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 IN SUPPORT OF
OBJECTIONS TO REPORT AND RECOMMENDATION ON SUMMARY JUDGMENT

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INTRODUCTION

The Nation claims it is entitled to an historical accounting. In response, Federal Defendants sought summary judgment on all three counts in the Nation's complaint, arguing (among other things) that the only potential source of a duty to historically account was the 1994 Trust Reform Act, and that Interior had acted nearly thirty years ago to fulfill that duty via the Andersen Report.

The Magistrate Judge's Recommendation analyzed the Andersen Report under the APA's arbitrary and capricious standard of review to determine whether it satisfied the 1994 Act's historical accounting duty. Because the Recommendation recognized and applied only the 1994 Act, however, it should have granted Federal Defendants' request for summary judgment as to Count 1, which rests on other sources for the purported duty. And the Recommendation failed to acknowledge that its application of arbitrary and capricious review, which applies to agency *actions*, was inconsistent with its holding that Interior failed to act. The Recommendation therefore erred in failing to grant summary judgment in favor of Federal Defendants on Count 3 and those portions of Count 2 that seek to compel an historical accounting.

What remains is a challenge to the historical accounting that Interior did provide under the 1994 Act: the Andersen Report. But the Recommendation erred in even proceeding to the merits of that claim given the six-year statute of limitations in 28 U.S.C. § 2401(a) and Congress's specific directives that the Andersen Report was "deemed received" in 2000 for purposes of any statutes of limitations. The Recommendation eschews this clear Congressional intent in favor of an unfettered version of the doctrine of repudiation, failing to recognize that "repudiation" is simply a label for the point at which a tribe, for claim accrual purposes, has knowledge about an alleged breach of trust. Here, the Nation had all the knowledge it needed for its present claims when it received the Andersen Report.

Finally, in reaching the merits of the Andersen Report, the Recommendation misread the 1994 Act and misapplied the APA standard of review. With respect to the 1994 Act, Sections 4011 and Section 4044 must, at a minimum, be read in concert when it comes to historical accounting to tribes. And, regardless, Section 4011's plain language (1) applies only to funds (not non-monetary trust assets), and (2) does not apply to transactions pre-dating 1938. With respect to the APA standard, Interior's reasonable judgments in implementing the 1994 Act are entitled to deference. Yet the Recommendation fails to even engage on an assessment of whether Interior's conclusions as to the scope of its chosen accounting were reasonable under the statutory scheme and the circumstances before the agency.

The Nation's responses recede into the same errors the Recommendation committed. This Court should reject the Recommendation and grant summary judgment to Federal Defendants on all three claims.

ARGUMENT

I. This Court should expressly confirm the conclusion of law that the Recommendation applied: the 1994 Act supplies the only applicable historical accounting duty.

We argued before the Magistrate Judge that the only potential accounting duty at issue in this case arises under the 1994 Act. Fed. Defs.' MSJ Br. 32-36, ECF No. 96-1. Though the Recommendation did not expressly address our argument, it correctly focused entirely on the 1994 Act in its analysis. R&R at 17-23; 28-33. The Nation did not object. Indeed, there is no basis to conclude that another statutory accounting duty applies to this case. *See* Fed. Defs.' MSJ Br. 32-36.[1] Federal Defendants are thus entitled to summary judgment on Count 1 of the

[1] We acknowledged in our summary judgment briefing that the 1893 Act contained an accounting duty, but the Nation apparently does not press any claim under that Act. *See* Pl.'s Comb. Reply & Resp. 24-41, ECF No. 100 at; Pl.'s Resp. to Fed. Defs.' SUF # 2, ECF No. 99-1 (objecting to discussion of Slade and Bender Report submitted in compliance with 1893 Act as

Nation's Complaint. That Count asserts that "[t]he United States is required to provide an accounting of the Trust Funds held or managed by the United States," but does not identify any statute that creates the accounting duty it asserts, including 1994 Act. Compl. ¶¶ 132-137, ECF No. 2-1; *see Cherokee Nation v. Dep't of the Interior*, 531 F. Supp. 3d 87, 91 (D.D.C. 2021) (recognizing that Count 1 cites provisions that "create a trust relationship"). In granting summary judgment on Count 1, the Court should recognize that the only historical accounting duty potentially applicable to this case is the duty created by the 1994 Act.

To avoid this result, the Nation contends that the 1994 Act did not create a duty to account, but only affirmed a pre-existing duty. Pl.'s Opp'n to Fed. Defs.' Objs. to R&R on Summ. J. 13-15, ECF No. 112 ("Pl.'s Opp."). The parties briefed this issue before the Magistrate Judge, who instead focused exclusively on the 1994 Act. 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* noted 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 Nat. Gas Co. v. United States*, 750 F.3d 863, 896 (D.C. Cir. 2014) (quoting *Cobell VI*, 240 F.3d at 1099). And, of course, *Cobell VI* pre-dates the Supreme Court's opinion in *Jicarilla*, where the Supreme Court made clear that only statutes, treaties, and regulations can create trust duties. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011). But the Nation does not identify any other source allegedly

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"not relevant, as the Nation does not seek a restatement of the transactions covered by the Slade & Bender Report.").

creating an accounting duty. In any event, that the 1994 Act used the term "recognition" in referring to trust duties 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 also responds that the duty to account "is not itself a free-floating 'trust duty,' but instead is the test by which a beneficiary can measure whether underlying trust duties have been satisfied." Pl.'s Opp. 11, 13-16. The Nation previously relegated this argument to a footnote. Pl.'s MSJ Opp. 21 n.8. We are aware of no authority supporting this newly featured argument, and the Nation does not identify any. Rather, courts engage in the same analysis for trust accounting suits as other breach of trust claims, asking whether Congress has recognized an enforceable trust duty. *See, e.g.*, *Fletcher v. United States*, 730 F.3d 1206, 1208 (10th Cir. 2013).

