IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	
v.	Case No. 1:96CV01285 (Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	
Defendants.	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE NON-SETTLEMENT OF ACCOUNTS

The Secretary of the Interior, the Assistant Secretary of the Interior - Indian Affairs ("Interior Defendants") and the Secretary of the Treasury (collectively "Defendants") oppose Plaintiffs' Motion For Partial Summary Judgment As To The Non-Settlement Of Accounts And Defendants' Failure To Perform The Accounting, In Whole Or In Part, Ordered By This Court On December 21, 1999 ("Plaintiffs' Motion" or "Plaintiffs' Motion for Partial Summary Judgment") (filed Jan. 31, 2003).

Plaintiffs' Motion for Partial Summary Judgment that the General Accounting Office ("GAO") did not perform settlements of accounts raises an issue that is not discussed in the parties' Court-ordered Historical Accounting and Trust Management Plans and is therefore not before the Court in the Phase 1.5 trial. In addition, since Interior has not decided whether to rely on GAO documents regarding these settlements in doing accountings, the question of whether the GAO performed settlements is, at this time, of purely speculative significance and would call for an advisory opinion. Accordingly, Plaintiffs' Motion should be denied because it fails to

comply with the Court's September 17, 2002 Order permitting the parties to file motions for summary judgment concerning the Phase 1.5 trial and is not ripe for decision.

In the alternative, Plaintiffs' Motion should be denied because there exist genuine issues as to the facts that plaintiffs claim are material, including most importantly, whether there have been settlements of Plaintiffs' accounts. As detailed below, as well as in the attached Defendants' Statement Of Genuine Issues With Regard To Plaintiffs' Motion For Partial Summary Judgment ("Defendants' Statement Of Genuine Issues") (filed Feb. 14, 2003), there is a great deal of evidence that contradicts Plaintiffs' assertion that there have been no such settlements and that, at a minimum, raises a genuine issue as to this and related material facts. Furthermore, Plaintiffs' effort to deny the Court access to this evidence by manufacturing (yet again) allegations of fraud and arguing that, because of this alleged fraud, the Court must disregard all evidence filed by Defendants in support of their Opposition is based on a shameless misrepresentation of both the facts and the law.

I. Plaintiffs' Motion For Partial Summary Judgment Should Be Denied Because It Fails To Comply With The Court's September 17, 2002 Order And Is Not Ripe For Decision

In its September 17, 2002 opinion, the Court ordered, inter alia, a Phase 1.5 trial, to begin on May 1, 2003, for the purpose of deciding what "further injunctive relief [to grant] with respect to the fixing the system portion of the case and the historical accounting project." Cobell v. Norton, 226 F. Supp. 2d 1, 148 (D.D.C. 2002). In so ordering, the Court further directed Interior Defendants to file, by January 6, 2003, "a plan for conducting a historical accounting of the IIM trust accounts" and "a plan for bringing themselves into compliance with the fiduciary

obligations that they owe to the IIM trust beneficiaries."[1] Id. In addition, the Court afforded Plaintiffs the opportunity "to file any plan or plans of their own regarding the aforementioned matters" and ruled that "[t]he parties shall file any summary judgment motions with respect to the Phase 1.5 trial no later than January 31, 2002." Id. at 149.

On January 6, 2003, both Interior Defendants and Plaintiffs filed plans regarding the historical accounting and trust management. See Interior's Historical Accounting Plan For Individual Indian Money Accounts; Interior's Fiduciary Obligations Compliance Plan; Plaintiffs' Plan For Determining Accurate Balances In The Individual Indian Trust; Plaintiffs' Compliance Action Plan Together With Applicable Trust Standards (collectively "Historical Accounting and Trust Management Plans").

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[1] The Court did not require Treasury to file historical accounting and trust management plans. However, as the Court "grant[ed] leave to the Treasury defendant to make a pertinent submission in this regard," 226 F. Supp. 2d at 149 n.158, Treasury filed a Memorandum and Statement Regarding the Court's September 17, 2002 Opinion and Order, see Notice of Filing (filed Jan. 6, 2003). As set forth therein, Treasury has been reporting on and implementing a plan for remedying the single breach of trust identified by this Court in its December 21, 1999 Opinion–namely, Treasury's destruction of IIM trust materials "after their age exceeded six years and seven months, without regard to the fact that the United States (through its trustee-delegates) has not rendered an accounting of plaintiffs' IIM trust money." 91 F. Supp. 2d at 50. To rectify this breach of trust, the Court ordered Treasury "to create a comprehensive document retention plan that deals with IIM-related trust documents." Id. at 51. Treasury completed such a plan and has reported on its implementation in two "Stipulation progress" reports filed October 6, 1999 and January 6, 2000, and in twelve Quarterly Reports filed beginning March 1, 2000 through December 2, 2002. See Notice of Filing at 1-2. Although Plaintiffs, ever ready with their allegations of fraud, seek to call the veracity of Treasury's "periodic reports to the Court" into question, see Plaintiffs' Motion at 8 n.16, they base their arguments, as always, on rhetoric, rather than fact. The fact is that Plaintiffs have never directly challenged any of the statements made in the Quarterly Reports or any of the documents attached thereto. Furthermore, Treasury's plan for curing the only breach of trust found by this Court, as well as its implementation of that plan, has been a matter of public record for over two years.

Plaintiffs filed their Motion for Partial Summary Judgment on January 31, 2003, in response to the Court's invitation that the parties file any summary judgment motions concerning the Phase 1.5 trial by this date. Plaintiffs' Motion, however, has absolutely nothing to do with the Phase 1.5 trial.

As noted above, the Court ordered the Phase 1.5 trial for the purpose of reviewing Interior Defendants' Historical Accounting and Trust Management Plans, in conjunction with the Plans filed by Plaintiffs. Thus, the focus of the Phase 1.5 trial must be on the content of the parties' respective plans and, in particular, on the question of whether these plans comport with Defendants' obligation to perform an accounting. Plaintiffs' Motion, however, raises an issue that is not part of any of the Plans filed by the parties on January 6, 2003[2]: namely, whether the GAO performed settlements of individual Indian money ("IIM") accounts. Because the parties' Plans do not discuss the GAO settlements, this issue will not be before the Court in the Phase 1.5 trial.[3] And because this issue will not be before the Court in the Phase 1.5 Trial, Plaintiffs'

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[2] Plaintiffs' Historical Accounting Plan cites various GAO Reports for the proposition that IIM accounts may not be reconcilable. See, e.g., Plaintiffs' Historical Accounting Plan, 30, 32-33. Plaintiffs make this argument, however, in the portion of their filing (the first thirty-eight pages) devoted to establishing that an historical accounting is impossible and that the Court must, instead, adopt their plan for calculating what are essentially money damages. See Defendants' Motion For Partial Summary Judgment That Interior's Historical Accounting Plan Comports With Their Obligation To Perform An Accounting And Supporting Memorandum Of Points And Authorities, 31-40 ("Defendants Motion for Partial Summary Judgment Regarding Interior's Historical Accounting Plan) (filed Jan. 31, 2003). In other words, the portion of Plaintiffs' filing that actually sets forth their own plan (the last seventeen pages) nowhere proposes to rely on GAO settlements.

[3] As described in Defendants' Motion for Partial Summary Judgment Regarding Interior's Historical Accounting Plan, Interior Defendants intend to prepare account transaction histories by "collecting relevant and available trust records and using those records to verify the accuracy of the account activity recorded in electronic and paper account ledgers." Defendants' Motion for Partial Summary Judgment Regarding Interior's Historical Accounting Plan 6-7. It

Motion for Partial Summary Judgment that the GAO did not perform such settlements fails to comply with the Court's authorization that the parties may "file any summary judgment motions with respect to the Phase 1.5 trial." 226 F. Supp. 2d at 149. Furthermore, because it is entirely speculative at this time whether, in performing the accounting, Interior will rely on any GAO documents regarding these settlements, the issue of whether GAO settled accounts and of the proper use to be made of documents concerning such settlements is not ripe for decision. In other words, such a decision would be purely advisory.[4] Accordingly, Plaintiffs' Motion for Partial Summary Judgment should be denied.

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is, of course, possible that as Interior Defendants collect more of the "relevant and available trust records" and gain more experience using these to verify the accuracy of IIM accounts, they may determine that GAO records regarding the settlement of Indian disbursing agents accounts are of some use in this process of verification. Such use of GAO records would be reviewable by this Court when Interior Defendants actually complete any final accountings that draw on these records.

[4] Defendants filed a motion for partial summary judgment based on the GAO settlements on September 19, 2000. See Defendants' Third Phase II Motion For Partial Summary Judgment (Re: Settlement Of Accounts By Treasury And GAO) (filed Sept. 19, 2000). However, as Plaintiffs are well aware, Defendants moved to withdraw this motion on February 1, 2002, see Defendants' Motion To Withdraw Three Motions For Partial Summary Judgment ("Motion to Withdraw") (filed Feb. 1, 2002), and the Court granted the Motion to Withdraw, see Order of Mar. 11, 2002. Once the Court granted Defendants' Motion to Withdraw, the question of whether GAO performed settlements ceased to be a pending issue. Thus, the fact that Defendants initially filed a motion for partial summary judgment based on the GAO settlements does not make this issue ripe for decision. In contrast, Defendants' Motion For Partial Summary Judgment Regarding Statute Of Limitations and Laches (filed Jan. 31, 2003) is ripe for decision because the applicability of the statute of limitations and laches is a purely legal question that is at issue whenever, as here, a statutory claim is asserted. See also Defendants' Corrected Motion For Partial Summary Judgment Regarding Statute Of Limitations and Laches (filed Feb. 3, 2003).

II. Even If The Court Does Not Deny Plaintiffs' Motion For Partial Summary Judgment On The Ground That It Fails To Comply With The Court's September 17, 2002 Order and Is Not Ripe, The Court Should Deny The Motion On The Ground That Genuine Issues Of Material Fact Exist

Summary judgment properly lies only where the pleadings, discovery taken, and supporting affidavits, if filed, demonstrate that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Wadley v. Aspillaga, 209 F. Supp. 2d 119, 121 (D.D.C. 2002) (citing Curtin v. United Airlines, Inc., 275 F.3d 88, 93 (D.C. Cir. 2001)). Furthermore, "[a]ll facts must be viewed in the light most favorable to the non-moving party." Wadley, 209 F. Supp. 2d at 121 (citing Breen v. Department of Transp., 282 F.3d 839, 841 (D.C. Cir. 2002)).

Pursuant to Local Civil Rule 56.1, defendants have filed their statement of genuine issues, which demonstrates the existence of triable issues with regard to those facts alleged by plaintiffs to constitute "material" facts for purposes of their motion for partial summary judgment. See Defendants' Statement Of Genuine Issues. Because genuine issues exist as to facts that plaintiffs claim are material, summary judgment cannot be granted.

