UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants.

No. 19-cv-2154-TNM-ZMF

REPORT AND RECOMMENDATION

For over two centuries, the United States' response to the Cherokee Nation's (the "Nation") questions about the Nation's assets has been trust but do not verify. Understandably frustrated with this response, the Nation sued the U.S. Department of the Interior and other federal defendants (the "Government") for an accounting of its assets, which the United States holds in trust. Judge McFadden referred this matter to a magistrate judge for full case management, including discovery and potentially dispositive motions, pursuant to Local Civil Rules 72.2 and 72.3. *See* Min. Order (Feb. 18, 2020). The Nation moved for summary judgment, seeking an order that the administrative record produced by the Government—including the Tribal Reconciliation Project Report prepared by Arthur Andersen (the "AA Report"), associated background documents, and subsequent periodic financial statements—does not contain an accounting that satisfies the Government's duty to account to the Nation. *See* Statement P. & A. Supp. Pl.'s Mot. Partial Summ. J. ("Pl.'s Mot.") 1, ECF No. 88-1. The Government cross-moved for summary judgment arguing that the Nation's claims fail as a matter of law. *See* Defs.' Br. Opp'n to Pl.'s Mot. Partial Summ. J. & Supp. Cross-Mot. Summ. J. ("Defs.' Mot."), ECF No. 96-1. The Nation also moved pursuant

to Federal Rule of Civil Procedure ("Rule") 56(d) to seek additional discovery. *See* Pl.'s Mot. Summ. J. Under 56(d) ("Pl.'s 56(d) Mot."), ECF No. 98. The Nation replied to the Government's cross-motion. *See* Pl.'s Combined Reply Supp. Mot. Partial Summ. J. & Resp. in Opp'n Defs.' Cross-Mot. Summ. J. ("Pl.'s Reply"), ECF No. 100. The Government replied to the Nation's motion for summary judgment, *see* Defs.' Reply Brief in Supp. Cross-Mot. ("Defs.' Reply"), ECF No. 103, and to the Nation's Rule 56(d) motion, *see* Defs.' Resp. Opp'n Pl.'s Rule 56(d) Mot. ("Defs.' 56(d) Resp."), ECF No. 104, to which the Nation replied, *see* Pl.'s Reply Supp. Rule 56(d) Mot. ("Pl.'s 56(d) Reply"), ECF No. 106.

For the reasons set forth below and the entire record herein, the undersigned recommends that Plaintiff's Motion for Partial Summary Judgment be GRANTED IN PART AND DENIED IN PART, that Defendants' Cross-Motion for Summary Judgment be DENIED, and that Plaintiff's Rule 56(d) Motion be DENIED as moot.

I. BACKGROUND[1]

"Since the founding of this nation, the United States' relationship with the Indian tribes has been contentious and tragic." *Cherokee Nation v. Dep't of the Interior*, No. 19-cv-02154, 2020 WL 224486, at *1 (D.D.C. Jan. 15, 2020) (quoting *Cobell v. Norton* (*Cobell VI*), 240 F.3d 1081, 1086 (D.C. Cir. 2001)). "This is as true for the Nation as any other tribe. The history has been well-chronicled in previous cases, and a detailed retelling is unnecessary here." *Cherokee Nation*, 2020 WL 224486, at *1 (cleaned up).

[1] Although each exhibit and submission from the parties in support of and in opposition to the pending motions has been reviewed, only those exhibits necessary to provide context for the resolution of the pending motions are cited herein.

The Government is the trustee for the Nation. *See* Defs.' Resp. to Pl.'s Statement of Undisputed Facts ("Defs.' Resp.") ¶ 2, ECF No. 96-3. This fiduciary relationship dates to 1790. *See id.* ¶ 1. The Trust's "vast resources" include:

> money; proceeds from the sale of land or profits from the land; money from surface leases for agriculture, surface, oil and gas mining leases, coal leases, sand and gravel leases, businesses, and town lots; income from property owned by the Nation; buildings; the Nation's records; and money resulting from treaties or other agreements.

Am. Compl. ¶ 2, ECF No. 2-1.

This case is one of many stemming from the Government's failure to discharge its accounting duties over tribal trusts. *See, e.g.*, *Sisseton Wahpeton Oyate Lake Traverse Rsrv. v. Jewell*, 130 F. Supp. 3d 391, 393 (D.D.C. 2015) (citing *Cobell VI*, 240 F.3d at1086). On July 19, 2019, the Nation filed its Complaint against the Government seeking a declaratory judgment and injunctive relief. *See* Am. Compl. ¶¶ 131–67. Count I of the Nation's Complaint requests an accounting rooted in the Nation's status "as a beneficiary of the Government's trusteeship." *Id.* ¶ 131–37. Count II seeks an accounting based on provisions of the American Indian Trust Fund Management Reform Act of 1994 (the "1994 Act"), codified at 25 U.S.C. §§ 4011, 4044, and 162a. *See id.* ¶¶ 138–54. Count III seeks an accounting under the Administrative Procedure Act ("APA"). *See id.* ¶¶ 155–67. This final claim is a "failure to act" claim under 5 U.S.C. § 706(1). *See Cherokee Nation v. Dep't of Interior*, 19-cv-2154, 2021 WL 3931870, at *2 (D.D.C. Sept. 2, 2021).

Under 25 U.S.C. § 4011(a), the federal government must account for "all funds held in trust by the United States for the benefit of an Indian tribe." Separately, 25 U.S.C. § 4044 mandated that the federal government submit reconciliation reports to Congress by May 31, 1996. The U.S. Department of the Interior submitted the AA Report to Congress pursuant to this deadline. *See* Defs.' Mot. at 20; Pl.'s Statement Genuine Issues & Resp. to Fed. Defs.' Statement of Undisputed

Facts ("Pl.'s Resp.") ¶ 108, ECF No. 100-1. The AA Report summarized Arthur Andersen's procedures to reconcile receipts, disbursements, and certain investment transactions for which documentation was available to Arthur Andersen from July 1, 1972 through September 30, 1992. *See* Pl.'s Mot., Ex. 1, Tribal Trust Funds Reconciliation Project: Agreed-Upon Procedures & Findings Report for Cherokee Nation Oklahoma 1–3, ECF No. 88-4. The parties dispute whether the AA Report and associated documents constitute an accounting of the Nation's trust as required by 25 U.S.C. § 4011(a) and/or § 4044.[2] *See* Pl.'s Resp. ¶ 108.

II. LEGAL STANDARDS

A. Judicial Review

1. *Summary Judgment*

Under Rule 56, a movant must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that "might affect the outcome of the suit under the governing law," and a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Steele v. Schafer*, 535 F.3d 689, 692 (D.C. Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The moving party bears the burden of demonstrating that there is no genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must identify "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)).

[2] The Nation also disputes that the AA Report meets the requirements of 25 U.S.C. § 4044(2)(A) for Reconciliation reports, which requires attestations by each account holder that a "full and complete accounting as possible of the account holder's funds to the earliest possible date" has been provided. *See* Defs.' Resp. ¶ 92.

In evaluating motions for summary judgment, the Court must review all evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmoving party's favor. *See Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014) (per curiam). In doing so, the Court must not assess credibility or weigh the evidence. *See Barnett v. PA Consulting Grp., Inc.*, 715 F.3d 354, 358 (D.C. Cir. 2013). However, the nonmoving party "may not merely point to unsupported self-serving allegations, but must substantiate his allegations with sufficient probative evidence." *Reed v. City of St. Charles*, 561 F.3d 788, 790 (8th Cir. 2009) (quoting *Bass v. SBC Commc'ns, Inc.*, 418 F.3d 870, 872–73 (8th Cir. 2005)). A genuine issue for trial must be supported by affidavits, declarations, or other competent evidence. *See* Fed. R. Civ. P. 56(c). If the nonmoving party's evidence is "merely colorable or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249–50 (cleaned up).

Partial summary judgment is available when a factual issue that does not decide the entire case is not subject to "genuine dispute" and the fact is "material." Fed. R. Civ. P. 56(a). It is inappropriate "as to a fact or an element of a claim." *LaPrade v. Abramson*, No. 97-cv-10, 2006 WL 3469532, at *8 (D.D.C. Nov. 29, 2006). It is subject to the same evaluations as full summary judgment. *See Pettengill v. United States*, 867 F. Supp. 380, 381 (E.D. Va. 1994) (citing *Gill v. Rollins Protective Servs. Co.*, 773 F. 2d 592, 595 (4th Cir. 1985), *amended by* 788 F.2d 1042 (4th Cir. 1986) (mem.)).

