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

FEDERAL DEFENDANTS' BRIEF IN OPPOSITION TO THE NATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Cherokee Nation's motion for partial summary judgment should be denied and summary judgment on all claims should be entered favor of Federal Defendants. The Nation moves for partial summary judgment seeking an order that the Andersen Report does not satisfy the United States' accounting responsibilities to the Nation. In seeking that narrow ruling, the Nation ignores crucial predicate questions that must be resolved before the Court can rule on the sufficiency of the Andersen Report. The most fundamental of those questions is what specific accounting responsibilities the United States owes. The Nation attempts to answer that question with the general assertion that, because the United States is a trustee, it must be held to "the most exacting fiduciary standards." Pl.'s Stat. of Points and Auths. for Partial Sum. J. ("Pl.'s Br.") 1. That is not the law. Because the United States is a sovereign nation rather than a private trustee, its trust responsibilities—including any duty to account—are comprised only of those responsibilities that "arise from a statute, treaty, or executive order." *El Paso Nat. Gas Co. v. United State*s, 750 F.3d 863, 895-96 (D.C. Cir. 2014). The Nation's motion is premised on an assumption that fails at this first hurdle: identifying any duty for the United States to conduct an accounting covering the entire 233-year history between the United States and the Nation.

Indeed, the Nation fails even to articulate the scope of the fiduciary accounting obligation the United States allegedly owes. Instead of training on specific rights-creating statutory provisions, as binding precedent requires, the Nation lists a variety of statutes, most of which make no reference to any accounting, and asks the Court to infer based on that list that the standards applicable to a private trustee also apply to the government. While the Nation's broad allegations that these statutes require an accounting may have been sufficient to survive Rule 12 motions practice, they are insufficient on summary judgment.

Of the many statutes that the Nation identifies as supposedly creating a duty to account,

only two actually do so. First, in 1893, Congress required an accounting of certain payments owed under treaties ratified between 1817 and 1868. The United States prepared an accounting under this statute the following year. Second, Congress enacted the 1994 Trust Management Reform Act. The United States provided the Andersen Report to satisfy any retrospective duty under this Act seventeen months later.

The Nation's failure to ground its arguments in statutes that create a duty to account is fatal to its motion for partial summary judgment as to the Andersen Report. So too is the fact that Congress designated December 31, 2000, as the date by which the Andersen Report should be "deemed received" for purposes of any statute of limitations. That was nearly twenty years before the Nation filed this lawsuit. The Nation's claim that the Andersen Report was not an adequate implementation of any accounting under the 1994 Act thus accrued, and expired, years ago under the applicable six-year statute of limitations.

The same is true of the Nation's claims for an accounting more generally, warranting summary judgment in our favor on all the Nation's claims. The United States complied with both statutory accounting duties (the 1893 Act and the 1994 Act) following their enactment. The government's response to these accounting statutes also put the Nation on notice of any claims for a re-accounting, or additional accounting, beyond what the government provided. As such, the only potentially cognizable accounting claims the Nation might have brought—under the 1893 Act and the 1994 Act—long ago expired (in 1895 or, at the latest, 1900, for claims related to the 1893 Act, and in 2006 for claims related to the 1994 Act).

Even assuming some broader accounting duty untethered to statutes exists (it does not), the Nation has continually been made aware of its account activity through various accountings, account statements, and reports, triggering numerous procedural bars. Indeed, while the Nation

claims that "[t]he United States has never produced an accounting of the Nation's Trust," Pl.'s Br. 25, the historical record contradicts that statement.

For example, following allotment of the Nation's lands to individual tribal citizens and the sell-off of unallotted and other tribal lands at the beginning of the 20th century, Congress enacted a special jurisdictional statute in 1924 allowing the Nation to pursue any claims it had against the United States in the Court of Claims. In preparation for that litigation, the Nation commissioned a six-year accounting (ending in 1926), for which the United States allowed the Nation open access to its books. Based on this accounting, the Nation brought claims of mismanagement concerning the allotment era and also sought additional accounting in the Court of Claims. The Nation was thus on notice of any accounting claims that pre-date 1926, when it completed its accounting work. And, because the Nation in fact sought an additional accounting in court, those same claims covering that same period are also barred by res judicata.

Finally, any request for relief beyond the Nation's demand for an accounting also fails as a matter of law. For example, the Nation has not, and cannot, point to any statute creating a duty to restore trust funds for which an accounting has not been provided. Nor can the Nation demonstrate the United States violated some other provision of the 1994 Act. Rather, Interior's administrative record reflects compliance with the Act's requirement to provide statements of account and conduct annual audits.

For these reasons, the Nation's motion for partial summary judgment should be denied and the Court should grant summary judgment in favor of Federal Defendants.

LEGAL AND FACTUAL BACKGROUND

I. The United States' Duty to Account

In its January 4, 2021 Report and Recommendation (the "2021 R&R"), this Court, Hon. Zia M. Faruqui, M.J., recognized that, "when a tribe claims that the Government owes them a

specific duty as trustee, that tribe must 'identify a specific, applicable, trust-creating' statute, regulation or treaty" that gives rise to that duty. 2021 R&R at 5, ECF No. 68 (Jan. 4, 2021) (quoting *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 302 (2009)). That is so, as the Supreme Court has explained, because it is the "applicable statutes and regulations" rather than traditional trust principles that both "'establish [the] fiduciary relationship *and* define the contours of the United States' fiduciary responsibilities.'" *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (quoting *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 224 (1983)) (emphasis added). Indeed, "[t]he United States . . . does not have the same common-law disclosure obligations as a private trustee." *Jicarilla*, 564 U.S. at 184; *see also id.* at 185 ("The common law of trusts does not override the specific trust-creating statute and regulations that apply here.").

Because the United States' discharge of its accounting duties can only be measured by its compliance with specific statutory obligations, the first question a court must resolve is which source(s) of law identified by the plaintiff give rise to an enforceable accounting duty. *See Jicarilla*, 564 U.S. at 177 ("The government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."). That question is primarily a matter of statutory interpretation, and a court's "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *El Paso*, 750 F.3d at 895 (quoting *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 506 (2003).

Identification of a specific, accounting duty-creating statute is critical because, while "[o]ne might be excused for thinking the relationship between the federal government and Native American tribes resembles a traditional trust relationship bearing all the usual attendant fiduciary responsibilities," the Supreme Court has made clear that "traditional trust principles cannot

displace what statutes and regulations mandate." *Fletcher v. United States*, 730 F.3d 1206, 1208 (10th Cir. 2013) (Gorsuch, J.). As a result, if a court finds that a specific statute created an enforceable trust duty, it may thereafter look to traditional trust principles to "help illuminate the meaning" of the relevant statute. *Id.* But those "background principles cannot be used to 'override' the language of statutes and regulations 'defin[ing] the Government's . . . obligation[s]' to a tribe." *Id.* (citing *Jicarilla*, 564 U.S. at 185).

Two—and only two—statutes identified by the Nation create enforceable accounting duties.[1] The first is the Act of March 3, 1893, 27 Stat. 612, (the "1893 Act"), which required the United States to "render a complete account of moneys due the Cherokee Nation under" several specifically-enumerated treaties, and which provided the Nation with a cause of action to challenge that accounting within a specific period of time. SUF # 1. The second is the American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4239 (1994) (the "1994 Act"), which this Court held entitles "the trust beneficiaries, including tribes, . . . to an accounting." *Cherokee Nation v. Dep't of Interior*, 2021 WL 3931870, at *2 (D.D.C. Sept. 2, 2021) (quoting *Cobell v. Salazar* ("*Cobell XXII*"), 573 F.3d 808, 813 (D.C. Cir. 2009)). It is against these statutes that the United States' accounting efforts must be judged.

II. Relevant History of the Relationship Between the Nation and the United States

The history of the relationship between the Nation and the United States is long and, in certain periods, fraught. The discussion that follows sets out that relationship for periods most relevant to this litigation.

[1] *See* discussion *infra* Arg. Section I. We have included as an appendix to this brief a table of the sources of law cited by the Nation in its Statement of Undisputed Facts, ¶ 71, along with the relevant language of each provision and a short statement of our position on whether each provision creates an enforceable trust accounting duty. *See* App'x of Sources of Law.

A. The Allotment Era

In the latter part of the Nineteenth Century, the United States' policy toward Indian nations shifted from the practice of dealing individually with tribes as separate sovereigns through treaties to policies "designed to undermine measured separatism. Most notably, the Interior Department and then Congress embarked on a program of allotment of Indian reservation lands." Fletcher, Federal Indian Law, § 3.6. In general, the process of allotment involved transferring reservation lands belonging to tribes as a whole to individual Indians "to break up the communal land ownership systems of many Indian nations guaranteed by treaty." *Id.* Like most tribes, the Nation's lands went through an allotment process and were subjected to other land-sale transactions during this period.

1. Sale of the Cherokee Outlet and the Slade–Bender Accounting of 1894

One of the first major sales of lands belonging to the Nation occurred in 1891 with the sale of the Nation's lands in the western part of the Indian Territory (now the state of Oklahoma) known as the "Cherokee Outlet." Pl.'s SUF ## 15, 17-19; Loc. Civ. R. 7(h) ("[T]he Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion."). As part of the agreement to sell the Cherokee Outlet, the federal government agreed that:

> The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835-'6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect.

SUF # 1. Congress ratified this agreement in the 1893 Act. 27 Stat. at 640-43.

Accounting work under this provision concluded in April 1894. SUF ## 3-7. It was

prepared by James H. Slade, the chief of the Finance Division of the Bureau of Indian Affairs ("BIA"), and Joseph T. Bender, "a clerk from an auditor's office." SUF # 3. Slade and Bender's accounting report concluded that the United States owed the Nation a total of $1,133,841.98 as a result of four separate errors. SUF # 6.

The Nation had appointed an agent to work with Slade and Bender, and that agent strongly endorsed the accounting's findings. SUF # 4. On December 1, 1894, the Cherokee National Council approved an act accepting the results of the Slade-Bender accounting. SUF # 9. The United States, however, disputed the accounting's conclusions, in particular the conclusion that it owed the Nation $1,111,284.70 under the treaty of 1835. SUF# 57. As discussed further *infra*, Background II.A.6, the Nation sued the United States to enforce the findings of the Slade-Bender accounting and the Nation was eventually awarded $1,134,248, plus interest. SUF ## 59-63; *see* 40 Ct. Cl. 252, 331-32 (Ct. Cl. 1905), *aff'd* 202 U.S. 101 (1906).

2. Allotment of the Nation's Lands to Individual Citizens

Allotment of the Nation's lands began in 1898 with enactment of what became known as the Curtis Act. The Act directed the Dawes Commission to allot lands among enrolled citizens of the Five Civilized Tribes (which included the Nation) once a roll of citizens was completed. Curtis Act, 30 Stat. 495, 497-98, § 11. In 1902, the Nation's voters and Congress approved an allotment agreement providing that each of the Nation's citizens would receive "land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation." 32 Stat. 716, 717, § 11; SUF # 12. The Allotment Agreement provided for the allotment of all Nation lands, the disposition of town sites, and other measures designed, under the policy of the time, to force assimilation of the Nation's citizens. *See generally id.*

Congress provided additional directives in the Act of April 26, 1906 "for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory." The Five Tribes

Act of 1906, 34 Stat. 137, 137. Among other provisions, Section 16 provided that, once all allotments had been made, the remaining unreserved lands (i.e., lands not exempted from allotment for specific purposes like churches, schools, and town sites) were to be sold and the proceeds deposited in the U.S. Treasury to the credit of the appropriate tribe. 34 Stat. 137, 143, § 16. The funds from these lands would then be "distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls." *Id.* at 143-44, § 17.[2] The final roll of the Nation's citizens was completed in March 1907. SUF # 13. Individual tribal citizens were thereafter allotted plots of land deemed equal in value to 110 acres of average allottable lands. *See* 32 Stat. 716, 718, § 18. Allotment of the Nation's lands was effectively complete by 1910. SUF # 14. By that year, within the Cherokee Nation, there remained about 50,300 acres that had not been allotted and 21,000 acres reserved for other purposes such as town sites or cemeteries. SUF # 15.

3. Land Sales

Following allotment, the applicable statutes, including the 1902 Allotment Act and the 1906 Five Tribes Act (and various amendments and appropriations acts) required the sale of all of the Nation's remaining lands. *See e.g.*, 1906 Five Tribes Act, 34 Stat. at 143.

Section 16 of the 1906 Five Tribes Act provided for the sale of unreserved lands (i.e., lands other than those set aside for special purposes like town lots, churches, and cemeteries) by terms adopted by Interior regulations. The Commissioner to the Five Civilized Tribes conferred

[2] The Five Tribes Act vested the President of the United States with authority to remove a principal chief that "shall refuse or neglect to perform the duties devolving upon him" and to fill any vacancy "by appointment of a citizen by blood of the tribe." *Id.* at 139, § 6. Nonetheless, Section 28 provided "[t]hat the tribal existence and present tribal governments of the . . . Cherokee . . . are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature . . . shall not be in session for a longer period than thirty days in any one year." *Id.* at 148, § 28.

with the Nation's National Attorney on the draft of these regulations, and the Nation's Attorney supported them. *See* SUF # 16. Interior held public auctions of these unallotted lands under the terms specified in the regulations in the ensuing years. SUF ## 17-18. The Nation appointed a representative that attended each of the auctions where almost all of the Cherokee unallotted lands were sold. SUF # 19. For the first round of auctions, the representative reported that "the sales were conducted openly and freely" and that "the best prices obtainable were gotten for the land." SUF # 20.

Purchasers of unallotted lands made payment to the office of the Commissioner of the Five Civilized Tribes, who "maintain[ed] a large force to keep proper account of the money received, compute interest, make proper record and ledger accounts of every tract sold, prepare schedules of the sales for approval, and issue certificates . . . and deeds . . . ." SUF # 21. Once Congress authorized, in 1912, placing funds from the sale of unallotted lands in commercial banks so they could earn ordinary interest, those banks were required to provide detailed monthly account statements to the Commissioner of the Five Civilized Tribes. SUF ## 22-23. The sale of the Nation's unallotted lands was effectively completed by the end of fiscal year 1914, though isolated tracts of land subsequently came under tribal ownership for various reasons. SUF # 24-25.

