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' NOTICE OF FILING OF REDACTED VERSION OF REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING STATUTE OF LIMITATIONS AND LACHES

Defendants hereby file a redacted version of their *Reply in Support of Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches*, in which quotations or other direct references to testimony from depositions that are treated as under seal have been redacted. A complete, unredacted version has been filed on this date along with a motion for leave to file under seal.

Dated: April 25, 2003

Respectfully submitted,

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Plaintiffs,	)	
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v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	(REDACTED VERSION--
	)	NOT FILED UNDER SEAL)
Defendants.	)	
	)	

DEFENDANTS' REPLY
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY
JUDGMENT REGARDING STATUTE OF LIMITATIONS AND LACHES

Defendants state the following as their reply to the Plaintiffs' Opposition ("Plaintiffs' Opposition" or "Pls. Opp.") to Defendants' Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches.

Introduction

What is most striking about Plaintiffs' Opposition and their other papers is how few of the material facts they attempt to controvert. Thus, the record contains voluminous, unchallenged evidence that allegations of mismanagement of the Indian trust have been well known for most of the 20th century. Plaintiffs fail to overcome Defendants' showing that Plaintiffs and the rest of the class knew or should have known of their claims prior to October 1, 1984. Plaintiffs also fail to show any genuine issue of material fact or any legal principle that would defeat Defendants' motion for partial summary judgment.

Argument

I. Plaintiffs Fail to Show Any Genuine Issue of Material Fact

Defendants Statement of Material Facts in Support of Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches ("Defendants' Statement of Facts" or "Defs. St. Facts"), filed January 31, 2003, listed 70 paragraphs of material facts (plus subparagraphs). Plaintiffs' opposition papers filed on April 18, 2003, included their Statement of Material Facts Not in Dispute ("Plaintiffs' Statement of Facts" or "Pls. St. Facts"). Plaintiffs' Statement of Facts does not challenge paragraphs 25 through 70 of Defendants' Statement of Facts. Therefore, under local Civil Rules 5(h) and 56.1, the facts stated in those paragraphs should be deemed admitted.

Plaintiffs' Statement of Facts challenges a number of Defendants' characterizations and quotations from the deposition testimony of the named Plaintiffs. As shown in Defendants' Rebuttal (filed on this date), however, Plaintiffs' challenges are not well-taken.

Plaintiffs' own allegations of fact (see Pls. St. Facts at 1-4) do not demonstrate a genuine issue of material fact and do not preclude summary judgment against them. Paragraphs 1 through 4 and 6 merely provide quotes from the opinions issued by this Court and the court of appeals regarding the effect of the Government's prior failures to provide accountings or fulfill obligations. Paragraph 5 (Pls. St. Facts at 3) similarly refers to a congressional "report" for a generalized allegation of "fraud and corruption." But those points do not pertain to whether Plaintiffs can escape the statute of limitations and laches. Plaintiffs also point to general statements by former Secretary Babbitt (Pls. St. Facts at 3, ¶ 7) as to why he would prefer not to include a disclaimer in quarterly statements, and they cite a 1932 memorandum (id. at 4, ¶ 8)

discussing the policies behind whether regular statements should be sent to all Indian beneficiaries or only to those who request statements. Such remarks are no defenses to statutes of limitations and laches, and Plaintiffs have cited no authority that they are.

Finally, Plaintiffs allege that Defendants have not repudiated their obligations to perform an accounting for Plaintiff Elouise Cobell (id. at 4, ¶ 9). That is a conclusion of law rather than a fact, and, as discussed below, the concept of "repudiation" is irrelevant.

II. The Statute of Limitations and/or the Doctrine of Laches Should Be Applied to Limit the Time Period of the Accounting

Plaintiffs' Opposition (at 6 et seq.) first asserts that Defendants are obliged to account for the entire period during which Individual Indian Money ("IIM") accounts have existed,[1] and that this time period cannot be limited by the statute of limitations or laches. Significantly, Plaintiffs admit that the statute of limitations could apply to "an accounting claim" under some circumstances (e.g., if there were a "repudiation, termination or denial") (Pls. Opp. at 6-7). Plaintiffs also admit (Pls. Opp. at 7) that the statute of limitations, if found to apply, could preclude a "restatement of accounts or a legal remedy" as to particular transactions found to have been maladministered in earlier periods.

Despite those substantial admissions, Plaintiffs appear to contend that the statute of limitations or laches defenses are all-or-nothing principles as to a claim for an accounting; either they preclude the claim for an accounting entirely, or they have no effect at all on the accounting.

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[1] The authorities Plaintiffs cite for this proposition do not address whether the time period of an accounting can be limited by the statute of limitations or laches. Brown v. Lee, 38 Cal. App. 242, 245 175 P. 907 (1918), and Anderton v. Patterton, 363 Pa. 121, 69 A.2d 87 (1949), did not even involve statutes of limitations or laches. Sines v. Shipes, 192 Md.139, 159, 63 A.2d 748 (1949), found that laches did not apply at all under the facts, but said nothing as to whether laches could limit the time period of an accounting if it did apply.

Plaintiffs are incorrect, for the continuing claim doctrine calls for just the result Defendants seek.

