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No. ___ - _____

In the Supreme Court of the United States

HOMER FLUTE, ROBERT SIMPSON, JR., THOMPSON FLUTE, JR. DOROTHY WOOD, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

THE UNTIED STATES OF AMERICA, THE DEPARTMENT OF THE INTERIOR, THE BUREAU OF INDIAN AFFAIRS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

LARRY DERRYBERRY
DERRYBERRY & NAIFEH, LLP
4800 N. Lincoln Blvd.
OKC, Oklahoma 73105
(405) 528-6569

DAVID F. ASKMAN
ASKMAN LAW FIRM, LLC
2533 West 32nd Ave
Denver, Colorado 80211
(720) 855-1533

JASON B. AAMODT,
KRYSTINA E. PHILLIPS,
DALLAS L.D. STRIMPLE
INDIAN & ENVIRONMENTAL LAW GROUP, PLLC
1723 E. 15th Street, Suite 100
Tulsa, Oklahoma 74104
(918) 347-6169

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QUESTIONS PRESENTED

The questions presented are:

Whether a treaty promise to pay reparations to a group of Native Americans in the form and amount that is "best adapted to the respected wants and conditions of" said group of Native Americans, and subsequent appropriation of funds by Congress to pay such reparations, create a fiduciary relationship between the United States and said group of Native Americans.

Whether the Administrative Procedures Act waives the United States' immunity from suit for accounting claims regarding trust mismanagement that begun before the enactment of the Act.

Whether a set of Appropriations Acts by Congress that defer the accrual of trust mismanagement claims against the United States operates as a waiver of the United States' immunity from suit.

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Homer Flute, Robert Simpson, Jr., Thompson Flute, Jr., and Dorothy Wood respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

INTRODUCTION

The Tenth Circuit in this action ignored the guidance of this Court in regard to analyzing the United States' trust responsibilities to Indian peoples, and expressly rejected the D.C. Circuit's interpretation of various appropriations acts, creating conflict between the Circuits.

This Court has clearly and concisely explained that where:

> the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or a fiduciary connection.

United States v. Mitchell, 463 U.S. 206, 225 (1983) ("*Mitchell II*") (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980)).

In the decision below, the Tenth Circuit ignored the holding of *Mitchell II* by placing an "undue

emphasis on the absence of express trust language." *See* Pet. App. 27a (J. Phillips, concurring); *see also* Pet. App. 22a ("neither the treaty nor the 1866 Appropriations Act contains *any* express trust language") (majority opinion). The Treaty of Little Arkansas, while silent as to the creation of an express trust, placed fiduciary obligations on the Secretary of the Interior to assure that payment pursuant to the treaty was "best adapted to the respective wants and conditions" of the beneficiaries. 14 Stat. 703, 705-706. The 1866 Appropriations Act thereafter supplied funds – the necessary trust corpus for the Secretary of the Interior to manage. Simply put, "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe of Indians*, 224 Ct. Cl. at 183).

Additionally, the Tenth Circuit found that the United States had not waived its immunity from suit for Petitioners' trust accounting claims. This holding conflicts with the plain language of the Indian Trust Reform Act, which requires the Department of the Interior to provide "as full and complete accounting as possible of the account holder's funds to the earliest possible date," 25 U.S.C. § 4044(2), and the Administrative Procedures Act which waives the United States immunity from suit for failure to perform a statutorily required act.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 808 F.3d 1234. The opinion of the district court (Pet. App. 33a) is reported at 67 F.Supp. 3d 1178.

JURISDICTION

The court of appeals entered its judgment on December 22, 2015, and denied a petition for rehearing on March 22, 2016. *See* Pet. App. 1a, 31a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Treaty with the Cheyenne and Arapaho (1865) (herein the "Treaty of Little Arkansas"), 14 Stat. 703, An Act making Appropriations for the Current and Contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes for the Year ending thirtieth June, eighteen hundred and sixty-seven, and for other Purposes (herein the "1866 Appropriations Act"), 14 Stat. 255, the Administrative Procedures Act, 5 U.S.C. § 702, and the Indian Trust Reform Act, 25 U.S.C. §§ 4011, 4044, are reproduced at Pet. App. 81a.

