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' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT THAT INTERIOR'S TRUST MANAGEMENT PLAN COMPORTS WITH THEIR OBLIGATION TO PERFORM AN ACCOUNTING

Defendants submit this Reply to Plaintiffs' Opposition ("Opposition") to Defendants' Motion For Partial Summary Judgment That Interior's Trust Management Plan Comports With Their Obligation To Perform An Accounting ("Motion").

Rather than respond to each assertion in the Opposition – including Plaintiffs' assertions of fact that will be premature until the legal issues raised by the Motion have been resolved – section I of this Reply addresses the legal sufficiency of Interior's Trust Management Plan and the legal insufficiency of Plaintiffs' Trust Management Plan. Section II briefly disposes of Plaintiffs' assertion regarding their entitlement to an adverse inference in connection with the Motion, and Section III responds to Plaintiffs' assertion that Defendants' Statement of Material Facts As to Which No Genuine Issue Exists for Motion for Partial Summary Judgment that

Interior's Trust Management Plan Comports With Their Obligation to Perform an Accounting ("Defendants' Statement of Material Facts") is improper.[1]

I. INTERIOR'S TRUST MANAGEMENT PLAN COMPLIES WITH ALL RELEVANT LEGAL REQUIREMENTS, AND PLAINTIFFS' TRUST MANAGEMENT PLAN DOES NOT

Summary judgment should be granted solely on the basis of the legal sufficiency of Interior Defendants' Fiduciary Obligations Compliance Plan (Jan. 6, 2003) ("Interior's Trust Management Plan").[2] Motion at 10-18. In addition, if this Court determines it necessary to reach the issue, Plaintiffs' Compliance Action Plan Together With Applicable Trust Standards (Jan. 6, 2003) ("Plaintiffs' Trust Management Plan") is legally deficient.[3] Motion at 18-31. The Motion raises legal rather than factual issues, whereas Plaintiffs' Opposition discusses disputed facts that would potentially be relevant only if the legal issues were resolved in Plaintiffs' favor.[4] The

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[1]The Defendants rely on their previous assertions, Motion at 3-9, regarding the nature and scope of the proceeding with regard to Interior's Trust Management Plan and respectfully reserve the right to address Plaintiffs' factual assertions should it become necessary to do so upon resolution of the Motion.

[2]Defendants have previously asserted that this Court lacks the authority to undertake a Phase 1.5 trial for the purpose of reviewing Interior's Trust Management Plan. See Motion at 1-2; Brief for the Appellants (filed Dec. 6, 2002). However, the Court's order requiring Defendants to file a Trust Management Plan and stating its intent to hold a trial thereon, see Order of Sept. 17, 2002, reflects the Court's conclusion that the legality of "Interior's planned future conduct" is justiciable at this time.

[3]Defendants respectfully note their prior assertion that no basis exists to consider Plaintiffs' Trust Management Plan because Trial 1.5 is limited to, at most, determining whether Interior's Trust Management Plan is, on its face, so defective that it will necessarily cause further delay rather than accelerate performance of the required accounting. See Motion at 7-9.

[4]As discussed in section III, the Defendants' Statement of Material Facts is therefore sufficient because these legal issues arise from the plain language of the competing trust

Motion thus presents issues that are ripe for summary judgment because no underlying facts, disputed or otherwise, would affect the determination of the legal sufficiency of the competing trust management plans. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) ("principal purpose[] of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses"). As a result, Plaintiffs' allegations that "genuine issues of material fact" exist regarding Interior's Trust Management Plan, Opposition at 8-17, and Plaintiffs' Trust Management Plan, id. at 21-27, are premature and have no bearing on resolution of the legal issues raised by the Motion.