As discussed at length in Defendants' opening brief (at 28-32),[2] the failure to provide an accounting – like the failure to fulfill other fiduciary duties – generates a new and separate cause of action each time the trustee fails to so perform. Thus, each day (or quarter or other period), or upon the occurrence of each trust transaction (e.g., receipt or disbursement of money), a new duty to account for that day (or other period) or that transaction arises, and if that duty is not fulfilled, a new and separate cause of action arises to enforce that duty. Under 28 U.S.C. § 2401(a), beneficiaries have six years to sue for each such violation. Thus, the statute of limitations imposes a temporal limit such that the claimant can only recover with regard to the periods of time falling within the statute of limitations.

The courts have applied the continuing claim doctrine in just the way we describe in many contexts involving fiduciary and other duties, including the Government's fiduciary duties to Indians.[3] The various duties of the defendants in those cases covered lengthy periods of time that were curtailed because of the application of the statute of limitations. Similarly, here, while Defendants previously might have had duties to provide accountings for previous periods of time

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[2] See Defendants' Corrected Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches.

[3] See cases cited in Defendants' opening brief at 28-31, including cases involving the Government's fiduciary duty to Indians to manage timber sales on allotted land and regenerate the land (Mitchell v. United States, 10 Cl. Ct. 787, 788 (1986)), the Government's trust obligations to Indians to manage tribal land (Cherokee Nation of Okla. v. United States, 21 Cl. Ct. 565, 572 (1990)), fiduciary duties to manage pension funds (Gruby v. Brady, 838 F. Supp. 820, 824, 830 (S.D.N.Y. 1993)), duties of co-owners of land to share profits (Barash v. Estate of Sperlin, 271 A.D.2d 558, 559, 706 N.Y.S.2d 439, 440 (2000)), statutory claims for back pay (Adams v. Hinchman, 1654 F.3d 429, 422 (D.C. Cir. 1998) (per curiam)), and the Government's statutory duty to make rent adjustments on housing assistance contracts (Brown Park Estates-Fairfield Development Co. v. United States, 127 F.3d 1449 (Fed. Cir. 1997)).

(i.e., prior to October 1, 1984), that period of time is now curtailed because of the statute of limitations. Thus, from the day when the Government first held IIM property in trust, it may have had a new and separate duty to account that arose each day or upon each transaction, and the IIM beneficiaries could have sued to enforce each of those obligations long ago. They did not do so until 1996. Claims not already time-barred were tolled beginning October 1, 1990.[4] Thus, only the claims for accountings that arose within six years of that date (i.e., after October 1, 1984) remain viable. This is the precise principle that was applied by the D.C. Circuit, see Adams v. Hinchman, 154 F.3d at 422 (applying the principle to a back-pay claim under the Fair Labor Standards Act) and many other federal courts in the cases cited in note 3, supra.

Although Defendants' cited cases (see preceding note) did not involve claims for only an accounting (that, no doubt, is because it is so rare for a claimant to seek only an accounting but no recovery of funds), the principle of those cases is equally sound in a claim for a pure accounting. Plaintiffs fail to distinguish or refute Defendants' cited cases so construing the continuing claim doctrine.

Rather, Plaintiffs (Pls. Opp. at 38) misinterpret the continuing claim doctrine by relying on Cherokee Nation of Oklahoma v. United States, 26 Cl. Ct. 798 (1992). See Pls. Opp. at 38. But that was an action for trespass, involving, e.g., claims for failure to remove trespassers who occupied plaintiff's land. The case does not save Plaintiffs' stale accounting claims. First, the continuing claim doctrine applies in a fundamentally different way to the type of trespass claim at issue in Cherokee Nation. While each new trespass may be an independent violation, once the trespass occurs, it continues until the trespasser leaves. Thus, the court held that, so long as the

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[4] See Defendants' opening brief at 3.

trespass remains in effect during the limitations period (e.g., within six years before suit), the continuing claim doctrine allows the claim for trespass to be brought. 26 Cl. Ct. at 804 (trespass claims "that first accrued [more than six years before suit was filed] but which continued extant during the six year statutory period potentially remain actionable")

Second, Plaintiffs misapply Cherokee Nation, for they argue that the Government's failure to "discharge the duty to account" means that there has been no "termination of a continuing wrong" and, therefore, the continuing claim doctrine keeps alive their claim for an accounting going back to 1887. But Cherokee Nation does not stand for that proposition and, even if it did, it would be contrary to binding D.C. Circuit precedent and the other cases cited in note 3, supra. In Fitzgerald v. Seamans, 553 F.2d 220, 230 (D.C. Cir. 1977), the court held, "the mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong which tolls the statute of limitations, for that is the purpose of any lawsuit and the exception would obliterate the rule." Applied to this case, Defendants' failures to provide accountings for each day or transaction that occurred before October 1, 1984 were "mere failure[s] to right a wrong" and cannot toll the statute of limitations.