STATEMENT

A. Statutory and Regulatory Background

In 1992, the United States Congress—after over a century of its self-described "inept management" of Indian trusts—issued a report that catalogued the United States' "dismal history of inaction and incompetence." *Cobell v. Norton*, 392 F.3d 461, 463-464 (D.C. Cir. 2004) (quoting MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE

INDIAN TRUST FUND, H.R. Rep. No. 102-499 at 5 (1992) ("Misplaced Trust")) (internal quotation omitted) ("*Cobell XIII*"). Specifically, Congress found that the United States "repeatedly failed to take resolute corrective action to reform its longstanding financial management problems." *Cobell XIII*, 392 F.3d at 464 (quoting Misplaced Trust at 3)(internal quotation omitted).

In 1994, responding to these findings, Congress passed legislation requiring the Department of the Interior to provide "as full and complete accounting as possible of the account holder's funds to the earliest possible date." 25 U.S.C. 4044(2) (emphasis added) (herein the "1994 Act"). The purpose of the 1994 act was "to provided for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians. . . ." 25 U.S.C. § 4041(1).

Petitioners' trust fund was created in 1865 as a part of the Treaty of Little Arkansas. In that Treaty the United States expressly condemned the massacre of Native Americans at Sand Creek, Colorado — discussed in depth below — and promised reparations to both identified individuals and other "sufferers as may have been omitted." 14 Stat. 703, Art. 6. On July 26, 1866, Congress appropriated money to fulfill these trust responsibilities to the "members of the bands of Arapaho and Cheyenne Indians who suffered at Sand Creek." *See* 1866 Appropriations Act, 14 Stat. 255, 276 (July 26, 1866). Both the Treaty and 1866 Appropriations Act imposed an obligation on the Secretary of the Interior to distribute funds to "members of those

bands" who suffered at Sand Creek in the form of "United States securities, animals, goods, provisions, or such other useful articles," to those affected by the massacre at Sand Creek, Colorado. 14 Stat. at 276.

B. Facts

On or about June 27, 1864, Territorial Governor and Superintendent of Indian Affairs John Evans conspired with Colonel John Chivington to plan a campaign against certain peaceful bands of the Cheyenne and Arapaho Tribes. Evans issued a proclamation stating ". . . I direct that all friendly Indians keep away from those who are at war, and go to places of safety. Friendly Arapahoes and Cheyennes belonging on the Arkansas River will go to Major Colley, U.S. Indian agent at Fort Lyon, who will give them provisions, and show them a place of safety . . ." *See* Pet. App. 58a. On or about September 28, 1864, the Cheyenne and Arapaho tribal leaders agreed to travel to the territorial capitol of Denver to assure Governor Evans of the Tribes' peaceful intentions. *Id.* at 59a.

At the meeting, Governor Evans informed the tribal leaders that he was not interested in making peace and that, to prove their peaceful intentions, the Tribes should move near Fort Lyon and cooperate with military officials by relaying information and scouting out Indians combating whites. *Id.* Colonel John Chivington, a colonel in the United States Army and commander of the First Colorado Cavalry and Third Colorado Cavalry, told the tribal leaders at the same meeting that his policy was to "fight them until they lay down their arms and submit to military authority." *Id.* After the September 1864

meeting, Major Wynkoop told the Cheyenne and Arapaho Tribes that they could relocate the Tribes' villages closer to Fort Lyon in order to prevent further difficulties with whites. *Id.*

Major Edward Wynkoop was removed from command of Fort Lyon on or about November 5, 1864, and replaced by Major Scott J. Anthony. *Id.* at 60a. Major Wynkoop's removal was predicated on beliefs that he was too friendly with the Indians. *Id.* Major Anthony's orders were to keep the Indians away from Fort Lyon. *Id* Shortly after Major Anthony assumed command of Fort Lyon, the Cheyenne, under Black Kettle, arrived at Fort Lyon, and Major Anthony suggested the Tribe camp at Sand Creek where they could hunt bison. *Id.* at 61a. Major Anthony disarmed Black Kettle's bands, leaving them only with aboriginal weapons for hunting. *Id.*

On or about November 14, 1864, Colonel Chivington issued marching orders to the Colorado Third, sending them, along with three companies of the Colorado First, from Denver towards the Arkansas River and then to Fort Lyon to prepare for and commence what would become the Massacre at Sand Creek. *Id.* Around noon on November 28, 1864, Colonel Chivington and his soldiers arrived unannounced at Fort Lyon. *Id.* at 62a.