That genuine issues of material fact exist is evident first and foremost from the fact that Plaintiffs seek partial summary judgment as to a factual matter that is very clearly in dispute–namely, that "there has been no 'settlement' of the accounts of plaintiffs or their predecessors-in-interest." Plaintiffs' Motion at 21. As this claim lies at the heart of Plaintiffs' Motion, and as there is an overwhelming amount of evidence that IIM accounts have been subject over time to a wide array of thorough settlement procedures, Defendants supplement their

Statement Of Genuine Issues by outlining below the history of these procedures from 1817 through 1951 (when Congress directed that the GAO cease settling Indian disbursing agents' accounts). During this long period, two Executive-Branch agencies bore primary responsibility for settling Indian disbursing agents' accounts: first, from 1817-1921, the Department of the Treasury, and second, from 1921-1951, the GAO. Furthermore, as described below, substantial evidence exists that Interior, Treasury, and GAO complied with the settlement procedures as required by law.[5]

A. Treasury

From 1789 until 1871, Congress directed and the Executive Branch implemented a policy of negotiating treaties with Indian tribes in order to resolve conflicts with and obtain lands from the tribes. See 1 Francis Paul Prucha, The Great Father 168-73 (1984) (Exhibit 1). As a result of these treaties, over the decades, the United States began to supervise increasing amounts of tribal trust funds. In 1817, Congress required that "all claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Treasury Department." An Act to Provide for the Prompt Settlement of Public Accounts, ch. 45, § 2, 3 Stat. 366 (Mar. 3, 1817) (Exhibit 2, Tab 1) ("Act of March 3, 1817"). The Act of March 3, 1817 established a number of auditors and comptrollers, each assigned a specific area of supervision. One auditor was assigned to "receive all accounts . . . arising out of Indian affairs, and examine the same, and thereafter certify the balance, and transmit the accounts, with the vouchers and certificate, to the

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[5] At the very least, the following demonstrates genuine issues as to the matters recited in Plaintiffs' Statement of Material Facts. Thus, partial summary judgment is not appropriate.

first comptroller for his decision thereon. . . ." Id. § 4. A comptroller had the "duty . . . to examine all accounts settled by the [auditor in charge of accounts arising out of Indian affairs] and certify the balances arising thereon . . . ." Id. § 8.

Secretary of War Calhoun created the Bureau of Indian Affairs ("BIA") by order of March 11, 1824. See Felix S. Cohen, Federal Indian Law 217 (1958) (Exhibit 3). In 1834, Congress formally organized that office into the "Indian Department," which eventually again became the BIA.[6] See Act of June 30, 1834, ch. 162, 4 Stat. 737-38 (Exhibit 2, Tab 2). In the same statute, Congress required BIA to settle its accounts in accordance with the Act of March 3, 1817. Specifically, the statute required that

> all persons whatsoever, charged or trusted with the disbursement or application of money, goods, or effects of any kind, for the benefit of the Indians, shall settle their accounts, annually, at the War Department, on the first day of October; and copies of the same shall be laid, annually, before Congress at the commencement of the ensuing session, by the proper accounting officers; together with a list of the names of all persons to whom money, goods, or effects had been delivered within said year, for the benefit of the Indians, specifying the amount and object for which it was intended, and showing who are delinquents, if any, in forwarding their accounts according to the provisions of this act . . . .

Id. § 13. In addition, Congress authorized the President to "prescribe such rules and regulations as he may think fit, . . . for the settlement of the accounts of the [BIA]." Id. § 17.

In 1849, Congress created the Department of the Interior and placed both BIA and public land matters under the Secretary of the Interior. Act of Mar. 3, 1849, ch. 108, 9 Stat. 395 (Exhibit 2, Tab 3). Congress gave the Secretary supervisory control over Indian affairs, "subject

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[6] The name of the office charged with Indian affairs has changed over the years; for purposes of this brief, the name "BIA" will refer to that office in all its incarnations.

to the same adjustment or control" exercised by the auditors and comptrollers at Treasury pursuant to the Act of March 3, 1817. Id. § 5.

In 1868, Congress amended the Act of March 3, 1817 to address disputes among the executive agencies. Specifically, before 1868 there had been efforts by various executive agencies to challenge or change the balances certified by the auditors and comptrollers in accordance with the Act of March 3, 1817. Congress passed the Act of March 30, 1868, "apparently to settle conclusively that long standing controversy between executive officers and to prevent the interferences of others in the settlement of accounts by the accounting officers." In re Billings, 23 Ct. Cl. 166, 180 (1888). Accordingly, Congress provided that:

> [The Act of March 3, 1817] shall not be construed to authorize the heads of departments to change or modify the balances that may be certified to them by the commissioner of customs or the comptroller of the treasury, but that such balances, when stated by the auditor and properly certified by the comptroller as provided by that act, shall be taken and considered as final and conclusive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts . . . .

Act of Mar. 30, 1868, ch. 36, 15 Stat. 54 (Exhibit 2, Tab 4).

As a result of Congress's focus on relationships between the tribes and the federal government, Interior held relatively few trust funds on behalf of individual Indians before 1871.[7] Beginning in 1871, federal Indian policy shifted from dealing with tribal governments to dealing

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[7] However, Interior apparently held some funds of individual Indians before 1871. For example, in 1862, Congress directed the Secretary of the Interior to "cause settlements to be made with all persons appointed by the Indian councils to receive moneys due to incompetent or orphan Indians, and to require all moneys found to be due to said incompetent or orphan Indians to be returned to the treasury of the United States; and all moneys so returned shall bear an interest at the rate of six per centum per annum, until paid by order of the Secretary of the Interior to those entitled to the same. . . ." Act of July 5, 1862, ch. 135, § 6, 12 Stat. 512, 529 (Exhibit 2, Tab 5).

directly with individual Indians. The allotment of land to individual Indians represented a fundamental aspect of the shifting federal policy. By November 1897, Indians agents were handling increasing amounts of money for individual Indians. Report of the Secretary of the Interior for the Fiscal Year Ended June 30, 1897, at 44-45 (1897) (Exhibit 5,[8] Tab 1). These funds came from a variety of sources, including the sale and lease of allotments. Id. During the early 1900s, agents also began receiving additional funds from other sources. These included distributions of tribal trust funds to individual members of the tribes (commonly known as per capita payments). See, e.g., Report of the Commissioner of Indian Affairs, 70-76 (Sept. 30, 1908) (Exhibit 5, Tab 3); Act of Mar. 2, 1907, ch. 2523, § 1, 34 Stat. 1221 (Exhibit 2, Tab 6). In addition, by at least 1914, Interior employees were receiving funds "voluntarily placed by [individuals] in the hands of the officer for safe-keeping . . . ." Amendment to the Regulations Concerning the Handling of Individual Indian Money, ¶ 11(A) (Jan. 5, 1914) (Exhibit 6, Tab 5).

As noted above, when Congress created Interior, it provided that funds relating to Indian affairs would be accounted for in accordance with the settlement procedures established for all government accounts. Congress continued to provide specific guidance on how books relating to Indian trust funds were to be kept. For instance, in 1875, Congress provided that:

> Each Indian agent shall keep a book of itemized expenditures of every kind, with a record of all contracts, together with the receipts of money from all sources; and the books thus kept shall always be open to inspection; and the said books shall remain in the office at the respective reservations, not to be removed from said

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[8] Exhibits 5, 6, 7 (Tab 1), 8, and 15, among others, were originally filed in Defendants' Third Phase II Motion For Partial Summary Judgment (Re: Settlement Of Accounts By Treasury And GAO) (filed Sept. 19, 2000). Although that Motion was withdrawn per this Court's March 11, 2002 Order, the Court specified that the motion "will remain part of the record in this case." Order of March 11, 2002 at 2.

> reservation by said agent, but shall be safely kept and handed over to his successor; and true transcripts of all entries of every character in said books shall be forwarded quarterly by each agent to the Commissioner of Indian Affairs.[9]

Act of Mar. 3, 1875, ch. 132, § 10, 18 Stat. 420, 450-51 (Exhibit 2, Tab 7).

This requirement was supplemented in 1894, when Congress revised the procedures established in 1817 for keeping and auditing accounts held by government officials. Pursuant to the 1894 Act, the Comptroller of the Treasury "prescribe[d] the forms of keeping and rendering all public accounts, except those relating to the postal revenues and expenditures therefrom." Act of July 31, 1894, ch. 174, § 5, 28 Stat. 162, 206 (Exhibit 2, Tab 9). Treasury's Auditor for Interior was directed to "receive and examine . . . all accounts relating to . . . Indians . . . and to all other business within the jurisdiction of the Department of the Interior, and certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate to the Secretary of the Interior." Id. § 7(3). Once certified by the Auditors, the settlements of the accounts were "final and conclusive upon the Executive Branch," although they could be appealed to the Secretary of the Interior or the Comptroller of the Treasury for up to one year. Id. § 8.

As Interior's Chief Disbursing Clerk reported in 1911:

> Immediately after the passage of the Act [of July 31, 1894], the Secretary of the Interior, delegated to the several Bureau Officers of the Department, authority to make rules and regulations for the proper administrative examination, in their respective offices, of accounts sent to them; and, from that time to the present, all

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[9] In 1909, Congress amended this requirement to "relieve[] disbursing officers from the duty of furnishing transcripts of the cash book to the Indian Office . . . ." Amendment No. 28 to the Regulations of 1904 (Mar. 23, 1909) (Exhibit 6, Tab 3) (discussing Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 784 (Exhibit 2, Tab 8)).

> accounts originating in, or sent to the Indian . . . . Bureau[] have received the required administrative examination, and been sent direct therefrom, to the Auditor for the Interior Department [at the Treasury], for final settlement, without approval, or further supervisory action of the Department.

Letter from Geo. W. Evans, Chief Disbursing Clerk, Interior, to Clement S. Ucker, Chief Clerk, Interior 1-2 (Apr. 29, 1911) (Exhibit 5, Tab 5). The regulations promulgated by Interior provided that "miscellaneous funds" – defined to include individual Indian money – were to be reported on the "account current"[10] and "every expenditure therefrom must be properly authorized and vouched for." Regulations of the Indian Office §§ 455-62 (1894) (Exhibit 6, Tab 1).

Congress supplemented these requirements in 1898, providing that "hereafter Indian agents shall account for all funds coming into their hands as custodians from any source whatever, and be responsible therefor under their official bonds." Act of July 1, 1898, ch. 545, § 1, 30 Stat. 571, 595 (Exhibit 2, Tab 10). Disbursements of funds held by the agent, if not substantiated and approved by Treasury, had to be paid by the disbursing agent unless he obtained relief in the form of a private bill from Congress. Decl. of Frank Sapienza, ¶¶ 8, 19, 56 (Sept. 18, 2000) (Exhibit 7, Tab 2); see Act of July 4, 1884, ch. 180, § 823 Stat. 76, 97-98 (Exhibit 2, Tab 11); see, e.g., Act of May 28, 1926, ch. 427, 44 Stat. 1483 (Exhibit 2, Tab 12) (private bill appropriating funds for the relief of an Indian agent to reimburse individual Indian funds stolen during a burglary at the Nez Perce Indian Agency).