Finally, the Nation retreats to a procedural argument. Specifically, the Nation defends the Magistrate Judge's failure to grant our motion with respect to Count 1 by contending that "the claims at issue could be resolved by review of the 1994 Act, and . . . it is undisputed that the Act requires an accounting." Pl.'s Opp. 13. But it is Count 2 that focuses on the 1994 Act, not Count 1. In a footnote, the Nation explains further that the Recommendation "is limited to the 1994 Act because the Nation's Motion focuses on whether the Arthur Andersen Report 'meets the Government's duty to account under the 1994 Act.'" *Id.* 13 n.19 (quoting Recommendation at 18). But only *the Nation's* motion for summary judgment "is limited to the 1994 Act." Federal Defendants cross-moved on the entire case, including Count 1. Federal Defendants' motion analyzed each source of law the Nation identified and argued that these sources' plain language "precludes a finding that those statutes give rise to any accounting duty whatsoever." Fed. Defs.' MSJ Br. 27; *see also* App'x of Sources of Law, ECF No. 96-2. Thus, we demonstrated that

Federal Defendants are "entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a), with respect to Count 1, which relies exclusively on provisions that "create a trust relationship" but do not create a duty to account, *Cherokee Nation*, 531 F. Supp. 3d at 92.[2]

In sum, because Count 1 is not based on any duties the government expressly accepted by statute, the Recommendation should have granted summary judgment in favor of Federal Defendants on Count 1, and this Court should do so now. In doing so, the Court should also rule, consistent with D.C. Circuit and Supreme Court precedent, that the only historical accounting duty potentially applicable to this case is the duty created by the 1994 Act.

II. The Nation's challenge to the Andersen Report is time-barred.

Though the parties dispute the scope and specific provisions involved, the parties agree that the 1994 Act provides for a duty to historically account to tribes. Because Interior's effort to comply with that duty—the Andersen Report—occurred in 1995, and Congress deemed tribes to have received it in 2000, any challenge to the Andersen Report's compliance with the 1994 Act is barred by the six-year limitations period in 28 U.S.C. § 2401(a). Fed. Defs.' Obj. at 8-22, ECF No. 111. The Nation's attempts to defend the Recommendation's errors should be rejected.

A. The doctrine of repudiation, if relevant at all, does not modify ordinary accrual rules in this case.

Where, as here, the trustee provides the beneficiary with actual knowledge of the facts giving rise to the beneficiary's suit, the doctrine of repudiation adds nothing to ordinary claim accrual principles. *See* Fed. Defs.' Obj. 14. The Nation's actual knowledge of the Andersen Report in 1995 meets any fair application of the doctrine of "repudiation" as well. The Nation has long been on

[2] The Nation also contends that the United States has recognized a duty to account outside the 1994 Act by citing statements in Congressional committee reports and by various agencies. Pl.'s Opp. 15. These statements are not "statutory or regulatory prescriptions." *El Paso*, 750 F.3d at 895.

notice of what it alleges to be conduct inconsistent with the United States' duty to account under the 1994 Act. Congress established that "for purposes of determining the date on which an Indian tribe received a reconciliation report for purposes of applying a statute of limitations, any such report . . . shall be deemed to have been received" on December 31, 2000. Settlement Act, 116 Stat. 79; Amendment Act, 119 Stat. 2954. The Nation makes various arguments to avoid this result, but nowhere does the Nation identify words or actions in the six years preceding their lawsuit that give rise to their claim. *See* Pl.' Opp. 3 n.6. That is fatal to the Nation's claims in Counts 2 and 3, and the Recommendation should have granted summary judgment to Federal Defendants on those claims.

The Nation says "[t]he Recommendation sets out the correct repudiation standard," by recognizing that repudiation must: (1) "consist of actions by the trustee that are inconsistent with its responsibilities," (2) "be clear and continuing," and (3) be made known to the trust beneficiary. Pl.'s Opp. 5. However, that is not the standard the Recommendation applied.

The Recommendation's central conclusion was that, to repudiate, the United States must deny the trust's existence. R&R 15. Indeed, in rejecting our argument that the Andersen Report constituted repudiation, the Recommendation held that "the failure to account does not amount to a denial of the trust's existence." *Id.* 15 (quoting *Boehnke v. Roenfanz*, 67 N.W.2d 585, 590 (Iowa 1954)). But, as our Objections demonstrated, repudiation does not require action that "amount[s] to denial of the trust's existence." Fed. Defs.' Obj. 14-19. The Recommendation's gloss on the doctrine of repudiation from private-sector trust litigation has no place in actions relating to the government's trust duties to Indian tribes. Even the Nation does not try to defend the Recommendation's central premise. Likewise, any fair reading of the Recommendation makes clear that it required far more than "actions inconsistent with [trust] responsibilities" for repudiation to occur. *See* Pl.'s Opp. 5. In fact, the Recommendation explicitly rejected this standard, reasoning that "the Federal Circuit rule

that trustees may repudiate by taking actions inconsistent with trustee responsibilities. . . . undermines the repudiation standard itself." R&R 16. Far from requiring mere "actions inconsistent with [trust] responsibilities," the Recommendation required all out denial of the existence of a trust relationship and erred in doing so. *Id.*

Applied to the United States' trusteeship, the Recommendation's approach effectively reads 28 U.S.C. § 2401(a)'s limitations period out of existence, because the United States does not and will not wholesale deny there is a trust for federally recognized tribes. *See Jicarilla*, 564 U.S. at 173-74 ("Though the relevant statutes denominate the relationship between the Government and the Indians a 'trust,' *see, e.g.*, 25 U.S.C. § 162a, that trust is defined and governed by statutes rather than the common law."). The Recommendation's construction of the repudiation doctrine is thus much higher than the Nation admits, and cannot be squared with the principle that federal "statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant," *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988).