The 1902 Allotment Agreement reserved from the allotment process tribal lands for town sites and set different rules for selling lots in town sites (called "town lots") than those applicable to the sale of unallotted lands. Fed. Defs.' Resp. to Pl.'s SUF #31 (undisputed that "[s]ome land was reserved from allotment, including land for town sites"), 43-44. The Agreement set out a series of preferences for Indians and non-Indians with previously recognized rights to a lot or who had constructed improvements on the lot to purchase the lot at a discounted price. *See* 32

Stat. 716, 722-25, §§ 38-57 (providing, for example, that "[a]ny [Cherokee] citizen in rightful possession of any town lot having improvements thereon . . . shall have the right to purchase same by paying one-half the appraised value thereof"). Areas designated as "town sites" were "surveyed, laid out, platted, appraised, and disposed of." 32 Stat. 716, 722-23, § 40. Designated town lots were appraised by the Cherokee Townsite Commission, composed of three individuals, one of whom was a tribal citizen appointed by the Nation's Chief. SUF # 26; Act of May 31, 1900, 31 Stat. 221, 237 ("at least one [member of three-member town site commission] shall be a citizen of the tribe and shall be appointed upon the nomination of the principal chief of the tribe"); Allotment Act, 32 Stat. 716, §§ 38-45 (discussing townsite commission). The Nation's National Attorney monitored the appraisal process and disputed (in some cases, successfully) the specifics of certain town lot appraisals. *See* SUF # 27. Unclaimed town lots, as well as those forfeited where the purchasers failed to complete payments, were sold at public auction. SUF ## 28-30. Beginning in 1910, Interior sold town lots that were forfeited due to failure to complete payments. SUF # 29. Interior shared copies of papers related to sales of forfeited lots with the Nation's National Attorney, who expressed satisfaction with the sale price. *See* SUF ## 29-31.

BIA's Union Agency (later the Five Civilized Tribes Agency) was responsible for maintaining the accounts for each town lot sale. SUF # 32. Schedules prepared by the Indian Inspector for the Indian Territory reflected the owner of each lot purchased and the purchase price. SUF # 33. The Union Agency checked and entered town-lot payments on these records before crediting to the appropriate tribe's account. [3] SUF # 34.

[3] The Commissioner to the Five Civilized Tribes also audited the account books maintained at the Union Agency on at least one occasion to make sure that town lot payments and mineral lease royalty payments were properly recorded. SUF # 32. The audit covered the period from January 1, 1904, to March 31, 1908. SUF # 32.

4. Distribution of Tribal Funds to Nation's Citizens

Under Section 17 of the 1906 Five Tribes Act, once the Nation's unallotted lands and other tribal property had been sold and any outstanding tribal financial obligations met, funds remaining to the Nation's credit were to be distributed to its citizens through per capita payments. 34 Stat. 137, 143-144. Per capita payments were authorized and paid out between 1911 and 1915. *See* Act of August 22, 1911, 37 Stat. 44; Act of August 1, 1914, 38 Stat. 582; SUF # 35. The final per capita payment to the Nation's citizens occurred in 1915. SUF # 35. Congress authorized the use of the remaining balances of the Nation's trust funds following these per capita distributions to build an orphanage dormitory and a hospital. Act of May 25, 1918, 40 Stat. 561; Act of June 5, 1924, 43 Stat. 390; SUF # 36. In 1925, the Assistant Commissioner of Indian Affairs informed an attorney for the Nation that the Nation's trust account balance was $1,501. SUF # 36. And the following year, as the Nation notes, the trust fund balance was zero. Pl.'s Br. at 21 (citing the Combined Statements of the Department of the Treasury, 1926).

5. Handling and Accounting for Tribal Revenue From Land Sales and Then-Existing Trust Funds

As set out above, representatives for the Nation had direct knowledge of disbursements from the Nation's trust funds during the allotment era, and Interior maintained (and in some cases audited or shared with the Nation) detailed accounts of allotment-era land sales. The government-wide and Interior-specific procedures in place for tracking these accounts reflect a system that generated detailed and generally reliable information about the Nation's trust funds during this period. Specific examples relevant to this litigation follow.

Settled Account Packages. Once the United States assumed administration of the Nation's funds at the beginning of the allotment process, those funds became subject to a government-wide accounting and auditing system established under the Dockery Act, Act of July

31, 1894, 28 Stat. 162, 205-211. This process required Treasury Department auditors to audit and settle the accounts of all Federal disbursing agents and other officials authorized to handle funds. *Id.* at 206, § 7(3). In 1921, the General Accounting Office (GAO) took over the responsibility for settling the executive branch agency accounts, including the BIA. Act of June 10, 1921, 42 Stat. 20, 23-24 § 303-305. BIA prepared statements of account for the Nation's funds (including proceeds from land sales) and sent them to Treasury (later GAO) in Washington, D.C. SUF ## 37-40. Treasury then examined and audited the statements by checking them against supporting documentation. SUF ## 40-41. Treasury auditors would note exceptions to certain transactions, usually because of insufficient documentation. SUF ## 41-42. It was the responsibility of the disbursing agent to provide the information necessary to clear these exceptions. SUF ## 41-42. After a review of all documents, the Treasury Department auditor issued a certificate of settlement stating the closing balance for the period addressed by the accounts. SUF # 43. We have produced to the Nation the key summary documents from settlement packages spanning fiscal years 1902 through 1914, and these and other packages have been publicly available at the National Archives since at least December 31, 1979. SUF ## 44-45.

Financial Statements Provided to Congress. In 1909, Interior sent to the Senate a statement of receipts and disbursements for the period January 28, 1898, through June 30, 1908, for the Nation's accounts. SUF # 46. The statement provided information on annual receipts, expenditures, and year-end balances for both the principal and interest accounts, and for the various "Indian moneys, proceeds of labor" accounts that reflected revenue from royalties, sale of town lots, grazing, and the like. SUF ## 46-48. Separately, the Secretary of the Treasury transmitted a statement to the Senate of the amounts in the Treasury to the credit of each of the Five Tribes at the time the Curtis Act was passed, and the total additions to, and disbursements

from, these accounts through 1908. SUF # 49. Similarly, in 1915, Interior provided statements of all funds belonging to each of the Five Civilized Tribes, and these statements were published by the Government Printing Office and made publicly available. SUF ## 50-51. The statement of the Nation's accounts covered the fiscal years 1902 through 1914, plus the first quarter of fiscal year 1915. SUF # 51. Like the earlier statement in 1909, the 1915 statement provided information on the sources of revenue, including sales of unalloted lands at public auction and town lot sales. SUF # 51.

Annual Reports of the Department of the Interior. In the early decades of the twentieth century, the Department of the Interior produced annual reports that included summary statistics on the revenue received by the each of the Five Civilized Tribes from the sale and leasing of their tribal lands. SUF # 52. The Government Printing Office published copies of the reports for distribution, and they were also issued as U.S. House documents. SUF # 52. The Commissioner's reports included statistics on the sale of unallotted lands and town lots. SUF # 53. The Office of the Indian Inspector for the Indian Territory, which was later absorbed into the Commissioner to the Five Civilized Tribes, published separate reports that included extensive detail on town sites and the sale of town lots. SUF # 54. These publicly available reports are cited extensively above and in the Nation's brief and provide much of the detail set out above on the history of allotment of the Nation's lands. *See supra* Background Section II*; see also* Pl.'s Exhs. 20-25; Fed. Defs.' Exhs. 11, 14, 22, 32, 33, 45.

Accountings Prepared for 1930 Court of Claims Petitions. In 1924, as part of a special jurisdictional statute for the Nation's claims, Congress directed that "the departments of the Government shall give access to the" Nation's attorneys to "treaties, papers, correspondence, or records as may be needed." The Act of March 19, 1924, 43 Stat. 27, 28; *see also* discussion *infra*

Background II.A.6.b. The Nation produced its own accounting in 1930 based on a six-year examination of the United States' books and records, reviewing financial records from the late 18th Century through the end of fiscal year 1926. SUF ## 73-78, 83. Taken together with a 1933 GAO accounting and a supplement produced by the Nation's accountants two years later, this was "the most extensive statement of account ever made concerning the fiscal affairs between the United States and any Indian Tribe." SUF # 93.

6. Allotment Era Lawsuits Concerning the Nation's Trust Accounts

a. Lawsuits Based on Slade-Bender Accounting

After the Slade-Bender accounting was presented to, and accepted by, the Nation, Congress initially refused to appropriate funds to pay the Nation the amount that Slade and Bender concluded the United States owed. SUF ## 55-59. Thus, based on a provision in the Cherokee Allotment Act of July 1, 1902, 32 Stat. 726 that allowed the Court of Claims to hear claims concerning treaty provisions within two years of the Act's passage, the Nation sued the United States for payment under the Slade-Bender accounting. SUF # 59. In 1905, the Court of Claims ruled in the Nation's favor and ordered the United States to pay $1,134,248, plus five percent interest. SUF # 60. The United States paid $5,158,005.54 to the Nation in satisfaction of this judgment in 1919. SUF # 63.

The Nation later sought additional interest on the monies included in this judgment under a special jurisdictional statute. *See* Act of March 3, 1919, 40 Stat. 1316; SUF # 64. The Court of Claims dismissed the petition, observing that the "case ha[d] already been before this court and the Supreme Court and identical questions have been considered and decided by both courts." *Cherokee Nation v. United States*, 59 Ct. Cl. 862, 878, 880 (Ct. Cl. 1924); SUF # 65. The Supreme Court affirmed. *Cherokee Nation v. United States*, 270 U.S. at 436. SUF # 65.

b. Lawsuits in Court of Claims Filed in 1930 and Associated Accountings

Following completion of the allotment process on the Nation's lands, Congress conferred jurisdiction on the Court of Claims to decide claims by the Cherokee Nation against the United States concerning any Cherokee treaty, agreement, or Federal law. The Act of March 19, 1924, Pub. L. No. 68-55, 43 Stat. 27. Congress provided that the attorneys representing the Cherokee Nation were to be "employed to prosecute such claim or claims under contract with the Cherokees approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior." 43 Stat. 27, 28.

The Commissioner of Indian Affairs then directed the Superintendent for the Five Civilized Tribes to organize elections to establish a "representative committee" to act in the name of the Nation in selecting and employing attorneys to litigate claims under the 1924 jurisdictional statute. SUF # 68. Meetings were held in each of the Nation's districts, where a delegate was elected to represent each district in selecting attorneys. SUF # 69. The delegates met in May 1924 and ultimately approved a contract with four attorneys to represent the Nation in Court of Claims litigation. SUF # 70. Interior approved the contract with no modifications. SUF # 71.

Before filing any lawsuits, the Nation's attorneys employed an accounting firm to examine and report on "all financial transactions with the Cherokee Indian Nation or Tribe, as shown by the books of account of the United States." SUF # 72. The United States opened its books under the 1924 Act to allow access to the Nation's accountants to potentially relevant records. SUF # 73. The Nation worked for almost six years on its accounting, reviewing financial

records from the late eighteenth century through the end of fiscal year 1926.[4] SUF # 74. The receipts and disbursements of the Nation's funds over this period amounted to almost $43 million. SUF # 75. According to one of the Nation's then-attorneys, "[e]ach account was examined in detail and a transcript was made setting out the essential identification of each voucher covering each and every expenditure" during these years. SUF # 76. The Nation's accountants produced a series of bound volumes summarizing the comprehensive accounting. SUF # 77.

Following this accounting work, the Nation filed numerous lawsuits in the Court of Claims under the 1924 Act. SUF # 78. In its Court of Claims Cases L-46 and L-268, the Nation brought a number of claims it had identified through its accounting. SUF ## 79, 82, 84-86. And in Case L-268, the Nation also sought an additional accounting and "such other or additional amounts as the accounting may show." *Cherokee Nation v. Interior*, 102 Ct. Cl. 720, 759-60 (Ct. Cl. 1945); SUF # 86. Cases L-46 and L-268 therefore encompassed all the Nation's claims under treaties and statutes from 1785 to 1926, including, as discussed *infra*, both claims (1) relating to specific aspects of the allotment of the Nation's lands, and (2) an additional accounting. SUF ## 79-86.

In response to the Nation's petitions, the United States enlisted assistance from the General Accounting Office ("GAO"), which prepared a separate accounting. *Cherokee Nation*, 102 Ct. Cl. at 760; SUF # 87. The GAO's accounting "required several years' work," *id.*, which culminated in a three-volume accounting report that GAO submitted to the Department of Justice in November 1933. SUF # 88. The report spanned 1,628 pages, not including additional

[4] Sources differ on the precise date to which this accounting went back. SUF # 83. One source puts the starting year as 1796, but the accountant who performed the work testified that the accounting covered the period from 1785 to 1926. SUF # 82.a-c.

materials. *Id.* The GAO subsequently submitted two additional, shorter reports relevant to the two petitions. SUF # 89-90. The Nation's accountants then spent two years examining GAO's three-volume report in an attempt to reconcile this report with their accounting on a transaction-by-transaction basis. SUF # 91. As a result, the Nation's accountants produced 13 new statements of account, which the Nation introduced into evidence. SUF # 92.

Taken together, these efforts were, in the view of the Nation's attorney, "the most extensive statement of account ever made concerning the fiscal affairs between the United States and any Indian Tribe." SUF # 93. The Nation's attorney also stated in court filings that the GAO report was fair and "reasonably correct," but did not include as much detail as the Nation's accounting. SUF # 94.

A commissioner to the Court of Claims issued factual findings in 1943 and the Court of Claims issued a combined opinion on both cases in 1945. SUF # 95. The court addressed each of the Nation's claims, concluding in some that the government's handling of funds was appropriate and in others that the government made improper disbursements, failed to credit interest, and made other errors. *Cherokee Nation v. United States*, 102 Ct. Cl. at 756-69; SUF # 96. As to the Nation's claim for a further accounting (and any additional amounts the Nation could identify based on that accounting), the Court of Claims refused to remand for further accounting, emphasizing the many years that both parties had already invested in preparing their accountings in preparation for that litigation. *Cherokee*, 102 Ct. Cl..at 759-60; SUF # 97. In total, the court concluded that the United States owed the Nation $25,241. *Cherokee*, 102 Ct. Cl..at 769; SUF # 98. The court also found that the United States was statutorily entitled to an offset for any funds "gratuitously" spent on the Nation's behalf. *Cherokee*, 102 Ct. Cl..at 769-70; SUF # 99. Because the United States made an expenditure of $142,066 to support the Nation's schools, which fully

offset the amount the United States owed, the court ultimately dismissed the petitions in L-268 and L-46. *Cherokee*, 102 Ct. Cl..at 770; SUF # 99.

In sum, by 1934, the Nation had obtained at least two complete accountings under statutory schemes Congress passed to fully resolve the Nation's historic claims. The accountings addressed the period prior to 1930, during which the Nation's lands were allotted and sold, the resulting funds were paid to the Nation's citizens, and the Nation's trust fund balance was reduced to zero. The Nation sued based on these accountings and sought additional accounting in the Court of Claims. The Nation also received several more specific accountings and audits relating to allotment-era land sales. Extensive accounting procedures governed by regulation ensured the accuracy of these accounts (and the results of these procedures were later made publicly available at the National Archives), and publicly available reports submitted to Congress regularly provided statements of the Nation's accounts during the Allotment Era.

B. The Indian Claims Commission Litigation

Congress passed the Indian Claims Commission Act in 1946, which established an Indian Claims Commission ("ICC") to hear claims against the United States on behalf of Indian tribes. The Act of August 13, 1946, Pub. L. No. 79-726, 60 Stat. 1049. The law gave the ICC authority to consider a broader range of claims than had been permitted under the various jurisdictional acts previously enacted to allow tribes to sue the United States. 60 Stat. 1049, 1050, § 2. The ICC Act provided that "[e]ach . . . tribe, band, or other identifiable group of Indians may retain to represent its interest in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection." 60 Stat. 1049, 1053, § 15.