The Comptroller of the Treasury confirmed his understanding that these settlement and bonding procedures applied to individual Indian monies in 1899, stating:

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[10] The "account current" was a document prepared by each disbursing officer that summarized all credits and disbursements for the relevant period. Regulations of the Indian Office §§ 459-60 (1894) (Exhibit 6, Tab 1).

> Our scheme of government includes an accounting system, with proper officers thereof, and it seems reasonable to conclude that when the law provides for an accounting, and makes no special provision therefor, it was the legislative intent that the accounting should be done in the usual manner – that is, by the accounting officers of the Treasury Department.

Accounts of Indian Agents for the Proceeds of Sales of Property Belonging to Indians, 6 Comptroller of the Treasury 281, 283-84 (Sept. 25, 1899) (Exhibit 15, Tab 4).

In 1904, Interior reaffirmed that individual Indian monies were subject to the settlement procedures established by the Act of July 31, 1894:

> When individual Indian moneys . . . are received during the period for which an account is rendered, a schedule thereof must be attached to the account current showing as to each item the source from which received, the date and amount of receipt, and the object for which the money was paid in. Such schedule must be supported by a certificate of the agent as to correctness.

Regulations of the Indian Office Effective April 1, 1904 § 348a (1904) (Exhibit 6, Tab 2). Agents were obligated to render their accounts current on a quarterly basis. Id.

Interior and Treasury reported regular compliance with these requirements. For instance, in 1909, Interior reported:

> Section 12 of the act of July 31, 1894 (28 Stat. L. 209), commonly known as the "Dockery law" requires that quarterly cash accounts of disbursing officers shall be rendered within twenty days after the periods to which they relate; also that they shall be forwarded to and received by the Treasury Department within sixty days of their receipt in the administrative office. It also provides for the waiving of delinquencies in cases of justifiable delay. There were 63 delinquencies on the part of disbursing officers during the year, which, however, were found on investigation to be excusable.

Report of the Commissioner of Indian Affairs 71 (1909) (Exhibit 5, Tab 4).

Initially, individual Indian monies were not paid into the Treasury, but were "accounted for as other funds, and paid, upon proper vouchers, directly to the Indians to whom they belong." Regulations of the Indian Office Effective April 1, 1904 § 301 (1904) (Exhibit 6, Tab 2). Gradually, as the amount of income grew and policies changed, Interior began to hold more money in trust. Accordingly, by 1906, Interior had begun depositing individual Indian monies into private banks. This practice was confirmed in 1908, when Congress authorized the Secretary of the Interior to deposit Indian moneys, "individual or tribal, coming into his hands as custodian in such national bank or banks as he may select." Act of Apr. 30, 1908, ch. 153, 35 Stat. 70, 73 (Exhibit 2, Tab 13); see also Act of June 25, 1910, ch. 431, § 1, 36 Stat. 855, 856 (Exhibit 2, Tab 14). The 1909 Annual Report of the Commissioner of Indian Affairs illustrates that BIA closely tracked the collection and disbursement of individual Indian monies. The Commissioner reported the amount of individual Indian monies on hand at the beginning of the fiscal year ($3,992,379.78); the amount received during the year ($8,991,326.19); the amount disbursed during the fiscal year ($6,468,992.68), and the amount on hand as of June 30, 1909 ($6,514,713.29). See Report of the Commissioner of Indian Affairs, 106-09 (1909) (Exhibit 5, Tab 4). In addition, the Commissioner listed each bank holding individual Indian monies, the amount deposited in that bank as of June 30, 1909, and the amount of bond held by each bank to secure the IIM accounts. See id.

In 1913, Interior promulgated what appears to be the first comprehensive set of regulations governing IIM accounts. See Regulations Concerning the Handling of Individual Indian Money (1913) (Exhibit 6, Tab 4). The regulations confirmed that the IIM accounts were to be settled pursuant to the Act of July 31, 1894. Id. ¶¶ 45-51, 103. Banks that served as

depositories for these accounts were required to render a quarterly statement of each Indian's account.[11] Id. ¶¶ 154. The disbursing officer was required to check and correct the bank's quarterly statement and then forward that statement, along with the paid checks, to the Auditor for the Interior Department at the Treasury Department.[12] Id. ¶¶ 154-58.

In 1917, BIA developed a new accounting system. See U.S. Department of the Interior, Office of Indian Affairs, Accounting System for the United States Indian Service 5, 13-14 (1917) (Exhibit 6, Tab 6). The regulations not only established a double-entry bookkeeping system to ensure greater accuracy in the accounting by BIA, but they also confirmed Interior's practice of submitting the IIM accounts as part of the regular settlement procedure established by the Act of July 31, 1894. The regulations specified that the settlement procedure would encompass all funds held by the disbursing officer, funds held at the local banks to his official credit, and all funds on deposit with the Treasury, as well as interest postings by the local banks. See id. at ¶¶ 156, 169, 205-06. The regulations also established the new "individual account ledgers," which,

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[11] Attachments A and B (filed under seal) to Exhibit 10 are two examples of records showing that Interior received and reviewed quarterly bank statements. Exhibit 10 was filed as an attachment to Defendants' Reply to Plaintiffs' Opposition to Defendants' Third Phase II Motion For Partial Summary Judgment (Re: Settlement Of Accounts By Treasury And GAO) (filed Dec. 6, 2000).

[12] Later regulations for the "Deposit of Indian Funds in Banks" required that original financial documents be sent to the GAO. See 25 C.F.R. § 230.11 (1938), restated in 25 C.F.R. § 105.11 (1958) ("The disbursing officer will make a prompt comparison with his records, and after adjusting any errors found with the bank, the latter will immediately forward the original statement and paid checks directly to the General Accounting Office, Audit Division, Washington, D.C. . . . In no case will the depositary [bank] send the paid checks to the disbursing officer, nor should the statement and checks be sent to or routed through the Bureau . . . .")

in combination with the check registers and journal vouchers, would comprise the official records of activities in IIM accounts. Id. ¶ 190.

Thus, between 1898 and 1920, the Acts of March 3, 1817 and July 31, 1894 governed the settlement of disbursing agents' accounts. Under these acts, disbursing agents handling individual Indian monies would first account for these funds in accordance with regulations promulgated by Interior. The disbursing agents' accounts would then be submitted to Treasury, which would review and settle the accounts. These settlements were "final and conclusive" as to the Executive Branch, unless challenged within a year of settlement. While these procedures were followed eighty to one hundred years ago, substantial records documenting both how the system operated and that it operated effectively are located in the National Archives, Record Group 217. See U.S. National Archives and Records Administration, Guide to Records of the Accounting Officers of the Department of the Treasury (Record Group 217) 1775-1927 (available at http://www.archives.gov/research_room/federal_records_guide/treasury_department_accounting_officers_rg217.html) (Exhibit 4); see also Decl. of Frank Sapienza ¶ 56 (Sept. 18, 2000) (Exhibit 7, Tab 2). Excerpts from a settled account are attached at Exhibit 7, Tab 2, Attachment A (sealed exhibit). The excerpts demonstrate that the Treasury auditors examined each transaction and confirmed that it was supported by the appropriate documentation and properly reflected on the books of the agent. When discrepancies or errors were discovered, they were identified to the agent, who had to correct the discrepancies or errors before the accounts could be settled. See Decl. of Frank Sapienza ¶¶ 9-25, 57 & Attachment A (Sept. 18, 2000) (Exhibit 7, Tab 2) (attachment is sealed).

There is also evidence that the settlement of accounts by Treasury resulted in the review and adjustment of accounts held at private banks for individual Indians. For instance, correspondence between Interior and private banks reveals that the statements of the banks were compared with the records maintained by Interior and corrections noted. See, e.g., Letter from Special Disbursing Agent to First National Bank (Feb. 12, 1918) (Exhibit 10, Attachment B) (sealed exhibit); Letter from Special Disbursing Agent to Citz. St. Bank Lawton, Oklahoma (Exhibit 10, Attachment A) (sealed exhibit).

B. GAO

In 1921, Congress established the GAO. Budget and Accounting Act, ch. 18, §§ 301-18, 42 Stat. 20, 23-27 (June 10, 1921) (Exhibit 2, Tab 15). The Comptroller General immediately assumed the duties of Treasury "relating to keeping the personal ledger accounts of disbursing and collecting officers." Id. § 304. Thus, GAO began receiving and settling the accounts of disbursing officers, including Indian agents. Decl. of Frank Sapienza ¶ 26 (Sept. 18, 2000) (Exhibit 7, Tab 2). As with settlements by Treasury, the "balances certified by the Comptroller General [were] final and conclusive upon the executive branch of the Government." Budget and Accounting Act, ch. 18, § 304, 42 Stat. at 24 (Exhibit 2, Tab 15).

In its 1935 bookkeeping regulations, Interior stated:

> 127. The act of July 1, 1898 (30 Stat., 595), requires that Indian agents shall account for all funds coming into their hands as custodians from any source whatever, and be responsible therefor under their official bonds; and section 5491 of Revised Statutes prescribes a penalty for failure to render accounts as provided by law. These statutes are construed to embrace funds of every nature which are received in their official capacities by superintendents, disbursing agents, and other employees under their supervision. This includes . . . trust funds . . . in which the Government is financially concerned, which are received by officers and/or employees in their official capacities.

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128. Accounts will be rendered monthly and must be mailed or otherwise transmitted to the Indian Office within 10 days after the periods to which they relate. . . .

Department of the Interior, U.S. Indian Field Service Regulations, Section B - Bookkeeping and Accounting ¶¶ 127-28 (1935) (Exhibit 6, Tab 9).

Pursuant to the Budget and Accounting Act of 1921, disbursing agents would prepare their accounts in accordance with the regulations of Interior and submit those accounts to GAO. The accounts were audited for "compliance with the laws, regulations and decisions governing the expenditure of Indian moneys." Annual Report of the Acting Comptroller General of the United States 21 (1938) (Exhibit 8, Tab 14). The disbursing agents' accountings embraced "both collections and disbursements for the account of the individual Indian." Id.; see also Indian Funds, Letter from the Comptroller General of the United States, S. Doc. No. 268, 70th Cong., 2d Sess. 3 (1929) (Exhibit 8, Tab 10) ("The Indian fiscal agents render to the General Accounting Office a monthly accounting for all funds except as hereinafter set forth coming into their possession on account of the Indians. Schedules of collections are supported with copies of official receipts issued for the moneys collected, and all disbursements are supported by vouchers or other documents showing the expenditure to have been properly authorized. These accounts are audited by the General Accounting Office and the balances reported verified.").[13]

Indian agents' accounts were settled in this manner on a routine basis through 1950. Decl. of Frank Sapienza ¶¶ 45-52 (Sept. 18, 2000) (Exhibit 7, Tab 2); see, e.g., Letter from

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[13] GAO noted that "[n]o accounts are required to be kept at the agencies for securities purchased by a superintendent, registered in the name of the individual whose specific funds have been applied to the purchase, even though the securities may be subsequently delivered over to the custody of a superintendent." Id. at 77; see also id. at 79.