The Opposition makes clear both the Plaintiffs' frustration with the existing legal requirements and constraints that affect the Executive Branch's operation of the trust and the Plaintiffs' apparent belief that future trust operations must ignore the existence of those legal requirements and constraints and focus solely and exclusively on the interests of the individual Indian trust beneficiaries (as opposed to, for example, the interests of the tribal beneficiaries within the same trust structure established by Congress). See Opposition at 13-17. Disregarding the Supreme Court's statement that it is improper to accord "talismanic effect" to the fact that the federal government, in administering Indian trust resources, is held to exacting fiduciary standards, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 179 (1989), the Plaintiffs all but invite the Executive Branch or Judicial Branch to exceed the limits of its authority. Thus, after stating that "it is the United States government – all three branches – that owes these [fiduciary] duties to plaintiffs, not the [E]xecutive [B]ranch alone," Plaintiffs caution that "the judiciary too would be in breach of trust if it did not step up and ensure the prudent discharge of"

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management plans and can be resolved by reference to those plans and to applicable law.

the duties owed to individual Indian trust beneficiaries. Opposition at 7 (emphasis in original). The Plaintiffs also cite with approval former Special Trustee Homan, who does not "believe the Congress or the Executive Branch of government will resolve these [trust] issues," who advocates "the Court as the last recourse for the Individual Indian Trust beneficiaries," and who recommends that "[a]lternatives simply must be considered." Opposition at 22. Neither the Executive Branch nor this Court can simply ignore the role of Congress or the existing legal requirements and constraints applicable to the Executive Branch's operation of the trust for individual and tribal beneficiaries.

Only the Executive Branch is party to this suit. In acting as trustee-delegate, Interior Defendants are constrained by applicable law and are subject to the limits, duties, and competing obligations imposed by Congress and the Constitution. See Motion at 14-18. In proposing Interior's Trust Management Plan, the Interior Defendants could not ignore the legal requirements and constraints applicable to an Executive Branch agency operating a trust for individual and tribal beneficiaries. To the extent Plaintiffs seek trust operations that are free from the legal requirements and constraints imposed on the Executive Branch and that mirror private trust operations, that relief is not available from this Court.

Interior's Trust Management Plan complies with the existing legal requirements and constraints applicable to the Executive Branch's operation of the trust for individual and tribal beneficiaries, describes a process for reforming trust operations to consistently and reliably provide the accounting required by statute, and satisfies the court-imposed requirement to submit "a plan for bringing [the defendants] into compliance with the fiduciary obligations that they owe

to the IIM trust beneficiaries." Cobell v. Norton, 226 F. Supp. 2d 1, 148 (D.D.C. 2002). Plaintiffs' Trust Management Plan, on the other hand, does not.

A. Interior's Trust Management Plan Is Consistent with Existing Law and with the Limitations Placed on the Executive Branch of Government

Plaintiffs' Opposition is based on the predictable assertions that Interior's Plan is not a plan at all, see Opposition at 2, 17, and that it is "facially deficient," see id. at 12-17. Neither assertion withstands scrutiny. Plaintiffs' assertions are, of course, premised on their conception of how the trust should be operated, not on how a trust is required to be operated when it is operated by an Executive Branch agency pursuant to statutory authority. As discussed in section II.B, below, Plaintiffs' conception conflicts with existing law, and that conflict must be addressed before the underlying facts based on Plaintiffs' conception will even become relevant.

The issue presented by the Motion is not whether the Plaintiffs prefer their Trust Management Plan to Interior's, but whether Interior's Plan comports with all of the applicable legal standards, constraints, and requirements, which necessarily include not only fiduciary obligations to individual and tribal trust beneficiaries and specific statutory requirements to provide an accounting, but also the often competing or contradictory obligations to comply with the legal requirements and constraints otherwise applicable to an Executive Branch agency. See Motion at 10-18. Given this interplay of obligations and constraints,

> 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.

Nevada v. U.S., 463 U.S. 110, 128 (1983).

Interior's operation of the trust for individual and tribal beneficiaries is governed by statutes such as the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act") that specifically address Interior's operation of the trust; general statutes that affect trust operations, such as statutes requiring preferential hiring policies and increased tribal self-determination and governance; and statutes and case law regarding appropriations and budgets, such as the Anti-Deficiency Act. See Motion at 14-18. Interior's Trust Management Plan comports with all of these requirements and constraints, and nothing in Plaintiffs' Opposition suggests otherwise.