Colonel Chivington and his army arrived outside the Indian's camp on Sand Creek at sunrise on November 29, 1864. *Id.* at 63a. Black Kettle, Chief of the encampment, flew an American flag, with a white flag beneath it above his tent, signifying that the encampment was under the United States'

protection and under a flag of truce. *Id.* at 63a-64a. Upon arrival at Sand Creek, Colonel Chivington dispatched Lieutenant Luther Wilson with three Companies to cut off a herd of horses from the village. *Id.* at 64a. With the herd cutoff, effectively preventing the use of horses for defense or escape, the first shots were fired on the unsuspecting people. *Id.*

With the United States military firing on the Sand Creek encampment, the unsuspecting families attempted to flee. *Id.*. Many ran up the creek bed, where the bank offered some protection from the soldiers' bullets. *Id.* Women and children frantically began digging into the ground to make holes in which to hide. *Id.* Approximately two hundred soldiers surrounded those seeking to hide–mostly unarmed women and children–and slaughtered them. *Id.* at 64a-65a. The Massacre was over by 3 o'clock in the afternoon of November 29, 1864. *Id.* at 65a. The exact number of dead is unknown, but eyewitnesses stated that two-thirds of the dead were women and children. *Id.*

In response to the Massacre, the United States entered into an unprecedented Treaty, wherein the United States expressly condemned the massacre and promised reparations to both identified individuals and other "sufferers as may have been omitted." 14 Stat. 703, Art. 6. On July 26, 1866, Congress appropriated money to reimburse the "members of the bands of Arapaho and Cheyenne Indians who suffered at Sand Creek." *See* 1866 Appropriations Act, 14 Stat. at 276. Because no accounting has been provided, it is not clear whether the money appropriated by the 1866 Appropriations

Act was sufficient to compensate the victims of the massacre as required by the Treaty. *See* Pet. App. 70a. Moreover, it is believed that an accounting will show that some of the appropriated money was never actually distributed, or that some of the money was not distributed to the victims of the massacre as required by the Treaty. *Id.* However, at this time, the descendants of those surviving the massacre at Sand Creek cannot ascertain whether and to what extent they have suffered a loss as a result of the United States' mismanagement of the funds required to be paid under the Treaty, and appropriated in the 1866 Appropriations Act.

C. Proceedings Below

On July, 11, 2013, Petitioners, Homer Flute, Robert Simpson, Jr., Thompson Flute, Jr., and Dorothy Wood, (herein "Appellants" or "Plaintiffs") filed their Class Action Complaint for Injunctive and Declaratory Relief (herein the "Complaint") in this action. The Complaint stated claims against the United States of America, the Department of the Interior, and the Bureau of Indian Affairs (herein "Appellees," "Defendants" or "United States") for (1) breach of trust responsibilities for filing to ascertain the names of persons to whom reparations are still due and owing; (2) breach of trust responsibilities for failure to account for the reparations that the United States holds in trust for the putative class; and (3) failure to perform a discrete agency action to account and distribute trust assets pursuant its trust responsibilities. *See* Pet. App. 75a-78a. The District

Court's jurisdiction in this case arises from 5 U.S.C. § 702 and the "Appropriations Acts."[1]

On September 4, 2014, the District Court—on motion by the United States—dismissed Plaintiffs' Complaint and entered judgment for the United States. The District Court found that the Treaty of Little Arkansas and the 1866 Appropriations Act (which appropriated funds pursuant to the Treaty) did "not establish an enforceable trust." *See* Pet. App. 53a. On October 1, 2014, Plaintiffs timely filed their Notice of Appeal to the Tenth Circuit Court of Appeals.