Comptroller General to the Secretary of the Interior at 7 (June 13, 1942) (Exhibit 8, Tab 17); Letter from Comptroller General to Secretary of the Interior (June 20, 1927) (Exhibit 8, Tab 5); Letter from Assistant Secretary of the Interior to Comptroller General (Sept. 13, 1927) (Exhibit 8, Tab 6); Letter from Comptroller General to Secretary of the Interior (Oct. 6, 1927) (Exhibit 8, Tab 7). Interior's regulations specifically addressed the settlement of accounts and required that receipts and disbursements of individual Indian monies be subject to the settlement procedure. See U.S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting (1927) (Exhibit 6, Tab 7); see also Decl. of Frank Sapienza ¶¶ 27-52 (Sept. 18, 2000) (Exhibit 7, Tab 2).

The accounts of individual Indians were routinely reviewed and corrected by both Interior and GAO between 1921 and 1951. For example, the account of one of the named plaintiffs was adjusted in 1940 as a result of the settlement of the disbursing agent's account. Specifically, the 1940 Individual Indian Money Statement reveals two credits of specified amounts. The notation next to these two credits indicates that they were made to correct for "Gen Acctg Office Excepn." See Individual Indian Money Statement (Exhibit 10, Attachment C) (sealed exhibit). A corresponding Journal Voucher demonstrates that these adjustments resulted from the settlement procedure, as the Journal Voucher reflects a credit to that individual "of [the sum of the two credits] which was in answer to GAO Exception of Voucher [# omitted]." Journal Voucher (Miscellaneous) (June 19, 1940) (Exhibit 10, Attachment D) (sealed exhibit); see also Decedents, Estates of – Moneys Due Deceased Indians from the United States, A-95510, 18 Comp. Gen. 412, 413 (Nov. 3, 1938) (Exhibit 8, Tab 15) (reviewing the settlement of a disbursing agent's

account and "sustaining" the disallowance of certain payments to the superintendent as not in compliance with the regulations and law).

The settled account packages for this period that still exist today are located in the National Archives, Record Group 411. See Declaration of Kristen Wilhelm, Attachment A (Feb. 13, 2003) (Exhibit 9).[14] Excerpts from one of the settled accounts from this period are attached to this Opposition. See Decl. of Frank Sapienza ¶ 57, Attachment B (Sept. 18, 2000) (Exhibit 7, Tab 2) (sealed exhibit). These excerpts demonstrate that the settlement of accounts by GAO involved a detailed procedure for verifying reported transactions by comparison to supporting documentation and correction of errors where necessary. See id.

In addition to the regular settlement of accounts, during the period between 1920 and 1951, GAO performed at least one audit of the accounts of the Indian Service, including individual Indian monies. Specifically, between July and December 1928, GAO undertook a study that entailed the inspection of 111 of the 116 agencies, schools, hospitals, irrigation districts, and warehouses of the Indian field service. Indian Funds, Letter from the Comptroller General of the United States, S. Doc. No. 268, 70th Cong., 2d Sess. 2 (1929) (Exhibit 8, Tab 10). As part of this study, "[t]he accounts of the individual Indians were 'test checked' . . . ." Id. GAO criticized the Indian Service for certain practices, including loose accounting for certain pupils' monies, id. at 82, and failure to keep adequate records of investments, id. at 116. In addition, GAO identified certain accounting errors that needed to be addressed. See id. at 94.

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[14] As set forth in the Declaration of Frank Sapienza at paragraph 56-57 (Exhibit 7, Tab 2), not all the settled account packages have survived after the passage of more than half a century, but there are strong indications that the accounts for which settlement documentation is missing were settled in accordance with the requirements of law.

However, based on a careful examination of the check registers and disbursements from IIM accounts, GAO found "[t]he impression prevailed that with few exceptions the disbursements were on the whole reasonable and as a rule made for purposes beneficial to the Indian concerned." Id. at 104.

Meanwhile, as concerns regarding BIA's ability to account appropriately for individual Indian monies increased, the Senate Committee on Indian Affairs considered a proposal that would have required the Commissioner to prepare and submit to the tribes annual statements of activity in the IIM accounts. S. 4187, 72nd Cong., 1st Sess. (Mar. 23, 1932) (Exhibit 11). The Commissioner of Indian Affairs objected to the measure for a number of reasons, including insufficient staffing to address an estimated 20,000 individual accounts, stating that for the BIA "to furnish each individual Indian with an annual statement of his personal account would appear to be physically impracticable without an increase in the clerical force . . . ." Commissioner of Indian Affairs, Memorandum for the Secretary 2 (May 19, 1932) (Exhibit 5, Tab 6). Moreover, he stated that, in his opinion, an individual Indian's account was "a matter between him and the superintendent, who is required by existing instructions to furnish a statement of account to any Indian at any time upon request of the party in interest." Id. Congress did not enact the proposed accounting requirement.[15]

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[15] By 1937, however, superintendents and disbursing agents were instructed by regulation to furnish semiannual statements of receipts and disbursements to each person who had an IIM account. Department of the Interior, U.S. Indian Field Service Regulations, Section B - Bookkeeping and Accounting at B-167 (1935) (Exhibit 6, Tab 9); see also 25 C.F.R. § 221.38 (1938-1951). Defendants have not been able to determine with certainty whether semiannual account statements were provided to each individual account holder between 1937 and 1951, given the significant passage of time between those dates and the filing of this lawsuit.

In 1950, Congress consolidated and standardized the accounting performed by the various executive agencies by passing the Accounting and Auditing Act of 1950. Under this statute, the Comptroller General was directed to "prescribe the principles, standards, and related requirements for accounting to be observed by each executive agency . . . ." Pub. L. No. 81-784, § 112(a), 64 Stat. 832, 835 (Sept. 12, 1950) (Exhibit 2, Tab 16). Once established, these standards governed each executive agency's accounting systems. Id. § 117(a).

Under this revised accounting procedure, in May 1951, the regular settlement of individual Indian disbursing agents' accounts by GAO was discontinued. Letter from the Administrative Assistant Secretary of the Interior to Comptroller General (May 14, 1951) (Exhibit 8, Tab 20); Letter from the Acting Director, Division of Budget and Finance, to Commissioner of Indian Affairs (June 4, 1951) (Exhibit 8, Tab 21). After this time, individual BIA agencies were required to maintain and settle their own accounts according to the regulations. Id.

C. Evidence of Compliance With Settlement Procedures

The official reports and documents of Interior, Treasury, and GAO reflect that the Departments complied with the settlement procedures as required by law. These reports state how many accounts of Indian disbursing agents were settled each year and indicate whether any accounts were delinquent for the particular year. See, e.g., Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1887, at 545 (Exhibit 15, Tab 1); Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1888, at 576 (Exhibit 15, Tab 2); Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1889, at 517 (Exhibit 15, Tab 3); Annual Report of the Secretary of the Treasury on

the State of the Finances for the Year 1891, at 549 (Exhibit 15, Tab 5); Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1892, at 523 (Exhibit 15, Tab 6); Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1893, at 977-78 (Exhibit 15, Tab 7); Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1894, at 876-78 (Exhibit 15, Tab 8); Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1895, at 633-34 (Exhibit 15, Tab 9); Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1896, at 709-11 (Exhibit 15, Tab 10); Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1897, at 668-70 (Exhibit 15, Tab 11); Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1898, at 761-80 (Exhibit 15, Tab 12); Annual Report of the Auditor for the Department of the Interior 3-5 (1907) (Exhibit 15, Tab 13); Annual Report of the Auditor for the Department of the Interior 3-9 (1908) (Exhibit 15, Tab 14); Annual Report of the Auditor for the Department of the Interior 4-7 (1909) (Exhibit 15, Tab 15); Annual Report of the Auditor for the Department of the Interior 3-4 (1910) (Exhibit 15, Tab 16); Annual Report of the Auditor for the Department of the Interior 3-5 (1911) (Exhibit 15, Tab 17); Annual Report of the Auditor for the Department of the Interior 3-5 (1912) (Exhibit 15, Tab 18); Annual Report of the Auditor for the Department of the Interior 7-9 (1914) (Exhibit 15, Tab 19); Annual Report of the Auditor for the Department of the Interior 4-5 (1915) (Exhibit 15, Tab 20); Annual Report of the Auditor for the Department of the Interior 4-5 (1916) (Exhibit 15, Tab 21); Annual Report of the Auditor for the Department of the Interior 3-4 (1919) (Exhibit 15, Tab 22); Annual Report of the Auditor for the Department of the Interior 3-4 (1920) (Exhibit 15, Tab 23); Accounts of Indian Agents for the Proceeds of Sales of Property Belonging to Indians, 6

Comptroller of the Treasury 281 (Sept. 25 1899) (Exhibit 15, Tab 4); Annual Reports of the Department of the Interior 59-60 (1905) (Exhibit 5, Tab 2); Annual Report of GAO 17-18 (1924) (Exhibit 8, Tab 1); Annual Report of GAO 28-30 (1925) (Exhibit 8, Tab 2); Annual Report of the Comptroller General 36-37 (1926) (Exhibit 8, Tab 3); Annual Report of the Comptroller General 81 (1927) (Exhibit 8, Tab 4); Annual Report of the Comptroller General 46, 107 (1928) (Exhibit 8, Tab 8); Annual Report of the Comptroller General 119 (1929) (Exhibit 8, Tab 9); Annual Report of the Comptroller General 22, 117 (1930) (Exhibit 8, Tab 11); Annual Report of the Comptroller General 145 (1931) (Exhibit 8, Tab 12); Annual Report of the Comptroller General 128-29 (1932) (Exhibit 8, Tab 13); Annual Report of the Acting Comptroller General (1938) (Exhibit 8, Tab 14); Decedents, Estates of – Moneys Due Deceased Indians from the United States, A-95510, 18 Comp. Gen. 412 (Nov. 3, 1938) (Exhibit 8, Tab 15); Annual Report of the Comptroller General 99 (1942) (Exhibit 8, Tab 16); Annual Report of the Comptroller General 50-52 (1943) (Exhibit 8, Tab 18); Annual Report of the Comptroller General 59, 119 (1944) (Exhibit 8, Tab 19).

These reports are confirmed by other evidence, such as documentation from the named plaintiffs' accounts, which demonstrates that the records of the disbursing agents were checked and, where necessary, corrections were made to the accounts in accordance with statutory procedures. See, e.g., Individual Indian Money Statement (Exhibit 10, Attachment C) (sealed exhibit). Further, there is correspondence indicating that the records of banks were also checked as part of this procedure. See, e.g., Letter from Special Disbursing Agent to First National Bank (Feb. 12, 1918) (Exhibit 10, Attachment B) (sealed exhibit); Letter from Special Disbursing Agent to Citz. St. Bank Lawton, Oklahoma (Exhibit 10, Attachment A) (sealed exhibit).