Plaintiffs' insistence that Interior's Plan is flawed because it fails to address common law trust standards, Opposition at 13-15, is similarly unavailing. Plaintiffs cite no legal basis for the wholesale application of common law trust standards to the Executive Branch's operation of the trust, without regard to the competing legal requirements and constraints affecting operation of that trust. Having stated in their Trust Management Plan that the common law standards they espouse are "consonant with the precepts" of the accounting requirements in the 1994 Act, Plaintiffs' Trust Management Plan at 29, 26, Plaintiffs do not explain why successfully implementing Interior's Trust Management Plan will not satisfy the accounting-related fiduciary trust obligations owed to individual beneficiaries. Provision of the accounting as required by the 1994 Act and sought in Plaintiffs' complaint, coupled with Interior's plan to reform trust operations and management to allow the accounting to continue predictably and reliably in the future, will necessarily satisfy Interior's fiduciary obligations.

Interior's trust reform process will be accomplished by interconnected components, all of which are discussed in Interior's Trust Management Plan:

1) Develop an overall strategic plan – the now-completed Comprehensive Trust Management Plan – and use it to guide all of Interior's trust reform efforts, including those relating to the provision of an accounting. Motion at 9-11.

2) Reorganize trust functions to consolidate land and natural resource management functions within the Bureau of Indian Affairs and oversight authority and financial management within the Office of the Special Trustee. See Motion at 12; Trust Management Plan at 5, 44-77, 81-82; id. at Ex. 2.

3) Analyze existing trust-related business practices throughout Interior offices and bureaus. See Motion at 12; Trust Management Plan at 6-9, 26-36. This in-depth analysis has been memorialized in the now-completed As-Is study.

4) Develop a new model for trust-related business practices by scrutinizing the existing trust practices, consulting with experts inside and outside of Interior, and identifying best practices for incorporation into the To Be model. See Motion at 12; Trust Management Plan at 9, 36-43, 81-82.

Nothing in the Opposition suggests that the process described in Interior's Trust Management Plan is legally defective or that successful completion of the process described in Interior's Plan will not result in reformed trust operations and management that will provide accounting to trust beneficiaries predictably and reliably in the future.

Finally, Plaintiffs complain that Interior's Trust Management Plan does not provide sufficient details regarding how a host of current or past problems with Interior's trust operations will be resolved, including training, compliance, probate backlog, and data cleanup, to name but a few on their list. See Motion at 14-17. Interior's Trust Management Plan is precisely that – a plan. Interior Defendants acknowledge the existence of problems with trust operations that must be addressed before their fiduciary obligations can be consistently and reliably satisfied. Rather than rely on quick fixes as Plaintiffs propose, see Motion at 30-31, Interior Defendants are analyzing all trust-related operations and issues systematically, including those raised by the Plaintiffs, see id. at 13-14, 21-22. Until that analysis is complete, however, specific resolutions

for specific problems – and perhaps more importantly, integrated solutions that resolve shared or interrelated problems – may not be identified. For purposes of Trial 1.5, the Court required submission of a plan, not execution of a plan. Interior's Trust Management Plan is a plan for accomplishing trust reform. The process of reforming trust operations and management is underway but is not yet complete. The specific details about how specific issues are resolved cannot be known until later, when the Plan processes have been completed and trust reform has been accomplished.

B. The Plaintiffs' Trust Management Plan Is Not Consistent with Existing Law and with the Limitations Placed on the Executive Branch of Government

The Plaintiffs' Trust Management Plan, like the Interior's Plan, does not exist in a vacuum: trust management reform is not occurring in an environment that allows complete latitude to devise a trust model that is focused exclusively on trust beneficiaries, but in a complex federal government environment that involves numerous – and often competing – trust- and non-trust requirements and constraints that affect trust operations. To the extent that Plaintiffs seek a trust system that segregates individual from tribal trust operations, that is subject to different (or no) statutory and budgetary requirements and constraints, and that operates solely in accordance with common law trust standards, their recourse is to Congress, not this Court.

Because Plaintiffs' Trust Management Plan must comply with existing legal and budgetary requirements and constraints, Plaintiffs' Plan is a concept that is doomed from the outset. As Defendants explained in detail, and Plaintiffs do not refute in their Opposition, Plaintiffs' Plan does not comply with those requirements and constraints. See Motion at 14-15, 16-18, 24-29. This defect fatally undercuts Plaintiffs' Plan, and any facts regarding the steps that

Plaintiffs would take to implement their Plan or the standards on which their Plan would be based are simply irrelevant.

