IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96cv01285(JR)
	)	
DIRK KEMPTHORNE,	)	
Secretary of the Interior, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' FILING OF RESPONDING EXPERT REPORT OF EDWARD ANGEL, PURSUANT TO RULE 26(a)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants hereby file and attach hereto the Responding Expert Report of Edward Angel.

Dated: September, 17, 2007.

Respectfully submitted,
PETER D. KEISLER
Assistant Attorney General
MICHAEL F. HERTZ
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

/s/ Robert E. Kirschman, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that, on September 17, 2007 the foregoing *Defendants' Filing of Responding Expert Report of Edward Angel, Pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
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/s/ Kevin P. Kingston
Kevin P. Kingston

MorganAngel

ASSOCIATES, LLC

Rebuttal Report of

Edward Angel, Ph.D.

In

October 2007 Trial

Cobell v. Kempthorne

September 14, 2007

Rebuttal Report of Edward Angel

Introduction

Beginning in 1997, the United States Department of Justice engaged me and other members of Morgan, Angel & Associates, LLC, to prepare historical reports concerning various issues relating to the historical disposition of individual Indian moneys. In September 2007, the Justice Department asked me to review the reports of Mr. Richard E. Fasold and Mr. Paul M. Homan in the matter of *Cobell v. Kempthorne*. Specifically, I was asked to address their contentions concerning the volume and accessibility of historical records at National Archives and Records Administration facilities that could be used in an historical accounting of individual Indian moneys.

In Mr. Fasold's report dated August 17, 2007, he states that he was not instructed to update the computer model that he submitted to the court in 2003. In his 2003 report, Mr. Fasold stated that he had been asked to "set forth a proposed methodology to determine the revenues derived from individual Indian trust lands and other individual Indian trust monies from 1887 to the present without relying on information generated by the Department of Interior, to the extent possible."[1] Mr. Homan's report dated August 17, 2007, asserts that a large volume of Federal records necessary to accomplish an historical accounting are missing, lost, destroyed, or not retrievable from Government facilities. This statement also reflects Mr. Homan's report and testimony in the Cobell 1.5 trial.[2]

As a professional historian, I disagree with Mr. Fasold and Mr. Homan's contentions. As a professional historian, I believe that the existing historical record must be used whenever possible. In this regard, I stand by my report and testimony in 2003, supporting the Office of Historical Trust Accounting's proposal to use historical documents in its effort to account for individual Indian moneys. Indeed, as I have continued my research since the *Cobell 1.5* trial in 2003, I have found that a greater volume of potentially useful records exists than I originally anticipated, especially records related to the production of and payment for minerals on allotted lands.

Summary

The purpose of this report is to rebut plaintiffs' contention concerning the quantity of Federal records that would be potentially relevant for an historical accounting of individual Indian money. In the course of my research at various branches of the National Archives, I have examined records relating to individual Indian trust funds, including, but not limited to, Indian allotments, leases, financial transactions, payments to individual Indians, the investment of individual Indian moneys, the production and value of resources on individual Indian lands, and audits of individual Indian moneys among other documents.

As a result of my research, I have developed the following opinions:

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[1] Richard E. Fasold, "Expert Report of Richard E. Fasold in Trial 1.5 of *Cobell v. Norton*," February 28, 2003, p.1.

[2] Paul M. Homan, "Expert Report of Paul M. Homan in the matter of: Cobell v. Kempthorne," August 17, 2007, p. 1.

- Records of the Bureau of Indian Affairs, the General Accounting Office, and the Treasury Department at the National Archives contain documentation that would be useful to accountants performing an historical accounting of individual Indian moneys. These records are well organized and retrievable using National Archives finding aids.
- Records of the United States Geological Survey and the Minerals Management Service would be useful to accountants performing an historical accounting of individual Indian moneys because they contain documents pertaining to the production of minerals on individual Indian lands and payment to individual Indians for those minerals. These records are well organized and retrievable using National Archives finding aids.
- The maintenance and organization of Indian trust records has improved since the 1980s. The Bureau of Indian Affairs has adopted rules to insure the preservation of Indian trust documents. Materials from Bureau of Indian Affairs agencies and regional offices in the American Indian Records Repository have been inventoried, and the Interior Department has made a strong effort to preserve these records in a secure setting.

