Gabriel S. Galanda, WSBA #30331
Anthony S. Broadman, WSBA #39508
Ryan D. Dreveskracht, WSBA #42593
Galanda Broadman PLLC
11320 Roosevelt Way NE
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Attorneys for Plaintiff

The Honorable Edward F. Shea

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONNELLY R. VILLEGAS, an enrolled member of the Spokane Tribe of Indians;

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

NO. CV-12-001-EFS

OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

Plaintiff filed this lawsuit to enforce, among other duties, Federal Defendants' fiduciary duty to provide adequate records of his accounts; Federal Defendants' fiduciary duty to ensure that funds held in trust are invested prudently and that a return on such investments is maximized; Federal Defendants' fiduciary duty to ensure that non-Federal Defendants did not act in breach of leases,

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

contracts, and agreements; and Federal Defendants' duty to perform under those same leases, contracts, and agreements. ECF No. 1 at 24-25. At this stage of the litigation, Plaintiff primarily seeks (1) a declaration that Federal Defendants possess – and have breached – a fiduciary duty to account for funds and assets held in trust, and (2) injunctive relief directing Federal Defendants to provide the required relief and to comply with other obligations as determined by the Court. If such relief shows that Federal Defendants have breached other duties, other equitable relief may be appropriate and necessary to compel Federal Defendants to comply with their obligations in the present and in the future.

Notably, Federal Defendants seek dismissal despite having already admitted that they have a "trust responsibili[ty] to . . . individual allotment owners"; that "pursuant to the terms of the leases" they must manage the payment of "royalties and annual rentals" for Allotment 156; and that "audits sometimes identified questions about how [non-Federal Defendants] had calculated the royalties owed to the . . . individual owners." ECF No. 64-2 at 15, 17. These admissions alone "give the [C]ourt reason to believe that this [P]laintiff has a reasonable likelihood of mustering factual support for [his] claims," and thereby defeat Federal Defendants' dismissal motion. *Tonkawa Tribe of Indians of Oklahoma v. Kempthorne*, No. 06-1385, 2009 WL 742896, at *1 (W.D. Okla. Mar. 17, 2009).

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

At minimum, Plaintiff is entitled to know whether his trust has been properly maintained. Federal Defendants, however, offer nothing to counter Plaintiff's proof that these trust and fiduciary duties have not been fulfilled in any way, shape, or form – particularly those requiring that Federal Defendants account for their management of Plaintiff's trust property, as required by federal law and the admitted terms of said leases. Plaintiff remains chiefly concerned about the indefinite delay of Federal Defendants' fulfilling these obligations. Federal Defendants now seek to remove the Court from the picture entirely, and, in doing so, eliminate Plaintiff's only hope to vindicate his rights.

I. FACTS[1]

The United States has long held substantial assets, including funds and non-monetary assets, in trust for members of federally recognized Indian tribes. *See* COMMITTEE ON GOVERNMENT OPERATIONS, MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND 6 (1992) [hereinafter MISPLACED TRUST]. These funds are comprised principally of the proceeds from the leasing of trust lands and other assets. *See generally id.* The funds receive their trust character as proceeds of trust property – not because they are placed in a trust account; indeed, some of these funds are not placed in federal trust accounts at all. *Id*; *see also Markham v. Fay*, 74 F.3d 1347, 1352 (1st Cir.

[1] For ease of reference, a Table of Contents is attached hereto as Appendix A.

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11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

1996) (noting that "proceeds [are] trust property, although not . . . paid to the trusts"); *Chippewa Cree Tribe of the Rocky Boy's Reservation v. U.S.*, 69 Fed.Cl. 639, 656 (Fed. Cl. 2006) (same).

Federal Defendants' financial mismanagement of Indian trust property is well documented:

- In 1828, Federal Defendants' oversight was described as follows: "The derangements in the fiscal affairs of the Indian department are in the extreme. One would think that appropriations had been handled with a pitchfork. . . . There is a screw loose in the public machinery somewhere." MISPLACED TRUST, at 6 (quotation omitted).

- In 1915, Congress described Federal Defendants' trust management as fraught with "fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension." Report to the Joint Commission of the Congress of the United States, 63rd Congress, *Third Session to Investigate Indian Affairs Relative to Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs* (1915), at 2.

- In 1992, a three-year congressional investigation of Federal Defendants' trust mismanagement arrived at the same conclusion reached 164 years earlier, finding "no evidence that [Federal Defendants have] undertaken any sustained or comprehensive effort to resolve glaring deficiencies." MISPLACED TRUST, at 9.

- In 2000, Defendant Department of the Interior ("DOI") conducted its own internal audits that "revealed discrepancies between [its ledges and the] ledges of . . . the Department of the Treasury." Historical Analysis of Individual Indian Money Accounts, 65 Fed. Reg. 17521, 17525 (Apr. 3, 2000); *see also id* (noting that "account management deficiencies . . . have resulted in accountholder losses"); *see also e.g. Cheyenne and Arapaho Tribes v. U.S.*, No. 12-0357 (C.F.C. June 5, 2012), ECF No. 1.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Today – and as to Federal Defendants' mismanagement of Plaintiff's trust property, specifically – very little has changed. Title to Allotment 156 (the "Allotment") has been held by the United States in trust for the Plaintiff's benefit for the majority of his life.[2] Through numerous statutes and regulations, the United States maintains comprehensive control over all significant actions occurring on the Allotment,[3] and must maintain records pursuant to that management.

Plaintiff has occasionally been able to obtain piecemeal information related to his trust assets. This information, however, has included glaring inconsistencies,

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[2] At some point between March 31, 1946, and March 20, 1956, Plaintiff received an undivided interest in the Allotment due to his status as heir. ECF No. 1 at 10-12. Plaintiff has had an unequivocal undivided 50-percent interest in the property since 1973. ECF No. 116, at 4.

[3] *See e.g.* Indian Nonintercourse Act, 25 U.S.C. § 177; Indian Long-Term Leasing Act, 25 U.S.C. § 396; Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g; Federal Oil & Gas Royalty Management Act, 30 U.S.C. §§ 1701, *et seq.*; Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101, *et seq.*; 25 U.S.C. § 152; 25 U.S.C. §§ 155, 155b; 25 U.S.C. §§ 311, 312, 318a, 319, 321, 323-28; 25 U.S.C. § 397; 25 U.S.C. §§ 398, *et seq.*; 25 U.S.C. § 399; 25 U.S.C. §§ 415-416j; 25 C.F.R. §§ 150-51; 25 C.F.R. § 162; 25 C.F.R. § 166.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

and has never included full records or accountings. *See e.g.* ECF No. 89 at 11-34. On numerous occasions, Plaintiff has sought to obtain full records and accountings, but has been ignored or met with disregard.[4] Federal Defendants, however, attempt to paint a different picture. According to Federal Defendants: Plaintiff was paid a full balance of mining royalties, as "determined by an audit by BIA of Dawn's production records," ECF No. 62 at 7 (citing ECF No. 63-5); the BIA has

[4] *See* ECF No. 1 at 25 (alleging that "Federal Defendants have consistently and egregiously failed . . . to give . . . accurate information upon reasonable request"); ECF No. 88 at 3-4 (same). To offer but one example, in 1990 Plaintiff put Federal Defendants on notice that large sums of trust monies "were stolen, put into wrong accounts and [that] several very large royalty checks . . . were . . . unaccounted for." ECF No. 63-6 at 3. Federal Defendants rejoined that they "maintain a record of royalty income" and that "audits cover the full production period of [Allotment 156] and have accounted for the royalty income received by all parties with royalty interest." *Id.* at 5. No accounting, however, was ever produced for Plaintiff. Because one did not, and still does not, exist. *See* ECF No. 63-9 at 2 (internal BIA memorandum noting that Plaintiff, due to "problems . . . on past royalty payments," had requested trust account information, but the information requested was "not . . . retrievable from the archives"); *see also generally* MISPLACED TRUST.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

sufficiently investigated Plaintiff's "concerns regarding payment and splits of mining royalties," *id.* at 8 (citing ECF No. 63-9); and the BIA has fulfilled its fiduciary and contractual duties to "regularly audit[] the mine production and . . . royalty income." *Id.* (citing ECF No. 63-6).

As to Federal Defendants' alleged "regular audits," no corollary accounting has ever been produced. In light of Federal Defendants' record, *see generally* MISPLACED TRUST, and the glaring inconsistencies found in the minimal amount of files Plaintiff has been able to obtain, these "regular audits" were not as routine as Federal Defendants maintain. Indeed, the only audit referenced by Federal Defendants was prompted by an admitted royalty calculation error,[5] *see* ECF No. 63-5 – as discussed below, this is not the type of recordkeeping required by federal law. As to Federal Defendants' alleged "sufficient investigation" of royalty mismanagement, the BIA also did not provide an accounting. Rather, it simply informed Plaintiff that "there really wasn't too much the Bureau could do." ECF No. 63-9 at 2. As to Federal Defendants' alleged "regular audits," yet again the

[5] Indeed, of all of the years that the Midnite Mine was in operation, the audit included in Federal Defendants' moving papers pertains to the largest set of royalties paid. Plaintiff is very familiar with this document – each and every time he has requested information from the BIA, this lone document has been produced.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

BIA did not provide an accounting. Rather, it offered a conclusory statement that "[w]e do not have documents which indicate money was wrongfully taken." ECF No. 63-6 at 5.

