaties. For example, the Treaty of 1866 specifically requires that the United States allow the Cherokee Nation to "examine the accounts of the nation with the Government of the United States at such time as they may see proper," including "free access to all accounts and books in the executive departments relating to the business of said Cherokee Nation, and an opportunity to examine the same in the presence of the officer having such books and papers in charge." SUF#71(b). *See also* SUF#71 (identifying other treaty provisions requiring accountings).

Congress has recognized the United States' accounting obligation. *See generally* SUF#71. In 1938, Congress authorized DOI to move tribal trust funds from the U.S. Treasury to private banks, but also required the United States provide accurate accountings of those funds to trust beneficiaries. SUF#71(h) (citing Act of June 24, 1938, Pub. L. 103-412 § 101 (codified at 25

U.S.C. 162a)). The American Indian Trust Fund Management Reform Act of 1994 further specifies the elements of accounting required to discharge the United States' trust obligations to tribes. SUF#71(i) (citing 108 Stat. 4239). The accounting obligation was reaffirmed in the Indian Trust Asset Reform Act of 2016, Pub. L. No. 114-178. SUF#71j. *See also e.g.*, *Cobell v. Norton*, 377 F. Supp. 2d 4, 12 (D.D.C. 2005); *Cobell I*, 91 F. Supp. 2d at 32–33. Accordingly, the United States' accounting obligations are well established under both treaties and by Congressional decree.

2. The Threshold Elements of an Accounting Are Well-Established and Include a Statement of the Full Contents of the Trust, Accurate Starting Balances, and Reconciled Transactions

There are certain fundamental elements that must be included in order for an action to rise to the level of an "accounting." The 1994 Trust Reform Act provides the skeleton—including:

- identification of the source, type and status of funds, 25 U.S.C. § 162a(b)(1);
- accurate beginning and ending account balances confirmed through periodic reconciliations, 25 U.S.C. §§ 162a(b)(2) & (5), (d)(9)-(11); and
- a statement of receipts and disbursements from the account, 25 U.S.C. § 162a(d)(4).

These requirements are the bare minimum, and represent only "a portion of the government's specific obligations . . . ." *Cobell VI*, 240 F.3d at 1100-01 (the "government's duties predate and extend beyond those enumerated in the 1994 Act"). The 1994 Trust Reform Act "lists some of the means through which the Secretary shall discharge its preexisting duties" to tribes. *Id*. To meet its burden, the United States must produce an accounting that—*at a minimum*—meets these threshold requirements. *See W. Mtn. Apache Tribe*, 5 F.3d at 1506. Anything less would completely miss the point. The goal of any accounting is to ascertain the proper account balance to determine if an adjustment needs to be made. "An 'accounting' is designed to require a person in possession of financial records to produce them, demonstrate how money was expended, and

return pilfered funds in his or her possession. An action for an accounting has the purpose of adjusting the account of the litigants and of rendering complete justice in a single action." 1 Am. Jur. 2d Accounts and Accounting § 50. *C.f. Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 656 (4th Cir. 1996) (finding that the common law of trusts includes the beneficiary's entitlement to "complete and accurate information" as the trust property and are "always entitled to such information as is reasonably necessary to enable them to enforce their rights under the trust or to prevent or redress a breach of trust") (relying on Restatement (Second) of Trusts § 172 (1959)).

Based on the statutory requirements and well-established common law[6], the D.C. Circuit has held that the United States is required to provide a "fair" and "accurate" accounting to trust beneficiaries, and that the accounting must include a reconciliation of all funds, starting with an accurate historical balance and "taking into account past deposits, withdrawals, and accruals" to determine an accurate current balance. *Cobell VI*, 240 F.3d at 1102. It is "self-evident" that this must include "the locating and retention of records, operational computer systems, and adequate staffing . . . . Anything less would produce an inadequate accounting." *Id.* at 1103. This is because "the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." *See* Restatement (Third) of Trusts § 173 (2003). At a minimum, an accounting must include "information sufficient to alert the beneficiar[ies] to possible losses." *Chippewa Cree*, 69 Fed. Cl. at 664.

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[6] *See Cobell VI*, 240 F.3d at 1101 (common law trust obligations are incorporated into the special relationship between the United States and Indian tribes); *Cobell v. Kempthorne* ("*Cobell XVII*"), 455 F.3d 301, 307 (D.C. Cir. 2006) ("We rely on the common law to 'flesh out' the statutory mandates and determine the precise contours of the government's responsibilities."); *W. Shoshone Identifiable Group by Yomba Shoshone Tribe v. United States*, 143 Fed. Cl. 545, 607 (2019) ("When a statute imposes a fiduciary duty on the government, but does not explicitly define the scope of the fiduciary duty or guide the mechanics of how to advance the desired result, the court may look to the common law for guidance on how to define the scope of the duty.").