Moreover, those most familiar with the records of settled accounts themselves confirm that these procedures were followed for disbursing agents handling individual Indian monies. Attached to this brief are a September 18, 2000 declaration of Frank Sapienza, former Director of the Indian Trust Accounting Division ("ITAD"), and a February 13, 2003 declaration from Mr. Sapienza which supplements his September 18, 2000 declaration. See Exhibit 7, Tabs 1-2. ITAD was established in 1972 as a division of the General Services Administration and, since its creation, has had responsibility for preparing accounting reports for cases heard by the United States Court of Claims and, in earlier years, the Indian Claims Commission. Declaration of Frank Sapienza ¶ 1 (Sept. 18, 2000) (Exhibit 7, Tab 2). Mr. Sapienza was with ITAD from 1973 to 2000 and was involved in the preparation of over fifty cases accounting cases involving claims by Indian Tribes filed in the United States Court of Claims and the Indian Claims Commission. Id. According to Mr. Sapienza, the accounts of Indian disbursing agents were settled in accordance with the procedures set forth in the Act of March 3, 1817, the Act of July 31, 1894, and the Budget and Accounting Act of 1920. See id. ¶¶ 25-52; Declaration of Frank Sapienza ¶¶ 2, 5 (Feb. 13, 2003) (Exhibit 7, Tab 1). "Because Indian disbursing agents were the officials who received and disbursed both individual Indian monies and tribal monies . . . the settlement of the Indian disbursing agents' accounts resulted in a double-audit of reported receipts and disbursements of individual Indian and tribal monies during the time period covered by the account current." Decl. of Frank Sapienza ¶ 25 (Sept. 18, 2000) (Exhibit 7, Tab 2); see also Decl. of Frank Sapienza ¶ 2 (Feb. 13, 2003) (Exhibit 7, Tab 1).

Finally, Mr. Sapienza notes that, under applicable law, if a disbursing agent failed to settle his account within thirty days after the end of each quarter, the agent and/or his bond were

subject to legal proceedings. See Decl. of Frank Sapienza ¶ 56 (Sept. 18, 2000) (Exhibit 7, Tab 2). Despite having spent more than twenty years working with the records of Treasury, GAO, and Interior relating to accounting for Indian funds, Mr. Sapienza has seen no evidence of such legal proceedings being brought against either the agents or their sureties. Id.; see also Business and Accounting Methods, Indian Bureau, Report to the Joint Commission of the Congress of the United States, 63rd Cong., 3d Sess (1915) (Exhibit 19).

Thus, available documentation demonstrates a pattern and practice of compliance with the settlement procedures set forth in the Act of March 3, 1817, the Act of July 31, 1894, and the Budget and Accounting Act of 1920. This substantial body of evidence demonstrates that there is a genuine issue of material fact as to whether "there has been . . . 'settlement' of the accounts of plaintiffs or their predecessors-in-interest." Plaintiffs' Motion at 21. Accordingly, Plaintiffs Motion for Partial Summary Judgment should be denied.

III. Plaintiffs' Argument That The Court Should Disregard As Fraudulent All Evidence Submitted By Defendants In Opposition To Plaintiffs' Motion For Partial Summary Judgment Is Based On A Misrepresentation Of The Facts And The Law

To prevail on their claim that no genuine issues of material fact preclude the entry of partial summary judgment in their favor, Plaintiffs seek to deny the Court access to the evidence discussed above and detailed in Defendants' Statement Of Genuine Issues, which clearly establishes that such genuine issues exist. Plaintiffs attempt to deny the Court access to such evidence by arguing that it must disregard any "evidence adduced in opposition to" their Motion for Partial Summary Judgment as "likely to be fraudulent or a sham." Plaintiffs' Motion at 17. In other words, they seek to deny Defendants their fundamental right to come forward with evidence in their own defense. In support of this extraordinary argument, Plaintiffs allege that

Defendants engaged in numerous (yet vaguely identified) acts of fraud, relying as is their wont on little more than rhetoric to sustain their shameless allegations. Having thus manufactured allegations of fraud, Plaintiffs then cite to a hodgepodge of case law, none of which is directly on point. By cobbling together quotations and citations from these disparate sources, and by suggesting that this case law applies in some vague, unspecified manner to Defendants' alleged misdeeds, Plaintiffs try to disguise their bold effort to silence Defendants in a veneer of "law."

A. Plaintiffs' Argument That Defendants Have Perpetrated Fraud Is Entirely Lacking In Evidentiary Foundation And Is, Instead, Based On Plaintiffs' Own Misrepresentation Of The Facts

As they have repeatedly argued,[16] Plaintiffs assert yet again that Defendants perpetrated a fraud on the Court by filing their (now withdrawn) Third Phase II Motion For Partial Summary Judgment (Re: Settlement Of Accounts By Treasury And GAO) ("Defendants' Third Motion") (filed Sept. 19, 2000), at a time that they possessed documents which they allegedly knew were inconsistent with the claims presented in that motion. According to Plaintiffs, these documents include: (1) a letter from Gene Dodaro, Principal Assistant Comptroller General (GAO) to John Berry, Assistant Secretary-Policy Management and Budget ("GAO Letter") (Aug. 27, 1999) (Exhibit 12); and (2) historical reports prepared by Morgan Angel & Associates L.L.C. at Defendants' request. In addition, Plaintiffs assert that a November 17, 2001 memorandum, written by Joe Walker more than a year after the filing of Defendants' Third Motion,

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[16] See, e.g., Plaintiffs' Motion For Sanctions And A Contempt Finding Pursuant to F.R.C.P. 56(g) (filed Feb. 15, 2002); Plaintiffs' Consolidated Motion For Leave To Amend And Motion To Amend Plaintiffs' February 15, 2002 Summary Judgment Contempt Motion And A Contempt Finding Pursuant To F.R.C.P. 56(g) In Accordance With Newly Discovered Evidence (filed June 4, 2002).

demonstrates Defendants' efforts to perpetuate the fraud they allegedly committed by filing the Third Motion.

As Plaintiffs have made these baseless arguments repeatedly, Defendants incorporate by reference their prior filings addressing them. See Defendants' Opposition To Plaintiffs' February 15, 2002 Motion For Sanctions And A Contempt Finding Pursuant To Fed. R. Civ. P. 56(G) ("Defendants' Opposition to February 15 Motion") (filed Mar. 1, 2002) (Exhibit 13); Government's Opposition To Plaintiffs' June 4, 2002 Consolidated Motion For Leave To Amend And Motion To Amend Plaintiffs' February 15, 2002 Motion For Sanctions And A Contempt Finding Pursuant To F.R.C.P. 56(g) ("Government's Opposition to June 4 Motion") (filed June 18, 2002) (Exhibit 14). For the sake of clarity, however, Defendants also briefly outline below their primary objections to these arguments.

1. GAO Letter

According to Plaintiffs, Defendants committed fraud with respect to the GAO Letter by: (a) filing the Third Motion, even though the GAO Letter, which was in their possession at the time, allegedly contradicted its claims, and (b) failing to produce the GAO Letter until December 4, 2001.[17]

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[17] Plaintiffs also cite a letter from Anthony Gamboa, General Counsel of GAO, to Bert Edwards, Director, Office of Historical Trust Accounting ("Gamboa Letter") (Apr. 19, 2002), written more than eighteen months after Defendants filed their Third Motion, to support their claim that the GAO did not perform settlements. See Plaintiffs' Motion at 1 & n.5; Plaintiffs' Statement Of Material Facts As To Which There Is No Genuine Issue In Support Of Motion For Partial Summary Judgment ¶¶ 6-17. However, the Gamboa Letter acknowledges that the GAO reviewed and reconciled at least some IIM account activity: "Because GAO examined disbursing officers' disbursement and receipt vouchers, GAO's settlement of disbursing officers' accounts likely would have confirmed the accuracy of, or taken exception to, the disbursing officers' withdrawals from and credits to the IIM account so long as those transactions were vouchered transactions." Gamboa Letter at 6; see also Government's Opposition to June 4 Motion at 17-20.

Plaintiffs claim that the following language in the GAO Letter contradicts the claims asserted in Defendants' Third Motion: "'In response to questions, we have explained that our records do not establish that GAO conducted a 'final' GAO comprehensive audit of IIM accounts, nor do they establish any regular practice of auditing IIM accounts.'" Plaintiffs' Motion at 3 (quoting GAO Letter). As Defendants have previously explained, however, the Third Motion never argued that settlements performed by GAO constituted "a 'final' GAO comprehensive audit of IIM accounts" or a "regular practice of auditing IIM accounts." Instead, the Third Motion argued that, during the period that Indian disbursing agents presented their accounts to the GAO for settlement, this settlement process was the one prescribed by existing statutory and regulatory law concerning the accounting of IIM monies, and Defendants complied with this applicable law. See Defendants' Opposition to February 15 Motion at 8-16 (Exhibit 13). Furthermore, the GAO Letter itself acknowledges that "no one currently employed at GAO participated in audits of the IIM accounts, which took place at various times from the 1920's [sic] through the 1950's [sic]" and that "[g]iven the number of years that have passed, we have no direct knowledge about the nature of any accounting regarding individual Indian accounts previously undertaken by GAO, or the standards or procedures used." GAO Letter at 1 (emphasis added) (Exhibit 12).

Plaintiffs also claim that Defendants "wilfully and fraudulently suppressed" the GAO Letter, Plaintiffs' Motion at 5, by failing to produce it despite the fact that it allegedly contradicted their Third Motion and allegedly came within the scope of Paragraph 35 of Plaintiffs' Sixth Formal Request For Production ("Sixth Request"), see id. at 5-6 & n.12.

However, as argued above, Defendants had a good-faith basis for concluding that the GAO Letter was consistent with their Third Motion and, therefore, that they did not need to bring it to the Court's attention. See also Defendants' Opposition to February 15 Motion at 15 (Exhibit 13). Furthermore, Defendants also had a good-faith basis for determining that the GAO Letter did not come within the scope of Paragraph 35, which requests "'[a]ll audits and reports from the General Accounting Office relating to allotted Indian trust lands or the IIM Trust Fund or both from the period 1887 to 1999.'" Plaintiffs' Motion at 6 n.12 (quoting Sixth Request ¶ 35). Since the term "GAO report" is commonly recognized to refer to the official reports of the GAO, Defendants had a good-faith basis for concluding that the GAO Letter was not such a report and thus did not fall within Paragraph 35.[18] See also Defendants' Opposition to February 15 Motion at 16 (Exhibit 13).

2. Historical Reports Prepared by Morgan Angel & Associates L.L.C.

Plaintiffs argue that Defendants committed fraud with respect to the "Useless Papers Report"or "E & Y Compilation" (Exhibit 16)[19] by: (a) filing the Third Motion, even though this

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[18] Plaintiffs' assertion that "Defendants have not produced a single document in accordance with that document request [i.e., Sixth Request ¶ 35]," Plaintiffs' Motion at 6 n.12, is simply false. See Defendants' Response to Plaintiffs' Sixth Formal Request For Production Of Documents 20-21 & Att. B (Mar. 1, 2000); Defendants' Supplemental Response to Request 35 Of Plaintiffs' Sixth Formal Request For Production Of Documents (June 1, 2000); Defendants' Supplemental Response to Request 35, 68, 72 and 74 Of Plaintiffs' Sixth Formal Request For Production Of Documents 1-2 & Att. B (Nov. 17, 2000).