Plaintiff knows of no effort by Federal Defendants to fulfill their trust, fiduciary, and contractual obligations. To the contrary, they have continued to ignore Plaintiff's requests to fulfill those responsibilities – and in doing so have blatantly disregarded federal law. In the instant motion, Federal Defendants' seek to avoid accountability for their decades of mismanagement on procedural grounds. Federal Defendants' Motion to Dismiss must be **DENIED**.

II. ARGUMENT

The Section 702 of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706, waives the United States' sovereign immunity for claims seeking nonmonetary relief. The Mandamus Act, 28 U.S.C. § 1361, provides a similar but independent waiver of federal sovereign immunity. Here, Plaintiff has alleged and offered proof that the following violations of federal law have occurred:

(1) Federal Defendants have taken final agency action that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of 5 U.S.C. § 706;

(2) Federal Defendants have violated other federal law – federal laws that provide their own independent causes of action – which merit nonmonetary relief, including: (a) the Indian Trust Fund Management Reform Act, Pub. L. No. 103-412; 108 Stat. 4239 (1994); and (b) the Act of June 13, 1930, 25 U.S.C. §§ 161-62;

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

(3) Federal Defendants have violated their trust and fiduciary responsibilities made obligatory pursuant to the above-cited federal statutes;

(4) Federal Defendants have violated the federal common law.

A. Legal Standards

Federal Defendants have filed a Motion to Dismiss under FED. R. CIV. PROC. 12(b)(1), 12(b)(6), and 12(b)(7). Dismissal upon a Rule 12(b)(1) facial challenge to jurisdiction is proper only when the claim or claims at issue "clearly appear[] to be immaterial [or] wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). On a Rule 12(b)(1) motion, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Federation of African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). "So long as the federal law to be applied does more than merely create jurisdiction, it is a basis for federal court jurisdiction if it is potentially important in the outcome of the litigation." ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.2 (5th ed. 2007)

In order to survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint needs to contain more than a "formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rather, it must contain factual allegations sufficient to "raise a right to relief above the speculative level," and must "contain something more . . . than . . .

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id*. "[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Under Rule 12(b)(6), the Court must also accept as true the allegations of the complaint in question, construe the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in the pleader's favor. *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740 (1976). The Court must "presume that general allegations embrace those specific facts that are necessary to support the claim." *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) (quotation omitted). The Court may consider facts established by exhibits attached to the complaint. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). "The court may also consider facts which may be judicially noticed, and matters of public record, including pleadings, orders, and other papers filed with the court." *Harris v. Zamudio*, No. 09-1523, 2011 WL 2037009, at *5 (E.D. Cal. May 24, 2011); *see also Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F.Supp.2d 1224 (E.D. Cal. 2003) (considering contracts, permit applications and Interior agency decisions, reports and memoranda referenced in opposition to a

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Rule 12(b)(6) motion). Notably, where, as here, applicable law requires that an accounting be conducted, a plaintiff need only "give the court reason to believe that [the] plaintiff has a reasonable likelihood of mustering factual support for [his] claims" were that accounting provided. *Tonkawa Tribe*, 2009 WL 742896, at *1.

On a FED. R. CIV. PROC. 12(b)(7) motion to dismiss, a defendant bears "the burden to show that the absent party claims a non-frivolous interest that will be impaired if it is not joined as a party [which] burden can be satisfied by providing affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence." *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, No. 03-0846, 2010 WL 3368701, at *3-4 (N.D. Okla. Aug. 20, 2010) (citations omitted). "However, a motion to dismiss under Rule 12(b)(7) will not be granted because of a vague possibility that persons who are not parties may have an interest in the action. If the Court determines that the absent party is not a required party under Rule 19(a), it is not necessary for the Court to consider whether the case should be dismissed under Rule 19(b)." *Id.*

Federal Defendants' Motion falls short of the requisite dismissal standards of Rules 12(b)(1), 12(b)(6), and 12(b)(7).

B. This Court Possesses Subject Matter Jurisdiction.

Federal Defendants argue that the "United States has not waived its sovereign immunity." ECF No. 62 at 16. Federal Defendants are mistaken.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

The United States has waived its sovereign immunity in at least three relevant ways. First, Federal Defendants lack sovereign immunity under APA Section 702 for "judicial review of federal agency action" taken in violation of 5 U.S.C. § 706 – specifically, their failure to comply with applicable regulations, rules, and protocol governing their acts and omissions on Allotment 156 and pertaining to Plaintiff's trust. Second, Federal Defendants also lack sovereign immunity under APA Section 702 for "[a]n action in a court of the United States seeking relief other than money damages" – here, nonmonetary relief from their past and ongoing violations of federal law. Finally, Federal Defendants have no sovereign immunity from the Plaintiff's claims brought under the Mandamus Act.

(1) Because The United States Has Waived Its Sovereign Immunity Under The APA, Plaintiff's Claims Are Actionable In This Court.

Generally, the APA waives federal sovereign immunity in two instances: for actions (1) brought under any federal statute that authorizes review of agency action, and (2) in which relief other than monetary damages is sought. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, No. 11-246, 2012 WL 2202936, at *4 (U.S. Jun. 18, 2012); *see also Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 774 (7th Cir. 2011) ("[T]he waiver in § 702 is not limited to claims brought pursuant to the review provisions contained in the APA itself. The waiver applies . . . in cases involving constitutional challenges and other claims

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

arising under federal law."); *Confederated Tribes and Bands of Yakama Nation v. Holder*, No. 11-3028, 2011 WL 5835137, at *1 (E.D. Wash. Nov. 21, 2011) ("[T]he waiver of sovereign immunity contained within the second sentence of § 702 is not limited to actions brought pursuant to the first sentence of § 702").[6]

[6] On point here, in *Cobell v. Babbitt* the Court explicitly held that a similar type of nonmonetary relief requested in this action fell within the waiver of sovereign immunity provided in 5 U.S.C. § 702. 91 F.Supp.2d 1, 25 (D.D.C. 1999); *see also Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006) (same). Plaintiff filed this complaint when appeals of unrelated rulings in *Cobell* were pending. Since then, the D.C. Circuit has denied those appeals. *See Cobell v. Salazar*, No. 11-5205, 2012 WL 1843982 (D.C. Cir. May 22, 2012). In the instant motion, "Federal Defendants note that the resolution of [the *Cobell* litigation] will present a substantial defense on the merits that is not addressed in [their] motion to dismiss." ECF No. 62 at 13 n.5. Whatever the merits of Federal Defendants' conjecture, because they have not made any *Cobell*-related argument in their moving papers they are precluded from doing so on reply. *Docusign, Inc. v. Sertifi, Inc.*, 468 F.Supp.2d 1305, 1307 (W.D. Wash. 2006) (citing *U.S. v. Patterson*, 230 F.3d 1168, 1172 (9th Cir. 2000)). Further, because the time for filing a petition for rehearing or rehearing *en banc* with the D.C. Circuit, or for a writ of certiorari with

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Contrary to Federal Defendants' assertion, the fact that Plaintiff invokes Section 702's immunity waiver for equitable claims in no way means that Plaintiff's cause of action arises under Section 706 of the APA, or that Plaintiff seeks review of an agency action under the Section 706. Rather, Section 702 simply provides the requisite waiver of federal sovereign immunity. Here, Plaintiff has brought actions falling under both categories.

(a) No Adequate Remedy Exists In The Court Of Federal Claims Or Any Other Forum.

As a threshold matter, Federal Defendants' contention that the APA's waiver is not available because an adequate remedy is available in another forum, *see* ECF No. 62 at 30-34, holds absolutely no merit. *See Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik*, 510 F.3d 77, 93 (1st Cir. 2007) ("For jurisdictional purposes, the plaintiff normally is the 'master' of his complaint."). *Enos v. U.S.*, 672 F.Supp. 1391 (D. Wyo. 1987), is irrelevant. There, plaintiffs plainly sought "money claims against the United States on the [ILCA]." *Id.* at 1393. Here, Plaintiff has disclaimed any pursuit of money damages against Federal Defendants in this Court. ECF No. 1 at 29.

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the Supreme Court, has not expired, the *Cobell* appeal is still pending. Plaintiff was not notified of the *Cobell* suit and settlement, now on appeal, because of an admitted agency error. *See* ECF No. 89 at 1, 36.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Federal Defendants are correct that Plaintiff has also filed a complaint for money damages in the Court of Federal Claims ("CFC") to redress specific breaches of statutory, regulatory, and fiduciary duties vis-à-vis Plaintiff's trust funds and non-monetary trust assets. The United States' breach of such "money-mandating" duties may be remedied by a money judgment from the CFC. *U.S. v. Mitchell* (*Mitchell II*), 463 U.S. 206, 228 (1983). This does not mean, however, that Plaintiff is seeking money damages here. *Cf.* ECF No. 62 at 31 ("[I]t is clear that the ultimate relief [Plaintiff] seeks is damages."). As made clear below, each of Plaintiff's claims here concern prospective relief that would force defendants to meet their statutory obligations concomitant to their fiduciary duties. *Cobell v. Babbitt*, 52 F.Supp.2d 11, 19 (D.D.C. 1999).

Plaintiff requests injunctive relief enjoining Federal Defendants from continuing to breach these duties and compelling them to perform those legally mandated obligations. That the information gathered by the relief sought in the instant action may be used to state a claim in the CFC is irrelevant. *See Cobell*, 91 F.Supp.2d at 28 (holding that "even if plaintiffs were to eventually bring a money damages case in the Court of Federal Claims, and assuming that they somehow relied on their accounting claim in this case to support their argument in that lawsuit," that does not "deprive [a district] court of jurisdiction based on such unsubstantiated assumptions"). The issue is well settled: Plaintiff's pursuit of

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

nonmonetary relief in this Court is not precluded by the Tucker Act, 28 U.S.C. § 1491, or any other federal law.[7] *See id.*; *Cobell v. Babbitt*, 30 F.Supp.2d 24, 40-42 (D.D.C. 1998) (conducting a thorough analysis and citing cases).