If Plaintiffs' interpretation were the law, all of the continuing-claim cases cited above (note 3, supra) would have been decided differently, for in each of those cases, the defendants' failures to comply with their duties would have kept all of the plaintiffs' claims alive. Moreover, Plaintiffs' interpretation would have led to opposite results in all of the cases cited in Defendants' opening brief (at 7- 9) in which claims for accountings were time-barred.[5] Plaintiffs are trying to

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[5] Defendants' cited cases include the following, in which actions for accountings were time-barred: Chandler v. Lally, 31 N.E.2d 1, 3 (Mass. 1941), Kedzierski v. Kedzierski, 899 F. 2d 681, 684 (7th Cir. 1990), Glovaroma, Inc. v. Maljack Prod., Inc., 71 F. Supp. 2d 846, 857

have it both ways, admitting that accounting claims can be time-barred (see above), yet advancing a strained interpretation of the "continuing claims" theory under which no accounting claim ever could be time-barred.

Plaintiffs erroneously argue (Pls. Opp. at 10) that the 1994 Act helps them avoid the statute of limitations. That statute, however, has nothing to do with limitations or laches. The statute of limitations is jurisdictional and cannot be read out of existence by a statute (the 1994 Act) that does not refer to the statute of limitations, tolling or any related principle.

Plaintiffs also argue (Pls. Opp. at 11) that the accounting should be performed so that they will know whether any breaches occurred and to "determine accurate balances." But the extensive case law cited in Defendants' opening brief (at 30-32) holds that a plaintiff cannot circumvent the statute of limitations by pointing to continuing financial consequences during the limitations period that result from breaches that occurred before the limitations period.[6] Thus, regardless of whether any past errors in handling IIM accounts led to inaccurate balances as of October 1, 1984, Defendants cannot be required to provide an accounting of such prior transactions.

(N.D. Ill. 1999), and Potlatch Oil & Ref. Co. v. Ohio Oil Co., 199 F.2d 766, 770 (9th Cir. 1952). Plaintiffs' efforts (Pls. Opp. at 8-11) to distinguish these cases are to no avail, because the cases stand for the simple proposition that accounting claims may be time-barred. Plaintiffs fail to refute that.

[6] See cases cited in Defendants' opening brief (at 30-32), including Brown Park Estates-Fairfield Development Co v. United States, 127 F.3d at 1456, 1459 (even though a time-barred claim may have continuing "ill effects" later on, that does not revive the claim or allow recovery for those ill effects); Fitzgerald v. Seamans, 553 F.2d at 230; Miele v. Pension Plan of New York State Teamsters Conference Pension Plan & Retirement Fund, 72 F. Supp. 2d 88, 102 (E.D.N.Y. 1999) (a time-barred wrong does not remain actionable by pointing to "ill effects that continue to accumulate over time").

III. The Claims for an Accounting Accrued When Plaintiffs and the Class Knew or Should Have Known of Any Alleged Failures to Comply With Trust Obligations

The Court already decided that Plaintiffs' claims accrued when they "knew or should have known that they had a valid right of action for trust mismanagement against the government," and the Court found that "[t]he parties agree" that this is the standard. Cobell v. Babbitt, 30 F. Supp. 2d 24, 44 (D.D.C. 1998). Yet, Plaintiffs' Opposition subtly fights the Court's ruling by suggesting a higher standard. For example, Plaintiffs' Opposition at 11, suggests "repudiation" by the trustee is necessary and Plaintiffs cite various state law cases for the notion that the beneficiary must have "actual knowledge" of breach (see Pls. Opp. at 14-15).

Plaintiffs' effort to elevate the standard for determining when their accounting claim accrued must fail. First, the point has already been decided (with Plaintiffs' agreement) in this case and Plaintiffs show no basis for reopening the issue. Second, the many federal cases cited in Defendants' opening brief (at 16-19), the Bogert treatise,[7] and cases relied upon by Plaintiffs (Pl. Opp. at 11-13)[8] establish that the limitations period begins when a beneficiary knew or should

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[7] Plaintiffs' Opposition (at 12) relies upon GEORGE GLEASON BOGERT, BOGERT'S TRUSTS AND TRUSTEES § 951 (rev. 2d ed. updated 2002) ("BOGERT"), which states the following standard:

> If the trustee violates one or more of his obligations to the beneficiary, or by words or other conduct denies that there is a trust and claims the trust property as his own, there obviously is a cause of action in favor of the beneficiary and any relevant Statute of Limitation will apply from the date when the beneficiary knew of the breach or repudiation, or by the exercise of reasonable skill and diligence could have learned of it.

(footnotes omitted; emphasis added.)

[8] See Sadler v. Sadler, 73 F. Supp. 583, 586 (D. Nv.1947) (statute of limitations runs from the time of, among other things, "some act . . . inconsistent with trust"), aff'd, 767 F.2d 1 (9th Cir. 1948); see also Dist. 22 United Mine Workers of America v. Utah, 229 F.3d 982, 991

have known of alleged breaches. The law is clear that the rule relied upon by Plaintiffs (i.e., that repudiation is necessary in order to trigger limitations) only applies to disputes over the existence of a trust, not to claims (such as those in this case) arising out of alleged misfeasance or nonfeasance. See Cherokee Nation of Oklahoma v. United States, 21 Cl. Ct. 565, 571 (1990) (the notion that repudiation is necessary to trigger the statute of limitations "is not applicable to claims for misfeasance or nonfeasance as opposed to claims for recovery of the trust corpus" (quoting Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1578 (Fed. Cir. 1988)); Jones v. United States, 9 Cl. Ct. 292, 295-96 (1985), aff'd, 801 F.2d 1334 (Fed. Cir. 1986).