While the Court must later consider equitable factors to determine the proper scope and methodology to be used in the ultimate accounting of the Nation's Trust, that does not preclude the Court from granting the present motion. The Arthur Andersen Report does not satisfy the bare minimum accounting requirements, and it does not discharge the United States' fiduciary duty to the Nation. *See Cobell v. Salazar* ("*Cobell XXII*"), 573 F.3d 808, 813-15 (D.C. Cir. 2009) (providing guidance for the Court's determination of an "equitable accounting" that would fit the needs and limitations of the particular case); *W. Shoshone Identifiable Group by Yomba Shoshone Tribe v. United States*, 143 Fed. Cl. 545, 607 (2019) ("When a statute imposes a fiduciary duty on the government, but does not explicitly define the scope of the fiduciary duty or guide the mechanics of how to advance the desired result, the court may look to the common law for guidance on how to define the scope of the duty."); ECF Nos. 68 & 70 (finding that common law can help define the scope of the United States' trust obligations and denying the United States' motion for judgment on the pleadings).

An accounting also "necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception." *Cobell VI*, 240 F.3d at 1103 (including citations to Black's Law Dictionary (7th ed. 1999) and *W. Mtn. Apache*, 26 Cl. Ct. at 449). Property in the Nation's Trust is important in its own right and as sources of revenue.

B. The Arthur Andersen Report Is Not an Accounting

The Arthur Andersen Report shows an attempt to confirm balances on the United States' general ledger, SUF#109, for a handful of known monetary accounts, SUF#126, for a 20-year period, SUF#98, without first confirming the starting balance, SUF##97, 105, or the completeness of the ledger being verified, SUF#111. Even with those significant constraints, the United States and its contractor failed to reconcile a significant portion of the transactions. SUF##116-117.

Indeed, this Court has concluded that, despite orders and directives, "Congress has not been able or willing to force defendants to come into compliance with their fiduciary obligations—most fundamentally the statutory obligation to provide plaintiffs an accounting—notwithstanding numerous hearings, codifications, and the creation of a special entity to help spur change in this regard." *Cobell III*, 52 F. Supp. 2d at 18. Because of this recalcitrance, tribes have been forced to seek relief from the courts to obtain proper accounting of their trust resources. In litigation, the United States claims the Arthur Andersen Report is an accounting. In all other contexts, it acknowledges that it is not. SUF##136-146. [7] Indeed, no other conclusion is possible.

1. Major Elements of the Trust Are Missing from the Arthur Andersen Report

"It is black-letter trust law that an accounting necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception." *Cobell VI*, 240 F.3d at 1103 (internal quotation omitted, citing Black's Law Dictionary (7th ed. 1999) and *W. Mtn. Apache*, 26 Cl. Ct. at 449). The Arthur Andersen Report did not even consider property comprising the Trust corpus besides the monetary accounts, SUF#109. As such, it cannot be an accounting of the Nation's Trust.

As detailed above, the United States intentionally fractured ownership of the Nation's land and resources in its attempt to drive the dissolution of the Nation itself. *See* SUF##20-30. Although the Nation persevered, its land mass was substantially diminished, and the Nation was unable to track the resources that it owned and/or that the United States held in trust for it. SUF##46-53. The Nation's land and other revenue-generating resources are potentially a

[7] The Arthur Andersen Report was never meant to be an accounting. It was produced in an attempt to satisfy an entirely different provision of the 1994 Trust Reform Act—section 4044—which required the Secretary of the Interior to complete and submit a "reconciliation report" "identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995." Pub. L. 103-412 § 304 (codified at 25 U.S.C. 4044).

significant property asset in the Nation's Trust. The United States has acknowledged that "Indian natural resource assets" are "vital to Indian economic development," and it has failed to "adequately manage[d]" them "to ensure that maximum revenue is generated for tribal and individual Indian trust beneficiaries." SUF#137. Nothing in the Arthur Andersen Report accounts for the non-monetary property of the Nation. SUF#109. The Nation is entitled to an accounting of these resources to determine the extent of these breaches. *W. Mtn. Apache*, 26 Cl. Ct. at 449; *Faircloth*, 91 F.3d at 656.

Revenues generated by leases of land and other property interests provide a case in point. Despite their magnitude and importance to the Nation, DOI has never accounted for those revenues. SUF#101. And while the Arthur Andersen Report reconciled some lease receipts for other tribes, SUF##130-132, it reviewed none of the Nation's leases, SUF#133. Moreover, as GAO cautioned prior to finalization of the Arthur Andersen Report, that procedure could not "provide adequate assurance that all revenues have been billed, collected, and properly recorded and distributed." SUF#136. "To do so, the contractor would need to identify billable items in the leases and determine if the revenues had been billed and collected." SUF#136. But Arthur Andersen did not use the recommended procedure. As a result, the United States cannot "determine what collections should be coming off those leases with any precision," SUF#102, or even "*whether* it is collecting revenues from all active leases," SUF#103 (emphasis added).