(b) Federal Defendants Violated Section 706 By Taking Actions That Violate Their Own Regulations, Rules, And Protocol.

Pursuant to APA Section 706, federal district courts must "set aside an agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Stout v. U.S. Forest Service*, No. 09-0152, 2012 WL 1424069, at *2 (D. Or. Apr. 24, 2012) (quoting 5 U.S.C. § 706(2)(A)).

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[7] As noted by the leading treatise on Indian law:

> Claims for prospective relief are permissible, however, even if a successful judgment may result in a payment of money in the future. An example is the management of trust funds. Prospective relief resulting in better management of trust funds will result in increased wealth for the beneficiaries of the funds, but a request for that relief is not a claim for money damages within the exclusion of the APA. The federal courts have asserted jurisdiction over a claim alleging mismanagement of individual tribal trust funds, as well as pending claims on behalf of various tribes, because the plaintiffs tailored the claim to include only a declaration of the defendants' trust duties and an accounting of money . . . .

FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.03(3)(b) (2005) [hereinafter COHEN'S HANDBOOK] (quotation omitted).

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

(i) What Constitutes A "Final Agency Action"?

APA Section 704 limits the scope of Section 706 review only to "person[s] suffering legal wrong because of" a "*final agency action* for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704 (emphasis added). "Final agency action" can be the completion of an affirmative act taken by the federal agency – such as approving a lease that is unlawful – or the lack of an affirmative action where one is required by federal law or agency regulation – such as failing to maintain records that it is required to collect. *Confederated Tribes and Bands of Yakama Nation v. U.S. Dept. of Agriculture*, No. 10-3050, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010); *see also Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (where an agency is under an affirmative duty to act, "failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review'"). "The Ninth Circuit has confirmed that inaction involves a non-discretionary act" where "'at some level, the government has a general non-discretionary duty'" to take an affirmative action. *Sidhu v. Chertoff*, No. 07-1188, 2008 WL 540685, at *5 (E.D. Cal. 2008) (quoting *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 n. 6 (9th Cir. 1997)).

"It is . . . undisputed that claims of inaction by an agency are reviewable under the APA . . . ." *Florida Marine Contractors v. Williams*, No. 03-0229, 2004 WL 964216, at *3 (M.D. Fla. Apr. 22, 2004); *see also Hall v. Norton*, 266 F.3d 696,

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

975 n. 5 (9th Cir. 2005) (an agency's decision not to consult federal law is itself a "final agency action"); *Natural Resources Defense Council v. Patterson*, 333 F.Supp.2d 906, 916 n.6 (E.D. Cal. 2004) (finding "final agency action" where plaintiffs "point[ed] to specific, albeit repeated, instances in which the government decided not to act"). Here, as further demonstrated below, Federal Defendants' action, and inaction, has in numerous instances constituted a "final agency action" for the purpose the APA. That "final agency action" has been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and must be declared as such by this Court.

(ii) What Constitutes A Binding Regulation?

"Generally, the government is bound by the regulations it imposes on itself," and a failure to comply with those regulations creates a cause of action under APA Section 706. *U.S. v. 1996 Freightliner Fld. Tractor*, 634 F.3d 1113, 1116 (9th Cir. 2011). Courts have held that "[t]he internal policies that can bind an agency and give rise to a cause of action under the APA [Section 706] are not limited to only those rules promulgated pursuant to notice and comment rule making," although such rules surely do bind the agency. *Holder*, 2011 WL 5835137, at *3 (citing *Alcaraz v. Immigration and Naturaliation Serv.*, 384 F.3d 1150, 1162 (9th Cir. 2004)); *see also Persinger v. Marathon Petroleum Co.*, 699 F.Supp. 1353, 1357 (S.D. Ind. 1988) ("[R]egulations which [a]re officially published in the Code of

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11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Federal Regulations [a]re binding . . . ."). Notably, when these regulations, rules, and protocols are passed to benefit enrolled Indians, "the normally-applicable deference" given to agency interpretation under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), is "trumped by the requirement that statutes are to be construed liberally in favor of the Indians . . . ." *Cobell v. Kempthorne*, 455 F.3d 301, 301 (D.C. Cir. 2006) (quotation omitted); *see also Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982) (federal regulatory interpretation "should be made liberally in favor" of an Indian plaintiff).

(iii) Federal Defendants Have Violated 25 C.F.R. § 211 And Related Regulations.

"Pursuant to 25 C.F.R. § 211.40 and related regulations in 30 C.F.R., Subchapters A and D" Federal Defendants must "collect[] and manage[] all payments relating to . . . mineral leases unless such leases specify otherwise. The Government then must deposit and accrue interest on such proceeds . . . ."[8] *Shoshone Indian Tribe of Wind River Reservation v. U.S.*, 364 F.3d 1339, 1350, (Fed. Cir. 2004). This regulation applies to "leases and permits for the development of Indian tribal oil and gas, geothermal, and solid mineral resources," is "applicable to lands or interests in lands the title to which is held in trust by the United States,"

[8] The obligations of lessees to account are found, in part, at 30 C.F.R. § 210. *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1048 (10th. Cir. 2004).

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

and is "intended to ensure that Indian mineral owners desiring to have their resources developed are assured that they will be developed in a manner that maximizes their best economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from such development." 25 C.F.R. § 211.11(a).

The regulation mandates that the royalty rate payable to any allottee for any minerals "shall be 10 percent of the value of production produced and sold from the lease." *Id.* at § 211.43(a)(1). The regulations also require Federal Defendants to ensure that the allottee can "enter all parts of the leased premises for the purpose of inspection and audit," that lessees "keep a full and correct account of all operations and submit all related reports required by the lease and applicable regulations," that "books and records shall be available for inspection" by the allottee, *id.* at § 211.46, and that the lessee "[p]ay the Indian surface owner all damages . . . the Indian surface owner occasioned by the lessee's operations." *Id.* at § 211.47.

The regulation was clearly designed to protect Plaintiff, an Indian allottee who leased his interests in the Allotment 156 for the development of mineral resources, and imposes binding responsibilities upon Federal Defendants. *See Shoshone*, 364 F.3d 1339; *Woods Petroleum Corp. v. Department of Interior*, 47 F.3d 1032 (10th Cir. 1995).

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Here, as to Federal Defendants' supervisory duties, numerous provisions of 25 C.F.R. § 211 were categorically breached. As to Federal Defendants' failure to collect payments relating to the numerous Allotment 156 leases, among other substantive violations of 25 C.F.R. § 211, Plaintiff alleges that lessees and/or Federal Defendants have "[f]ail[ed] to enter the correct amount into Plaintiff's trust account"; that "the failure of Federal Defendants to hold Allotment lessees accountable to Plaintiff has been ongoing, and continues to this day"; that "the failure of Federal Defendants to provide accounts and records pertaining to these leases/royalty payments has been ongoing, and continues to this day"; that "Dawn/Newmont breached, and continues to breach, those agreements";[9] and that lessees have cause "extensive damage to the Allotment, including the trees being 'radioactive'" so that "portions of the Allotment c[an]not be logged." ECF No. 1 at 14-15, 19, 22. These violations of agency regulation will be further demonstrated and documented by the accounting made mandatory by Federal Defendants' fiduciary obligation as established below.

(iv) Federal Defendants Have Violated 25 C.F.R § 162.

Numerous subsections of 25 C.F.R. § 162 also impose a "duty on the government to monitor and ensure compliance with . . . BIA-approved lease[s]."

[9] The penalties applicable to lessees in breach is provided by 30 U.S.C. § 188.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

> 25 C.F.R. § 162.108(b) . . . requires that BIA "ensure that tenants comply with the operating requirements in their lease through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners"; § 162 .617(a) . . . allows BIA to enter the leased property to "ensure that the tenant is in compliance with the operating requirements of the lease"; § 162.617(b) . . . states that BIA will "initiate an appropriate investigation" if notified of a lease violation; § 162.618 . . . requires BIA to send notice of the violation of the tenants; and § 162.619 . . . lists BIA's responsibilities in the situation when, after notice, the tenant has not cured its violation. . . . [T]hese regulations impose a duty on the government to act without notice from the landowner to conduct inspections and ensure compliance with [an allottee's] lease.

Oenga v. U.S., 91 Fed.Cl. 629, 637 (Fed. Cl. 2010). Further, pursuant to 25 C.F.R. § 162.618(a), upon learning of a violation Federal Defendants are required to "consult with the Indian landowner[]" to determine a remedy. In sum, under 25 C.F.R. § 162, Federal Defendants clearly "had an independent trust duty to monitor [Plaintiff's] lease to discover and stop lease violations" and to consult with Plaintiff regarding any breach of contract. *Oenga*, 91 Fed.Cl. at 638.

