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

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

**FEDERAL DEFENDANTS' REPLY BRIEF IN SUPPORT
OF CROSS-MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Summary judgement should be granted in favor of Federal Defendants because, under binding Supreme Court and D.C. Circuit precedent, "[t]he government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011); *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 895-96 (D.C. Cir. 2014). The Nation's opening brief identified ten statutory sources that supposedly gave rise to an accounting duty. But, as explained in our cross-motion, that is the case with just two of them—the 1893 Act and the 1994 Act.

With respect to the 1893 Act, our opening brief demonstrated that the United States provided an accounting in accordance with that statute more than a century ago, and that the Nation accepted that accounting. Thus, the Nation is time-barred and judicially estopped from challenging the adequacy of Interior's compliance with the 1893 Act. The Nation's opposition does not engage with these points, effectively conceding them.

Thus, this case is only about the retrospective historical accounting duty to tribes that Congress set forth in the 1994 Act, and Interior's effort to comply with that duty through the Anderson Report. Summary judgment should be entered in favor of Federal Defendants on that issue for two reasons.

First, the Nation did not bring a timely claim challenging the Anderson Report's compliance with the 1994 Act. Unlike the fifty-four other tribes who sued by December 2006, the Nation waited 19 years after Congress set the accrual date for such a claim. The Nation's suit therefore falls outside the six-year statute of limitations in 28 U.S.C. § 2401(a). Perhaps recognizing the limitations issue, the Nation contends that the Andersen Report could not have constituted the accrual date because it was not intended to satisfy the 1994 Act. But Interior delivered the Andersen Report to Congress to comply with the 1994 Act. It did so on the date

required by Section 4044 of the 1994 Act, and expressly cited that section as its underpinning, a fact the Nation does not dispute. Where, as here, the summary judgment record shows that an agency has acted—and regardless of the sufficiency of that action—a plaintiff cannot artfully plead itself around the limitations period by posturing its case as one challenging a failure to act.

Second, even if the Nation's suit were timely, the Anderson Report represents a reasonable implementation of the 1994 Act's retrospective accounting duty to tribes. The Nation attempts to frame the Andersen Report as falling short of a hypothetical "accounting," a term the Nation takes pains to avoid defining. But it is not pertinent whether the Andersen Report satisfies the Nation's conception of an "accounting." The only pertinent question is whether the Anderson Report reasonably met the statutory requirements of the 1994 Act. It did.

Finally, the Nation is barred from any claim for an accounting of funds and transactions that pre-date August 1946. As our cross-motion showed, Congress enacted a statutory scheme (the 1924 Act) under which the Nation conducted an accounting of its funds during the allotment period, and fully and finally litigated related claims in the 1930s. The Nation's opposition attempts to avoid res judicata by pointing to allegedly unlawful domination of its government when its earlier accounting lawsuit was filed. But the Nation ignores that Interior followed the process mandated by Congress in appointing attorneys to represent the Nation, and the Nation does not seriously contend that it is not the same Nation that brought the earlier lawsuit. Similarly, Congress, in the Indian Claims Commission Act ("ICCA"), established a strict deadline through which the Nation should have brought by no later than 1951 any claim that it was owed (but had not received) an adequate accounting for funds or transactions pre-dating August 1946. The Nation argues that now-lapsed appropriations acts that included language preserving certain claims somehow revived the Nation's nearly century old accounting claims.

But appropriations acts only have force in the year they are enacted, and Congress has not included the language the Nation cites since 2014.

For these and the other reasons set forth below, the Court should enter summary judgment in favor of Federal Defendants.

ARGUMENT

I. The Nation's arguments assume a broad accounting duty without any basis in statute.

The starting point for any breach of trust claim must be a specific statutory duty. *Jicarilla*, 564 U.S. at 177. The Nation's motion for partial summary judgment listed ten sources of law that allegedly gave rise to enforceable accounting duties. Pl.'s SUF # 71, ECF No. 88-2 at 11-13. Our opening brief analyzed the text of each of those statutes and demonstrated that only two of them—the 1893 Act and the 1994 Act—gave rise to any accounting duty at all. *See* Fed. Defs.' Opening Br. 27, ECF No. 96-1 ("FD Op. Br."); App. of Sources of Law, ECF No. 96-2.

The Nation does not respond to those arguments. Instead, it offers the conclusory assertion that "these statutes establish 'rights and duties that characterize a conventional fiduciary relationship.'" Pl.'s Opp. 40-41, ECF No. 99 (quoting *El Paso*, 750 F.3d at 895). But the Nation does not ever say what rights or duties it thinks these statutes create. And it does not even attempt to explain how these statutes give rise to a duty to account, as opposed to some other duty. Under *El Paso*, the question of whether a statute creates an enforceable duty "is a matter of statutory interpretation" and the Court's "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." 750 F.3d at 895 (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)). But the Nation offers no statutory analysis at all. It does not even provide any statutory text. That telling omission confirms what our cross-motion made clear: the Nation has not identified any statute outside the 1893 Act and the 1994 Act that

imposes an accounting duty.[1]

For the same reason, there is no basis for the Nation's fallback argument "that the United States' duty to account was not created with the 1994 Act." Pl.'s Opp. 13. As an initial matter, the Nation leads this argument by identifying Sections 162a and 4011 as additional relevant sources. *Id.* at 12. But Section 4011 and substantial portions of Section 162a are just codification of different sections *of the 1994 Act*. *See* Pub. L. No. 103-412, Title I, §§ 101, 102, 103(b)(c).

The Nation's argument that "the United States had a pre-existing duty, established prior to the 1994 Act" fares no better. Indeed, it runs counter to D.C. Circuit and Supreme Court precedent limiting enforceable trust duties to those prescribed in statute. *Jicarilla*, 564 U.S. at 177; *El Paso*, 750 F.3d at 895-96. Thus, as this Court has explained, "when a tribe claims that the Government owes them a specific duty as trustee, that tribe must 'identify a specific, applicable, trust-creating' statute, regulation, or treaty 'that the Government violated.'" 2021 R&R 5, ECF No. 68 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009) ("*Navajo II*")).

