**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**THE CHEROKEE NATION'S COMBINED REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES**

**RULES**



**SECONDARY SOURCES**

## INTRODUCTION

Through its Motion for Partial Summary Judgment (ECF No. 88[1]) ("Motion"), the Cherokee Nation ("Nation") sought to streamline this litigation based on the repeated assertions by the Defendants ("United States") to the Court that the Arthur Andersen Report and the attendant Administrative Record wholly satisfied the United States' obligation to provide an accounting of the Nation's assets.

Instead, the United States' Response and Cross Motion for Summary Judgment (ECF No. 96) ("Cross Motion") runs away from its litigation position in this case, and in so doing adopts arguments diametrically opposed to the United States' *own* position in numerous other tribal accounting cases. These new arguments—many made for the first time in the Cross Motion and without the benefit of full discovery—do little more than underscore the inadequacy of the Arthur Andersen Report and the United States' failure to provide a meaningful accounting. Accordingly, the Nation respectfully requests the Court grant the Nation's Motion and, in so doing, provide the final nail in the coffin of the United States' oft-repeated assertion that the Arthur Andersen Report constitutes an accounting of tribal assets. As detailed below, the new arguments raised by the United States should be denied because they are not supported in the law or because disputes of material facts exist precluding summary judgment.

## ARGUMENT AND AUTHORITIES

### I. The Nation's Motion For Summary Judgment Regarding The Arthur Andersen Report Should Be Granted.

The United States does not dispute the material facts set forth in the Nation's Motion. Perhaps most importantly, the United States does not dispute that "the Arthur Andersen Reports

[1] All page citations refer to the pagination generated by the Court's CM/ECF system.

were a 'less than complete accounting of the state of the Tribal trust funds.'" Pl. SUF#143 (quoting ECF No. 88-21).[2] Nor does the United States dispute that after the Arthur Andersen Report was issued, "BIA . . . stated that the TRP 'provides a less than complete accounting of the state of the Tribal trust funds," Pl. SUF#142, and "the Secretary of the Interior stated that the United States had not yet 'conduct[ed] a complete audit or provided the level of assurance to account holders that was expected," Pl. SUF#141.

There is likewise no dispute about the specific shortcomings of the Arthur Andersen Report that prevent it from qualifying as an "accounting." The United States does not dispute:

- Arthur Andersen started with BIA's general ledger, Pl. SUF#110, and did not review it for completeness, Pl. SUF#111, 115, even though the general ledger "showed substantial and continual imbalances," Pl. SUF#85, was "considered unreliable to accurately account for the trust funds," Pl. SUF##114, 63, and BIA's account balances and "lack[ed] credibility," Pl. SUF#90. *See also* Pl. SUF##127 & 79.
- The Arthur Andersen Reports issued to tribes did not provide "reasonable assurance that trust fund account balances are accurate." Pl. SUF##139, 106, 107.
- The Arthur Andersen Report did not review *any* of the Nation's leases, Pl. SUF#133, and—for all tribes—did "not provide adequate assurance that all revenues have been billed, collected, and properly recorded and distributed," Pl. SUF#136, or "confirm whether or not the amounts that are due to the Indians are the right amounts due and whether they were, in fact, put into the right accounts," Pl. SUF#97, even though those

[2] As used herein, "Pl. SUF" refers to the Nation's Statement of Undisputed Facts filed as ECF No. 88-2; "U.S. SUF" refers to the United States' Statement of Undisputed Facts filed as ECF No. 96-4; "Response to U.S. SUF" refers to the Nation's response to U.S. SUF filed as ECF No. 99-1; and Pl. Exh. refers to the Nation's exhibits filed as ECF Nos. 99-3 through 99-14. The Nation's exhibits from its Motion and Opening Brief are referred to by their ECF designation.

revenues are "vital to Indian economic development," Pl. SUF#137, there were known deficiencies in the United States' lease management, Pl. SUF#131, and, by 1996, the United States did not even "know the total number of leases it [was] responsible for managing," Pl. SUF#103, or the total revenue that should be generated from them, Pl. SUF#134, 102.

- Arthur Andersen did not review *any* transactions beyond fiscal years 1972-1992. Pl. SUF##98, 112.

The Arthur Andersen Report also suffered from additional limitations, *see* Response to U.S. SUF##108-154; Pl. Exh. 30; Pl. Exh. 33.[3]

Although the material facts are undisputed, the United States' arguments against granting the Nation's Motion suffer from at least five fatal flaws: (A) the United States has already conceded that the Arthur Andersen Report was never meant to satisfy the United States' accounting responsibility under the American Indian Trust Fund Management Reform Act of 1994, Pub. L. 103-412, 108 Stat. 4239 ("1994 Act"), or otherwise (and that it did not, in fact, satisfy that obligation); (B) the United States applies the wrong legal standard to the Nation's claims; (C) the United States misinterprets the source and scope of its accounting responsibilities as a matter of law; (D) the United States' excuses for failing to provide a complete accounting are unpersuasive and not relevant as a matter of law; and (E) the United States cannot avoid the inadequacy of the Arthur Andersen Report by asserting that it repudiated its trust obligations to one of the largest Indian Tribes in the country *sub silentio*, fabricating a defense out of whole cloth.

[3] The Declaration of James Parris, CPA (Pl. Exh. 33) is being filed to explain certain aspects of the Trust Reconciliation Project and resulting Arthur Andersen Report in response to the United States' Cross Motion. There are no disputes of material facts supporting the Nation's Motion.

### A. The Arthur Andersen Report Was Never Meant To Be An Accounting, Let Alone An Accounting That Satisfied The 1994 Act.

The United States attempts to recast the Nation's claims pled in this action as a challenge to the sufficiency of agency action based on its argument that the Arthur Andersen "Report was Interior's reasonable implementation of any historical accounting duty under the 1994 Act." ECF No. 97 at 58. As an initial matter, this argument is merely an attempt to repackage for a third time the "final agency action" argument this Court has rejected twice already:

> The Government says that when an agency has acted, Section 706(1) and its failure-to-act case law do not apply. But the Court has already decided this question. As the Court said when it denied the Government's Motion to Dismiss, the Nation's Complaint alleges that the Government has a statutory obligation to act and has failed to so act.

ECF No. 85 at 2 (internal quotations and citations omitted); ECF No. 42 at 5. The United States acknowledges the prior rejections of its argument, but nonetheless urges the Court to reconsider it now at the summary judgment stage. The United States' request fails to identify any new factual issues that differ from the allegations previously considered by the Court. While the United States claims that existence of the Arthur Andersen Report and receipt of it by the Nation are facts the Court can now consider, ECF No. 97 at 58, those facts are no different than the allegations before the Court the two prior times it rejected this argument. *See, e.g.*, ECF No. 2-1 at 41 (alleging that the Cherokee Nation received the Arthur Andersen Report).

In fact, submissions by the United States in another case before *this* Court show that the Arthur Andersen Report was never meant to be an accounting, nor was it meant to constitute final agency action. In a filing made in 37 cases involving claims by 54 tribes that they had not received a full and complete accounting (including allegations that the Arthur Andersen Report received by each tribe was not a full and complete accounting), the United States filed a motion seeking a remand to prepare a proposed accounting *plan*:

> In other words, Interior made clear to Congress in 1997 that further accounting efforts were possible and also expressed that it would pursue such accounting where appropriate in order to address the individual circumstances of each tribe.

United States' Memorandum in Support of Motion to Remand (Aug. 11, 2007) 19 (filed at ECF No. 98-1 as Attachment 4); *see also id.* at 24-27.

> The issues Plaintiffs demand to litigate now should be addressed, if ever, following issuance of any final agency action under the tribal trust accounting plan, with a supporting administrative record, upon which Plaintiffs can base any subsequent challenge and the Court can rely to determine the merits of Plaintiffs' challenge.

United States' Reply Memorandum in Support of Motion to Remand (Nov. 21, 2007) 25 (filed at ECF No. 99-1 as Attachment 5).

These submissions were premised in part on the Declaration of Ross Swimmer, during his tenure as the U.S. Special Trustee for American Indians at the Department of the Interior ("Interior"). *See* Pl. Exh. 31. Mr. Swimmer declared, *inter alia*: that after submission of the Arthur Andersen Report to the individual Tribes, Interior continued its reconciliation work that it had been unable to complete, *id.* ¶ 9; that Interior was preparing a proposed accounting plan that applied to *all tribes*, *id.* ¶¶ 2, 17, 22; and that he was "committed to ensuring that Interior provides tribes with historical accountings in accordance with its understandings and interpretations of applicable law," *id.* ¶ 20. This is completely at odds with the United States' current litigation position, particularly since no intervening statutory or factual changes occurred between that statement and this lawsuit. Nor is there anything in the Administrative Record that explains the reasoning for such a policy shift by Interior. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). Indeed, Mr. Swimmer has offered a declaration in this case, pointing out that:

> Interior did not consider the Trust Reconciliation Project to be an accounting and did not hold the Trust Reconciliation Project out to Tribes as an accounting. Rather,

> Interior recognized that the Trust Reconciliation Project - or some part thereof - might be incorporated in an historical accounting.

*See* Pl. Exh. 30 (Swimmer Declaration) ¶ 25.

To support its argument, the United States claims that the "Andersen Report was designed to satisfy '[t]he Congressional mandate for . . . an accounting to each Tribe for each of their Trust accounts.'" ECF No. 97 at 58 (quoting ECF No. 88-1 at 6). Yet, a cursory glance at the source document makes clear that the selectively cited statement is merely a recitation of Arthur Andersen's view of the Congressional requirements, stating in full: "The Congressional mandate for the Bureau Tribal Trust Funds Reconciliation Project (Reconciliation Project) requires an accounting to each Tribe for each of their Trust accounts." ECF No. 88-4 at 6. Notably, nowhere does Arthur Andersen claim that its Report *is intended to satisfy* that recited Congressional mandate, or the 1994 Act. Indeed, in the *very same paragraph* it acknowledges that "not all records would be available for a full accounting," and later states that "[t]his report is solely for the information of the Bureau to assist the Bureau in determining whether the objective described in the second paragraph of this report has been met and is not to be used, referred to or distributed for any other purpose." ECF No. 88-4 at 6, 9; *see also* Pl. Exh. 30 ¶¶ 23, 25, 27; Pl. Exh. 33 ¶¶ 24, 28, 30, 69. The Court should reject the United States' attempt to cast the Arthur Andersen Report as satisfying a purpose that Arthur Andersen itself expressly disclaimed.