Here, as noted above, *supra* § B(1)(b)(iii) (citing ECF No. 1 at 14-15, 19, 22), Plaintiff has alleged that numerous subsections of 25 C.F.R. § 162 have not been performed by Federal Defendants. Nor has Plaintiff has been adequately consulted regarding his Indian land and property rights. *See* ECF No. 1 at 28 (alleging that Federal Defendants have never "meaningfully consult[ed] with Plaintiff [regarding] Plaintiff's interest in the Allotment"). These violations of agency regulation will be further demonstrated and documented by the accounting

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

made mandatory by Federal Defendants' fiduciary obligation as established below. By not conducting the "appropriate inspections" required by 25 C.F.R. § 162.108(b) – inspections that clearly would have revealed non-Federal Defendants' breach of the lease in connection with mining on Alotment 8-A – the government breached its duty to "ensure that the tenant is in compliance" with the lease. *See* 25 C.F.R. §§ 162.108(b), 162.617(a); *Oenga*, 91 Fed.Cl. at 639. Had the government fulfilled its trust obligations and discovered that non-Federal Defendants were exceeding the scope of the lease, Federal Defendants would have been required under § 162.618 to consult Plaintiff to determine which option provided by 25 C.F.R. § 162.619 to pursue. *Oenga*, 91 Fed.Cl. at 639.

Because Federal Defendants have failed to comply with their own regulations, rules, and protocols, they have acted arbitrarily and capriciously, abused their discretion, and have violated the law. Plaintiff has clearly stated a claim under Section 706 of the APA.

(c) Federal Defendants Have Violated Federal Law.

Where the right to judicial review arises under federal law other than APA Section 706, "section 702 waive[s] sovereign immunity without the need to satisfy the ['final agency action'] requirements of section 704." *Delano Farms Co. v. California Table Grape Com'n*, 655 F.3d 1337, 1348 (Fed. Cir. 2011). The waiver of sovereign immunity will apply to a plaintiffs' request for nonmonetary relief to

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

correct a violation of federal law where "the request for judicial review . . . [does] not involve '[final] agency action,' as defined by the APA." *Id.* (citing cases). In other words, as the current state of the law was most recently described in *Valentini v. Shinseki*, "[w]here the allegation is that the agency action violates [a federal] law – be it statutory, constitutional, or common law – the waiver of sovereign immunity is not so limited, but rather is the broad, unqualified waiver . . . ." No. 11-4846, 2012 WL 1512111, at *19 (C.D. Cal. Mar. 16, 2012).

Here, Federal Defendants have violated numerous federal laws – "statutory" and "common law." *Id.* Under the limited waiver granted Section 702, Plaintiff is entitled to nonmonetary relief in order to remedy these violations. Like the regulations discussed above, these federal laws, too, must "be construed liberally" in favor of the Indian plaintiff, "with ambiguous provisions interpreted to [his] benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

(i) Federal Defendants Have Violated Their Trust And Fiduciary Responsibilities Made Obligatory Pursuant To Federal Law.

Federal Defendants are "charged with fulfilling the trust obligations of the United States' to Indians."[10] *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374

[10] Defendants Department of the Interior, Bureau of Indian Affairs, Bureau of Land Management, Bureau of Safety and Environmental Enforcement, Environmental Protection Agency, Office of Natural Resources Revenue, Lisa P. Jackson, Stan

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

(1968); *see also Cobell v. Norton*, No. 96-1285, 2003 WL 21978286, at *7 (D.D.C. 2003) ("[H]eightened responsibilities are directly implicated in the unique fiduciary relationship between the United States and individual Indian beneficiaries."). The longstanding trust relationship between Federal Defendants and members of Indian tribes, and Federal Defendants' resulting fiduciary duties, is rooted in and derived from numerous statutes, treaties, regulations, and executive orders. *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 475-76 (2003); *Mitchell II*, at 225. As recently described by the Federal Court of Claims:

> A statute, or confluence of statutes and regulations, can create a fiduciary duty on the part of the government which can also give rise to a claim for damages . . . . In some cases, Congress establishes only a limited trust relationship to serve a narrow purpose. In other circumstances, Congress can establish full fiduciary obligations on the part of the government. Full fiduciary obligations, however, are applicable only if a plaintiff identifies a specific rights-creating or duty-imposing statutory or regulatory prescription, and if that prescription bears the hallmarks of a conventional fiduciary relationship.

Speaks, Kenneth L. Salazar, Robert Abbey, and James Watson are designated trustee-delegates for tribal assets and are equally responsible for fulfilling the fiduciary responsibilities. *See Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001) ("Each Secretary, or his designates, has specific fiduciary responsibilities that must be fulfilled lest the United States breach its fiduciary obligations.").

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Wolfchild v. U.S., 101 Fed.Cl. 54, 72 (Fed. Cl. 2011) (quotations, citations, and modifications omitted); *see also Cobell*, 52 F.Supp.2d at 16 n.4; *Begay v. Public Service Co. of N.M.*, 710 F.Supp.2d 1161, 1196-97 (D.N.M. 2010).

Here, while recognizing that "the federal government only assumes fiduciary duties when it explicitly does so," it has clearly done so in the below-cited federal statutes.[11] *Valentini*, 2012 WL 1512111, at *29 n.11 (and citing cases).

The statutes and regulations giving rise to the trust relationship between Plaintiff and Federal Defendants unquestionably give rise to trust duties that are enforceable outside of APA Section 706. It is axiomatic that federal district courts, "having jurisdiction over the administration of trusts," must "give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests . . . ." William F. FRATCHER, 3 SCOTT ON TRUSTS § 199, at 203-04 (4th ed.

[11] The law and analysis describing the federal assumption of the fiduciary duty pursuant to the below-cited statutes is described in their respective subsections. Importantly, although these types of claims are more often pursued by tribal governments as a matter of economy – and case law therefore reflects as much – numerous courts have held that these duties are equally owed to individual Indian beneficiaries, such as Plaintiff. *See generally Assiniboine and Sioux Tribe of Fort Peck Indian Reservation v. Norton*, 211 F.Supp.2d 157 (D.D.C. 2002).

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

1988). Pursuant to the statutes cited below and the fiduciary duties they create, as well as the breach of those duties, it is unquestionable that this Court has the jurisdiction – and the responsibility – to remedy the numerous violations of federal law that have harmed Plaintiff. *White Mountain Apache Tribe*, 537 U.S. at 475-76; *Mitchell II*, 463 U.S. at 225; *Cobell*, 240 F.3d 1081; *see also Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 286 (D.C. Cir. 1993) ("[It is] fundamental that the beneficiary of a trust may maintain a suit to compel the trustee to perform his duties as trustee or to redress a breach of trust."); *Manchester Band of Pomo Indians, Inc. v. U.S.*, 363 F. Supp. 1238, 1242 (N.D. Cal. 1973) (federal district courts have "jurisdiction over actions to compel the responsible officers of the United States to perform [their trust] duties in the event [that] they have not done so.").

The laws giving rise to Federal Defendants' fiduciary duties provide the "general contours" of those duties, but the specific details are filled in through reference to general trust law and defined in "traditional equitable terms." *Cobell*, 240 F.3d at 1099. Where a fiduciary duty is found, the failure of statutes to specify the precise nature of the fiduciary obligation or to enumerate the trustee's duties does not absolve the government of its responsibilities. *Id.* Rather, courts "must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary." *Nat'l Labor Relations Bd. v. Amax Coal Co., Div. of Amax, Inc.*, 453 U.S. 322, 330 (1981)

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

(quoted in *Cobell*, 240 F.3d at 1099 (adopting this generally applicable rule into the Indian trust context)). While some fiduciary duties are not expressly stated and are instead implied in the statutes that create the trust, they are nonetheless statutory duties, and an action to enforce an implied statutory duty does not present a common law claim.[12]

As part of the assumption of the fiduciary duty in those statutes, "[i]t is well settled that" Federal Defendants must "keep and render clear and accurate accounts with respect to administration of the trust," including funds and nonmonetary assets. *Pueblo of San Ildefonso v. U.S.*, 35 Fed.Cl. 777, 788 (1996); *see also Cobell v. Norton*, 213 F.R.D. 1, 11 (D.D.C. 2003) ("'The common law recognizes an obligation on the part of the trustee to provide full and accurate information to the beneficiary on his management of the trust.'") (quoting *Martin v. Valley Nat'l Bank of Arizona*, 140 F.R.D. 291, 322 (S.D.N.Y. 1991)). "In accordance with its fiduciary duty to furnish information, [Federal Defendants] must provide such documentation to the beneficiary upon request. If the beneficiary still believes that the transaction is not adequately supported, he or she may initiate a claim against" the department or agency that has assumed said fiduciary duty. *Cobell v. Norton*,

[12] Although, as discussed below, common law claims to enforce some specific fiduciary-related duties do exist in certain instances.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

283 F.Supp.2d 66, 186 (D.D.C. 2003); *see also Cobell*, 2003 WL 21978286, at *6 (Federal Defendants are "bound to keep all the records and evidence, respond to beneficiaries' requests for information fully and truthfully, and allow beneficiaries to inspect the trust res, accounts, and related documents" upon request) (citation and quotation omitted).

Federal Defendants have breached the fiduciary duty arising from the below-cited federal statutes. This fiduciary duty required that Federal Defendants take action to protect Plaintiff's trust assets, and to afford certain assurances to Plaintiff regarding those assets. Unfortunately, this action was never taken and, as a result, Plaintiff has been damaged. This court has jurisdiction to, and must, issue the requested relief to remedy these breaches of federal law.

(ii) Federal Defendants Have Violated The American Indian Trust Fund Management Reform Act And The Fiduciary Duties Arising Therefrom.