On December 22, 2015, the Tenth Circuit affirmed the District Court's decision, agreeing that no enforceable trust duties existed because: (i) "neither the [Treaty of Little Arkansas] nor the 1866 Appropriations Act contains *any* express trust language," Pet. App. 22a (emphasis in original); and

[1] The term "Appropriations Acts" refers to a series of acts passed by Congress regarding the accrual of claims of Indian beneficiaries. Pub. L. No. 111-88, 123 Stat. 2904 (2009) (emphasis added). Since 1991, Congress has each year passed similar language protecting both tribal and individual Indian claims. *See* Pub. L. No. 102-154, 105 Stat. 990 (1991); Pub. L. No. 102-381, 106 Stat. 1374 (1992); Pub. L. No. 103-138, 107 Stat. 1379 (1993); Pub. L. No. 103-332, 108 Stat. 2499 (1994); Pub. L. No. 104-134, 110 Stat. 1321 (1996); Pub. L. No. 104-208, 110 Stat. 3009 (1996); Pub. L. No. 105-83, 111 Stat. 1543 (1997); Pub. L. No. 105-277, 112 Stat. 2681 (1998); Pub. L. No. 106-113, 113 Stat. 1501 (1999); Pub. L. No. 106-291, 114 Stat. 922 (2000); Pub. L. No. 107-63, 115 Stat. 414 (2001); Pub. L. No. 108-7, 117 Stat. 11 (2003); Pub. L. No. 108-108, 117 Stat. 1241 (2003); Pub. L. No. 108-447, 118 Stat. 2809 (2004); Pub. L. No. 109-54, 119 Stat. 499 (2005); Pub. L. No. 110-161, 121 Stat. 1844 (2007).

(ii) there is an absence of "an elaborate regulatory scheme which directs the government to [manage Indian property] in the best interests of the current and future beneficiaries of the proceeds from the resources on that property." *Id.* at 23a. Additionally, the Tenth Circuit held that neither the Appropriations Acts, nor the Administrative Procedures Act, waived the United States immunity from suit in this action. *Id.* at 9a-11a, n. 4.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH PROPER APPLICATION OF DECISIONS OF THIS COURT AND THE OTHER CIRCUITS.

"The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship." *See Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("*Cobell VI*"). That trust relationship is "generally defined in the first instance by 'applicable statutes and regulations.'" *Fletcher v. United States*, 730 F.3d 1206, 1208 (10th Cir. 2013) (quoting *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2325 (2011)). In order for an individual Native American "to trigger a duty to account the [individual] first [has] to identify some statute or regulation creating a trust relationship between them and the government." *Fletcher*, 730 F.3d at 1208-1209.

In *Mitchell II*, this Court held that where:

> the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (*unless Congress has provided otherwise*) **even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or a fiduciary connection**.

Mitchell II, 463 U.S. at 225 (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980)) (emphasis added). Instead:

> a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).

Mitchell II, 463 U.S. at 225 (quoting *Navajo Tribe of Indians*, 224 Ct. Cl. at 183). Additionally, as explained by this Court in *United States v. White Mountain Apache Tribe*, enforceable trust duties clearly exist when the Secretary of the Interior is granted "discretionary authority to make direct use of portions of the trust corpus." 537 U.S. 465, 475 (2003).

A. The Treaty of Little Arkansas, and subsequent appropriations in furtherance thereof,[2] create trust responsibilities for the United States.

The situation here fits precisely within the framework set forth by this Court in *Mitchell II* and *White Mountain Apache Tribe*. The Treaty of Little Arkansas expressly states that the United States would provide reparations to both identified individuals and other "sufferers as may have been omitted." 14 Stat. 703, Art. 6. Specifically, the Treaty provided:

> the government . . . will grant three hundred and twenty acres of land by patent to each of the following-named chiefs of said bands [listing chiefs] and will in like manner grant to each other person of said bands made a widow, or lost a parent upon that occasion, one hundred and sixty acres of land. . . . The United States will also pay in United States securities, animals, goods, provisions, and other useful articles ***as may, in the discretion of the Secretary of the Interior, be deemed best adapted to the respective wants and conditions of the persons named in the schedule hereto annexed. . .***

[2] At the very least, the 1866 Appropriations Act is evidence of the United States attempting to fulfill its trust responsibilities under the Treaty of Little Arkansas.