Considering additional, undisputed facts only further buttresses the Court's prior rejections of the Arthur Andersen Report as an accounting. One must only look to the timeline of events to see that the United States' argument contradicts the facts. First, Arthur Andersen was hired to work on the trust reconciliation report in May 1991, approximately three years *prior* to passage of the 1994 Act. Pl. SUF #85. This alone establishes that the Arthur Andersen Report was never meant to be "Interior's reasonable implementation of any historical accounting duty under the

1994 Act." ECF No. 97 at 58.[4] Second, it is undisputed that Arthur Andersen's reconciliation work was limited to a 20-year period, Pl. SUF #98, and did not include a review of the starting balances, Pl. SUF #112. Third, the Arthur Andersen Report was acknowledged to be "an interim report" that did not even include the statutorily-required reconciled balances. Pl. SUF #92, #99; *see also* ECF No. 96-81 at 2

The United States does not dispute—and, indeed *cannot dispute*—that the aim of the Arthur Andersen Report was not to provide an accounting, but rather to measure "how much evidence there was of significant error or failure." Pl. SUF #104; *see also* ECF No. 88-14 at 41. In other words, the Arthur Andersen Report was intended to be a *starting point*, not an ending point. *See* Pl. Exh. 33 ¶ 28. *See also* Pl. Exh. 30 ¶¶ 23, 28.

Nor do the cases relied upon by the United States aid its argument that this is not a failure to act case under the APA. For example, in *Ecology Center, Inc. v. U.S. Forest Service*, the Ninth Circuit agreed with the agency's argument that final agency action had not yet occurred because the challenged actions—failure to perform certain day-to-day monitoring in 1988 and 1993—were not the type of agency action that is subject to judicial review. 192 F.3d 922, 924-26 (9th Cir. 1999). The plaintiffs also argued that the monitoring they requested should be compelled because it was a mandatory responsibility that the agency was failing to perform. *Id.* at 926. The Ninth Circuit determined this was not a "genuine" failure to act claim, since the agency by-and-large conducted the required monitoring activities, which were subservient to the final agency action to come. *Id.* at 926. Here, in contrast, the Nation is not challenging an interim action on the path to

[4] This is not the first time that the United States has tried to pass off its work as something it was not. For example, the BIA repeatedly tried to pass off its arrangement with Arthur Andersen as a full audit as required by law, until Arthur Andersen confirmed to a Congressional subcommittee that it was not. U.S. SUF #73.

the United States taking final agency action (providing the Nation with a meaningful accounting). Instead, the Nation is seeking to compel an accounting because the United States refuses to provide it.

*WildEarth Guardians v. Chao*, is also no help to the United States. In that case, the district court engaged in a lengthy discussion on the interplay between final agency action under Section 706(2), failure to act challenges under Section 706(1), and programmatic attacks under *Lujan*. 454 F. Supp. 3d 944, 947-56 (D. Mont. 2020). The crux of the holding was that a plaintiff cannot bring a programmatic attack disguised as a failure-to-act claim. *Id.* at 955. Here, in contrast, the Nation seeks an accounting that has been unlawfully withheld, just like in numerous other trust accounting claims that have been allowed. *See, e.g.*, *Cobell v. Norton*, 240 F.3d 1081, 1095-97 (D.C. Cir. 2001) ("*Cobell VI*") (holding that Indian trust beneficiaries have a valid claim under Section 706 of the APA in seeking an accounting when the United States has not provided one pursuant to 25 U.S.C. § 4011(a)). And, as stated above, the Court has already twice rejected the United States' final agency action arguments. ECF No. 42 at 5 *and* ECF No. 85 at 2.

### B. The United States Applies The Wrong Standard Of Review To The Arthur Andersen Report.

The United States erroneously asserts the Court should review the Arthur Andersen Report under an arbitrary and capricious standard of review. That standard of review could only apply if the Nation's claims challenged the sufficiency and reasonableness of the Report under the Administrative Procedures Act. As the Court has already recognized, this is not the claim the Nation has pled. *See* ECF No. 85 at 2-3. It is the *United States* that has put the Arthur Andersen Report forward as a reason why the Nation's demands for an accounting are moot; effectively as an affirmative defense to the Nation's claims and as a reason to avoid discovery. The Nation filed its Motion to resolve this wholly unsupported claim. In light of the overwhelming evidence

supporting the Nation's Motion, the United States constructs—with little success—legal arguments to try to avoid too close of an inspection of the Arthur Andersen Report.

Specifically, the United States argues, *post hoc*, that the limitations of the Arthur Andersen Report—some of which are discussed in Section II(D) below—are entitled to some sort of *Chevron* deference by the Court. Whenever "agency action is based on the agency's interpretation of a statute it administers, the court's review is governed by the two-step *Chevron* doctrine." *Native Vill. Of Eklutna v. U.S. Dep't of the Interior*, 2021 WL 4306110 at *3 (D.D.C. Sept. 22, 2021). For the first step, the court determines "whether Congress has directly spoken on the precise question at issue" or has delegated regulatory authority to "elucidate a specific provision of the statute by regulation." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843-44 (1984). If Congress has not spoken on the issue, the court looks to see if the agency's interpretation "is based on a permissible construction of the statute" or is "manifestly contrary to the statute." *Id*. at 843, 844.

In cases involving the United States' trust responsibility to Indian tribes, "*Chevron* deference can be 'trumped by the requirement that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009) ("*Cobell XXII*") (quoting *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 89 (D.D.C. 2008) ("*Cobell XX*")) (one of the so-called "Indian Canons of Construction"). In such instances, *Chevron* deference does not disappear from the process" but merely "applies with muted effect." *Id*. It must be noted, though, that "the Indians' benefit remains paramount." *Id*. In the words of the D.C. Circuit:

> This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of Indians arises not from the ordinary exegesis, but from principles of equitable obligations and normative rules of behavior,

> applicable to the trust relationship between the United States and the Native American people.

*Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008) (internal quotation marks and citations omitted) (quoting *Cobell VI*, 240 F.3d at 1101). Generally speaking, *Chevron* deference only survives the application of the Indian Canons of Construction when the agency's interpretation "does not run against any Indian tribe [and] actually advances the trust relationship between the United States and the Native American people." *Koi Nation of N. Cal. v. Dep't of Interior*, 361 F. Supp. 3d 14, 49-50 (D.D.C. 2019) (quoting *Cal. Valley Miwok*, 515 F.3d at 1266 n.7) (alteration in original).

The United States' argument, and particularly its treatment of 25 U.S.C. § 4044, runs afoul of that rule. Section 4044 of the 1994 Act provides that Interior was required to submit a report to Congress including attestations by trust account holders either that Interior "provided the account holder with as full and complete accounting as possible of the account holder's fund to the earliest possible date," or that the account holder disputed the balance. 25 U.S.C. § 4044(2). Thus, Congress specifically reserved to the *account holder* the determination—at least in the first instance—of whether the accounting is as full and complete as possible and whether it goes back to the earliest possible date. Congress's plain language in section 4044 contradicts the United States' position that Interior's decision as to when to cut off the reconciliation should be given deference. Even if Interior shares some authority to delineate the earliest possible date, the United States' argument goes too far, asking the Court to find that Interior was right to cut off the accounting to a later date simply because it might have been difficult to go back further. The section clearly states that if it was *possible* for Interior to provide a more full and complete accounting, it was required to do so.

The United States' reliance on *Cobell XXII* and *Fletcher* to support its position—that the Court should defer to Interior's decision that the meager information provided in the Arthur Andersen Report is all the Nation is entitled to—is misplaced. In each case, the courts found the account holders had an absolute right to an accounting, and that the United States had not provided one. Only after finding that the United States breached its trust obligation did the courts look to considerations, including, but not limited to, the burden on the parties, in exercising their equitable discretion to craft the appropriate remedy.

In *Cobell XXII*, the D.C. Circuit reviewed this Court's decision that an accounting was impossible as a matter of law "because the government could not 'achieve an accounting that passes muster as a trust accounting' given inadequate present and (likely) future funding from Congress." *Cobell XXII*, 573 F.3d at 810 (quoting *Cobell XX*, 532 F. Supp. 2d 37, 102-03 n.19 (D.D.C. 2008)). The Court of Appeals agreed that the 1994 Act, as informed by precedent and common law, requires "a full accounting" that the beneficiaries clearly were entitled to under law, *id.*at 810-13, but advised that a determination that no accounting would ever be provided was premature, *id*. at 813. Instead, the Court of Appeals instructed that the Court "sitting in equity" could craft an order "that efficiently uses limited government resources" to achieve the accounting's goals, *id.* at 810, and "do everything it can to ensure that Interior provides [the beneficiaries] an equitable accounting," *id.* at 813.

The Tenth Circuit, in *Fletcher v. United States*, followed the same reasoning. 730 F.3d 1206 (10th Cir. 2013). First the court held that the United States owed an accounting to the plaintiff Indians and found that such an accounting had never been provided. *Id*. at 1209-13. Then, the Tenth Circuit advised that "the exact contours of the accounting have to be decided by the district court on remand with the assistance of the parties." *Id.* at 1214. But it also noted that "Congress

chose to reference a traditional equitable remedy from trust law. And in a traditional equitable accounting, the trial court possesses considerable discretion 'to mould' the nature and scope of the accounting 'to the necessities of the particular case.'" *Id.* (quoting *Cobell XXII*, 573 F.3d at 813).

The through-points in both *Cobell XXII* and *Fletcher* are (1) that the United States owes an unfaltering duty to the Nation to account for its Trust and (2) if the Court concludes that such accounting has not been provided, then it should exercise equitable discretion to craft the proper remedy. Indeed, after ruling on the United States' duty and breach, the Court may then draw on equitable considerations to craft a remedy. But to compromise the accounting duty in ruling on the United States' liability in the first instance would be error.