The Nation seeks a legal ruling that the AA Report is not an accounting within the meaning of the 1994 Act, leaving for trial the exact scope of the accounting duty and its claims of breach of other statutory and fiduciary obligations. *See* Pl.'s Mot. at 1 n.1, 2. This limited ruling is on a "discrete factual issue[] . . . warranted by the record" and thus a proper subject for partial summary judgment. *United States ex rel. Landis v. Tailwind Sports Corp.*, 234 F. Supp. 3d 180, 191 (D.D.C.

2017); *see also* Pl.'s Mot. at 3 (citing Tr. of Hearing before Mag. Robinson (June 19, 2020) ("It is federal defendants' position that whether an adequate accounting has been provided is a question of law that can be decided on motions for partial summary judgment.")).

2. *Challenges to agency action*

a. APA Claims

Courts generally review federal agency (in)action pursuant to the APA. Section 706(2) of the APA directs courts to set aside agency action under certain conditions. *See* 5 U.S.C. § 706(2). Alternatively,"§ 706(1) provides relief for an agency's failure to act." *Cayuga Nation v. United States*, 594 F. Supp. 3d 64, 72 (D.D.C. 2022) (cleaned up).

Ordinarily, Rule 56 does not apply to APA challenges. *See Rancheria v. Hargan*, 296 F. Supp. 3d 256, 264 (D.D.C. 2017). This is "due to the 'limited role of a court in reviewing the administrative record.'" *Scotts Valley Band of Pomo Indians v. U.S. Dep't of Interior*, No. 19-cv-1544, 2022 WL 4598687, at *5 (D.D.C. Sept. 30, 2022) (citing *Select Specialty Hosp.-Akron, LLC v. Sebelius*, 820 F. Supp. 2d 13, 21 (D.D.C. 2011)). Thus, judicial review is under the "arbitrary and capricious" standard. *Koi Nation of N. Cal. v. U.S. Dep't of Interior,* 361 F. Supp. 3d 14, 34 (D.D.C. 2019), *amended sub nom.*, No. 17-cv-1718, 2019 WL 11555042 (D.D.C. July 15, 2019).

To pass muster under the arbitrary and capricious standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Koi Nation*, 361 F. Supp. 3d at 34 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). This is a narrow standard of review that asks whether

> the agency has [1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible

> that it could not be ascribed to a difference in view or the product of agency expertise.

Cayuga Nation v. United States, 594 F. Supp. 3d 64, 72 (D.D.C. 2022) (quoting *State Farm*, 463 U.S. at 43).

The Nation asserts that "failure to act" claims under 5 U.S.C. § 706(1) are not subject to the arbitrary and capricious standard of review. *See* Pl.'s Reply at 8. But the Nation points to no authority for this claim, nor does it offer an alternative standard of review other than citing ordinary Rule 56 summary judgment standards. *See id.*; Pl.'s Mot. at 3–4. In fact, the D.C. Circuit has implied that the arbitrary and capricious standard applies in § 706(1) cases: "[I]t would be arbitrary and capricious for an agency simply to thumb its nose at Congress and say—without any explanation—that it simply does not intend to achieve a congressional goal on any timetable at all." *Grand Canyon Air Tour Coal. v. Fed. Aviation Admin.*, 154 F.3d 455, 477 (D.C. Cir. 1998); *see also Dallas Safari Club v. Bernhardt*, 518 F. Supp. 3d 535, 538–40 (holding that statutory text of the APA provides for the same standard of review regardless of whether the claim is directed at agency action or inaction). Moreover, a "failure to act" claim is subject to relief under § 706(2). *Sisseton*, 130 F. Supp. 3d at 396. And "[t]he arbitrary or capricious provision, under § 706(2)(A), 'is a catchall, picking up administrative misconduct not covered by the other more specific paragraphs,'" such as § 706(1). *Koi Nation*, 361 F. Supp. 3d at 34 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. Governors Fed. Rsrv. Sys*., 745 F.2d 677, 683 (D.C. Cir. 1984)). Thus, §§ 706(1) and 706(2) claims follow the same judicial review analysis. *See* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENV'T L.J. 461, 469–70 (2008).

b. Non-APA Claims

In non-APA challenges to agency actions where the statute at issue does not specify the standard of review, "district courts are divided" on whether to apply the traditional Rule 56 or arbitrary and capricious standards. *Rancheria*, 296 F. Supp. 3d at 264.

The Nation raises two non-APA claims arising from its status as a trust beneficiary and the 1994 Act. *See* Am. Compl. ¶¶ 131–54; *Cherokee Nation*, 2021 WL 3931870, at *1. Courts interpret the 1994 Act independently from the APA. In *Cobell v. Babbitt*, the first blockbuster trust accounting litigation, Judge Lamberth noted that although the Government sought "from the beginning to constrain the plaintiffs' claims to the APA, . . . such a characterization simply d[id] not comport with the facts alleged." *Cobell v. Babbitt* (*Cobell I*), 30 F. Supp. 2d 24, 33 (D.D.C. 1998). Judge Lamberth later applied ordinary Rule 56 standards to such claims. *See Cobell v. Babbitt* (*Cobell III*), 52 F. Supp. 2d 11, 19 (D.D.C. 1999) (denying defendants' motion for summary judgment under Rule 56 standards). On that basis, courts have applied the ordinary summary judgment standard. *See Chickasaw Nation v. Dep't of Interior*, 120 F. Supp. 3d 1190, 1198 (W.D. Okla. 2014) (applying ordinary summary judgment standards under Rule 56), *on reconsideration*, 161 F. Supp. 3d 1094 (W.D. Okla. Apr. 22, 2015). Thus, the Court declines the Government's request to adopt the APA's arbitrary and capricious review standard. Although there may be a "strong presumption" for application of the APA standard to non-APA claims generally, that is not how courts have handled 1994 Act claims. *Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 109 (D.D.C. 2009).

A review of other statutes enacted by Congress for the benefit of Indian tribes reinforces that "legislative intent also supports [ordinary summary judgment] review" here. *Rancheria*, 296 F. Supp. 3d at 265. "Given '[c]ongressional concern with agency malfeasance, it would be ironic indeed if Congress offered the tribes nothing more than a record-based, deferential court review

of agencies' actions.'" *Id.* (quoting *Shoshone-Bannock Tribes of Fort Hall Rsrv. v. Shalala*, 988 F. Supp. 1306, 1318 (D. Or. 1997)). Indeed, Congress enacted the 1994 Act after having "harshly criticized the Interior Department's mishandling of the trust accounts." *Cobell VI*, 240 F. 3d at 1090.

Finally, this is no ordinary APA case.[3] Judge McFadden already held that traditional civil discovery outside the record may proceed for Counts I and II. *See Cherokee Nation*, 2021 WL 3931870, at *2. This is contrary to the norm in APA cases. *See Koi Nation*, 361 F. Supp. 3d at 33–34. This break from the APA straitjacket in one setting demonstrates that the Court is not bound by the APA in all settings. *See Stand Up for California! v. U.S. Dep't of Interior,* 71 F. Supp. 3d 109, 115–16 (D.D.C. 2014) (extra-record review "inconsistent with applying the arbitrary and capricious standard"). Thus, the Court will proceed with ordinary summary judgment review for Counts I and II relying on "the pleadings, depositions, affidavits, and other factual materials in the record." *Koi Nation*, 361 F. Supp. 3d at 33.

B. Statutory Interpretation

In reviewing an agency's interpretation of a statute, courts employ the two-step *Chevron* test. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). First, "a court must [] determine whether Congress has directly addressed the precise question at issue." *Koi Nation*, 361 F. Supp. 3d at 42 (cleaned up). In so doing, a court must use "traditional tools of statutory construction," including "evaluation of the statute's text, structure, legislative history,

[3] Indeed, the full administrative record has not been filed before the Court, making it difficult to meet the requirements of "black-letter administrative law that in an APA case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision." *Koi Nation*, 361 F. Supp. 3d at 33–34 (cleaned up); *see generally* Defs.' Notice Filing Index to Certified Administrative R., ECF No. 51 (reflecting that a table of the administrative record, but no record itself, was filed with the Court).

and purpose." *Id.* (cleaned up). Second, if Congress has not spoken on the issue or the statutory text is ambiguous, then a court is to "assess[] whether the agency's interpretation of a statute was reasonable." *Id.* (cleaned up). Courts defer to the agency's interpretation if it is a reasonable policy choice. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005).