14 Stat. at 705-706 (emphasis added). Thereafter, in furtherance on this duty, in 1866, Congress appropriated money to reimburse the victims of the massacre:

> For reimbursing members of the bands of Arapaho and Cheyenne Indians who suffered at Sand Creek . . . to be paid in United States securities, animals, goods, provisions, or such other useful articles ***as the Secretary of the Interior may direct,*** as per [Article VI of the Treaty], thirty-nine thousand and fifty dollars [($39,050.00)].

1866 Appropriations Act, 14 Stat. at 276 (emphasis added).

As such, <u>both</u> the Treaty of Little Arkansas and 1866 Appropriations Act specifically identify beneficiaries, provide for funds to be paid to those beneficiaries, and charge the Secretary of the Interior – the trustee of those funds – with the discretion to manage and control the reparation funds to provide articles to the surviving families that are "best adapted to the respective wants and conditions of the [beneficiaries]." 14 Stat. at 705-706; 14 Stat. at 276.[3] Such an explicit obligation of the

[3] J. Phillips explained this in his dissent to the Tenth Circuit's opinion:

> the United States exercised managerial control over the funds [appropriated to the victims]: under the treaty's express language, the Secretary will pay the Tribe members "in United States securities, animals, goods, provisions, or such other useful articles as may,

Secretary of the Interior creates a carefully defined trust duty to the individual Indians—as the Tenth Circuit itself stated in *Fletcher*, "an obligation on the federal government to distribute funds to individuals ... in a timely and proper manner"— requiring the Secretary to manage the manner in which payment should have best been made. *Fletcher*, 730 F.3d at 1209. Moreover, the Secretary maintained complete and exclusive control and discretion over the funds appropriated for the victims. *See White Mountain Apache Tribe*, 537 U.S. at 475.

B. The Tenth Circuit's focus on Express Trust Language was inappropriate.

The Tenth Circuit's Opinion ignores the standards set forth in *Mitchell II* and *White Mountain Apache Tribe*, and its own opinion in *Fletcher*, instead placing, as J. Phillips stated it, an "undue emphasis on the absence of express trust language." *See* Pet. App. 27a (J. Phillips, concurring). In fact, there is little to no discussion of the language of the Treaty of Little Arkansas and the control and discretion it grants to the Secretary of the Interior in the Tenth Circuit's opinion. Instead, the Tenth Circuit devoted considerable time to addressing whether an "allocation of funds for a particular purpose creates fiduciary obligations enforceable by the heirs of the intended recipients of those funds." Pet. App. 23a.

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in the discretion of the Secretary of the Interior, be deemed best adapted to the respective wants and conditions" of the Tribe members affected.

Pet. App. 30a (J. Phillips, concurring).

In focusing solely on the appropriations act, the Tenth Circuit relied on *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009), to hold that the 1866 Appropriations Act did not create trust responsibilities. Pet. App. 23a-25a. However, *Wolfchild* did not involve a situation like the one at issue in this action. In *Wolfchild*, the plaintiffs were relying *solely upon* on the appropriations of funds to create fiduciary responsibilities. 559 F.3d at 1236 ("plaintiffs' theory of the case was that the Appropriations Acts created a trust"). These acts were "simply authorizing the expenditure of funds for a particular purpose," and meant to be more flexible than a trust investment. *Id.* at 1243.

However, here, as noted above, Petitioners are not relying solely upon the 1866 Appropriations Act to establish the United States trust duties, and Congress was not "simply authorizing the expenditure of funds." Instead, Congress was attempting to fulfill its trust responsibilities under the Treat of Little Arkansas. Once appropriated, those funds were to managed pursuant to the Treaty of Little Arkansas, and as such, under *Mitchell II*, are properly considered trust funds, despite any express trust language. J. Phillips perfectly explained this in his concurrence to the Tenth Circuit's opinion:

> [T]he money was not appropriated for immediate, direct payment to the qualified tribal members. Rather, Congress appropriated the money to the Secretary to spend <u>*on their behalf at his discretion*</u> until he used the full amount. Until all of the money appropriated was

> paid out on behalf of the Tribe members, I believe that the money is still held in trust.