Under the standard the Nation now proffers, a "repudiation" occurred here. The Nation itself contends that the Andersen Report failed to satisfy the United States' trust duty to account in numerous ways—the Nation variously describes the Andersen Report as "notoriously limited," "meager," the result of "recalcitrance," omitting "significant revenue-generating components of the Nation's trust," and "of little to no use." Pl.'s MSJ Br. 2, 6, 19, 20, 22, and 23, ECF No. 88-1. Surely the Nation's claim is that the Andersen Report was "inconsistent with [the government's] responsibilities." *See* Pl.'s Opp. 5. And the Nation would have known those alleged facts when it received the Report. Further, the Andersen Report was Interior's only effort to historically account to the Nation under the 1994 Act, and the Report was explicit that it constituted Interior's attempt to

comply with the 1994 Act's retrospective accounting duty. Fed. Defs.' Obj. 10, 20-21; Fed. Defs.' SUF # 108; ECF No. 96-4. Finally, the Nation had actual knowledge of the Andersen Report. Indeed, the Nation's response to our objections confirms that "the Nation has never denied that it received the Arthur Andersen Report, and both that date and the deemed-received date are more than six years before this litigation started." Pl.'s Opp. 3 n.6. The standard the Nation sets out is readily met.

The Nation's other arguments only illustrate the Recommendation's error. According to the Nation, "the United States' sworn discovery responses confirm that repudiation did not occur at any point prior to this litigation." Pl.'s Opp. at 6. But this assumes the United States must affirmatively state when it repudiates. The opposite is true: actions alone can give rise to repudiation. *Shoshone Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("*Shoshone II*"). The Nation's point also makes little sense. For the Nation's complaint to validly state a claim, Federal Defendants would have had to repudiated the trust *before* the Nation filed suit. If repudiation is relevant to a statute of limitations inquiry, then it must also be relevant to whether the Nation's claim accrued at all. After all, "[w]hile it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit," courts should "not infer such an odd result in the absence of any such indication in the statute." *Reiter v. Cooper*, 507 U.S. 258, 267 (1993). The Recommendation, and the Nation, point to no such indication. This "odd result" should be rejected.

The Nation's other principal defense of the Recommendation's conclusion is based on the Nation's contention that its "claims are not a challenge to the Arthur Andersen Report," but instead seek relief for a failure to act. Pl.'s Opp. 8-10. Indeed, the Nation claims that nearly all of Federal Defendants' "arguments suffer from the same infirmity—namely, the United States'

misrepresentation that the Nation's claims are exclusively a direct challenge to the adequacy of the . . . Andersen Report." *Id.* 8.[3] The Nation's premise fails. It is an undisputed fact that Interior provided the Andersen Report to the Nation to comply with the historical accounting duty created in the 1994 Act. *See* Pl.'s SUF ## 91-92, ECF No. 88-2; Fed. Defs.' SUF # 108; Pl.'s Ex. 1, at 5, ECF No. 88-4; Fed. Defs.' MSJ Br. 47. Where an agency has acted, regardless of the ultimate sufficiency of that action, a lawsuit to compel what is allegedly missing from that agency action is generally not "a genuine failure to act" claim. *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). Instead, it is an ordinary claim for arbitrary and capricious agency action. That is exactly the situation here: The Andersen Report provided certain accounting information under the 1994 Act; the Nation contends more was required. These contentions take the case out of the failure-to-act framework.[4]

That the Nation postures the Andersen Report as Federal Defendants' "factual defense" does not change the fundamental nature of this suit. The same could be said of any lawsuit in which a plaintiff styles its action as a failure-to-act claim without referencing agency decisions that grapple with the issue at hand. This is exactly what happened in *WildEarth Guardians v. Chao*, where the plaintiff "fashion[ed] its claim as a 'failure to act' challenge" and "Federal Defendants suggest[ed] that [plaintiff] actually challenges the adequacy of its . . . regulations." 454 F. Supp. 3d 944, 948 (D. Mont. 2020). Ultimately, despite noting that the plaintiff there presented a strong case on the merits, the court rejected the plaintiff's failure-to-act framing because that would "rewrite § 706(1) of the APA to replace *action* with *compliance*." *Id.* at 952.

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[3] This is the only argument the Nation makes with respect to the "deemed received" date set by statute and the applicability of the Indian canons of construction. Pl.'s Opp. 8-10.

[4] Another premise of the Nation's argument that this is a failure-to-act case is that its complaint is broader than the 1994 Act. As discussed *supra*, that contention fails as a matter of law. *See* Section I, *supra*.

So too here. Federal Defendants' provision of the Andersen Report in an attempt to satisfy any duty to historically account in the 1994 Act is no more a "factual defense" than the existence of the regulations in *WildEarth*. The Nation's action seeks compliance with what it views as a standard that the Andersen Report did not meet. That is a challenge to agency action regardless of the Nation's artful pleading. *See Ecology Ctr.*, 192 F.3d at 926 (challenge to "sufficiency of an agency action 'dressed up as an agency's failure to act" is not "a genuine failure to act" claim); *Davidson v. United States Dep't of State*, 113 F. Supp. 3d 183, 191-92 (D.D.C. 2015).[5]