Revealingly, the Nation does not engage with this binding precedent; indeed, it does not cite *Jicarilla* even once in its brief. Equally telling, the Nation fails to identify a single preexisting statute besides the 1994 Act in which to ground its argument. It therefore has not carried its burden to "identify a specific, applicable, trust-creating statute" outside the 1994 Act. *Navajo II*, 556 U.S. at 302.

It is true that the 1994 Act refers to "recognition of trust responsibility" rather than creation of trust responsibility. 25 U.S.C. Ch. 42, sub. I. It is also true that *Cobell VI* interpreted

[1] In a footnote, the Nation asserts without explanation that the duty to account "is not itself the 'trust duty' but instead is the test by which one measures whether the trust duty has been implemented." Pl.'s Opp. 21 n.8. There is no support for this new, conclusory assertion.

that distinction to mean that "the 1994 Act does not *create* 'trust responsibilities of the United States.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D. C. Cir. 2001). But, in *El Paso*, the D.C. Circuit made clear that *Cobell VI* still stands for the proposition that "a fiduciary relationship depends on substantive laws, stating that 'the government's obligations are rooted in and outlined by the relevant statutes and treaties.'" *El Paso*, 750 F.3d at 896 (quoting *Cobell VI*, 240 F.3d at 1099). And, of course, *Cobell VI* pre-dates the Supreme Court's opinion in *Jicarilla*. Thus, the Nation's point only begs the question: if the duty does not arise from the 1994 Act, from which statute does is it arise? The Nation never answers this question. In any event, the term "recognition" in the 1994 Act does not necessarily imply a preexisting enforceable duty. When Congress recognizes something, it should be presumed that it had not previously done so; otherwise, it need not have acted. *Cf. Clark v. Rameker*, 573 U.S. 122, 130-31 (2014).

The Nation points to *Fletcher*, but that case does not support the existence of a duty broader than that in the 1994 Act. To be sure, *Fletcher* recognized that courts "normally assume Congress has legislated against the background of traditional 'adjudicatory principles'—including traditional adjudicatory principles found in trust law." Pl.'s Opp. 14 (quoting *Fletcher v. United States*, 730 F.3d 1206, 1208 (10th Cir. 2013)). But in the very next sentence, the Tenth Circuit also said that "those background principles cannot be used to 'override' the language of statutes and regulations 'defining the Government's obligations' to a tribe or tribal members." *Fletcher,* 730 F.3d at 1208 (alterations omitted) (citing *Jicarilla*). The Tenth Circuit goes on to identify the 1994 Act as the source of the accounting duty there, rather than recognizing a non-statutory duty. *Id.*at 1209-10. Because *Fletcher* involved individual tribal members, it focused on Section 4011 of the 1994 Act rather than Section 4044, which is applicable here. *See* FD Op. Br. 55-58. But *Fletcher* reinforces that any accounting duty must be imposed by statute, and that the

specific language of the 1994 Act cabins the scope of accounting required. 730 F.3d at 1215.

The Nation accuses the United States of "refus[ing] to acknowledge the proper source and scope of its trust obligation." Pl.'s Opp. 15. But each paragraph in the section that precedes this accusation talks only about what is *not* the source of that duty. The Nation never identifies, as is its burden, a statutory source for the supposed accounting duty that the Nation claims exists outside of the 1994 Act.

II. The Andersen Report explicitly and reasonably implemented the 1994 Act, and the Nation waited 19 years from Congress's "deemed received" date to sue.

A. There can be no genuine dispute that the Andersen Report was used to satisfy the 1994 Act.

In our opening brief, we explained that the Anderson Report constituted Interior's implementation of the 1994 Act's retrospective accounting duty to the Nation. FD Op. Br. 47-48. Congress deemed tribes to have received the Anderson Report in December 2000. *Id.* at 49; Settlement of Tribal Claims—Amendment, Pub. L. 109-158, 119 Stat. 2954 (2005). Yet the Nation did not file the present suit challenging the adequacy of the Andersen Report until 2019. The Nation's challenge to the adequacy of the Andersen Report is therefore time-barred under 28 U.S.C. § 2401(a).

Perhaps recognizing the time bar, the Nation now contends that Interior never intended the Arthur Andersen Report to satisfy the 1994 Act. Pl.'s Opp. 4-8. In making that argument, the Nation misconstrues several documents filed in connection with prior litigation concerning the Andersen Report. Rather than supporting the Nation's argument, those documents expressly confirm that Interior provided the Andersen Report to Congress to comply with the requirements of the 1994 Act. They also underscore what the 54 tribes involved in those various lawsuits understood: if tribes wanted to challenge the Andersen Report's sufficiency, it was incumbent on them to do so within the six-year statute of limitations by filing suit by the end of 2006.