### C. The United States Misinterprets The Source And Scope Of Its Accounting Duty.

#### *i. The 1994 Act Did Not Create The United States' Duty To Account.*

The United States' also tries to limit its accounting duty by focusing myopically on 25 U.S.C. § 4044 as the sole "source of [Interior's] retrospective accounting duty to tribes in the 1994 Act." ECF No. 96-1 at 65. This argument has been rejected by the Court at least three times already in this case. First, in rejecting the United States' motion to dismiss, the Court found that the Nation's reliance on 25 U.S.C. §§ 162a and 4011 to demand an accounting was well placed. ECF No. 42 at 4-5 ("*Sisseton* and *Cobell VI* are on all fours, even analyzing two of the same statutory sections—25 U.S.C. §§ 162a, 4011—that the Nation invokes."). Next, in denying the United States' motion to dismiss under Rule 12(c), the Court again advised that because the Nation "rooted this claim in enacted federal law" (a point that the United States appears to concede), common law plays a role in defining the scope and proper implementation of the fiduciary duty to account. ECF No. 68 at 9; ECF No. 70 (adopting the Report and Recommendation); *see also* ECF No. 68 at 7 n.1 (describing the Court's prior ruling on this issue). Third, in denying the United

States' motion for a protective order to shield it from any and all discovery in this case, the Court again stated that "the D.C. Circuit has already held that the trust beneficiaries, including tribes, 'are entitled to an accounting under [§ 4011].'" ECF No. 85 at 4 (McFadden, J.) (quoting *Cobell XXII*, 573 F.3d at 813) (also finding "persuasive the Tenth Circuit's analysis in *Fletcher*, 730 F.3d at 1209-11, which held a tribe has a private right of action under 25 U.S.C. § 4011."). The United States' attempt to circumscribe its trust accounting duty as arising solely under section 4044 must be rejected (again).

Regardless, and as a matter of completeness, it is critical to recognize that the United States' duty to account was not created with the 1994 Act. The D.C. Circuit has found that the United States had a pre-existing duty, established prior to the 1994 Act, to account to Indians and Indian tribes for the funds and assets the United States holds in trust:

> [T]he 1994 Act does not *create* 'trust responsibilities of the United States.' Rather it lists some of the means through which the Secretary shall discharge these preexisting duties. For instance, the first listed duty is 'providing adequate systems for accounting for and reporting trust fund balances.' 25 U.S.C. § 162a(d)(1). This would not be necessary to discharge the government's trust responsibilities were not the government *already* obliged to account for and report trust fund balances.

*Cobell VI*, 240 F.3d at 1101 (emphasis in original). The D.C. Circuit affirmatively stated that "the 1994 Act is not the source of plaintiffs' rights." *Id.* at 1096. This Court has similarly recognized that, "[t]he 1994 Act codifies certain *preexisting* duties that the Secretary of the Interior, as a trustee-delegate of the United States, owes both to individual Indian and tribal trust beneficiaries." *Assiniboine and Sioux Tribe of the Fort Peck Indian Rsrv. v. Norton*, 211 F. Supp. 2d 157, 158 (D.D.C. 2002) (emphasis added). This Circuit's holdings mirror the United States' interpretation in 1993—again prior to the 1994 Act—that "[o]ne of the most basic trustee responsibilities of the Federal Government to the Indian people of the United States is to effectively manage and account for their trust funds." Pl. Exh. 37 at AR-010541. Indeed, the United States acknowledged its

"fiduciary responsibility dates back more than 150 years when the first trust funds were established through treaties between the United States and individual Indian tribes." *Id*. at AR-010546.

This makes sense because the specific duty to account "inheres in the trust relationship itself." *Cobell VI*, 240 F.3d at 1103. As now-Justice Gorsuch explained in *Fletcher*, courts "normally assume Congress has legislated against the background of traditional 'adjudicatory principles'—including traditional adjudicatory principles found in trust law." *Fletcher*, 730 F.3d at 1208 (relying on *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S. Ct. 2166 (1991)). "The obligation of a trustee to provide an accounting is a fundamental principle governing the subject of trust administration." *White Mountain Apache Tribe of Ariz. v. United States*, 26 Cl. Ct. 446, 448 (1992) (citing G.T. Bogert, *Trusts* § 141, at 494 (6th ed. 1987)).[5] Thus, "when Congress says the government may be called to account, we have some reason to think it means to allow the relevant Native American beneficiaries to sue for an accounting, *just as traditional trust beneficiaries are permitted to do*." *Fletcher*, 730 F.3d at 1210 (emphasis added). And, in fact, even before it passed the 1994 Act, Congress recognized a trust obligation to account. The United States does not dispute that in 1992, Congress called the "duty to make a full accounting of the property and funds held in trust" a "fundamental fiduciary responsibility of the

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[5] Congress provided that the accounting must be "meaningful." The phrase "meaningful accounting" is a term of art. It means something more than "simple notice." *See Chippewa Cree Tribe. v. United States.*, 69 Fed. Cl. 639, 664 (2006). "[T]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." *See* Restatement (3d) of Trusts § 173. At a minimum, it means "information sufficient to alert the beneficiar[ies] to possible losses." *Chippewa Cree*, 69 Fed. Cl. at 664; *see also Cobell XX*, 532 F. Supp. 2d at 90 (ruling that the Department of Interior's proposed plan to account to individual Indians would "not contain sufficient information for the beneficiary readily to ascertain whether the trust has been faithfully carried out.").

It also "requires the locating and retention of records, operational computer systems, and adequate staffing. . . . Anything less would produce an inadequate accounting." *Cobell VI*¸ 240 F.3d at 1103 (internal citations omitted).

government," Pl. SUF#68, and recognized that the "government's obligation to account for Indian trust funds requires it to affirmatively establish that it has properly discharged its trust," Pl. SUF#69. *See also* Pl. SUF##67, 82. In crafting the 1994 Act, Congress began with Title 1—"*Recognition* of Trust Responsibility." Pub. L. 103-412 (emphasis added).

Ultimately, the United States refuses to acknowledge the proper source and scope of its trust obligation. The United States' brief is silent on any theory as to how the Arthur Andersen Report meets the minimum elements of an accounting that are clearly set out in the Nation's opening brief and are supported by statutes, precedent, and common law: a statement of the full contents of the trust, an accurate starting balance, and reconciled transactions. *See* ECF No. 88-1 at 21-23.[6] The Court should grant the Nation's Motion.

***ii. "Trust Funds" Include Both Monies And Assets.***

The United States also attempts to avoid its accounting responsibilities by arguing that it has no duty to account for non-monetary assets because they are not liquid monetary funds. *See* ECF No. 97 at 68-69. Starting simply, Black's Law Dictionary has defined "trust fund" as follows:

> Money ***or property*** set aside as a trust for the benefit of another held by a trustee.
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> ***
>
> A fund held by a trustee for the specific purposes of the trust; in a more general sense, a fund which, legally or equitably, is subject to be devoted to a particular purpose and cannot or should not be diverted therefrom. In this sense, it is often said that the ***assets*** of a corporation are a 'trust fund' for payment of its debts.

Black's Law Dictionary at 1515 (6th ed. 1990) (emphasis added); Black's Law Dictionary at 1683 (4th ed. 1951). Under this black letter and accepted definition, "trust funds" are not limited to

[6] Although the United States asserts that "as explained *infra*, the Andersen Report satisfies both Section 4011 and Section 4044," ECF No. 97 at 67-68, that promised explanation never comes.

money, but also include property and other assets. Congress appears to agree. *See* Pl. SUF#68 ("The most fundamental fiduciary responsibility of the government, and the Bureau, is the duty to make a full accounting of the *property and funds* held in trust . . . ." (emphasis added)).

In the seminal breach of trust case, *Cobell v. Norton*, this Court held that non-monetary trust assets in the form of allotted lands were themselves the "trust corpus" or "trust assets" or "trust property" that were held in trust by the United States on behalf of individual Indians and were an indispensable element of the trust. 283 F. Supp. 2d 66, 176-77 (D.D.C. 2003) ("*Cobell X*"), *partially vacated on other grounds*, 392 F.3d 461 (D.C. Cir. 2004). Further, the 1994 Act itself provides that "The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) . . . Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands." 25 U.S.C. § 162a(d)(8).

Other courts agree. For example, in *Chickasaw Nation v. Department of Interior*, the Western District of Oklahoma found that the "duty to account encompasses trust assets, including non-monetary assets." 120 F. Supp. 3d 1190, 1225 (W.D. Okla. 2014). In *Otoe-Missouria Tribe v. Kempthorne*, the Court was clear in the existence of a duty to account for non-monetary assets:

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

2008 WL 5205191, at *5 (W.D. Okla. Dec. 10, 2008) (holding that non-monetary trust assets are properly covered by the accounting requirements of the 1994 Act), *abrogated on other grounds by Gilmore v. Weatherford*, 694 F.3d 1160 (10th Cir. 2012). The court explained that the United States had "offered no argument of law or fact establishing that the different nature of the corpus affects Defendants' obligations," and the court found none. *Id.* In so holding, the court found that

non-monetary trust assets properly are covered by the accounting requirements of the 1994 Act. *Id*.

Likewise, in *Navajo Tribe of Indians v. United States*, the Navajo Nation filed an accounting claim, disputed an accounting report, and argued that the United States failed to account for certain statutorily mandated sales of fire-damaged timber on tribal lands. 624 F.2d 981, 988 (Ct. Cl. 1980). The Court of Claims held that the United States had a duty "to account for its management of plaintiff's timber, including an accounting for proceeds of sales of fire-damaged timber." *Id.* at 989.

