IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Thomas Charles Bear, Edwina Faye Busby, Grace M. Goodeagle, Phyllis Romick Kerrick, Jean Ann Lambert, Florence Whitecrow Mathews, Ardina Revard Moore, Tamara Anne Romick Parker, and Fran Wood, individually and on behalf of similarly situated Members of the Quapaw Tribe of Oklahoma (the O-Gah-Pah), and the Quapaw Tribe of Oklahoma (the O-Gah-Pah), a federally recognized Indian nation,	)	
Claimants,	)	Case No. 13-cg-00051X
v.	)	Hon. Thomas Wheeler
United States,	)	
Defendant.	)	

CONGRESSIONAL REFERENCE COMPLAINT

This complaint requests a determination by the Hearing Officer that members of the Quapaw Tribe of Oklahoma (the O-Gah-Pah) and the Quapaw Tribe, a federally recognized Indian nation (collectively "Claimants" or "the Quapaw"), have established Indian trust-related legal and equitable claims for money damages owed to them by Defendant, the United States:

- After being deprived of their ancestral homeland along the Arkansas River and forcibly relocated to inhospitable lands, the Quapaw were finally settled in the area where present-day Oklahoma, Kansas, and Missouri come together.

- This Quapaw land was once valuable for commercial agriculture, on which crops such as wheat, soybeans, and pecans were grown; the area was once so fertile that it was once known as the "hay capital of the world."

- But rich lead and zinc deposits were discovered on Quapaw lands in the 1890s, launching a mining boom that enriched mining companies but destroyed the Quapaw's land and their way of life.

- Defendant, the United States, acting through the Secretary of the Interior and the Bureau of Indian Affairs, had and continues to have, fiduciary obligations requiring that it approve mineral leases, chat (valuable mine tailing) leases, and other leases or sale of trust lands only on terms that are in the "best interest" of the Quapaw.

- But an accounting prepared for the Quapaw (the Quapaw Analysis) reveals that the Government failed in its trust-related obligations to the Quapaw; failed to comply with its leasing obligations required by statute and its own regulations; failed to exercise control over the mining operations on Quapaw lands for the benefit of the Quapaw; failed to require payment for easements, rights-of-way, and encroachments on trust lands; failed to prevent theft of Quapaw chat and the unlawful comingling of chat resources without Quapaw consent; and, continues today to grossly mismanage the leasing and permitting of town lots and business leases on Quapaw lands.

- As a result of the Government's egregious breach of its obligations owed to the Quapaw—and as a continuing insult and injury to the Quapaw people—Quapaw lands are today covered with mountains of mining waste and toxic mill ponds creating a veritable wasteland. The Quapaw's land is thus no longer suitable for agriculture, or habitation, or commercial use. And since the Secretary will not take this contaminated land into trust, the Tribe's ability to exercise its sovereignty over Quapaw land is correspondingly impaired.

In accordance with RCFC Appendix D, Claimants therefore ask the Hearing Officer to issue a report containing findings of fact and conclusions of law sufficient to inform Congress whether the Claimants' demand is a legal or equitable claim, and the amount of damages to which the Claimants are legally or equitably due from the Government.

Parties

1. Plaintiff, Thomas Charles Bear, is an enrolled member of the Quapaw Tribe residing in Miami, Oklahoma. Bear is a successor-in-interest to an undivided ownership interest in the Anna Beaver allotment and the John Beaver allotment. These allotments, ratified by the United States in 1897, are located within the Quapaw Tribe's 1833 reservation.

2. Plaintiff, Edward Faye Busby, is an enrolled member of the Quapaw Tribe residing in Miami, Oklahoma. Busby is a successor-in-interest to an undivided ownership interest in the Francis Quapaw Goodeagle allotment and the Ho-Gha-Meh Goodeagle allotment. These allotments, ratified by the United States in 1897, are located within the Quapaw Tribe's 1833 reservation.

3. Plaintiff, Grace M. Goodeagle, is an enrolled member of the Quapaw Tribe residing in Commerce, Oklahoma. Goodeagle is a successor-in-interest to an undivided ownership interest in the Francis Quapaw Goodeagle allotment and the Wah Tah Noh Zhe allotment. These allotments, ratified by the United States in 1897, are located within the Quapaw Tribe's 1833 reservation.

4. Plaintiff, Phyllis Romick Kerrick, is an enrolled member of the Quapaw Tribe residing in Lawton, Oklahoma. Kerrick is a successor-in-interest to an undivided ownership interest in the Mary Whitebird allotment. This allotment, ratified by the United States in 1897, is located within the Quapaw Tribe's 1833 reservation.

5. Plaintiff, Jean Ann Lambert, is an enrolled member of the Quapaw tribe residing in Miami, Oklahoma. Lambert is a successor-in-interest to an undivided ownership interest in the Benjamin Quapaw allotment and the Robert Thompson allotment. These allotments, ratified by the United States in 1897, are located within the Quapaw Tribe's 1833 reservation.

6. Plaintiff, Florence Whitecrow Mathews, is an enrolled member of the Quapaw Tribe residing near Quapaw, Oklahoma. Mathews is a successor-in-interest to an undivided ownership interest in the Harry Crawfish allotment. This allotment, ratified by the United States in 1897, is located within the Quapaw Tribe's 1833 reservation.

7. Plaintiff, Ardina Revard Moore, is an enrolled member of the Quapaw Tribe and resides in Miami, Oklahoma. Moore is a successor-in-interest to an undivided ownership interest in the Slim Jim allotment and the Sin-Tah-Hah-Hah-Track allotment. These allotments, ratified by the United Sates in 1897, are located within the Quapaw Tribe's 1833 reservation.

8. Plaintiff, Tamara Anne Romick Parker, is an enrolled member of the Quapaw Tribe residing in Garden City, Kansas. Parker is a successor-in-interest to an undivided ownership interest in the Mary Whitebird allotment. This allotment, ratified by the United Sates in 1897, is located within the Quapaw Tribe's 1833 reservation.

9. Plaintiff, Fran Wood, is an enrolled member of the Quapaw Tribe residing in Miami, Oklahoma. Wood is a successor-in-interest to an undivided ownership interest in the John Quapaw allotment, the Red Sun Quapaw allotment, and the Charlie Blackhawk

Quapaw allotment. These allotments, ratified by the United States in 1897, are located within the Quapaw Tribe's 1833 reservation.

10. Plaintiff, the Quapaw Tribe of Indians of Oklahoma, also known as the Quapaw Tribe of Oklahoma or the O-Gah-Pah, is a federally recognized Indian tribe with its tribal headquarters located within Indian country near Quapaw, Oklahoma.

11. Defendant, the United States of America, acts through the Department of the Interior of the United States (Interior), including the Bureau of Indian Affairs (BIA), and other federal agencies, departments, bureaus, and offices.

Jurisdiction

12. This Court has jurisdiction over these claims under 28 U.S.C. § 1492 and under 28 U.S.C. § 2509.

Congressional Reference

13. On December 19, 2012, the U.S. House of Representatives approved House Resolution 668, referring to the Chief Judge of the U.S. Court of Federal Claims a bill, H.R. 5862, entitled "A Bill relating to members of the Quapaw Tribe of Oklahoma (O-Gah-Pah)."[1] The purpose of this referral was for "a determination of whether the Tribe and its members have Indian trust-related legal or equitable claims against the United States other than the legal claims that are pending in the Court of Federal Claims on the date of enactment of this resolution."[2]

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[1] H. Res. 668, 112th Cong. § 2 (as passed Dec. 19, 2012).
[2] H. Res. 668, 112th Cong. § 2 (as passed Dec. 19, 2012).