To understand why, it is useful to place the 1994 Act in context. As part of Interior's efforts to improve trust management in the 1980s, the agency investigated the possibility of transferring certain money management responsibilities to private institutions. *See* Frandina Decl. Ex. 4 at 6, ECF No. 98-1. Responding to concerns from tribal stakeholders, Congress included language in several appropriations acts beginning in 1987 that prohibited any transfer of tribal trust funds until they had been "audited and reconciled, and the tribe . . . has been provided with an accounting of such funds." *Id.* at 6-7 (quoting Act of July 11, 1987, Pub. L. 100-71, 101 Stat. 391, 416 (1987)). In its 1989 appropriations bill, Congress modified the language to account for practical challenges posed by such a process, prohibiting any transfer until funds had been "audited and reconciled to the earliest possible date." *Id.* at 7 & n.2. In 1991, BIA hired Arthur Andersen to conduct agreed-upon procedures for tribal trust accounts—work commonly referred to as the Trust Reconciliation Project. *Id.*

When it enacted the 1994 Act, Congress incorporated a modified version of the requirement from prior appropriations bills, this time directing Interior to prepare "a report identifying for each tribal trust fund account for which [Interior was] responsible a balance reconciled as of September 30, 1995." 25 U.S.C. § 4044. Congress set a deadline of May 31, 1996, for Interior to complete the reconciliation work and report back to Congress. *Id.* Congress also established a process by which tribes could either accept or dispute Interior's reconciliation of their accounts. Those who accepted the reconciled balance were asked to attest that Interior had provided "as full and complete accounting as possible of the account holder's funds to the earliest possible date" and that the account holder (the tribe) accepted that balance. *Id.* For those tribes who disputed the balance, Congress directed Interior to outline a plan by which it would resolve the dispute. *Id.*

So it is true, as the Nation points out, that Arthur Andersen began its work before Congress enacted the 1994 Act. But the context disproves the conclusion the Nation draws from that fact. Rather than demonstrate that the Andersen Report could not have been intended to satisfy Section 4044, Pl.'s Opp. 6, this history demonstrates the contrary: with Section 4044, Congress intended Interior to finish by a date certain the reconciliation process it had already begun and to provide those results to tribes. And when Interior delivered the Andersen Report to Congress in 1996, it expressly referenced Section 4044; indeed, the Nation does not dispute that "[o]n May 31, 1996, Interior delivered a report on its efforts under 'Section 304 [25 U.S.C. § 4044] of the American Indian Trust Fund Management Reform Act of 1994' to Congress." Pl.'s SUF Resp. # 108, ECF No. 99-1.

The Nation tries to brush this context aside by arguing that the Andersen Report was not intended to be a historical "accounting." Pl.'s Opp. at 5-7. That argument is based on a false premise. It assumes that the Andersen Report should be judged on whether it is an "accounting," based on whatever definition the Nation gives that term (something it has not disclosed). But the Nation has not, and cannot, identify any source outside of the 1994 Act that gives rise to an enforceable duty here. The question, then, is not whether the Andersen Report meets the Nation's or a private trustee's idea of an "accounting," but what the 1994 Act required, and whether the Andersen Report satisfied those requirements.[2] *See Jicarilla*, 564 U.S. at 177.

[2] For this reason, it is not relevant that Ross Swimmer now believes 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." Pl.'s Opp. 5. While it is not clear how Mr. Swimmer could have firsthand knowledge of those facts since he was not employed at Interior at the time the Andersen Report was developed or completed, his statement, as the Nation attempts to portray it, is also beside the point. 2022 Swimmer Decl., Pl.'s Ex. 30 ¶¶ 10-11 ECF No. 99-3. The United States has never contended that the Andersen Report is a forensic audit tracking every dollar in and out. We have contended that it satisfied the specific requirements of Section

It is also true that, after complying with its statutory obligations, Interior continued to work to resolve disputed balances, both by negotiating directly with tribes, and by submitting a proposal for a legislated settlement. Frandina Decl. Ex. 4 at 10. Interior also responded to litigation brought by certain tribes who filed suit "to preserve their objections to the TRP." *Id.* at 11. Thirteen such cases were filed by April 2002. *Id.* at 11 n.6. As the statute of limitations to challenge the adequacy of the Andersen Report drew nearer, Congress twice passed legislation to extend the date that tribes were deemed to have received their reconciliation reports. *Id.* at 11. In its second extension, Congress expressly stated it did so "for purposes of determining the date on which an Indian tribe received a reconciliation report *for purposes of applying a statute of limitations*." An Act to Amend Public Law 107-153 to Modify a Certain Date, Pub. L. No. 109-158 (2005) (emphasis added). 54 tribes sued within six years of the "deemed received" date.

In the years following the publication of the Andersen Report, Interior continued its programmatic work to reconcile and account for tribal trust accounts. Mr. Swimmer's 2007 declaration in the earlier litigation details those programmatic efforts. *See* 2007 Swimmer Decl., ECF No. 99-3. Interior also sought a remand to allow its programmatic accounting efforts to continue outside the constraints of litigation. *See Id.* ¶¶ 17-21. But nothing about that programmatic work undermines the United States' position that the Andersen Report satisfied the requirements of Section 4044. Indeed, by the time of Interior's 2007 remand motion, the six-year limitations period in which the Nation should have challenged the adequacy of the Andersen Report had already expired, as that motion itself notes. Frandina Decl. Ex. 4 at 11-12, 36. Noticeably absent from the documents Plaintiffs cite is any statement by the United States that

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4044. Nothing in Mr. Swimmer's declaration is inconsistent with that argument. In any event, his 2022 declaration does not serve as Rule 30(b)(6) testimony on behalf of Interior or any other Federal Defendant.

the Andersen Report was not intended to satisfy the 1994 Act's retrospective tribal accounting duty, or that the 1994 Act required Interior's subsequent programmatic efforts. *See* Pl.'s Exs. 30-31, ECF Nos. 99-3, 99-4. To use Interior's efforts at programmatic improvement against it to re-open otherwise time-barred claims would only provide a disincentive to undertake those efforts.

B. The Nation's focus on repudiation does not alter the statute of limitations.

There is one crucial difference between the prior litigation that followed the Andersen Report and this case. Unlike the 54 tribes who brought the prior lawsuits, the Cherokee Nation did not preserve its rights by the December 31, 2006 deadline created by 28 U.S.C. § 2401(a) and Congress's "deemed received" date. Instead, the Nation waited to bring suit until *nineteen years* after Congress ended its extension of the "deemed received" date for the Andersen Report. Like the other tribal nations that challenged the Andersen Report before December 31, 2006, the Nation was aware of the contents and scope of the Andersen Report by the "deemed received" date, and Interior expressly cited Section 4044 in transmitting the Report to Congress. SUF # 108, ECF No. 96-4. The Nation does not dispute this. Pl.'s SUF Resp. #108.