This report focuses on records that are located at branches of the National Archives and Records Administration (NARA) throughout the United States. Records that are in the National Archives are part of the public domain of the United States, and, as such, are open to public review. Records that are in a Federal Records Center, or FRC, are also part of the NARA system. Records maintained in FRCs, however, remain in the custody of the agency that has created them and require permission from that agency to review its records. This report will review the location of Federal records in the NARA system that could provide the greatest documentation for an historical accounting of individual Indian moneys.

Significant changes in the location and management of records have occurred since my testimony in the *Cobell* 1.5 trial. Most importantly, Bureau of Indian Affairs (BIA) records and records of the Office of the Special Trustee (OST) that had been at the Federal Records Center of the Central Plains Region of the National Archives in Lee's Summit, Missouri, and the Office of Trust Records in Albuquerque, New Mexico, have been relocated to the American Indian Records Repository (AIRR) in Lenexa, Kansas. Moreover, since 2003, thousands of boxes have been sent from BIA agencies and regional offices to the facility in Lenexa. These records have been fully inventoried in a searchable electronic database known as the Box Inventory Search System.

A second significant change in the location of records potentially relevant for an historical accounting of individual Indian funds involves records of the former Indian Trust Accounting Division (ITAD). ITAD had been responsible for preparing accounting reports for cases in which Indian tribes sued the United States Government. As such, ITAD's records provide a rich source for a wide variety of Indian trust accounting and trust asset documents. ITAD was terminated in 2006, and approximately 17,000 feet of ITAD records have been inventoried and transmitted to the AIRR or to branches of the National Archives.

Records of the Bureau of Indian Affairs at the National Archives

Records of the Bureau of Indian Affairs constitute the single most important source of documentation necessary for an historical accounting of individual Indian moneys (IIM). NARA holds a total of 67,392.1 cubic feet of records that are located at 12 branches of the National Archives throughout the United States.[3] The records begin in the late 1700s and continue to the 1990s, although the strength of the collection ends by the early 1970s. For the most part, more recent records are at the AIRR or remain at the BIA agency or regional office. In my experience a wide variety of Indian trust fund and Indian trust asset records exist in these records, including individual Indian money account ledgers, leases, allotment records, probate and heirship records, documents recording various types of financial transactions that produced income for individual Indians, audits of individual Indian moneys, and materials relating to the receipt and disbursement of judgment and per capita funds for individual Indians.

There are three principal inventories or finding aids that assist a researcher in his efforts to navigate the more than 12.75 miles of BIA records to determine records that may useful to an historical accounting.[4] A review of the finding aids combined with my research experience and the research experience of other members of Morgan Angel leads me to estimate that at least one-half of the 67,392.1 cubic feet of records either predate 1938 or are not useful to an historical accounting because they relate to issues unrelated to either individual Indian trust assets or an accounting of IIM.

The National Archives also holds an extensive collection of BIA records on microfilm, which totals about 5,129 rolls in 172 collections.[5] A review of the 172 collections shows that approximately 1,157 rolls of microfilm could be useful to an historical accounting of IIM since 1938, because they contain probate, census, payment, or trust fund documents that potentially could assist accountants in an historical accounting of IIM.[6]

Records of the General Accounting Office

Records of the General Accounting Office (GAO) contain documents that would be useful for an historical accounting of Indian trust funds. The GAO was established by the Budget and Accounting Act of 1921.[7] Among other duties, the GAO reviewed Indian agent account packages, which included documentation relevant to IIM.

A review of the National Archives finding aids for GAO records indicates that the National Archives at College Park, Maryland, holds 14,000 cubic feet of GAO records relating to Indian affairs. The largest portion of the GAO records is settled Indian agent

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[3] National Archives, "Statistical Summary of Holdings," http://www.archives.gov/research/guide-fed-records/index-numeric/001-to-100.html#RG075, viewed 8/8/2007.