The present case involves disputes over alleged misfeasance or nonfeasance, so repudiation was not necessary to start the limitations period running. Accordingly, Plaintiffs' discussion (Pls. Opp. at 13-14) of what constitutes actionable repudiation of a trust is inapposite.

Plaintiffs erroneously argue (Pls. Opp. at 14) that the statute of limitations and laches are not triggered by the trustee's failure to provide an accounting after a demand by the beneficiary. The cases cited by Plaintiffs (Pls. Opp. at 14) furnish weak support for such an argument. Plaintiffs quote dicta out of context and fail to note crucial distinguishing features of those cases.

First, most of the cases cited by Plaintiffs involved disputes over whether a trust existed or whether certain property was held in trust, thus requiring evidence of repudiation in order for the statute of limitations to apply.[9] Not surprisingly, the courts found that such repudiations did

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(10th Cir. 2000) (whether the statutes of limitations had run would depend on whether trustee's actions "constituted a breach of its trust obligations . . . and, if so, when [the beneficiaries] knew or should have known of the breach").

[9] See Rollestone v. National Bank of Commerce in St. Louis, 252 S.W. 394, 399 (1923) (dispute over whether certain stock was held in trust for plaintiff); Boehnke v. Roenfanz, 246 Iowa 240, 67 N.W.2d 585, 587 (1954) (suit to establish interest in realty under trust agreement);

not occur by the trustee's silence after receiving a single letter equivocally asking him to acknowledge the trust (In re Dieter's Estate, 239 P.2d at 960; Rollenstone, 252 S.W. at 400,) or merely because the trustee failed to send accountings (Boehnke, 67 N.W.2d at 591). But, as discussed above, this case does not involve a dispute over the existence of a trust, so repudiation was not necessary in order to trigger the limitations period.

Second, this case is substantially different from those cited by Plaintiffs. In Plaintiffs' cited cases, the beneficiaries had little or no reason to suspect improper acts by the trustee long before suit. See In re Dieter's Estate, 239 P.2d at 960; Rollenstone, 252 S.W. at 400; Boehnke, 67 N.W.2d at 591; Nayee v. Nayee, 705 So. 2d 961, 965 (Fla. Dist. Ct. App. 1998) (failure to receive payments was not inconsistent with what beneficiaries had been told by trustee, so they had no reason to suspect that he adversely held funds). In sharp contrast, the record here establishes vociferous, widespread, well-publicized allegations that Interior refused multitudes of demands to provide information and allegedly committed other breaches of trust over a period spanning many decades. See Defendants' Statement of Facts.

Third, several cases cited by Plaintiffs (Pls. Opp. at 14-15) relied upon incorrect or inapplicable statements of the law, requiring "actual knowledge" of breach for the limitations time to begin running. See Nayee, 705 So. 2d at 964 (cited in Pls. Opp. at 14-15). But, as discussed above, "actual knowledge" is not required.

Plaintiffs incorrectly suggest (Pls. Opp. at 15) that limitations will not run unless an accounting is provided with sufficient information to apprize the beneficiary of breaches. The

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In re Dieter's Estate, 172 Kan. 359, 239 P.2d 954, 960 (1952) (action over "whether there was . . . a valid and enforceable trust").

cases cited by Plaintiffs are readily distinguishable or rely upon the inapplicable principle that "actual knowledge" is required. For example, Plaintiffs rely upon Di Grazia v. Anderlini, 22 Cal. App. 4th 1337, 1345 (1994), and Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 677 N.E.2d 159, (1997), which adopted the "'actual knowledge' standard of notice due to fraudulent concealment" (Pls. Opp. at 15). But Demoulas noted that it was applying Massachusetts law on that point, and stated that federal law is different, for it only tolls limitations until "plaintiffs, in exercise of reasonable diligence, discover or should have discovered, alleged fraud or concealment." 677 N.E.2d at 175 n.26. "Consequently," the Demoulas court stated, "the Federal application of the fraudulent concealment doctrine is not necessarily equivalent to our law and may produce dissimilar outcomes." Id.

Other of Plaintiffs' cited cases (Pls. Opp. at 15) are distinguishable because the plaintiffs there neither knew nor had reason to know of the alleged breaches. See Dennis v. Rhode Island Hospital Trust National Bank, 571 F. Supp. 623, 637 (D.R.I. 1983), aff'd as modified, 744 F.2d 893 (1st Cir. 1984) (the beneficiary "did not know and had no reason to know" of the trustee's breach); Kaufman v. Kaufman, 292 Ky. 351, 166 S.W.2d 860, 865 (1942) (no knowledge of trustee's wrongdoing). In Chisholm v. House, 183 F.2d 698, 706-07 (10th Cir. 1950), an illiterate Indian beneficiary, who had been declared incompetent, never learned of breaches by the trustees, and "never understood the nature of his acts or contracts or their legal import." Here, the record shows that the named Plaintiffs and the class generally knew or were on notice of widespread allegations of breach over many decades.