The Nation makes much of our use of the word "repudiation" in our opening brief. In arguing that the Court—despite undisputed facts now being available—should return to the conclusions it reached at the Rule 12 stage, the Nation argues that "[t]he only difference now is that the United States has developed a repudiation argument for litigation expediency." Pl.'s Opp. 23. But there are two problems with the Nation's argument.

First, "repudiation" in this context means nothing more than claim accrual. The point is that a trust beneficiary cannot bring a breach of trust claim until it knows that the duty allegedly owed is not being provided—what some courts have called "repudiation of the trust." *See Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed.

Cir. 2004) ("*Shoshone II*"); *compare with* Pl.'s Opp. 23.[3] We simply cabined our accrual argument, in places, as "repudiation" in response to the Court's statement that "there is no suggestion that the Government has repudiated the trust." Mem. Op. and Order, 2020 WL 224486, at *3. And it is perfectly appropriate for an accrual-based limitations argument to be raised on summary judgment. Indeed, the Court expressly reserved the statute of limitations for a later phase of the case. *Id.* at *3.

Second, the Nation is incorrect that, because the United States did not use the word "repudiation" in distributing the Anderson Report, repudiation had not occurred. Pl.'s Opp. 23. Repudiation can occur without any express statements; indeed, the Federal Circuit has equated it to a breach plus notice of that breach. *See Shoshone II*, 364 F.3d at 1348. Unlike a private trustee, the United States need not "den[y] there is a trust and claim[] the trust property [as its] own" to trigger repudiation. 76 Am. Jur. 2d Trusts § 648 (2022).[4] Rather, limitations begin to run when the Nation is aware that the United States has taken actions allegedly inconsistent with a duty. That occurred two decades ago when the Andersen Report was provided.

C. The Andersen Report is Interior's proffered satisfaction of the 1994 Act such that the APA's ordinary time limitations and deferential review apply.

The Nation contends that we argue for the incorrect standard of review because it does not challenge the Andersen Report directly. Instead, it tries to evade the Andersen Report by framing its claims as alleging a failure-to-act under 5 U.S.C. § 706(1), rather than a challenge to

[3] Our use of the term "repudiation" is not meant to imply that there is no longer a trust relationship between Interior and the Nation, only that the Nation was on notice by Interior's words or actions of any alleged breach.

[4] The Nation argues in a footnote that it is the repudiation of substantive duties that triggers accrual of a right of action, not repudiation of the duty to account, because an accounting claim is not a trust duty but "the test by which one measures whether the trust duty has been implemented." Pl.'s Opp. 21 n.8. But if the accounting duty is not a trust duty at all, then it is unclear what the basis of the Nation's claim would be.

agency action under § 706(2). Pl.'s Opp. 8-12. But the Court need look no further than the Nation's opening brief to see that, despite its artful pleading, the Nation is indeed challenging the sufficiency of an action already taken: the Andersen Report. Although the Nation may not be satisfied with the manner in which Interior chose to carry out the 1994 Act's requirements, that does not change the fact that the Andersen Report was Interior's attempt to comply with those requirements. "Permitting [the Nation's] § 706(2) claim to go forward under the guise of a § 706(1) claim would undermine the important interests served by statutes of limitations, including evidence preservation, repose, and finality." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 933-34 (9th Cir. 2010) (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)).

Whether the Court construes the Nation's challenge as arising under a cause of action in the 1994 Act directly or under the APA, that challenge must be judged using the APA's arbitrary and capricious standard of review, because of the "strong presumption in [the D.C.] Circuit that when a statute provides for judicial review but does not specify any standard for that review, it should be construed to include the APA standard." *Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 108-09 (D.D.C. 2009); *see* FD Op. Br. 59-61. And the Nation does not appear to dispute application of "muted *Chevron* deference." Pl.'s Opp. 9.

D. The 1994 Act applies only to monetary accounts.

The Nation argues that the accounting duty applies to assets as well as money, Pl.'s Opp. 15-17, but the 1994 Act refers only to monetary accounts. Section 4044 refers to "trust fund accounts" while Section 4011 refers only to "funds held in trust . . . which are deposited or invested pursuant to section 162a of this title." 25 U.S.C. §§ 4044, 4011(a). The D.C. Circuit has twice indicated that this language should be read to apply only to money. *See Cobell VI*, 240 F.3d at 1102 (noting accounting duty applies only "so long as [the funds] were deposited after

the Act of June 24, 1938"); *Cobell v. Salazar,* 573 F.3d 808, 815 (D.C. Cir. 2009) ("*Cobell XXII*") (noting that the 1994 Act did not require accounting of "money from closed accounts," but only money that still has "daily or annual balances" and "are . . . deposited or invested"). In the context of individual Indian accounts, *Fletcher* held that the plain language of Section 4011 applies to "the daily and annual balances of *money* it holds in trust." *Fletcher*, 730 F.3d at 1209 (emphasis added).

The Nation's contrary authority is not persuasive. Pl.'s Opp. 15-17. Black's Law does not account for the specific language in the 1994 Act: Section 4011 refers to funds "deposited or invested," while Section 4044 refers to "a balance reconciled" as of a certain date. 25 U.S.C. §§ 4011(a), 4044. Those are monetary terms. The Nation's citation to one of the numerous district court opinions in *Cobell* should not be credited over the D.C. Circuit opinions just discussed, which plainly contemplate the 1994 Act's application to monetary accounts. *See Cobell VI*, 240 F.3d at 1103; *Cobell XXII*, 573 F.3d at 815. In any event, the opinion the Nation cites relied on the common law of trusts, not the plain language of the statute. *See Cobell X*, 283 F. Supp. 2d 66, 128-34 (D.D.C. 2003). But as the Supreme Court subsequently clarified, "[t]he common law of trusts does not override [a] specific trust-creating statute." *Jicarilla*, 564 U.S. at 185.