II. PLAINTIFFS ARE NOT ENTITLED TO AN ADVERSE INFERENCE REGARDING THE MOTION FOR SUMMARY JUDGMENT

The Plaintiffs ask "that this Court summarily reject Defendants' Motion for the additional reason that the trustee-delegate has destroyed massive amounts of relevant trust documents, given the nature and scope of the adverse inferences resulting from such spoliation." Opposition at 20 (italics omitted). No basis exists to deny the Motion based on a legally defective assertion of entitlement to an adverse inference.

The Court specifically instructed Interior Defendants, and invited Plaintiffs, to submit plans for trust management reform and for an accounting, and set a January 31, 2002 deadline for "fil[ing] any summary judgment motions with respect to the Phase 1.5 trial." Cobell, 226 F. Supp. 2d at 148-49. Under these circumstances, the Defendants' submission of a summary judgment motion regarding Interior's and the Plaintiffs' Trust Management Plans is wholly proper and certainly does not merit Plaintiffs' vitriolic assertions to the contrary, see Opposition at 18-20. Furthermore, the Opposition does not establish the elements necessary for an adverse inference or for denial of summary judgment on grounds unrelated to the merits of the Motion.

Under well-established case law, a party seeking an adverse inference arising from the destruction of evidence must make three separate showings. First, it must demonstrate that "the party having control over the evidence . . . had an obligation to preserve it at the time it was destroyed." Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)). Second, it must show

that the "evidence was intentionally destroyed." Id. at 127; see also Byrnie v. Cromwell, 243 F.3d 93, 107-08 (2d Cir. 2001) (noting that destruction that occurred through bad faith or gross negligence has sometimes been deemed sufficient). Third, the party requesting the adverse inference must demonstrate a "'likelihood that the destroyed evidence would have been of the nature alleged by the party affected by its destruction.'" Byrnie, 243 F.3d at 108 (quoting Kronisch, 150 F.3d at 127). To demonstrate such a likelihood, this party must "produce 'some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files.'" Id. (quoting Kronisch, 150 F.3d at 128). As the D.C. Circuit has cautioned, "[m]ere innuendo" is insufficient. Wyler v. Korean Air Lines Co., 928 F.2d 1167, 1174 (D.C. Cir. 1991).

As indicated by the three required showings, the party seeking an adverse inference must thus make assertions as to particular pieces of destroyed evidence and must claim a precise adverse inference regarding the content of that evidence. For example, in Kronisch, the D.C. Circuit ruled that the district court had improperly denied plaintiff an adverse inference in a suit alleging that he had been made to participate without his consent in a CIA-run program designed to test the effects of lysergic acid diethylamide (LSD). Plaintiff sought an adverse inference arising from the CIA's intentional destruction of a particular set of records – namely, those relating to this drug-testing program. Furthermore, he identified the adverse inference that he sought with precision, arguing that the destroyed "files may have contained evidence helping to substantiate plaintiff's claim that Gottlieb [a CIA agent] drugged him in Paris in 1952." Kronisch, 150 F.3d at 129.

Likewise, in Byrnie, where the plaintiff sued a school system and board of education, arguing that they failed to hire him as a part-time art teacher on the basis of age and gender discrimination, the D.C. Circuit held that the district court had erred in denying plaintiff an adverse inference. Here as well, however, plaintiff identified the destroyed documents and the adverse inference he sought with precision. In particular, he pointed to: (1) "the missing application materials of the other candidates;" (2) "the written ballot form" used by "the screening committee members . . . to rank the 21 applications to determine which applicants would receive an interview . . . , along with the tally sheet that compiled their votes;" (3) "the forms on which, . . . [e]ach Committee member independently wrote down his or her top three choices for the job opening, in order of preference, after the first round of interviews, along with the tally sheet adding up the votes;" (4) "any notes made by the interviewers in the first and second rounds of interviews–and Nappi [the school principal] testified that it was likely that such notes were made;" and (5) "the notes Nappi relied upon in drafting the summary of the hiring process that the CCHRO [Connecticut Commission on Human Rights and Opportunities] Answer [to plaintiff's complaint] was based upon." Byrnie, 243 F.3d at 107. Having thus identified a specific set of documents that were destroyed, plaintiff sought the precise adverse inference that "the destroyed documents would show unlawful discrimination." Id. at 110.