However, the Indian canon of construction—instead of ordinary *Chevron* deference—applies here because this case involves a statute passed for the benefit of American Indians.[4] *See El Paso Nat. Gas Co. v. United States*, 632 F.3d 1272, 1278 (D.C. Cir. 2011). The Indian canon of construction is "rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)). Under the Indian canon, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* Thus, *Chevron* deference at step two only "applies with muted effect." *Cobell v. Salazar* (*Cobell XXII*), 573 F.3d 808, 812 (D.C. Cir. 2009). Muted effect means "that an agency's interpretation is given consideration but not deference." *Rancheria*, 296 F. Supp. 3d at 266.

The Nation and the Government disagree on what is required of the Government under the 1994 Act. *See* Pl.'s Reply at 13–15; Defs.' Reply at 8. The agency's interpretation can only govern if "the Secretary's proposed interpretation does not run against any Indian tribe . . . [and] actually advances the trust relationship between the United States and the Native American people." *Koi Nation*, 361 F. Supp. 3d at 49–50 (quoting *Cal. Valley Miwok Tribe v. United States*, 515 F.3d

[4] When referring to concepts found in the distinct body of federal law relating to American Indians, the Court uses the same terminology, such as "Indian" or "American Indian" to promote consistency. In other contexts, such as the identification of the plaintiff in the instant action, the Court uses terms preferred by the Plaintiff, such as "Nation," except where other terms are used in direct quotations. *See American Indian Law*, Legal Information Inst., https://www.law.cornell.edu/wex/american_indian_law (last visited Feb. 10, 2023).

1262, 1266 n.7 (D.C. Cir. 2008)). The Government's proposed interpretation of the 1994 Act is inconsistent with the Act's purpose and does not advance this trust relationship. *See* Defs.' Mot. at 55–58 (asserting that §§ 4011 and 4044 must be read together as the source of the accounting duty but omitting an explanation of how this is consistent with the Indian canon); Defs.' Reply at 14 (claiming that the duty to account under the 1994 Act does not include non-monetary assets but omitting any explanation of how this is consistent with the Indian canon). This warrants rejection of the Government's interpretation. *See Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F. 3d 460, 467 (D.C. Cir. 2007) (finding that the Secretary's interpretation of the Indian Gaming Regulatory Act was due deference because it was consistent with the statute's purpose and ensured that certain tribes would not be disadvantaged relative to others). Conversely, the Nation's application of the plain language of the 1994 Act, as described below, furthers the trust relationship between the Government and the tribes. *See* Pl.'s Reply at 10. Thus, the Indian canon of construction tips the scale in favor of the Nation's interpretation. *See El Paso Nat.. Gas*, 632 F. 3d at 1278.

III. DISCUSSION

A. The Nation's Claims Are Timely Under the Applicable Statute of Limitations.

Claims against the United States are generally "barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Actions accrue "when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). However, when "there is a fiduciary relationship between the parties, the universal rule is that a statute of limitation does not begin to run . . . until the relationship is repudiated." *Cobell v. Norton*, 260 F. Supp. 2d 98, 105 (D.D.C. 2003) (citing *Manchester Band of Pomo Indians v.*

United States, 363 F. Supp. 1238 (N.D. Cal. 1973)). Due to the nature of the trust relationship, trust "beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets" and may permissibly rely on their trustees. *Shoshone Indian Tribe of Wind River Rsrv. v. United States* (*Shoshone II*), 364 F. 3d 1339, 1347 (Fed. Cir. 2004).

1. *Repudiation determines whether the statute of limitations has run.*

The Government argues that the statute of limitations expired six years after the AA Report was "deemed received" by the Nation. Defs.' Mot. at 46; *see id.* at 35. "[F]or the purposes of determining the date on which an Indian tribe received a [§ 4044] reconciliation report for purposes of applying a statute of limitations, any such report . . . shall be deemed to have been received by the Indian tribe on December 31, [2000]." An Act to Encourage the Negotiated Settlement of Tribal Claims, Pub. L. No. 107–153, 116 Stat. 79 (2002) (deemed received date subsequently changed by Pub. L. 109–158, 119 Stat. 2954 (2005)). But it is unclear if this language applies to § 4011(a) accounting actions. "[T]he legislative history at least suggests that Congress did not intend to take a position on what qualified as an accounting, as a matter of law, sufficient to trigger the statute of limitations. . . . [And] the plain language of any statutory provision [does not] answer the question." *Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 212 (2020), *appeal filed*, No. 21-cv-1366, (Fed. Cir. Dec. 4, 2020); *see also Sisseton*, F. Supp. 3d at 396–97 (citing Committee on Indian Affairs, S. Rep. No. 107–138, at 5 (2002) (noting that the Senate Committee on Indian Affairs took "no position" on whether the receipt of reports in fact commenced the statute of limitations)). Because the Indian canon of construction "requires the court to resolve any doubt in favor of the tribe," the above statute does not set a date for accrual of the statute of limitations. *Scotts Valley Band of Pomo Indians*, 2022 WL 4598687, at *8 (quoting *City of Roseville v. Norton*, 348 F. 3d 1020, 1032 (D.C. Cir. 2003)). Thus—as Judge McFadden previously indicated—the

statute of limitations only begins after the trust is repudiated. *See Cherokee Nation*, 2020 WL 224486, at *3.[5]

The Government instead proposes following the Court of Federal Claims' rule that repudiation does not apply to claims for "misfeasance or nonfeasance." Defs.' Mot. at 52; *see Chemehuevi Indian Tribe*, 150 Fed. Cl. at 197. But the Court of Federal Claims' rule does not apply to this *equitable* action because the Court of Federal Claims' jurisdiction is limited to monetary damages claims. "It is fundamental that an action for accounting is an equitable claim and that courts of equity have original jurisdiction to compel an accounting." *Klamath and Modoc Tribes & Yahooskin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 487 (Ct. Cl. 1966). That the Nation may seek reimbursement of funds improperly spent does not draw the action out of equity. *See Pelt v. Utah*, 611 F. Supp. 2d 1267, 1279 (D. Utah 2009); *see also Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("Our cases have long recognized the distinction between an action at law for damages . . . and an equitable action for specific relief.. . . The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"). This is because "the nature of [the Nation's] allegations and causes of action are related to their claim for accounting and are limited to equitable remedies." *Pelt*, 611 F. Supp. 2d at 1279; *see* Am. Compl. ¶¶ 131–67. Indeed, "[b]ecause this unwarranted exception runs against the grain of fundamental trust law principles, . . . it has apparently not been adopted in any other Circuit, and this Court will not do so now." *Cobell*, 260 F. Supp. 2d at 107–108 (cleaned up).

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[5] Because the Nation's claims have not accrued, the Court need not consider whether the Appropriations Act revived expired claims. *See* Pl.'s Mot. at 35.

The Government retorts that adopting a repudiation standard "would allow the Nation to simply choose the day it files suit as the accrual date." Defs.' Mot. at 54 (citing *Chemehuevi Indian Tribe*, 150 Fed. Cl. at 207). But this argument ignores the underpinning of the trust relationship: trust! The law not only allows but encourages beneficiaries "to rely upon the good faith and expertise of the trustee." *Loudner v. United States*, 108 F.3d 896, 901 (8th Cir. 1997). In turn, this "lessen[s]" the beneficiary's duty to discover mismanagement. *Id.* Indeed, "[a] trusteeship would mean little if the [tribes] were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement." *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 227 (1983). A contrary standard would create perverse incentives, such as encouraging beneficiaries to file suit prior to the general statute of limitations deadline with little indication that the trustee has violated the trust relationship. Such a rule may be desirable outside of the trust relationship. But it would remove the trust from a trust relationship, which is reason enough to not adopt such a rule. *Cf. Mitchell II*, 463 U.S. at 227; *see also Blackfeet Tribe of Indians*, 471 U.S. at 766 (rejecting standard principles of statutory construction in part because of the "unique trust relationship between the United States and the Indians").