Pet. App. 29a, n.2 (emphasis added). It is likely that some of those monies are *still* held in trust, as there is no evidence they were ever expended to benefit the victims' families, including Petitioners. Without a full accounting, however, any losses are impossible for the Petitioners to ascertain.

Additionally, and important to evaluation of the Treaty of Little Arkansas, the Federal Circuit in *Wolfchild* explained that when a grant of land to Native Americans is accompanied with a restriction on alienation, that is a key indicator of Congress's intent to create trust responsibilities. *Id.* at 1241-42 ("That language clearly would have created an inheritable beneficial interest in the recipients"). In fact, the General Allotment Act of 1887, 24 Stat. 388, defined this period of restricted alienation as a trust period. *See Wolfchild*, 559 F.3d at 1242.

The Tenth Circuit did not consider this distinction when analyzing the Treaty of Little Arkansas and the 1866 Appropriations Act. If it had addressed this fact, the Tenth Circuit would have found that Article Six of the Treaty of Little Arkansas contains such a restriction on alienation:

> said grants shall be conditioned that all devises, grants, alienations, leases, and contracts relative to said lands, made or entered into during the period of fifty years from the date of such patents, shall be unlawful and void. Said lands

> shall be selected under the direction of the Secretary of the Interior within the limits of country hereby set apart as a reservation for the Indians parties to this treaty, and shall be free from assessment and taxation so long as they remain inalienable.

14 Stat. 703. This restriction on alienation is evidence that Article Six was intended to create trust obligations. The 1866 Appropriations thereafter sought to fulfill these trust obligations.

II. DISMISSAL FOR SOVEREIGN IMMUNITY CONFLICTS WITH THE LAW OF THIS COURT, OTHER CIRCUITS AND THE TENTH CIRCUIT.

The central holding at issue here is the District of Colorado's dismissal of Petitioners' claims based on the United States' sovereign immunity from suit, which was affirmed by the Tenth Circuit. However, as set forth below, through both the APA and various Appropriations Acts, the United States has waived its immunity from suit for Petitioners' claims.

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without consent of Congress." *Temple v. Cleve Her Many Horses*, 2016 WL 722151 *7 (D.S.D. Feb. 19, 2016) (quotation omitted); *see also United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("United States, as sovereign, is immune from suit save as it consents to be sued"). "Any waiver of sovereign immunity must be strictly construed in favor of the sovereign and may not be extended beyond the explicit

language of the statute [granting the waiver]." *Chickasaw Nation v. Department of the Interior*, 120 F. Supp. 3d 1190, 1225 (W.D. Okla. 2014) (quotation omitted). Consequently, the government waives its sovereign immunity only when such a waiver is "unequivocally expressed." *Id.*

The Administrative Procedure Act ("APA") provides the unequivocal waiver necessary for the Petitioners' claim for an accounting. The APA in pertinent part states that a case against the United States government alleging that government acted or failed to act "shall not be dismissed on the ground that is it against the United States." 5 U.S.C. § 702.

In fact, almost every Court — with the exception of the decision below — has found that the APA provides a waiver of sovereign immunity for trust accounting claims brought under the APA.[4] *See, e.g.*, *Chickasaw Nation*, 120 F. Supp. at 1225-30; *Otoe-Missouria Tribe of Oklahoma v. Kempthorne*, 2008 WL 5205191 at *4 (W.D. Okla. Dec. 10, 2008) abrogated on other grounds by *Gilmore v. Weatherford*, 694 F.3d 1160 (10th Cir. 2012); *Tonkawa Tribe of Indians of Oklahoma v. Kempthorne*, 2009 WL 742896 at *3 (W.D. Okla. Mar. 17, 2009) abrogated on other grounds by *Gilmore v. Weatherford*; *Seminole Nation of Oklahoma v. Salazar*, 2009 WL 919435 at *1 (E.D. Okla. Mar. 31, 2009); *Gilmore v. Salazar*, 748 F. Supp. 2d 1299, 1305 (N.D. Okla. 2010), aff'd sub nom. *Gilmore v. Weatherford*; *Cobell VI*, 240 F.3d at 1094-95; *Villegas*

[4] Likewise, this Court has recognized that 5 U.S.C. 702 waives the United States immunity from suit for claims for breach of fiduciary duties. *See e.g. Mitchell II*, 463 U.S. at 227, n. 32.

v. United States, 963 F. Supp. 2d 1145, 1156 (E.D. Wash. 2013); *Temple*, 2016 WL 722151 at *10.