Because it excluded significant revenue-generating components of the Nation's Trust, the Arthur Andersen Report is not an "accounting."

2. The Arthur Andersen Report Does Not Consider Critical Time Periods for the Nation's Trust and Failed to Use a Defensible Starting Balance.

The United States has held money in trust for the Nation since the 1800s. *See* SUF##1, 3. From at least 1902 to 1970, the United States illegally suppressed the Nation's government and

exercised domineering control over its resources and records. But, the Arthur Andersen Report did not review any transactions before 1972, SUF#98, and did nothing to confirm that it started with a reliable balance for 1972 in its reconciliation. SUF#112.

The pre-1972 transactions on the Nation's accounts are crucial to determine how much *should* be in the Nation's accounts. For example, from the late 1880s until 1923, U.S. Treasury's "Combined Statement of Receipts, Expenditures, and Balances of the United States Government" show substantial balances held by trust in the Cherokee National Fund, the Cherokee School Fund, the Cherokee Asylum Fund, and the Cherokee Orphan Fund. SUF#54. The balance in these funds was over $1.5 million in 1912, but by 1926, the Treasury reported that the Nation's trust fund balances were zero. *Id.* It is unclear what happened to these accounts or the funds in them. This is but one example of significant questions that should be resolved through an accounting. Without such accounting, the United States cannot defend the Nation's balances as is required by law. *See W. Mtn. Apache*, 5 F.3d 1506 (Fed. Cir. 1993) ("The burden of establishing the propriety of disbursements from tribal trust funds rests with the Government.").

By refusing to look at any transactions before 1972, the United States necessarily failed to consider any transaction entered into by the United States during its allotment of the Nation's property (1902 to 1920), SUF#30, when the United States controlled the Nation's resources, government, and records, SUF##46-52. For example, under the 1906 Five Tribes Act the United States sold millions-of-dollars-worth of "town lots" to people looking to live within the Nation's boundaries. SUF##33-34. The United States sold other property belonging to the Nation, including buildings and schools. *See* SUF##51-52. The Curtis Act had made it illegal for the Nation to collect its own revenue, 30 Stat. L. 495, and millions of dollars of revenue was reportedly

collected by the United States for the Nation during this period, *see, e.g.*, SUF#53. All of these transactions fall outside of the limited twenty-year Arthur Andersen period.

BIA's tracking of trust fund account balances and transactions during that period were notoriously abysmal. According to the Inspector General, the "general ledger showed substantial and continual imbalances," yearend statements too were "often inaccurate," and "if accounts didn't balance at any given time, they would simply plug in an amount which would make it balance." SUF#85. Among the faulty practices identified were that accounting data was "entered at approximately 250 remote field locations, without adequate system edits or central office review to ensure the propriety and integrity of the entries," with the "potential for fraudulent transactions to be entered virtually anywhere on the system." SUF #85. These systemic weaknesses render the starting balance used by Arthur Andersen unreliable and insufficient for the accounting that is owed to the Nation.

U.S. officials have admitted that accurate starting balances, confirmed to the earliest possible date is part of the United States' accounting obligation. SUF#101 ("The Congress has requested that we go back and reconcile, and audit, and then certify it to the furthest extent possible for the Bureau's records in regard to accounting for these funds. So we, at this point, are required by Congress to go back, if we have records back to Andrew Jackson, and rebuild those accounts to that time."). The D.C. Circuit Court has confirmed that the 1994 Trust Reform Act requires an accounting for "*all* funds held in trust by the United States" and that "'[a]ll funds' means *all funds*, irrespective of when they were deposited . . . ." *Cobell VI*, 240 F.3d at 1102 (emphasis original). By failing to consider pre-1972 funds and transactions, the Arthur Andersen Report falls short of the required accounting owed to the Nation.

3. There Is No Reliable Current Balance for the Nation's Monetary Accounts.

The Arthur Andersen Report failed to produce a reliable account balance for the Nation's monetary accounts. In the 1994 Trust Reform Act, Congress recognized that a key part of its trust obligations is to "determin[e] accurate account balances" and to provide them to the account holders, Pub. L. 103-412 § 101(4) & (5) (codified at 25 U.S.C. § 162a(d)), and mandated that periodic statements of performance contain a "beginning balance" and "ending balance," *id.* § 102(b) (codified at 25 U.S.C. § 162a(b)). Without an accurate starting and ending balance, an accounting is of little to no use and does not satisfy the very purpose of an accounting—"to enable [beneficiaries] to enforce their rights under the trust or to prevent or redress a breach of trust." *Faircloth*, 91 F.3d at 656. *See also* SUF#82 (without accurate account balances, "[t]he Indian trust fund is equivalent to a bank that doesn't know how much money it has.").

