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' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING STATUTE OF LIMITATIONS AND LACHES

Defendants, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior" or "Interior Defendants"), and the Secretary of the Treasury, pursuant to Fed.R.Civ.P. 56, hereby move for partial summary judgment in their favor and against Plaintiffs, with regard to the effect of the statute of limitations or the doctrine of laches on the Plaintiffs' claims for an accounting.[1]

Defendants have filed herewith the following papers in support of this motion (1) Memorandum of Points and Authorities; (2) Statement of Material Facts; and (3) Appendix of Exhibits. As shown in those papers, there is no genuine issue of material fact and Defendants are entitled to partial summary judgment as a matter of law, to the effect that the statute of limitations or the doctrine of laches bars any claims for accountings of transactions or balances prior to October 1, 1984.

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[1] In a telephone conference on this date, counsel for Plaintiffs and counsel for Defendants discussed whether a "meet and confer" regarding motions for partial summary judgment is necessary under LCvR 7.1(m), and concluded that such motions are dispositive, and, therefore, LCvR. 7.1(m) does not apply.

Accordingly, Defendants respectfully move for entry of partial summary judgment in their favor and against Plaintiffs, in accordance with the attached proposed order.

Dated: January 31, 2003

Respectfully submitted,

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	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING STATUTE OF LIMITATIONS AND LACHES

This matter coming before the Court on Defendants' Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches, and any responses thereto, the Court finds that the Motion should be GRANTED.

IT IS THEREFORE ORDERED that the partial summary judgment is hereby entered in favor of Defendants and against Plaintiffs, in that any claims of the Plaintiff class for accountings of any Individual Indian Money ("IIM") transactions or balances prior to October 1, 1984 are time-barred, and, therefore, are not actionable. Specifically: (1) With regard to any IIM accounts that were closed prior to October 1, 1984, no accounting is required; and (2) With regard to any IIM accounts that were open both before and after October 1, 1984, no accounting is required for any transactions or balances prior to October 1, 1984, regardless of whether or what effect they might have had on the balances shown in Interior's records as of October 1, 1984. Thus, the

balances shown in the Department of the Interior's records as being the balances as of October 1, 1984 are not subject to challenge based upon any prior transactions or balances.

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 January 31, 2003 I served the foregoing *Defendants' Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches - Filed Under Seal* by hand in accordance with their Agreement of January 31, 2003:

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K.P. Kingston

Kevin P. Kingston

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.,	)	
	)	(REDACTED VERSION-
	)	THIS VERSION NOT
	)	FILED UNDER SEAL)[1]
Defendants.	)	
	)	

DEFENDANTS' CORRECTED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING STATUTE OF LIMITATIONS AND LACHES

Defendants, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior" or "Interior Defendants"), and the Secretary of the Treasury, state the following in support of their motion for partial summary judgment to the effect that the applicable statute of limitations or the doctrine of laches bars any claims that the named Plaintiffs and other members of the class would otherwise have for an accounting regarding any transactions and balances prior to October 1, 1984.[2]

[1] Defendants have filed herewith a Motion for Leave to File Under Seal, which seeks leave to file under seal this brief, the accompanying Statement of Material Facts, and Appendix of Exhibits that discuss details of the depositions of the named Plaintiffs and certain other information because they contain materials that may be subject to a protective order or otherwise may be considered confidential (although some or all of such materials might later be determined as appropriate for disclosure). Defendants also will submit (for the public court file) redacted versions.

[2] Pursuant to LCvR 7.1(h) and 56.1, Defendants have filed herewith their Statement of Material Facts as to which Defendants contend there is no genuine issue. Defendants also have filed an Appendix of Exhibits in support of the motion.

Introduction

The Court's 1998 opinion in this case (discussed below) indicates that the Court would entertain a motion for summary judgment regarding the statute of limitations and laches after appropriate factual discovery. Such discovery has now been conducted and it, together with the other evidence submitted by Defendants, demonstrates that no genuine issue of material fact exists and that Defendants are entitled to partial summary judgment in their favor, to the effect that certain of the Plaintiffs' claims for an accounting are time-barred.

As we discuss below, and as this Court already determined in this case, Plaintiffs' claims accrued when they "knew or should have known" of their right of action, and that the applicable statute of limitations allowed them six years from accrual of the cause of action to file their suit. Plaintiffs' claim for an accounting thus accrued when they knew or should have known of allegations of trust violations. This rule applies to Indian trusts no less than to other types of trusts. The doctrine of equitable tolling does not apply in this case.