Finally, the United States itself has admitted it should account for trust *assets*. In 2007, the United States submitted a declaration from Ross Swimmer, the then-Special Trustee for American Indians, in more than thirty Indian trust mismanagement actions before this Court. *See* Pl. Exh. 31. Mr. Swimmer testified that the United States would "conduct and incorporate into its accountings a review and accounting of non-monetary assets, such as real property and natural resources," *id*. ¶ 22, and that it "will review and address the tribes' non-monetary trust asset accounting claims," *id*. ¶ 26.

The United States has also relied upon an asset-inclusive definition of trust funds in reports to Congress. In 1994, the General Accounting Office ("GAO") reported to Congress concerning deficiencies in Interior's management of Indian trust funds, observing that "Interior has numerous, long standing *trust fund* financial management problems" including "*inadequate management of Indian land and resources* . . . ." ECF No. 88-15 at 8 (emphasis added). Adopting the United States' argument that it is only required to account for monetary assets would contradict precedent of this Court and Circuit, would negate Congress's understanding and intent, and would be inconsistent with Interior and GAO's prior statements about the scope of the United States' duty.

### D. The Arthur Andersen Report Is Not A Meaningful Accounting Of The Nation's Trust.

In response to the Nation's presentation of the discrete question of whether the Arthur Andersen Report is an accounting, the United States tellingly points to anything and everything *except* the Arthur Andersen Report. The United States particularly posits that Interior's decision to cut the Arthur Andersen reconciliation short was "reasonable" based, in part, on other "accountings . . . covering various pre-1972 time periods" that included certain components of the Nation's Trust. ECF No. 97 at 77, 78. But, this new litigation position is in direct opposition to the sworn statement from an official at the Office of Historical Trust Accounting that the Administrative Record included "all documents the Department of the Interior directly and indirectly relied upon in providing *all* accountings to Plaintiff required by law during the applicable time frame," ECF No. 65-2 ¶ 2 (emphasis added), and which contains no reference to those earlier efforts. As such, the prior work could not have formed the basis for Interior's decision. The United States' position is nothing more than *post hoc* rationalization that is entitled to no deference. *See Kisor v. Wilkie*, --- U.S. ---, 139 S. Ct. 2400, 2417 (2019) ("a court should decline to defer to a merely convenient litigating position or post hoc rationalization advanced to defend past agency action against attack.") (internal quotations and citations omitted).

The United States' argument that it only had seventeen months to prepare the reconciliation is misleading and should be rejected. Congress first asked Interior to reconcile the accounts in 1987. Pl. SUF#72; Pl. Exh. 33 ¶ 21. Interior hired Arthur Andersen in response, at first to reconcile the funds for fiscal years 1988 and 1989, *see* Pl. SUF#73, and then extended the contract to Arthur Andersen to complete the reconciliation for fiscal years 1972-1992 in 1991, Pl. SUF#86. Pl. Exh. 33 ¶¶ 22. It was only after Congress ran out of patience with Interior's recalcitrance in providing such reconciliations that it passed the 1994 Act. *See, e.g.*, Pl. SUF##80, 81, 84. The

United States' argument that the 1994 Act "took into account what was 'possible' in the 17-month timeframe Congress allowed for Interior to complete its work," ECF No. 96-1 at 72, is therefore wrong and cannot be credited.

In addition to the prior efforts made by the parties to account for portions of the Nation's Trust, the United States puts forward several excuses as to why it could not complete a full "reconciliation for *all* tribal accounts" by the deadline set by Congress. ECF No. 97 at 74 (emphasis original). *See also* Pl. Exh. 30 ¶ 24 (the Trust Reconciliation Project used a "one-size-fits-all" procedure). Again, the United States' argument fails to address the real question at issue—whether the Arthur Andersen Report is an accounting of the Nation's trust resources. As shown elsewhere, there are unique aspects of the United States' relationship with the Nation that were not considered in limiting the reconciliation as applied to the Nation, *see infra* at Section II(A), and the United States has acknowledged that a meaningful accounting should take into consideration the unique aspects of each tribe, *see* Pl. Exh. 31 ¶¶ 22, 24.

It is clear that the United States' reliance on the earlier efforts is nothing more than an attempt to deflect examination of the Arthur Andersen Report itself. The United States does not seriously challenge the Nation's position that the Arthur Andersen Report does not constitute an accounting (nor could it). The United States admits that the "aim of the Arthur Andersen Report was to determine" whether significant errors had been made in keeping track of tribal trust accounts. Pl. SUF #104, ECF No. 88-2 at 19. There can be no doubt that significant errors were exposed. But there also can be no doubt that the product of that effort was woefully short of an accounting.

### E. The Arthur Andersen Report Did Not Begin a Statute of Limitations Running on the Nation's Accounting Claims.

The Court has already held that the statute of limitations on the Nation's accounting claims begins to run on repudiation of the trust. ECF No. 42 at 6. While a definitive ruling on the United States' statute of limitations defense may have been premature at the time the Court ruled on the United States' motion to dismiss, the United States has cited no new facts that would justify departing from the Court's prior holding. ECF No. 97 at 56-64. Instead, the United States seeks to rehash its previously rejected Section 2401(a) argument. ECF No. 97 at 58-61. This well-worn ground need not be covered again. *See* ECF No. 39 at 37-42 (responding to this argument at the motion to dismiss stage).

The United States' Section 2401(a) argument is premised—yet again—on its argument that "[t]he Andersen Report would certainly qualify as final agency action." ECF No. 97 at 60. This argument has already been rejected twice by this Court, *see supra* Section II(D), and should be rejected a *third* time.

In the alternative, the United States argues that, even if the Nation's claim is interpreted as a failure to act, the Nation's claim still accrued when the Arthur Andersen Report was deemed received. ECF No. 97 at 60. The argument makes no sense. Since the Nation's claims are for an accounting that it has never received and its Motion establishes that the Arthur Andersen Report is not an accounting, receipt of the Arthur Andersen Report could not have begun the statute of limitations. The United States nevertheless argues that the Nation knew when it received the Arthur Andersen Report that Interior was providing the Report as full fulfillment of the agency's duties under the 1994 Act, *see* U.S. SUF ##108, 129, and, as a result, the Nation should have

known that Interior would never provide a "meaningful accounting" to the Nation. ECF No. 97 at 60.[7]

The United States' new-found argument that it repudiated its accounting duty does not save its statute of limitations argument.[8] Initially, as noted *infra* at Section III, the United States should be precluded from making its new repudiation argument. Regardless, the argument fails on the merits. "Repudiation of a trust occurs when the trustee expressly terminates the fiduciary relationship or takes actions inconsistent with the terms of the trust (for example, by claiming or taking the corpus of the trust as its own and denying any obligation to the beneficiary)." *Pelt v. Utah*, 611 F. Supp. 2d 1267, 1285 (D. Utah 2009) (citations omitted); *see also Shoshone Indian Tribe of Wind River Rsrv.*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("*Shoshone II*") ("a trustee may repudiate the trust by express words or by taking actions inconsistent with its responsibilities as trustee") (citing *Jones v. United States*, 801 F.2d 1334, 1336 (Fed. Cir. 1986) and *Philippi v. Philippe*, 115 U.S. 151 (1885)). "But even given acts constituting repudiation, no accrual occurs

[7] For this proposition the United States only cites the Nation's brief, and to language that does not even support the United States' claim.

[8] The United States' construction of its argument—that the duty to account is *the* trust duty it repudiated—is misplaced and logically requires rejection of its entire argument. The United States has trust obligations to the Nation which are substantive in nature. These include, for instance, proper investment of monies, or management of natural resources, under 25 U.S.C. § 162a. In this case, such duties included, *inter alia*, the proper investment of money, the sale and recovery of monies for land, the conservation of the Nation's oil and gas reservation, and the management of the Nation's submerged lands. An accounting is not itself the "trust duty" but instead is the test by which one measures whether the trust duty has been implemented. It is, accordingly, ironic that the United States argues it repudiated its duty to account, when what that really means is that it failed to ever test or report on whether it was complying with the underlying trust duties regarding management of the Nation's Trust. Such an argument of repudiation of the duty to account should more reasonably be understood as an admission of the United States' failure to ever report to the Nation on whether the Nation's trust was adequately managed.

unless the beneficiary knows, or should have known, of the trustee's repudiation of the trust." *Pelt*, 611 F. Supp. 2d at 1285.

In addressing repudiation, the United States first argues that repudiation is not necessary for the Nation's claims to accrue. However, this argument fails because it relies on cases of "misfeasance or nonfeasance" from the Court of Federal Claims, which applies a different standard because of its jurisdiction being limited to claims for monetary damages.[9] Here, the Nation's claims are not for misfeasance or nonfeasance; they are for an accounting that has never been provided. For this reason, the United States' argument about "the complete absence of salient facts relevant to the Nation's claims since 1996" completely misses the mark. ECF No. 97 at 64. As this Court has already twice held, this case constitutes a failure to act case, and repudiation is required to start the statute of limitations. *See* ECF No. 42 at 5-6 *and* ECF No. 85 at 2. No "new" fact need occur, since the Nation's claims are to compel an accounting that has never been provided.

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[9] The Court of Claims does not even have equitable jurisdiction to compel an accounting for Indian beneficiaries. This is recognized by *Chemehuevi Indian Tribe v. United States*, a case relied upon by the United States, in endorsing the Nation's filing of this action for an accounting:

> the Tribe cannot proceed before this Court, but may be able to seek an accounting from the district court and, depending upon the results of that action, then proceed in a case before this Court, perhaps without having to worry about the statute of limitations. That is because, in the absence of the government's having provided the Tribe with a meaningful accounting, the [Indian Trust Accounting Statute] tolling provision may protect the Tribe from (at least some of) its claims being barred by the statute of limitations. The Supreme Court has recognized this sequence of actions as proper.