The cases cited in Defendants' opening brief (at 6-11) are far more applicable in showing when claims will be deemed time-barred. Plaintiffs' efforts to show factual distinctions (Pls.

Opp. at 16-17) result in no legal consequence.[10] Plaintiffs fail even to discuss other cited cases.[11] Thus, Plaintiffs demonstrate no reason why Defendants' cited cases should not control and result in a finding that claimants here tarried too long and their claims for an accounting before October 1, 1984 are time-barred.

IV. Plaintiffs' Claims Were Not Equitably Tolled

Plaintiffs' Opposition (at 18-21) relies heavily on two cases, Manchester Band of Pomo Indians, Inc. v. U.S., 363 F. Supp. 1238 (N.D. Cal. 1973), and Loudner v. U.S., 108 F.3d 896 (8th Cir. 1997), to avoid the effect of the statute of limitations. Defendants' opening brief (at 11-13) explained that those cases are contrary to the great weight of authority and, in any event, even

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[10] Plaintiffs fail to distinguish Harvey v. Leonard, 268 N.W.2d 504, 516 (Iowa 1978). Contrary to Plaintiffs' description, the court found that the beneficiary knew or should have known of the trustee's breaches, but not because breaches were somehow disclosed in statements sent to the beneficiary. On the contrary, the court noted that the information showing the breaches was omitted from the statements. 268 N.W.2d at 516 (statements did not show loss of control of the company, which was the breach). Rather, the court relied on other facts, such as the plaintiff's presence at meetings at which facts (e.g., transfer of company control) were discussed, which put her on notice. Id. at 514. The Harvey court relied on the following statement from Bogert § 949: "A cestui que trust cannot sit idly by and close his eyes to what is going on around him."

Plaintiffs similarly fail to distinguish Lawson v. Lawson, 524 F. Supp. 1097 (W.D. Penn. 1981). It makes no difference that it was not a "trust case." It was a suit for an accounting for property held in a fiduciary capacity, so the same principles of laches apply. Plaintiffs suggest that, because the plaintiff in that case was a lawyer, officer and director, he was in a better position to know of his trustee's malfeasance than are Plaintiffs in this case. While Plaintiffs in this case might not all be lawyers, officers or directors, they have had something far more useful in the discovery of claims: Widespread public allegations over decades – reflected in GAO reports, congressional hearings and reports, popular press and books, and reported litigation – alerting them to purported Government breaches.

[11] For example, Plaintiffs fail to discuss Carnahan v. Peabody, 31 F.2d 311, 313 (S.D.N.Y. 1929), cited in Defendants' opening brief at 15, in which the court held that laches barred a claim for an accounting of transactions that occurred over a century earlier.

those cases merely relaxed slightly the duty of a beneficiary to discover trust violations. That point is crucial, for even under such a relaxed standard, Plaintiffs and the rest of the class surely knew or should have known of alleged breaches of trust long before October 1, 1984.

Plaintiffs point to Manchester and Loudner for a number of points that do not actually aid them. They argue (Pls. Opp. at 19) that, in Manchester, the plaintiffs "relied on the good faith" of their fiduciary, that the facts of the breach were concealed, and that the court held that beneficiaries are "not required to ferret out from government records the information necessary to understand the government's breach of trust." Plaintiffs note that in Loudner, beneficiaries who did not even know they were beneficiaries were not deemed to have known of their claims. But those points do Plaintiffs no good because, for decades, the public record has been full of allegations that the Government did not carry out its Indian trust obligations, and such knowledge has been widespread in the Indian community for generations. See Defendants' Statement of Material Facts. These publicly known facts gave more than sufficient "factual basis" for Plaintiffs to sue for the accounting that they now seek, without having to "ferret" anything out of government records. The allegations of breach were not just "tacked to a bulletin board," like the notice found insufficient in Loudner, 108 F.3d at 902.

Plaintiffs offer their usual mantra about a "pattern and practice of deception" and a "cover up," (Pls. Opp. at 21) and their stock allegations of document destruction (id. at 23), as though the mere utterance of those words suspends the statute of limitations. Actually, Plaintiffs attempt to prove too much, for they were able to file this suit in 1996, notwithstanding whatever deceptions or cover ups they contend existed and in spite of whatever documents they lacked. This proves that the supposed "deception" and "cover up" did not stop them from filing suit.

The allegations of trust mismanagement of which they admit being aware long before October 1, 1984, were ample to allow them to sue for an accounting. If Plaintiffs mean to assert that the law requires that they be informed of every undotted "i" and uncrossed "t" before a statute of limitations will run against them, they seriously misapprehend the law and they cite no support for such a novel proposition.

Plaintiffs assert (Pls. Opp. at 23) that they raised concerns about management of the trust, and that defendants "pledged" they would address such concerns. Significantly, Plaintiffs cite nothing in the record to support a "pledge." Conclusory allegations of fact, not supported by record evidence, cannot defeat a motion for summary judgment. See Int'l. Dist. Corp. v. American Dist. Tel. Co., 569 F.2d 136, 139 (D.C. Cir. 1977) ("a party may not avoid summary judgment by mere allegations unsupported by affidavit").