14. House Resolution 668 further stated that "[u]pon receipt of the bill, the chief judge shall . . . (2) report back to the House of Representatives, at the earliest practicable date, providing—(A) findings of fact and conclusions of law that are sufficient to inform the Congress of the nature, extent, and character of the Indian-trust related claims of the Quapaw Tribe of Oklahoma and its tribal members for compensation as legal or equitable claims against the United States other than the legal claims that are pending in the Court of Federal Claims on the date of enactment of this resolution; and (B) the amount, if any, legally or equitably due from the United States to the claimants."[3]

15. On January 22, 2013, the Clerk of the House of Representatives transmitted House Resolution 668 to the Chief Judge of this Court, and on January 24, 2013, the Chief Judge issued an order designating Hon. Thomas C. Wheeler as Hearing Officer in this case. In addition, the Chief Judge designated a Review Panel consisting of Hon. Francis M. Allegra as Presiding Officer, and Hon. Lynn J. Bush and Hon. Nancy B. Firestone as members of the Review Panel.[4]

16. In approving House Resolution 668, Representative Lofgren stated that "[w]e have consulted with the Department of Justice and the Department of the Interior on this matter, and both agencies agree that the Quapaw Tribe has legitimate claims against the

[3] H. Res. 668, 112th Cong. § 2 (as passed Dec. 19, 2012).
[4] Order Designating Hearing Officer and Review Panel, Doc. 3 (Jan. 24, 2013).

United States concerning certain tribal lands that were held in trust by the Federal Government. The only real dispute is the value of the claim."[5]

17. In approving House Resolution 668, Representative Boren (one of the bill's sponsors) explained what was meant by the resolution's reference to pending claims:

> A question arises. If one or more of those currently pending legal claims are dismissed by the Court for lack of jurisdiction, would the dismissed claim be considered "pending" for purposes of this resolution?
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> In my view, the answer is no. Our intention with the reference resolution is to request from the Chief Judge of the U.S. Court of Federal Claims a report containing findings of fact and conclusions of law concerning the nature, extent, and character of the Indian-trust related claims of the Quapaw Tribe of Oklahoma and its tribal members for compensation. As the language of the resolution suggests, these claims may be legal or equitable in nature, and exclude only the claims that are already within the jurisdiction of the Court of Federal Claims (including the statute of limitations) and are already pending in the Court of Federal Claims on the date of enactment. If a claim is dismissed as being outside the statute of limitations or for jurisdictional reasons, in my view, it was not pending on the date of enactment.[6]

The Quapaw Analysis

18. On November 5, 2004, the Tribe and the Government entered into a settlement of the Tribe's suit for an accounting of its trust assets, which was then pending in federal district court for the Northern District of Oklahoma. The settlement agreement provided that the Tribe would release its claim for an accounting of tribal assets in return for which Interior's Office of Historical Trust Accounting ("OHTA") would enter into a contract with Quapaw Information Services as contractor to "identify, select, and analyze documents, and

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[5] 158 CONG. REC. H7281 (daily ed. Dec. 19, 2012) (statement of Rep. Lofgren).
[6] 158 CONG. REC. E1987 (daily ed. Dec. 21, 2012) (statement of Rep. Boren).

prepare an analysis (the 'Quapaw Analysis'), of Interior's management" of the Quapaw Tribe's Tribal Trust Fund Account, along with certain non-monetary land and natural resource assets held in trust for the Tribe and eight individual members of the Tribe.

19. Under the terms of the contract between Interior and Quapaw Information Systems, as required by the settlement agreement, the Government agreed to make available to the contractor all records relevant to Quapaw trust funds and assets, and the contractor agreed to perform the analysis in compliance with the Office of Historical Trust Accounting's manual for preparing trust asset accountings.

20. Upon completion of the Quapaw Analysis and acceptance of the report by the Government signifying that the report had been prepared in accordance with the accounting principles and standards required by OHTA, the parties planned to address the findings and any resulting claims that were supported by the Quapaw Analysis. In short, the Quapaw Analysis was intended to document the actions of the Trustee and identify any instances in which the Government may have failed to properly manage the Quapaw Tribe's funds or other non-monetary assets. If the Quapaw Analysis resulted in claims, then the parties intended to act in good faith to resolve the claims, either directly or through independent arbitration. The parties anticipated that this new paradigm for resolving tribal accounting claims would encourage other tribes that an agreed-upon accounting/claims resolution process could be substituted for the litigation and Government-prepared accounting process that left many tribes dissatisfied.

21. After years of information-gathering and analysis under the supervision of

Interior's Office of Historical Trust Accounting, on June 1, 2010, Quapaw Information Systems transmitted its completed Quapaw Analysis report to the Government, and on November 19, 2010, the Department of Interior accepted the Quapaw Analysis as complete.

22. The Quapaw Analysis in fact demonstrated that the Government had on multiple occasions and over many decades violated its duty of trust regarding the assets of the Quapaw Tribe and its members, as described more fully in this Complaint. The Quapaw Analysis is incorporated by reference in this Complaint.[7]

Class Action Allegations

23. Each of the named individual claimants in this case is a successor-in-interest to one or more of the allotments, chat piles and/or other assets examined in the Quapaw Analysis and, as the Quapaw Analysis demonstrates, each has a valid claim against the United States for breach of its duty of trust owed to the beneficiaries of those assets. Each named individual plaintiff is also an enrolled member of the Quapaw Tribe of Oklahoma (the O-Gah-Pah). Accordingly, the claims of the named individual claimants are typical of the claims of other enrolled members of the Tribe, presenting issues of law and fact common to all members of the class. And, as the Quapaw Analysis further demonstrates, the Government has acted or refused to act on grounds generally applicable to the entire class and common questions of law and fact predominate in this Congressional Reference case.

[7] Due to the protective orders governing disclosure of the Quapaw Analysis, Claimants will file a motion to file the Quapaw Analysis separately and under seal.

24. Claimants estimate that the class they propose to represent includes between 500 to in excess of 1,000 members. This class is thus so numerous that individual joinder of all members is impracticable. But the identity of the members of the class is readily ascertainable from the records of the Tribe and the leadership of the Quapaw Tribe has agreed to assist in identifying and notifying the members of the class. This class is therefore readily manageable under the procedures provided in Rule 23 of this Court.

25. Each named individual plaintiff understands that he or she has brought this suit for the purpose of acting as a representative of the class of all similarly situated enrolled members of the Quapaw Tribe, and each individual plaintiff has agreed to and will fairly and adequately represent the interests of all class members in this suit.

26. Thus, under all of the facts of this case, a class action is superior to other available methods for fairly and efficiently adjudicating the claims of the individual Quapaw Tribal members in this Congressional Reference case.

FIRST CAUSE OF ACTION
(Breach of trust regarding mining lands)

27. Rich lead and zinc deposits were discovered on Quapaw land in the late 1800s, and for many decades later extensive mining was conducted on Quapaw lands under the supervision and control of the Government. The region became known as the Tri-State Mining District (southeastern Kansas, southwestern Missouri, and northeastern Oklahoma). Most of the large-scale mining operations occurred in the 1920s and 1930s, but some mining operations continued in the region into the 1970s.