150 Fed. Cl. 181, 201 (2020), *appeal filed* Dec. 4, 2020.

Ultimately, the only undisputed fact the United States points to in support of its position is that the Nation received the Arthur Andersen Report.[10] This fact matches the allegations considered by the Court when it previously concluded "there is no suggestion that the Government has repudiated the trust." ECF No. 42 at 6. The only difference now is that the United States has developed a repudiation argument for litigation expediency. The United States only seems to have become aware of this alleged repudiation after several years of litigation and, surely, the Nation could not possibly have known about the alleged repudiation before the United States. *See Shoshone II*, 364 F.3d at 1348 ("A cause of action for breach of trust traditionally accrues when the trustee 'repudiates' the trust *and the beneficiary has knowledge of that repudiation*.") (emphasis added). In its sworn response to Interrogatory No. 5 the United States did not claim that any repudiation had occurred. *See* United States' Responses and Objections to Plaintiff's Interrogatories (Aug. 27, 2020) 15-16 (filed at ECF No. 98-1 as Attachment 7).

During conferral on the Nation's Rule 56(d) Motion, the United States stated as follows about its discovery response: "At the time we answered that interrogatory, we had not yet developed our position on whether the various accountings provided, including the Andersen Report, constituted repudiation, and we were under no obligation to marshal our case at that time." Letter dated July 28, 2022 from J. Ecker to M. Frandina *et al.*, at 8 (attached to ECF No. 98-1 as Attachment 9). Thus, the earliest that the United States knew it had repudiated the trust came sometime between August 27, 2020 and July 28, 2022. *See also* Pl. Exh. 30 ¶ 22. Because the Nation could not have known about the alleged repudiation before the United States itself, and

[10] The United States does not dispute that the "Arthur Andersen package provided to tribes did not explain or describe the numerous changes in reconciliation scope and methodologies or the procedures that were not performed, and the limitations of the reconciliation were not evident from the face of the Arthur Andersen Report." Pl. SUF#96.

because this action was already filed by the time the United States alleged it had repudiated the trust, repudiation did not start the running of the limitations period such to bar the Nation's claims.

## II. The United States' Cross Motion For Summary Judgment Should Be Denied.

Much of the United States' Cross Motion relies on statements made by individuals that it attributes to the Nation. However, the United States fails to inform the Court that most of those individuals were actually appointed to their posts by the United States in contravention of the Cherokee Constitution, during an era when the United States actively worked to suppress the Nation's democratic and constitutional government. Although this historical record is not material to resolving the Nation's Motion (on whether the Arthur Andersen Report constitutes an accounting), it is critical to understanding the arguments the United States makes in support of its affirmative defenses, particularly those based on preclusion.

### A. The United States' Illegal Takeover Of The Nation's Government.

The United States recognizes that the Nation has alleged that the United States "'illegally' dominated the Nation's government" such that the current action should not be barred by prior efforts that occurred in the mid-1900s. ECF No. 97 at 50. The United States does not seriously dispute this, nor could it. Rather, the United States attempts to brush the sordid history aside by citing certain hearsay statements to suggest the Nation ratified the United States' actions during this period.[11] *See* Response to U.S. SUF#104. This attempted whitewashing of history—by the

[11] Specifically, the United States relies upon one factual allegation—comprised of multiple layers of hearsay—in an attempt to ameliorate against the United States' illegal takeover of the Nation. ECF No. 97 at 29, 49-51; *see* Response to U.S. SUF #104; *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007) (holding that hearsay "counts for nothing" in opposing summary judgment); *Walden v. Patient-Centered Outcomes Rsch. Inst.*, 304 F. Supp. 3d 123, 143 (D.D.C. 2018) ("this evidence cannot be credited at summary judgment because it is hearsay"). The United States' factual allegation is the type of fact a non-movant would put forth to defeat summary judgment. It is not the type of broad assortment of facts that are normally required for a party to establish there is no legitimate dispute necessary to support summary judgment.

Nation's own trustee, no less—is simply a continuation by the United States of its centuries-old practice of bureaucratic imperialism. *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C. 1976).

The United States' shameful record of suppressing the governments of the Five Civilized Tribes (including the Cherokee Nation), preventing the Tribes from managing their own affairs, and the United States leveraging that abuse to its own benefit is well documented and critically relevant to the issues the United States has put before this Court. *See* Pl. Exh. 32 ¶¶ 11, 41. It is difficult to overstate the repercussions of the United States' illegal and pervasive domination over the Nation during these times. Prior to the United States' meddling in the latter parts of the nineteenth century, the governmental structure of the Cherokee Nation included three branches of government (executive, legislative, and judicial). In 1885, Senator Henry Dawes described the state of the Nation in Indian Territory before allotment:

> there was not a family in that whole Nation that had not a home of its own. There is not a pauper in that Nation, and the Nation does not owe a dollar. It built its own capitol . . . and built its schools and hospitals. Yet the defect of the system was apparent. They have got as far as they can go, because they hold their land in common . . . there is no selfishness, which is at the bottom of civilization.

*Id*. at ¶ 16. "It became an article of faith among self-proclaimed friends of the Indians that private ownership of property was one of the most powerful tools that could be used to bring about assimilation." *Id.* at ¶ 19.

The United States formed a commission to obtain the land belonging to the Nation, Pl. SUF#20, which was found to be:

> rich in mineral and agricultural resources and invaluable timber; a country which has been occupied and cultivate for over half a century, whose fertile valleys yielded bountiful harvests of southern products, and on whose prairies grazed a quarter of a million cattle yearly; where cities had spring up; through which railroads had been constructed; and where five distinct modern governments existed, independent of the sovereignty of the United States.

Pl. SUF#22.

In the latter parts of the nineteenth century, the United States used the largest cudgel it held to force disestablishment of tribal governments: allotment. While not a new concept, "the clamor for allotment had reached a new peak." *Harjo*, 420 F. Supp. at 1121 (D.D.C. 1976). The United States tasked the Dawes Commission with obtaining the Five Tribes' agreement to allotment, and its goal was extinguishment of communal land held by the Nation. Pl. SUF## 21, 22; *see also Harjo*, 420 F. Supp. at 1122 (describing the United States' failed attempts to impose allotment of the Five Tribes' land through negotiation). But the Dawes Commission "concluded the Nation would never surrender by consent what it did not want to give up at all," and so Congress converted the Commission from merely a negotiating body into also an executive and semi-judicial body to proceed with its work "regardless of the will of the tribes." Pl. SUF#24 (quoting ECF No. 88-24). After years of failed "negotiations" and without tribal agreement, in 1898 Congress passed the Curtis Act to force allotment on the Five Tribes. Act of June 28, 1898, Pub. L. 55-517, 30 Stat. 495.

The Curtis Act granted the Department of the Interior and the Dawes Commission with broad powers. The Act prohibited the enforcement of tribal laws and completed the destruction of tribal courts.[12] The Act also granted the Secretary of the Interior control over leasing, tribal revenues, and the numerous townsites in Indian Territory. Finally, the Act authorized the Dawes Commission to begin allotment as soon as citizenship of the Cherokee Nation was "fully

[12] The Nation is still feeling the effects of the Curtis Act's destruction of tribal courts, and how such courts could have evolved and expanded to cover the responsibilities of the current, post-takeover, Cherokee Nation. This is seen most plainly in the response to the Supreme Court's recent decision in *McGirt v. Oklahoma*, 130 S.Ct. 2452 (2020), which found that criminal actions in the traditional boundaries of the Creek Nation reservation (and effectively in other reservations of Indian Nations like the Cherokee Nation) must be prosecuted in either Federal or Tribal Courts. This decision has led to explosive expansion of the current Cherokee Nation court system and Attorney General's office.

completed." Senator William Bate of Tennessee was the only Senator to speak out against passage of the Curtis Act, calling it an "injustice to the Five Civilized Tribes." 31 Cong. Rec. 5593 (1898).

The Board of Indian Commissioners lauded the Curtis Act as "the first attempt to secure for white residents a title to the lands upon which they have built costly buildings and flourishing towns" and noted that the Act "must work a complete revolution in the affairs of the Territory and place it practically under the Government of the United States." U.S. Dep't of the Interior, *Annual Report of the Commissioner of Indian Affairs, 1898* at 1094 (Pl. Exh. 41). Empowered and emboldened, "federal officials and agents dominated the lives of the Five Civilized Tribes, using their control over tribal disbursements and resources to ensure that the administration of the Territory during that time conformed to the preferences, values, and priorities of the Interior Department." *Harjo*, 420 F. Supp. at 1126.

In an increasingly strained state, the Nation—under the leadership of Principal Chief W.C. Rogers—ratified an agreement to allot the Nation's lands in 1902. *See* Cherokee Allotment Agreement, 32 Stat. 716 (July 2, 1902) ("1902 Act").[13] While the 1902 Act continued the press towards allotment and curtailed the ability of the Cherokee people to manage their own affairs, it expressly allowed for the continuation of the Cherokee Nation and its government. *See id.* § 34 (express recognition that the Cherokee National Council would continue); *id.* § 54 (providing for the continued role and function of the Cherokee Chief as "chief executive" for the Nation). Although the Cherokee judicial system was abolished under Section 28 of the Curtis Act, the remaining branches of the Cherokee constitutional government were supposed to continue.

[13] The Curtis Act imposed allotment on the Nation on very unfavorable terms, and then the United States "negotiated" an "agreement" from each of the Five Tribes to such allotment under slightly better terms. *Harjo,* 420 F.Supp. at 1124.

Regardless, the 1902 Allotment Agreement set out a four-year window for the United States to wrap up the affairs of the Nation. *See* 1902 Act § 63.

In 1905, as the march toward tribal disintegration continued, the Nation's Council—as provided for in the 1839 Cherokee Constitution and expressly continued in the 1902 Act—voted to remove Principal Chief W.C. Rogers (who many Cherokees believed was too complacent or complicit with the United States) from office and replace him with Frank Boudinot. Response to U.S. SUF#16; Pl. Exh. 32 ¶ 39. Undeterred by the will of the Nation, the Department of the Interior "believed" it would be in Nation's best interests for Mr. Rogers to "continue" as Chief and refused to recognize Mr. Boudinot. Pl. Exh. 32 ¶¶ 10, 40. Without any legal basis for doing so, Interior strongarmed W.C. Rogers to remain "Chief" and to shepherd in the deeply contentious allotment process, even though Rogers was *the singular person* that the Cherokee people collectively resolved *should not* represent the Nation through that time. Interior's disregard foreshadowed what was to come.