The Recommendation found the Nation's claims timely by reasoning that Federal Defendants cannot both "claim[] producing the [Andersen] Report was *consistent* with its trust responsibilities" and also assert a statute of limitations bar. R&R 17; Fed. Defs.' Obj. 17-18. The Nation agrees, contending that the nature of the fiduciary relationship means that "the United States cannot assert that it met obligations while simultaneously claiming it repudiated those same obligations." Pl.'s Opp. at 11. Why not? Claim accrual (or repudiation) is not a question of the merits of the underlying claim. It is a question of what the plaintiff knew (or should have known) and when. Indeed, the Federal Circuit has described repudiation as the moment when "the government's *purported* liability was fixed," not its concession of liability. *Ramona Two Shields v. United States*, 820 F.3d 1324, 1329 (Fed. Cir. 2016) (emphasis added). There is no

[5] It is true, as the Nation points out, that the Andersen Report and accompanying transmittal materials referenced the 1994 Act's Section 4044, not Section 4011. Pl.'s Opp. 22. As we have argued, it is Section 4044 that requires a historical accounting for tribes, and that Interior interpreted as containing a retrospective duty to account. Fed. Defs.' MSJ Br. 55. But even if the Court concludes that 4011 contains the relevant duty, that would not convert the Nation's claim into one seeking to compel a failure-to-act. As the Recommendation and the Nation both acknowledge, challenges to agency action can include situations where "an agency has either violated Congress's precise instructions or exceeded the statute's clear boundaries.'" R&R 31 (quoting *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011)); Pl.'s Opp. 25. While we disagree that the Andersen Report violated congressional instruction, this analysis reinforces that this is not a failure to act case, but a case about agency action.

reason to depart from that framework here.

The Nation claims this Court may ignore Federal Circuit case law on repudiation. As our objections explained, however, those cases are persuasive because they address tribal trust repudiation and because the standards for claim accrual are the same in the D.C. Circuit and the Federal Circuit. Fed. Defs.' Obj. 16. The Nation's response provides a new justification for the Recommendation's departure from Federal Circuit case law (one that the Recommendation itself does not rely on): that the Court of Federal Claims applies "a different standard because of its limited jurisdiction." Pl.'s Opp. 10. The basis for this claim is unclear. Though it is true that Court of Federal Claims jurisdiction is limited to claims viable under the Tucker Act and Indian Tucker Act, that court's limited jurisdiction makes no difference to the substance of its analysis of whether a claim has accrued. The Federal Circuit's accrual standard is the same as that applicable in this Court. *Felter v. Kempthorne*, 473 F.3d 1255, 1259 (D.C. Cir. 2007); *United States v. Commodities Exp. Co.*, 972 F.2d 1266, 1270 (Fed. Cir. 1992).[6]

Ultimately, the Nation implicitly endorses the consequence of the Recommendation's analysis: that "the Nation's accounting claim has no statute of limitations." Fed. Defs.' MSJ Br. 54. The Nation's answer to this consequence is that "the United States[' argument] confuses (i) the time at which a failure to act constitutes final agency action that is ripe for judicial review with (ii) when accrual of the claim begins the running of the statute of limitations." Pl.'s Opp. 12. But that is exactly the point—there should be no difference between these two concepts. Otherwise, a litigant can file suit whenever it pleases, regardless of when its claim accrued. That

[6] The Nation also claims that the Court may ignore Federal Circuit case law because it relies on the concept of "misfeasance or nonfeasance." Pl.'s Opp. 10. While it is true that the Federal Circuit does not apply the doctrine of repudiation to claims of misfeasance or nonfeasance, our objections did not rely on this exception. Fed. Defs.' Obj. 16-17. And the Recommendation rejected "the Federal Circuit rule" wholesale. R&R 16; *see supra* II.A.

is inconsistent with basic statute of limitations principles and Congress's intent here; this Court should reject it. In doing so, the Court should grant summary judgment for the Nation's claims under the 1994 Act—Counts 2 and 3. Those claims cannot be failure to act claims and they accrued in December 2000 and expired six years later.

B. Interior's programmatic accounting work in response to litigation, and the now-lapsed Appropriations Acts, do not revive the Nation's claims.

In addition to misconstruing the doctrine of repudiation, the Recommendation relies in passing on the declaration of former Cherokee Nation Principal Chief and former Interior official Ross Swimmer for the proposition that "after submission of the [Andersen] Report, the Government *continued* its efforts to prepare a historical accounting for tribal trust accounts." R&R 16 (citing Swimmer Decl. ¶ 19, ECF No. 99-3).[7] While it is true that, after the Andersen Report, Interior continued to work to resolve disputed balances by negotiating with tribes and submitting a proposal for a legislative settlement, that does not change the Congressionally mandated deadline for tribes to challenge the results provided to them in the Andersen Report. No expectation of a future historical accounting (i.e., a future agency action) would toll the statute of limitations for the concrete agency action that already occurred. After all, an APA "cause of action accrue[s] when the agency action occurred." *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850-51 (D.C. Cir. 1983). And, in any event, as Mr. Swimmer's declaration points out,

[7] The Nation submitted two declarations from Mr. Swimmer in support of its summary judgment briefing. One is from 2007, when Mr. Swimmer was the Special Trustee for the Department of the Interior, and was filed along with the government's request for a voluntary remand in numerous timely-filed tribal account actions. Pl.'s Ex. 31, ECF No. 100. The second declaration was prepared in 2022 for the present litigation and takes the position that Interior did not intend the Andersen Report to constitute an accounting. Pl.'s Ex. 30, ECF No. 100. Of course, Mr. Swimmer was not employed with Interior in 1995 when the Andersen Report was released—he would have no personal knowledge. In any event, the relevant question is whether the Andersen Report complies with the 1994 Act (not any private accounting standard), a point to which Mr. Swimmer's 2022 declaration does not speak. *See* Fed. Defs.' MSJ Reply at 8n.2, ECF No. 103.

"[t]he United States' attempts to remand the various Tribal trust Accounting cases"—the 54 tribal trust cases timely filed before December 31, 2006—"were unsuccessful." 2022 Decl. ¶ 20. Indeed, the proposed historical accounting plan was never prepared. *Id.* Had the Court remanded the Andersen Report for further accounting, the resulting agency action post-remand would have perhaps constituted a new agency action (with a different accrual date). But the Court denied Interior's remand request.