The American Indian Trust Fund Management Reform Act ("ITFMA"), Pub. L. No. 103-412; 108 Stat. 4239 (1994), has been identified as one of those "rights-creating or duty-imposing statutory or regulatory prescription[s] . . . that . . . bears the hallmarks of a conventional fiduciary relationship." *Wolfchild*, 101 Fed.Cl. at 72; *see e.g. Round Valley Indian Tribes v. U.S.*, 97 Fed. Cl. 500, 507 (Fed. Cl. 2011); *Alabama-Quassarte Tribal Town v. U.S.*, No. 06-0558, 2010 WL 3780979, at *6 (E.D. Okla. Sept. 21, 2010); *Tonkawa*, 2009 WL 742896; *Otoe-Missouria*

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Tribe of Oklahoma v. Kempthorne, No. 06-1436, 2008 WL 5205191 (W.D. Okla. Dec. 10, 2008). This statute "codifies certain preexisting duties that the Secretary of Interior, as a trustee-delegate of the United States, owes . . . to individual Indian . . . trust beneficiaries," *Assiniboine*, 211 F.Supp.2d at 158, by requiring that Federal Defendants "account for the daily and annual balance of all funds held in trust by the United States for the benefit of . . . an individual Indian."[13] 25 U.S.C. § 4011(a); *see also* COHEN'S HANDBOOK § 5.03(3)(b) ("These duties [in the ITFMA] are in addition to the common law duties of a trustee and simply prescribe some of the means through which the Secretary shall discharge these preexisting duties.").

Federal Defendants must comply with this statute by issuing account statements that identify "(1) the source, type, and status of the funds; (2) the beginning balance; (3) the gains and losses; (4) receipts and disbursements; and (5) the ending balance." 25 U.S.C. § 4011(a). The requisite reconciliation of Indian beneficiaries' accounts was to be provided shortly after the ITFMA's passage in

[13] The ITFMA was passed due to Federal Defendants' "[e]mbarrassment" in its "fail[ure] to be a diligent trustee." *Cobell v. Norton*, 428 F.3d 1070, 1073 (D.C. Cir. 2005); *see also id.* ("[R]eport after report [has] excoriated the government's management of [Indian trust] funds.").

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

1994 and further "require[d] proper accounting and reconciliation to continue in the future." *Otoe-Missouria*, 2008 WL 5205191, at *2.

As alleged in the Complaint, from 1910 to the current day, Federal Defendants have failed to provide, among other required information:

> adequate records of accounts; including, without limitation, records to the leases and other contractual agreements giving rise to income from allotments, and as to all other invests of trust monies [and/or] records as to the ownership of such accounts; including, without limitation, records as to the devolution of rights in and to such accounts, by assignment, bequest, devise, or otherwise.

ECF No. 1 at 25. These accounts were to be provided pursuant to the trust and fiduciary duties made obligatory by the ITFMA, beginning in 1994. "Consequently, Plaintiff is entitled to pursue this action[,] as Plaintiff may compel Defendants to perform the discrete activity of accounting for the funds held in trust as required under § 4044."[14] *Otoe-Missouria*, 2008 WL 5205191, at *2.

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[14] [T]o the extent Plaintiff seeks an accounting of non-monetary assets, . . . the obligations of the United States to . . . Plaintiff in particular, are well established. It is clear that the United States acts as a trustee for Plaintiff and that at least some of the corpus of the trust is non-monetary. Whether the duty to account for the non-monetary assets held in trust arises from statute or common law, it does exist . . . .

Otoe-Missouria, 2008 WL 5205191, at *5. The duty to account for trust assets pursuant to the federal common law is discussed *infra* at § B(1)(c)(iv).

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

(iii) Federal Defendants Have Violated The Act Of June 13, 1930, 25 U.S.C. §§ 161-62 And The Fiduciary Duties Arising Therefrom.

Like the ITFMA, Courts have determined that 25 U.S.C. §§ 161-62 ("the 1930 Act") is one of those statutory or regulatory prescriptions that "establish a fiduciary relationship between the United States and the Indians." *Short v. U.S.*, 50 F.3d 994, 998 (Fed. Cir. 1995); *see also Shoshone*, 364 F.3d at 1351 (pursuant to the 1930 Act, "[a]s part of its duties, a trustee must keep clear and accurate accounts, showing what he has received, what he has expended, what gains have accrued, and what losses have resulted"); *Chippewa Cree*, 69 Fed.Cl. at 658, 662.

As explained by the Court in *Cobell*, pursuant to the 1930 Act:

> Among other duties, the Secretary of the Interior must collect trust income from the leases of the allotments, *see* 25 U.S.C. § 162a(d)(1), direct the investment of trust fund monies in public debt securities held by the United States Treasury, *see* 25 U.S.C. 162a(b), deposit and invest trust fund monies outside of the United States Treasury, *see* 25 U.S.C. § 162a(a) & (c), maintain and perform the accounting . . . for the individual Indian beneficiaries, 25 U.S.C. § 162a(d)(3) & (5), provide periodic account statements to beneficiaries, *see* 25 U.S.C. § 162a(d)(5), and disburse funds to the beneficiaries, *see* 25 U.S.C. § 162a(d)(2). The Department of the Interior has exercised its comprehensive responsibilities in issuing extensive regulations to complement this legislative scheme. . . . In furtherance of the discharge of these fiduciary obligations, Congress has authorized the Secretary of the Interior to deposit IIM funds with the United States Treasury. *See* 25 U.S.C. § 161. The Secretary of the Treasury is authorized to invest these funds, at the discretion of the Secretary of the Interior, subject to certain statutory requirements. *See* 25 U.S.C. § 161a. **In short, Congress has statutorily provided the Secretary of**

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

> **the Interior and, to a more limited extent, the Secretary of the Treasury, with several specific fiduciary duties** . . . .

52 F.Supp.2d at 16 (selected citation omitted, emphasis added). A violation of any of these fiduciary duties will create a cause of action for which nonmonetary relief is available in the form of injunctive or declaratory relief. *See id.*; *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 928-29 (9th Cir. 2008); *Chippewa Cree*, 69 Fed.Cl. at 657.

In *Shoshone*, 364 F.3d 1339, for instance, the Federal Circuit held that the 1930 Act mandated that Federal Defendants: (1) timely collect amounts due and owing to a tribal beneficiary under contracts with a third party; (2) collect interest on monies that the Government collected; and (3) collect interest on monies that the Government was obligated to collect, but did not collect or delayed in collecting. *See also Short*, 50 F.3d at 998.

Here, Plaintiff has alleged that Federal Defendants have not adequately collected trust income from the leases of the Allotment, have failed to properly invest the income that it did collect, did not maintain and perform an accounting, and did not properly disperse funds to Plaintiff's accounts. *See* ECF No. 1 at 23-25.

Like the ITFMA, where a tribal beneficiary properly alleges that the 1930 Act has been violated by his or her fiduciary, "an accounting of the trust" must be "completed that reveals whether a loss has been suffered." *Shoshone*, 364 F.3d at

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

1347. Such records, where required, must be provided to the beneficiary before any 1930 Act claim may be dismissed. *See generally id.* That Plaintiff has stated a claim under the 1930 Act is tautological: Plaintiff is entitled to an accounting; such accounting has not been provided; Plaintiff is entitled to relief.

(iv) Federal Defendants Have Violated Federal Common Law.

In *Valentini*, "the Government contend[ed] that . . . the waiver of sovereign immunity contained in § 702 does not extend to . . . claims [that] arise under federal common law." 2012 WL 1512111, at *29. The Court rejected this argument, explicitly holding that **APA Section 702 waives federal sovereign immunity as to claims brought under federal common law**. *Id.*

"The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands," such as those asserted against Federal Defendants in this instance. *U.S. v. Pend Oreille Public Utility Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994), *cert. denied*, 514 U.S. 1015 (1995). Although Plaintiff cannot be sure without further discovery that the following list is exhaustive, Federal Defendants have, at minimum, acted in violation of the following common law:

- *Accounting For Profits*

"[F]ederal common law provides [Indian] plaintiffs with a . . . 'federal common law cause[] of action [for an] accounting for profits . . . .'" *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 281 (2nd Cir. 2005) (quoting *Pend Oreille*,

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

28 F.3d at 1549 n.8). This common law cause of action,[15] requires the federal government "seek on [an allotte's] behalf" from the non-governmental lessee "an accounting for 'rents, issues, and profits' derived from leasing and use of lands." *Edwardsen v. Morton*, 369 F.Supp. 1359, 1372 n.24 (D.D.C. 1973) (quoting *U.S. v.*

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[15] In *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), the court held:

> The [ITFMA] reaffirmed and clarified preexisting duties; it did not create them. . . . [The ITFMA] did not alter the nature or scope of the fiduciary duties owed by the government to [Indian] trust beneficiaries. Rather, by its very terms the 1994 Act identified a portion of the government's specific obligations . . . .

Id. at 1100; *see also Chippewa Cree Tribe v. Norton*, No. 02-0276, at 2 (D.D.C. Jul. 23, 2002), ECF No. 19 ("The [ITFMA] codifies certain preexisting duties that the [DOI], as a trustee-delegate of the United States, owes . . . to individual Indian . . . trust beneficiaries."). In *Otoe-Missouria Tribe*, 2008 WL 5205191, the court noted that *Cobell*, 240 F.3d 1081, had "establish[ed] the common law obligation of [Federal Defendants] to provide an accounting," and had thereby likely "establish[ed] . . . a discrete, non-discretionary, mandatory duty to properly account for the funds they hold in trust." *Id.* at *2, *1. The court, however, chose not to examine the common law claim, finding that the ITFMA's provisions providing the same accounting relief, and the Federal Defendants' failure to provide that accounting, was enough to defeat a 12(b)(6) motion to dismiss. *Id.*

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Santa Fe Pacific Railroad Co., 314 U.S. 339, 351 (1941)); *see also Cobell v. Norton*, 213 F.R.D. 1, 11 (D.D.C. 2003) ("'The common law recognizes an obligation . . . to provide full and accurate information to the beneficiary . . . .'") (quoting *Martin v. Valley Nat'l Bank of Arizona*, 140 F.R.D. 291, 322 (S.D.N.Y. 1991)); *U.S. v. Atlantic Richfield Co.*, 435 F.Supp. 1009 (D. Alaska 1977) (recognizing the common law cause of action requiring the U.S. to request an accounting from the lessee of Indian lands).