The APA provides a broad waiver of sovereign immunity. Section 702 of the APA states in full:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States . . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702.

Section 702 provides a waiver of sovereign immunity for at least two types of claims: nonmonetary claims that an agency acted or failed to act in violation of a statute other than the APA, and claims for violations of the procedural requirements under the APA (primarily § 704 and § 706).

A. Sovereign Immunity Has Been Waived for the Petitioners' Claim for an Accounting as Required by the 1994 Indian Trust Fund Management Reform Act and other Statutes.

Petitioners' claim for an accounting arises primarily under the 1994 Act. Congress reiterated the Department of the Interior's duty to provide trust beneficiaries "as full and complete accounting as possible of the account holder's funds to the earliest possible date." 25 U.S.C. § 4044(2). Here, the United States has never provided such an accounting for the specific trust at issue in this action.

The APA specifically states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Indeed, the Fifth Circuit has considered this issue directly, and found that the APA provides a waiver of sovereign immunity

> when judicial review is sought pursuant to a statutory or non-statutory cause of action that arises completely apart from the general provisions of the APA. There is no requirement of "finality" for this type of waiver to apply. Instead, for this type of waiver there only needs to be "agency action" as set forth by 5 U.S.C. § 551(13).[5]

Alabama-Coushatta Tribe of Texas v. United States, 757 F.3d 484, 489 (5th Cir. 2014).

Moreover, there is broad consensus among the circuits that "the waiver of sovereign immunity contained in section 702 is not dependent on application of the procedures and review standards of the APA." *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988); *see also Temple*, 2016 WL 722151 at *10; *Winnebago Tribe of Nebraska v. Babbitt*, 915 F. Supp. 157, 165 (D.S.D. 1996) ("waiver applies to every action in a court of the United States seeking relief from agency action taken outside the scope of authority"); *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 673 (6th Cir. 2013) ("noting that the Sixth Circuit had previously applied the waiver of sovereign immunity in § 702 in cases under statutes other than the APA."); *Cobell VI*, 240 F.3d at 1094 (stating that section 702 acts as a blanket waiver of sovereign immunity "for [any] action[] seeking relief other than money damages involving a federal official's action or failure to act." So long as "the plaintiffs seek specific injunctive and declaratory relief—and, in particular, seek the accounting to which they are entitled—the

[5] 5 U.S.C. § 551(13) defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

government has waived its sovereign immunity under this provision.").

The Petitioners allege that the United States has failed to provide an accounting of funds owed to the Sand Creek victims. As such, the allegations fall squarely within the actions for which the APA waives the United States' sovereign immunity.

B. The Tenth Circuit Improperly Considered the United States' failure to Account as "actions taken in the 1860s and 1870s."

The Tenth Circuit, upon argument by the United States, held that the APA's waiver of sovereign immunity did not apply because the underlying facts of the case involved actions occurring long before the enactment of the APA:

> Plaintiffs also make passing reference to 5 U.S.C. § 702 as a source of the district court's jurisdiction in this case. But as Defendants have correctly argued, § 702 does not operate retroactively to waive sovereign immunity for claims accruing prior to its effective date of October 21, 1976. *See United States v. Murdock Mach. & Eng'g Co. of Utah*, 81 F.3d 922, 929 n.8 (10th Cir. 1996). Plaintiffs have failed to address the retroactivity of § 702 or otherwise to demonstrate how § 702 applies to waive sovereign immunity for their claims, which arise from actions taken in the 1860s and 1870s—long before the effective date of § 702. Because Plaintiffs have provided no argument or reasoned analysis on appeal supporting their bald assertion that § 702 acts to waive sovereign immunity under the facts of this case, we do not consider this argument further.