[19] As Defendants have previously noted, the Report that Plaintiffs term the "Useless Papers Report" (EY0002325-EY0002455), see Plaintiffs' Motion at 10 & Ex. 4, is actually a compilation of two separate Morgan and Angel reports that was produced to Plaintiffs as a single report in the November 16, 2001 response to Plaintiffs' discovery request to Ernst and Young. See Defendants' Opposition to February 15 Motion at 17 (Exhibit 16). In order to be consistent with their prior filings, Defendants henceforth refer to the "Useless Papers Report" (EY0002325-EY0002455) as the "E & Y Compilation."

Compilation, which was in their possession at the time, allegedly contradicted its claims, and (b) failing to produce the Compilation until November 16, 2001.[20]

According to Plaintiffs, the E & Y Compilation "refute[s] representations made by defendants and their other purported experts in their Third Motion." Plaintiffs' Motion at 12. As detailed at length, however, in Defendants' Opposition to February 15 Motion, Plaintiffs' argument that the E & Y Compilation contradicts the Third Motion is based on a willful misreading of the Compilation. See Defendants' Opposition to February 15 Motion at 17-23 (Exhibit 13). To give but one example, Plaintiffs cite the Compilation's statement that "'[d]ocument-specific accountings were rare'" as evidence that the GAO settlement process rarely entailed using specific documents to verify Indian disbursing agents' accounts. See Plaintiffs' Motion at 11 (quoting E & Y Compilation). However, as any fair reading of this statement in context reveals, the statement's true meaning is that there are very few reports detailing which specific documents were destroyed pursuant to a (then extant) law mandating the destruction of papers deemed useless. See Defendants' Opposition to February 15 Motion at 21

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[20] Because the "Useless Papers Report" is actually a compilation of two separate reports prepared by Morgan and Angel, Plaintiffs err in claiming that it was not produced until November 16, 2001. While the first 57 pages of the E & Y Compilation (EY0002325-EY0002383) were first produced to Plaintiffs on November 16, 2001, the remainder (EY0002384-EY0002455) was actually produced to Plaintiffs on August 10, 2001, as Exhibit 4 to the Department of the Interior's Response to the First Report of the Court Monitor. See Defendants' Opposition to February 15 Motion at 17 (Exhibit 13). As of August 10, 2001, the current Department of Justice team had not yet taken over defense of this litigation. Thus, Plaintiffs are utterly mistaken in insisting, yet again, that "[h]ad the former–and now recused–Justice and Interior attorneys (or even the named defendants) been privy to the November 16, 2001 production of information, plaintiffs doubt that this Court and plaintiffs would now know of the existence of this series of historical analyses." Plaintiffs' Motion at 10 n.18; see also Defendants' Opposition to February 15 Motion at 17 & nn.10-11 (Exhibit 13). The fact is that a very large portion of the E & Y Compilation was produced by the former Department of Justice team.

(Exhibit 13). In other words, as the author himself of the E & Y Compilation declared, the term "accounting" is employed in this statement, not in its financial sense (as a "financial accounting" or audit), but instead as a "generic reporting of facts–in this case, the disposition or destruction of financial records." Declaration of William A. Morgan ¶ 4 (Feb. 27, 2002) (Exhibit 18)[21]; see also Defendants' Opposition to February 15 Motion at 21 (Exhibit 13).

Plaintiffs also claim that Defendants "suppressed" the E & Y Compilation, by failing to produce it despite the fact that it allegedly contradicted their Third Motion and allegedly came within the scope of the First Order Of Production ("First Order"), as well as Paragraph 4 of Plaintiffs' Second Formal Request For Production ("Second Request"). See Plaintiffs' Motion at 10. As argued above, however, Defendants had a good-faith basis for determining that the E & Y Compilation was consistent with their Third Motion and, therefore, that they did not need to bring it to the Court's attention. See also Defendants' Opposition to February 15 Motion at 23 (Exhibit 13). Furthermore, because the E & Y Compilation consists of broad-brushed historical surveys, Defendants had a good faith basis for concluding that it did not come within the relatively narrow scope of the First Order and Paragraph 4 of the Second Request.[22] See

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[21] The original Declaration of William A. Morgan (Feb. 27, 2002) was filed as Exhibit 8 to Defendants' Opposition to February 15 Motion.

[22] Plaintiffs do not identify the paragraphs of the First Order to which they believe the E & Y Compilation is responsive, but the only one broad enough would appear to be Paragraph 19. Paragraph 19 requests "[a]ll documents, records, and tangible things which embody, refer to, or relate to IIM accounts of the five named plaintiffs or their predecessors in interest." First Order ¶ 19. Paragraph 4 of the Second Request asks for:

> [a]ll memoranda and other documents which relate to problems or concerns of BIA or OTFM personnel in connection with the retrieval of documents relevant to the five named Plaintiffs in this action, including but not limited to problems and concerns associated with the transfer of IIM records from BIA area and agency offices to the OTFM in Albuquerque . . . .

Defendants' Opposition to February 15 Motion at 23-24 (Exhibit 13). Finally, even if Defendants were mistaken in concluding that the E & Y Compilation was not responsive to the First Order and Paragraph 4 of the Second Request, they had a good-faith basis at the time they filed their Third Motion for believing that the E & Y Compilation was protected by the work-product privilege. At that time, the E & Y Compilation had been prepared at the direction of the Department of Justice for use in the litigation and was not then being used for any other purpose. See Defendants' Opposition to February 15 Motion at 25-26 (Exhibit 13).

3. Joe Walker Memorandum

Plaintiffs argue that a memorandum written by Joe Walker on November 17, 2001 ("Walker Memo") (Exhibit 17), more than a year after Defendants filed their Third Motion, constitutes a "thinly veiled . . . recommendation that the Interior defendants' lawyers should be encouraged to defraud this Court by pressing for a ruling on the Withdrawn Motion for Summary Judgment while at the same time suppressing the 1999 GAO letter and other related evidence that would highlight and make clear the misrepresentations that defendants and their counsel had made." Plaintiffs' Motion at 15-16. In support of this extraordinary claim, Plaintiffs cite the following language from the Walker Memo:

> '1. DOI should press DOJ with great vigor to seek a ruling on Summary Motion Number Three which was filed in 2000, **approximately a year after being alerted to the role of the GAO in stating accounts. This could prove** of great value to "Cobell" and **an immeasurable benefit to the challenge of performing a historical accounting. The lawyer should be extremely well versed** in the history of the GAO prior to going [sic] the hearing.'

Second Request ¶ 4.

Id. at 16 (quoting Walker Memo) (emphases added by Plaintiffs). According to Plaintiffs, "[t]he underscored passage is undoubtedly a reference to the 1999 GAO Letter as there is an approximately year gap between that letter . . . and the filing of the Third Motion . . . ." Id. Furthermore, they claim, the Walker Memo's statement that the lawyer arguing the Third Motion "'should be extremely well versed' is a clear euphemism that the counsel should be prepared in a manner that would ensure that the 1999 GAO Letter itself and the facts set forth therein would not come to light during the course of any oral argument." Id. at 17.

As argued in Defendants' Opposition to February 15 Motion, there is absolutely no rational basis for reading the Walker Memo in the manner Plaintiffs propose. See Defendants' Opposition to February 15 Motion at 26-28 (Exhibit 13). First, contrary to Plaintiffs' assertions, the underscored passage does not refer to the GAO Letter, and indeed, nowhere in the Walker Memo is the letter discussed. The only place the GAO Letter appears is in a list of attached documents, where it is recorded as Attachment 1. The Walker Memo cites Attachment 1 as an example of GAO's two-year denial that it "possess[ed] . . . some Indian contracts and leases," and then goes on to observe that, after this long period of denial, GAO has "finally admitted" that it does possess some such documents. Walker Memo at DEF0040416-DEF40418 (Exhibit 17). Given this context–and in particular, the Walker Memo's assertion that the GAO was now admitting that it possessed relevant Indian documents–there is simply no basis for concluding that the statement, "a year after being alerted to the role of the GAO in stating accounts," is a reference to the GAO Letter, much less to some alleged need to suppress this Letter in order to win the Third Motion. Accordingly, there is also no rational basis for concluding that the Walker Memo's recommendation that the lawyer arguing the Third Motion "be extremely well versed in

the history of the GAO" is a secret directive that counsel be prepared to conceal the GAO Letter and its facts.

B. Plaintiffs' Argument That The Court Should Disregard All Evidence Submitted by Defendants Because They Have Allegedly Perpetrated Fraud Is Based On A Misrepresentation Of The Law

Having thus manufactured supposed evidence that Defendants perpetrated fraud, Plaintiffs then argue that, because of this alleged past fraud, the Court should "view any evidence that defendants might hereafter adduce with respect to this motion for summary judgment as the 'sham' that it likely will be" and therefore refuse to consider it. Plaintiffs' Motion at 19. Plaintiffs justify this effort to silence Defendants and thereby deprive them of their fundamental right to defend themselves by appealing to a patchwork of case law, none of which stands for the proposition for which Plaintiffs cite it.

According to Plaintiffs, "[w]hen a court considers evidence adduced in opposition to a motion for summary judgment it is not obligated to consider evidence that is likely to be fraudulent or a sham." Id. at 17. In support of this proposition, they cite the following four cases, none of which is on point: Bank of Illinois v. Allied Signal Safety Restraint Systems, 75 F.3d 1162 (7th Cir. 1996); Pacific Insurance Co. v. Kent, 120 F. Supp. 2d 1205 (C.D. Cal. 2000); School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255 (9th Cir. 1993); and Cleveland v. Policy Management Systems Corp., 526 U .S. 795 (1999).

These cases establish that a party may not seek to create a genuine issue of material fact for the purpose of opposing a motion for summary judgment by introducing sham affidavits or deposition testimony that flatly contradict its prior sworn testimony. See Bank of Illinois, 75 F.3d at 1168 ("[P]arties cannot thwart the purposes of Rule 56 by creating 'sham' issues of fact

with affidavits that contradict their prior depositions."); Pacific Insurance Co., 120 F. Supp.2d at 1213 ("[A] party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony" or by "the use of a later deposition testimony to contradict prior sworn testimony" (internal citation omitted)); Policy Management Systems, 526 U.S. at 1603-04 (citing, inter alia, cases setting forth the rule against sham affidavits and deposition testimony for the principle that "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity").[23]

As these cases cited by Plaintiffs make clear, courts applying this rule against sham affidavits or deposition testimony must look to an affidavit or deposition testimony that the party opposing a motion for summary judgment has actually entered into the record. It is only if this party has, in fact, submitted an affidavit or deposition testimony that the Court can inquire whether it so flatly contradicts that party's prior sworn testimony that it must be deemed a sham designed for the purpose of manufacturing a genuine issue of material fact and thereby avoiding summary judgment. Here, however, Plaintiffs do not argue that Defendants have entered a sham affidavit or deposition testimony in opposition to their Motion for Partial Summary Judgment.