"As a matter of law," Indian allottees are also, "like all beneficiaries . . . entitled to receive the 'maximum benefit' and return from leases encumbering their land.'" *Cobell*, 2003 WL 21978286, at *12 (quoting *Jicarilla Apache Tribe v. Supron Energy Corp*, 728 F.2d 1555, 1568 (10th Cir. 1984)); *see also id.* at *15 (noting that Federal Defendants owe "the duty to ensure that individual Indian beneficiaries are justly compensated for . . . leases running across their lands."); COHEN'S HANDBOOK § 5.03(3)(b) ("In general, funds held by the Secretary of the Interior in trust for tribes or individuals must earn interest."). This common law duty to "maximize the financial return to beneficiaries finds its origin in the government's 'power to control and manage the property and affairs' of beneficiaries and to adhere to the 'stricter standards [that] apply to federal agencies when administering Indian programs.'" *Cobell*, 2003 WL 21978286, at *12 n.38 (quoting *Chippewa Indians of Minnesota v. U.S.*, 301 U.S. 358, 375 (1937); *Cobell*,

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

240 F.3d at 1099). In order to comply with this duty, any lease of allotted Indian property to non-Indians must "rest on a well-maintained and thorough set of supporting information" to be provided to beneficiary at his or her request. *Id.* at *8. Where this information reveals that a fiduciary has ignored a third party's misappropriation of funds, a breach of the trust has occurred and the fiduciary will be liable to the beneficiary. *Begay*, 710 F.Supp.2d at 1198.

Here, as described above, *see supra* §§ B(1)(c)(i)-(ii), despite numerous requests by the Plaintiff, an accounting has not been provided. Plaintiff is entitled to this declaratory and injunctive relief.

- *Breach of Contract*

"[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law. Courts must therefore apply the federal common law of contracts to the interpretation of contracts with the federal government. . . ." *Red Lake Band of Chippewa Indians v. U.S. Dept. of Interior*, 624 F.Supp.2d 1 (D.D.C. 2009). "[A]s to the elements of a breach of contract claim under federal law, 'a party must allege and establish: (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by the breach.'" *Id.* (quoting *Pryor v. U.S.*, 85 Fed.Cl. 97, 104 (Fed. Cl. 2008)). Courts will "look to state law for guidance" in analyzing a federal common law breach of contract claims. *Herrera v.*

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Metropolitan Life Ins. Co., No. 11-1901, 2011 WL 6415058, at *5 (S.D.N.Y. Dec. 19, 2011). "[T]he Government, acting in its administrative capacity, [may not] waive or diminish the rights of the Indians under the terms of their mineral leases." *In re Roy Lawrence Drilling Company*, Interior Dec. No. 92-0265, 1993 WL 13711223, at *2 (Nov. 19, 1993) (citing cases).

As noted by this Court, Federal Defendants have been tasked, by valid contract, to "direct[] audits of each lessee's accounts and books" and to "conduct[] audits of the rents and royalties paid." ECF No. 116 at 5; *see also generally* ECF No. 1 at 12-13. And as noted above, Federal Defendants have wholly failed to fulfill these contractual duties. *See supra* §§ B(1)(c)(i)-(ii); ECF No. 1 at 14 ("The failure of Federal Defendants to provide accounts and records pertaining to these leases/royalty payments has been ongoing, and continues to this day."). Federal Defendants have done so despite *numerous* requests by Plaintiff.[16] *See infra* §§ B(1)(c)(i)-(ii). Because these documents have not been provided, "all doubts [must] be resolved against" Federal Defendants, and an assumption must be made that audits had not been conducted as required by contract. *Confederated Tribes of*

[16] As noted above, this failure was in and of itself a patent breach of federal law. *See Edwardsen*, 369 F.Supp. at 1372 n.24; *Cobell*, 213 F.R.D. at 11; *Cobell*, 283 F.Supp.2d at 186; *Atlantic Richfield Co.*, 435 F.Supp. 1009.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Warm Springs Reservation v. U.S., 248 F.3d 1365, 1373 (Fed. Cir. 2001) (internal quotation omitted); *Pueblo of Laguna v. U.S.*, 60 Fed.Cl. 133, 139 n. 11 (Fed. Cl. 2004). Federal Defendants have presented absolutely no evidence to counter these assumptions. Because these audits have not been provided to Plaintiff, he has been damaged. *See generally id.* Federal Defendants' dismissal action must therefore be denied as to this claim.

(2) Because The United States Has Waived Its Sovereign Immunity Under The Mandamus Act, Plaintiff's Claims Are Actionable In This Court.

Title 28 U.S.C. § 1361, otherwise known as the Mandamus Act, grants federal district courts original jurisdiction to compel an officer, employee, or agency of the United States to perform a duty owed to the plaintiff. *Hill v. U.S. Bd. of Parole*, 257 F.Supp. 129, 130 (D.C. Pa. 1966).

First, it is clear that Section 1361 confers an independent basis of jurisdiction. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1234-1235 (10th Cir. 2005); 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 105.42[3] (3d ed. 2011) ("Section 1361 is clearly a jurisdictional statute. Mandamus is an original process, jurisdictional in itself."). Second, although there is some local *dicta* stating otherwise,[17] cases indicate that Section 1361 creates both a jurisdictional grant **and**

[17] *See e.g. Smith v. Grimm*, 534 F.2d 1346, 1353 n.9 (9th Cir. 1976). This statement in *Smith*, however, was *dicta*:

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

sovereign immunity waiver. *See e.g. Sheehan v. Army & Air Force Exch. Serv.*, 619 F.2d 1132, 1140 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982); *McNutt v. Hills*, 426 F. Supp. 990, 999 n.2, 1001 (D.D.C. 1977).

At minimum, should this Court find that the Mandamus Act does not create an independent federal immunity waiver, waiver exists under the APA. Because mandamus jurisdiction under Section 1361 is coextensive with the remedies available under the APA (i.e. injunctive relief directed at an agency or officer), this Court nonetheless has Section 1361 jurisdiction. *See Tucson Airport Authority v. General Dynamics Corp.*, 922 F.Supp. 273, 280 (D. Ariz. 1996) ("For claims permitted under the APA's waiver of sovereign immunity, federal district court jurisdiction may be proper under . . . the mandamus statute, 28 U.S.C. § 1361.").

(3) No Statute Of Limitations Bars Plaintiff's Claims.

(a) APA Section 706 Claims Not Related To Losses To Or Mismanagement Of Trust Funds.

To the extent that Plaintiff has brought claims under APA Section 706 that do

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> Many of the cases that hold or state that the Mandamus Act does not waive sovereign immunity do so in a perfunctory manner, without any substantial analysis. They might be better construed as standing for the proposition that mandamus is not an available remedy on the facts of the cases, given the stringent standards that must be met before the writ will issue.

16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 105.42[4] (3d ed. 2011).

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11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

not concern losses to or mismanagement of trust funds,[18] these claims are subject to the six-year statute of limitations in 28 U.S.C. § 2401(a). *Wind River Mining Corp. v. U.S.*, 946 F.2d 710, 713 (9th Cir. 1991). Plaintiff has brought, pursuant to APA Section 706, claims alleging violations of 25 C.F.R. § 211.40, its related regulations in 30 C.F.R. Subchapters A and D, and 25 C.F.R. § 162. Under 28 U.S.C. § 2401(a), the statute of limitations on these claims "begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." *Industrial Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir. 1994); *see also* ECF No. 62 at 25, 27 (same).

Plaintiff has consistently maintained that he did not know or have reason to know of the existence and cause of some of his injury until April 26, 2011. ECF No. 89 at 5-6. On that date, Plaintiff became aware that he is entitled, at any time,

[18] As discussed below, the express "notwithstanding" language of the Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat 786 (2011) [hereinafter Pub. L. No. 112-74], precludes any statute of limitations that may otherwise apply to these claims.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

to seek an accounting of his trust properties to confirm his suspicions regarding Federal Defendants' mismanagement. *Id.*

Federal Defendants argue that "Plaintiff was on notice as early as 1989 of his claims concerning management of his funds" because he requested, on numerous occasions, that the BIA account for said mismanagement. ECF No. 62 at 29. As discussed above, this is not so. But regardless, as discussed below, these trust-related claims are not barred by any statute of limitations. Once this relief is granted it will operate to confirm or refute Plaintiff's allegations – at which point the limitations period of 28 U.S.C. § 2401(a) will be triggered as to those claims. *See Shoshone*, 672 F.3d at 1029-31.

Thus, as numerous other courts have ruled, the duties imposed by these regulations were continuing and are subject to the "continuing claim doctrine"[19] because their related causes of action constitute "an ongoing breach rather than a single event." *Oenga*, 91 Fed.Cl. at 645; *see also id.* ("[W]hen a defendant owes a

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[19] Beneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets. A strict application of the six-year limitation period to situations in which the government has an ongoing duty to manage property or funds would in effect give the trustee a license to continue the mismanagement. The continuing claims doctrine ameliorates this injustice.