The Nation's Principal Chief at the time, J.B. Milam, and BIA Superintendent for the Five Civilized Tribes, W.O. Roberts, publicly announced that a convention of "duly enrolled Cherokee Indians by blood" would be held in Tahlequah on July 30, 1948, to, among other

matters, select attorneys for ICC litigation. SUF # 100. A federal government attorney who attended the convention reported that "all factions of the Cherokees were present and had an opportunity to make their wishes known and to vote on all questions." SUF # 101. He concluded that "the meeting represented the wishes of an overwhelming majority of the Cherokee people." SUF # 101. The convention adopted a resolution establishing a Standing Executive Committee. SUF # 102. This Committee immediately convened and recommended attorneys for ICC litigation, and the convention approved these selections with the addition of one more attorney. SUF # 103. In later testimony before Congress, Chief William Keeler, who had been a member of the Executive Committee, recalled that the committee members experienced no interference from the BIA in their selection of attorneys. SUF # 104. Subsequent contracts with these attorneys were extended through 1977. SUF # 105. Though the Nation did not bring an accounting claim before the ICC, it brought numerous lawsuits in that venue, two of which resulted in substantial money judgments. SUF # 106-07.

III. The Trust Reconciliation Project

After the 1893 Act, Congress did not enact additional accounting duties relevant to the Nation until the 1994 Act. The 1994 Act contains two sections potentially relevant to tribes—Section 4011 and Section 4044. Section 4011(a) 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 or an individual Indian which are deposited or invested pursuant to section 162a of this title." 25 U.S.C. § 4011(a). Section 4044 specifies the retrospective duty to tribes. There, Congress afforded Interior 17 months to complete three tasks: (1) complete its reconciliation of tribal "trust fund accounts;" (2) obtain an attestation from each tribe that the reconciliation was "as full and complete accounting as possible" or a statement that the tribe disputed its balances; and (3) submit "by May 31, 1996, a report identifying for each tribal trust fund account for

which the Secretary is responsible a balance reconciled as of September 30, 1995." § 4044.

By May 31, 1996, Interior completed these three steps with respect to the Nation. First, it completed its reconciliation for what it deemed to be the earliest date possible (July 1, 1972) by submitting the Andersen Report to the Nation and to Congress. *See* Pl.'s Ex. 1, ECF No. 88-4; SUF ## 108, 128-29. This Report and Interior's Tribal Trust Funds Reconciliation Project (the "Reconciliation Project") is discussed in more detail in the following paragraphs. Second, Interior disclosed that, as of the statutory deadline, the Nation had requested additional time to review the Andersen Report. SUF # 113. Third, on May 31, 1996, Interior delivered the Reports to Congress as required by Section 4044. SUF # 108. The Nation's claims here appear to relate only to the first of these three requirements: the reconciliation or accounting requirement.

At the time of the 1994 Act's enactment, Interior had already engaged Arthur Andersen LLP to assist in conducting the Reconciliation Project. The Project's goal was "to reconstruct historical transactions, to the extent practicable, for all years for which records are available for all Tribal Trust accounts managed by the Bureau." SUF # 115. Phase I of the Project, "from June 1991 through January 1992 concentrated on . . . pilot reconciliation work" and "was designed to determine the most efficient and effective way to approach the reconciliation work." SUF # 117. In Phase I of the Project, officials determined that "not all records would be available for a full accounting of such funds" for all tribes. SUF # 118. As a result, the Reconciliation Project was limited in scope to the period of July 1, 1972 (Fiscal Year 1973) through September 30, 1992 (Fiscal Year 1992). SUF # 109, 123.

This limitation on the scope of work, as well as other scoping decisions, was based on the conclusion reached in Phase I "that a complete reconstruction of all trust activity was impractical, cost prohibitive, and in all likelihood, impossible due to BIA's record keeping and

other deficiencies." SUF # 119. Nonetheless, the Project's scope was "designed to provide reasonable assurance as to the accuracy of each Tribal Trust account balance." SUF # 118. Though the BIA recognized the Project did not necessarily provide assurances to every tribe that their accounts were accurate, "[w]hat the [TRP] will do . . . is provide as accurate of an accounting as practicable to the tribes." SUF # 134.

Phase II of the Project performed the reconciliation work designed based on the findings from Phase I. SUF # 120-21. The Project also provided additional information to Tribes in the form of analytical charts and digitized records for the years 1946 through 1972. SUF # 122. Finally, for the years 1972 through 1992, the Project provided account statements reflecting the reconciliation efforts undertaken in the Project and detailing all transactions for that period. SUF # 123.

The Reconciliation Project's total cost was immense. The Project's contract with Arthur Andersen ultimately cost roughly $21 million. SUF # 124. It took five years in total and spanned all tribal accounts. SUF # 124-26. After the Project was completed, each tribe was provided with Arthur Andersen's explanation of procedures employed and overview of results reached (the "Andersen Report"), along with a detailed set of reports for each trust account held by the tribe. *Id.* Each of these reports set out the degree of reconciliation achieved for the transactions that the Project investigated and supporting records were attached. SUF # 127. The Nation, like other tribes, received each of the above-listed materials. SUF # 128. BIA and Arthur Andersen also held meetings, gave presentations, and provided explanations of the Reconciliation Project. SUF # 129-30.

Ultimately, the Project reconstructed "approximately 1,500 accounts for over 280 tribes." SUF # 131. "For the reconciled transactions, approximately $1.87 Million in transactions were in

error (an error rate of .01%)." SUF # 131. The Project identified a net variance of $677,063 dollars between Interior's and Treasury's accounts. SUF # 132. Arthur Andersen reconciled 86% of non-investment transactions that made up 90% of absolute dollars across non-investment transactions in the Nation's accounts. SUF # 133. The Project also reconciled 26% of the Nation's investment accounts and tested the rest through alternative procedures. SUF # 133.

The 1994 Act also requires, in Section 4011(b) and (c), that Interior provide tribal account holders with periodic statements of performance and to conduct "an annual audit on a fiscal year basis" and "include a letter relating to the audit in the first statement of performance provided . . . after the completion of the audit." 25 U.S.C. § 4011(b)-(c). The administrative record reflects the periodic statements and annual audits that Interior has provided in the six years preceding this litigation, and the Nation does not allege or contend they did not receive the materials required by these subsections. *See* Corrected Certified Index, ECF No. 65-1, at 309-12; Compl., ¶ 129, ECF No. 2-1 (conceding the United States has provided periodic statements and alleging they "are unsatisfactory because they are not based on a proper accounting").

PROCEDURAL BACKGROUND

The Nation filed its three-count complaint in 2019. Compl. Count I invokes the Nation's "right to an accounting of the Trust Fund as a beneficiary," and "seeks an order from this Court compelling . . . an accounting" based on "Presidential Proclamations, 'various . . . treaties, other agreements, and . . . congressional or administrative acts' dating back to 1785 that the Nation contends create a trust relationship." *Cherokee Nation v. U. S. Dep't of the Interior*, 531 F. Supp. 3d 87, 91 (D.D.C. 2021) (Faruqui, M.J.) (quoting Compl.).

Count II is "more precise," as it is rooted in the 1994 Act and asserts "that the Government 'has failed to provide . . . any of the accounting required by Sections 4011 and 4044]." *Id.* at 92. According to the District Court, this claim "alleges that the Government has

failed to act . . . according to its statutory obligations" under the 1994 Act. *Cherokee Nation v. Dep't of Interior*, 2021 WL 3931870, at *2 (D.D.C. Sept. 2, 2021). The District Court rejected our argument that this claim should be subject to the APA's record-review rule because it asserted a non-APA failure-to-act claim. *Id.* The District Court so held because "[t]he Nation is master of its Complaint, and its assertion has survived Rule 12(b)." *Id.*

Finally, Count III "again seeks an accounting, but this time under the Administrative Procedure Act." *Cherokee Nation*, 531 F. Supp. 3d at 92. The Court determined that Count III was "a failure-to-act claim under § 706(1) of the APA." *Cherokee Nation v. Dep't of Interior*, 2021 WL 3931870, at *1. After almost a year of discovery of historical documents from the late nineteenth and early twentieth centuries, and nearly two years after Federal Defendants lodged their administrative record for the Andersen Report, the Nation filed a motion for partial summary judgment in March asking for a ruling that the Andersen Report is not an accounting. Pl.'s Br. at 2, ECF No. 88-1; Joint Status Reports, ECF Nos. 75, 84, 86, 87.

Federal Defendants now cross-move for summary judgment and oppose the Nation's motion for partial summary judgment.

LEGAL STANDARDS

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In an ordinary civil action, "[a] genuine issue of material fact exists 'if the evidence, viewed in a light most favorable to the nonmoving party, could support a reasonable [factfinder's] verdict for the nonmoving party.'" *Figueroa v. Pompeo*, 923 F.3d 1078, 1085 (D.C. Cir. 2019) (internal quotation marks omitted) (quoting *Hairston v. Vance-Cooks*, 773 F.3d 266, 271 (D.C. Cir. 2014)). But the nonmoving party cannot manufacture genuine issues of material fact with "some metaphysical doubt as to

the material facts," *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Summary judgment functions differently in actions for judicial review under the Administrative Procedure Act. Section 706(2)(A) of the APA directs a reviewing court to affirm final agency action, unless that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Section 706(1) of the APA authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed" and "provides relief for a failure to act." *Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 19-20 (D.D.C. 2017) (quoting *Norton* v. *S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004)). "When assessing a motion for summary judgment in an APA case, 'the district judge sits as an appellate tribunal[,]'. . . and '[t]he entire case on review is a question of law, and only a question of law[.]'" *Cognitive Pro. Servs. Inc. v. U.S. Small Bus. Admin.*, 254 F. Supp. 3d 22, 32 (D.D.C. 2017) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) and *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993)).

Under the APA, "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Instead, the reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416. In making this determination, the court's review is limited to the administrative record. *See TOMAC v. Norton*, 193 F. Supp. 2d 182, 194 (D.D.C. 2002) (citing *Overton Park*, 401 U.S. at 420). Review under the "arbitrary and capricious" standard is "highly deferential" and "presumes the agency's action to be valid." *Envt'l. Def. Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) (citations omitted). The plaintiff

bears the burden to demonstrate that an agency has violated the APA. *Banner Health v. Sebelius*, 715 F. Supp. 2d 142, 153 (D.D.C. 2010).

"There exists a strong presumption in [the D.C.] Circuit that when a statute provides for judicial review but does not specify any standard for that review, it should be construed to include the APA standard." *Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 108-09 (D.D.C. 2009); *see also Shoshone-Bannock Tribes of Fort Hall Rsrv. v. Shalala*, 988 F. Supp. 1306, 1313, 1313 n.4 (D. Or. 1997), *on reconsideration*, 999 F. Supp. 1395 (D. Or. 1998) (applying same rule to tribe's claim under the Indian Self-Determination and Education Assistance Act and noting that "[t]his general principle has been applied under a variety of statutes"). Thus, regardless of whether the 1994 Act creates a freestanding right of action or is enforceable only through the APA, the APA's arbitrary and capricious review standard applies.

ARGUMENT

The Court cannot reach the merits of the Andersen Report, as the Nation's motion requests, without also considering our threshold procedural defenses and the historical context in which the Andersen Report must be placed. The Nation attempts to isolate the Andersen Report both from the legal consequences of this historical context and from the fact that the Nation had all the facts necessary to seek any accounting beyond what was provided in the Andersen Report at least 19 years ago. Because historical context informs the reasonableness of the Andersen Report's scope, and because claims regarding that Report accrued 19 years ago, the Nation's request for a motion for partial summary judgment must be considered in tandem with our cross-motion. In doing so, this Court should conclude that, for the numerous reasons set out herein, the Nation's claims fail as a matter of law.

Argument sections I and IV of this brief provide both our response in opposition to the Nation's motion for partial summary judgment and support our motion for summary judgment

on the issues raised in those sections. The remainder of the brief sets out the basis for summary judgment in the government's favor on any remaining claims beyond the sufficiency of the Andersen Report. However, these sections are also relevant to the Nation's motion because they go to the reasonableness of the Andersen Report's scope. To that extent, we cross-reference those sections in our arguments in Section I and IV, and thereby incorporate them by reference.

I. The United States' duty to account arises from specific statutes.

The Nation has pointed to "an abundance of statutes, treaties, and regulations" that it alleges are relevant to its claims. 2021 R&R at 6. In finding the Nation's citation to those various statutes and treaties sufficient to survive dismissal at the pleading stage, this Court did not analyze the scope of trust responsibilities (if any) under those statutes and treaties, including the extent to which any gave rise to an accounting duty. 2021 R&R at 9. On summary judgment, however, the Nation cannot rely on permissive pleading standards. It must establish specific, statutory accounting duties that the United States allegedly failed to discharge. With the exception of the 1893 and 1994 Act, the Nation cannot do so.

A. The majority of the statutes identified by the Nation do not give rise to an enforceable accounting duty.

In its complaint, in response to interrogatories, and in its statement of undisputed facts, the Nation has identified ten sources of law that it alleges give rise to an enforceable accounting duty. Pl.'s SUF # 71; Pl.'s Resp. to Interrogs. No. 1; Compl., ¶ 101. Apart from listing and briefly characterizing those sources of law, however, the Nation's brief largely begs the question of what specific duties (if any) were created by each statute, and ignores the question of the scope of those duties.[5] Instead, the Nation asserts that the United States "is the trustee for the

[5] The Nation's complaint and its response to Interrogatory No. 1 identify two additional statutes not included in the Nation's statement of undisputed facts: The Act of March 3, 1911, Pub. L.

Nation" and asks the Court to assume that, as a result, the United States must "provide an accounting on demand" to the Nation. Pl's Br. 14. But the statutes the Nation cites do not support that conclusion. "The government assumes Indian trust responsibilities only to the extent it *expressly* accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177. The Court's "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *El Paso*, 750 F.3d at 895 (quoting *Navajo I*, 537 U.S. at 506).

The plain language of each purported source other than the 1893 Act and the 1994 Act precludes a finding that those statutes give rise to any accounting duty whatsoever.[6] *See* As shown in the Appendix of Sources of Law. For example, the Nation cites the 1846 Treaty of Washington, 9 Stat. 871, Art. 4, as requiring "the United States to account to the . . . Nation for the disbursement of lands and funds, including the mismanagement of $5,000,000 by the Defendants." Pl.'s SUF # 71.a. In reality, Article 4 of the Treaty of Washington adopted a system to determine the value of the interest in lands of one of two separate groups of Cherokees in existence at the time. "[T]o ascertain the value of that interest, it [was] agreed that" a specific process would be followed whereby certain "investments and expenditures" would "be first deducted from [the] aggregate sum [owed], thus ascertaining the residuum or amount which would, *under such marshalling of accounts*, be left for *per capita* distribution among the

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No. 61-454, 36 Stat. 1058, and the Act of August 24, 1912, Pub. L. No. 62-335, 37 Stat. 518. Resp. to Interrog. No. 1, Exh. 74; Compl., ¶ 101. The Nation does not cite a specific provision of the 1911 or the 1912 Acts, and we can locate none that references an accounting. Those Acts appropriated funds for BIA to use in administering the various Indian programs in effect at the time. 36 Stat. 1058; 37 Stat. 518.