2. *The United States has not repudiated the trust.*

Repudiation is an "unequivocal act in violation of the duties of the trustee or in repudiation of the trust." *Cobell*, 260 F. Supp. 2d at 105 (quoting Bogert & Bogert, The Law of Trusts & Trustees § 951, at 638–39 (rev. 2d ed. 1995)). Examples of repudiation include when a trustee claims to hold the trust corpus as the trustee's own, or when a government causes a tribe to be divested of trust land. *See Pelt*, 611 F. Supp. 2d at 1285 (citing *Loudner*, 108 F. 3d at 901 n.2; *Jones v. United States*, 9 Cl. Ct. 292, 295–96 (1985)). The trustee must make "a clear and continuing repudiation of the right of the beneficiary to enjoy the benefits of the trust" for the

statute of limitations to begin. *Cobell*, 260 F. Supp. 2d at 106 (citing *Kosty v. Lewis*, 319 F.2d 744, 750 (D.C. Cir. 1963)). This is "the controlling law of this Circuit." *Cobell*, 260 F. Supp. 2d at 105.

Here, "[t]he failure to account was a breach of the trust but it did not amount to a repudiation." *Boehnke v. Roenfanz*, 246 Iowa 240, 247 (1954); *see also Pelt*, 611 F. Supp. 2d at 1285 ("[F]ail[ure] to provide an adequate (or any) accounting in earlier years . . . is not sufficient to show repudiation."). This is because the failure to account does not "amount[] to a denial of [the trust's] existence." *Boehnke*, 246 Iowa at 247. "[A]nd no mere tacit failure of the trustee to perform his duty in respect to such trust could or should be held to amount to a repudiation of it so as to set the statute of limitations in motion in his favor and as a result of his own neglect of duty." *Id.* (cleaned up). Other than the AA Report, the Government points to no other actions as constituting a repudiation. *See* Defs.' Mot. at 51–54.

The Government's three arguments in response are unavailing. *See* Defs.' Reply at 10–11. First, for repudiation to be clear, it must be known to the beneficiary. *See Cobell*, 260 F. Supp. 2d at 106–107. Yet the Nation had no "knowledge of [the purported] repudiation." *Shoshone II*, 364 F.3d at 1348; *see* Pl.'s Reply at 23. The Government's reliance on receipt of the AA Report to prove otherwise, *see* Defs.' Reply at 11, fails for two reasons. To start, (a) the Government did not identify any repudiation in its sworn interrogatories on the subject. *See* Pl.'s 56(d) Mot."), Ex. 7, Defs.' Resps. & Objs to Pl.'s Interrogs. ("Defs. Interrog. Resps.") . 15–16, ECF No. 98-1. Indeed, the Government seemingly—and conveniently—only became aware of its alleged repudiation in its pending motions. *See* Defs.' Mot. at 52–54. And (b) even if the Government had breached its trust responsibilities via the submission of the AA Report, "[i]t is often the case, however, that the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred." *Shoshone II*, 364 F.3d at 1348.

Second, for repudiation to be continuing, a trustee must refrain from taking actions in contradiction of its stated repudiation over a substantial time period. *See Valle v. Joint Plumbing Indus. Bd.*, 623 F.2d 196, 202 n.10 (2d Cir. 1980) (subsequent contradictory communications from a trustee two years later precluded repudiation). Here, the Government has continued to service the overall trust, including via periodic statements of performance in the years since the AA Report. *See* Defs.' Resp. ¶ 96. In fact, even after submission of the AA Report, the Government *continued* its efforts to prepare a historical accounting for tribal trust accounts. *See* Pl.s Reply, Ex. 30, Decl. of Ross Swimmer ¶ 19, ECF No. 99-3. These repeated trust-appropriate actions by the Government while it claims to have rejected a sliver of its duties—only the duty to account—precludes a continuing repudiation finding. *See* Defs.' Resp. ¶ 93; Defs.' Mot. at 10–11; *see also Chuck v. Hewlett Packard Co.*, 455 F.3d 1026, 1037–38 (2006) (two years consistently rejecting pension benefits for a retirement trust was sufficiently long to constitute repudiation).

Third, the Government urges adoption of the Federal Circuit rule that trustees may repudiate by taking actions inconsistent with trustee responsibilities. *See Shoshone II*, 364 F.3d at 1348. But this rule undermines the repudiation standard itself, which requires an unequivocal violation of the trust, and the cases the Government cites are inapplicable, *see* Defs.' Mot. at 52–53. In *Jones v. United States*, the trustee sold trust property, thus depriving the beneficiary of the trust corpus and constituting "actions inconsistent with [] obligations under the trust." 801 F.2d 1334, 1336 (Fed. Cir. 1986). And in *Ramona Two Shields v. United States*, the trustee approved leases at below-market rates, depriving the trust beneficiary of trust income. 820 F.3d 1324, 1329 (Fed. Cir. 2016). Because the trustee's actions were grossly inconsistent with its trust obligations and known to the beneficiaries, claims relating to the leases were time-barred. *Id.* at 1330.

Here, by contrast, the Government claims producing the AA Report was *consistent* with its trust responsibilities and met the requirements of applicable law. *See* Defs.' Mot. at 70. Indeed, the classic inconsistent actions demonstrating repudiation are not present. Unlike *Jones* and *Ramona Two Shields,* the Government has not taken any part of the trust corpus for its own or denied the Nation's claims to it. *See also Pelt*, 611 F. Supp. 2d at 1285 (collecting cases on what constitutes repudiation). Ultimately, the Government asks the Court to believe that the AA Report was both inadequate enough to trigger the statute of limitations as a breach of a trust duty under the clear and continuing standard, yet adequate enough to meet the Government's statutory obligations to account. *See* Defs.' Mot. at 10–11. This strains credulity. "[D]efendants have consistently chosen the coward's route by failing to provide [] beneficiaries with the information that the beneficiaries were entitled to by law, while simultaneously insisting that they were fully complying with their fiduciary obligations to the beneficiaries." *Cobell*, 260 F. Supp. 2d at 108.

B. The 1994 Act Creates a Historical Accounting Duty

Statutes and regulations play the lead role in determining the "specific obligations the Government may have under [its general trust] relationship." *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 258 (2016). However, "common law [can] play a [supporting] role . . . [by] inform[ing] [the] interpretation of statutes and . . . determin[ing] the scope of liability." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (cleaned up). The parties disagree as to the source of the duty to account.[6] *See* Defs.' Mot. at 26–31; Pl.'s Reply at 12–15.

[6] This Court has already found that that the Nation's reliance on sections of the 1994 Act is sufficient to establish a statutory basis for the suit. *See Cherokee Nation*, 2020 WL 224486, at *2; *Cherokee Nation v. U.S. Dep't of Interior*, No. 19-cv-2154, 2021 WL 1232712, at *4 (D.D.C. Apr. 1, 2021), *report and recommendation adopted in part*, *rejected in part sub nom*, 2021 WL 3931870 (D.D.C. Sept. 2, 2021). The court continues to "read [Plaintiff's] soundly grounded claims to be derived from statute, not the common law." *Cobell v. Babbitt* (*Cobell V*), 91 F. Supp. 2d 1, 28 (D.D.C. 1999), *aff'd and remanded sub nom.*, *Cobell VI*, 240 F.3d at 1081.

However, the Nation's pending motion focuses on the AA Report and whether it meets the Government's duty to account under the 1994 Act—specifically, 25 U.S.C. §§ 162a, 4011, and 4044. *See* Pl.'s Mot. at 16–17. The Court examines § 4011—along with its incorporation of § 162a—and § 4044 in turn.