COHEN'S HANDBOOK 5.06(5) (quotation omitted).

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

continuing duty, a new cause of action arises each time the defendant breaches that duty.") (citing *Cherokee Nation of Oklahoma v. U.S.*, 26 Cl.Ct. 798, 803 (1992)). In *Mitchell v. U.S.*, for example, the court held that Federal Defendants' duty to manage a tribe's commercial timber was an ongoing trust obligation, and "[t]hus, the non-performance of the duty is properly viewed as giving rise to a series of actionable breaches." 10 Cl.Ct. 787, 789 (1986). Here, because Federal Defendants' violation of law is similarly ongoing, Plaintiff is not barred by any statute of limitations. *See e.g. Oenga*, 91 Fed.Cl. at 646-47.

(b) Trust Fund Mismanagement Pursuant To APA Section 706; 25 U.S.C. §§ 161a, 162a, 4001-61; 25 U.S.C. §§ 161-62; And The Federal Common Law.

On November 5, 1990, Congress approved the Department of the Interior's annual appropriations bill that included the following language: "[N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds, until the affected tribe **or individual Indian** has been furnished with the accounting of such funds . . . ."[20] Pub. L. No. 101- 512, 104 Stat. 1915, 1930 (1990) (emphasis added). For each

[20] This provision codified the common law rule that because, typically, no cause of action can exist without proof via an accounting, "the statute of limitations on a beneficiary's action against the trustee for breach generally does not begin to run

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

subsequent fiscal year, Congress has included substantially similar language in all Interior appropriations. *Round Valley Indian Tribes*, 97 Fed. Cl. at 506. In its Order Granting Newmont USA's Motion to Dismiss, this Court noted that the language of these appropriations bills "defer[] the accrual of causes of action relating to the United States' failure to timely collect funds [and for] mismanagement of tribal trust finds." ECF No. 16 at 11 (citing *Shoshone*, 364 F.3d at 1345-51). Numerous federal courts have held likewise. *See e.g. Chippewa Cree*, 69 Fed.Cl. at 665; *Tonkawa Tribe*, 2009 WL 742896, at *4. This is the case whether or not money "distributions have been made out but an accounting has not been presented." *Chippewa Cree*, 69 Fed.Cl. at 665. "[T]o the extent there are ambiguities concerning how the various statutory pronouncements regarding tribal accountings impact jurisdiction or limitations and repose periods, the Indian canons of construction require ambiguities to be construed in favor of plaintiff." *Tonkawa Tribe*, 2009 WL 742896, at *4.

The most recent version of these statutes, Pub. L. No. 112-74, contains the same language:

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until the . . . beneficiary has actual or constructive notice of the . . . breach." GEORGE GLEASON BOGERT, ET AL., THE LAW OF TRUSTS AND TRUSTEES § 969 (2011) (citing *Cobell v. Babbitt*, 30 F.Supp. 2d 24 (D.D.C. 1998)).

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

> [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 . . . individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss . . . .

Id. at 1002. Were any other statue of limitations to arguably apply to these claims, it is well-established that "the phrase 'notwithstanding any other provision of law,' or a variation thereof, means exactly that; it is unambiguous and effectively supersedes all previous laws." *Energy Transp. Group, Inc. v. Skinner*, 752 F. Supp. 1, 10 (D.D.C. 1990).

Here, Plaintiff has alleged against Federal Defendants causes of action concerning losses to, and mismanagement of, his trust funds. Despite numerous requests, Federal Defendants have provided no accounting from which Plaintiff can determine losses. It "is simple logic – how can a beneficiary be aware of any claims until an accounting has been rendered?" *Shoshone*, 364 F.3d at 1347. Indeed, said accounting is the threshold relief that Plaintiff seeks in the instant action. Under applicable acts of Congress, Plaintiff's claims have not yet even accrued, let alone been barred by any statute of limitations.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

(c) Federal Common Law Claims

(i) Accounting for Profits

To the extent that Plaintiff brings this suit to enforce an accounting claim that is rooted in the federal common law, *see supra* § B(1)(c)(iv), numerous courts have ruled that when such a claim is "based on federal common law . . . there is no applicable federal statute of limitations." *Begay*, 710 F.Supp.2d at 1202 (citing *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 240 (1985)). Likewise, as indicated above, the tolling provision of Pub. L. No. 112-74 does not discriminate between statutory and non-statutory claims – the claim need only "concern[] losses to or mismanagement of trust funds" to be tolled. *Id.* Here, Plaintiff's claim for an accounting clearly "concerns losses to or mismanagement of trust funds." *Id.* Indeed, this tolling provision has been held time and time again to apply to any and all accounting claims. *See supra* § B(3)(b). As such, Plaintiff's claim for an accounting for profits under the federal common law is not yet subject to any statute of limitations, and cannot be dismissed on any such grounds.

(ii) Breach of Contract

Plaintiff will concede that his common law claim would normally be "subject to state statutes of limitations." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 507 (1986). And as indicated in the Court's previous Order Granting Newmont USA's Motion to Dismiss, ECF No. 116, the "discovery rule" is not

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

available under Washington law with respect to Plaintiff's breach of contract claims. For at least two reasons, however, Plaintiff herein maintains that his common law breach of contract claim is not barred by any statute of limitations.

First, recent decisions from the Western District of Washington and the Washington State Supreme Court instruct that an "[e]quitable tolling" doctrine is generally available "to extend the statutory period with respect to breach of contract claims." *Putz v. Golden*, No. 10-0741, 2012 WL 208110, at *8-10 (W.D. Wash. Jan. 24, 2012) (citing *In re Pers. Restraint of Carter*, 263 P.3d 1241, 1247 (Wash. 2011)). There are two instances where this doctrine will apply. The limitations period will be tolled where the plaintiff shows "(1) bad faith, deception, or false assurances by the defendant, and (2) the exercise of diligence by the plaintiff." *Id.* In this context, "bad faith" exists where a defendant hides information in order to "prevent[] timely assertion of a claim." *Larry v. Hartford Fire Ins. Co.*, 150 Wash.App. 1029, 1029 (Wash. Ct. App. 2009). The limitations period will also be tolled, and "applie[d] more broadly[,] 'when justice requires it.'" *Putz*, 2012 WL 208110, at *10 (quoting *Restraint of Carter*, 263 P.3d at 1247). Thus, a motion to dismiss must be denied where the non-movant indicates any issue of fact pertaining to (1) "bad faith, deception, or false assurances"; (2) whether or not the plaintiff has "sat on [his] rights"; or (3) any "equitable issue of concern." *Id.* at *9-*10.

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Here, Plaintiff has presented facts that create a question of fact as to whether Federal Defendants have deprived Plaintiff of "audits of each lessee's accounts and books" and "audits of the rents and royalties paid," as well as other information that he is legally entitled to, and have done so in bad faith:

> Since his first inclinations that Newmont had been breaching the leases, Plaintiff has made every effort possible to derive specific facts that would confirm his suspicions regarding these acts. Despite these efforts, . . . Federal Defendants have been successful in purposefully depriving Plaintiff of the knowledge of the accrual of the cause of action by refusing to turn over documents.

ECF No. 88 at 9-10; *see also* ECF No. 1 at 14 ("The failure of Federal Defendants to provide accounts and records pertaining to these leases/royalty payments has been ongoing, and continues to this day."); ECF No. 89 at 4-5 (BIA statement that its Superintendent "ordered all Dawn Mining paper work to be burned."). Indeed, in *Cobell v. Norton*, 407 F.Supp.2d 140 (D.D.C. 2005), the court found that Federal Defendants had acted in "bad faith" where documents very similar to those sought by Plaintiff in this action have been purposefully withheld or willfully destroyed.

Further, it cannot be said that Plaintiff has sat on his rights, or that to grant Plaintiff's claim would be a complete miscarriage of justice. *See Shoshone Indian Tribe of Wind River Reservation, Wyo. v. U.S.*, 672 F.3d 1021, 1031 (Fed. Cir. 2012) ("[I]t is undisputed that the 'statute of limitations can be tolled where the government fraudulently or deliberately conceals material facts relevant to a

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11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

plaintiff's claim so that the plaintiff was unaware of their existence and could not have discovered the basis of his claim.'") (quoting *Hopland Band of Pomo Indians v. U.S.*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)); *see generally e.g.* ECF No. 1 at 14; ECF No. 89. At minimum, a question of fact exists as to Plaintiff's diligence in asserting this common law claim and whether an "equitable issue of concern" has been presented. *Putz*, 2012 WL 208110, at *9-*10.

Second, even were the state's statue of limitations to otherwise bar Plaintiff's common law breach of contract claim, the contract at issue orders Federal Defendants to "direct[] audits of each lessee's accounts and books" and to "conduct[] audits of the rents and royalties paid." ECF No. 116 at 5. Plaintiff's common law breach of contract claim undoubtedly "concern[s] losses to or mismanagement" of Plaintiff's funds, and is therefore tolled pursuant to the express terms of Pub. L. No. 112-74. *See Shoshone*, 672 F.3d at 1035 ("[A] claim premised upon a failure to collect royalties due under [a] contract or lease is a claim based upon losses to trust funds."); *Shoshone*, 364 F.3d at 1351 (same).

Plaintiff's breach of contract claim, brought at federal common law, is not yet subject to any statute of limitations, and cannot be dismissed on any such grounds.