Pet. App. 9a, n.4. The Tenth Circuit misconstrued the Petitioners' arguments, and never addressed Congress' recent reiteration of the United States' duty to account to Indian beneficiaries.

As noted above, in 1994 Congress passed legislation requiring the Department of the Interior to provide "as full and complete accounting as possible of the account holder's funds to the earliest possible date." 25 U.S.C. 4044(2). The failure to provide this accounting did not "arise from actions taken in the 1860s and 1870s," but was a repudiation of Congress' charge that the United States perform "a reconciliation of the account to determine what the proper balance should be and to *require proper accounting and reconciliation to continue into the future.*" *Otoe-Missouria*, 2008 WL 5205191 (W.D. Okla. Dec. 10, 2008) (emphasis added); *see also Cobell VI*, 240 F.3d at 1002-1004 (indicating that the duty to account "necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception."). These actions occurred *after* the effective date of the APA, so the APA's waiver of sovereign immunity applies to Petitioners' claim for an accounting.

As such, at the very least, upon passage of the 1994 Act, which occurred after the effective date of the APA, the United States had a duty to provide Plaintiffs and the putative class with an accounting "to the earliest possible date," which would include

accounting for "actions taken in the 1860s and 1870s." 25 U.S.C. 4044(2); Pet. App. 9a, n.4. To hold otherwise would undermine the 1994 Act because "it defies reason to believe that Congress intended to direct that whatever balance was on the books at the time of passage of the 1994 Act was sufficient." *Otoe-Missouria*, 2008 U.S. Dist. LEXIS 99548, at *6 (W.D. Okla. Dec. 10, 2008).

C. The Tenth Circuit's Decision Conflicts with the Federal Circuit's Interpretation of the Appropriations Acts.

The Tenth Circuit's decision creates conflict between the circuits regarding another waiver of sovereign immunity: the Appropriations Acts.

The most recent Appropriations Act provides:

> [N]otwithstanding any other provision of law, *the statute of limitations shall not commence to run on any claim*, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 111-88, 123 Stat. 2904 (2009) (emphasis added). Since 1991, Congress has each year passed similar language protecting both tribal and individual Indian claims. *See supra* at note 1 (listing acts).

The Federal Circuit, in 2004, held that "[b]y the plain language of the [Appropriations] Act, *Congress has expressly waived its sovereign immunity* and deferred the accrual of the Tribes' cause of action until an accounting is provided." *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1346 (Fed. Cir. 1339) (emphasis added). It is hard to contemplate how the Federal Circuit could have used clearer language respecting this waiver of sovereign immunity.

However, the Tenth Circuit did not agree, claiming that the Federal Circuit's clear language does not mean what it says. *See* Pet. App. 14a. Instead, the Tenth Circuit limited *Shoshone* only to the application of statutes of limitations, and not to waivers of sovereign immunity. This seems to be based on the Tenth Circuit belief that the *Shoshone* court was only referring to how statutes of limitations "act as *conditions on* waivers of sovereign immunity." Pet. App. 13a.

This conflict should be easy to resolve by resort to the language of the appropriations acts themselves. The acts prevent the accrual of breach of trust claims until "until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." 123 Stat. 2904 (2009). It defies logic – and creates an irreconcilable split in the jurisprudence of the Circuit Courts for the Tenth Circuit to hold that the statute contemplates the United States providing an accounting, and preventing the accrual of *any* breach of trust claim, but does not provide beneficiaries any opportunity to

assure they actually receive the accounting they are owed.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

LARRY DERRYBERRY
DERRYBERRY & NAIFEH, LLP
4800 N. Lincoln Blvd.
OKC, Oklahoma 73105
(405) 528-6569

DAVID F. ASKMAN
ASKMAN LAW FIRM, LLC
2533 West 32nd Ave
Denver, Colorado 80211
(720) 855-1533

JASON B. AAMODT,
KRYSTINA E. PHILLIPS,
DALLAS L.D. STRIMPLE
INDIAN & ENVIRONMENTAL LAW GROUP, PLLC
1723 E. 15th Street, Suite 100
Tulsa, Oklahoma 74104

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