V. The Statute of Limitations and Laches Can and Should Be Applied to the Class

Where, as here, notice of potential claims has been a matter of common, public knowledge for decades before suit was filed, it is entirely appropriate to apply the statute of limitations or laches to a class. Plaintiffs erroneously assert that the law precludes class wide application of those defenses. But many cases have done just that. For example, Mitchell v. United States, 10 Cl. Ct. 63, 65 modified on reconsideration, 10 Cl. Ct. 787 (1986), involved consolidated actions, including a suit proceeding as a class action, and involving approximately 1,500 individual Indian allottee plaintiffs. The court entered partial summary judgment, based upon the statute of limitations, against all plaintiffs, finding that they "had reason to know of their causes of action long before the date their suits were finally brought." 10 Cl. Ct. at 68.

In Littlewolf v. Hodel, 681 F. Supp. 929, 934 & 941 (D.D.C. 1988), aff'd, 877 F.2d 1058 (D.C. Cir. 1989), the court certified the case (involving Indian trust beneficiary claims) as a class action and entered summary judgment for the defendants based upon a statute of limitations. The same results occurred in Gruby v. Brady, 838 F. Supp. 820 (S.D.N.Y.1993) (class action of participants in union pension fund; court held that claims prior to a certain date were time-barred).

Other cases also have ruled on statutes of limitations questions on a class-wide basis or otherwise opined that such defenses may be applied class wide. See Waters v. Int'l Precious Metals Corp., 172 F.R.D. 479, 508 (S.D. Fla. 1996) ("the Court finds that class wide determination of whether the Plaintiffs' claim was timely filed is appropriate under the circumstances of this case"; court found the claim was timely filed); In re ML-Lee Acquisition Fund II, L.P. and ML-Lee Acquisition Fund Retirement Accounts II, L.P. Securities Litigation, 848 F. Supp. 527, 559 (D. Del. 1994) (in ruling on class certification motion, court noted that "[d]efendants' statute of limitations defenses are not unique to [the class representatives]" and that "[s]imilar statute of limitations arguments may be raised against all class members"); Gruber v. Price Waterhouse, 117 F.R.D. 75, 80 (E.D. Pa. 1987) (on class certification motion, court stated it would not rule on merits of statute of limitations defense at that stage, but observed that the defense "is based on information disclosed to the public and obtained during discovery in [a] related case" and that "the statute of limitations defense is common to the class").

Plaintiffs cite no authority holding that statute of limitations or laches defenses cannot be decided class wide. The section they cite (Pls. Opp. at 24) from A. CONTE, H. NEWBERG, NEWBERG ON CLASS ACTIONS § 9:63 at 451 (4th ed. 2002), merely states the obvious proposition

that some class members might be subject to defenses while other members are not. Likewise, in the two cases that Plaintiffs cite[12] (Pls. Opp. at 24-26), the facts showed that only some class members in those cases were subject to a limitations defense. That does not mean that the statute of limitations requires an individualized analysis in every class action. Moreover, those cases involved decisions on class certification motions. The fact that the courts declined to rule on substantive defenses such as the statute of limitations at that juncture of the case does not mean that Defendants' Motion should not be decided now.

Plaintiffs fail to show any basis to excuse the class from being held aware of the widespread, well-known public allegations of trust mismanagement that circulated throughout most of the 20th century. Defendants have presented massive evidence of this. The evidence begins with deposition testimony, including

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Plaintiffs fail to overcome these allegations by quibbling over the precise quotations of Ms. Cobell, or by challenging the sufficiency of their own testimony about

REDACTED [13] Contrary to Plaintiffs' suggestion, the courts do allow testimony as to

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[12] Western States Wholesale, Inc. v. Synthetic Ind., Inc., 206 F.R.D. 271, 276 (C.D. Cal. 2002); Lamb v. United Sec. Life Co., 59 F.R.D. 25 (S.D. Iowa 1972).

[13] To challenge their own testimony **REDACTED**, Plaintiffs (Pls. Opp. at 27 n.9) cite

whether certain facts or beliefs are common knowledge in the community.[14]

Moreover, Plaintiffs fail even to challenge or question the fact that the voluminous other evidence cited by Defendants demonstrates that the Indian community, including the class, knew or should have known of the allegations of trust mismanagement long before October 1, 1984.

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inapposite cases and seriously misrepresent their holdings. In Jackson v. Dist. of Columbia, 672 F. Supp. 22, 26 (D.D.C. 1987), the court was unpersuaded by an arrestee's "scattered references to 'widespread knowledge in the community' of illicit police conduct." Contrary to Plaintiffs' argument (Pls. Opp. at 27 n.9), the court did not hold that particular testimony to be inadmissible hearsay. 672 F. Supp. at 26. Rather, the court simply found those particular allegations by that arrestee to be insufficient to prove a general illegal policy or inept supervision by the city and police.