Though the Nation contends that the accounting work Mr. Swimmer discussed in his 2007 declaration was not merely programmatic, it points to nothing reflecting that this work was intended to satisfy the historical accounting duty in the 1994 Act. Pl.'s Opp. 7-8. And, revealingly, the Nation does not respond to our argument that no evidence exists to show that the Nation relied on any ongoing programmatic accounting work to delay filing its present suit. *See* Fed. Defs.' Obj. at 21. Nor would any such reliance be reasonable. After all, the voluntary remand motion itself pointed out the limited time that Congress "deferred the deadline for tribes to object to the" Andersen Report, and that the "effects of" Congressional extensions "expired Dec. 31, 2006.". Frandina Decl. Ex. 4 at 11, 36, ECF No. 98-1. Had the Nation reviewed this motion—as it would have had to if it considered, at the time, Mr. Swimmer's declaration—the Nation would have been put on notice (again) of the Congressionally-mandated deadline for filing suit.

The Nation also does not respond to our argument that an already-expired claim cannot be revived by events occurring after its expiration. Consistent with Congressional intent, the Nation's claim expired in December 2006 and the motion for voluntary remand was not filed until 2007. As in the context of equitable tolling, an "external obstacle to timely filing" stops the clock from running while the obstacle is present; it does not revive already-expired claims. *See*

Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 256 (2016) ("litigant seeking tolling [must] show that some extraordinary circumstance stood in his way" from filing before limitations expired (quotations and emphasis omitted)); *Virtue v. Int'l Bhd. of Teamsters Ret. & Family Prot. Plan*, 997 F. Supp. 2d 10, 18 (D.D.C. 2013) (equitable tolling did not revive claim that "had already expired"). Thus, even if Mr. Swimmer's 2007 declaration had provided a basis to delay the Congressionally-directed accrual date (it did not), it would be irrelevant because the Nation's claim had already expired.

The Nation's conclusory assertion that various appropriations acts "tolled the Nation's accounting claims or revived stale claims" also fails. *See* Pl.'s Opp. 12. As the Nation acknowledges, the Recommendation did not reach this issue. Should this Court consider the Nation's incorporation by reference to its argument on this point before the Magistrate Judge, it should reject the argument. In its summary judgment papers, the Nation cited the 2014 version of annual appropriations acts enacted each year from 1990 to 2014. Pl.'s MSJ Opp. 34-36. Those 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).

The Nation's briefing fails to mention, however, that 2014 was the last year Congress included this provision in Interior's appropriations acts. See Consol. Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2526-52, Div. G. Title I (2015). 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," 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 were filed while the appropriations acts still included this tolling language, making them inapt. *See* Pl.'s MSJ Opp.35-36. Even when still in effect, the appropriations acts applied only to claims "concerning losses to or mismanagement of trust funds," not accounting claims. Consol. Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. at 305-06.

For these reasons, the Nation cannot rebut what has been true all along: The Nation waited too long to file suit. The Recommendation's contrary conclusion should be rejected and summary judgment should be entered in favor of Federal Defendants on Counts 2 and 3.

C. The law of the case does not apply to the United States' statute of limitations arguments.

The Nation also now argues (for the first time) that the Court's denial of the statute of limitations argument in United States' motion to dismiss constitutes law of the case. Pl.'s Opp. 3-5. But, as the Nation recognizes, rulings on motions to dismiss are not typically law of the case. Pl.'s Opp. 3-4; *Am. Canoe Ass'n, Inc. v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 34 (D.D.C. 2004) (citing 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 2713 at 233 (2d. ed.1998)). And, in any event, this Court's ruling on the motion to dismiss explicitly was based on the "perils of deciding the statute of limitations in a motion to dismiss." *Cherokee Nation v. Dep't of the Interior*, No. 1:19-CV-02154 (TNM), 2020 WL 224486, at *3 (D.D.C. Jan. 15, 2020) (referring to "the Government's statute of limitations arguments [as] premature"). The law of the case doctrine is not applicable.

III. The Recommendation misreads the 1994 Act.

The Recommendation misreads the 1994 Act—the sole source of an historical accounting duty in this case—in several fundamental ways. First, the Recommendation appears to read the 1994 Act as creating two, overlapping and, at times, inconsistent retrospective duties to provide an historical accounting to tribes. Fed. Defs.' Obj. 22-25. Second, the Recommendation concludes that, despite clear statutory language to the contrary, the duty to account in the 1994 Act applies to non-monetary assets with no temporal limitations. *Id.* 25-29. Third, the Recommendation used Section 162a(d), a section about Interior's programmatic fund and asset management responsibilities, to judge Interior's accounting efforts provided under a separate section of the 1994 Act. *Id.* 29-34. This Court should reject the Recommendation's failure to apply the plain language of the 1994 Act.

A. The 1994 Act creates only one duty to retrospectively account to tribes.

Our objections demonstrated that Section 4044 creates the sole historical accounting duty in the 1994 Act applicable to tribes. *Id.* 22-23. At most, Section 4011 and Section 4044 should be read together to create one retrospective accounting duty that encompasses Section 4044's requirement that Interior conduct an accounting as "full and complete . . . as possible" to "the earliest possible date" by May 31, 1996, the date when the completed report had to be delivered to Congress. §4044(2)(A). After all, both sections use the word "accounting." §§ 4011(a); 4044(2)(A). The Nation defends the Recommendation's contrary conclusion solely based on the 1994 Act's legislative history. Pl.'s Opp. 17-19.