1. *Section 4011's text, legislative history, and precedent indicate a duty to account.*

Section 4011 provides that "[t]he Secretary *shall* account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe . . . deposited or invested pursuant to § 162a."[7] 25 U.S.C. § 4011(a) (emphasis added). The analysis is simple: "[s]hall means shall." *Cobell V*, 91 F. Supp. 2d at 41, *aff'd and remanded sub nom.*, *Cobell VI*, 240 F.3d at 1081. Hence, § 4011 establishes a mandatory duty. *See id.* "Judging from the plain language of the text, as *Chevron* and all basic principles of statutory construction demand," all funds means all funds. *Id.* Indeed, multiple courts have held that § 4011(a)'s plain text "reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting of trust

[7] Specifically, § 162a(d) lists eight trust responsibilities of the United States, which "shall include (but are not limited to) the following:"

> (1) Providing adequate systems for accounting for and reporting trust fund balances; (2) Providing adequate controls over receipts and disbursements; (3) Providing periodic, timely reconciliations to assure the accuracy of accounts; (4) Determining accurate cash balances; (5) Preparing and supplying account holders with periodic statements of account performance and balances . . . (6) Establishing consistent, written policies and procedures for trust fund management and accounting; (7) Providing adequate staffing, supervision, and training for trust fund management and accounting; [and] (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

25 U.S.C. § 162a(d)(1)–(8).

fund assets." *Cobell VI*, 240 F.3d at 1102; *see, e.g.*, *Chickasaw Nation*, 120 F. Supp. 3d at 1223 (following *Cobell VI*); *Cherokee Nation*, 2021 WL 3931870, at *2; *see also Fletcher v. United States*, 730 F.3d 1206, 1209 (10th Cir. 2013) ("But does the government have a duty to provide an accounting? The answer comes clear in 25 U.S.C. § 4011.").

This duty is not bound by a certain time period. After all, one cannot "determine an accurate account balance " at any time "without confirming historical account balances." *Cobell VI*, 240 F.3d at 1102. Although this does not require "[a] green eye-shade death march through every line of every account over the last one hundred years," courts must consider equitable principles in fashioning the scope of the accounting. *Fletcher*, 730 F.3d at 1214.

The legislative history confirms this interpretation. The original version of the House bill that would become § 4011 provided that the responsibility of the Secretary to account would "only apply with respect to earnings and losses occurring on or after October 1, 1993." H.R. 1846, 103rd Cong. (1993). The removal of this subsection demonstrates "that Congress intended what it said when it" deleted the subsection. *In re Equip. Servs., Inc.*, 290 F.3d 739, 745 (4th Cir. 2002), *aff'd sub nom. Lamie v. U.S. Trustee*, 540 U.S. 526 (2004).

Regardless, even if there is an ambiguity in how far back the accounting should go, the statute "must be construed for, not against, Native Americans." *Fletcher*, 730 F.3d at 1212.

2. *Section 4044 reconciliation report requirement*

Section 4044 required the Secretary of the Interior to transmit to Congress "by May 31, 1996, a report identifying for each tribal trust fund account for which the Secretary [wa]s responsible a balance reconciled as of September 30, 1995." 25 U.S.C. § 4044. The reconciliation report needed to include an attestation by the account holder that they had either received a "full and complete accounting," or that they "dispute[d] the balance." *Id.* § 4044(2)(A)–(B).

Reconciliation reports are distinct from a trust accounting. The concept of an accounting has a specific meaning in trust law. *See* Fletcher, 730 F.3d at 1210. A trust accounting "frequently refers to the report of all items of property, income, and expenses prepared by a personal representative, trustee, or guardian and given to heirs, beneficiaries, or the probate court." Accounting, Black's Law Dictionary (11th ed. 2019). By contrast, a reconciliation report is merely "[a]n accounting or financial statement in which discrepancies are adjusted." Reconciliation Statement, Black's Law Dictionary (11th ed. 2019). Unlike the ubiquitous term "accounting," the term "reconciliation" does not appear in the trust treatises cited by courts to consider tribal accounting claims. *See generally* Amy Morris et al., *Bogert's the Law of Trusts and Trustees* (June 2022 update); Restatement (Third) of Trusts § 83 (Am. L. Inst. 2007) (discussing and defining accounting).

The parties agree that the Government hired Arthur Andersen to work on reconciliation reports in 1991, prior to the enactment of § 4044. *See* Defs.' Resp. ¶¶ 86–87. The parties agree that the Government transmitted the AA Report and associated documents to the Nation pursuant to the May 31, 1996 deadline mandated by § 4044, a fact which explains § 4044's existence. *See* Pl.'s Resp. ¶ 108.

3. *Sections 4011 and 4044 are separate sections and should be read separately.*

The question then is why Congress separately enacted §§ 4011 and 162a. These two provisions would be rendered meaningless if they called for the same "accounting" as § 4044. This is a result the Government claims to want to avoid. *See* Defs.' Mot. at 55–58. And it should be avoided, because it is a "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Loughrin v. United States*, 573 U.S. 351, 358

(2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)). The answer is that §§ 4011 and 162a call for something other than what § 4044 does.

The Government argues that §§ 4011 and 4044 must be read together as the sole source of an accounting duty, and that its interpretation is due deference. *See* Defs.' Mot. at 55–60. The Government insists that § 4011 applies only to prospective accounting, while § 4044 applies only to retrospective accounting. *See* Defs.' Mot. at 56. This reading is inconsistent with the legislative history of § 4011 described above. And it is unsupported by the plain text. Section 4011 uses the term "account" in reference to the "Responsibility of [the] Secretary to account." By contrast, § 4044 limits "accounting" to its mandate for reconciliation reports, and the term is only used in reference to what account holders are required to attest regarding such reports. *See* 25 U.S.C. § 4044(2)(A) (attestation requirement subsection). "[W]hen we're engaged in the business of interpreting statutes we presume differences in language . . . convey differences in meaning." *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1723 (2017) (citing *Loughrin*, 573 U.S. at 359).

Instead of addressing the accounting requirements established by § 162a(d) and incorporated by § 4011, the Government claims that § 162a(d) is unenforceable and cannot compel relief. *See* Defs.' Mot. at 69. But *Cobell VI*—a case upon which the Government relies, *see id.*—already rejected these arguments when considering § 162a(d)(6). *See* 240 F.3d at 1105–1106. Section 162a(d)(6) required the Government to "establish[] consistent, written policies and procedures for trust fund management and accounting." The *Cobell VI* court concluded "[t]here may not literally be a duty to have such written policies and procedures." *Id.* at 1105. But this simply meant that the lack of written policies was not a per se breach of the statute, although "it surely provides substantial evidence that such a breach has occurred." *Id.* at 1106. The *Cobell VI*

court further held that "the district court's conclusions that certain types of policies and plans would be necessary for the government to discharge its fiduciary obligations [we]re sustainable." *Id.* And that the federal government would need "to take [such] reasonable steps" to remedy "[t]he actual legal breach" of "the failure to provide an accounting." *Id.* What the Government misses is that a *breach* requires a *duty*. *See Democracy Partners v. Project Veritas Action Fund*, 453 F. Supp. 3d 261, 278 (D.D.C. 2020) (explaining that a breach of a fiduciary duty requires a fiduciary relationship). This is why the D.C. Circuit refused "to alter the district court's order" mandating certain policies and plans designed to implement § 162a(d). *Cobell VI*, 240 F.3d at 1106. The only caveat was that the Government "should be afforded sufficient discretion in determining the precise route they take" when executing these § 162a(d) duties so long as the Government's actions were reasonable. *Id.*

The Government also argues that because the items in § 162a(d) are broadly programmatic in nature, they cannot be compelled. *See* Defs.' Mot. at 69 (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (holding that courts may only compel agencies to perform discrete agency actions they are required to take)). The *Cobell VI* court also rejected this argument, finding that "federal courts have repeatedly recognized the right of Native Americans to seek relief for breaches of fiduciary obligations," *Cobell VI*, 240 F.3d at 1104, and that "the district court acted well within its broad equitable powers" to order specific policies and plans, *id.* at 1108.

4. *The § 4011 duty to account includes non-monetary assets.*

The Government next argues that because § 4011 refers to an accounting of "funds," any order for an accounting of non-monetary assets contradicts the statute. *See* Defs.' Mot. at 58–59. But the Government misunderstands the role of common law. As Justice Gorsuch explains:

> While the Supreme Court has said we may not employ traditional trust principles inconsistent with Congress's statutory directions, the

> Court has *also* said we *may* refer to traditional trust principles when those principles are consistent with the statute and help illuminate its meaning. *Jicarilla Apache Nation*, 131 S. Ct. at 2325. In the statute before us, Congress has chosen to invoke the concept of an accounting. That concept has a long known and particular meaning in background trust law. It means that "a beneficiary may initiate a proceeding to have the trustee's account reviewed and settled by the court." Alan Newman et al., The Law of Trusts and Trustees § 966 (3d ed. 2010).