[6] The Act of April 4, 1910, for example, included a requirement that Interior state annual accounts "arising under appropriations" that "by law are required to be reimbursed to the United States." 36 Stat. at 270. This provision thus requires a statement of funds owed to the government *from* tribes. *See Navajo Tribe of Indians v. United States*, 368 F.2d 279, 281 (Ct. Cl. 1966). It does not require an accounting *to the Nation* nor does it relate to trust funds; it is limited to appropriations from Congress.

Cherokees emigrating under the treaty of 1835." 9 Stat. 871, 873 (first emphasis added). Thus, the reference to "such marshalling of accounts" actually referred back to the process for determining the residuum for per capita payments, not some separate accounting. Indeed, "marshaling" does not mean accounting: It is "[t]he principle that, when a senior creditor has recourse to two or more funds to satisfy its debt, and a junior creditor has recourse to only one fund to satisfy its debt, the senior creditor must satisfy its debt out of the funds in which the junior creditor has no interest." *Marshaling Doctrine*, Black's Law Dictionary (11th ed. 2019). This provision is thus a far cry from the generalized accounting duty for which the Nation relies on it.[7]

Several other sources the Nation cites do not even use the word "account" or "accounting." Pl.'s SUF # 71; App'x of Sources of Law. For example, the Act of March 2, 1895, 28 Stat. 764 ("the 1895 Act") did not create an enforceable duty to account to the Nation as a trust beneficiary. Instead, because it was unhappy with the Slade-Bender accounting's conclusions, Congress required the Attorney General to create a "restatement" of the Slade-Bender accounting already provided, not some new accounting. 28 Stat. at 795-96. The Attorney General provided that restatement, and the Nation successfully challenged the positions the Attorney General took regarding the Nation's entitlement to payment under the Slade-Bender accounting. SUF ## 57-63.

The same is true of the specific provisions that the Nation highlights in its brief. The Treaty of 1866 did not create a duty for the United States to provide an accounting to the Nation. Rather, it granted permission to the Nation to "appoint an agent to examine the accounts of the

[7] In any event, the United States prepared a balance sheet to finally determine the residuum owed, as explained in *Cherokee Nation v. United States*, 82 Ct. Cl. 456, 470 (1936).

nation with the Government of the United States," and stated that the agent "shall have free access to all accounts and books in the executive departments relating to the business of said Cherokee Nation." 14 Stat. 799, Art. 22 (July 19, 1866). By its plain terms, then, the Treaty of 1866 is about granting an authorized representative of the Nation the privilege to inspect certain government records, not about the government creating an accounting for the Nation.

The other statute the Nation highlights—the Act of June 24, 1938—fares no better. The Nation is correct that "Congress authorized DOI to move tribal trust funds from the U.S. Treasury to private banks" in 1938. Pl's Br. 15. But, contrary to the Nation's assertion, it did not simultaneously "require[] the United States [to] provide accurate accountings of those funds to trust beneficiaries." *Id.* The Act of June 24, 1938, now codified at 25 U.S.C. § 162a(a), does not establish or define a fiduciary relationship (let alone an accounting duty) between the United States and the Nation; instead, it "is simply and all about granting the Secretary of the Interior authority to invest monies belonging to Native American trust fund beneficiaries." *Fletcher*, 730 F.3d at 1211. The provisions codified at § 162a(a) through (c) "were enacted between 1918 and 1990 as Congress sought to refine and qualify the Secretary's [investment] options." *Id.* at 1212. Those provisions "are of a piece and speak to the Secretary's investment options, not to the nature or scope of [the] Secretary's accounting obligations." *Id.* The trust responsibilities enumerated in § 162a(d), on the other hand, were passed as part of the 1994 Act, which is separately addressed below. *See* Pub. L. 103-412 (Oct. 25, 1994); *see infra* Arg. IV.C.1.

This leaves only the 1893 Act and the 1994 Act. The Acts of 1893 and 1994 each created enforceable accounting obligations. The government has complied with each statute and any claim to the contrary is time-barred. *See* discussion *infra* Arg. II.A, IV.

B. The United States has no generalized accounting duty based on its trust relationship with the Nation.

In addition to its list of statutes that allegedly required an accounting, the Nation also suggests that the United States "has assumed fiduciary obligations" (including, presumably, the obligation to account) by virtue of the fact that it "has held and continues to hold the Nation's property and money" over which it has "exerted elaborate control." Pl's Br. 15. The Nation cannot establish an accounting duty on that basis. To succeed on its claims, the Nation must do more than point to "the general trust relationship between the federal government and Indian Tribes [or] the mere invocation of trust language in a statute." *El Paso*, 750 F.3d at 893.

Indeed, the D.C. Circuit rejected a tribe's argument that statutory language invoking a trust "plus the Government's control establishes an actionable fiduciary relationship." *El Paso*, 750 F.3d at 898. Binding precedent therefore forecloses any argument that the government has assumed specific fiduciary responsibilities by exercising control over a tribe's trust. Rather, statutes "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Jicarilla*, 564 U.S. at 177. Thus, "when 'the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter.'" *Id.* (quoting *Navajo II*, 556 at 302). The D.C. Circuit in *El Paso* likewise rejected the notion that *Cobell VI* stands for the proposition that elaborate control alone is sufficient to create an enforceable trust relationship. *El Paso*, 750 F.3d at 896. Rather, *Cobell VI* did not "suggest that an actionable fiduciary relationship arises merely by operation of federal common law" but is consistent with the principle that "the common law informs the interpretation of statutes that establish the elements of a common-law trust without employing the terms of art." *Id.* Thus, "a fiduciary relationship depends on *substantive* laws," not control. *Id.*

It makes sense that Congress would not hold (and has not held) the government to the same common-law accounting standards as a private trustee. Ten years after *Cobell VI*, the Supreme Court in *Jicarilla* analyzed the government's disclosure obligations in examining whether the fiduciary exception to the attorney-client privilege applied as between tribes and the United States. 564 U.S. at 178. In doing so, the Court examined whether the "two features justifying the fiduciary exception" exist "in the trust relationship Congress has established between the United States and the Tribe." *Id.* Because the two features at common law—"the beneficiary's status as the 'real client' and the trustee's common-law duty to disclose information about the trust"—were absent, the Court concluded that Congress did not intend application of the common-law fiduciary exception. *Id.*

Applying this analysis here leads to the same result as in *Jicarilla*. The Nation, citing hornbook and common-law trust principles, contends the government's accounting obligation requires a complete history of "how money was expended, and return [of] pilfered funds." Pl.'s Br. 16-17 (quoting 1 Am. Jur. 2d Accounts and Accounting § 50; citing *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 656 (4th Cir. 1996) (regarding common law of trusts); Restatement (Second) of Trusts § 172 (1959)). But the Nation ignores a central tenant of the common-law accounting duty: "A trustee may be indemnified out of the trust estate for the trustee's expenses in rendering and proving the trustee's accounts." 76 Am. Jur. 2d Trusts § 564. That key feature—which functions as an intrinsic limitation on the depth of accounting—is wholly absent from the relationship between the United States and the Nation. Instead, the scope of an accounting is "unequivocally control[led] by 'congressional appropriations.'" *Cobell XXII*, 573 F.3d at 813 (citing *Cobell XVII*, 428 F.3d at 1075). Thus, any duty to account is limited to the express terms of applicable statutes. Indeed, as the Supreme Court has made clear, "[t]he United States . . .

does not have the same common-law disclosure obligations as a private trustee." *Jicarilla*, 564 U.S. at 184.

* * *

The following sections track the two duty-creating statutes relevant to this action—the 1893 Act and the 1994 Act—as well as the numerous lawsuits the Nation has brought that are relevant to the Nation's ability to relitigate portions of those claims here. Specifically, the remaining sections of this brief demonstrate that: (1) The Slade-Bender accounting provided in 1894 satisfied any accounting duty under the 1893 Act and triggered the statute of limitations; (2) any claim for an accounting of funds held before August 1946 is barred by previous litigation and statutory provisions (including the Indian Claims Commission Act); (3) the Andersen Report and the underlying Reconciliation Project constituted a reasonable implementation of the 1994 Act's accounting duty in light of the deadline and funding limitations Congress imposed, as well as the likelihood that devoting additional resources would not result in a better accounting due to missing records; and (4) Interior is entitled to summary judgment on the claims for relief on which the Nation has not sought summary judgment.

II. The United States satisfied the accounting duty in the 1893 Act, and any claim challenging the adequacy of that accounting is time-barred.

The United States, in satisfaction of the 1893 Act, "render[ed] a complete account of moneys due the Cherokee Nation under," the various treaties required by that Act. SUF ## 1, 5. The Nation accepted the results of this accounting in 1894—128 years ago. SUF # 9. When Congress failed to appropriate funds to satisfy the amounts disclosed in the Slade-Bender accounting, the Nation sued. SUF # 59.

These facts bar portions of the present action. First, the Slade-Bender accounting satisfied any duty to account in the 1893 Act, the only statute the Nation identifies outside the 1994 Act

that requires an accounting. Second, the Nation is judicially estopped from asserting additional duties to account under the 1893 Act by virtue of its successful suit to enforce the Slade-Bender accounting. Third, and finally, the Slade-Bender accounting, at a minimum, put the Nation on notice of its claims for any additional or re-accounting of its trust account activity prior to 1893 and thus started the applicable statutes of limitations.

A. The United States prepared, and the Nation accepted, the Slade-Bender accounting in satisfaction of the 1893 Act, waiving any right to assert it was inadequate.

The Slade-Bender accounting was prepared expressly to carry out the accounting duty set out in the 1893 Act and the treaty it ratified. SUF # 1-5. The accounting "was accepted by the Cherokee Nation by an act of its national council approved December 1, 1894, and no suit was thereafter brought by the Cherokee Nation against the United States, charging that said account was in anywise incorrect or unjust." *Cherokee Nation v. United States*, 202 U.S. 101, 113 (1906). As the Court of Claims put it, the Nation "signified their acceptance, thereby waiving the items which the accountants had disallowed and its right to carry those rejected items into the courts of the United States." *Cherokee Nation v. United States*, 40 Ct. Cl. 252, 319. The United States thus conclusively satisfied the 1893 Act's accounting duty with the Slade-Bender accounting.

Congress provided the Nation with the right to contest the accounting if it believed it was insufficient under the 1893 Act. In addition to requiring an accounting, article 2(4) of the treaty ratified by the 1893 Act provided that "should the Cherokee Nation, by its National Council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve (12) months to enter suit against the United States in the Court of Claims." SUF # 2; *see Cherokee Nation v. United States*, 270 U.S. 476, 480 (1926) (setting out time bar and jurisdictional provision in full). Instead, the Nation accepted the results. As such, the United States satisfied the 1893 Act's accounting requirement.

B. The Nation is judicially estopped from asserting any additional accounting is required under the 1893 Act.

Having accepted the Slade-Bender accounting, the Nation next successfully sued to enforce that accounting's conclusions against a reluctant United States executive branch. SUF ## 59-63. That successful litigation judicially estops the Nation from taking any contrary position now that the 1893 Act required or requires more.

Courts invoke judicial estoppel "[w]here a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position." *New Hampshire v. Maine,* 532 U.S. 742, 749 (2001). The D.C. Circuit uses a three-part test to determine whether judicial estoppel applies:

> (1) Is a party's later position clearly inconsistent with its earlier position? (2) Has the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled? (3) Will the party seeking to assert an inconsistent position derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped?

Moses v. Howard Univ. Hosp., 606 F.3d 789, 798 (D.C. Cir. 2010).

These elements are satisfied here. First, the Nation sued the United States to obtain the amounts it was owed under the Slade-Bender accounting. *See also Cherokee Nation*, 40 Ct. Cl. at 323. In doing so, the Nation necessarily pressed the position it took when it ratified the accounting, that the accounting was accurate. *See United States v. Cherokee Nation*, 202 U.S. at 120 ("The correctness of the account is conceded, and the question is whether the United States were properly held liable therefor."). Here, by contrast, the Nation relies on the contrary position that it is somehow owed additional accounting under the 1893 Act. *See* Pl.'s SUF # 71.c. Second, the Nation was successful in persuading both the Court of Claims and the Supreme Court that the

United States owed the Nation the amount identified in the Slade-Bender accounting despite the United States' argument to the contrary. *See* 40 Ct. Cl. at 299-300, 331-32; 202 U.S. at 119. Finally, judicial estoppel is appropriate here because it would be unfair to require the United States to do additional accounting work now, more than 120 years after the Nation fully accepted the accounting provided in 1894, successfully used it as a basis in litigation, and was compensated for accounting's identified errors. The Nation would likewise derive an unfair advantage in the absence of estoppel, since it declined to challenge the accounting at the time.

C. The Slade-Bender accounting means the Nation's claims for an accounting accrued in 1894 for the period covered by Slade-Bender and are time-barred.

Even if not barred by waiver, acceptance, or judicial estoppel, any claim for additional accountings under the 1893 Act would nonetheless be barred by limitations. 28 U.S.C. § 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *Id*. "Actions usually accrue 'when they come into existence.'" *Felter v. Kempthorne*, 473 F.3d 1255, 1259 (D.C. Cir. 2007) (quoting *United States v. Lindsay*, 346 U.S. 568, 569 (1954)). In other words, "a claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). "[S]tatutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant." *Id.* at 1576; *see also Felter*, 473 F.3d at 1259 (applying Section 2401(a) to terminated Indian tribe's members).

The Supreme Court and Court of Claims both recognized the Nation could have sued about the adequacy of the Slade-Bender accounting in 1894 but chose not to. *See Cherokee Nation*, 202 U.S. at 113; *Cherokee Nation*, 40 Ct. Cl. at 319 (Cherokee "signified their acceptance, thereby waiving the items which the accountants had disallowed and its right to

carry those rejected items into the courts of the United States"). Indeed, the Cherokee Outlet Agreement provided the Nation with the right to bring any such suit. SUF # 1; *see also Cherokee Nation v. United States*, 270 U.S. at 480. Thus, the Nation's claim seeking any further pre-1893 accounting accrued at that time and expired either within twelve months under the Outlet Agreement's time limitation, or within six years under Section 2401(a).[8] After all, at the time the Nation was provided the Slade-Bender accounting, "all the events . . . occurred which fix[ed] the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland*, 855 F.2d at 1577.[9]

III. Any claim for an accounting of funds held before August 1946 is barred.

The Nation makes much of the "critical time period[]" of allotment, when all the Nation's assets were sold or distributed to the Nation's citizens, and implies that it never received an accounting for this period. Pl.'s Br. 20-22. The historical record proves this to be false. The Nation secured a special jurisdictional act allowing it to bring all of its claims predating March 19, 1924, against the United States. 43 Stat. 27. The Act provided the Nation, and only the Nation, with the right to supplement the numerous accountings and statements of account it received regarding allotment-era transactions by providing that "the Government shall give access . . . to such treaties, papers, correspondence, or records" as needed to bring its claims. 43 Stat. at 28. As a result, the Nation prepared its own accounting after being granted open access to the United States' books and records. Based on its six years of extensive accounting work, the

[8] The present statute of limitations, Section 2401(a), was codified as part of the 1948 codification of Title 28 of the United States Code. However, a version of that law also appeared in the 1911 judicial code. *See* Act of Mar. 3, 1911, Pub. L. No. 61-475 § 24, 36 Stat. 1087, 1093 (1911); *see also* Historical and Revision Notes to 28 U.S.C. § 2401.