28. At all times relevant to this claim, from the time lead, zinc, and other minerals were first produced in the early 1900s and continuing to the present, the Government has exercised (and continues to exercise) broad and elaborate authority and control over this trust asset, under statutes, regulations, and other federal law, including the common law of trusts, which together create a fiduciary duty owed to the Quapaw that the Government has breached. In 1909, Congress authorized the Secretary of the Interior to promulgate regulations for mining activity on Quapaw lands and in 1921, Congress expanded this authority to allow the Secretary to determine the terms and conditions for mineral leases on all allotted Quapaw lands. In addition, for land held by a Tribal member whom the Secretary deemed "incompetent"—and that was a large portion of the Quapaw—the Secretary was actually given authorization to grant a mining lease without the owner's consent. Further, the Secretary promulgated comprehensive regulations governing mining on restricted land in 1929. Those regulations did not give the Tribe any role in the leasing process or permit the Tribe to regulate mining activity.

29. In fact, in 1918, the Government declared Quapaw landowners incompetent to manage the mineral leasing of their own lands, and the BIA expressly assumed exclusive authority and responsibility over such assets, and thereby deprived the Quapaw landowners of any ability to control their own assets or to initiate enforcement actions to protect their assets. Under 25 C.F.R. § 162.601, authorized by 25 U.S.C. § 380, the Secretary may negotiate and grant leases "on individually owned land on behalf of" Indians deemed

incompetent.[8] But BIA regulations required that no lease was to be made for less than "fair annual rental" unless it is in the "best interest of the landowners" to request less.[9] Those regulations also required a surety bond.[10] There is also a general provision in the regulations that payment obligations will be collected and enforced.[11]

30. In addition, under the Indian Long-Term Leasing Act, 25 U.S.C. §§ 396, 415–415d, and corresponding federal regulations, the Government has ultimate management and control over all aspects of the leasing and sale of lead, zinc, and other minerals. The Secretary of the Interior determines whether to consent to a lease and the terms of the lease; performs any and all acts "necessary to carry the statute" into full force and effect; and, makes all rules and regulations as may be necessary to carry out the legislation, including:

- creating the standardized lease form that must be used;
- finalizing all the key terms of the lease such as assignability, protection of land by lessees, and the length of leases;
- approving or disapproving the price terms and the royalty percentage;

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[8] 25 C.F.R. § 162.601 (2011). The same regulation has been in force since 1938 under different citations.
[9] 25 C.F.R. § 162.604(b) (2011).
[10] 25 C.F.R. § 162.604(c) (2011).
[11] 25 C.F.R. § 162.108(a) ("We will ensure that tenants meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and enforcement actions. We will also assist landowners in the enforcement of payment obligations that run directly to them, and in the exercise of any negotiated remedies that apply in addition to specific remedies made available to us under these or other regulations."), 25 C.F.R. § 162.619 (2001) (making BIA responsible for policing leases and violations). In § 162.619, the regulations simply change prior regulations into question and answer form; it is a restatement of prior regulations 25 C.F.R. §§ 171.18 (1938), 171.22 (1949), 131.22 (1958), 131.14 (1966), and 162.14 (1984).

- approving or disapproving any attempt to assign a lease from one lessee to another; and

- receiving all payments owed to the Quapaw —and then as middleman sending the proper amount of royalty payments and bonus payments to the mineral owners.

31. The regulations further require the Secretary to ensure that the Quapaw lead, zinc, and other mineral interests are managed in a manner that maximizes their best economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from mineral development. 25 C.F.R. § 212.1. Federal regulations also require the Secretary to take actions that are in the Quapaw's best interests in connection with the lead, zinc, and other minerals. 25 C.F.R. § 212.3.

32. Further, former 25 C.F.R. § 162.604 provided that "no lease shall be approved or granted at less than the present fair annual rental." *See also* 25 C.F.R. §§ 162.401–474. Further, 25 C.F.R. § 212.20 requires a bid process on mineral leases. The Secretary must also specifically approve the removal of Indian restricted property, including lead, zinc, and other minerals, from trust before it is sold to a non-Indian. 25 C.F.R. Part 152, and § 152.22; *see also* 25 U.S.C. § 202; 25 C.F.R. §§ 152.1–152.5, 152.8, 152.17 and 152.23–152.30. Otherwise, the non-Indian is in unlawful trespass and the Secretary is required to remove the trespasser, and to "take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies . . . ." 25 C.F.R. § 162.106(a).

33. At 25 C.F.R. Part 201, and now found at 25 C.F.R. Part 215, the Government has adopted a comprehensive regulatory scheme under which the Government controls lead

and zinc mining on Quapaw lands. Under those regulations no mining operations may take place without the approval of the Government,[12] all royalties are paid to the Government for the benefit of the Indian,[13] all leases are sold at public auction conducted by the Government,[14] at royalty rates set by the Secretary of Interior.[15] The Government may extend the lease,[16] and the Government requires a surety bond,[17] prescribes the term of the lease,[18] prescribes lease forms,[19] prescribes mineshaft construction requirements,[20] and prescribes and receives for the Indian lessees detailed accounts of all minerals sold, including prices.[21]

34. In breach of these and other fiduciary duties owed to the Quapaw, the Secretary has (among other violations) failed to charge adequate royalties for lead, zinc, and other minerals sold—and sometimes failed to charge or collect any sum at all; failed to conduct competitive bidding for lead, zinc, and other mineral leases; failed to remit all sums collected on behalf of the Quapaw; failed to keep accurate or even any records of amounts of lead, zinc, and other minerals mined and processed or sums collected; failed to produce written leases or sales agreements with terms that adequately safeguard the rights of the

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[12] 25 C.F.R. § 215.1.
[13] 25 C.F.R. § 215.3.
[14] 25 C.F.R. § 215.4.
[15] 25 C.F.R. § 215.5.
[16] 25 C.F.R. § 215.10.
[17] 25 C.F.R. § 215.13.
[18] 25 C.F.R. § 215.18.
[19] 25 C.F.R. § 215.19.
[20] 25 C.F.R. § 215.22.
[21] 25 C.F.R. § 215.24.

Quapaw; and failed to determine the respective ownership interests of the Quapaw, allowing lead, zinc, and other minerals to be mined and processed without any clear idea of who owned them.

35. In further breach of the fiduciary duties owed to the Quapaw, the theft of lead, zinc, and other minerals was routinely ignored by the Secretary and the Secretary has allowed repeated and multiple trespasses, including the mining of many tons of lead, zinc, and other minerals without payment or remedy for the Quapaw.

36. In addition, the Secretary has failed to enforce regulations promulgated for the benefit of the Quapaw and failed to carry out fiduciary obligations with respect to lease agreements, repeatedly allowing lease terms to be ignored or leases to lapse unrenewed.

37. Finally, the Secretary has entered into agreements for the mining of lead, zinc, and other minerals without any competitive bidding process; entered into agreements that do not require proper performance bonds; and otherwise ignored the best interests of the Quapaw in favor of the interests of others—including the Government. Worse the Quapaw landowners, having been declared incompetent, were deprived of any knowledge of their assets, including knowledge of the Government's improper actions and breaches of trust, rendering the Quapaw landowners unable to seek redress for as yet unknown breaches of trust.