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[23] Unlike the other three cases cited by Plaintiffs, School Dist. No. 1J does not, in fact, directly address the rule against filing sham affidavits or deposition testimony in support of oppositions to motions for summary judgment. 5 F.3d at 1264 (noting that the district court "made no finding that the affidavits filed by the School District were or were not 'sham' affidavits generated solely in order to create a genuine issue of material fact"). Instead, the Ninth Circuit in School Dist. No. 1J upheld the district court's grant of summary judgment on the ground that the affidavit filed by the party opposing summary judgment "does not pass the 'significantly probative' test of Liberty Lobby" and thus "[n]o reasonable juror could rely upon it." Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Indeed, they cannot do so, because they rely on this rule against sham affidavits or deposition testimony in their own Motion for Partial Summary Judgment and thus, by definition, before Defendants have had the opportunity to file an Opposition to their Motion–let alone to attach allegedly fraudulent affidavits or deposition testimony to this Opposition.

Rather than arguing that Defendants have, in fact, filed sham affidavits or deposition testimony, Plaintiffs make the extraordinary assertion that they can predict that Defendants are "likely" to do so. See Plaintiffs' Motion at 19 (stating that the Court should "view any evidence that defendants might hereafter adduce with respect to this motion for summary judgment as the 'sham' that it likely will be" (emphasis added)). In support of this remarkable claim to predict the future, Plaintiffs' only "evidence," of course, is the alleged past misdeeds that, as described above, they have erroneously attributed to Defendants. Thus, claiming to rely on the Court's holding in School Dist. No. 1J, Plaintiffs conclude that "'[n]o reasonable juror [or in this case, judge] could rely upon' anything defendants would now say on the subject." Plaintiffs' Motion at 18 (quoting School Dist. No. 1J) (emphasis added).[24] Of course, what Plaintiffs fail to note is

[24] Although the cases concerning the rule sham affidavits or deposition testimony are clearly inapplicable because it is only with this filing that Defendants are submitting evidence in opposition to Plaintiffs' Motion for Partial Summary Judgment, it should be emphasized that a number of "circuits have cautioned that this rule ought to be applied with great caution." Bank of Illinois, 75 F.3d at 1169. In particular, "'[a] definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence,'" because the latter "'are questions of fact which require resolution by the trier of fact.'" Id. at 1169-70 (quoting Tippens v. Celotex Corp., 805 F.2d 949 (11th Cir. 1986)); see also Pacific Insurance Co., 120 F. Supp.2d at 1213 (holding that "testimony is not a sham if it merely elaborat[es] upon, explain[s] or clarif[ies] prior testimony," if "the witness was confused at the time of the earlier testimony and provides an explanation for the confusion," and if it "results from newly discovered evidence" (internal citations omitted)).

that the Court's actual holding in School Dist. No. 1J was that "[n]o reasonable juror could rely upon it"–namely, the sham affidavit. 5 F.3d at 1264 (emphasis added).

Apparently well aware that the cases they cite concern sham affidavits or deposition testimony that have actually been entered into the record, and thus that these cases are inapplicable here, Plaintiffs take yet another stab at identifying case law that would prevent Defendants from obtaining judicial consideration of evidence entered in their own defense. Thus, after concluding that the Court should "view any evidence that defendants might hereafter adduce with respect to this motion for summary judgment as the 'sham' that it likely will be," Plaintiffs append a footnote directing the Court to "[s]ee cases discussing the adverse inference rule": namely, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); International Union v. National Labor Relations Board, 459 F.2d 1329 (D.C. Cir.1972); and Hoffman v. C.I.R., 298 F.2d 784 (3d Cir. 1962). Plaintiffs' Motion at 19 & n.25. These cases, however, are no more on point than those concerning the rule against filing sham affidavits or deposition testimony in support of oppositions to motions for summary judgment.

As explained in the very case law cited by Plaintiffs, the adverse inference rule provides that when a party in possession of relevant evidence fails to produce it, an inference or presumption properly arises that this evidence is unfavorable to him. See Interstate Circuit, 306 U.S. at 226 ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."); International Union, 459 F.2d at 1336 ("[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him."); Hoffman, 298 F.2d at 788

("[T]he failure of a party to introduce evidence within his possession gives rise to the presumption that, if produced, it will be unfavorable to him.").

Like the rule against filing sham affidavits or deposition testimony in support of oppositions to motions for summary judgment, the adverse inference rule is inapplicable here and for the same fundamental reason. The adverse inference rule concerns the failure to enter evidence into the record once the party possessing this evidence has had the opportunity to do so. Here, however, Plaintiffs raise this rule in their Motion for Partial Summary Judgment in order to bar the Court from reviewing any evidence Defendants might subsequently file in opposition to their Motion. But there can be no adverse inference about Defendants' failure to file certain evidence before Defendants have had the opportunity to file any evidence at all. Indeed, because Defendants could not possibly present evidence in opposition to Plaintiffs' Motion before Plaintiffs filed their Motion, Plaintiffs (in writing their Motion) had no idea what evidence Defendants would or would not present. Thus, they could not and did not attempt to identify what specific relevant evidence Defendants would allegedly fail to file and what precise adverse inference must be drawn from this hypothesized failure.

Conclusion

The Court should deny Plaintiffs' Motion for Partial Summary Judgment because it fails to comply with the Court's September 17, 2002 Order and is not ripe for decision, and in the alternative, because genuine issues exist as to material facts.

Dated: February 14, 2003

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' STATEMENT OF GENUINE ISSUES WITH REGARD TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, Defendants respectfully submit the following statement of genuine issues in response to Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue in Support of Motion for Partial Summary Judgment.

1. At no time has GAO conducted an accounting of any individual Indian trust accounts.

Defendants' Response: Defendants deny this statement. The letter cited by plaintiffs simply states that the author had no "direct knowledge" regarding the nature, standards, or procedures of accountings previously undertaken by GAO; it does not state that GAO never conducted an accounting for any individual Indian trust account. Moreover, GAO documents reflect that Indian Service agents performed accountings for private funds of individual Indians and that GAO audited the accounts. For example, the Annual Report of the Acting Comptroller General of the United States for 1938 contained the following statements regarding accountings

performed with regard to IIM accounts:

> Individual Indian Moneys These accounts embrace an accounting by agents of the Indian Service for private funds of individual Indians received and disbursed. The audit consists of a determination as to compliance with the laws, regulations and decisions governing the expenditure of Indian moneys. The complete accounting embraces both collections and disbursements for the account of the individual Indian. The decisions for application are those of the former Comptrollers of the Treasury, the Comptroller General, the Secretary of the Interior, and the Courts.

Annual Report of the Acting Comptroller General of the United States ("GAO Annual Report") 21 (1938) (Exhibit 8, Tab 14).

For further support for defendants' denial, see Part II of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts and documents cited therein.

2. At no time has the United States government conducted an accounting of individual Indian trust assets.

Defendants' Response: Defendants object to this statement to the extent it implies that defendants were under a duty to provide an accounting for individual Indian trust "assets" other than money held in trust. Because this statement presents issues that are irrelevant and immaterial to defendants' duty to account for funds and balances, the claim on which this lawsuit is based, plaintiffs' statement does not present a material issue of fact.

Defendants further deny this statement to the extent that it suggests that the frequent reconcilations, adjustment, probate and settlement of litigation regarding IIM accounts over the

history of the Trust did not constitute or did not satisfy some or all of defendants' obligations to account. The trial testimony cited by plaintiffs does not support plaintiffs' assertions regarding individual Indian trust "assets;" rather, it discusses efforts with regard to auditing and reconciling individual Indian trust accounts.

Moreover, GAO documents reflect accountings undertaken by disbursing agents with regard to assets constituting individual Indian trust accounts. Further, GAO documents reflect the product of statutorily prescribed accounting procedures which GAO itself often referred to as accountings with regard to assets constituting individual Indian trust accounts. See, e.g., GAO Report of the Amount of the Funds of the Indians, the Investment Thereof, the Rate of Interest Thereon Together With Comments Pertinent to the Uses Made of Such Funds, at 76-110 (1929) (Exhibit 21) (discussing "Individual Indian Moneys" and related matters); GAO Office of Investigations Report of Study and Investigation of the Funds and Securities of the Several Indian Tribes, Including Those of Tribal Organizations, Pursuant to Senate Resolution No. 147, Eighty-Second Congress, at II, V-X, 171 (Apr. 1, 1952) (Exhibit 20) (summarizing and discussing amounts constituting "Individual Indian Moneys").

For further support for defendants' denial, see Part II of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts and documents cited therein.

3. At no time has GAO conducted a final comprehensive audit of individual Indian trust accounts.

Defendants' Response: Defendants object to this statement because it is vague and

ambiguous and appears to imply more than can reasonably be inferred from the documents cited by plaintiffs in support of this statement.

Moreover, defendants deny this statement. The letter cited by plaintiffs is the same document cited in support of their statement 1, and, as is explained above in response to that statement, the letter confirms that the author had no "direct knowledge" regarding the nature, standards, or procedures of accountings previously undertaken by GAO. This is further confirmed by the letter's statements that "no one currently employed at GAO participated in audits of the IIM accounts, which took place at various times from the 1920's [sic] through the 1950's [sic]."

In addition, the portion of the letter cited by plaintiffs only referred to matters "establish[ed]" by the author's review of GAO records. The letter does not contain the unqualified statement that GAO never conducted a "final comprehensive audit of individual Indian trust accounts," nor does it define the meaning of a "final comprehensive audit."

In fact, as is explained above in responses to plaintiffs' statements 1 and 2, which are incorporated by reference herein, GAO documents do reflect the results of GAO activities with regard to Individual Indian Moneys, which included audit efforts. See, e.g., GAO Annual Report 21 (1938) (Exhibit 8, Tab 14).

For further support for defendants' denial, see Part II of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts and documents cited therein.

4. At no time has GAO engaged in any regular practice of auditing individual Indian

trust accounts.

Defendants' Response: Defendants deny this statement. The letter cited by plaintiffs is the same document cited in support of their statement 1, and, as is explained above in response to that statement, the letter confirms that the author had no "direct knowledge" regarding the nature, standards, or procedures of accountings previously undertaken by GAO. This is further confirmed by letter's statements that "no one currently employed at GAO participated in audits of the IIM accounts, which took place at various times from the 1920's [sic] through the 1950's [sic]." Moreover, the portion of the letter cited by plaintiffs only referred to matters "establish[ed]" by the author's review of GAO records. The letter does not contain the unqualified statement that GAO did not "engage[] in any regular practice of auditing individual Indian trust accounts."

In fact, as is explained above in responses to plaintiffs' statements 1 and 2, which are incorporated by reference herein, GAO documents do reflect the results of GAO activities with regard to Individual Indian Moneys, which included audit efforts. See, e.g., GAO Annual Report 21 (1938) (Exhibit 8, Tab 14); see also Decl. of Frank Sapienza, Attachment B (Sept. 18, 2000) (Exhibit 7, Tab 2, Attachment B) (GAO Sample Audit Documents) (sealed exhibit). While the significance and effect on this litigation of the GAO settlement of accounts process may or may not be subject to dispute later in this litigation depending on whether Interior decides to rely on records regarding this process, the fact of the regular conduct of such accounting activities is not reasonably disputable.