The following year, Congress passed what has become known as the "Five Tribes Act." Act of April 26, 1906, 34 Stat. 137. The Act was largely a rejection of a January 1906 Report by Interior. For instance, the Interior wished to simply continue the present Principal Chief of the Cherokee Nation in his "titular office" after the March 1906 dissolution of the Nations' governments, and give non-elected persons the title of chief and governor[14] and confer upon them the power to sign documents on behalf of the Tribe. *See Harjo*, 420 F. Supp. at 1127 n.41; *see also* 40 Cong. Rec. 1250 (1906). Instead, and in opposition to the express wishes of Interior, Congress provided that the tribal governments would continue and the Tribes would select their

[14] The Chief Executive of the Chickasaw Nation, and some other Indian Tribes, has the denomination of "Governor" and not Chief or Principal Chief. The Cherokee Nation has a "Principal Chief" and a "Deputy Principal Chief."

own leaders, with the President filling vacancies in limited circumstances. *Harjo*, 420 F. Supp. at 1127 ("It is quite clear from the circumstances in which the provision was enacted and from its legislative history that it was intended by the Congress simply to ensure that the office whose occupant was charged by statute with signing the allotment deeds would at all times be filled, and not to deprive the tribes of the right to continue electing their Principal Chiefs—under ordinary circumstances—as long as their tribal governments continued to exist."); Five Tribes Act, 34 Stat. 137, 139 § 6. Most importantly, the Act prevented the termination of the Nation's government:

> That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law . . . .

*Id*. at 148, § 28.

However, after losing its strenuous battle to prevent its passage, Interior acted as though Section 28 did not exist. *Harjo*, 420 F. Supp. at 1129-30. In contravention of Congress's mandate for the Nation to continue with self-government, Interior worked to ensure that there would be no more elections and that only persons friendly to federal administration would have the title of Principal Chief. Interior's actions were clearly motivated by its intent to quell any dissent when it acted. *Id*. at 1130. In litigation between the Chickasaw and Choctaw Nations and the Department of Interior over the legality of the 1906 takeover, this Circuit found that the destruction of the Five Tribes' constitutional governments "resulted 'wholly from the Interior Department Bureau of Indian Affairs' determined use of its raw power over the tribe to bring about that result.'" *Morris v. Watt*, 640 F.2d 404, 407 n. 3 (D.C. Cir. 1981) (quoting *Harjo* 420 F. Supp. at 1143). More specifically, Judge Bryant in *Harjo* found:

> During the period immediately following the approval of the Five Tribes Act, the Interior Department behaved as though it had been successful in its efforts to prevent the enactment of § 28 and the Congressional changes made in its draft of § 6. The available evidence[] clearly reveals a pattern of action on the part of the

> Department and its Bureau of Indian Affairs *designed to prevent any tribal resistance* to the Department's methods of administering those Indian affairs delegated to it by Congress. This attitude, which can only be characterized as *bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the Act.*

420 F. Supp. at 1130 (emphasis added). According to Interior's own statement in 1913:

> While the tribal governments were to be continued [under § 28 of the 1906 Act] *the tribal officials had been divested of practically all government functions* . . . There *being no governmental machinery in the Five Civilized Tribes to hold elections, there have been none held since the passage of the [1906 Act]* . . .

1913 Annual Report of the Commissioner to the Five Civilized Tribes at 411 (emphasis added) (Pl. Exh. 36). Moreover, and more recently, the Supreme Court has explained that the process of allotment was not intended to destroy the sovereignty of Indian Nations. *McGirt*, 140 S. Ct. at 2464 (noting that "[m]issing in [the allotment act], is a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands."). Justice Gorsuch likened the allotment of tribal lands to the patent of lands by the United States:

> The federal government issued its own land patents to many homesteaders throughout the West. These patents transferred legal title and are the basis for much of the private land ownership in a number of States today. But no one thinks any of this diminished the United States's claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another.

*Id*. Despite the loss of communal ownership of land, and the hindering of tribal government, the tribes still maintained "significant sovereign functions." *Id.* at 2466.

To accomplish the goals of the United States Government, the Department of the Interior would "appoint the Principal Chiefs without the benefit of any election by the tribe." *Harjo*, 420 F. Supp. at 1139. This process—to varying degrees amongst the Five Tribes—continued until the early 1970s and caused the Tribes' affairs to be "administered without even a token of democracy, and the Principal Chief was treated by the Bureau as being the sole embodiment of the [Tribes']

governmental authority." *Id.* Interior's influence and control over the Tribes' affairs were undertaken "wholly without the benefit of any specific Congressional mandate." *Id.* This resulted in an extended period when the only governmental actor of the Nation—the Principal Chief—was not chosen by the Cherokee people but, rather, by the bureaucratic machinery of the federal government. This is to say nothing of Interior suppressing any elections for the Cherokee legislature who was supposed to have the legislative authority of the Nation. *See* Pl. Exh. 30 ¶¶ 5-6, 9.

Despite W.C. Rogers being impeached and removed in 1905, Interior recognized him as the Nation's Principal Chief until his death in 1917. Pl. Exh. 32 ¶¶ 39, 43. After his death, a disturbing—and illegal—pattern began to emerge. The Nation was without any governmental officials—appointed or elected—until November 1919 when President Wilson appointed A.B. Cunningham to serve as Chief. *Id.* ¶ 43. During his short tenure, Cunningham "signed and executed all of the Cherokee deeds then ready for execution" to convey the Nation's property. ECF No. 96-28 at 2. Following Cunningham, the Nation was again leaderless. Yet Interior prepared more deeds (to convey away the Nation's property) which needed to be executed. *Id.* at 3. The Superintendent for the Five Civilized Tribes noted the difficulty in disposing of the Nation's lands without a "Chief" on hand to execute the deeds and recommended "that a principal chief of the Cherokee Nation [be] appointed for an indefinite period of time" solely to "sign and execute deeds." *Id.* The Superintendent claimed that "numerous" Cherokee citizens would be willing to so serve as chief for little compensation. *Id.*

Ed M. Frye was then appointed "Chief for a Day" on June 23, 1923. Pl. Exh. 32 ¶ 43. In late 1925, Richard B. Choate was appointed "Chief for a Day." *Id.* On December 27, 1928, Charles J. Hunt was appointed then Oliver P. Brewer in 1931, William W. Hastings in 1936, J.B.

Milam in 1941 and W.W. Keeler in 1949. *Id.* Between each tenure, the Nation continued without any governmental officials—the Nation's affairs ran entirely by Interior.

It was not until 1970 that this lawless parade of appointed Chiefs was suspended—evidenced by President Nixon's July 8, 1970 Message on Indian Affairs and Congressional passage of the Principal Chiefs Act that Fall. *See* Act of October 22, 1970, 84 Stat. 1091 ("Principal Chiefs Act"); *see also* Pl. SUF #48. Then, in 1971, for the first time since Rogers' (non)ouster in 1905, the Nation was enabled to have a democratically-elected leader of its own. However, it still was not an election under the Nation's own Constitution. That would not occur until after the election of Ross Swimmer as Principal Chief in 1975 who platformed on reestablishing the constitutional government of the Nation. *See* Pl. Exh. 30 ¶¶ 3, 8. When he was later elected under that Constitution, he became the first person since 1903 that had the authority and the obligation to protect the Nation's legal interests. *See* Pl. Exh. 32 ¶ 44.

Nothing within the Principal Chiefs Act altered the legal basis for the election of a Chief. It merely served to do away with the "bureaucratic imperialism" of the Executive branch that was occurring without Congressional authority and in contravention of Congressional mandate. *Harjo*, 420 F. Supp. at 1130. While Congress could have repudiated its treaty guarantees to the Nation, and could have abolished the Nation's constitutional government, it did neither. *Id.* at 1142. Instead, the lawless and oppressive domination over the Nation arose "from the Interior Department-Bureau of Indian Affairs' determined use of its raw power over the tribe to bring about" its desired result. *Id.* at 1143.

This is not to say that Cherokee citizens were not concerned about the affairs of the Nation throughout the twentieth century. Some Cherokees attempted to influence the destiny of the Nation, some even having seats at the decision-making table from time to time. However, *that*

limited involvement—when it was permitted by Interior—is a far cry from the operation of the democratically elected, constitutional form of government that the Cherokee people chose for themselves. "The Supreme Court has recognized the Cherokee Nation as a distinct organization capable of governing itself, consistent with its existence even prior to the signing of treaties with the United States." *Wheeler v. U.S. Dep't of Interior, Bureau of Indian Affs.*, 811 F.2d 549, 551 (10th Cir. 1987) (citing *Talton v. Mayes*, 163 U.S. 376, 379–81 (1896) and *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831)). "[O]ne of the fundamental aspects of tribal existence is the right to self-government." *Id.* That right—of the Cherokee Nation, the body politic itself—pre-dated the Curtis Act and it remained intact, though obstructed, throughout Interior's illegal twentieth-century approach.

It may well be—indeed, it most assuredly is—that yeoman efforts of *some* Cherokee citizens throughout the early twentieth century served to blunt even greater abuses. But those herculean efforts by certain Cherokee citizens do not absolve or excuse the United States' failure to provide the Nation with information sufficient to understand how the United States handled the Nation's trust assets, including during the timeframe of Interior's illegal handicap. Moreover, and as addressed below in Section II(B)(ii), the United States cannot use its own past and illegal control of the Nation to bind the Nation to actions it had no control or supervision over.

### B. The Nation Is Not Precluded From Seeking An Accounting Of Its Pre-1946 Resources.

The United States argues that "earlier accountings and actual notice of land sales" triggered accrual of the Nation's claims for an accounting of *all* allotment-era transactions, and said claims are therefore barred by the provisions of the 1924 Act and ICCA. *See* ECF No. 97 at 47. The United States concedes that the Nation did not bring a claim for a generalized accounting under either act. *See id.* at 46-47 (conceding that the 1924 only allowed the Nation "supplement" earlier

accountings) and 48 ("the Nation did not bring a generalized accounting claim under the ICCA"). As set forth below, there are numerous reasons the Nation's claims have not begun to accrue, and the Court should deny the United States' Cross Motion on this issue.