Likewise, the Western District of Oklahoma cases the Nation cites cannot stand up to the Tenth Circuit's explicit conclusion in *Fletcher* that the plain language of the 1994 Act applies only to "money [Interior] holds in trust." *Fletcher*, 730 F.3d at 1209. Indeed, those earlier, lower court cases do not grapple with the statutory text at all on this issue. *See Chickasaw Nation v. Dep't of the Interior*, 120 F. Supp. 3d 1190, 1225 (W.D. Okla. 2014) (relying only on *Cobell X* and *Otoe-Missouria*, not statutory text); *Otoe-Missouria Tribe of Oklahoma v. Kempthorne*, No.

CIV-06-1436-C, 2008 WL 5205191, at *5 (W.D. Okla. Dec. 10, 2008), *abrogated on other grounds by Gilmore v. Weatherford*, 694 F.3d 1160 (10th Cir. 2012) (relying on United States' capacity "as a trustee for Plaintiff and that at least some of the corpus of the trust is non-monetary," rather than any specific statutory duty).[5]

Finally, the Nation cites Mr. Swimmer's declaration in 2007 and the General Accounting Office's reckoning of deficiencies in Interior's management of trust funds. Pl.'s Opp. 17. But neither of these sources relies on the 1994 Act as the basis for its discussion. Indeed, as discussed *supra*, Mr. Swimmer's declaration discussed ongoing programmatic work—*not* work being done pursuant to the 1994 Act. *See supra* III.B. Further, on its face, the GAO discussion the Nation cites relates to management of assets, not any accounting duty relating to assets. *See* Pl.'s Opp. 17; ECF No. 88-15 at 7. There is no basis on which to incorporate these more generalized statements about Interior's management of non-monetary assets into an interpretation of the 1994 Act's plain language on the issue of accounting. That plain language is dispositive, and applies only to money accounts.

E. The Trust Reconciliation Project and Andersen Report reasonably implemented the 1994 Act.

The Nation largely does not respond to the merits of our argument that the Andersen Report reasonably implemented the 1994 Act. *Compare* FD Op. Br. 54-68 *with* Pl.'s Opp. 18-19. Instead, the Nation reiterates its view—without reference to the text of the 1994 Act—that the "Andersen Report does not constitute an accounting." Pl.'s Opp. 19. As explained above, that

[5] The Nation's citation to *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980), is further from the mark. That holdover ICC case explicitly relied on "control and supervision over tribal property" as the basis for an accounting duty. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 989 (Ct. Cl. 1980). That is out of step with contemporary Supreme Court and D.C. Circuit precedent. *See* FD Op. Br. 30-32.

argument is illusory because it is not tethered to the 1994 Act.

In our opening brief, we also set out several reasons why the Andersen Report was reasonable as applied to the Nation's accounts in particular. FD Op. Br. 66-68. For instance, we argued that the fact that prior accountings "cover[ed] various pre-1972 time periods, including allotment, reinforce[s] the reasonableness of the Andersen Report's temporal scope." FD Op. Br. 67. The Nation responds that the Court should disregard that argument because it is a *post hoc* rationalization. Pl.'s Opp. 18. That is true only if—as we have argued and the Nation in places implicitly concedes—this case is a challenge to the Andersen Report as an agency action and therefore subject to the arbitrary and capricious standard of review. We agree that, under that standard, the Court's review would be limited to the administrative record.[6] But the Nation has taken pains to argue that judicial review is not so limited. And, if the Nation is correct (it is not), then it is perfectly appropriate for the Court to consider the fact that the Nation has already received accountings for the "critical time period[]"of allotment, Pl.'s Op. Br. 20, ECF No. 88-1, and whether that information supports a conclusion that the Andersen Report's temporal limitation is reasonable as applied to the Nation.

Though the Nation does not say exactly what standard this Court should apply in reviewing the Andersen Report, it refers at times to the concept of a "meaningful accounting." *E.g.*, Pl.'s Opp. 18-19. This language derives from a Federal Circuit gloss of a different (now lapsed) reference to "accounting" in past years' appropriations acts. *See infra* III.A. As with

[6] For this same reason, we do not concede that the declarations the Nation submitted with its summary judgment motion are properly before the Court on the merits of the 1994 Act. *See Gibraltar Sav. v. Ryan*, 772 F. Supp. 1290, 1293 (D.D.C. 1991) ("The general rule is that when the statute is silent on the procedure for review, the review must be confined to the administrative record."). The Nation has not attempted to demonstrate an applicable exception to the record-review rule.

many of its other arguments, the Nation's point is wholly disconnected from the text of the 1994 Act, which governs here.

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

Regardless of where the accounting duty arises, the Nation is not entitled to an accounting for any funds or transactions that pre-date August 1946. In its opening brief, the Nation asserted that it had a "crucial" need for an accounting of pre-1972 transactions because "[i]t is unclear what happened" to the funds in its trust accounts. Pl.'s Op. Br. 21. In particular, the Nation highlighted the period between 1912 and 1926, when its balances went from more than $1.5 million to zero. *Id.* In our cross-motion, we showed that the Nation has long been on notice of what happened to its funds during this "allotment period." FD Op. Br. 11-18, 36-46. In its opposition brief, the Nation no longer claims that it does not know what happened to its property during this period. Instead, it attempts to refute the various procedural bars that flow from these historical events and the Nation's prior knowledge. These arguments fail.

A. The Nation's claim for an accounting for the allotment era and earlier are barred by numerous time and presentment bars.