"[R]esort to legislative history is not appropriate in construing plain statutory language." *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004). The Recommendation does not identify any ambiguity that requires reference to legislative history. Yet the Recommendation goes on to rely on a draft version of what became Section 4011, which

included additional language indicating the section would apply only to earnings and losses occurring after a certain date. R&R 19. Because that language does not appear in the final version of Section 4011, the Recommendation concludes that Congress did not intend Section 4011 to apply only prospectively. Even if reviewing legislative history is appropriate here (it is not), neither the Recommendation nor the Nation grapples with the fact that this early draft did not include Section 4044. That fact undermines the draft bill's reliability as a source of Congressional intent for an Act that ultimately included both sections rather than just Section 4011 with a limiting date. H.R. 1846, 103rd Cong. (1993).

The Nation claims that our plain text argument is "bad faith" because we also argued in our objections "that the language of the two Sections must be 'reconciled by interpreting' the two Sections" in the manner we assert. Pl.'s Opp. 18. But arguing for interpretations (even reconciliatory ones) that are based on a statute's ordinary meaning and structure—relying on textual interpretative maxims, as we did—does not render those provisions ambiguous. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Legislative history is "never allow[ed] to be used to muddy the meaning of clear statutory language." *Id.* (internal quotations and alterations omitted). If the meaning of Sections 4011 and 4044 is plain on their face, the Court may not resort to legislative history to glean a contrary meaning.

B. Section 4011 applies only to monetary fund accounts deposited after 1938.

Even assuming the duty to retrospectively account to tribes derives only from Section 4011, the Recommendation misconstrues the scope of that duty in two fundamental ways. The Recommendation ignores the statute's plain language in concluding that (1) Section 4011(a) contemplates an accounting of non-monetary assets, and (2) the duty to account "is not bound by a certain time period." R&R at 19, 22-23; Fed. Defs.' Obj. 25-29. Section 4011's plain language precludes both conclusions. That statute relates solely to "*funds* held in trust." 25 U.S.C. §

4011(a) (emphasis added). And it applies only to "funds . . . deposited or invested pursuant to section 162a of this title." *Id.* Section 162a was not enacted until 1938, and the public law version of Section 4011(a) refers directly to "the Act of June 24, 1938 (25 U.S.C. 162a)." 1994 Act, Pub. L. No. 103-412, 108 Stat 4239, 4240 (1994).

The Nation contends in response that the Recommendation relied on several *Cobell* decisions along with two from the Western District of Oklahoma, *Otoe-Missouria* and *Chickasaw Nation*, in concluding that Section 4011 applies to non-monetary trust assets. Pl.'s Opp. 19-20. The Western District of Oklahoma cases are contrary to the plain statutory text just quoted. Indeed, the *Otoe-Missouria* decision appears to rely on the common law, rather than a specific statute, for its conclusion. *Otoe-Missouria Tribe of Oklahoma v. Kempthorne*, No. CIV-06-1436-C, 2008 WL 5205191, at *5 (W.D. Okla. Dec. 10, 2008). And *Cobell* does not stand for the proposition the Nation asserts. It is true that the D.C. Circuit in *Cobell VI*, citing state trust law, noted that "each item of property" should be accounted for. 240 F.3d at 1103. But the court went on to emphasize that Section 4011 applies to "*funds* held in trust by the United States." *Id.* at 1102 (emphasis added). If the D.C. Circuit in *Cobell VI* meant to interpret the 1994 Act as including an accounting of non-monetary assets, even despite quoting the "funds" language in Section 4011, it would not have continued, saying "'[a]ll funds' means *all funds*, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)." *Id.* The court spoke in terms of deposits of funds. The Nation cannot rely on *Cobell VI* for the proposition that Congress meant to include non-monetary assets in the 1994 Act's historical accounting duty to tribes.[8]

[8] Section 4044 was not relevant in *Cobell* because that section applies only to tribes. 25 U.S.C. § 4044.

Even *Cobell XX*, which the D.C. Circuit later vacated, is more limited than the Nation contends. *See* Pl.'s Opp. 19. There, the district court found Interior's accounting plan for individual Indian money accounts deficient because "it will not provide beneficiaries with information about the assets *from which IIM funds have been derived*." *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 98 (D.D.C. 2008), *vacated and remanded sub nom. Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (emphasis added). That is not the same as a blanket duty to account for non-monetary trust assets. Rather, it requires information about assets to validate *funds* transactions in monetary trust accounts. At bottom, the 1994 Act's accounting requirement does not extend to non-monetary trust assets. The Court should thus set aside the Recommendation's contrary conclusion. *See* R&R 22-23.

The Nation does not even try to defend the Recommendation's conclusions regarding temporal scope. Indeed, the Nation does not respond at all to our argument that Section 4011 is temporally limited to "funds . . . deposited or invested" after 1938. *See Cobell VI*, 240 F.3d at 1103 (noting that accounting under the 1994 Act is only available "so long as [the funds] were deposited after the Act of June 24, 1938"). The Court should thus reject the Recommendation's conclusion that the duty to account "is not bound by a certain time period." R&R 19.

C. Section 162a(d) does not create enforceable duties.

The Recommendation relies heavily on Section 162a(d) for its conclusion that the Andersen Report was arbitrary and capricious, repeatedly judging the Andersen Report against "the strictures of § 162a(d)." *Id.* 31. In our objections, we demonstrated that this reliance was improper. While Section 162a(d) enumerates certain trust responsibilities, it does not create enforceable trust duties. *See Cobell VI*, 240 F.3d at 1105. Nor were its provisions "incorporated by § 4011." R&R 21. While Section 4011(a) references Section 162a, it does so in the context of limiting the historical accounting required there: accounting is required of funds "deposited or

invested pursuant to Section 162a." § 4011(a). Sections 162a(a)-(c) relate to such deposits and investments; Section 162a(d) does not. Moreover, the cross-reference the Recommendation relies on is simply incorrect: the public law version of the 1994 Act reflects that Congress was referring to "the Act of June 24, 1938." 108 Stat 4239, 4239-41. Section 162a(d) was passed in 1994 as an amendment to the 1938 Act. 108 Stat. 4239, 4240; Fed. Defs.' Obj. 29-34.