[9] The doctrine of repudiation cannot revive the Nation's accounting claim for this period. As discussed *infra*, provision of one accounting repudiates the United States' alleged duty to provide any additional accounting beyond that. *See* discussion *infra* Arg. IV.B.2.

Nation brought numerous claims for mismanagement of its accounts during allotment, including two suits (later consolidated) that asserted mismanagement claims and sought additional accountings. SUF # 78-86. Like the 1924 Act, Congress provided an additional avenue for claims against the United States through the ICCA, and the Nation again brought several mismanagement claims against the government. SUF # 106.

These facts have legal consequences. First, the Nation's claims for an accounting of transactions during the allotment period accrued in time to be brought under the 1924 Act and the ICCA, barring claims for an accounting of funds predating enactment of the ICCA in August 1946. Second, any claim here seeking an accounting of the Nation's trust prior to 1926 is barred by res judicata given the petitions that the Nation brought in the Court of Claims in 1930 based on its extensive accounting. Third, and finally, earlier accountings and actual notice of land sales put the Nation on notice of any claims for an accounting for the allotment era in real time, through 1926, such that the Nation's request for allotment-era transactions is barred by limitations.

A. The ICCA and the 1924 Act preclude claims that could have been brought under those statutes, through August 1946.

The Indian Claims Commission Act, enacted on August 13, 1946, and the Act of March 19, 1924, both established regimes whereby the Nation could bring any legal and equitable claims against the United States, including any demand for an accounting. Act of March 19, 1924, 43 Stat. 27, § 1; Indian Claims Commission Act ("ICCA"), 60 Stat. 1049, § 2. However, each Act also established a time limit for such claims. Under the 1924 Act, "[a]ny and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act." 43 Stat. 27, § 2. Likewise, the ICC "receive[d] claims for a period

of five years . . . and no claim existing before [approval of the ICCA] but not presented within such period may thereafter be submitted to any court or administrative agency for consideration." ICCA § 12. Similarly, "[a] final determination against a claimant made and reported in accordance with [the ICCA] shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy." *Id.* § 22(b).

It is well established that the ICCA bars claims involving title to lands, claims to equitable relief, claims for damages, and related constitutional and procedural claims that accrued before August 13, 1946 and were not brought by August 13, 1951. *See Oglala Sioux Tribe of Pine Ridge Indian Rsrv. v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 331-32 (D.C. Cir. 2009) (collecting authorities). In other words, the ICCA bars any legal, moral or equitable claim that could have been brought before 1946. "A tribe cannot avoid the [ICCA] through 'artful pleading.'" *Id.* at 333 (citation omitted). The 1924 Act is similarly broad. "Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims, within five years from the date of approval of this Act." Act of March 19, 1924, 43 Stat. 27, §§ 1-2. That Act's purview included "any and all legal and equitable claims arising under or growing out of any treaty or agreement . . . or arising under or growing out of any Act of Congress." *Id.* at § 1.

As the Nation's prior lawsuits under both these statutes demonstrate, the Nation had numerous accrued claims at the time of these Acts, including accounting claims. Notably, the Nation sought additional accounting under the 1924 Act and, after receiving the GAO accounting report in 1933, brought all claims it identified in those accountings before the Court of Claims. SUF # 73-95. And, though the Nation did not bring a generalized accounting claim under the ICCA (perhaps because they had already received full accountings in 1894, 1930, and 1933), its

lawsuits under the ICCA make clear that the Nation was already aware of its claims of alleged mismanagement with respect to actions by the United States before 1946. For example, the Nation successfully brought two claims relating to the purchase price for the Cherokee Outlet and parts of the Outlet's assignment to other tribes. SUF # 107; Pl.'s SUF #17-19. And, in any event, the ICCA bars any and all claims that could have been brought, not just those actually litigated. ICCA § 12; *see Sioux Tribe v. US*, 205 Ct. Cl. 148, 203 (1974) ("There is no doubt about the fact that Congress intended to cut off all claims not filed before August 13, 1951, and the Act so provides in clear and unmistakable language."). Accordingly, to the extent the Nation now claims it is entitled to an accounting for activity in its trust accounts preceding the enactment of the ICCA, or, at the very least, enactment of the 1924 Act, those claims are barred because the Nation's accounting claims prior to 1946 and 1924 accrued prior to enactment of these Acts and could have been brought at that time.

Section 2 of the 1924 Act required the Nation to choose "the attorney or attorneys employed to prosecute" its claims "by a committee chosen by them under the direction and approval of the Commission of Indian Affairs and the Secretary of the Interior." Act of March 19, 1924 § 2. Delegates to this committee were chosen by popular election in each of the Nation's districts, and the committee entered contracts with four attorneys that Interior approved without modification. SUF # 68-71. Section 2 also required that any "such suit shall make the Cherokee Nation party plaintiff and the United States party defendant." Act of March 19, 1924 § 2. There can be no dispute that the attorneys chosen to pursue the Nation's claims were chosen in accordance with governing law, or that the Nation that brought claims under the 1924 Act is the same Nation named as plaintiff here.

The ICCA specified that "wherever any tribal organization exists, recognized by the

Secretary of the Interior as having authority to represent such tribe . . ., such organization shall be accorded the exclusive privilege of representing such Indians . . . .” ICCA § 10. And it provided that a tribe “may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection.” *Id.* § 15. The attorneys the Nation selected to bring its ICC actions were identified by a “Standing Executive Committee” created by vote of a national convention of the Nation’s citizens. SUF # 100-04. The entire national convention unanimously adopted a resolution approving the selection of attorneys. SUF # 103. William Keeler (later Principal Chief of the Nation), who participated as a member of the Executive Committee in the selection of attorneys, testified before Congress that BIA did not interfere in the committee’s selection of attorneys except to confirm the attorneys’ credentials and that the contract met all legal requirements. SUF # 104.

These facts demonstrate that there is no legal or equitable reason why the Nation’s claims that demand an accounting for pre-1946 and pre-1924 transactions should not be barred. We anticipate the Nation will attempt to rebut this showing with allegations that the United States “illegally” dominated the Nation’s government during this period, nullifying the effect of these statutes. But such a claim does not square with the fact that the United States did not interfere with the selection of attorneys under these Acts, who were instead selected by representative electoral processes of the Nation’s citizens. SUF ## 68-71, 100-04. Nor does it square with the fact that the ICC attorneys’ contracts were extended for years following election of the Nation’s principal chief and adoption of a new constitution. SUF # 106. Moreover, the selection of attorneys and presentment of claims complied with the Acts themselves, making any claim of domination of the Nation’s government as a general matter inapplicable to the Nation’s ability to prosecute its claims under the 1924 Act or the ICCA. After all, “the organization and

management of the trust is a sovereign function subject to the plenary authority of Congress." *Jicarilla*, 564 U.S. at 175; *United States v. Wheeler*, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."). Congress delineated the means for the Nation to select its attorneys, the scope of jurisdiction of the Court of Claims and the ICC, and the time limit for bringing claims in those forums. With respect to the ICCA, it even deemed final determinations to "forever bar any further claim or demand . . . arising out of the matter involved in the controversy." ICCA § 22(b). The Nation brought numerous claims under both statutes, demonstrating its capacity to sue, and its attorneys were selected under Congressionally-mandated processes and recognized by Interior as representing the Nation. The Nation's claims thus accrued, and are barred, under both Acts, to the extent they relate to trust account activities predating 1946 and 1924.

B. Any claim for an accounting for the allotment era through the 1930 litigation is barred by res judicata.

To the extent that the Nation would otherwise have any claims for an accounting of its trust from the allotment era through the 1930 litigation under the 1924 Act, those claims are precluded. Under the doctrine of res judicata, or claim preclusion, "a judgment on the merits in a prior suit bars a second suit involving identical parties or their privies based on the same cause of action." *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004). Res judicata advances the very "purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Id.* (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). It therefore "precludes a party from relitigating claims that were or could have been raised in the initial action." *Meng v. Schwartz*, 305 F. Supp. 2d 49, 61 (D.D.C. 2004) (emphasis added). Res judicata bars a subsequent lawsuit "if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a

final, valid judgment on the merits, (4) by a court of competent jurisdiction." *Toggas v. Wachovia Mortgage, FSB*, 2020 WL 3103966, at *5 (D.D.C. June 11, 2020) (McFadden, J.) (quoting *Porter v. Shah*, 606 F.3d 809, 813-14 (D.C. Cir. 2010)). "Under the first prong of the test, it is unnecessary that the two cases raise the same legal claims." *Toggas*, 2020 WL 3103966, at *5. Instead, whether two cases implicate the same cause of action "turns on whether they share the same 'nucleus of facts.'" *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002).

The Nation's 1930 litigation meets each of those four elements and therefore precludes the portions of the Nation's present case that seek an accounting for transactions before 1926. First, the claims that the Nation raised in the 1930 litigation share the same "nucleus of fact" with the claims they raise here. In considering whether two cases share the same nucleus of facts, courts in this district evaluate "whether the facts are related in time, space, origin, or motivation, or whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understandings or usage." *Apotex*, 292 F.3d at 217. Here, there can be no doubt that the Nation's 1930 litigation is related in time, space, and motivation to its claims here. In its 1930 litigation, the Nation sought additional accounting in addition to the many claims it identified through the extensive accountings conducted in connection with that litigation. *Cherokee Nation*, 102 Ct. Cl. at 759-60. And, in this action, the Nation has identified the period between 1912 and 1926 as a crucial period for which it is currently seeking an accounting. Pl's Br. 21. But the Nation already received an accounting that covered that time period, prosecuted its claims related to that accounting, and was denied any additional accounting covering that period by the Court of Claims.

The second res judicata element is also met because the Nation is the same Cherokee Nation that brought the 1930 litigation. As Congress has recognized, the Nation maintained a

"continuous government-to-government relationship with the United States since the earliest years of the Union." Cherokee, Choctaw, and Chickasaw Claims Settlement Act § 3, 25 U.S.C. § 1779, 116 Stat. 2845 (repealed Dec. 13, 2002). The Nation's complaint recognizes this same fact. Compl., ¶ 4 ("[T]he Cherokee people have existed as a distinct national community . . . for a period extending into antiquity[.]"); *id.* ¶ 93 ("The Nation's government has been in continual existence since time immemorial through the date this document is signed below."). Rightly so. Section 28 of the 1906 Five Tribes Act provided "[t]hat the tribal existence and present tribal governments of the . . . Cherokee . . . are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature . . . shall not be in session for a longer period than thirty days in any one year." 34 Stat. at 148, § 28; *cf. McGirt v. Oklahoma*, 140 S. Ct. 2452, 2466 (2020) (interpreting the 1906 Five Tribes Act and subsequent legislation as "never withdr[awing] [Congress's] recognition of the [Creek] tribal government"). Indeed, the Nation's claims here are premised in part on the very treaties and statutes that gave rise to the Nation's prior litigation. ECF 1 ¶¶ 31-47. If the Nation can assert it is a party to those treaties, it must also be the same Nation—or at least in privity with it—that asserted accounting claims in the 1930 lawsuits. *See* 116 Stat. 2845 (finding that the Nation has "maintained a continuous government-to-government relationship with the United States since the earliest years of the Union"); *McGirt*, 140 S. Ct. at 2466-68.

The third and fourth elements are met as well, because the 1930 litigation resulted in a final decision on the merits by a court of competent jurisdiction—the Court of Claims—that resolved all claims that the Nation brought with respect to the United States' management of its funds through 1926, as well as its request for an additional accounting. The 1924 Act permitted the Nation to raise "any and all legal and equitable claims arising under or growing out of any

treaty or agreement between the United States and the Cherokee Indian Nation or Tribe." 102 Ct. Cl. at 723. The Nation did just that, raising numerous claims, including for additional accountings. And in its decision in the 1924 Act litigation, the Court of Claims separately addressed and ruled on each claim that the Nation had raised. 102 Ct. Cl. 756-70. The 1930 litigation therefore resulted in a decision on the merits of all claims that the Nation raised concerning the United States' management of, and accounting for, the Nation's funds up to 1926.

C. The Nation's claims for an accounting prior to 1930 are barred by applicable statutes of limitations.

Even if res judicata does not bar the Nation's claims for an accounting of allotment-era transactions, those claims are barred by statutes of limitations. "Actions usually accrue 'when they come into existence.'" *Felter*, 473 F.3d at 1259 (quoting *Lindsay*, 346 U.S. at 569). Under this standard, the Nation's claims for an accounting for this period *must* have accrued by the time it brought suit that included a claim for accounting in 1930.

Setting aside the Nation's 1930 lawsuit, which was based on a comprehensive accounting, the Nation had ample notice of the existence of any claims at the time, and thus its accounting action for this period accrued, and expired, decades ago. Most telling on this score is that the United States actually opened its books and records to the Nation, which prepared a detailed accounting that took six years to prepare. SUF # 73-74. That accounting covered financial records from the late 18th century through fiscal year 1926, by which time allotment had been completed on the Nation's reservation. SUF ## 74, 83. The United States also prepared financial statements to Congress covering receipts and disbursements from the Nation's accounts from 1898 through the first quarter of fiscal year 1915, and prepared and submitted annual reports that detailed revenue for land sales and leases. SUF ## 49-54. Finally, in response to the Nation's 1930 lawsuits, the GAO prepared a detailed, three-volume report setting out credits and disbursements, and interest

payments, for all the Nation's trust funds, through June 1930. SUF # 87-89.

Taken together or separately, these accounting efforts at the very least meant that the Nation was aware of any claims for an accounting that had gone unsatisfied to that time. Indeed, the Nation *brought* suit to that effect in 1930. SUF #82-86. The Nation also was aware of any claims regarding the allotment, sale, and leasing of its lands. *See* discussion *supra* Background II.A. The Nation's claims thus accrued, and expired, in the 1930s, when it was provided detailed information on the allotment era transactions on which it now seeks another accounting. By that time, "all the events . . . occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland*, 855 F.2d at 1577; *see also Spring Commc'ns*, 76 F.3d at 1228 ("Under the discovery rule, . . . a cause of action accrues when the injured party discovers—or in the exercise of due diligence should have discovered—that it has been injured."); *Shoshone Indian Tribe of Wind River Rsrv. v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("The beneficiary, of course, may bring his action as soon as he learns that the trustee has failed to fulfill his responsibilities.").