Our cross-motion argued that any claim for an accounting of funds held before August 1946—including what the Nation calls the "critical time period[]" of allotment, Pl.'s Op. Br. 21, when all the Nation's assets were sold or distributed—is barred. To reiterate, under the 1924 Act, "[a]ny and all claims against the United States within the purview of this Act shall be *forever barred* unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act." The Act of March 19, 1924 § 2, Pub. L. No. 68-57, 43 Stat. 27, 28 (emphasis added). Likewise, the ICC "receive[d] claims for a period of five years . . . and no claim existing before [August 1946] but not presented within such [five-year] period may thereafter be submitted to any court or administrative agency for consideration."

ICCA § 12, 60 Stat. at 1052. Similarly, "[a] final determination against a claimant made and reported in accordance with [the ICCA] shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy." *Id.* § 22(b), 60 Stat. at 1055. These provisions, along with Section 2401(a), bar the portion of the Nation's action that seeks an accounting of transactions that predate August 1946.

B. The Nation is incorrect that lapsed appropriations acts revive allotment era claims.

The Nation's sole response to these statutory prohibitions is to argue that language in annual appropriations acts enacted decades later—from 1990 to 2014—suspends the time and presentment bars just discussed. Pl.'s Opp. 34-36. Those appropriations acts provided that "notwithstanding any other provision of law, 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." Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 305-306 (2014).

Though the Nation cites the 2014 version of this law, Pl.'s Opp. 35, it fails to mention that 2014 was the last year this provision was included in Interior's appropriations acts. *See* Pub. L. No. 114-113, 129 Stat. 2242, 2526-52, Div. G. Title I. That is critical, because "[w]hile appropriations acts are 'Acts of Congress' which can substantively change existing law, . . . the change is only intended for one fiscal year." *Bldg. & Constr. Trades Dep't., AFL-CIO v. Martin,* 961 F.2d 269, 273-74 (D.C. Cir. 1992). There was nothing in the acts' language that "clearly indicates that it is intended to be permanent," as required for the Nation's point to have merit, nor does the Nation argue there was. *Id.* That Congress repeatedly passed the same language year after year plainly indicates the contrary: it did not believe that the acts' language was permanent.

The cases the Nation cites are distinguishable for the simple reason that those cases occurred while the appropriations acts still included tolling language. *See* Pl.'s Opp.35-36.[7]

Even if the appropriations acts were still in effect, they would not apply to the Nation's claims in this case. The acts' language limits tolling to "any claim . . . concerning losses to or mismanagement of trust funds." 2014, Pub. L. No. 113-76, 128 Stat. at 305-06. The Federal Circuit has held that this language means that "claims falling within its ambit shall not accrue . . . until the claimant is provided with a meaningful accounting." *Shoshone II*, 364 F.3d at 1347. But "claims within [the acts'] ambit," *id.*, are those for "losses or mismanagement," not accounting claims. Pub. L. No. 113-76, 128 Stat. at 305-06. Moreover, the acts only toll claims "until the affected Indian tribe . . . has been furnished with an accounting." *Id.* Not only did the Andersen Report already do that, but so did the accountings provided in connection with the Nation's 1930 litigation. FD Op. Br. 11-18.

The Nation next contends that "the United States does not point to any event causing accrual" and instead points to lawsuits.[8] Pl.'s Opp. 36. But past lawsuits evidence accrual. They reveal that the Nation has long been on notice of, for example, allotment era transactions for which it now claims it needs an accounting. *See* FD Op. Br. 14-18. The lawsuits evidence that the Nation had, nearly a century ago, the information from which it could claim that it was entitled to a further accounting of these transactions. Regardless, we pointed to far more than

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[7] The Nation's reliance on appropriations acts is also misplaced because, even when in force, those acts did not revive stale claims. *See Cobell v. Babbit*, 30 F. Supp. 2d 24, 43-44 (D.D.C. 1998) ("*Cobell I*") (appropriations act "only tolls a clock that has not commenced running" and "cannot revive claims for which the clock stopped running long ago"); *see also FDIC v. Belli*, 981 F.2d 838, 843 (5th Cir. 1993). *But see Chickasaw*, 120 F. Supp. 3d at 1229.

[8] ICCA § 12—which applies to any claims for an accounting of funds or transactions before August 1946—was a statute of repose, not limitations. "There is no doubt . . . that Congress intended to cut off all claims not filed before August 13, 1951." *Sioux Tribe v. United States*, 500 F.2d 458, 489 (Ct. Cl. 1974) (Skelton, J., concurring in part).

lawsuits. The Nation's lands were sold and tribal representatives attended those sales. FD Op. Br. 8-9. The United States opened its books to the Nation in 1924. *Id.* 15-17, 44-46. The GAO prepared a restatement of the Nation's accounting in 1933. *Id.* 16-18. The United States prepared financial statements covering 1898 through the first quarter of fiscal year 1915 and provided those statements to Congress and the public. *Id.* 12-13, 44-46. And the United States prepared settled account packages, validating the disbursements and collections from the Nation's accounts for the allotment era, on a quarterly or annual basis, depending on the period. *Id.* 11-12, 44-46. These accountings, standing alone, caused the statute of limitations to run on any claim that the Nation was entitled to a further accounting of the allotment era transaction. The Nation's subsequent lawsuit based on the information it did receive removes any doubt.

Notably, the Nation does not argue that its contentions of a takeover of the Nation's government apply to the various jurisprudential bars on the Nation's pre-1946 claims, instead limiting the point to our *res judicata* argument. *See* Pl.'s Opp. 36-40. Rightly so. When members of a tribe are aware of a sale, the statute of limitations will not be tolled on the tribe's claim "on the ground that the disablement of [a Tribe's] governing body . . . prevented the [Tribe's] knowledge of" the sale. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1579-81 (Fed. Cir. 1988). And, in any event, the Nation alleges incapacity only until 1975 when, even under its view of the facts, limitations would have restarted. Indeed, the Nation maintained contracts with the same lawyers it hired for ICC litigation past 1975. *See* Pl.'s Opp. 32; SUF # 104-05. As such, the Nation's demand for an accounting of pre-1946 transactions is barred.