38. As a direct and proximate result of these breaches of fiduciary duty by the Government, the Quapaw Tribe and its members have been deprived of substantial sums of rents, royalties and other amounts to which they were entitled for the leasing of land and

mining of lead, zinc, and other minerals, together with interest thereon, as more fully described in the Quapaw Analysis, which is hereby incorporated by reference. Claimants are uncertain of the exact amount of these damages, which they will calculate and present to Defendant and the Court at the appropriate time in compliance with the procedure to be established by the Court.

SECOND CAUSE OF ACTION
(Failure to Properly Lease and Manage Chat)

39. The lead and zinc mining operations on Quapaw land produced a valuable mining by-product known locally as "chat," which is restricted trust personalty to which the Quapaw hold title as undivided mineral interests. Chat is defined by EPA regulation as "waste material that was formed in the course of milling operations employed to recover lead and zinc from metal-bearing ore minerals in the Tri–State Mining District of Southwest Missouri, Southeast Kansas and Northeast Oklahoma." 40 C.F.R. § 278.1. EPA regulations further allow for the safe and profitable use of chat in (A) cement or concrete projects; and (B) transportation construction projects (including transportation construction projects involving the use of asphalt) that are carried out, in whole or in part, using federal funds. Criteria for the Safe and Environmentally Protective Use of Granular Mine Tailings Known as "Chat," 72 Fed. Reg. 39,331 (July 18, 2007).

40. At all times relevant to this claim, and since chat was first produced in the early 1900s and continuing to the present, the Government has exercised (and continues to exercise) broad and elaborate authority and control over this trust asset under statutes,

regulations, and other federal law, including the common law of trusts, which together create a fiduciary duty owed to the Quapaw which the Government has breached.

41. Specifically, under controlling law, including the Indian Long-Term Leasing Act, 25 U.S.C. §§ 396, 415–415d, and corresponding federal regulations, the Quapaw lead and zinc mining regulations, 25 C.F.R. Part 215, and the laws and regulations relating to the disposition of federally managed Indian trust property, the Government has ultimate management and control over all aspects of the leasing and sale of chat. The Secretary of the Interior determines whether to consent to a lease and the terms of the lease; performs any and all acts "necessary for the purpose of carrying the provisions of this section into full force and effect"; and, makes all rules and regulations as may be necessary to carry out the legislation, including:

- creating the standardized lease form that must be used;
- finalizing all the key terms of the lease such as assignability, protection of land by lessees, and the length of leases;
- approving or disapproving the price terms and the royalty percentage;
- approving or disapproving any attempt to assign a lease from one lessee to another; and
- receiving all payments owed to the Quapaw —and then as middleman sending the proper amount of royalty payments and bonus payments to the chat owners.

42. The regulations further require the Secretary to ensure that the Quapaw chat interests are managed in a manner that maximizes the owners' best economic interests and minimizes any adverse environmental impacts resulting from mineral development. These

regulations are intended to ensure that the Quapaw's mineral resources are developed in a manner that maximizes their best economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from its development. 25 C.F.R. § 212.1. Federal regulations also require the Secretary to take actions that are in the Quapaw's best interests in connection with the chat. 25 C.F.R. § 225.22.

43. In addition, former 25 C.F.R. § 162.604 provided that "no lease shall be approved or granted at less than the present fair annual rental." *See also* 25 C.F.R. §§ 162.401–474. Further, 25 C.F.R. § 212.20 requires a bid process on mineral leases. The Secretary must also specifically approve the removal of Indian restricted property, including chat, from trust before it is sold to a non-Indian. 25 C.F.R. Part 152 & § 152.22; *see also* 25 U.S.C. § 202; 25 C.F.R. §§ 152.1–152.5, 152.8, 152.17 & 152.23–152.30. Otherwise, the non-Indian is in unlawful trespass and the Secretary is required to remove the trespasser, and to "take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies . . . ." 25 C.F.R. § 162.106(a).

44. In breach of fiduciary duties owed to the Quapaw, the Secretary has (among other violations): permitted chat—a severed mineral asset—to run with the land, allowed restricted Indian and unrestricted (non-Indian) chat to be commingled to the point that accurate records of is storage and disposition could not be maintained; authorized the removal of Quapaw chat without following required procedures for the sale and disposition of trust property and without obtaining any compensation to the restricted Indian owners; failed to properly maintain storage of restricted Indian chat and permitted chat to be lost or

stolen; failed to charge the market price for chat sold—and sometimes failed to charge anything at all; failed to conduct competitive bidding for chat sales; failed to remit all sums collected on behalf of the Quapaw; failed to keep accurate or even any records of amounts of chat sold or sums collected from sales; failed to produce written leases or sales agreements with terms that adequately safeguard the rights of the Quapaw; failed to determine the respective ownership interests of the Quapaw, allowing chat piles to be comingled without the consent of the chat pile owners; and, failed to properly treat chat as trust personalty, separate from realty, and at times allowed chat to be passed with title to realty without proper consideration and without proper record, depriving chat owners of their restricted trust personalty interests or otherwise creating inconsistencies in chat ownership records.

45. In further breach of the fiduciary duties owed to the Quapaw, the theft of chat was routinely ignored by the Secretary and the Secretary has allowed repeated and multiple trespasses, including the removal of millions of tons of chat without payment or remedy for the Quapaw. Having been declared incompetent, many of the Quapaw chat owners were deprived of knowledge of the status of their ownership interest in chat and had no means to become aware of the various breaches of trust.

46. In addition, the Secretary has failed to enforce regulations promulgated for the benefit of the Quapaw and failed to carry out fiduciary obligations with respect to lease agreements, repeatedly allowing lease terms to be ignored or leases to lapse unrenewed, including more recently when certain Quapaw chat owners informed their federal fiduciary of these breaches of trust and were ignored and denied redress for the loss and damage to

their chat interests. Finally, the Secretary has entered into chat sales and lease agreements without any competitive bidding process; entered into agreements that do not require proper performance bonds, encouraged individual restricted Indian owners to enter into contracts for the sale of chat that were unfair and not in their best interests, and otherwise ignored the best interests of the Quapaw in favor of the interests of others—including the Government and certain private vendors. The Secretary has also retaliated against restricted Indian chat owners who have attempted to vindicate their rights with respect to federal management of their trust property.

47. A report prepared from DOI records and discussed in the Quapaw Analysis shows gross underreporting of tons of chat sold and gross underpayment of royalties owed. The lease management documents repeatedly form a pattern of disregard for accuracy in compensation of the chat trust owners, and failure to maintain accurate and complete records with respect to chat sales, royalties, and leases.

48. As a direct and proximate result of these breaches of fiduciary duty by the Government, the Quapaw Tribe and its members have suffered damages in the sum of $86 million as more fully described in the Quapaw Analysis, which is hereby incorporated by reference.

THIRD CAUSE OF ACTION
(Breach of trust regarding agricultural lands and town lots)

49. Although the Quapaw had traditionally lived by hunting, fishing and agriculture, the advent of mining operations largely destroyed this heritage. To

accommodate mining interests the Government allowed construction of a mining boom town, called Picher, Oklahoma (named for the owner of the Picher Lead Company) to be constructed on agricultural lands that had been allotted to members of the Quapaw Tribe. Incorporated in 1918, by 1920 Picher had a population of 9,726. Peak population occurred at 14,252 in 1926, followed by a gradual decline paralleling a decrease in mining activity, to 2,553 by 1960.