Fletcher, 730 F.3d at 1210. Under common law, an "an accounting necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception." *Cobell VI*, 240 F.3d at 1103 (citing *Engelsmann v. Holekamp*, 402 S.W. 2d 382, 391 (Mo. 1966)). Courts may fashion an accounting specific to the needs of the case before them consistent with background equitable principles. *See Fletcher*, 730 F.3d at 1214. But courts may not ignore terms with particular and defined meanings. *See id.* at 1210. Indeed, at least one court already concluded that including all asset information "in historical accounting statements" is not only consistent with the 1994 Act and common law but required for an adequate accounting. *Cobell v. Kempthorne* (*Cobell XX*), 532 F. Supp. 2d 37, 99–100 (D.D.C. 2008), *vacated and remanded sub nom.*, *Cobell XXII*, 573 F.3d at 808;[8] *see also Chickasaw Nation*, 120 F. Supp. 3d at 1225 (collecting cases holding that the duty to account encompasses non-monetary assets).

5. *Summary judgment is not appropriate as to whether past accounting efforts preclude the Nation's claims.*

[8] The D.C. Circuit vacated *Cobell XX* in *Cobell XXII*, the final opinion prior to the settlement of the *Cobell* saga. *Cobell XXII* cautioned that whether or not the accounting should cover the escheatments of Indian land—which the Government argued was "an accounting for land"—depended on "the practical question of whether the cost to account will exceed the amount recovered by class beneficiaries." *Cobell XXII*, 573 F.3d at 814 (cleaned up). Thus, *Cobell XXII* did not overrule *Cobell XX*'s holding that an accounting must consider non-monetary assets. Rather, it cabined such accounting to a cost-benefit analysis, which is consistent with other similar cases. *See Fletcher*, 730 F.3d at 1214.

The Government asserts that because it has undertaken various efforts from 1893 onwards, the Nation's claims are barred. First the Government argues the statute of limitations bars such claims, *see* Defs.' Mot. 48–51; however, this argument is unavailing, *see supra* at III.A. Second, the Government argues that because the Nation accepted the results of an accounting prepared in 1894 (the Slade-Bender Report)[9] and did not contest its results, the Nation is judicially estopped from asserting any accounting for the pre-1893 time period. *See* Defs.' Mot. at 32–34. Third, the Government argues that any claim for an accounting prior to 1946 is also barred due to the 1946 Indian Claims Commission Act and Act of 1924, which established regimes allowing the Nation to bring such claims. *See id.* at 37–38. The Government argues that these two statutes provided that all claims against the United States would be "forever barred" unless brought by a certain time. *Id.* at 37. Finally, the Government argues that claim preclusion prevents the Nation from bringing any claims from the beginning of the allotment era (1902), *see* Defs.' Resp. ¶ 30, until 1930 due to the Nation's 1930 litigation in the Court of Claims, *see* Defs.' Mot. at 41–44 (citing *Cherokee Nation v. United States*, 102 Ct. Cl. 720 (Ct. Cl. 1945)). However, the Nation has provided material facts backed by probative evidence, which preclude summary judgment on these defenses.

a. Judicial estoppel[10]

[9] The Slade-Bender Report, alongside other topics, is the subject of a discovery dispute. *See* Pl.'s Reply at 41. The Nation may still seek discovery on these issues as discussed *infra* III.D.

[10] It is not even clear that judicial estoppel is recognized in this Circuit. *See United Mine Workers of America 1974 Pension v. Pittston Co.*, 984 F.2d 469, 477–78 (D.C. Cir. 1993) ("[W]e have not previously embraced the doctrine of judicial estoppel in this circuit and we decline to do so in this case."). Nevertheless, for the reasons explained above, judicial estoppel, even if applicable, is not appropriate here.

"[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *New Hampshire v. Maine*, 532 U.S. 742, 742 (2001) (cleaned up). "[J]udicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" *Id.* at 750 (citing *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). "Additional considerations may inform the doctrine's application in specific factual contexts" and courts are to weigh the balance of equities. *New Hampshire*, 532 U.S. at 751. "[A]sserting inconsistent positions does not trigger the application of judicial estoppel unless 'intentional self contradiction is . . . used as a means of obtaining unfair advantage.'" *In re Labrum & Doak, LLP*, 227 B.R. 391, 403 (Bankr. E.D. Pa. 1998) (quoting *Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953)). That is, "[j]udicial estoppel is only appropriate when the inconsistent positions are tantamount to a knowing misrepresentation to or even fraud on the court." *Fahie v. Virgin Islands*, 858 F.3d 162, 171 (V.I. 2017) (quoting *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 324 (3d Cir. 2003)).

Regarding the Government's claims of judicial estoppel for the pre-1893 period, the Nation has established facts that suggest that the Nation did not have a fair opportunity to object to the results of the Slade-Bender Report. The Government does not dispute that at the same time the Government expected the Nation to object to the Slade-Bender Report, the Government was in the beginning steps of forcibly assimilating the Nation. *See* Defs.' Resp. ¶¶ 20–21. Simultaneously, the Government also violated other agreements with the Nation and "settled other Indians" on tracts of promised Cherokee land. Defs.' Resp. ¶¶ 15–18. During this period, the Government also accused tribal officials "of pervasive corruption and venality . . . [and] there was a widespread perception in Congress that no tribal officials could be trusted to" complete simple tasks. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1123 n.29 (D.D.C. 1976). If congressional views of tribal officials

were correct, then the tribal officials—who were also undergoing assimilation and being overrun by other settlers—were not able to competently pursue objections. These historical events demonstrate that the Nation's prior actions were likely "good faith mistake[s] rather than . . . a part of a scheme to mislead the court." *Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980). This precludes a finding of judicial estoppel. *See id.* The Court—acting in its discretion—refuses to apply an equitable remedy considering this sordid history and thereby create an inequitable result, especially on summary judgment. *See New Hampshire*, 532 U.S. at 750.

The same reasoning applies with respect to claims for an accounting relating to funds held after 1893 and before 1946. First, the Nation credibly alleges that while attorneys for the Nation litigated claims on the Nation's behalf in the early part of the twentieth century, such attorneys were not chosen in line with the Cherokee Constitution. *See* Pl.'s Resp. ¶¶ 94–96. The Government's claim that there was no interference with the Nation's selection of attorneys relies, at least partially, on impermissible hearsay evidence. *See* Pl.'s Resp. ¶ 104. And "sheer hearsay . . . counts for nothing on summary judgment." *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007) (cleaned up).

Second, the Government does not dispute that it was during this period that Congress created the Dawes Commission and subsequently tasked it "with the work [of extinguishing communal land ownership] . . . regardless of the will of the tribes." Defs.' Resp. ¶ 24. The powers Congress granted to the Commission were "designed to coerce the tribes to negotiate with the Commission." *Id.*; *see also Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442 (D.C. Cir. 1988) (describing congressional attempts to eradicate tribal self-government, including through abolishing Cherokee tribal courts). Forcing the Nation to abide by legal rulings obtained during this period of "bureaucratic imperialism" and strategic efforts to "frustrate, debilitate, and

generally prevent from functioning the tribal governments" would result in inequity. *Harjo*, 420 F. Supp. at 1130. Again, the Court—acting in its discretion—refuses to apply an equitable remedy to create an inequitable result, especially on summary judgment. *See New Hampshire*, 532 U.S. at 750.