The United States has recognized both that the starting balance used in the Arthur Andersen Report is unconfirmed, and that ongoing "weaknesses in trust fund management systems and internal controls and policies and procedures that do not ensure the accuracy of trust fund balances" renders current account balances unreliable. SUF#138; *see also* SUF#127 (concluding that ongoing problems with BIA's accounting systems and practices would render future account balances unreliable). According to the Assistant Secretary for Indian Affairs, the Arthur Andersen Report was *never meant* to produce accurate account balances, SUF##63-64, and the account balances used by BIA after the Arthur Andersen Report was complete were presumed to *not be accurate*, SUF##105-107. *See also* SUF#106 (admitting the United States "cannot guarantee the balances are going to be accurate"); SUF#107 (there is "no way" that the TRP would allow DOI to "assure the account balances are accurate"); SUF#139 ("BIA will not achieve its objective of providing reasonable assurance that the trust fund account balances are accurate."). As a result, it is not surprising that the Nation's account balances are still unreliable.

Because the DOI has never determined accurate account balances for the Nation's Trust, the balances shown on the various "Periodic Statements of Performance" in the Administrative Record, *see* ECF No. 65-1 at 309-12, are not reliable, and are not meaningful for determining the correct balance for these accounts.

4. There Is No Record of Deposits, Withdrawals, or Accruals for the Nation's Accounts.

An accounting must also identify "the gains and losses" and the "receipts and disbursements" from the account. 25 U.S.C. § 162a(b)); *see also* 1 Am. Jur. 2d Accounts & Accounting § 50 (an "accounting" requires the trustee to "demonstrate how money was expended"). Moreover, the obligation extends to the earliest possible date so that the Nation can determine whether "past deposits, withdrawals, and accruals" have been accurately recorded and incorporated into the Nation's Trust. *Cobell VI*, 240 F.3d at 1102.

Even for the 20-year window examined by Arthur Andersen, a significant number of transactions on the Nation's accounts remain unreconciled. The Arthur Andersen Report reviewed only receipt and disbursement transactions recorded on BIA's general ledger. In other words, Arthur Andersen confirmed whether a listed receipt was deposited into an account, not "whether or not the amounts that are due to the Indians are the *right amounts due* and whether they were, in fact, *put into the right accounts* . . . . That remains an unknown." SUF#97 (emphasis added). Even given this limited—and arguably useless—exercise, Arthur Andersen was able to reconcile only 86% of the Nation's non-investment transactions and only 12% of the disbursements. SUF#116. A whopping *ten percent* of the Nation's dollars for non-investment transactions for the Nation could not be reconciled at all. SUF#117. "A trustee in the private sector could not possibly continue such mismanagement and hope to get away with it for very long." SUF#75; *See also*

ECF No. 73 at 4 n.1 ("A student with an 86% score receives a B+ in school, but a trustee who can only account for 86% of a trust receives an F grade.").

While Arthur Andersen originally envisioned using other methods to reconcile the trust funds, those efforts were cut short. Arthur Andersen compared some data on BIA's general ledger to data in the trust fund investment system for some tribes, but never completed that task for the Nation's accounts. SUF#126. Arthur Andersen attempted to reconcile BIA's general ledger to U.S. Treasury's records, but eventually limited that review to a single year. SUF#126. And a planned reconciliation of BIA's Integrated Records Management System to BIA's Finance System was never done. SUF#126.

The Arthur Andersen Report simply fails to provide the required statement of the purported deposits, withdrawals, and accruals for the Nation's financial accounts. The Federal Defendant's accounting duty requires them to provide a statement of the transactions into and out of the Nation's accounts, and they have failed to do so.

V. Conclusion

The United States has never produced an accounting of the Nation's Trust. Indeed, other than in litigation, the Federal Defendants readily admit that the Arthur Anderson Report ***is not*** an accounting. The Arthur Andersen Report does begin with defensible starting account balances, SUF##97, 105, or a complete ledger, SUF##97, 105, only considered a handful of financial accounts, SUF#126, for a twenty-year period, SUF#111, and still did not fully reconcile the transactions it reviewed. In part because of these limitations, the Arthur Andersen Report failed to produce a reliable balance for the Nation's trust. *See* SUF##116-118. The Nation respectfully requests this Court hold the Federal Defendants to their word—that the Arthur Anderson Report does not constitute an accounting. *See, e.g.*, SUF##141, 142, 143, 144, 145, 146.

Respectfully submitted this 3rd day of March, 2022,

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