(4) Plaintiffs Claims Are Not Barred By A Failure To Exhaust Administrative Remedies.

To begin, Plaintiff's non-Section 106 claims – the majority of Plaintiff's

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

claims – do not require that administrative remedies be exhausted. *See Tonkawa Tribe*, 2009 WL 742896, at *5 ("[A]dministrative exhaustion doctrines do not apply [to claims brought] under other federal statutory law and federal common law . . ."); *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Norton*, 527 F.Supp.2d 130, 136 (D.D.C. 2007) (where the "resolution of claims raised by [Plaintiff] requires analysis of trust and administrative law principles" those claims fall "'within the conventional competence' of the district court" and not in that of an administrative agency) (quoting *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976)); *Tonkawa Tribe*, 2009 WL 742896, at *5 (rejecting Federal Defendants' "argument that plaintiff has failed to exhaust its administrative remedies with respect to claims for an accounting" because "[n]othing . . . suggests that those procedures could provide the type of relief sought in this action") (citing *Otoe–Missouria*, 2008 WL 5205191, at *5). Indeed, had Plaintiff undertaken the steps suggested by Defendants, nothing in that process would have even remotely addressed the relief Plaintiff seeks. *Otoe–Missouria*, 2008 WL 5205191, at *5.

The cases cited by Federal Defendants involve the mere mechanical application of the exhaustion doctrine in cases where plaintiffs plainly failed to seek available remedies at the administrative level. The plaintiffs in *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920 (10th Cir. 1994), for example, sought cancellation of an oil and gas lease under a particular regulation that provided a specific

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11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

mechanism for the cancellation of such leases. *Id.* at 924-25. In *Coosewoon*, there was a perfect correlation between the relief sought and the remedy available under the regulation. Here, numerous courts have already held that no such remedy exists. *Tonkawa Tribe*, 2009 WL 742896, at *5; *Otoe–Missouria*, 2008 WL 5205191, at *5; *Alabama-Quassarte Tribal Town*, 2010 WL 3780979, at *8.

As to Plaintiff's Section 706 claims, "[e]xhaustion is not required when administrative remedies would be futile . . . or when an agency has adopted a policy or pursued a practice of generally applicability that is contrary to law." *Alabama-Quassarte*, 2010 WL 3780979, at *8. Here, Plaintiff has made numerous requests that Federal Defendants properly collect and manage payments relating to leases; make Allotment lessees accountable for their breaches of contract; and inspect the acts and omissions of non-Federal Defendants. Federal Defendants admit as much in their dismissal motion. *See* ECF No. 62 at 7-9.

Federal Defendants have repeatedly failed or refused to provide the requisite accounting to reconcile Plaintiff's concerns or otherwise comply with their own regulations. Clearly, requiring Plaintiff to follow through with the remainder of Defendants' procedure would have been futile. *See Alabama-Quassarte*, 2010 WL 3780979, at *8. Moreover, in repeatedly denying his information requests, Federal Defendants "adopted a policy or pursued a practice of not providing the requested" relief that was contrary to law. *Id.*

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Plaintiff's non-Section 706 claims do not require that administrative remedies be exhausted. His Section 706 claims fall under the futility exception. Therefore, Plaintiff was not required to exhaust Federal Defendants' administrative remedies.

C. Plaintiff's Request for Injunctive Relief Regarding His Uranium Rights Does Not Exclude This Court's Exercise of Jurisdiction.

Federal Defendants argue that Plaintiff's requested injunctive relief related to stockpiled ore "is based on a challenge to a removal or remediation action" on Allotment 156. ECF No. 62 at 38. Plaintiff has already addressed this argument in his Opposition to Dawn Mining Company LLC's Motion to Dismiss, ECF No. 86, and will rest on the arguments made therein. In relevant part, Plaintiff submits:

> To any extent that this injunctive relief could be construed as interfering with CERCLA cleanup, [Federal Defendants have] not met their burden to demonstrate that the CERCLA cleanup is in anyway related to the Plaintiff-specific ore stockpiles under which the relief is requested. Indeed, Mr. Villegas suspects that this ore has either been sold – and that he has not been paid for it – or mixed with Defendants' ore to the extent that it is indecipherable – and he cannot be paid for it. In short, the record presently before the Court does not sufficiently distinguish between ore stockpiles or the CERCLA cleanup's relation thereto. Unless [Federal Defendants come] forward with some evidence otherwise, [Federal Defendants have] not met [their] burden under the summary judgment standard. *See e.g. Natural Resources Defense Council, Inc. v. NVF Co.*, No. 9700496, 1998 WL 372299, at * 14 (D. Del. June 25, 1998). To the extent that [Federal Defendants do] come forward with some evidence that (a) Mr. Villegas' ore has been maintained and (b) [the requested relief] would delay the CERCLA cleanup, Mr. Villegas is entitled to . . . demonstrate jurisdictionally relevant facts for himself. *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080 (9th Cir. 2003). Finally, to any extent that, in light of [an accounting], it is determined that Mr. Villegas' requested

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11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

> relief will delay or interfere with the CERCLA cleanup, he would stipulate not to pursue that relief until after the CERCLA cleanup has been completed. *See North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1245 (7th Cir. 1991) ("[T]he purpose of [§ 113(h)] was not to defeat an aggrieved person's presumptive right of judicial review of agency action, . . . but merely to postpone the exercise of the right to the completion of the remedial action . . . . ") (citations omitted).

ECF No. 86 at 8 n.3 (alterations added).

D. Plaintiff's Claims are Not Barred by Failure to Join the Spokane Tribe.

Federal Defendants argue that Plaintiff's requested ore-related injunctive relief would also affect the Spokane Tribe's interest in the Allotment and therefore must be dismissed pursuant to FED. R. CIV. PROC. 12(b)(7). ECF No. 62 at 41. Federal Defendants are wrong. As explained by the Ninth Circuit:

> [A]bsent tribes are "required" parties to [an] action if they claim an interest relating to the subject of the action and are so situated that disposing of the action in their absence may: (i) as a practical matter impair or impede their ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. A crucial premise of mandatory joinder, then, is that the absent tribes possess an interest in the pending litigation that is "legally protected." . . . At one end of the spectrum, we have held that the interest at stake need not be property in the sense of the due process clause. At the other end of the spectrum, we have recognized that the interest must be more than a financial stake, and more than speculation about a future event. Within the wide boundaries set by these general principles, we have emphasized the "practical" and "fact-specific" nature of the inquiry.

Cachil Dehe Band of Wintun Indians v. California, 547 F.3d 962, 970 (9th Cir. 2008) (quotations, citations, and modifications omitted). The text of Rule 19 also

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

instructs courts to consider "whether the plaintiff would have an adequate remedy" if the action is dismissed. FED. R. CIV. PROC. 19(b)(4). In most Rule 19 analyses, "this factor is a central – if not *the* central – consideration in determining whether dismissal is appropriate." Katherine Florey, *Making Sovereigns Indispensable*, 58 UCLA L. REV. 667, 712 (2011) (emphasis in original, citing cases).

Here, as noted above, Federal Defendants' concerns are nothing more than mere "speculation about a future event." *Id.* It is uncontested that the Spokane Tribe has an undivided half interest in the Allotment, and that the Allotment is currently under CERCLA remediation. But, for the same reasons identified above, it cannot be determined, at this point, that Plaintiff's requested relief will affect any interest at all – Spokane or otherwise. Does Plaintiff's stockpiled ore still exist? Has the ore been removed from the Allotment? Has the ore been milled, processed, or sold? Until Plaintiff's trust assets are accounted for, none of the parties will know if the requested injunctive relief would affect the Tribe's interest.

Until Federal Defendants can provide some evidence otherwise, their allegations regarding the Spokane Tribe's "affected interests" are mere conjecture and must be rejected. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468-69 (9th Cir. 1986). Further, even were the Court to find otherwise, Plaintiff would not have an adequate remedy if this cause of action were dismissed – a factor that mandates the denial of

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631

Federal Defendant's motion as to this claim, regardless. *Anrig v. Ringsby United*, 603 F.2d 1319, 1326 (9th Cir. 1979).

III. CONCLUSION

Plaintiff is entitled to "sufficient information" that will allow him "to ascertain whether the trust has been faithfully carried out." *Cobell*, 240 F.3d at 1103 (citation omitted). This information – mandated by codified federal law, common law, and contract – will enable Plaintiff to demonstrate the remaining claims asserted in this suit. In light of the foregoing, Plaintiff respectfully requests that Federal Defendants' Motion to Dismiss be **DENIED**.

DATED this 26th day of June, 2012.

s/Gabriel S. Galanda
Gabriel S. Galanda, WSBA# 30331
Anthony S. Broadman, WSBA #39508
Ryan D. Dreveskracht, WSBA #42593
Attorneys for Plaintiff
11320 Roosevelt Way NE
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631
Email: gabe@galandabroadman.com
Email: anthony@galandabroadman.com
Email: ryan@galandabroadman.com

CERTIFICATE OF SERVICE

I, Gabriel S. Galanda, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 11320 Roosevelt Way NE, Seattle, WA 98125.

3. On June 26, 2012, I caused the foregoing document to be filed via ECF which will provide service to the following via email:

Jody Helen Schwarz
William J. Schroeder
Gregory C. Hesler

The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 26th day of June 2012.

s/Gabriel S. Galanda

Galanda Broadman PLLC
11320 Roosevelt Way NE
Seattle, WA 98125
P.O. Box 15146
Seattle, WA 98115
(206) 691-3631