Plaintiffs also mischaracterize United States v. Allen, 960 F.2d 1055, 1059 (D.C. Cir. 1992), which did not hold that reputation of having used a nickname was inadmissable hearsay. The court declined to decide that question. Id. ("We need not resolve that issue.").

Plaintiffs' misstatement of case law continues with Jinro America, Inc. v. Secure Investments, Inc., 266 F.3d 993, 1006 (9th Cir. 2001). The case did not find that a witness's remarks about Korean businesses were inadmissable hearsay. Rather, the court found that the witness was not qualified to offer such opinions and his remarks were unduly prejudicial under Federal Rule of Evidence 403.

The remaining two cases cited by Plaintiffs are not even remotely on point. Von Zedtwitz v. Sutherland, 26 F.2d 525 (D.C. Cir. 1928), involved "family tradition as to residence," while Snell v. United States, 16 App. D.C. 501 (1900), refused to accept general reputation of insanity as proof.

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Plaintiffs are bound by their statements.

[14] See S.B.L. v. Evans, 80 F.3d 307, 309 (8th Cir. 1996) (in civil rights action against school principal who claimed she was unaware of a teacher's pattern of abusing students, grandmother of teacher's former students testified it was "common knowledge in the community" that the teacher engaged in certain conduct); C.C. Gunn v. Comm'r, 247 F.2d 359, 361 (8th Cir. 1957) (where issue existed over whether taxpayer had cash on hand, banker testified that it was "common knowledge and repute in the community" that taxpayer always carried considerable cash); Broadview Lumber Co. v. Southwest Missouri Bank of Carthage, 168 B.R. 941, 958 (Bankr. W.D. Mo. 1994) (witness testified that it was "common knowledge" that a company had ceased doing business).

That unchallenged evidence includes the multitude of GAO and other reports documenting allegations of trust mismanagement, beginning in 1915 (Defs. St. Facts ¶¶ 29 through 58), congressional hearings, testimony and reports further documenting such allegations (Defs. St. Facts ¶¶ 59-64), popular media articles and books with similar allegations (Defs. St. Facts ¶¶ 65-67), and reported decisions of pre-1984 federal cases involving individual Indian allottees' claims of trust violations (Defs. St. Facts ¶¶ 68-70).

Defendants' opening brief (at 28) noted that, based upon the same types of evidence, the court in Mitchell, 10 Cl. Ct. at 68-69, held that a class of trust beneficiaries knew or should have known of their claims. Plaintiffs fail to show why that precedent should not be followed here.

VI. Plaintiffs' Unspecified Accusations of "Spoliation" Are Insufficient to Avoid Summary Judgment

Defendants have met their burden of showing that there is no genuine issue of material fact that Plaintiffs knew or should have known of their claims prior to October 1, 1984. As the nonmovants, Plaintiffs have the burden of showing a genuine issue of material fact exists, and they must do so by showing "specific facts," proven by "affirmative evidence." Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1033-34 (D.C. Cir. 1988).

This they apparently cannot do. Hence, they instead resort to their customary conclusory allegations of "spoliation" and document "destruction." Plaintiffs treat such concepts as though they are trump cards that will get them out of any legal jam. Those concepts do not afford them the relief they seek.[15]

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[15] Of course, given the vague and completely conclusory nature of Plaintiffs' allegations regarding absent documents, no one could be expected to refute the accusations. Moreover, for purposes of the present motion, Defendants need not jump into that fray. As the parties seeking an adverse inference, Plaintiffs have the burden of proving all elements to obtain such an

Even the cases that Plaintiffs cite show that conclusory allegations of document destruction, such as Plaintiffs' assertions, do not supply a defense to a summary judgment motion. For example, in Byrne v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 108 (2d Cir. 2001), the court held that before it could make an adverse evidentiary inference based upon alleged destruction of evidence, the "prejudiced party" (here, Plaintiffs) has the burden of producing "some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files."

Plaintiffs quote at length (Pls. Opp. at 28 n.10) from Kronisch v. United States, 150 F.3d 112, 128 (2d Cir. 1998), but they unfortunately misuse an ellipsis to omit crucial language that is directly relevant and essentially eviscerates their argument. Part of the language they omit is the following:

> We do not suggest that the destruction of evidence, standing alone, is enough to allow a party who has produced no evidence - or utterly inadequate evidence – in support of a given claim to survive summary judgment on that claim.

150 F.3d at 128.

Plaintiffs utterly fail to offer the required proof.[16] They offer no evidence whatsoever of a single document allegedly destroyed that would prove the existence of a genuine issue of

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inference. As shown in the text, they fail to do so.

[16] Plaintiffs cite Pelletier v. Magnusson, 195 F. Supp. 2d 214 (D. Me. 2002), but that case only shows how woefully insufficient Plaintiffs' allegations are. In Pelletier, the plaintiff identified the specific types of documents that he alleged were incomplete or tampered with, and showed how those documents were relevant to substantiating his claim. The case was a section 1983 claim for state employees' failure to prevent an inmate from committing suicide. The records at issue were documents obviously relevant to proving such a claim, such as the treatment plan, medical record, and daily logs for the inmate. 195 F. Supp. 2d at 234-35. Plaintiffs in the present case offer no such proof.

material fact pertaining to the statute of limitations or laches. Plaintiffs' overheated but vague allegations cannot overcome this fatal shortcoming. But Plaintiffs' complete lack of proof is not surprising. The relevant facts have to do with what Plaintiffs and the other class members knew or should have known. The relevant evidence that proves this are the named Plaintiffs' own admissions and the voluminous reports and other materials in the public domain that show that the allegations of trust mismanagement have been widely known all along. Plaintiffs offer no reason to think, let alone any proof, that documents in the Government's hands would somehow show the opposite, i.e., that Plaintiffs had no reason to know.