Here, Plaintiffs fail to make the showing required to obtain an adverse inference because they do not identify which documents (or categories of documents) Defendants have destroyed. Furthermore, Plaintiffs do not explain how those destroyed documents would in any way give rise to an specific adverse inference regarding a forward-looking plan to reform trust operations and management and to prevent future recurrences of the types of incidents alleged by Plaintiffs.

Not surprisingly, given their utter failure to identify any trust reform-related documents that were destroyed and to explain the bearing that any such documents would have on Interior's Trust Management Plan, Plaintiffs do not (and cannot) even remotely delineate the specific adverse inference that they seek. Their claim of entitlement to an adverse inference is legally defective.

III. DEFENDANTS' STATEMENT OF MATERIAL FACTS COMPLIES WITH LOCAL CIVIL RULE 7.1(H)

Contrary to the Plaintiffs' assertion, Opposition at 9-12, the Defendants' Statement of Undisputed Material Facts complies with the requirements of Local Civil Rule 7.1(h) and with the case law regarding such statements. Furthermore, even if the Statement failed to comply with this Rule, the proper remedy would not be to dismiss Defendants' Motion, but rather, at most, to order both parties to amend and re-file their Statements.

Pursuant to Local Civil Rule 7.1(h), "[e]ach motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement." LCvR 7.1(h). In accordance with this Rule, Defendants filed their Statement of Material Facts in support of their Motion. Although this Statement is brief, it fully conforms with the Rule, because the Motion relies on legal analysis and on the text of the competing Trust Management Plans; as a result, there are very few facts material to resolution of the Motion.[5]

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[5]Notwithstanding their assertion that they "contest vigorously all facts material to Defendants' Motion," Opposition at 17 (italics omitted), Plaintiffs apparently misunderstand their obligation as the opponents of a motion for summary judgment. Under Local Civil Rules 7.1(h) and 56.1, Plaintiffs, as the opponents of the motion, must file a "concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated . . . ." Notwithstanding their assertion that Defendants' Statement of

As Plaintiffs correctly observe, Local Rule 7.1(h) serves to "isolate[] the facts that the parties assert are material, distinguish[] disputed from undisputed facts, and identif[y] the pertinent parts of the record." Opposition at 11.[6] In other words, "a district court judge should not be obliged to sift through hundreds of pages of depositions, affidavits, and interrogatories in order to make his own analysis and determination of what may, or may not, be a genuine issue of material disputed fact." Twist v. Meese, 854 F.2d 1421, 1425 (D.C. Cir. 1988). Because Defendants' Motion relies so heavily on legal analysis, there is simply no need for the Court to "sift through" a large record to decide it, and thus no need for Defendants to file an extensive Statement of Material Facts with numerous citations to the record.[7]

However, even if Defendants' Statement failed to comply with Local Civil Rule 7.1(h), the case law on which Plaintiffs themselves rely indicates that the proper remedy would not be to dismiss Defendants' Motion, but rather, at most, to order both parties to amend and re-file their Statements. In Gardels v. CIA, the D.C. Circuit held that, because the CIA had filed an "inadequate . . . Statement" pursuant to a predecessor of Local Civil Rule 7.1(h), it was

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Material Facts is improper, Plaintiffs themselves filed a Statement that is equally brief and that is equally improper because it is confined to "address[ing] defendants' . . . proposed undisputed facts," Plaintiffs' Statement Of Genuine Issues In Opposition To Defendants' Motion For Partial Summary Judgment That Interior's Trust Management Plan Comports With Their Obligation To Perform An Accounting (Apr. 18, 2003).

[6]Plaintiffs incorrectly attribute this quote to King v. Georgetown Univ. Hosp., 9 F. Supp. 2d 4, 6-7 (D.D.C. 1998); it appears instead to come from page 151 of the second case cited. See Opposition at 11.