[4] See Edward E. Hill, comp., Preliminary Inventory Number 163, Records of the Bureau of Indian Affairs, 2 Vols., (Washington, DC: The National Archives, 1965), this inventory is currently being updated by the National Archives; Edward E. Hill, Guide to Records in the National Archives of the United States Relating to American Indians (Washington, DC: The National Archives, 1981); and National Archives, "Records of the Bureau of Indian Affairs (BIA), http://www.archives.gov/research/guide-fed-records/groups/075.html, viewed 8/8/2007.

[5] National Archives, "Microfilm Catalog Order Online," http://www.archives.gov/research/order/orderonline.html?microfilm, viewed 8/8/2007.

[6] National Archives, "Welcome to Order Online," https://eservices.archives.gov/orderonline/start.swe, viewed 8/8/2007.

[7] 42 Stat. 20, 6/10/1921. The General Accounting Office is now called the General Accountability Office.

account packages, which include receipt and disbursement documentation for individual Indian moneys on an agency-by-agency basis. For example, NARA holds one set of records containing more than 8,315 boxes (more than 8,400 cubic feet) of settled account packages for the period 1936 through 1951.[8]

In addition to the settled account packages, GAO records contain original contracts made by accountable officers of the United States Government, including leases made by Indian agents on behalf of individual Indians. In this regard, the GAO has retained about 690 boxes of original BIA contracts at the FRC in Chicago, Illinois.

GAO records in the National Archives system contain documents that would assist the historical accounting of Indian trust funds. In this regard, the strength of the GAO records encompasses the period 1936 to the early 1950s, and includes leases and financial documents relating to individual Indians.

Records of the Treasury Department

Prior to the establishment of the GAO in 1921, the Treasury Department received Indian agent account packages. In addition, original copies of all contracts made by Indian agents were sent to the Treasury Department. The Budget and Accounting Act of 1921 transferred both functions to the GAO.

Morgan Angel reviewed finding aids at NARA for Treasury Department records pertaining to Indian agent account packages. Viewing the period 1890 to 1921, for example, NARA holds approximately 29,676 Indian agent account packages containing financial records pertaining to Native Americans that could assist accountants engaged in an historical accounting of IIM. In addition, Morgan Angel has reviewed Treasury records at the Washington National Records Center in Suitland, Maryland. Although some records of the Bureau of Accounts and the Financial Management Service contain Indian trust financial records, such as documents relating to the investment of individual Indian moneys, these records appear to constitute a small percentage of the total volume and are frequently interspersed with tribal records. We have not been able to develop an estimate for Treasury Department records at the Washington National Records Center that contain documents relevant to an historical accounting for individual Indians after the early 1920s.

Records of the United States Geological Survey and Minerals Management Service

Records of the United States Geological Survey (USGS) and the Minerals Management Service (MMS) are especially important to an historical accounting for the production of oil and gas on Indian trust lands as well as payments for those commodities. Both agencies are part of the Department of the Interior and each has compiled data on mineral resources, including individual Indian lands. As such, the records of each agency contain documents that would be useful for an historical accounting of IIM.

Because oil and gas leases and solid mineral leases often encompass both tribal and allotted Indian land, it is not possible to segregate records pertaining to individual

[8] National Archives, "Record Group 411, Records of the General Accounting Office (GAO), Records of the Indian Tribal Claims Branch (Indian Trust Accounts), 14,000 cubic feet." Other series in Record Group 411 contain settled account packages for the period prior to 1936.

allottees from records pertaining solely to tribal lands without looking at the specific document.

Records of the USGS Conservation Division are located at the National Archives in College Park, Maryland, and encompass the period 1906 to 1980. A review of the NARA finding aid indicates that there are approximately 250 feet of USGS Conservation Division records and approximately 165 volumes of monthly statistical reports that are potentially responsive to an historical accounting for IIM, although some of these records predate 1938. As noted above, however, information concerning tribal assets and tribal funds will be interspersed with information about IIM.