Indeed, Courts have ruled against estoppel based on concerns about whether tribal attorneys taking part in the prior litigation "had the incentive to fully litigate the Nations' claims, or whether effective litigation was limited by the nature or relationship between these attorneys and the United States." *Chickasaw Nation*, 120 F. Supp. 3d at 1235 (cleaned up). The same conclusion applies here. In fact, there is evidence that interference with the Nation's legitimate rights to self-government persisted until at least 1970, when Congress enacted legislation to allow the Nation its own democratically-elected leader. *See* Defs.' Resp. ¶¶ 47–48; *Harjo*, 420 F. Supp. at 1139–40 (citing Act of October 22, 1970, 84 Stat. 1091, which established tribal self-government). Again, these historical events demonstrate that the Nation was likely a bystander-victim to the prior actions and that any change in position once they gained self-governance was not "part of a scheme to mislead the court." *Konstantinidis*, 626 F.2d at 939.

b. Claim preclusion

Prevailing on an invocation of claim preclusion requires not only prior litigation (1) "involving the same claims," (2)"between the same parties or their privies, and (3) a final, valid judgment on the merits, (4) by a court of competent jurisdiction," but also (5) "the additional requirement that the nonmoving party had a full and fair opportunity to litigate the claim." *Lamont v. Proskauer Rose, LLP*, 881 F. Supp. 2d 105, 112 (D.D.C. 2012) (citing *Li v. Montgomery*, 2000 WL 815992, at *1, 2000 U.S. App. LEXIS 15467, at *3 (D.C. Cir. 2000)).

The historical tragedies that preclude judicial estoppel also preclude claim preclusion. The Nation credibly alleges, backed by competent evidence, that in 1905 the Government "usurped the legitimate authority of the Nation's constitutional government still in operation and administratively inserted Interior as the effective governing authority." Pl.'s Mot., Ex. 32, Decl. of Brian Hosmer, Ph.D. ¶ 41, ECF No. 100-5. The evidence of illegal domination leaves open "genuine issues of material fact . . . with regard to the second element—identity of parties—and with regard to whether the Nations had a full and fair opportunity to litigate any prior claims." *Chickasaw Nation*, 120 F. Supp. 3d at 1235.

C. The AA Report Is Not an Accounting Within the Meaning of the 1994 Act.

1. *The AA Report does not meet the statutory requirements of the 1994 Act and is arbitrary and capricious.*

The Government concedes that the AA Report "was not perfect." Defs.' Mot. at 61. In fact, the AA Report "receives a F grade." *Cherokee Nation v. U.S. Dep't of Interior*, 531 F. Supp. 3d 87, 93 n.1 (D.D.C. 2021).

The AA Report failed to meet congressional goals set out in § 4044, which directed "as full and complete accounting as possible of the account holder's funds to the *earliest possible date*." 25 U.S.C. § 4044(2)(A) (emphasis added). The Government concedes that it had accounting information available "covering various pre-1972 time periods." Defs.' Mot. at 67. But the AA Report only covered the 1972 to 1992 period. Defs.' Resp. ¶ 98. The Government justifies this disregard of the congressional directive by claiming that limiting the AA Report "to the time period of 1972 to 1992 was . . . reasonable based on its judgment that it would focus on the time period that was deemed to likely be the most susceptible to problems or errors.'"[11] Defs.' Mot. at 62

[11] The Nation disputes that this was the true reason for the time limitation. *See* Pl.'s Resp. ¶ 135.

(cleaned up). But this reason is a "factor[] which Congress has not intended it to consider" as it appears nowhere in the statute and in fact, contradicts its express terms. *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 189 (D.C. Cir. 2013) (quoting *State Farm*, 463 U.S. at 43). It is also "an explanation for its decision that runs counter to evidence before the agency," as the Government admits pre-1972 data existed. *State Farm*, 463 U.S. at 43; *see* Defs.' Mot. at 67. The failure to "articulate[] a satisfactory explanation for its action" demonstrates the Government's failure to rationally connect its choices to the facts. *Animal Legal Defense Fund, Inc. v. Vilsack*, 237 F. Supp. 3d 15, 20 (D.D.C. 2017) (quoting *State Farm*, 463 U.S. at 43). Without this, the Government's action cannot survive arbitrary and capricious review. *See Animal Legal Defense Fund*, 237 F. Supp. 3d at 20.

Regardless, the AA Report fails to meet the requirements of § 4011, which is the applicable provision for a historical accounting. *See infra* III.B.1. Section 162a(d) outlines the specifics of the accounting duty established in § 4011, including

- Providing adequate systems for accounting for and reporting trust fund balances;
- Providing adequate controls over receipts and disbursements;
- Providing periodic, timely reconciliations to assure the accuracy of accounts;
- Preparing and supplying . . . periodic statements of . . . account performance and balances to account holders; and
- Establishing consistent, written policies and procedures for trust fund management and accounting.

Cobell VI, 240 F.3d at 1090 (quoting 25 U.S.C. § 162a(d). In the eight pages the Government devotes to defending the AA Report, it references only § 4044 and makes no attempt to explain how the AA Report meets the requirements of §§ 162a(d) and 4011. *See* Defs.' Mot. at 61–68. The Government admits that the AA Report reconciled transactions, investment yields, deposit lag times, selected systems, special procedures for five tribes, and lease receipts. *See* Defs.' Resp. ¶

109. Yet these procedures do not cover non-monetary assets. *See id.*; Defs.' Mot. at 58–59. And that is fatal as § 4011 mandates such accounting. *See supra* III.B.4.

Furthermore, in 2001 the Government "stipulated that many of the duties owed under the 1994 Act were not being fulfilled. In other words, the federal government readily acknowledge[d] that it [wa]s in breach of at least some of the fiduciary duties owed to [Indian tribes]." *Cobell VI*, 240 F.3d at 1090. The breach of duties included the obligations under § 162a(d). *See id.* at 1090. Given that the Government was in breach in 2001, years after Arthur Anderson completed the AA Report, the Government cannot turn around and now use the AA Report to demonstrate that it is meeting its trust obligations. *See id.*

Government reliance on the flawed AA Report is also misplaced as it "was not an audit." *Cobell XX*, 532 F. Supp. 2d at 52. The AA Report "failed altogether to consider Congress's policy objectives" as found on the face of the 1994 Act. *Scotts Valley Band of Pomo Indians*, 2022 WL 4598687, at *27 (cleaned up). For example, the Act required the Government to provide "adequate systems for accounting and reporting trust fund balances." 25 U.S.C. § 162a(d)(1). Yet the AA Report, despite taking "about 5 years," was not able to identify "sufficient records . . . to fully reconcile the accounts." Pl.'s Mot, Ex 2, U.S. Government Accounting Office Report on Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results ("GAO Report") 7, ECF No. 88-5. Additionally, § 162a(d)(4) mandated accounting "accurate cash balances." But the AA Report only covered an estimated 86% of transactions. *See* Defs' Resp. ¶ 116. That meant that $2.4 billion (14% of transactions) were not accounted for due to lack of source documentation. *See Cherokee Nation*, 531 F. Supp. 3d at 93. Hence the "F grade." *Id.* at n.1.

These gaps stem from the fact that the AA Report "was modified and re-modified until the parties ultimately agreed" it would include a limited number of discrete tasks. *Nez Perce Tribe v.*

Kempthorne, No. 6-cv-2239, 2008 WL 11408458, at *2 (D.D.C. Dec. 1, 2008). This reduced the AA Report to a "contract governed by agreed upon procedures—in other words, a contract in which the client define[d] the scope and nature of the project" based on the Government's judgment—not Congress's—of what was possible or desirable during the reconciliation attempt. *Cobell XX*, 532 F. Supp. 2d at 52. Indeed, even Arthur Anderson concedes its report was not an audit.[12]

If an "agency has either violated Congress's precise instructions or exceeded the statute's clear boundaries, then, as *Chevron* puts it, 'that is the end of the matter'—the agency's interpretation is unlawful." *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) (quoting *Chevron*, 467 U.S. at 842). The Government's self-election of accounting procedures as opposed to following the strictures of § 162a(d) violates *Chevron*. *See Vill. of Barrington*, 636 F.3d at 660.And even if § 162a(d) was ambiguous, moving to *Chevron* step two is of no help to the Government. The Indian canon of construction compels an interpretation of the statute "construed liberally in favor of the [Nation.]" *Blackfeet Tribe of Indians*, 471 U.S. at 766. A liberal construction of § 162a(d) mandates an accounting that includes at least the requirements of its own strictures. *See Cobell VI*, 240 F.3d at 1102; *Fletcher*, 730 F.3d at 1209. Granted this is against the backdrop of the equitable considerations of "balanc[ing] the often warring (and admittedly incommensurate) considerations of completeness and transparency, on the one hand,

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[12] The Government "tried to pass off its arrangement with Arthur Andersen as a full audit and reconciliation as required by law. However, Arthur Andersen informed the [Government] that its work was not intended to meet the audit and reconciliation requirements of the Congressional directives [of the 1994 Act]." Pl.'s Mot, Ex. 8, Misplaced Trust, The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund 26, ECF No. 88-11. Arthur Andersen explained that its procedures did "not constitute an audit made in accordance with generally accepted auditing standards. . . . [Ha]d we made an audit of the financial statements of the Trust funds managed by the Bureau in accordance with generally accepted auditing standards, other matters might have come to our attention." AA Report at 4.

and speed, practicality, and cost, on the other." *Fletcher*, 730 F.3d at 1214. But the Government's woefully inadequate attempt to pass muster via the AA Report does not risk tipping this balancing scale.