In response, the Nation says "the United States' argument is in clear conflict with well accepted norms of statutory interpretation, which requires review of the statute as a whole." Pl.'s Opp. 17. Not so. It is by reading the statute as a whole (indeed, by reading the public law version in which the provisions are side-by-side) that one appreciates the distinctions between Sections 162a, 4011, and 4044. Section 162a(d), as the Tenth Circuit recognized, reflects some of "the government['s] . . . many other duties as a result of its trust relationship, like 'supplying account holders with periodic statements of their account performance.'" *Fletcher*, 730 F.3d at 1209 (quoting 25 U.S.C. § 162a(d)(5)). It does not modify the duty to provide a historical accounting set out elsewhere in the 1994 Act. Indeed, in a footnote following the sentence the Nation quotes for its contrary argument, the Tenth Circuit explicitly noted that "*Cobell* thought" that Section 162a(d) does not "itself give rise to a duty to account," and that the Tenth Circuit would not pass on the issue. *Id.*, 730 F.3d at 1212 n.4.

IV. The Recommendation errs in finding the Andersen Report arbitrary and capricious.

The Recommendation ultimately concludes that the Andersen Report was arbitrary and capricious because it did not meet the requirements of the 1994 Act. This conclusion is incorrect. *See* Fed. Defs.' MSJ Br. 61-68. There is no dispute that Interior made difficult choices about the scope of the reconciliation project based on the time and budget constraints that Congress imposed. *See id.* 61-66. But Interior's choices were "designed to provide reasonable assurance as to the accuracy of each Tribal Trust account balance." *Id.* 62; Fed. Defs.' SUF # 118. True, those

scoping choices may not be available to a private trustee (whose funding comes from the trust itself, not Congressional appropriations). But the United States is not held to "the same common-law disclosure obligations as a private trustee." *Jicarilla*, 564 U.S. at 184-85. Instead, Interior's obligations arise from the 1994 Act, and that Act afforded Interior some measure of discretion.

The Recommendation erred in giving Interior what amounts to no discretion in its application of the 1994 Act, instead merely granting it "consideration." R&R 10. The Recommendation misread Section 4044's requirement to account "to the earliest possible date" as precluding Interior's informed judgment as to what temporal scope was "possible." R&R 28-29, 32; Fed. Defs.' Obj. 39. The Recommendation relies primarily on the "strictures of 162a(d)," even though that provision has nothing to do with the accounting requirement in the 1994 Act. R&R 31. The Recommendation concludes that the Andersen Report was arbitrary and capricious in failing to account for "non-monetary assets," an accounting that the 1994 Act does not require. R&R 30. It also concludes that, in essence, Interior must provide a retrospective "audit," even though that term appears nowhere in the sections the Recommendation relied on for a historical accounting duty. R&R 30. In all these ways, the Recommendation fails to give meaningful deference to Interior's interpretation of the 1994 Act and its exercise of judgment and discretion in implementing the Act's duty to historically account to tribes. The Nation's response to our objections simply makes the same errors as the Recommendation. *See* Pl.'s Opp. 25. This Court should not adopt those errors and should instead set aside the Recommendation and grant summary judgment in favor of Federal Defendants on Count 2.

V. If this Court reaches the merits of the Andersen Report and finds it arbitrary and capricious, the Report should be remanded to Interior to provide further accounting.

If this Court reaches the merits of the Andersen Report and concludes that the Report failed to satisfy a duty to provide a historical accounting to the Nation, then the merits of this

case are over and all that remains is remedy. As we explained in our objections, and as is the normal course under the APA, that remedy should be a remand to Interior for further accounting. *See* Fed. Defs.' Obj. 42 (citing *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002)). This is, after all, an accounting suit. And, as the Nation reiterated in its opposition, it "is seeking an accounting" that, according to the Nation, "the United States has never provided." Pl.'s Opp. 1. Thus, if the Court agrees that the Andersen Report did not comply with the 1994 Act's historical accounting duty, then the remedy that would afford the Nation what it seeks is for Interior to prepare a further accounting. *See* Fed. Defs.' Obj. 42.

The Nation does not appear to dispute that further accounting would be the appropriate remedy. But the Nation argues that, before remanding back to Interior, the Court should exercise "its equitable discretion" to craft a specific "scope and method of accounting." Pl.'s Opp. 28. We, too, have recognized that "there may be questions as to the proper scope of any accounting to be provided by Interior on remand." Fed. Defs.' Obj. 43. To a large extent, those scoping questions would be resolved through the Court's interpretation of the 1994 Act's historical accounting duty, as set forth above. *See, e.g.*, *Cobell v. Salazar*, 573 F.3d 808, 813 (D.C. Cir. 2009) ("*Cobell XXII*") ("[T]he scope of the accounting is derived from statutory law."). And even if the Court concludes that additional equitable proceedings are appropriate, those proceedings would need to focus on the practical considerations governing any further accounting. Congress did not "grant courts the same discretion that an equity court would enjoy in dealing with a negligent trustee" to order—"at the taxpayers' expense"—"the best imaginable accounting without regard to cost." *Id.* at 811 (quoting *Cobell v. Norton*, 428 F.3d 1070, 1074-75 (D.C. Cir. 2005) ("*Cobell XVI*")); *accord Cobell v. Kempthorne*, 569 F. Supp. 2d 223, 244-45 (D.D.C. 2008) ("*Cobell XXI*"), *vacated and remanded sub nom by Cobell XXII* (noting "the

boundaries posed by doctrines such as subject-matter jurisdiction, sovereign immunity, and . . . the separation of powers between federal agencies and federal courts" on equitable remedy proceedings); *see also Fletcher*, 730 F.3d at 1215 ("the government is entitled o a degree of discretion in choosing an appropriate accounting methodology").