This suit was filed in 1996. However, because other legislation tolled further running of the statute of limitations beginning October 1, 1990, Plaintiffs' claims are time-barred unless they accrued after October 1, 1984.

There can be no genuine dispute that Plaintiffs – and the rest of the class – knew or should have known of their claims long before October 1, 1984. Their failure to file suit results in application of the statute of limitations. Alternatively the doctrine of laches applies.

As discussed below, the effect of the application of the statute of limitations or laches is to limit the time period for which an accounting must be performed, precluding any claims for

accountings or other information about transactions or balances prior to October 1, 1984.

Argument

I. Relationship of the Motion to Prior Court Opinions and to Interior's January 6, 2003 Plan for an Historical Accounting

A. Prior Court Opinions

This Court's 1998 opinion, Cobell v. Babbitt, 30 F. Supp. 2d 24 (D.D.C. 1998), decided most of the legal issues surrounding the applicability of the statute of limitations, and contemplated the filing of a summary judgment motion once factual discovery was conducted. The Court held that 28 U.S.C. § 2401(a) supplies the applicable statute of limitations; it states, in pertinent part:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

30 F. Supp. 2d at 43. The Court correctly held that the statute of limitations is jurisdictional. Id. at 43 n.21, citing Spannaus v. United States Dep't of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987).

The Court properly interpreted the tolling provisions in Interior's annual appropriations statutes since fiscal year 1991.[3] Such statutes merely "stop[] the clock from commencing to run on the plaintiffs' viable claims as of October 1, 1990 . . . [] but cannot revive claims for which the clock stopped running long ago." 30 F. Supp. 2d at 43-44 (footnote omitted). Accordingly, the

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[3] See, e.g., Pub. L. No. 101-512, 104 Stat. 1915, 1930 (1990), which states, "notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds until the affected tribe or individual Indian has been furnished with the accounting of such funds."

Court held, the six-year statute of limitations bars claims that accrued prior to October 1, 1984. As the Court stated, "[a]ny claims that accrued before October 1, 1984, would have been time barred before the enactment of the tolling provision in the 1990 appropriations act." Id. at 44.

Finally, the Court noted that "[t]he parties agree that the plaintiffs' claims accrued when the plaintiffs knew or should have known that they had a valid right of action for trust mismanagement against the government."[4] 30 F. Supp. 2d at 44 (emphasis added.) Because the Court found this to be a question of fact, it declined to answer it on the basis of the motions to dismiss that were pending at that time. Rather, the Court indicated that it would entertain the question "once the parties have completed their discovery of facts that go to the plaintiffs' knowledge and have had the opportunity to adequately brief" questions such as "when the plaintiffs' claims accrued, the effect of the statute of limitations on an action for an accounting, [when] the plaintiffs' cause of action for an accounting has accrued, and equitable tolling." Id. at 45 & n.26.

In subsequent opinions, this Court (Cobell v. Babbitt, 91 F. Supp. 2d 1, 32 n.22 (D.D.C. 1999) and the court of appeals (Cobell v. Norton, 240 F.3d 1081, 1110 (D.C. Cir. 2001) also indicated that this Court later would address the impact of the statute of limitations.[5] In light of the discovery conducted and the impact that the statute of limitations would have on the plan for

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[4] Although this case does not involve claims for recovery of money based upon alleged trust mismanagement, the beneficiaries knowledge of allegations of any sort of trust mismanagement means they "knew or should have known" of their cause of action for an accounting. See section II.A., infra.

[5] Although the cited opinions stated that statute of limitations issues would be addressed in Phase 2, that was before this Court established a Phase 1.5. Because the statute of limitations would have such a significant impact on the plan for and the conduct of an accounting that is the subject of Phase 1.5, this is the appropriate juncture to consider it.

an historical accounting, Defendants respectfully urge that partial summary judgment in their favor on the statute of limitations is appropriate at this time.

B. Relationship of the Motion to Interior's January 6, 2003 Plan

On January 6, 2003, Interior filed its Historical Accounting Plan for Individual Indian Money Accounts ("Interior's 1/6/2003 Accounting Plan"). That plan indicated that Interior would perform historical accountings of accounts open as of or after the date of the enactment of the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act")), and that, "[u]ltimately, Interior intends to be in a position to provide eligible IIM account holders an account transaction history [of] all transactions in their accounts back to their inception or to passage of the Act of June 24, 1938, whichever is later."[6] See Interior's 1/6/2003 Accounting Plan at II-2.