The Government states that the 1994 Act "took into account what was 'possible' in the 17-month timeframe Congress allowed for Interior to complete its work." Defs.' Mot. at 62. But Arthur Andersen began this work as early as 1988, even before it was tasked to produce reconciliation reports. *See* Defs.' Resp. ¶ 73; GAO Report at 7; Defs.' Reply at 8. Thus, Arthur Andersen had about five years to complete its work, nearly three times as long as the Government first alleged. *See* Defs.' Resp. ¶ 91. Even with this lengthy review, the AA Report excludes pre-1972 data. *See id.* ¶ 98. This abbreviated review period disqualifies the report for the purposes of § 4044, which made explicit Congress's mandate for reports dating back "to the earliest possible date," and for § 4011(a)'s mandate of an historical accounting duty. The Government's failure to "articulate[] a satisfactory explanation for its action" equals a failure to rationally connect its choices to the facts. *Animal Legal Defense Fund*, 237 F. Supp. 3d at 20 (cleaned up). Without this, the Government's action cannot survive arbitrary and capricious review. *See id.*

Even if it fails to rationally connect the facts to the choices made, the Government may still survive arbitrary and capricious review "if the agency's path may reasonably be discerned." *Id*. (citing *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281 (1974)). However, the AA Report failed to "explain or describe the numerous changes in reconciliation scope and methodologies or the procedures that were not performed." GAO Report at 2. Without an explanation or description of these changes, "the tribes and [] Congress [could not effectively] understand the reconciliation results and determine whether the reconciliation represents as full and complete an accounting as possible." *Id* at 16. And refusing to provide an explanation

altogether is a near-guarantee that the reasoning is not discernable. *See Calixto v. Walsh,* No. 19-cv-1853, 2022 WL 4446383, at *12 (D.D.C. Sept. 23, 2022) ("The agency may not 'depart from a prior policy sub silentio.'") (quoting *U.S. Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Thus, the AA Report cannot survive arbitrary and capricious review. *See Env't Health Tr. v. U.S. Fed. Commc'ns Comm'n*, 9 F.4th 893, 905 (D.C. Cir. 2021) (finding that conclusory statements that do not explain the reasoning behind an agency's decision do not reveal "a discernable path to which the court may defer" and thus fail arbitrary and capricious review) (cleaned up).

D. Discovery Sanctions Are Not Warranted.

1. *The Government is not barred from presenting evidence on earlier accountings.*

"[J]udges enjoy wide discretion in managing the discovery process." *3E Mobile, LLC v. Glob. Cellular, Inc.*, 222 F. Supp. 3d 50, 53 (D.D.C. 2016) (cleaned up). Rule 37 empowers courts to award sanctions if a party fails to provide required information as required by Rules 26(a) (initial disclosures) or (e) (supplementing disclosures), unless the failure was "substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). The party proposing to admit evidence that it failed to disclose under Rules 26(a) and (e) bears the burden of showing substantial justification or lack of harm. *See United States ex rel. Morsell v. NortonLifeLock, Inc.*, 567 F. Supp. 3d 248, 261 (D.D.C. 2021). "District courts enjoy substantial discretion in deciding *whether* and how to impose sanctions under Rule 37." *Gluck v. Ansett Australia Ltd.*, 204 F.R.D. 217, 220–21 (D.D.C. 2001) (quoting *Alexander v. FBI*, 186 F.R.D. 78, 88 (D.D.C. 1998)) (emphasis omitted). But Rule 37 sanctions must be just. *See* Fed. R. Civ. P. 37(c)(1); *Arias v. Dyncorp Aero. Operations, LLC*, 677 F. Supp. 2d 330, 332 (D.D.C. 2010) (citing *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996)).

The duty to supplement under Rule 26(e) is a continuing obligation. *See* Fed. R. Civ. P. 26(e)(1)(A). The Nation claims that the Government changed its position post-discovery disclosures as to the relevance of pre-1972 conduct (*i.e.*, the Slade-Bender Report) and repudiation. *See* Pl.'s Reply at 42. However, it is unclear whether this information was relevant in some material respect. *See Morsell*, 567 F. Supp. 3d at 261. The Government's claim of "repudiation" is seemingly an alternative designation for accrual of a statute of limitations. Defs.' Reply at 23 ("[W]e 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)."). In other words, the Government seems to be making a statute of limitations argument based on actions already within the record and known to the Nation. *See* Defs.' Reply at 22–23. Judge McFadden previously found this to be permissible, even at this later phase of the case. *See supra* III.A.2; Defs.' Reply at 10–11 (citing *Cherokee Nation*, 2020 WL 224486, at *3).

The Nation's claims regarding the Slade-Bender Report are more persuasive, but only slightly so. The Nation asked the Government via interrogatory to identify "any accountings provided to Plaintiff as required by law." Defs. Interrog. Resps at 8–9. The Government claims it understood this question to refer only to accountings within the administrative record. Admittedly, the interrogatory did reference the administrative record. *See id.*; Defs.' Reply at 24. This good faith basis for the Government's misunderstanding weighs against the imposition of sanctions. *See Long v. Howard Univ.*, 561 F. Supp. 2d 85, 94 (D.D.C. 2008).

Regardless, Rule 37 exclusions are "'extreme sanction[s]' that should be used sparingly." *Sherrod v. McHugh*, 334 F. Supp. 3d 219, 269 (D.D.C. 2018) (quoting *Richardson v. Korson*, 905 F. Supp. 2d 193, 200 (D.D.C. 2012)). "Given the indisputable fact that additional relevant materials

have been produced . . . after the close of the [current] discovery period,"—such as the Slade-Bender Report—the Court finds that any prejudice the Nation perceives to have resulted from the Government's usage of repudiation and the Slade-Bender Report can be mitigated by additional phases of discovery. *G & E Real Est., Inc. v. Avison Young-Washington, D.C., LLC*, 323 F.R.D. 67, 71 (D.D.C. 2017) (reopening discovery "to nullify the prejudices Defendants perceive to have resulted"); *see also* Joint Status Report (Jan. 27, 2023), ECF No. 108 (indicating that Phase 3 discovery is in process).

IV. CONCLUSION

In 2005, years after the Government presented the AA Report to the Nation, the Department of Interior told Congress that

> Trust reform has remained a high priority. . . . We stand at a crossroads in history and must work together to resolve issues, such as *Cobell*, promptly and in a meaningful way that will fulfill our responsibilities to our beneficiaries and to the American taxpayer.

Oversight Hearing on Trust Reform: Hearing Before the S. Comm. on Indian Affs., 109th Cong. 47 (2005) (statement of Jim Cason, Acting Assistant Sec'y for Indian Affs., Dep't of Interior). Eighteen years have passed and the same issues plague the Nation. How can it trust when the Government still will not verify?

For the foregoing reasons, the Court recommends: GRANTING the Plaintiff's claims as to the AA Report in that it does not meet the 1994 Act; DENYING the Plaintiff's requests for sanctions; DENYING the Defendants' Cross-Motion for Summary Judgment; and DENYING as moot the Plaintiff's Rule 56(d) Motion.

V. REVIEW BY THE DISTRICT COURT

The parties are hereby advised that, under the provisions of Local Rule 72.3(b) of the U.S. District Court for the District of Columbia, any party who objects to the Report and

Recommendation must file a written objection thereto with the Clerk of this Court within fourteen days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the Report and Recommendation to which objection is made and the basis for such objections. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn*, 474 U.S. 140, 144–45 (1985).

Date: February 10, 2023

ZIA M. FARUQUI
UNITED STATES MAGISTRATE JUDGE