50. At all times relevant to this claim, and particularly since the mining of lead, zinc, and other minerals gave birth to the boom town of Picher in the early 1900s and continuing to the present, the Government has exercised (and continues to exercise) broad authority and control over the Quapaw land on which the town of Picher was built as a trust asset under statutes, regulations, and other federal law including the common law of trusts, which together create a fiduciary duty owed to the Quapaw, which the Government has breached.

51. Specifically, under the Indian Long-Term Leasing Act and implementing regulations published at 25 C.F.R. § 162,[22] the Government has exercised ultimate management and control over the planning, construction and functioning of the town of Picher, Oklahoma on agricultural lands belonging to members of the Quapaw Tribe. Under Subpart B of these regulations the BIA must ensure that tenants meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and enforcement actions. 25 C.F.R. §

[22] 25 C.F.R. §§ 162.01–162.474.

162.108. The BIA must also assist landowners in the enforcement of payment obligations that run directly to them, and in the exercise of any negotiated remedies that apply in addition to specific remedies made available to the BIA under the lease regulations. 25 C.F.R. § 162.108. The BIA must also ensure that tenants comply with the operating requirements in their leases, through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners and respond to concerns expressed by them. 25 C.F.R. § 162.108. The BIA must take immediate action to recover possession from trespassers operating without a lease, and take other emergency action as needed to preserve the value of the land. 25 C.F.R. § 162.108. And unless otherwise provided by the Secretary, a satisfactory surety bond is required in an amount that will reasonably assure performance of the contractual obligations under the lease, not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

52. Further, all such leases must be in a form approved by the Secretary and are subject to his written approval.[23] And prior to granting a lease or permit on Indian land, the Secretary must advertise the land for lease.[24] Advertisements must call for sealed bids and must not offer preference rights.[25] No lease shall be approved or granted at less than the present fair annual rental.[26] But leases may be granted or approved by the Secretary at less than the fair annual rental when in his judgment such action would be in the best interest of

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[23] 25 C.F.R. § 162.604 (2011); 25 C.F.R. §§ 162.340, 162.440.
[24] 25 C.F.R. § 162.606 (2011); 25 C.F.R. § 162.212.
[25] *Id.*
[26] 25 C.F.R. § 162.604(b) (2011).

the landowners.[27] In the discretion of the Secretary, tribal land may be leased at a nominal rental for religious, educational, recreational, or other public purposes to religious organizations or to agencies of federal, state, or local governments; for purposes of subsidization for the benefit of the tribe; and for home site purposes to tribal members provided the land is not commercial or industrial in character.[28]

53. The term for such a non-agricultural lease is limited to a maximum of 25 years.[29] Prior to 1958, lease terms were limited to 5 years.[30] A lease must specify the interest rate on any rent payment not made by the due date.[31] A lease may also identify additional late payment penalties that will apply if a rent payment is not made by a specified date.[32] Unless otherwise provided in the lease, the interest charges and late payment penalties will apply in the absence of any specific notice to the tenant from the BIA or the Indian landowners, and the failure to pay the amounts is treated as a violation of the lease.[33] Improvements placed on the leased land become the property of the landowner unless specifically stated under the terms of the lease.[34] The lease must specify the maximum time allowed for the removal of any improvements.[35]

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[27] 25 C.F.R. § 162.604(b) (2011).
[28] 25 C.F.R. § 162.604(b) (2011).
[29] 25 C.F.R. § 162.607(a) (2011).
[30] 25 C.F.R. § 162.171.9 (1949)
[31] 25 C.F.R. § 162.614 (2011).
[32] *Id.*
[33] *Id.*
[34] 25 C.F.R. § 162.608 (2011).
[35] *Id.*

54. In addition, a sublease, assignment, amendment, or encumbrance of any lease or permit may be made only with the approval of the Secretary and the written consent of all parties to the lease or permit, including the surety or sureties.[36] With the consent of the Secretary, the lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval.[37] Subleases do not relieve the individual subleasing the property from any liability nor diminish the authority of the Secretary.[38]

55. Under these regulations the BIA is also responsible for handling violations and if needed cancelation of leases.[39] Specifically, if the BIA determines that a lease has been violated, it must send the tenant and its sureties a notice of violation within five business days of that determination.[40] Within ten business days of the receipt of a notice of violation, the tenant must cure the violation and notify the BIA in writing that the violation has been cured, dispute BIA's determination that a violation has occurred or explain why BIA should not cancel the lease, or request additional time to cure the violation.[41] If a tenant fails to provide adequate proof of payment or cure the violation within the requisite time period described in § 162.618(b), and the amount due is not in dispute, the BIA may immediately take action to recover the amount of the unpaid rent and any associated interest charges or

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[36] 25 C.F.R. § 162.610 (2011).
[37] 25 C.F.R. § 162.610 (2011).
[38] *Id.*
[39] 25 C.F.R. §§ 162.612–162.621 (2011).
[40] 25 C.F.R. § 162.615(a) (2011).
[41] 25 C.F.R. § 162.618(b) (2011).

late payment penalties.[42] The BIA may also cancel the lease under § 162.619, or invoke any other remedies available under the lease or applicable law, including collection on any available bond or referral of the debt to the Department of the Treasury for collection.[43] An action to recover any unpaid amounts need not be conditioned on the prior cancellation of the lease or any further notice to the tenant, nor will such an action be precluded by a prior cancellation.[44]

56. In addition, if a tenant remains in possession after the expiration or cancellation of a lease, the BIA must treat the unauthorized use as a trespass.[45] Unless the tenant is engaged in negotiations with the Indian landowners to obtain a new lease, the BIA must take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law.[46]

57. In breach of its fiduciary duties owed to the Quapaw, the Government has (among other violations) allowed non-Quapaw to permanently occupy Quapaw lands; to construct buildings, roads, habitations, mills, and other structures upon them; to dispose of mill tailings and other mining wastes upon them, fouling the ground, water and air; to dig mine tunnels and works beneath them, causing subsidence of the surface and creating a hazardous condition that prohibits further occupancy and use of these lands.

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[42] 25 C.F.R. § 162.615(b) (2011).
[43] *Id.*
[44] 25 C.F.R. § 162.615(b) (2011).
[45] 25 C.F.R. § 162.623 (2011); 25 C.F.R. § 162.106.
[46] *Id.*

58. In further breach of its fiduciary duties owed to the Quapaw the Government has in many instances not required outsiders to sign leases containing the provisions required by law and necessary to protect the best interests of the Quapaw; failed to demand adequate rents, interest, and penalties, at times charging only nominal rent; failed to enforce leases when they are breached; failing to properly extend leases and/or requiring continuing lease payments; often failed to require that outsiders sign any lease at all; and in many instances simply allowed outsiders to trespass on these Quapaw lands without taking any actions whatever. The Secretary has further facilitated disregard for Quapaw property rights by, among other acts, issuing "revocable permits" to third-parties to use Quapaw lands, without following the requirements of law and without obtaining market values.

59. As a direct and proximate result of Defendant's breach of its duty of trust and fiduciary obligations to the individual claimants and the class they represent, the individual claimants and the class they represent have been deprived of the use and value of their agricultural lands, the crops, livestock, wildlife, timber, and other valuable production of those lands, rents, profits, and other substantial sums to which they were entitled. Together with interest substantial sums of rent and other amounts for their town lots that the United States was obligated to collect and deposit in their Individual Indian Management accounts, together with interest thereon. Claimants are uncertain of the exact amount of these damages, which they will calculate and present to Defendant and the Court at the appropriate time in compliance with the procedure to be established by the Court.