Following the creation of the Minerals Management Service (MMS) in 1982, most of the Conservation Division records that had been located in Federal Records Centers were transferred to the custody of the MMS. According to NARA, there are approximately 110 cubic feet of MMS records at the National Archives branches in College Park, Maryland, and Laguna Niguel, California. These holdings include records of the royalty management program during the late 1970s and early 1980s.[9] A far greater volume of MMS and USGS Conservation Division records are held at the Federal Records Centers located in Denver, Colorado, and in Fort Worth, Texas.

A review of NARA finding aids indicates that as of early 2007, there was a total of 13,492 cubic feet of MMS and USGS boxes at the FRC in Denver, Colorado. The finding aids indicate that approximately 6,610 cubic feet of these boxes contain documents relevant to the production of oil and gas or solid mineral resources on tribal and individual Indian trust lands beginning in the late 1930s. Our experience, however, indicates that the majority of the records are for the period after 1950. The FRC in Fort Worth, Texas holds about 9,246 feet of MMS and USGS records, of which we estimate approximately 4,495 feet contain documents relevant to the production of oil and gas or solid mineral resources on tribal and individual Indian trust lands.

Many of the records at the two FRCs contain royalty information and production data relating to minerals leases on Indian lands from 1938 to the early years of this century. Because of the nature of oil and gas and solids minerals leasing, many of the records contain production and leasing data for both tribal and allotted lands. Within individual production and accounting documents, however, information concerning allotted lands is often maintained separately from tribal data.

The Minerals Management Service at the Denver Federal Center in Colorado maintains numerous cabinets filled with microform copies of electronic reports pertaining to production and payment information. Many of these records could be of use to an historical accounting of IIM. For example, MMS report AIN 330 is a financial distribution report containing payment information for producing oil and gas leases on allotted lands.

Disposition of Records

In my expert report and testimony at the Cobell 1.5 trial, I discussed the historical disposition of Indian trust fund records. This testimony was based largely on a draft

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[9] National Archives, "Records of the Minerals Management Service," http://www.archives.gov/research/guide-fed-records/groups/473.html, and http://www.archives.gov/research/guide-fed-records/index-numeric/401-to-500.html#RG473, viewed 9/7/07.

report entitled "Disposition or Disposal? An Investigation into the Historical Disposition of Indian Trust Fund Records," authored by William A. Morgan, who retired in 2000. The Act of February 16, 1889 (25 Stat. 672), "An Act to Authorize and Provide for the Disposition of Useless Papers," established a formal policy for the destruction of Federal papers that Congress believed had no "permanent value or historical interest." Legislation in 1934 created the National Archives of the United States and repealed the Useless Papers Act (48 Stat. 1122). Subsequently, the Archivist of the United States received recommendations from executive departments concerning which records should be destroyed and which should be maintained. The Archivist evaluated them, and then submitted his recommendations for the disposition of agency records to Congress for approval. In 1949 the General Services Administration (GSA) assumed responsibility for records management and disposal. Subsequently, the GSA worked with Federal agencies to develop records disposal schedules. The BIA's disposal schedules were modified in the 1950s and 1960s.[10]

As noted in my earlier expert report, the BIA has been criticized for its records management program, and BIA records have been destroyed as part of its records disposition program or by fire and other forces. The BIA, however, did endeavor to retain financial documents relating to individual Indian moneys. In 1971, for example, the BIA prepared a Field Office Records Retention Plan that included records retroactive to 1926. The Plan defined the types of records at agencies and area offices that were "to be retained permanently (never destroyed)." The records in the Plan were divided into eight categories, one of which directly concerned the retention of documents pertaining to individual Indian moneys. Category 4, "Assisting the Indians, as Trustee, in Making the Most Effective Use of Their Lands and Other Resources," included probate and heirship files, land allotment and assignment records, lease files, individual Indian money ledger cards and IIM status ledgers, and case files of individual Indian money. The latter files constitute a "history of the management of an individual Indian money account, including receipts for money collected, authority for disbursement, copies of purchase order[s], vouchers, royalty and production statements, heirship data, etc."[11]