***i. The Statute Of Limitations Has Been Tolled By The Appropriations Acts.***

A claim against the United States does not accrue until the claimant knew or should have known that the claim existed. *Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000) (finding that, when determining when a taking claim accrues, "the key issue is whether the permanent nature of the taking was evident such that the landowner should have known that the land had suffered erosion damage"); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) ("Thus, for the purposes of section 2501, it would appear more accurate to state that a cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence.") (emphasis in original) (citing *Kinsey v. United States*, 852 F.2d 556, 557 n.* (Fed. Cir. 1988)); *see also Holmes v. United States*, 657 F.3d 1303, 1322 n.15 (Fed. Cir. 2011). Mere suspicion of a claim is not enough to cause an action to accrue and the statute of limitations to commence to run. *Osage Tribe of Indians of Oklahoma v. United States*, 68 Fed. Cl. 322, 334 (2005).

Generally, and as discussed *supra* in Section I(E), a claim for trust mismanagement occurs when the trustee repudiates the trust. This is largely because trust beneficiaries "are permitted to rely on the good faith and expertise of their trustees," and "are under a lesser duty to discover malfeasance relating to their trust assets." *Shoshone II*, 364 F.3d at 1347 (citing *Loudner v. United States*, 108 F.3d 896, 901 (8th Cir. 1997); *Cobell XX*, 260 F. Supp. 2d. at 104; *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973)); *see also Sakezzie v. Utah State Indian Affs. Comm'n*, 215 F.Supp. 12, 19 (D. Utah 1963) ("it is no answer to say that the

information could be ferreted out from their records by the plaintiffs"). In recognition of this, Congress—in a series of Appropriations Acts—has required the United States to provide an accounting of trust resources to Indian beneficiaries (including tribes) before the statute of limitations can begin to run. *See, e.g*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 305-306 (2014) (providing that the statute of limitations "shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected Indian tribe . . . has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.").

In *Shoshone II*, the Federal Circuit determined that the introductory phrase in the Appropriations Acts, "'notwithstanding any other provision of law' connotes a legislative intent to displace any other provision of law that is contrary to the Act . . . ." 364 F.3d at 1346. The Federal Circuit went on to hold that Congress clearly intended that claims would not accrue until the tribe was provided with a meaningful accounting. Simply put, "how can a beneficiary be aware of any claims unless and until an accounting has been rendered?" *Id*.; *see also Osage Tribe*, 68 Fed. Cl. at 334 ("Defendant does not claim that such a 'meaningful accounting' has been provided to the Osage Tribe. The court therefore concludes that the plaintiff's claims that fall within the Appropriations Act are not time-barred.").

The Appropriations Acts also apply to claims that have already accrued and become stale as a result of a statute of limitation. As this Court has explained:

> Even though the language [of the Appropriations Act] does not contain an explicit directive to revive stale claims, it is identical to the language that the Supreme Court hypothesized would indicate an express command for retroactive application . . . .

*Felter v. Salazar*, 679 F. Supp. 2d 1, 7 (D.D.C. 2010). Then, after conducting a review of the legislative history of the Appropriations Acts, this Court found that legislative history also supported a reading that the Appropriations Acts revive stale claims. *Id.* at 8.; *see also Chickasaw*

*Nation*, 120 F. Supp. 3d at 1229 ("to the extent any claims had already expired, case law holds that these appropriations acts revive the same").

Here, the United States has argued that "actual notice of land sales" triggered accrual of the Nation's claims for an accounting of *all* allotment-era transactions, and said claims are therefore barred by the provisions of the 1924 Act and ICCA. *See* ECF No. 97 at 47. This argument has been rejected by numerous other courts. *See Chickasaw Nation*, 120 F.Supp.3d at 1229-1230 ("the Court finds that the Nations' claims have not yet accrued for purposes of the 1924 Act of the ICCA"); *Otoe-Missouria*, 2008 WL 5205191 at *4 ("Congress deferred accrual of the statute of limitations including any limitation arising from the ICCA by passage of the various Tribal Trust Accounting Statutes…"); *Tonkawa Tribe of Indians v. Kempthorne*, 2009 WL 742896 at *2 (W.D. Okla., March 17, 2009); *Seminole Nation of Oklahoma v. Salazar*, 2009 WL 919435 at * 1 (E.D. Okla., March 31, 2009); *Osage Nation v. United States*, 57 Fed. Cl. 392 (Fed. Cl. 2003); *Shoshone II*, 364 F.3d 1339.

Regardless, the United States cannot establish that the Nation's claims have accrued. In its Cross Motion, the United States does not point to any event causing accrual. *See* ECF No. 97 at 46-56. Instead, the United States points to lawsuits brought in the Nation's name during the time it had illegally dismantled the Nation's government. *Id*. These lawsuits are discussed below in Section II(B)(ii). Without citations to specific events from the United States, the Court is left to navigate the United States' more than one-hundred fifty "undisputed facts" in hopes of discovering which purported "fact" might trigger accrual of a claim.

***ii. Res Judicata Does Not Bar An Accounting Of The Nation's Trust Resources.***

Under the doctrine of *res judicata*, sometimes referred to as claim preclusion, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on

the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). *Res judicata* will bar subsequent lawsuits when the prior litigation:

> (1) involve[ed] 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.

*Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006). Even when these elements are present, courts may avoid applying the doctrine when the party did not have a "full and fair opportunity" to litigate the claim in the prior suit. *Nixon v. United States*, 978 F.2d 1269, 1298 (D.C. Cir. 1992) (Henderson, J., concurring) ("To apply *res judicata*, the litigants or their privies must have had a full and fair opportunity to raise the claim in an earlier proceeding."); *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481 n.22 (1982).

Here, the United States does not contend that this case involves the same claims or causes of action as any previous action. *See* ECF No. 97 at 46-47 (conceding that the 1924 only allowed the Nation "supplement" earlier accountings). Instead, the United States focuses its argument on a theory that the Nation *could have* requested an accounting in the previous actions, *see id*. at 52-53, invoking an extension of the "identity of claims" element for claims based the theory that the claims have the "same nucleus of facts." *Capitol Hill Grp v. Pillsbury Winthrop Shaw Pittman, LLP*, 574 F. Supp. 2d 143, 149 (D.D.C. 2008) (quoting *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984)).[15] Factors for the court to consider in such an extension include "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit,

[15] The undersigned counsel could not find *any* case where the United States has previously asserted, let alone prevailed on, a *res judicata* defense based on the "same nucleus of facts" extension regarding Indian accounting claims brought in the first half of the twentieth century. In fact, the *only* case undersigned counsel found regarding the "same nucleus of facts" argument and a previous case that old involved a defense raised, and lost, by a county government in Minnesota regarding the ICCA: *Mille Lacs Band of Ojibwe v. County of Mille Lacs, Minn.*, --- F. Supp. 3d ---, 2022 WL 675980 (D. Minn. Mar. 4, 2022).

and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004). "[W]hen considering whether a prior action involved the same 'nucleus of facts' for preclusive purposes, we must narrowly construe the scope of that earlier action." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir. 2002) (cited positively by *Nippon Shinyaku Co., Ltd. v. Iancu*, 369 F. Supp. 3d 226, 236 n.6 (D.D.C. 2019) ("Courts narrowly construe the doctrines of *res judicata* and collateral estoppel to reach the merits.")).

The United States points to only one previous action: *Cherokee Nation v. United States*, 102 Ct. Cl. 720 (1945), for which it seeks to invoke *res judicata*. That case involved two consolidated actions brought in the Nation's name.[16] Those actions did not seek a generalized historical accounting as requested in this action. Instead, the prior action was limited to deficiencies discovered in the United States' records regarding specific monetary trust accounts. Without additional discovery it is difficult to say, but it appears these accounts are not the same trust funds the Nations seeks an accounting of in this action. Instead, they appear to relate to the sale of lands in Tennessee, Alabama, and Kansas, as well as the sale of lands to other Indian tribes relocated into modern-day Oklahoma. ECF No. 96-65 at 14. As such, at most, any *res judicata* argument would be limited to the individual accounts at issue in *Cherokee Nation*, 102 Ct. Cl. 720. *See Nippon*, 369 F. Supp. 3d at 236 n.6.

Second, even if a claim had been filed in the name of the Nation, there is not a true identity of the parties or their privies. At the time any action would have been filed under the 1924 Act or the ICCA, the Nation—as an entity—was fully under the control of the Department of the Interior

[16] The United States has not allowed discovery on the prior actions it claims bar the Nation's case here or the circumstances around them. Nor did the United States identify these actions as potential *res judicata* defenses in discovery.

through its period of "bureaucratic imperialism," discussed above. *See supra* at Section II(A). The doctrine of *res judicata* simply cannot apply under the circumstances present in this case, where Interior had, without authority and contrary to law, dismantled the constitutional government of the Nation. *See Harjo*, 420 F. Supp. at 1130. Governmental leaders should have legal authority, and in the traditions of the United States, as well as the traditions of the Nation, that authority can only be granted by the people. It would be a true perversion of justice if a litigant was permitted to illegally disassemble and seize control over a tribal government, appoint tribal executives in violation of federal law and the tribal constitution, illegally empower those appointed executives to file legal actions, and then, later, use those same legal actions to assert a *res judicata* defense *against* the tribe after the tribe shook itself loose from illegal federal control. Under these extraordinary facts, it cannot be said that there is sufficient "identity of the parties" such that *res judicata* applies.[17]

Moreover, the United States could not have adequately represented the Nation's interests in any potential action under the 1924 Act or ICCA. Indeed, the government exhibited nothing short of hostility to the Nation's interests during this period. *Supra* at Section II(A). Similarly, it cannot be said that the interests of the illegally appointed tribal executives—to the extent there were any at the time—were aligned with those of the Nation.[18] These executives (or clerks at Interior) faced an inherent conflict of interest in the performance of their duties. Once the United

[17] This is not to say that the results of any previous action brought in the Nation's name are irrelevant. For instance, they will likely be useful for the Court's consideration in crafting an equitable remedy for the United States' failure to account and, to the extent *those* actions resulted in a financial benefit to the Nation, the United States might reasonably be entitled to an offset therefrom. *Cf.* Pl. Exh. 31 ¶¶ 22, 24.