FOURTH CAUSE OF ACTION
(Breach of trust regarding easements and rights-of-way)

60. Since well before Oklahoma became a state in 1907 and continuing to the present day the Quapaw Reservation has been crisscrossed by railroads, public highways, municipal utilities, pipelines, and more recently by the Will Rogers Turnpike (Interstate Highway 44). Although the Government as trustee has throughout this time been responsible for protecting the best interests of the Quapaw Tribe and its members, the BIA today claims to have no record of legal rights of way and easements for most of these encumbrances and little or no payment for them was ever received by the Quapaw. The town of Picher (and other town areas on the Quapaw reservation) was built without grants of easements or rights-of-way, and the Quapaw were never compensated for the easements granted to form streets and alleys, sewer facilities, and electric, phone and gas lines. In violation of its fiduciary duty, the Government has instead simply granted easements without the knowledge or consent of the Quapaw or else simply allowed non-Indians to use Quapaw land without any claim of right at all.

61. At all times relevant to this claim and continuing to the present, the Government has exercised (and continues to exercise) broad authority and control over Quapaw lands under statutes, regulations, and other federal law including the common law of trusts, which together create a fiduciary duty owed to the Quapaw, which the Government has breached.

62. Specifically, 25 U.S.C. § 324 provides that "[n]o grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials," and "[r]ights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners" only in limited circumstances.

63. In addition, federal regulations at 25 C.F.R. Part 169 "prescribe the procedures, terms and conditions under which rights-of-way over and across tribal land, individually owned land and Government owned land may be granted,"[47] including:

> Anyone desiring to obtain permission to survey for a right-of-way across individually owned, tribal or Government owned land must file a written application therefor with the Secretary . . . accompanied by the written consents required by § 169.3, by satisfactory evidence of the good faith and financial responsibility of the applicant, and by a check or money order of sufficient amount to cover twice the estimated damages which may be sustained as a result of the survey.[48]

64. Further, under 25 C.F.R. § 169.5, any applicant for a right-of-way must agree to a host of obligations, including:

> (a) To construct and maintain the right-of-way in a workmanlike manner.
>
> (b) To pay promptly all damages and compensation, in addition to the deposit made pursuant to § 169.4, determined by the Secretary to be due the landowners and authorized users and occupants of the land on account of the survey, granting, construction and maintenance of the right-of-way.
>
> (c) To indemnify the landowners and authorized users and occupants against any liability for loss of life, personal injury and property damage arising from the construction, maintenance, occupancy or use of the lands by the applicant, his employees, contractors and their employees, or subcontractors and their employees.

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[47] 25 C.F.R. § 169.2.
[48] 25 C.F.R. § 169.4.

(d) To restore the lands as nearly as may be possible to their original condition upon the completion of construction to the extent compatible with the purpose for which the right-of-way was granted.

(e) To clear and keep clear the lands within the right-of-way to the extent compatible with the purpose of the right-of-way; and to dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project.

(f) To take soil and resource conservation and protection measures, including weed control, on the land covered by the right-of-way.

(g) To do everything reasonably within its power to prevent and suppress fires on or near the lands to be occupied under the right-of-way.

(h) To build and repair such roads, fences, and trails as may be destroyed or injured by construction work and to build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under the right-of-way.

(i) That upon revocation or termination of the right-of-way, the applicant shall, so far as is reasonably possible, restore the land to its original condition.

(j) To at all times keep the Secretary informed of its address, and in case of corporations, of the address of its principal place of business and of the names and addresses of its principal officers.

(k) That the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way is granted.[49]

65. Each application for a right-of-way must also be accompanied by a map showing (among other things) "the allotment number of each tract of allotted land, and shall clearly designate each tract of tribal land affected." 25 C.F.R. § 169.6.

[49] 25 C.F.R. § 169.5.

66. In breach of the fiduciary duties owed to the Quapaw, the Secretary has (among other violations) failed to charge adequate sums (and often charged nothing at all) for easements and rights-of-way granted; failed to require complete applications for easements and rights-of-way as required by federal statutes and regulations; failed to obtain the consent of the Tribe or its members; and often simply failed to require anything at all of non-Indians who have simply taken and occupied easements and rights-of-way on the Quapaw reservation. As a direct and proximate result of these breaches of fiduciary duty by the Government, the Quapaw Tribe and its members have suffered damages in the sum of $251,185 as more fully described in the Quapaw Analysis, which is hereby incorporated by reference.

FIFTH CAUSE OF ACTION
(Failure to pay amounts due from judgment against the Government)

67. Although the Court of Claims affirmed a substantial judgment for the Quapaw against the Government in 1954, and Congress appropriated funds to pay that judgment, approximately 25% of that judgment was never paid to the Quapaw or otherwise accounted for, in violation of the Government's duty of trust with respect to funds held for the benefit of Indians.

68. The proceeds of this judgment have at all relevant times remained under the supervision and control of the Government, imposing on the Government a fiduciary duty of trust with respect to these Indian funds. Under 31 U.S.C. § 1321(a) Congress has classified as trust funds:

(20) Indian moneys, proceeds of labor, agencies, schools, and so forth.

. . .

(66) Funds contributed for Indian projects.

(67) Miscellaneous trust funds of Indian tribes.

69. Congress has also decreed that amounts that "are received by the United States Government as trustee shall be deposited in an appropriate trust fund account in the Treasury. Except as provided in paragraph (2), amounts accruing to these funds are appropriated to be disbursed in compliance with the terms of the trust."[50]

70. Further, under 25 U.S.C. § 162a the Government has the statutory trust obligation to timely and accurately account to the Tribe for the trust funds the Government holds on behalf of the Tribe:

> (d) Trust responsibilities of Secretary of the Interior
>
> The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:
>
> (1) Providing adequate systems for accounting for and reporting trust fund balances.
>
> (2) Providing adequate controls over receipts and disbursements.
>
> (3) Providing periodic, timely reconciliations to assure the accuracy of accounts.
>
> (4) Determining accurate cash balances.

[50] 31 U.S.C. § 1321(b)(1).

(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

71. The Government also has a statutory fiduciary duty under 25 U.S.C. § 161a to properly invest the Tribe's trust funds:

> All funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of Indian tribes shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities with maturities suitable to the needs of the fund involved, as determined by the Secretary of the Interior, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities.

72. In 1994 Congress reaffirmed the Government's fiduciary responsibilities again by enacting the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103–412, 25 U.S.C. §§ 161a, 162a, 4001–4061 ("ITFMA"). Section 304 of this Act provides that

> [t]he Secretary [of the Interior] shall transmit to the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, by May 31, 1996, a report identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995 . . . .[51]

73. Yet the Government has never paid or accounted for a substantial portion of the funds appropriated by Congress and held by the Treasury Department for the Quapaw, arising out of a decision of the Indian Claims Commission that was affirmed by the Court of

[51] Pub. L. No. 103-412 (1994) (codified at 25 U.S.C. § 4044).