[7]The only "factual dispute" raised by Plaintiffs in response to Defendants' Statement of Material Facts is not a factual dispute at all. Whether Interior's Trust Management Plan constitutes a "plan," Opposition at 9 & n.6, is a question of law that can be resolved on summary judgment by examining Interior's Plan.

"impossible for . . . [it] to determine whether genuine issues of material fact existed when summary judgment was granted." Gardels, 637 F.2d 770, 774 (D.C. Cir. 1980). Accordingly, it decided to "remand the case to the District Court so that the CIA may file a proper Rule 1-9(h) Statement." Id. Likewise, in Robertson v. American Airlines, Inc., the district court "f[ou]nd[] that the defendants' statement does not comply with Rule 56.1," which is identical to Local Civil Rule 7.1(h), but "decline[d] to adopt the plaintiff's suggestion of striking the statement and denying the defendants summary judgment. Robertson, 239 F. Supp. 2d 5, 9 (D.D.C. 2002). Instead, it determined that the proper relief was to "strike[] the defendants' motion for summary judgment, and permit[] the defendants to refile a motion that complies with the letter and spirit of the rule." Id. Accordingly, because any basis for concluding that Defendants' Rule 7.1(h) Statement is improper necessarily implies that Plaintiffs' Rule 7.1(h) Statement is also improper,[8] the appropriate remedy for the Court would be, at most, to order both parties to amend and re-file their Statements.[9]

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[8]Plaintiffs' allegation that Defendants have filed an improper Statement does not excuse them from their obligation to file a proper one. Thus, if the Court adopts Plaintiffs' argument that Defendants' Statement failed to comply with Local Civil Rule 7.1(h), the same reasoning would indicate that Plaintiffs' Statement is also improper. See note 5, above.

[9]Rather than ordering the refiling of the Rule 7.1(h) Statement, some courts have addressed the problem of an improper statement by striking the statement and adopting as admitted the facts set forth in the opponent's statement. See, e.g., Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 154 (D.C. Cir. 1996) ("[Having struck Jackson's . . . statement, the district court properly deemed as admitted the material facts set forth in the law firm's . . . statement of material facts not in dispute."); Twist v. Meese, 854 F.2d 1421, 1425 (D.C. Cir. 1988) ("[I]n the absence of the statement required to be furnished by Twist, the district court did not abuse its discretion in accepting as 'admitted' the facts identified by the government in the government's statement of material facts."); cf. LCvR 7.1(h) ("In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion."). Here, however, Defendants respectfully

As the D.C. Circuit has recently emphasized, however, "this court has long recognized that the district court does not abuse its discretion by declining to invoke the requirements of the local rule in ruling on a motion for summary judgment." Burke v. Gould, 286 F.3d 513, 519-20 (D.C. Cir. 2002). Indeed, the Burke Court observed:

> [B]ecause the Local Rules 'supplement' and 'shall be construed in harmony' with the Federal Rules of Civil and Criminal Procedure, see Local Rule 1.1(a); . . . , the district court is required by Federal Rule of Civil Procedure 56(c) itself to consider the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' in determining whether 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Fed. R. Civ. P. 56(c); . . . . Although Local Rule 56.1 [which is identical to Local Civil Rule 7.1(h)] facilitates more precise identification of the record materials on which the parties rely, Rule 56(c) identifies the materials the court is to consider before granting summary judgment.

Id. at 519-20 (internal citations omitted). Accordingly, Defendants respectfully submit that the materials filed pursuant to Federal Rule of Civil Procedure 56(c), and in particular the pleadings themselves, constitute a sufficient basis for the Court to decide their Motion without requiring the parties to amend and re-file their Statements.

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observe that the remedy of striking Defendants' Statement and adopting Plaintiffs' is unavailable, because any conclusion that Defendants' Statement is infirm inexorably leads to the conclusion that Plaintiffs' is as well.

CONCLUSION

For the foregoing reasons, Plaintiffs' Opposition to Defendants' Motion is without merit and Defendants respectfully renew their request for partial summary judgment that Interior's Trust Management Plan comports with their obligation to perform an accounting.

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' Reply in Support of Motion for Partial Summary Judgment That Interior's Trust Management Plan Comports with Their Obligation to Perform an Accounting* by facsimile in accordance with their written request of October 31, 2001.

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