Interior's 1/6/2003 Accounting Plan (at II-2 n.7) also stated, however, "Interior intends to present legal issues that might affect the scope of the historical accounting to the Court by way of summary judgment motions." The present motion is such a motion. If granted, the motion would limit the accounting otherwise contemplated by Interior's 1/6/2003 Accounting Plan, by obviating any otherwise existing obligation to provide an accounting for transactions or balances prior to October 1, 1984.[7] See section VI, infra.

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[6] Defendants also are filing a Motion for Partial Summary Judgment That Interior's Historical Accounting Plan Is Consistent With Its Obligation to Perform an Accounting. That motion also notes that the application of the statute of limitations or laches would limit the time period of the accounting otherwise provided for in Interior's 1/6/03 Accounting Plan.

[7] Additionally, if the Court were to hold that applicable law requires Interior to provide accountings to account holders other than those addressed by Interior's 1/6/2003 Accounting Plan (such other account holders would include, for example, those whose accounts closed prior to enactment of the 1994 Act), then Defendants' statute of limitations motion, if granted, would

The partial summary judgment requested herein would be appropriate even if the Court determined not to hold the Trial 1.5 (Defendants will be filing a separate partial summary judgment motion in that regard), and this partial summary judgment would be appropriate regardless of what plan for an accounting the Court adopts. The determination that the claims covered by the present motion are time-barred is important so that Interior will know the scope of the accounting to be performed.

II. The Statute of Limitations Applies to Plaintiffs' Claim for an Accounting

A. Claims for an Accounting Accrue When a Plaintiff First Knows or Should Know of a Breach

Claims involving trusts accrue when the beneficiary first knows or should know of a breach. As stated in Bogert and Bogert, The Law of Trusts and Trustees § 951 at 629 (Rev. 2d ed. 1995) ("Bogert"), "[t]o give rise to a cause of action against which the Statute of Limitations can run there must be a breach of some duty owed by the trustee to the beneficiary, the most extreme form of which is complete repudiation of any obligation."[8] Thus,

> If the trustee violates one or more of his obligations to the beneficiary, . . . there obviously is a cause of action in favor of the beneficiary and any relevant Statute of Limitations 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.

Bogert § 951 at 630-34 (footnotes omitted). For example, "the trustee's denial of the

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eliminate any otherwise existing obligation to account for balances or transactions prior to October 1, 1984.

[8] Although the common law of trusts between private parties does not establish the trust duties of the Government, which are defined only by statute and regulation (see United States v. Mitchell, 463 U.S. 206, 224 (1983)), cases and treatises on the common law of trusts of private parties are instructive on how courts address trust issues.

beneficiary's right to information constitutes a breach of trust." Id. § 961 at 4.

With regard to claims for an accounting, statutes of limitation begin to run when the plaintiff first knows or should know that the other party was not fully complying with its obligations regarding the handling of funds or property.[9] For example, in Chandler v. Lally, 31 N.E.2d 1, 3 (Mass. 1941), the trust beneficiaries' claim for an accounting was time-barred. The limitations period began to run when the trustee refused a beneficiary's demand for an accounting, even though the trustee also said he would hold the fund for the beneficiary's wife and children and that the beneficiary was a spendthrift. Alternatively, the court held that the action was barred by laches because the beneficiaries waited "approximately a quarter of a century" to bring suit, after the trustee died.

The Chandler court rejected the beneficiary's claim that this delay was because of his "relationship and his 'subserviency'" to the trustee (his uncle) and his reliance on the trustee's promise to hold the fund for the beneficiary's wife and children. In finding unreasonable delay, the court noted the prejudice to the defendant (administratix of the trustee's estate), because the trustee had died and his testimony would have been material to "details of an accounting." Id.; see also Harvey v. Leonard, 268 N.W.2d 504, 516 (Iowa 1978) (trust beneficiary's claim for accounting was barred by laches where, for many years, plaintiff received statements of account that were not sufficiently detailed, but she failed to object).

In Kedzierski v. Kedzierski, 899 F. 2d 681, 684 (7th Cir. 1990), plaintiff sued his brother

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[9] Where, as in this case, the claims involve alleged misfeasance or nonfeasance of trust obligations (such as allegations of failure to provide accountings and failure to maintain proper records), rather than a suit to recover the trust corpus, the trustee need not repudiate the existence of its trust obligations in order for the cause of action to accrue. See Cherokee Nation of Okla. v. United States, 21 Cl. Ct. 565, 571 (1990).

for an accounting of the estate of their father. Although both brothers were heirs, the defendant-brother took possession of the father's property and only occasionally made payments to the plaintiff. The plaintiff also occasionally demanded an accounting, to no avail. Id. at 682. The court held that the action for an accounting was time-barred, noting that plaintiff "had sufficient information concerning his alleged injury and its cause soon after his father's death to put him on notice that he should inquire into whether any actionable conduct was involved. Instead, plaintiff tarried for twenty-five years before filing this lawsuit." Id. at 683. The action that triggered the running of the limitations period was "when the defendant brother allegedly gathered the father's estate to himself." Id. at 684. This result was not changed by the fact that the defendant occasionally made some payments over the years. Id.