The historical record demonstrates that the Nation's leaders and attorneys had actual contemporaneous knowledge of the sale of their lands during the allotment era and the distribution of funds to individual Indians, such that claims for this period accrued decades ago.[10] When tribal members are aware of a sale, the statute of limitations will not be tolled "on the ground that the disablement of [a Tribe's] governing body . . . prevented the [Tribe's] knowledge of" the sale. *Hopland*, 855 F.2d at 1579-81. Interior promulgated regulations governing land sales. SUF # 18. The Nation appointed a representative to attend each public auction. SUF # 19. The relevant offices' annual reports during the allotment era, the settled account packages

[10] These same facts demonstrate repudiation. *See infra* Arg. IV.B.2.

prepared by Treasury (and later GAO) each month or quarter detailing the Nation's trust accounts and land sales, and the various reports to Congress on the Nation's accounts, have been publicly available for decades. SUF #37-54. And, of course, the Nation's members knew of the distribution of tribal trust funds to members, since members were the recipients of funds. SUF # 35. These distributions were made pursuant to Acts of Congress. And tribal officials knew the Nation had no tribal trust funds left. *See* SUF # 36, Pl.'s Br. at 21. As such, any claim for additional or re-accounting for this period is barred by limitations.

IV. The United States does not owe the Nation any further accounting under the 1994 Act.

As shown, the Nation has received numerous accountings and has pursued accounting and mismanagement claims based on those accountings. These facts demonstrate knowledge of account activities sufficient to trigger statutes of limitations. The Nation is thus barred from relitigating accounting claims it already brought (or could have brought), and from demanding any re-accounting or additional accounting for account activity up to and including August 1946.

For the period following August 1946, the relevant question is whether Interior complied with the accounting requirements of the 1994 Act. But any claim that Interior has not so complied is also barred by limitations. The Nation had all the facts it needed to challenge the adequacy of the Andersen Report when the Report was "deemed received" in December 2000. On the merits, Interior complied with the directives of the 1994 Act by providing the best accounting it could in the short time period Congress provided for it to do so with respect to *all tribes* for which it administered funds, not just the Nation. That task was monumental, and Interior's execution of it—balancing its limited resources and time against the utility of what could be done within those parameters—deserves deference. Accordingly, the Nation's motion for summary judgment seeking an order that the Andersen Report was insufficient, and the

Nation's broader claims surrounding the adequacy of the Andersen Report, fail.

A. The Andersen Report is not a "factual defense" but instead goes to the nature of the Nation's claims, which seek to compel a historical accounting.

The Nation's motion for partial summary judgment postures the Andersen Report as a "factual defense" to their claims seeking to compel an accounting. Motion, ECF No. 88, at 1. That is not accurate. Rather, the existence of the Andersen Report illustrates that the Nation's case can only be a challenge to the adequacy of the historical accounting Interior provided under the 1994 Act, rather than one to compel an accounting as if Interior had not already attempted to comply with the 1994 Act's requirements. As this Court has already concluded, Count II of the Complaint asserts "that the Government 'has failed to provide . . . *any of the accounting* required by Sections 4011 and 4044]." *Cherokee Nation*, 531 F. Supp. 3d at 92 (emphasis added). The Andersen Report—regardless of its supposed insufficiencies—was Interior's attempt to comply with the 1994 Act, SUF #108 (referring to Andersen Report as under "Section 304 [25 U.S.C. § 4044] of the American Indian Trust Fund Management Reform Act of 1994"), and precludes as a matter of law the contention that no accounting whatsoever has been provided and must be compelled. In short, the Nation cannot maintain "a genuine failure to act" claim, but instead complains "about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) (quoting *Nevada v. Watkins*, 939 F.3d 710, 714 n.11 (9th Cir. 1991)).[11]

[11] *See also WildEarth Guardians v. Chao*, 454 F. Supp. 3d 944, 956 (D. Mont. 2020) ("The cases that interpret § 706(1) suggest that an agency's action in furtherance of complying with a statute, *regardless of how feeble*, removes a challenge to the agency's conduct from the realm of § 706(1) and into the arbitrary and capricious or contrary to law review of § 706(2)." (emphasis added)); *Davidson v. United States Dep't of State*, 113 F. Supp. 3d 183, 191–92 (D.D.C. 2015), *aff'd*, 728 F. App'x 7 (D.C. Cir. 2018) (rejecting failure-to-act claim where agency defendant provided assistance demanded by lawsuit though plaintiff may not have "found such assistance helpful").

Though this Court rejected this argument earlier in this case, it did so based on the principle that "[t]he Nation is the master of its Complaint, and its assertion has survived Rule 12(b)," such that, despite the Andersen Report's existence, "no 'decision' provides any 'substance' for the Court to review on the Nation's non-APA claims." *Cherokee Nation*, 2021 WL 3931870, at *2. However, this case is now at summary judgment, and the Nation's complaint is no longer entitled to its most favorable reading. Instead, at summary judgment, the Nation's claims must be judged against the evidence. Fed. R. Civ. P. 56(a), (c); *see Liberty Lobby*, 477 U.S. at 255. That evidence includes the Andersen Report. *See* Pl.'s Ex. 1. There can be no genuine dispute that the Nation (and Congress) received the Report; indeed, that fact is conclusively established in the parties' statements of undisputed facts. *See* Pl.'s SUF ## 91-92, Fed. Defs.' Resp. The Andersen Report was designed to satisfy "[t]he Congressional mandate for . . . an accounting to each Tribe for each of their Trust accounts." Pl.'s Ex. 1, at 5. These facts alone preclude the Nation's claim that Interior has never complied with the 1994 Act. Because any claim to compel an accounting under the 1994 Act fails as a matter of law based on these undisputed facts, the Court should grant summary judgment for Federal Defendants on Count II.

All that remains of the Nation's demand for an accounting, then, is the sufficiency of the Andersen Report. But, as discussed below, that issue is barred by limitations. And even if it were not, the Report was Interior's reasonable implementation of any historical accounting duty under the 1994 Act. Under the standards that govern judicial review of agency action (whether under the APA or otherwise), summary judgment should be granted to Federal Defendants.

B. The Nation's claims under the 1994 Act are barred by Section 2401(a)'s six-year statute of limitations

The fact that Interior provided the Nation with the Andersen Report means that any claim that the Andersen Report did not comply with the 1994 Act accrued—and expired—years ago.

Section 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). "Actions usually accrue 'when they come into existence.'" *Felter*, 473 F.3d at 1259 (quoting *Lindsay*, 346 U.S. at 569). The Nation's claim that the Andersen Report violates the 1994 Act accrued no later than December 31, 2000, and, thus, expired at the end of 2006.

1. Congress established that the Andersen Report was "deemed received" on December 31, 2000 and the Nation's accounting claims accrued, at the latest, at that time.

Plaintiff's claim that any additional historical accounting was required under the 1994 Act came into existence no later than when the Nation received the Andersen Report. It is undisputed that the Nation received the Andersen Report in January 1996. Fed. Defs.' Resp. to Pl.'s SUF No. 91. The Nation contends the Andersen Report does not live up to applicable accounting requirements in the 1994 Act and elsewhere. Pl's Br. 18-25. But all the facts about that Report—and thus all the facts necessary for the Nation to make that argument and bring a claim challenging the Report's adequacy—were available by 1996. Perhaps recognizing this fact, Congress intervened in 2002 to provide that "[n]otwithstanding any other provision of law, for purposes of determining the date on which an Indian tribe received a reconciliation report for purposes of applying a statute of limitations, any such report . . . shall be deemed to have been received by the Indian tribe on December 31, 1999." An Act to Encourage the Negotiated Settlement of Tribal Claims, Pub. L. No. 107-153, 116 Stat. 79 (2002) (codified at 25 U.S.C. § 4044 note). Congress later changed the "deemed received" date to December 31, 2000. Settlement of Tribal Claims—Amendment, Pub. L. 109-158, 119 Stat. 2954 (2005). The Nation's claim that Interior should have done more than what it did in the Andersen Report came into existence when it received the Report; because Congress established that the Report was "deemed received" in December 2000, that is the date the six-year statute of limitations began to

run, and it expired six years later. *Felter*, 473 F.3d at 1259.

The "deemed received" date is the accrual date for the Nation's action regardless of whether their claim for a historical accounting arises under the APA or the 1994 Act itself. If the Nation is challenging agency action under the APA, such a claim accrues upon final agency action. *Impro Prod., Inc. v. Block*, 722 F.2d 845, 850 (D.C. Cir. 1983); *Worthington v. Off. of Nat'l Drug Control Pol'y*, 2020 WL 1509167, at *6 (D.D.C. Mar. 30, 2020). The Andersen Report would certainly qualify as final agency action. The same is true even if the Nation's claim is interpreted as a challenge to non-action, because any alleged "inaction is a discrete agency action that is the 'functional equivalent' of final agency action." *Lauderhill Hous. Auth. v. Donovan*, 818 F. Supp. 2d 185, 195 (D.D.C. 2011); *see also Hi–Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 1, 10 (D.D.C. 2008) (citation omitted) (unreasonable delay claims accrue when inaction has "the same impact on the rights of the parties as an express denial of relief"). After all, the Nation knew when it received the Andersen Report that Interior submitted the Reports in fulfilment of its duties under the 1994 Act. *See* SUF ## 108, 129. The Nation also knew that Interior would not provide an additional, potentially (in the Nation's view) more "meaningful accounting." Pl.'s Br. 1. The Andersen Report informed tribes "that not all records would be available for a full accounting of such funds," but "the scope of the [Report] is designed to provide reasonable assurance as to the accuracy of each Tribal Trust account balance." SUF # 118. Reinforcing notice of the existence of a claim at the time of the Andersen Report, Interior officials stated at a national meeting on the Report that further "recourse is not with the BIA but with [C]ongress." SUF # 129. Interior's claims thus accrued when the Andersen Report was

"deemed received."[12]

Illustrating the fact that the Nation has long been on notice for any challenge to the Andersen Report, nearly all of the Nation's exhibits are Congressional, GAO, or agency reports; news releases; or judicial opinions and statutes from 1996 or, in many cases, decades earlier. *See* ECF No. 88-3 (Exhibit List). Indeed, the very GAO reports the Nation relies on to make its merits arguments—published in 1996 or earlier—conclude that a more detailed accounting was not possible. Pl.'s SUF ## 61, 107; Pl.'s Ex. 2 at 15 of 33. Simply put, there is nothing in the Nation's motion that indicates it had insufficient knowledge in 1996, or, for that matter, on the "deemed received" date set by Congress, for purposes of challenging the Andersen Report.[13]

2. The doctrine of repudiation does not prevent accrual of the Nation's claims.

At the motion to dismiss stage, this Court suggested that it could not dismiss based on the pleadings because "there is no suggestion that the Government has repudiated the trust." Mem. Op. & Order at 6, ECF No. 42. Summary judgment presents the opportunity for this Court to take up the issue of repudiation on the merits, at which point the Nation may no longer rely on the permissive pleading standard. In doing so, this Court should conclude that Interior has, by words or action, repudiated any obligation or intent to provide further historical accounting under the 1994 Act and, as a result, put the Nation on notice of its claims. Thus, the doctrine of

[12] The "deemed received" date is the accrual date for the Nation's claims even under the more permissive discovery rule. "Under the discovery rule, . . . a cause of action accrues when the injured party discovers—or in the exercise of due diligence should have discovered—that it has been injured." *Sprint Commc'ns Co., L.P. v. F.C.C.*, 76 F.3d 1221, 1228 (D.C. Cir. 1996). The facts set out above also demonstrate discovery under this standard.

[13] The Nation cannot avail itself of the "continuing violation" doctrine. As an exception to the general accrual rule, the burden to demonstrate a continuing violation is on the Nation. *Earle v. D.C.*, 707 F.3d 299, 305 (D.C. Cir. 2012) (describing the continuing violation doctrine as an exception). Indeed, "the general rule of claim accrual" applies "absent a 'clear directive' from Congress." *Id.* at 305 n.9 (quoting *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 757 (D.C. Cir. 2012)).

repudiation does not change the fact that the Nation's accounting claim under the 1994 Act accrued in December, 2000, and expired in 2006.

As an initial matter, it is not clear that the doctrine of repudiation applies to the Nation's claims. The court in which Indian breach of trust claims are brought most frequently—the Court of Federal Claims (and its predecessor, the Court of Claims)—has repeatedly held that claims for misfeasance or nonfeasance of an alleged trust duty do not require repudiation for accrual. *See Jones v. United States*, 9 Cl. Ct. 292, 295–96 (1985), *aff'd on other grounds*, 801 F.2d 1334 (Fed. Cir. 1986); *Catawba Indian Tribe v. United States*, 24 Cl. Ct. 24, 31-32 (1991), *aff'd*, 982 F.2d 1564 (Fed. Cir. 1993). In this situation, "the existence of a trust relationship does not act to toll the statute of limitations." *Cherokee Nation v. United States*, 21 Cl. Ct. 565, 572 (1990). The Nation's accounting claims are akin to misfeasance or nonfeasance. *See* Nonfeasance, Black's Law Dictionary (11th ed. 2019) (Nonfeasance is "[t]he failure to act when a duty to act exists."); Misfeasance (Misfeasance is "[a] lawful act performed in a wrongful manner").

Assuming the repudiation rule applies here, the Nation's claims are barred. "A trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as trustee." *Shoshone Indian Tribe of Wind River Rsrv.*, 364 F.3d at 1348. "The beneficiary, of course, may bring his action," and thus his claim accrues, "as soon as he learns that the trustee has failed to fulfill his responsibilities." *Id.* Moreover, unlike a private trustee, the United States need not repudiate the trust relationship in full,[14] but need only repudiate its responsibility to perform the specific duty at issue in the claim. *See, e.g.*, *Jones*, 801 F.2d at 1335-36 (rejecting argument that "statute of limitations did not begin to run on . . . breach of

[14] *See, e.g.*, 76 Am. Jur. 2d Trusts § 648 (2022) ("Repudiation sufficient to commence the running of the statute of limitations against an express trust occurs when the trustee by words or other conduct denies there is a trust and claims the trust property is his or her own.").

fiduciary duty claim because the United States never clearly repudiated the trust" because plaintiff's "interpretation of the term 'repudiate' is too narrow"). The beneficiary's awareness of the government's alleged failure is sufficient for the right of action to accrue, and for limitations to begin to run. *See Shoshone*, 364 F.3d at 1348.