For further support for defendants' denial, see Part II of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts and

documents cited therein.

5. Principal Assistant Comptroller General Gene L. Dodaro informed former Interior Assistant Secretary John Berry on August 27, 1999 that GAO previously had informed officials from Justice, Treasury, and Interior that it has never conducted an accounting of individual Indian trust accounts, never conducted a final comprehensive audit of individual Indian trust accounts, and never engaged in a regular practice of auditing individual Indian trust accounts.

Defendants' Response: Defendants object to this statement because it is inconsistent with the evidence before the Court and fails to define terms which are necessary for a response.

Defendants further deny this statement. The letter cited by plaintiffs is the same document cited in support of their statement 1, and, as is explained above in response to that statement, the letter confirms that the author had no "direct knowledge" regarding the nature, standards, or procedures of accountings previously undertaken by GAO. This is further confirmed by letter's statements that "no one currently employed at GAO participated in audits of the IIM accounts, which took place at various times from the 1920's [sic] through the 1950's [sic]."

This statement is plaintiffs' summary of statements 1, 3, and 4, and as is explained in defendants' responses to statements 1, 3, and 4 (incorporated herein by reference), the letter cited by plaintiffs does not state that GAO "never conducted an accounting of individual Indian trust accounts, never conducted a final comprehensive audit of individual Indian trust accounts, and never engaged in a regular practice of auditing individual Indian trust accounts."

6. At no time did GAO settle individual Indian trust accounts.

Defendants' Response: Defendants deny this statement. The statement relied upon by plaintiffs is controverted by the various GAO documents discussed in defendants' responses to statements 1 and 2 above, which are incorporated by reference herein. Moreover, the settlement of individual Indian trust accounts is reflected in GAO documents. See Decl. of Frank Sapienza, Attachment B (Sept. 18, 2000) (Exhibit 7, Tab 2, Attachment B) (GAO Sample Audit Documents) (sealed exhibit).

For further support for defendants' denial, see Part II of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts and documents cited therein.

7. Individual Indian trust accounts balances have never been certified.

Defendants' Response: Defendants deny this statement because plaintiffs fail to identify the standards or laws establishing the "certification" requirement addressed in this statement. The statement relied upon by plaintiffs simply states the author's conclusion whether GAO was "aware of any record of certified balances"; it does not state that "Individual Indian trust accounts balances have never been certified." Moreover, the GAO documents reflecting settlement of individual Indian trust accounts included a certification executed on behalf of the Comptroller General. See Decl. of Frank Sapienza, Attachment B (Sept. 18, 2000) (Exhibit 7, Tab 2, Attachment B) (GAO Sample Audit Documents) (sealed exhibit).

For further support for defendants' denial, see Part II of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts and

documents cited therein.

8. Individual Indian trust accounts are legally distinct from disbursing officer accounts.

Defendants' Response: Plaintiffs' allegation does not constitute a statement of fact, but, rather, constitutes a legal conclusion. Plaintiffs acknowledge this when they state that the two categories of accounts are "legally distinct." No response is required under the Court's rules.

9. There is no certified record of Individual Indian Trust account balances as of 1951.

Defendants' Response: Defendants deny this statement because plaintiffs fail to identify the standards or laws establishing the "certification" requirement addressed in this statement. Further, the statement relied upon by plaintiffs simply states the author's conclusion whether GAO was "aware" of a record of such balances.

10. There have been no examinations of individual Indian trust accounts to ensure the propriety and accuracy of trust balances.

Defendants' Response: Defendants deny this statement to the extent that it suggests that the frequent reconciliations, Treasury and GAO reviews, administrative reviews, probates, and prior litigation regarding IIM accounts over the history of the Trust did not constitute examinations of the accuracy of trust balances.

In addition, the language relied upon by plaintiffs in support of this statement does not assert that "[t]here have been no examinations of individual Indian trust accounts to ensure the propriety and accuracy of trust balances"; rather, it provides the author's conclusion as to the steps that would "ensure the propriety and accuracy of trust balances." Moreover, as is explained above in responses to plaintiffs' statements 1 and 2, which are incorporated by reference herein, GAO documents do, in fact, reflect both accounting and audit activities with regard to individual Indian trust accounts, and such efforts plainly were undertaken for the purpose of ascertaining the accuracy of account balances.

Plaintiffs' statement further disregards the accountings which have been performed by the Office of Historical Trust Accounting with regard to Judgment IIM accounts. See Status Report to the Court Number Twelve at 31 (filed Feb. 3, 2003) (referring to reports in previous two status reports).

For further support for defendants' denial, see Part II of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts and documents cited therein.

11. No statements of account have been rendered for individual Indian trust accounts.

Defendants' Response: Defendants deny this statement. The language relied upon by plaintiffs does not assert that "[n]o statements of account have been rendered for individual Indian trust accounts"; rather, it provides the author's conclusion as to the steps that would "reconcile transactions with a statement of account."

In addition, plaintiffs' statement disregards the quarterly statements regularly prepared by

the Office of the Special Trustee as well as the statements of account which have been prepared by the Office of Historical Trust Accounting with regard to Judgment IIM accounts. See, e.g., Interior's Fiduciary Obligations Compliance Plan (filed Jan. 6, 2003) ("OST prepares quarterly statements on accounts in TFAS and mails the statements to account holders with known addresses to include beginning balances, type of income, receipts and disbursements[,] and ending balance."); Status Report to the Court Number Twelve at 31 (filed Feb. 3, 2003) (discussing accountings for Judgment IIM accounts).

For further support for defendants' denial, see Part II of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts and documents cited therein.

12. At no time has GAO maintained records of certified balances of individual Indian trust accounts.

Defendants' Response: Defendants deny this statement. The GAO documents reflecting settlement of individual Indian trust accounts included a certification executed on behalf of the Comptroller General. See Decl. of Frank Sapienza, Attachment B (Sept. 18, 2000) (Exhibit 7, Tab 2, Attachment B) (GAO Sample Audit Documents) (sealed exhibit)

For further support for defendants' denial, see Part II of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts and documents cited therein.

13. The amount of funds held in individual Indian trust accounts cannot be

ascertained because of the loss, destruction, and corruption of trust records.

Defendants' Response: Plaintiffs' allegation does not constitute a statement of fact, but, rather, constitutes a legal conclusion. No response is required under the Court's rules, but to the extent any response is deemed necessary by this Court, defendants state that the letter cited by plaintiffs does not support the assertions contained within this statement and, further, defendants deny that there is support for these assertions. In addition, defendants refer to (1) Interior Defendants' Historical Accounting Plan for Individual Indian Money Accounts (filed Jan. 6, 2003), which establishes a plan for ascertaining the amount of funds held in individual Indian trust accounts; (2) Defendants' Motion For Partial Summary Judgment That Interior's Historical Accounting Plan Comports With Their Obligation To Perform An Accounting And Supporting Memorandum Of Points And Authorities 7-8, 41-45 (filed Jan. 31, 2003), which argues that sufficient individual Indian trust records are available to undertake the historical accounting described in Interior's Historical Accounting Plan and relies, inter alia, on attached Declarations (Exhibits 1-3) of two professional historians and a forensic accountant retained by the Office of Historical Trust Accounting to assist in Interior's effort to comply with its accounting obligation; and (3) the report prepared by Ernst & Young and filed with the Court under seal, which demonstrated that Interior was able to reconstruct accounts for the four named plaintiffs in this action who had IIM accounts. See Motion to Amend Protective Order, if Necessary, to Respond to House of Representatives Request to Provide Copy of Ernst & Young Report, Ex. 1 (Revised Interim Final Report of Joseph R. Rosenbaum (dated Nov. 19, 2001)) (filed Jan. 15, 2002).

14. There are no reports that certify balances of individual Indian trust accounts as

accurate.

Defendants' Response: Defendants deny this statement. The language relied upon by plaintiffs does not assert that "[t]here are no reports that certify balances of individual Indian trust accounts as accurate;" rather, it provides the author's conclusion regarding a 1929 GAO Report. Moreover, the GAO documents reflecting settlement of individual Indian trust accounts included a certification executed on behalf of the Comptroller General. See Decl. of Frank Sapienza, Attachment B (Sept. 18, 2000) (Exhibit 7, Tab 2, Attachment B) (GAO Sample Audit Documents) (sealed exhibit).

In addition, while this statement apparently refers only to GAO certifications, it disregards other accountings and reports rendered by Interior with regard to individual Indian trust accounts, as is explained above in response to statements 10 and 11.

For further support for defendants' denial, see Part II of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts and documents cited therein.

15. It is not possible to certify that disbursements from individual Indian trust accounts have been and are made to the correct individual Indian trust beneficiaries in the correct amounts.

Defendants' Response: Plaintiffs' allegation does not constitute a statement of fact, but, rather, constitutes a legal conclusion. No response is required under the Court's rules, but to the extent any response is deemed necessary by this Court, defendants state that the letter cited by plaintiffs does not support the assertions contained within this statement and, further, defendants

deny that there is support for these assertions.

16. It is not possible to certify that disbursements authorized by BIA agency superintendents from individual Indian trust accounts have been and are made to the correct individual Indian trust beneficiaries in the correct amounts.

Defendants' Response: Plaintiffs' allegation does not constitute a statement of fact, but, rather, constitutes a legal conclusion. No response is required under the Court's rules, but to the extent any response is deemed necessary by this Court, defendants state that the letter cited by plaintiffs does not support the assertions contained within this statement and, further, defendants deny that there is support for these assertions.

17. GAO has no copies of Statements of Outstanding Checks for the years 1932 through 1955.

Defendants' Response: Defendants admit that GAO possesses no copies of Statements of Outstanding Checks for the years 1932 through 1955.

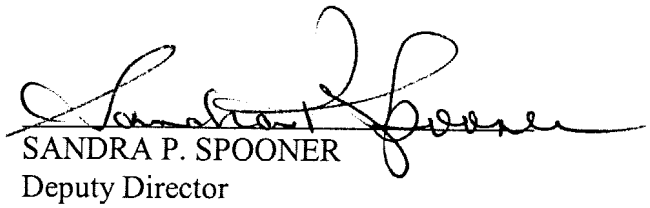
Dated: February 14, 2003

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before the Court on Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts, filed on January 31, 2003, and Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts, filed on February 14, 2003.

Upon consideration of Plaintiffs' motion, responses thereto, and the applicable law in this case, the Court finds that Plaintiffs' Motion for Partial Summary Judgment should be DENIED.

SO ORDERED this _____ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 14, 2003, I served the foregoing *Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment as to the Non-Settlement of Accounts* and *Defendants' Statement of Genuine Issues with Regard to Plaintiffs' Motion for Partial Summary Judgment* by U.S. Mail upon:

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Courtesy copies by hand upon:

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First 25 pages by facsimile; a complete copy to be delivered by hand February 18, 2003 upon:

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