[18] Where there were no such executives, the clerks in the Department of the Interior were in charge of the Nation's assets. *See* Pl. Exh. 32 ¶ 26.

States illegally assumed the right to appoint—and remove—the Nation's executives, those who accepted the appointment were conflicted between acting in the interest of the Nation or acting in the interest of the federal officials to whom they owed their positions. These executives could not ignore the reality that the United States government, and not the Nation's people, would ultimately decide if they were to remain in power.[19]

The United States recently raised *res judicata* as a defense in a tribal trust case filed in the U.S. District Court for the Western District of Oklahoma. In *Chickasaw Nation*, 120 F. Supp. 3d at 1235-36, the district court refused to grant summary judgment against the tribe, even though certain of the claims alleged had been previously heard in the Court of Claims and the Indian Claims Commission. The court found that, due to the tribes' arguments regarding the United States' "bureaucratic imperialism," and illegal takeover of the tribes' governments following allotment, there were issues of fact regarding the ability of "tribal attorneys" to adequately and effectively litigation the prior claims. *Id.*

### C. The Statutes And Treaties Identified By The Cherokee Nation Establish Fiduciary Standards For Which The United States Is Required To Account.

In its Cross Motion, the United States complains that a "majority of the statutes identified by the Nation do not give rise to an enforceable accounting duty." ECF No. 97 at 36. But these

[19] This reality is exemplified by the experience of the Seminole Nation. In 1923, the United States summoned appointed Chief Alice Davis to Muskogee and ordered her to sign a deed transferring title to some Seminole property to a white man. *See Tulsa World: Oklahoma Centennial*, "Only in Oklahoma: First female chief made Seminole history" at 2 (available at https://tulsaworld.com/archive/only-in-oklahoma-first-female-chief-made-seminole-history/article_00ae10ad-90db-5c4a-b0e0-2d3c17b33772.html). Davis refused, and as a consequence, she was removed as Chief and replaced by George Jones. *Id.* However, Jones followed Davis' example and also refused to sign the deed. *Id.* Thus, Chief Jones was removed and replaced by Harry Tiger who also refused to sign the deed. *Id.* The message was clear: appointed Chiefs could *and would* be removed for their failure to comply with the will and edicts issued by Interior. The Secretary of the Interior ended up signing that deed.

statutes establish "rights and duties that characterize a conventional fiduciary relationship." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014) (summarizing *Mitchell I*, *Mitchell II*, *White Mountain*, and *Navajo I*). Those rights and duties give rise to the duty to account. *Fletcher*, 730 F.3d at 1208-09 ("to trigger a duty to account" the beneficiary must first establish the trust relationship); *see also Flute v. United States*, 808 F.3d 1234, 1247 (10th Cir. 2015) ("In order for Plaintiffs to claim any right to a trust accounting, there must first be a trust.").

In its Complaint, the Nation identified a great number of treaties and statutes relating to the United States' fiduciary duties. When it accounts to the Nation, the United States must address its management of these fiduciary duties.

## III. The United States Is Barred From Making Many Of Its Arguments.

The Nation filed concurrently herewith a motion under Rule 56(d) regarding several factual issues raised by the United States in its Cross Motion. However, due to the United States' conduct during discovery—or rather, lack of discovery—many of those same arguments should be disregarded under Rule 37(c)(1), which prohibits the use of information or witnesses that were not provided as required by Rule 26(a) or (e) unless the failure was "substantially justified or is harmless." As detailed herein, the United States' conduct was neither substantially justified nor harmless and, as such, should not be allowed.

The United States abused the discovery process in this case and should be barred from making two arguments: 1) that it repudiated its duty to account, and 2) that the Slade & Bender Report or activities done in connection with the 1924 Act constitute an accounting. When opposing *any* discovery in this case, the United States urged that the only relevant information was related to the Arthur Andersen Report, which covered a period beginning in 1972. *See, e.g.*, ECF No. 46 at 15 ("a determination on whether Interior provided the legally required accounting to

Plaintiff should be decided on judicial review of the accounting actually provided (and the Administrative Record upon which Interior's accounting decisions were based)."); *and* ECF No. 55 (motion for a protective order to prohibit discovery outside the Administrative Record). In a total reversal of its course, the United States now urges that its activities before 1972 are relevant to "understand" its position in this case. By representing to the Court that the only relevant issues were post 1972, the United States obtained an order that limited discovery for earlier periods. Then, the United States used that vacuum to cherry pick documents that only support its position.

As set forth below, the United States argued against discovery of information it now relies upon (claiming it was not necessary to resolve this lawsuit), engaged the Court in fashioning a limited discovery plan, refused to answer pointed discovery questions, and then, in the days before filing its Motion for Summary Judgment, quietly slipped cherry-picked documents into its document production to support its position without any opportunity for the Nation to take meaningful discovery on those topics. The net impact of the United States' actions was an attempt to produce a one-sided argument.

Parties must disclose information about their case, including about any "individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses" and descriptions or copies of documents the party may use to support is claims or defenses. Fed. R. Civ. P. 26(a). Parties in litigation are further obligated to "supplement or correct [their Rule 26 initial disclosures and interrogatory responses] in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e). "If a party fails to provide information . . . as required by Rule [26(e)], the party is not allowed to

use that information . . . to supply evidence on a motion . . . unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

Since at least 2019, the United States has been aware that the Nation alleges the United States never repudiated its responsibilities over the Nation's trust. *See* ECF No. 2-1 at 39, ¶ 114 ("The United States has not repudiated the trust."). In early 2020, this Court recognized that "there is no suggestion that the Government has repudiated the trust." ECF No. 42 at 6. The Nation sought to confirm that the United States does not claim repudiation, propounding Interrogatory No. 5 on July 10, 2020 as follows:

> State definitively whether You contend You have repudiated any trusteeship owed to the Cherokee Nation. If you contend you have repudiated any trusteeship owed to the Cherokee Nation, identify the trust responsibility repudiated, the express words or actions taken by You that You contend repudiate the trust responsibility, when such repudiation occurred, why it occurred, who was responsible for deciding to repudiate, and identify each and every document relating to each such repudiation.

Plaintiff's Interrogatories dated July 10, 2020, at 8 (attached to ECF No. 98-1 as Attachment 6).

In response, the United States did not claim that any repudiation had occurred, of any trust responsibility, ever. United States' Responses and Objections to Plaintiff's Interrogatories dated August 27, 2020, at 15-16 (attached to ECF No. 98-1 as Attachment 7). Nor has the United States supplemented its response to claim repudiation. The United States' initial disclosures did not mention repudiation, either with regard to individuals with knowledge or to categories of supporting documents. United States' Rule 26 Initial Disclosures dated April 13, 2020 (attached to ECF No. 98-1 as Attachment 8). Despite this, in its Motion the United States now argues—*for the first time*—that it has repudiated the trust. *See* ECF No. 97 at 61-64.

This sudden about-face is highly prejudicial to the Nation and cannot be "substantially justified" considering the Nation's explicit discovery request on the topic of repudiation and the United States' equally explicit response that it had never repudiated the trust. Accordingly, under

Rule 37(c)(1), the United States should be barred from claiming it repudiated the trust in its Cross Motion.

Similarly, the United States should be barred from making arguments based on the Slade and Bender Report, ECF No. 97 at 42-56, and activities done in connection with the 1924 Act, ECF No. 97 at 51-56. As with repudiation, the United States' contention that the Slade and Bender Report and the work done in connection with claims under the 1924 Act constituted an accounting required by law was never mentioned in the United States' initial disclosures. United States' Rule 26 Initial Disclosures dated April 13, 2020 (filed at ECF No. 98-1 as Attachment 8). In fact, this argument directly contradicts its previous position in this case. Until the Cross Motion, the United States has repeatedly represented to the Nation and this Court that all accountings required by law are contained in the Administrative Record the United States filed in this case. Tellingly, the Slade and Bender Report, the 1924 Act, and actions brought under the 1924 Act are *not contained* in the Administrative Record. *See* ECF No. 98-1 ¶¶ 11-12.

Nonetheless, the Nation propounded Interrogatories Nos. 1 and 2 on the issue of prior accountings, specifically asking the United States to "[i]dentify any accountings provided to Plaintiff required by law." Plaintiff's Interrogatories dated July 10, 2020, at 7 (filed at ECF No. 98-1 as Attachment 6). In response, the United States pointed only to the Administrative Record and the Arthur Andersen Report. United States' Discovery Responses (Aug. 27, 2020) 6-12 (filed at ECF No. 98-1 as Attachment 7). The United States disclosed neither the Slade and Bender Report nor the 1924 Act, and has not supplemented or corrected its response prior to the Nation's Motion. Despite this, the United States now relies heavily on the Slade and Bender Report and the 1924 Act in its Motion. Under Rule 37(c)(1), the United States should be precluded from using that information in support of its Cross Motion.

## CONCLUSION

After decades of trust management litigation, the United States' arguments, which have been altered and repackaged numerous times, have become so twisted that they end up losing all reasonable basis. Many of the positions raised in the United States' Cross Motion are diametrically opposed to the United States' position in numerous other tribal accounting cases, while also contradicting its own statements in this case. Ultimately, the United States puts forth no honest dispute regarding the material facts showing the inadequacies of the Arthur Andersen Report. The Court should grant the Nation's Motion.

Resolving this issue will also allow the parties to begin meaningful discovery regarding the breadth of factual issues remaining in the case, and particularly those issues raised in the United States' Cross Motion. As demonstrated above, there are significant disputes of fact regarding the United States' management of the Nation's trust resources. This includes issues related to the United States' illegal takeover of the Nation's constitutional government during the early twentieth century, an action that severely handicapped the Nation's ability to serve its citizenry, limited its ability to protect its trust resources, and to prevented it from developing necessary governmental services.

Respectfully submitted,

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