For example, in *Ramona Two Shields v. United States*, 820 F.3d 1324, 1329 (Fed. Cir. 2016), the Federal Circuit considered whether a claim had accrued at the time of the *Cobell* settlement and, thus, was barred. Plaintiffs there argued that their pre-*Cobell* settlement lease-rate was not barred because it did not accrue until the company holding the lease resold the leases at a profit. 820 F.3d 1328-29. The Federal Circuit concluded that "the government's purported liability was fixed at the time it allegedly repudiated its trust duties . . . —when it approved the . . . leases at below-market rates." *Id.* at 1329. Thus, the claim "had accrued, and could have been asserted . . . when the BIA approved the below-market . . . leases." *Id.*

Here, repudiation of any duty to provide a more detailed retrospective accounting under the 1994 Act occurred when the Nation is deemed to have received the Andersen Report. At that time, the Nation was aware of the content and scope of the Andersen Report. It was also aware that Congress had not appropriated additional funds for historical accounting and, as a result, that BIA was not in a position to carry out any additional historical accounting. That is why Interior officials made clear at the national meeting on the Project that further "recourse is not with the BIA but with [C]ongress." SUF #129. Indeed, all the materials in the Nation's motion are over twenty years old and were publicly available (with the exception of the specific Andersen Report's reconciliation of the Nation's trust accounts, which the Nation itself received). Tellingly, the Nation's Complaint contains exactly one fact that occurred more recently than the 1990s: "In 2016, the Nation requested the United States provide the Nation with a review of the

Arthur Andersen trust reconciliation project or any other accounting efforts." Compl., ECF No. 2-1, ¶ 127. This allegation ignores that Interior and Arthur Andersen officials met with the Nation in June 1996 to discuss "the content and format of the [Andersen Report]." SUF # 130. In any event, like the resale of mineral leases in *Ramona Two Shields*, the government's alleged breach of the 1994 Act was fixed "when it approved" the Andersen Report and provided the Report to the Nation. 20 F.3d at 1329.

To hold otherwise given the complete absence of salient facts relevant to the Nation's claim since 1996 would essentially be to conclude that the Nation's accounting claim has no statute of limitations. But Congress did not create a tribe- or accounting-specific exception in Section 2401(a). "[S]tatutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). And, here, all relevant actions took place, at the latest, in the 1990s. To conclude otherwise would allow the Nation to simply choose the day it files suit as the accrual date. That cannot be correct. *See Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 207 (2020) (noting similar paradox, where "identifying *any earlier* date would merely beg a question fatal to the Tribe's position: what new fact did the Tribe learn on that yet earlier date—triggering the accrual of the claims—that the Tribe did not know prior to" the expiration of the otherwise applicable limitations period).

In sum, the Nation's claim accrued in 2000 and the limitations period expired in 2006. The doctrine of repudiation does not change that fact.

C. The Reconciliation Project and the resulting Andersen Report reasonably implemented any duty in the 1994 Act for a historical accounting.

As established *supra*, Section I, the Nation has identified two statutes that established an enforceable accounting duty. And because the Nation received a full accounting in satisfaction of

the 1893 Act, accepted the results of that accounting, and then sued to enforce it, the 1994 Act is the only remaining viable source of an accounting duty available to the Nation. Any action to enforce that duty is long barred by the statute of limitations. But, even if it were not, the Reconciliation Project and the resulting Andersen Report satisfied any retrospective accounting duty set out in the 1994 Act.

1. Sections 4011 and 4044 must be read in concert as the sole source of an accounting of tribal trust funds in the 1994 Act.

The Court has interpreted the Nation's Complaint as asserting that the government has not provided "any of the accounting required by Section 4011 and 4044 of the 1994 Act]." 531 F. Supp. 3d 87, 91 (D.D.C. 2021) (Faruqui, M.J.) (emphasis added). But Interior interprets Section 4044 as the source of its retrospective accounting duty to tribes in the 1994 Act. SUF # 108. It is that provision that places strict time limitations on the Reconciliation Project and imposes a responsibility to present the Project's findings to tribes and obtain their views. § 4044(2)(B). And it is that provision that requires "as full and complete [an] accounting as possible of the account holder's funds to the earliest possible date." § 4044(2)(A). The Nation, contrary to the allegations in its Complaint, ¶ 141 ("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"), now argues in a footnote that the Andersen Report was "never meant to be an accounting" because it was "produced in an attempt to satisfy" Section 4044. Pl.'s Br. 19 n.7. But the Nation provides no support for its statement about Interior's intent, nor the Nation's implicit assumption that Section 4044 is irrelevant to the scope of any historical accounting duties owed to tribes under the 1994 Act.

That courts have interpreted Section 4011(a) to require a historical accounting for

individual tribal members does not render Section 4044 a nullity.[15] *See, e.g.*, *Cobell v. Salazar*, 573 F.3d 808, 813 (D.C. Cir. 2009) ("*Cobell XXII*") (observing that the plaintiffs were "entitled to an accounting" under Section 4011(a)). After all, Section 4044 applies to tribes, but not individual account holders, and "[w]hen statutes intersect, the specific statutes . . . trump the general." *Loving v. I.R.S.*, 917 F. Supp. 2d 67, 77 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014). Reconciling Sections 4011 and Section 4044 is accomplished by interpreting Section 4011 to apply only prospectively with respect to tribes, with Section 4044 providing the 1994 Act's sole retrospective accounting duty with respect to tribes. Section 4011's plain language supports such a reading. It concerns funds that are already "held in trust . . . for the benefit of an Indian tribe" and subsequently "*are* deposited or invested" by the Secretary within the most recent quarter. 25 U.S.C. § 4011(a) (emphasis added). Therefore, the investment-focused provisions in Section 4011 concern funds that, subsequent to enactment, "*are* deposited or invested" by the Secretary, rather than historical accounts that no longer existed. *See* 25 U.S.C. 4011(a) (emphasis added). Section 4044, by contrast, clearly refers to a retrospective duty to account, requiring the Secretary to confirm whether tribes can attest that "the Secretary has provided . . . as full and complete accounting as possible . . . to the earlier possible date." § 4044(2)(A). Because the viable, forward-looking interpretation of Section 4011(a) with respect to tribes would avoid conflict with or duplication of Section 4044, that interpretation should prevail.

Alternatively, Section 4011(a) and Section 4044 should, at most, be read together to

[15] We recognize that this Court has already ruled that Section 4011(a) applies to require an accounting to the Nation. *Cherokee Nation v. Dep't of Interior*, No. 1:19-CV-02154 (TNM), 2021 WL 3931870, at *2 (D.D.C. Sept. 2, 2021). This argument is presented for preservation purposes.

create one retrospective accounting duty as to tribes subject to the more-specific limitations included in Section 4044. The general/specific canon controls here too. Though it applies most often where provisions contradict, it also "has full application . . . to statutes . . . in which a general authorization and a more limited, specific authorization exist side-by-side. There the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) (applying canon in Indian law context, noting that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"). More, "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory. . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012); *Maracich v. Spears*, 570 U.S. 48, 68 (2013) (interpreting statute to avoid "inconsistency and the concomitant undermining of the statutory design").

Though Section 4011's use of the present tense indicates a forward-looking accounting duty only, that section and Section 4044 both use the term "account" or "accounting." § 4044(2)(A); § 4011(a). "It is a well established rule of statutory construction that a word is presumed to have the same meaning in all subsections of the same statute." *Allen v. CSX Transp., Inc.*, 22 F.3d 1180, 1182 (D.C.Cir.1994) (internal quotation marks omitted). As such, even if Section 4011 is relevant here, Sections 4011 and 4044 should be read, at most, to complement each other with respect to any duty to provide a retrospective accounting to tribes. But even if the Court concludes that Section 4011 creates an independent historical accounting duty owed to tribes, as explained *infra*, the Andersen Report satisfies both Section 4011 and Section 4044,

regardless of whether they are read separately or together.

In asserting that a far broader accounting duty exists, the Nation does not provide a single verbatim quote of any statutory provision. Pl's Br. 16. Instead, the Nation describes three elements that it supposedly gleaned from various sections of Section 162a, including from subsection (b). But subsection (b) of Section 162a, like subsections (a) and (c) "speak to the Secretary's investment options, not to the nature or scope of [the] Secretary's accounting obligations." *Fletcher*, 730 F.3d at 1212. The Nation therefore cannot rely on subsections (a) through (c) to define the scope of an accounting duty here. Nor does Section 162a(d) provide for an accounting duty. *See Cobell v. Norton*, 240 F.3d 1081, 1105 (D.C. Cir. 2001) (observing that "[t]here may not literally be a duty to have such written policies and procedures"). Any contrary interpretation of Section 162a(d) would run afoul of the principle that courts "are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Jicarilla*, 564 U.S. at 185. The narrower, and more specific, accounting duty explicated in Section 4044 (and perhaps Section 4011), applies here.

2. The 1994 Act applies only to monetary assets.

The Nation's contention that the Andersen Report "cannot be an accounting of the Nation's trust" because it did not "consider property comprising the Trust corpus besides the monetary accounts" Pl.'s Br. 19, cannot be squared with the plain language of the 1994 Act. In Section 4044, Congress expressly referred to "trust *fund* accounts." 25 U.S.C. § 4044 (emphasis added). Likewise, to the extent applicable, Section 4011(a) refers to an accounting of "funds" that are both (i) "held in trust" and (ii) "deposited or invested pursuant to section 162a." § 4011(a). Congress's decision to expressly limit the 1994 Act specifically to "funds" forecloses any argument that an accounting of trust assets other than monetary assets is required, because "background principles cannot be used to 'override' the language of statutes and regulations

'defin[ing] the Government's . . . obligation[s]' to a tribe."[16] *Fletcher*, 730 F.3d at 1208 (citing *Jicarilla*, 564 U.S. at 185). Had Congress intended an accounting duty for non-monetary assets, it would have said so. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *see also* discussion *supra* Arg. Section I.

The limitation of any accounting duty to monetary trust assets applies despite *Cobell VI*'s recitation of the common law principle that "an accounting necessarily requires full disclosure and description of each item of property constituting the corpus of the trust at its inception," which the Nation repeatedly relies on. Pl's Br. at 18, 19 (citing *Cobell VI*, 240 F.3d at 1103). Indeed, *Cobell VI* itself noted that this is true only "so long as [the funds] were deposited after the Act of June 24, 1938." *Id.* And, as the Supreme Court subsequently clarified in a decision issued a decade after *Cobell VI*, "[t]he common law of trusts does not override [a] specific trust-creating statute." *Jicarilla*, 564 U.S. at 185. *See also Fletcher*, 730 F.3d at 1208 (same). For that reason, other courts, including the D.C. Circuit, have relied on the plain language of the 1994 Act to establish the scope of the accounting it requires, and this Court should do the same.[17]

3. Interior's implementation of the 1994 Act through the Andersen Report is entitled to "muted *Chevron* deference" and subject to review under the deferential arbitrary and capricious standard.

In the 1994 Act, Congress also did not require perfection. Indeed, the actual breach the

[16] *Cobell VI* is not to the contrary. As the D.C. Circuit explained in a 2014 decision, *Cobell VI*'s references to the general fiduciary relationship was "not to suggest that an actionable fiduciary relationship arises merely by operation of federal common law." *El Paso*, 750 F.3d at 896.
[17] *See Cobell XXII*, 573 F.3d at 815 (reversing district court's order requiring an accounting of closed accounts because "[t]he statute calls for an accounting of 'the daily and annual balance of all funds held in trust' that '*are* deposited or invested" and "[c]losed accounts no longer have daily or annual balances, nor are they deposited or invested"); *Fletcher*, 730 F.3d at 1214 (first "hurdle" in enforcing Section 4011 is proving that a tribe's trust funds "are deposited in a bank pursuant to section 162a(a)").

D.C. Circuit found in *Cobell VI* was a "fail[ure] to take reasonable steps toward the discharge of the federal government's fiduciary obligations to IIM trust beneficiaries." 240 F.3d at 1106. Other trust accounting cases recognize a rule of reason. The D.C. Circuit has cautioned that the 1994 "Act's general language doesn't support the inherently implausible inference that it intended to order the best imaginable accounting without regard to cost." *Cobell XVI*, 428 F.3d at 1075. Likewise, the Tenth Circuit has advised that "[a] green eye-shade death march through every line of every account over the last one hundred years isn't inevitable." *Fletcher*, 730 F.3d at 1214. Moreover, because an accounting under the 1994 Act must be carried out on the taxpayer's dime, "congressional appropriations 'unequivocally control what may be spent on historical-accounting activities.'"[18] *Cobell XXII*, 573 F.3d at 813 (citation omitted).

Principles of deference to administrative agency's implementation of statutory mandates are also relevant to this Court's inquiry. "There exists a strong presumption in [the D.C.] Circuit that when a statute provides for judicial review but does not specify any standard for that review, it should be construed to include the APA standard." *Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 108-09 (D.D.C. 2009) (compiling cases); *see also Shoshone-Bannock Tribes of Fort Hall Rsrv. v. Shalala*, 988 F. Supp. 1306, 1313, 1313 n.4 (D. Or. 1997), *on reconsideration*, 999 F. Supp. 1395 (D. Or. 1998) (applying same rule to tribe's claim under the Indian Self-Determination and Education Assistance Act and noting that "[t]his general principle has been applied under a variety of statutes").

[18] We agree with the Nation that, if the Court concludes that the Andersen Report failed to satisfy the requirements of the 1994 Act, "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." Pl.'s Br. 18. But similar considerations going to the reasonableness of the accounting are necessarily relevant to whether the Andersen Report satisfies the 1994 Act. *See Cobell XXII*, 573 F.3d at 809 (holding "muted *Chevron* deference" applies to Interior's choice of scope and methodology in judging whether Interior was "in continuing breach of its duty to account").

In *Citizen Potawatomi Nation*, a court in this district applied the "strong presumption" that the APA's standards govern absent a statute dictating a different standard of review in the context of tribal claims. 624 F. Supp. 2d at 108-09. The court rejected the plaintiff's contention "that the Court should engage in de novo review," because that statute "d[id] not provide a standard of review." *Id.* at 108. The court there noted the importance of the "strong presumption" to the "well ingrained characteristics of the administrative process" and "to avoid 'supplanting' the agency's role in the litigation." *Id.* (citations omitted). So too here. The 1994 Act contains no standard of review. 25 U.S.C. §§ 4011, 4044. Indeed, "*Chevron* deference does not disappear from the process of reviewing an agency's interpretation of . . . statutes it is trusted to administer for the benefit of the Indians, although that deference applies with muted effect." *Cobell XXII*, 573 F.3d 808, 812 (D.C. Cir. 2009). Thus, as in *Citizen Potawatomi*, the presumption of review under the APA's standards holds because "the judicial function [here] is fundamentally and exclusively an inquiry into the legality and reasonableness of the agency's action." 624 F. Supp. 2d at 109 (quoting *Doraiswamy v. Sec'y of Labor*, 555 F.2d 832, 840 (D.C. Cir. 1976)).

4. The Andersen Report was not arbitrary, capricious, or contrary to the 1994 Act.

The Andersen Report was not perfect. Interior officials repeatedly recognized as much. *See, e.g.*, SUF # 135. Indeed, Congress's temporal and financial limitations precluded perfection. Critically, the United States and its officials are not held to the standards of a private trustee. The question is whether Interior, through the Andersen Report, reasonably implemented any duty in the 1994 Act to provide a retrospective accounting. The 1994 Act does not mandate any particular form beyond the strictures of Section 4044, and the "choice of how the accounting would be conducted and whether certain accounting methods, such as statistical sampling or something else, would be appropriate," is "properly left in the hands of administrative agencies."

Cobell VI, 240 F.3d at 1103-04 (2001). "[M]uted *Chevron* deference" applies to Interior's determination both of the required accounting's scope and its methodology to account for the countervailing Indian canon of construction. *Cobell XXII*, 573 F.3d at 813.