In 1989 the BIA established Part 16 of the Bureau of Indian Affairs Manual as the "Records and Files Disposition Handbook." Chapter 10 of the Handbook described the "Freeze on Certain BIA Records." Among other records, the disposition handbook cited a freeze on voucher and schedule of payment files, schedule of cancelled check files, IIM deposit ticket files, journal voucher files, special disbursing agent files, audit files and reports, and land lease accounting files.[12] These BIA initiatives were further reinforced by document retention orders issued by the District Court for the District of Columbia. These actions have stabilized the disposition of records necessary for an historical accounting of Indian trust funds.

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[10] See Expert Report of Edward Angel, 2/28/2003, pp. 19-22.

[11] Chief, Management Research Staff, Bureau of Indian Affairs to Area Directors and Central Office Jurisdiction Staff, 8/5/1971 [MA-1650] and Bureau of Indian Affairs, Management Research Staff, "Part II, Retention Plan for Records of the Bureau of Indian Affairs Area Offices and Field Offices After 1926: Identification of Records to be Retained Permanently" [MA-1651], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1967, Accession 73A-1106, box 58, file 3306-1967-103.1.

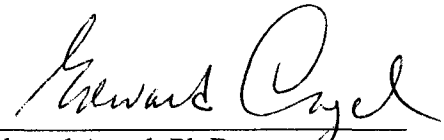
[12] U.S. Department of the Interior, Bureau of Indian Affairs, 16 BIAM, Records and Files Disposition Handbook, 7/12/1989, pp. 10-1 to 10-5.

Conclusion

As a professional historian, I believe that the opinions of Mr. Fasold and Mr. Homan are incorrect concerning the volume, applicability, and availability of historical records useful for an historical accounting of individual Indian moneys.

Records of the BIA remain the single most important source of documents necessary for an accounting of individual Indian moneys since 1938. The National Archives and associated Federal Records Centers, however, also contain records of other agencies that have been involved in the management of individual Indian trust funds. As discussed above, a significant volume of records potentially useful for an historical accounting of individual Indian trust funds since 1938 exist in records of the General Accounting Office, the Treasury Department, the United States Geological Survey, and the Minerals Management Service. There are other Federal records that contain documents relating to assets and funds of individual Indians. In the course of future research, such records may be reviewed. The records cited in this report, however, appear to contain the most useful sources for locating information about individual Indian trust assets or individual Indian moneys.

These records are impressive not only for their volume, which can be measured in miles, but also for their accessibility. The National Archives has created finding aids that assist a researcher to navigate this mass of documentation. As a professional historian, I believe that OHTA is following the correct path by using this large volume of historical records in its effort to provide an historical accounting to individual Indian account holders.



Edward Angel, Ph.D. September 14, 2007

Compliance with Rule 26, Rules of Civil Procedure

A. Compensation

Fees for Morgan, Angel & Associates is this case range from $115.00 per hour to $77 per hour. Edward Angel's rate is $115 per hour. Morgan Angel charges $96.00 for a Senior Associate and $77.00 for an Associate.

B. Testimony and Publications

Appendix A, Resume of Edward Angel, lists testimony during the last four years and publications during the last 10 years.

C. Data or Information Considered by the Witness

Appendix B, list of sources, shows the sources used in the preparation of this report. In addition, I have based my opinions on use of various Federal records at the National Archives since approximately 1977.

Appendix A
Resume of
EDWARD ANGEL
Morgan, Angel & Associates, LLC
ed@morgangel.com

EDUCATION

Doctor of Philosophy, The George Washington University, 1979
Master of Philosophy, The George Washington University, 1977
Bachelor of Arts, University of Maryland, 1968

PROFESSIONAL EXPERIENCE

Morgan, Angel and Associates, LLC, Washington, D. C.
Co-founder and partner, 1981 to present, specializing in public policy research and evaluation, litigation activities, and expert witness reports and testimony, with particular emphasis on American Indian, public land, environmental, and natural resources matters.