Plaintiffs allege instead that Defendants have produced no document that "imparts any plaintiff with full knowledge" regarding administration of their trust, and no document that states that the trusts were administered improperly. Pls. Opp. at 30. That latter statement, of course, is untrue, for Defendants' Statement of Material Facts and their exhibits identify and include numerous documents alleging trust mismanagement in periods prior to October 1, 1984. Plaintiffs turn the adverse inference doctrine on its head, apparently implying that Defendants must have destroyed documents that would have helped prove Defendants' case. But the burden is on Plaintiffs to prove destruction of documents that would substantiate their defense or that would show a genuine issue of material fact. This they have not done.

VII. Plaintiffs Fail to Show That They Were Induced Not to Enforce Their Rights

Plaintiffs cannot credibly argue that they were induced not to enforce their rights. First, Plaintiffs offer no proof that any Government official said anything that could reasonably induce a Plaintiff not to enforce his or her rights. They offer the statements of only one person, Ms. Cobell (her deposition testimony), but even the things that she claims she was told could not

reasonably be interpreted to induce someone to not enforce her rights for decades.[17]

Second, the totality of facts surrounding

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. The public domain was replete with allegations of mismanagement of the trust accounts. Defs. St. Facts at 17 et seq.

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[17] Ms. Cobell testified that,

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Thus, this case is fundamentally different from those that Plaintiffs cite in which defendants made statements that reasonably could lead someone to not take further action, for example, a doctor telling a patient that her pain was part of the normal healing process, Bohus v. Beloff, 950 F.2d 919, 926 (3d Cir. 1991), or a seller of annuity policies telling the buyers to "ignore" written notices from the company regarding the policy's value, Dominick v. Dixie Nat'l Life Ins. Co., 809 F.2d 1559, 1576 (11th Cir. 1987).

VIII. Indian Trust Law Principles Furnish No Basis for Denial of Summary Judgment

Plaintiffs argue (Pls. Opp. at 33-34) that, because statutes may be liberally construed to the benefit of Indians, Defendants cannot even "maintain" a summary judgment motion against them. That obviously is not the law, for the federal courts many times have granted motions for summary judgment or to dismiss against Indian plaintiffs. See, e.g., Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588 (9th Cir. 1990); Mitchell v. United States, 13 Cl. Ct. 474, 486 (1987); Nichols v. Rysavy, 809 F.2d 1317, 1334 (8th Cir. 1987).

Moreover, because the statute of limitations is jurisdictional (see cases cited in Defendants' opening brief at 3), no basis exists to grant litigants a blanket exemption from it because of their status as Indians. Thus, general principles regarding liberal interpretation of statutes furnish no basis for denying Defendants' motion for summary judgment.

Plaintiffs fare no better with their argument (Pls. Opp. at 34-36) that Defendants are "estopped" from even maintaining a summary judgment motion because of supposed fiduciary duties of the United States or it agencies and officers. Plaintiffs incorrectly suggest that the Department of Justice has a fiduciary duty to Plaintiffs that is "paramount" (Pls. Opp. a t 36),

supersedes any other duties to the Government, and precludes assertion of the statute of limitations against them.

While the Government, including the Attorney General, might in some instances have a duty to bring some types of affirmative claims on behalf of, e.g., Indian tribes, there is no authority for the proposition that this precludes the assertion of all proper defenses on behalf of the Government when Indian litigants sue. The authorities cited by Plaintiffs (Pls. Opp. at 34-35) do not say otherwise. Moreover, in Nevada v. United States, 463 U.S. 110, 128 (1983), the Court recognized that:

> the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

Under 28 U.S.C. §§ 516 and 519, the Department of Justice is charged with representing the United States and its agencies and officers in litigation. Representing the Government includes asserting all proper defenses on its behalf, including jurisdictional defenses such as the statute of limitations.

Conclusion

Although Plaintiffs assert (Pls. Opp. at 36-37) in conclusory fashion that "there are no undisputed facts" and that there are "multiple possible inferences" from the facts that Defendants have put forward, Plaintiffs fail to identify any material facts genuinely in dispute. The pertinent facts, set forth in Defendants' Statement of Facts, are clear-cut and not susceptible to different inferences. Summary judgment is appropriate and should be granted on the grounds of statute of

limitations or laches.

Dated: April 25, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 25, 2003 I served the foregoing *Defendants' Notice of Filing of Redacted Version of Reply in Support of Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches, and Defendants' Reply in Support of Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches-Redacted Version Not Filed Under Seal* by facsimile in accordance with their written request of October 31, 2001 upon:

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