The Nation next takes on the issue of restitution. Our objections pointed out that we moved for summary judgment on the question of restitution and the Nation did not respond. Fed. Defs.' Obj. 43. The Nation argues that we did not preserve that argument before the Magistrate Judge, and asserts that "authority is clear that restitution is an appropriate equitable remedy in breach of trust cases." Pl.'s Opp. 30. Both arguments fail.

As to preservation, we argued on Federal Defendants' cross-motion for summary judgment that "the Nation's request for restoration of the trust funds 'for which the United States cannot account' fails as a matter of law." Fed. Defs.' MSJ Br. 70. We pointed out that, "to the extent the Nation discovers alleged mismanagement based on any accounting that the Nation believes entitles it to monetary relief, it may pursue those claims in the Court of Federal Claims." *Id.* That is so because the Court of Federal Claims has exclusive jurisdiction for such claims under the Indian Tucker Act. *See id.* (citing *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983)). Indeed, the Nation appears to ultimately recognize that Federal Defendants have not waived their opposition to restitution.[9] *See* Pl.'s Opp. 28 (acknowledging that argument appeared in Federal Defendants' cross-motion, but arguing that discussion was brief).

This Court thus can, and should, reject the Nation's request for "restor[ation of] those Cherokee Trust Funds for which the United States cannot account." Compl. ¶¶ 154(10), 167(10).

[9] In fact, as explained in our objections, it was the Nation—not Federal Defendants—who failed to squarely address this issue below. Fed. Defs.' Obj. at 43.

To do so, the Court need look no further than the *Cobell XXI* decision that the Nation cites. Pl's Opp. 30. *Cobell XXI* rejected the premise that district courts have jurisdiction to award restitution as a remedy for a failure to adequately account. 569 F. Supp. 2d at 243. Rather, "the failure to *account* is remediable by a successful *accounting*." *Id.* (emphasis added). And though "money damages might be an alternative remedy" for a failure to account, such a remedy would fall outside the jurisdiction of the district court. *Id.* Because that is precisely the remedy the Nation seeks in its Complaint, Federal Defendants are entitled to summary judgment on that request.[10]

Further, even if restitution were a viable remedy, any evaluation of restitution should await any further Interior accounting on remand. *Cf. Cobell XXII*, 573 F.3d at 811 (vacating district court's order granting restitution and directing it to order further accounting). The history of the *Cobell* litigation illustrates the point.

The district court in *Cobell* attempted to award restitution based on a theory advanced in that case that Interior collected money for the benefit of the *Cobell* plaintiffs but "failed to distribute [it] to them or to post [it] to their [Individual Indian Money] accounts." *Cobell XXI*, 569 F. Supp. 2d at 242. The district court theorized that restitution in that circumstance was "not a substitute remedy for a failed accounting," but rather a return of "the trust property itself." *Id.* at 243. Because the district court had held that an accounting showing the precise amount of funds improperly withheld was, for all practical purposes, impossible, it relied on modeling

[10] The other cases cited by the Nation are inapposite. *Otoe-Missouria* addressed remedy in the event that an accounting revealed an inaccurate account balance, not restitution as a substitute for a failure to account. 2008 WL 5205191 at *4. And *CIGNA Corp. v. Amara*, 563 U.S. 421, 439-40 (2011), was a private ERISA suit. Principles traditionally available at equity do not apply with equal force in the Indian trust context. *See Cobell XXII*, 573 F.3d at 811; *Cobell XXI*, 569 F. Supp. 2d at 243-44 (rejecting "theory that the government's failure to provide an accounting triggers a broad panoply of inherent equitable powers" because "the government is immune from suit unless the remedy sought is specific relief").

techniques to approximate a potential shortfall. *Id.* at 250-52.

The D.C. Circuit vacated the district court's impossibility finding and its restitution award on appeal, and instead "instruct[ed] the district court to use its equitable power to enforce the best accounting that Interior [could] provide, with the resources it receives, or expects to receive, from Congress." *Cobell XXII*, 573 F.3d at 811. The D.C. Circuit did not rule on the availability of restitution as a remedy in the limited circumstances for which the district court employed it. But the upshot of the D.C. Circuit's decision is that the remedy for any failure to adequately account is a further accounting. Thus, the Nation's claims for restitution, as presently pleaded and articulated, fail as a matter of law.

VI. The Nation has not preserved its request that the Court consider its Rule 56(d) motion.

In one sentence at the end of its brief, the Nation requests that "[i]f the Court disagrees with the Recommendation, then the Nation would ask that it consider the Rule 56(d) Motion [ECF No. 98] and incorporates it here." Pl.'s Opp. 31. The Nation did not file objections to this non-dispositive issue and has thus waived the right to further review. Fed. R. Civ. P. 72(a). Moreover, "the Court need not consider cursory objections" like these. *Shurtleff v. U.S. EPA*, 991 F. Supp. 2d 1, 8 (D.D.C. 2013).[11]

CONCLUSION

The Andersen Report satisfied the sole source of an accounting duty, the 1994 Act, nearly three decades ago. Any challenge to that action is barred. Even assuming otherwise, the Andersen Report satisfies the APA's arbitrary and capricious standard. The Court should reject the Recommendation and grant summary judgment in favor of Federal Defendants on all three of the Nation's counts.

[11] Federal Defendants' response to the Rule 56(d) motion is located at ECF No. 104.

Respectfully submitted this 11th day of May, 2023.

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