C. The United States' alleged "illegal takeover" of the Nation's government does not wipe away preclusive effect from the Nation's prior litigation.

Our cross-motion argued that the Nation's litigation under the 1924 Act precludes the Nation from now re-litigating claims it brought or could have brought in prior litigation. FD Op.

Br. 41-44. The Nation's broad claim, Pl.'s Opp. at 38, that the Nation "was fully under the control of the Department of the Interior" when it brought at least a dozen lawsuits against the United States under the 1924 Act does not withstand scrutiny. *See* Fed. Defs.' MSJ Ex. 59, ECF No. 96-64. But regardless, the Nation's point is immaterial because the process by which the Nation's attorneys were selected was mandated by Congress in Section 2 of the 1924 Act. That provision required the Nation to choose "the attorney or attorneys employed to prosecute" its claims "by a committee chosen by them under the direction and approval of the Commission of Indian Affairs and the Secretary of the Interior." 43 Stat. at 28. The Nation does not dispute that the selection of its attorneys complied with that Congressional directive, but instead disputes that the process "complied with the Nation's Constitution." Pl.'s SUF Resp. # 70. Even if that were true, it would not negate the process because "the organization and management of the trust is a sovereign function subject to the plenary authority of Congress." *Jicarilla*, 564 U.S. at 175. The Nation therefore has not established a factual or legal dispute as to whether the suits it brought under the 1924 Act were fully and fairly litigated.

The Nation cites *Chickasaw Nation v. Dep't of Interior*, where the court found a fact issue as to whether res judicata could apply in light of the tribes' claims that the United States suppressed their governments during prior litigation. Pl.'s Opp. at 40 (citing *Chickasaw*, 120 F. Supp. 3d at 1235-36). But the record in that case differs substantially from the record here. In *Chickasaw Nation*, the tribes asserted that the process for employing tribal attorneys was not followed, and that the ICC improperly approved a settlement offer, despite the fact that the ICC's approval allegedly violated settlement terms requiring approval by a governing tribal body. 120 F. Supp. 3d at 1236-37 nn.104-05. As a result, the court found a fact issue as to whether those tribes' attorneys had authority to prosecute or settle the suits. *Id.* at 1236-37. In contrast, the

Nation fails to present any facts here to suggest that the selection or employment of its attorneys contravened any portion of the 1924 Act, in which Congress expressly granted the Nation's attorneys representative authority. 43 Stat. at 28. And because the Nation's Court of Claims action was litigated to judgment, there is also no assertion, as in *Chickasaw*, of a dispute surrounding settlement authority. *See* 120 F. Supp. 3d at 1236 nn.104-05; FD Op. Br. 17-18. Even if the Nation's allegations were substantiated, they are irrelevant. Congress enacted legislation providing for resolution of the Nation's pre-1924 claims. The statute governs and precludes relitigation here.

The Nation's claim that there is no identity of parties fails for the same reason. Although the Nation's governance and relationship to the United States have changed over time, the Nation cannot seriously claim that it is not the same Cherokee Nation that brought the 1930 litigation. Congress had plenary authority to enact the provisions of the 1924 Act, and the Nation's attorneys were selected pursuant to that same Act.

Finally, the Nation contends that any preclusive effect of the 1930 litigation should be limited to the specific accounts at issue in that litigation. Pl.'s Opp. 38. In doing so, the Nation misstates the doctrine of res judicata, suggesting that its preclusion of claims that *could have been* brought is some sort of "extension" that requires a different or heightened showing. *Id.* at 37. That is incorrect. As the Nation's own citations confirm, res judicata also precludes claims that *could* have been brought. *See Capitol Hill Grp. v. Pillsbury Winthrop Shaw Pittman LLP*, 574 F. Supp. 2d 143, 148-49 (D.D.C. 2008); *see also Mervin v. FTC*, 591 F.2d 821, 830 (D.C. Cir. 1978). Here, the Nation's attorneys brought various claims based on extensive accountings prepared over six years by the Nation and the United States. The Nation's petitions also sought additional accounting, and to the extent it desired any further accounting beyond that explicitly

sought, the Nation could have sought that accounting at that time as well. *See* FD Op. Br. 43-44 (discussing jurisdiction under the 1924 Act). As a result, any claim for an accounting of transactions pre-dating 1930 is barred by res judicata.

IV. The Nation is incorrect that Rule 37(c)(1) prohibits Federal Defendants from asserting repudiation or presenting evidence on earlier accountings.

The Nation argues that we should be barred from arguing (1) repudiation in connection with our statute of limitations defense, or (2) that the Slade-Bender Accounting or the accountings surrounding the 1924 Act "constitute an accounting." Pl.'s Opp. 41. To show that any alleged discovery conduct bars a summary judgment argument under Rule 37(c)(1), however, only two questions are relevant: (1) whether the Nation has shown a failure to supplement discovery responses; and (2) whether the allegedly lacking supplementation is substantially justified or harmless. *United States ex rel. Morsell v. NortonLifeLock, Inc.*, 567 F. Supp. 3d 248, 260-61 (D.D.C. 2021). The Nation has not met this test.

With respect to repudiation, the Nation argues that Federal Defendants should have supplemented their response to the Nation's Interrogatory No. 5 under Rule 26(e), and, having failed to do so, our repudiation arguments should be excluded under Rule 37(c)(1). *See* Fed. R. Civ. P. 26(e), 37(c)(1) (allowing exclusion where "a party fails to provide information or identify a witness as required by Rule 26(a) or (e)). Interrogatory No. 5 asked whether "[Federal Defendants] contend [they] have repudiated any trusteeship owed to the Cherokee Nation," citing to Federal Defendants' motion to dismiss. FD Resp. Pl.'s Interrog. No. 5, Ex. 7 to Frandina Decl., ECF No. 98-1. We objected that this was a premature contention interrogatory and we were not in a position to make a definitive statement at that time, and responded that our motion to dismiss did not contain the issue of repudiation. *Id.* The Nation did not identify any alleged deficiency in this response for nearly two years. *Id.* (reflecting Aug. 27, 2020 service).