Claims in 1954. In that decision the Indian Claims Commission determined that "the amount paid by the Government to the [Quapaw] tribe for its lands sold to the Government by the treaty of November 15, 1824, 7 Stat. 232, was grossly inadequate within the meaning of clause (3) of Section 2 of the Indian Claims Commission Act,"[52] and "that the tribe was entitled to an award of $987,092 less such offsets, if any, as might be allowable."[53] Specifically, "[t]he Commission found that the Indians received, under this treaty, $28,037 for 1,161,284.75 acres of the reservation acquired by the Government, or 2.4 cents per acre, whereas the true value of this land in 1824 was 85 cents per acre."[54] After offsets the net award affirmed to the Quapaw Tribe was $927,668.04.

74. The Quapaw Analysis states that "[a]s of June 30, 1960, following payment of attorney fees and expenses, records show $820,024.46 in Quapaw Tribal Funds were sitting in Treasury account 14X7156 with an additional $170,668.47 in account 14X7656 (Interest and Accruals on Interest-Awards of Indian Claims Commission)" and that "[a]s of July 16, 1962, the total balance of funds to be distributed was $1,029,599.88."[55]

75. The Quapaw Analysis further states: "The Project Team has found no documentation that all of these funds were distributed and estimates that 25% of the funds

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[52] *Quapaw Tribe of Indians v. United States*, 120 F. Supp. 283, 286 (Ct. Cl. 1954).
[53] *Id.*
[54] *Id.*
[55] The Quapaw Analysis at 103.

were never distributed. Funds not distributed to individual tribal members were to be transferred directly to the Tribe, and there is no record that this happened."[56]

76. As a direct and proximate result of the Government's breach of trust with respect to amounts due but never paid to the Quapaw Tribe under the Court of Claims 1954 judgment, the Quapaw Tribe is entitled to damages in the amount of $5,211,494 as more fully set forth in the Quapaw Analysis, which is hereby incorporated by reference, together with interest thereon until paid.

SIXTH CAUSE OF ACTION
(Breach of trust: polluting soil and water, rendering them unsuitable for agricultural use, fishing and hunting)

77. The Government's actions and policies regarding mining, waste disposal, town construction, and rights-of-way (among others) have destroyed the Quapaws' use of their homelands for traditional activities such as agriculture, hunting and fishing—all in violation of the Government's fiduciary duty of trust to preserve and protect Quapaw trust and restricted lands under the Government's control and supervision.

78. Historically, the Quapaw Tribal lands were fertile prairie. Accounts from early records talk about prolific wildlife inhabiting prairie and woodland ecosystems. Evidence from photographs and reports show hay was grown on these lands. One report by the U.S. Geological Survey found in the Tar Creek Superfund Task Force Report states that this area

[56] The Quapaw Analysis at 103.

was the "Hay capital of the world." Hay was routinely exported from the site by rail, and at the turn of the century, the Picher area was the nation's leading exporter of native hay.[57]

79. In addition, the Quapaw Nation adapted to agriculture after settling on the reservation land in the early 1800s. Historical reports from the Commissioner of Indian Affairs illustrate the rich fertility of the land and the Quapaw's success with producing many agricultural crops:

> "The Quapaw possess a most beautiful country, about one-half of which is prairie, and nearly all in a body; the remainder is generally good land, and well-timbered, with very pure water."
>
> "I am of the opinion that the lands owned by these three tribes (Quapaw, Seneca, Shawnees) are as valuable as any, in their original state, I have ever met with. The climate is good and healthy, the water is superior, the lands are as rich as they can well be, with an ample supply of timber for building, fencing, and fire wood, and at the same time high and rolling, affording grazing grounds for immense herds of cattle."
>
> "There are also three fine large rivers – the Cowskin, the Neosho, and the Pomme de Terre [Spring River]. The rivers can be navigated the greater part of the year by flat-bottomed boats. The Indians of all those tribes are healthy, well-satisfied with their country, and seem to be fast approaching to contentment and happiness; and would, if left alone by unprincipled white men, who are incessantly intriguing with them and frequently against the agent, . . . would advance in the blessings of civilization much more rapidly." (Report of Commissioner of Indian Affairs, 1844.)[58]

80. The Quapaw also raised abundant livestock:

> "Their country is well-adapted to the growing of stock. The summer range is almost inexhaustible, and in winter the creek and river bottoms afford grass and pea vine sufficient to winter their out-houses and cattle. *Many of them cut and cure a large amount of prairie grass, which makes good hay*, and assists

[57] The Quapaw Analysis at 118.
[58] The Quapaw Analysis at 108–109.

them greatly in wintering their stock." (Report of Commissioner of Indian Affairs: Neosho Agency, 1851.)[59]

81. They were also skilled hunters of the game that flourished on Quapaw lands:

> Deer, small game, turkey, ducks, and geese were plentiful throughout the 1800's and important to the Quapaw diet. Fishing and use of aquatic species provided a significant portion of the Quapaw diet. From 1830-65, the Quapaw continued to make annual trips to kill buffalo and hunted the adjacent woodlands for bear, deer, beaver, and raccoon.[60]

82. The Government's fiduciary duty of trust with respect to these Quapaw trust lands and natural resources, which were at all relevant times under the Government's control, is confirmed by statutes and regulations including 25 U.S.C. § 162a, which states, in relevant part, that the proper discharge of the Secretary of the Interior's trust responsibilities to Indian tribes includes "[a]ppropriately managing the natural resources located within the boundaries of Indian reservations and trust lands."[61]

83. The Government's own regulations, including (but not limited to) 25 C.F.R. part 162, and 25 C.F.R. part 212, further require the Secretary to ensure that the Quapaw lands and natural resources are managed in a manner that maximizes their best economic interests and minimizes any adverse environmental impacts resulting from mineral development and other activities. These regulations are intended to ensure that the Quapaw's lands and natural resources are used and preserved in a manner that maximizes their best

[59] The Quapaw Analysis at 109.
[60] The Quapaw Analysis at 110.
[61] 25 U.S.C. § 162a(d)(8).

economic interests and minimizes any adverse environmental impacts or cultural impacts resulting from development.

84. In addition, under the Indian Long-Term Leasing Act, 25 U.S.C. § 415, and corresponding federal regulations, the Government has ultimate management and control over all aspects of the leasing of Quapaw trust and restricted lands. The Secretary of the Interior determines whether to consent to a lease and the terms of the lease; performs any and all acts "necessary to carry the statute" into full force and effect; and, makes all rules and regulations as may be necessary to carry out the legislation.[62]

85. In violation of its fiduciary duty of trust in managing and controlling Quapaw lands, as the Quapaw Analysis states, the Government's "[m]ismanagement of mining operations turned much of the prime farm land into a desolate wasteland, now laden with heavy metals."[63] In addition, "[t]he Quapaw trust and restricted Indian lands contained in the individual and Tribal allotments studied in this Project have been damaged and depleted by mining policies and practices. As a result, much of the land is now covered in toxic chat. In addition to the negative impacts of mining, these lands have also been poorly managed, and underutilized as productive agricultural assets. With proper management these lands could have been much more financially beneficial to their Indian owners, the same Indian owners whom the DOI and BIA are entrusted with serving. Historical research demonstrates the

[62] *See, e.g.*, 25 C.F.R. parts 162, 166.
[63] The Quapaw Analysis at 133.