EXPERT WITNESS REPORTS AUTHORED SINCE 1997

Irrigation, Drainage, and the Isleta Indian Pueblo, United States Court of Federal Claims, 2003 (co-authored with Frank Wozniak).

Expert Report of Edward Angel. *Elouise Pepion Cobell, et al. v. Gale Norton, Secretary of the Interior, et al.* 2003.

A History of Land and Water Use on the Gila River Indian Reservation. *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source,* 1999.

EXPERT WITNESS TESTIMONY SINCE 1997

U.S. District Court for the District of Columbia, Civ. 96-1285 (RCL), *Elouise Pepion Cobell, et al. v. Gale Norton, Secretary of the Interior, et al.* June 2003.

OTHER ACTIVITIES SINCE 1997

Review, "Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective," *The Public Historian*, Fall 2001.

Speaker, National American Indian Heritage Month, United States Department of the Interior, Washington, D.C., 1997.

PROFESSIONAL MEMBERSHIPS

American Historical Association
Historical Society of Washington, D.C.
National Council on Public History
Society for Historians of American Foreign Relations

Society for History in the Federal Government
Westerners International
Western History Association

ACADEMIC EXPERIENCE

Assistant Professorial Lecturer, The George Washington University
Lecturer in American History, The George Mason University
Lecturer in American History, Trinity College

COURSES TAUGHT

American Indian Policy
United States History Survey
United States Diplomatic History
United States Colonial History
Recent American History

Appendix B
Data or Information Considered by the Witness

42 Stat. 20, 6/10/1921.

Richard E. Fasold, "Expert Report of Richard E. Fasold in October 2007 Trial, *Cobell v. Kempthorne,"* August 17, 2007.

Richard E. Fasold, "Expert Report of Richard E. Fasold in Trial 1.5 of *Cobell v. Norton,"* February 28, 2003.

Paul M. Homan, "Expert Report of Paul M. Homan in the matter of: *Cobell v. Kempthorne,"* August 17, 2007.

Paul M. Homan, "Expert Report (Rebuttal) of Paul M. Homan in Trial 1.5 of *Cobell v. Norton,"* March 30, 2003.

Bureau of Indian Affairs, Management Research Staff, "Part II, Retention Plan for Records of the Bureau of Indian Affairs Area Offices and Field Offices After 1926: Identification of Records to be Retained Permanently," NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1967, Accession 73A-1106, box 58, file 3306-1967-103.1.

Chief, Management Research Staff, Bureau of Indian Affairs to Area Directors and Central Office Jurisdiction Staff, 8/5/1971 [MA-1650].

Edward E. Hill, comp., Preliminary Inventory Number 163, Records of the Bureau of Indian Affairs, 2 Vols., (Washington, DC: The National Archives, 1965), this inventory is currently being updated by the National Archives

Edward E. Hill, Guide to Records in the National Archives of the United States Relating to American Indians (Washington, DC: The National Archives, 1981).

National Archives, "Statistical Summary of Holdings," http://www.archives.gov/research/guide-fed-records/index-numeric/001-to-100.html#RG075.

National Archives, "Microfilm Catalog Order Online," http://www.archives.gov/research/order/orderonline.html?microfilm.

National Archives, "Record Group 411, Records of the General Accounting Office (GAO), Records of the Indian Tribal Claims Branch (Indian Trust Accounts), 14,000 cubic feet."

National Archives, "Records of the Bureau of Indian Affairs (BIA)," http://www.archives.gov/research/guide-fed-records/groups/075.html.

National Archives, "Records of the Minerals Management Service," http://www.archives.gov/research/guide-fed-records/groups/473.html, and http://www.archives.gov/research/guide-fed-records/index-numeric/401-to-500.html#RG473.

U.S. Department of the Interior, Bureau of Indian Affairs, 16 BIAM, Records and Files Disposition Handbook, 7/12/1989, pp. 10-1 to 10-5.