The Nation is incorrect that there was a violation of the discovery rules as to Interrogatory No. 5. Supplementation is only required where "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)(1)(A); *e.g.*, *Molock v. Whole Foods Mkt. Grp., Inc.*, No. 16-CV-02483 (APM), 2020 WL 13049429, at *1-2 (D.D.C. Dec. 16, 2020). Here, even assuming there was a duty to supplement, our brief provided the Nation with a written disclosure of the information. And, when the Nation's counsel raised the issue as part of the parties' meet and confer, we explained (again in writing) our Interrogatory response and offered to nonetheless supplement. July 28 Ltr. at 7-8, Ex. 9 to Frandina Decl., ECF No. 98-1. Thus, there was no remaining duty to supplement under Rule 26(e)(1) that could trigger Rule 37(c)(1). If the Nation believed, in light of our brief, that it needed further discovery on the repudiation issue, the proper remedy (if any) would be under Rule 56(d), which, as we concurrently will explain, is not implicated here. Further, there was no harm to the Nation. As explained above, *supra* Section II.B, we use "repudiation" in this context as simply a different label for our argument that the Nation's challenge to the adequacy of the Andersen Report accrued long ago. It is the Andersen Report, not our label of "repudiation," that is the "information" that would be the focus of Rule 37(c)(1). The Nation has long been aware of Interior's position that the Nation's claims challenging the adequacy of the Andersen Report are time-barred. Fed. Defs.' Mot. to Dism. 21-24, ECF No. 34-1.

The Nation is likewise incorrect in arguing that Interior "should be barred from making arguments based on the Slade and Bender Report, . . . and activities done in connection with the 1924 Act." Pl.'s Opp. 44. Interrogatory No. 1 asked "what [Federal Defendants] contend is required to be included in an 'accountings provided to Plaintiff required by law,'" referencing

Federal Defendants' certification of the administrative record. FD Resp. Pl.'s Interrog. No. 5, Ex. 7 to Frandina Decl., ECF No. 98-1. Interrogatory No. 2 asked what accountings were referenced in the administrative record certification. *Id.* Federal Defendants answered both of these interrogatories truthfully, stating that Interior's administrative record certification referred to the Andersen Report and the underlying Trust Reconciliation Project.[9] *See* July 28 Ltr. at 4-7, Ex. 9 to Frandina Decl., ECF No. 98-1. The Slade-Bender Accounting and the accounting completed under the 1924 Act were separate from that set forth in the Anderson Report and related administrative record; there is no information with which to supplement under Rule 26(e)(1). If the Nation believed we had misinterpreted the intended scope of those Interrogatories, it should have raised that issue through a meet and confer. The Nation cannot now attempt to use our unchallenged interpretation of the Interrogatory as a basis to exclude facts that, under our interpretation, were not within the scope of the Interrogatory. The Nation cannot show it is entitled to exclude any of our arguments under Rule 37.

V. The Nation's evidentiary objections in response to our Statement of Undisputed Facts are unfounded.

The Nation repeatedly objects on hearsay and authentication grounds to Federal Defendants' statements of undisputed facts concerning the Nation's prior accountings. *See* Pl.'s Opp. 24 n.11.[10] However, all but one of these documents qualify as "ancient documents," and are thus excepted from the rule against hearsay. Fed. R. Evid. 803(16). To remove any doubt as to

[9] It is also incorrect that Federal Defendants were required to initially disclose the earlier accountings. We collected these accountings from sources outside our control; namely, various public research sources. Declaration of Terrence Kehoe ¶ 7, attached as Federal Defendants' summary judgment Exhibit 75. And, having provided the documents in discovery, there is no live duty to supplement. Fed. R. Civ. P. 26(e)(1)(A).

[10] *See* Pl.'s SUF Resp. ## 4, 12, 16, 18, 20, 21, 22, 28, 29, 30, 31, 32, 34, 35, 36, 38, 39, 40, 41, 45, 47, 48, 69, 70, 76, 93, 101, 104.

their authenticity, we provide a declaration from the historian the United States engaged to collect these documents. *See* Kehoe Decl, Ex. 75. As shown there, all but one were prepared before January 1, 1998 as required for the "ancient documents" exception, and every document outside the administrative record that we included with our cross-motion was collected from a public research source.[11] *Id.* at ¶¶ 7-9. The National Archives and the other research sources we used are each "a place where, if authentic," these documents "would likely be." Fed. R. Evid. 901(8); Kehoe Decl., Ex. 75 at ¶¶ 7-9. Thus, the Nation's hearsay and authentication objections should be ignored, and, to the extent not otherwise validly disputed, paragraphs containing these objections should be deemed admitted.[12] Loc. Civ. R. 7(h)(1). The Nation's legibility objections are similarly flawed and should be ignored. *See* Kehoe Decl., Ex. 75, ¶ 10; Loc. Civ. R. 7(h)(1).

CONCLUSION

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

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[11] Exhibit 40 qualifies as a "learned treatise." Fed. R. Evid. 803(18); Kehoe Decl., Ex. 75, ¶ 9.t.

[12] The Nation also objects to several documents from the administrative record as containing hearsay. *See* Pl.'s SUF Resp. ## 109, 110, 111, 129, 130. But "[h]earsay evidence certainly may be included as part of the administrative record, . . . because the record is what it is." *Democracy Forward Found. v. Pompeo*, 474 F. Supp. 3d 138, 150 (D.D.C. 2020) (quotations omitted).

Respectfully submitted,

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