Quapaw Tribe's ability to operate farms and establishes that prior to mining this land was considered prime farm land with high crop potential."[64]

86. In addition, as a result of the Government's actions, much of the Quapaw's land has been turned into a moonscape incapable of supporting wildlife:

> Quapaw Trust Lands are significantly contaminated with mining and milling wastes. The ground water, surface water and riparian areas adjacent to and downstream from, and hydrologically connected to mining areas of operation are significantly contaminated with toxins, including heavy metals, chat and mining waste. Forested areas and other vegetation in the areas are decimated or significantly stunted as a result of contamination. Wildlife habitats have been destroyed or significantly degraded. Most areas cannot support wildlife.[65]

87. Further, as the Quapaw Analysis states: "Ottawa County [where the Quapaw lands are located] was once known as the 'Hay Capital of the World.' *In the late 1800's* (after destruction of the Buffalo herds), *hay was the chief income for Indian people in the area*, before statehood." But today "[i]n the mining district, hay production is limited. We are concerned about the possible lead and cadmium content of hay and grain crops grown in the area. Both cattle and wild game feed on these crops, also. We are also concerned about the safety of agricultural products grown for direct human consumption, as well."[66]

88. In addition, as the Governor's Tar Creek Task Force reports, "[t]oday, hunting and fishing is suppressed due in large part to self-regulation in response to knowledge of contamination:

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[64] The Quapaw Analysis at 108.
[65] The Quapaw Analysis at 110.
[66] The Quapaw Analysis at 109 (*quoting* Governor Frank Keating's Tar Creek Superfund Task Force, Final Report of the Native American Issues Subcommittee).

> 'Game: squirrel, rabbit, deer, duck, geese, quail, and turkey. These are the most commonly hunted game in the area. Tribal members report greatly diminished populations in the mining district area. We don't know the lead content of game flesh. Even in the parts of Beaver creek and Spring River which are out of direct mining impacts, game drinking the water and feeding on the animal, aquatic life and plants along the streams could be impacted. As with fish, if lead is stored in the bone, what is the impact of consuming game cooked whole?'"[67]

89. The health of the Quapaw people is also adversely affected by the Government's breach of its fiduciary duties owed to the Quapaw: "The widespread nature of soil and water contamination in Ottawa County demonstrates that wildlife is being exposed to metals on a wide scale. Although this bears obvious significance for the health of biological communities in general, a more specific concern relates to the effects on the health of people who gather and consume wild foods."[68]

90. The breaches of trust by the Government toward the Quapaw with respect to the management of Tribal and individual Tribal members' lands have resulted in an ongoing impediment to the Tribe's exercise of sovereignty and self-governance. Much of the land within the Tribe's jurisdictional area lies within the boundaries of the Tar Creek Superfund Site. Contrary to federal regulations and policies, the Secretary has arbitrarily refused to permit the Tribal government to acquire fractionated interests in such lands for reasons not justified in law. The Tribe therefore has been hindered by having an inadequate Indian land

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[67] The Quapaw Analysis at 110 (*quoting* Governor Frank Keating's Tar Creek Superfund Task Force, Final Report of the Native American Issues Subcommittee).
[68] The Quapaw Analysis at 114 (*quoting* Governor Frank Keating's Tar Creek Superfund Task Force, Final Report of the Native American Issues Subcommittee).

base and has been deprived of economic development initiatives due to the stigma associated with the Superfund site.

91. As a direct and proximate result of the Government's actions, the Quapaw have been damaged in the sum of $84,123,013 in agricultural enterprise losses together with interest thereon, as more fully described in the Quapaw Analysis, which is incorporated by reference, and in an amount as yet unascertained for damage done to their hunting, fishing and other rights, to be proved at trial.

SEVENTH CAUSE OF ACTION:
(Failure to make treaty payment of $1,000 per year)

92. Although the Government entered into a legally binding treaty with the Quapaw Tribe in 1833 under which, in return for the Quapaw's relinquishment of certain land claims, the United States would pay the Tribe annually the sum of $1,000, since at least 1932 the Government has failed to make this annual payment. This failure constitutes a breach of the Government's fiduciary duty of trust owed to the Quapaw Tribe, as well as a breach of the implied duty of good faith and fair dealing inherent in the 1833 treaty.[69]

93. The preamble to the treaty of May 13, 1833, between the Quapaw Indians and the United States[70] relates the circumstances leading up to the negotiation of this treaty. In accordance with their promise in the 1824 treaty, the Quapaws removed to the Caddo district and settled on land given them by the Caddo on the Bayou Treache on the south side of the

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[69] See United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Rebecca Tsosie, Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights, 47 U.C.L.A. L. Rev. 1615, 1620 (2000).
[70] 7 Stat. 424 (May 13, 1833).

Red River; that the land was found to be subject to frequent inundations so that the Quapaw crops were destroyed; that the country was unhealthy and many of the Quapaws died as a result; that since the Quapaws could obtain no substitute land from the Caddos who refused to take them into their tribe, the Quapaws had "no alternative but to perish if they continued there, or to return to their old residence on the Arkansas;" that upon returning to their old residence on the Arkansas, "they now find themselves very unhappily situated in consequence of having their little improvements taken from them by the settlers of the country; and being anxious to secure a permanent and peaceable home the following articles or treaty are agreed upon between the United States and the Quapaw Indians . . . ."[71]

94. The treaty thus provided for the cession by the Quapaws to the United States of whatever right and title and interest they had to the lands "given them by the Caddo Indians on the Bayou Treache of Red River."[72] Article II provided that the United States would convey to the Quapaws one hundred and fifty sections of land west of Missouri between the lands of the Senecas and Shawnees, to be selected for them by the Commissioners of Indian Affairs West. In Article III the United States agreed, "in consideration of the important and extensive cessions of lands made by the Quapaws to the United States and in view of their present impoverished and wretched condition," that the Quapaws should be moved to their new homes at the expense of the United States and would be supplied with one year's

[71] 7 Stat. 424.
[72] *Id.*

provision from the time of their removal.[73] In the same article the Government agreed to furnish cows and other farm animals, as well as farm implements, blankets, rifles, etc., and to provide a farmer for their instruction, a blacksmith, and blacksmith shop. The Government also agreed to appropriate a thousand dollars a year for the tribe's education.

95. The Quapaw Analysis states: "[T]he Treaty of 1833 provided for $1,000 per year to be allocated to the Tribe for educational purposes. From 1932 onward no record can be found of this payment being received, nor is there any record stating that the President no longer deemed this appropriation necessary. Since no records have been produced to the contrary, the Project Team concludes the Tribe was, and still is, due this amount annually."[74]

96. As a direct and proximate result of the Government's breach of its treaty obligations, its fiduciary duty of trust, and its duty of good faith and fair dealing, the Quapaw have been damaged in the sum of $2,428,5335 as more fully described in the Quapaw Analysis, which is incorporated herein by reference, together with interest thereon until paid.

PRAYER FOR RELIEF

Plaintiff, the Quapaw Tribe or the O-Gah-Pah and the individual Quapaw Tribal members and the class they represent, pray for relief as follows:

1. That this Hearing Officer issue a report containing findings of fact and conclusions of law that are sufficient to inform Congress of the nature, extent, and character of the Indian-trust related claims of the Quapaw Tribe of Oklahoma and its tribal members,

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[73] 7 Stat. 424.
[74] The Quapaw Analysis at 103.

and that the claimants are legally or equitably due from the United States an amount as yet unascertained, according to proof at trial, but estimated to be in excess of approximately $175 million;

2. Attorneys' fees, expert witness fees, and other incurred costs and disbursements; and

3. Further relief as this Court may deem just and appropriate.

Respectfully submitted,

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Dated: March 25, 2013

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