Interior made difficult choices due to the Reconciliation Project's immensity that were "designed to provide reasonable assurance as to the accuracy of each Tribal Trust account balance." SUF # 118. This goal represents a reasonable reading and implementation of the 1994 Act. *Cobell XXII*, 573 F.3d at 813 (scope and methodology of accounting entitled to "muted *Chevron* deference"). After all, "[t]o say that the [Nation] ha[s] a right to an accounting . . . is to say that it must give some sense of where money has come from and gone to—not to say it must disprove through a title search or otherwise any breach of trust theory the [Nation] may later choose to posit." *Fletcher v. United States*, 730 F.3d 1206, 1215 (10th Cir. 2013).

The Nation faults the Andersen Report for not going back to the inception of the trust relationship between the Nation and the United States. But that is not what the 1994 Act required; rather, the Act took into account what was "possible" in the 17-month timeframe Congress allowed for Interior to complete its work. BIA's limitation to the time period of 1972 to 1992 was also reasonable based on its judgment that it would "focus on the time period that was deemed to likely be the most susceptible to problems or errors." SUF # 137. BIA determined that the pre-1972 period was less susceptible to accounting errors for three reasons.

First, prior to July 1, 1972, "Treasury maintained separate accounts for each Tribal Trust fund. These dual sets of accounts would generally make it easier to detect differences" in real time. SUF # 136. After that time, all Tribal Treasury accounts "were consolidated into a single Treasury account (approximately 1,000 accounts were combined)." *Id.* As such, reconciliation after July 1972 required checking "the sum of approximately 1,000 accounts on BIA books"

against "the one balance on the Treasury's books." *Id.* "[I]f the totals were different, it could be necessary to review the activity in all 1,000 accounts to determine which individual account caused the variance." *Id.* Interior's decision not to undertake that analysis within the limited time frame and funding that Congress provided was a reasonable one.

Second, following July 1, 1972, "tribal trust funds were under BIA accounting management" rather than Treasury. SUF # 137. As BIA noted, "[a]udit reports dated 1929 and 1951 are available documenting the work performed by the [GAO] on the trust fund, and Treasury performed periodic reconciliations of tribal accounts through 1973, when the function was handed over to BIA." SUF # 139. By contrast, after July 1972, "periodic trust account reconciliations were not routinely performed." SUF ## 137, 143. Thus, "July 1, 1972, was considered to be a logical starting point for the reconciliation." SUF # 138.

Third, the value of tribal trust funds was far higher from 1972 forward when compared with earlier periods. *See* SUF # 140; SUF # 141 ("During the 1980s, higher royalty payments primarily from higher oil and gas prices and proceeds from a number of water and land claims settlements significantly increased the balances in these accounts."). The number of transactions also significantly increased during this same time. SUF # 142.

The short time period provided for a historical accounting to tribes also loomed large in the decisions about the scope of the Reconciliation Project's work. In November 1994, Interior sought an extension of Section 4044's deadline because, "based on recent cost and time estimates provided by the contractor, [certain work could not] be completed until the first quarter of Fiscal Year 1997 [December 31, 1996]." SUF # 144. Interior faced a choice between decreasing the scope of the TRP "to be responsive to the dates set forth in the recently enacted legislation," or proceeding "as originally planned . . . and incur[ring] the additional costs of $5.3

million and delay[ing] the completion of tribal reconciliation into 1997." SUF # 145. Interior sought an extension until November 30, 1997 to provide the report required by Section 4044 to Congress. SUF # 144-45. Chairman McCain and Vice-Chairman Daniel Inouye denied Interior's request and recommended that Interior suspend certain work in order to "focus its efforts on meeting the reporting deadlines established in the [1994 Act]." SUF # 146. Congress' focus on having Interior complete the report required by Section 4044 by the statutorily-specified date makes Interior's decision to restrict its retrospective reconciliation to the 1972 to 1993 period reasonable. *See Cobell v. Salaza*r, 573 F.3d 808, 812 (D.C. Cir. 2009) (agency must provide the best accounting it can with finite resources, and its balancing is entitled to some deference).

Section 4044's 17-month timeframe for a reconciliation of *all* tribal accounts could not possibly be read to require an accounting back to the inception of the trust. Indeed, the Nation's own effort in 1924 to account back to the inception of the trust took almost *six years*, and that was just one tribe. SUF # 74. It is not reasonable to assume that Congress mandated that Interior, in just seventeen months, go back and account for every transaction involving every tribe since the inception of the trust relationship with each tribe. Rather, as the Act's plain language indicates, Interior was to do only what was "possible" during this period. 25 U.S.C. § 4044. Interior did just that, and its decisions should thus be upheld. Interior understood that not all records would be located in the timeframe and under the budget constraints it faced, so "[w]hat was anticipated was that [Interior] would do the best [it] could and then come up with a question as to how much – given a percentage or other statistical analysis, how much evidence there was of significant error or failure." Pl.'s SUF #104.

The other limitations in the Andersen Report also reflect reasoned judgment calls based on limited funding, availability of records, and the Congressional deadline. For example, the

Nation criticizes the Andersen Repot on the basis that it never reconciled BIA's ledgers to the underlying, money-originating documents (such as leases) to confirm that the amounts received were accurate. Pl.'s Br. 20. But this criticism is only accurate as far as it goes. "[D]ue to time constraints for completing the reconciliation," BIA scaled back this effort to review 692 leases with a higher dollar threshold, rather than the broader sample originally planned. Pl.'s Ex. 2, at 23 of 33; *see also* Pl.'s SUF # 108. The Nation's criticism also omits BIA's reasoning for limiting lease reviews to a sample. It was determined early on that BIA would not be able to locate all leases and other source documents needed to perform such a procedure. SUF ## 147-49. Indeed, the Special Trustee specifically concluded that poor quality of management systems and "the condition of the historical records effectively preclude" a full accounting. SUF # 150. The BIA is entitled to deference in balancing the cost, deadline, and available appropriations against the likely utility of a specific accounting procedure like the one the Nation complains is absent from the Reconciliation Project. *Cobell XXII*, 573 F.3d at 813.

It is also inaccurate to characterize the Reconciliation Project as not checking *any* source documentation. SUF #151-54. Receipts listed on a tribe's accounts were checked against deposit tickets, collection vouchers, journal vouchers, or other relevant collection documentation. Pl.'s SUF # 151. The Nation's statement of undisputed facts—if not its brief—recognizes this fact. Pl.'s SUF # 110. And non-investment disbursements posted to a tribal account were checked "as to amount, date and account number to U.S. Treasury . . . processed SF1166 documents . . ., Treasury reports . . . of processed SF1166's, journal vouchers and/or other relevant disbursement documentation" and against "the requests for withdrawal from the Tribe and/or the Bureau." SUF #152. Indeed, where available, the Reconciliation Project confirmed the existence of a "request for withdrawal with approval signature of both the tribe and governmental official."

SUF # 154. It was reasonable for Interior to conclude that these procedures would provide reasonable assurances of the accuracy of account balances and give "some sense of where money has come from and gone to." *Fletcher*, 730 F.3d at 1215. That is especially so given the unavailability of more detailed source documentation.

5. The Reconciliation Project was reasonable as applied to the Nation.

Beyond its generalized arguments that the Andersen Report did not examine source documents such as leases and did not account for non-monetary trust assets (addressed above), the Nation levels essentially one criticism that specifically references the Nation's trust accounts. The Nation argues that the Andersen Report's temporal scope ignores critical periods in the Nation's history and does not ensure that its accounts' starting balances are correct. Pl.'s Br. 20-24. It is true that the Andersen Report went back to July 1, 1972, rather than the inception of the Nation's trust accounts. But there are several factors that make this temporal scope reasonable as applied to the Nation.

First, Section 4044 requires an accounting to the "earliest possible date" in light of the time and funding available for the Reconciliation Project. 25 U.S.C. § 4044. As Interior determined, and as GAO confirmed, "[a]lthough [Interior] made a massive attempt to reconcile tribal accounts, missing records and systems limitations made a full reconciliation impossible." *See, e.g.*, Pl.'s SUF ## 61, 107; Pl.'s Ex. 2 at 15 of 33. Nor does Section 4011(a), if applicable, require an accounting for the allotment era. That Section applies only to funds that "were deposited after the Act of June 24, 1938," *Cobell VI*, 240 F.3d at 1103; § 4011(a). This reinforces that there is no duty to account for allotment-era revenues. Thus, the Nation's focus on the "critical time period[]" of allotment, from 1902 to 1920, necessarily fails. Pl.'s Br. 21.

Second, and equally important, the Nation has already received accountings for the allotment era. Pl.'s Br. 20. Indeed, the Nation prepared its own accounting based on a six-year

review of the United States' books and records, spanning the inception of the trust to 1926, by which time the Nation's trust funds had been distributed to its citizens and allotment had essentially concluded with respect to the Nation. SUF ## 73-85. The other accountings discussed elsewhere covering various pre-1972 time periods, including allotment, reinforce the reasonableness of the Andersen Report's temporal scope. *See supra* Background II.A.5.

Third, BIA's determination that earlier periods were less susceptible to errors than 1972 and later given Treasury and GAO involvement, holds true with respect to the Nation's accounts. *See* SUF # 135. Auditors with the Treasury Department, and later GAO, audited and settled the accounts of all Federal disbursing agents, including BIA officials that handled the Nation's trust funds. SUF ## 37-44. The process of "settling" accounts included preparing statements of account, including supporting documents that were then transmitted to officials in Washington, D.C. *Id.* These officials then examined and audited the statements by checking them against supporting documentation or requiring additional documentation when necessary. *Id.* Finally, the Treasury Department, once any exceptions were cleared, issued a certificate of settlement for the period addressed by the accounts. *Id.*

These procedures demonstrate that it was reasonable for the Andersen Report "to focus on the time period that was deemed to likely be the most susceptible to problems or errors." SUF #135. And these facts undermine the Nation's unproven claim that the balances as of 1972 could not be trusted. To the contrary, the existence of these procedures during "critical time periods" makes a later starting date all the more reasonable. Interior's annual reports during this period also reinforce the reasonableness of not covering the same ground in the Andersen Report as covered in these contemporaneous materials. *See* SUF # 52.

Fourth, and finally, the Nation's litigation history (not to mention the earlier accountings

provided) reinforces the reasonableness of the 1972 start date for the Andersen Report as applied to the Nation. The Nation's history of vigorously litigating its claims—including accounting claims, claims for mismanagement of trust funds, and claims relating to treaty payments and distribution of assets, before the Court of Claims and the ICC—demonstrate that additional accounting work for periods covered by these lawsuits (through 1946) is not required. SUF # 55-107. That the Nation deemed accounting efforts at that time sufficient to bring particularized mismanagement claims demonstrates the reasonableness of excluding these periods from the Andersen Report. *See Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013) (interpreting statue requiring "meaningful accounting" as requiring "an accounting from which [the beneficiary] can determine whether there has been a loss").

In sum, the Andersen Report's temporal scope was reasonable as to the Nation's trust accounts because the activity the Nation claims is critical to the accuracy of its trust fund balances is outside the scope of the 1994 Act's accounting duty. These same "critical time periods," Pl.'s Br. 20, including allotment, have already been accounted for. And because of the nature of their management, transactions in these earlier periods were less susceptible to errors than the periods included within the Andersen Report. Finally, because the Nation has already prosecuted its claims of loss or mismanagement of its funds in this earlier era, there is no need for an accounting back to that time. Thus, BIA reasonably concluded that it provided reasonable assurance as to the accuracy of the Nation's monetary trust accounts. The Andersen Report should thus be upheld.

V. The Nation's remaining requests for relief fail as a matter of law.

The Nation's motion and its Complaint both focus on compelling an accounting. Pl.'s Br. 1 (summarizing claims and stating that "[i]mbedded in each of these claims are allegations that the United States failed or refused to account for the Nation's Trust . . . and a demand for a

meaningful accounting"). But the Nation's Complaint also requests a laundry list of injunctive relief based on the assertion that "[n]one of the requirements set out in 25 U.S.C. § 162a have been or are adequately being implemented by Interior," Compl., ¶ 144.[19] The Complaint includes no facts to support this conclusion. *See generally* Compl. And most of the terms of the injunction the Nation requests in its complaint—beyond the request to compel an accounting—parrot the language of Section 162a(d), with one exception. In addition to requesting, for example, "adequate controls over receipts and disbursements" and "consistent, written policies and procedures," the Nation requests that the Court "[r]estore those Cherokee Trust Funds for which the United States cannot account." Compl., ¶¶ 154, 167. The Nation's effort to compel the items Congress listed in Section 162a(d), and its request for restoration of funds, fail as a matter of law.

Section 162a(d) enumerates certain "trust responsibilities," including "[p]roviding adequate systems for accounting," "preparing and supplying account holders with periodic statements of their account performance," and "establishing consistent, written policies and procedures for trust fund management and accounting." 162a(d)(1), (5), (6). However, the D.C. Circuit has indicated Section 162a(d) likely does not create enforceable trust duties. *See Cobell VI*, 240 F.3d at 1105 ("There may not literally be a duty to have such written policies and procedures"). And in interpreting Section 162a(d), the Supreme Court has indicated that it does not impose "the same common-law disclosure obligations as a private trustee." 564 U.S. at 184-85. In any event, the items listed in 162a(d) are necessarily programmatic in nature, and therefore cannot be compelled. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004); *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 21 (D.D.C. 2018).

[19] The Nation also contends this same failure violates the APA. Compl., ¶ 165. This claim fails for the same reasons discussed in this section.

The Nation's request for restoration of the trust with funds "for which the United States cannot account" also fails as a matter of law. *See* Compl., ¶¶ 154, 167. This request for relief appears to be a reference to the common-law concept of restitution. *See, e.g.*, 76 Am. Jur. 2d Trusts § 376, 336, 338. But, as with any other aspect of trust law, statutes must ground the right to such relief in the first instance. *Jicarilla*, 564 U.S. at 177; *El Paso*, 750 F.3d at 895. No statute the Nation cites evidences an intent to incorporate this concept. The Nation's claim for restoration of its trust thus fails as a matter of law. To the extent the Nation discovers alleged mismanagement based on any accounting that the Nation believes entitles it to monetary relief, it may pursue those claims in the Court of Federal Claims. *Mitchell II*, 463 U.S. at 216-17 (Indian Tucker Act confers jurisdiction in the Court of Claims for claims for money damages caused by mismanagement based on statutory trust duties).

CONCLUSION

The Nation has failed to identify any enforceable accounting duty that the United States owes but failed to discharge. Instead, the undisputed facts establish that the Nation received accountings in satisfaction of the 1893 Act and the 1994 Act as well as numerous other accountings and statements. In addition, any claims the Nation wishes to bring for further accountings are barred by applicable statutes of limitations and other procedural bars, including any claims related to the Arthur Andersen report. And even if the Nation's claims concerning the Andersen Report were not barred, the Andersen Report was a reasonable implementation of the 1994 Act's retrospective accounting duty. The Nation's motion for partial summary judgment should be denied, and summary judgment should be entered in favor of Federal Defendants.

Respectfully submitted,

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