Glovaroma, Inc. v. Maljack Productions, Inc., 71 F. Supp. 2d 846, 857 (N.D. Ill. 1999), involved a copyright owner's action for copyright infringement, seeking, among other things, an accounting of royalty payments. The court held that the accounting claim was time-barred, such claim having accrued when plaintiff "first protested" the defendant's first royalty report. Id. at 857; see also Potlatch Oil & Ref. Co. v. Ohio Oil Co., 199 F.2d 766, 770 (9th Cir. 1952) (action for an accounting was time-barred, the claim having accrued when plaintiff demanded that defendant make changes regarding charges for oil development and operations, but defendant refused to do so and maintained the same course of conduct); Lawson v. Lawson, 524 F. Supp. 1097, 1098 (W.D. Pa.1981) (action for an accounting regarding liquidation of closely held business was barred by laches, where plaintiff should have known of his claim many years earlier, based upon "the absence of directors' meetings or any other signs of corporate life"), aff'd, 692 F.2d 748 (3d Cir. 1982).

Many of the facts of the cases cited above are similar to the allegations in this case: Alleged refusals to provide accountings (Chandler and Kedzierski), insufficiently detailed statements of account (Harvey), the making of occasional, inconsistent payments (Kedzierski), the beneficiary's protests but failures to sue in time (Kedzierski, Glovaroma and Potlatch). Those courts held that the claims for accountings were time-barred.

B. The Same Rules Apply to Claims Involving Indian Trusts

The fact that the claims in this case involve Indian trusts makes no difference; the statutes of limitations apply with equal force. Thus, courts have applied statutes of limitations specifically to Indian trust claims, including claims for breach of fiduciary duty under the same statutory scheme at issue in this case. In Jones v. United States, 801 F.2d 1334, 1335 (Fed. Cir. 1986), plaintiff held an interest in land pursuant to the General Allotment Act of 1887. The property was sold for non-payment of county taxes. Plaintiff obtained a return of the property, but also sued for damages for, among other things, breach of the Government's duties as trustee. Holding that allowing the taking of the property was a breach that caused the claim to accrue and that it was time-barred, the court stated: "A trustee may repudiate an express trust by words or, as in this case, by actions inconsistent with his obligations under the trust." Id. at 1336.

In Nichols v. Rysavy, 809 F.2d 1317, 1328 (8th Cir. 1987), descendants of Indian allottees sued the government for, inter alia, breach of fiduciary duty for conveying allotted trust land to the allottees, who later lost the property through sale or foreclosure. The Eighth Circuit held that the statute of limitations in 28 U.S.C. § 2401(a) applies to claims involving Indian allotments. Because the violations at issue occurred prior to enactment of Section 2401(a) in 1948, the plaintiffs had six years from enactment of that statute to bring the case. Having failed

to do so within that time, their claims were time-barred. 809 F.2d at 1328.

In Capoeman v. United States, 440 F.2d 1002, 1008 (Ct. Cl. 1971), the Government was trustee of land allotted under the General Allotment Act of 1887. Plaintiff was the beneficiary, claiming that the Government improperly deducted certain charges from proceeds of timber sales on that trust land. The court held that plaintiff's claim was time barred by the six-year statute of limitations for Tucker Act claims, 28 U.S.C. § 2501. The court noted that plaintiff had long known of his claims, and, in fact, had previously sued on a different aspect of the same transaction. 440 F.2d at 1005. The court rejected the plaintiff's arguments that the statute of limitations could not apply to his trust claim or should not apply because of his status as an Indian. Id. at 1003-04.

Also, in Littlewolf v. Hodel, 681 F. Supp. 929, 941 (D.D.C. 1988), aff'd, 877 F.2d 1058 (D.C. Cir. 1989), Indian beneficiaries brought an action, inter alia, to require the Government to perform trust duties. The court rejected a challenge to the statute of limitations, stating:

> to the extent that plaintiffs are asking for special treatment simply because they are Indians, that special treatment may not be afforded them. Courts have routinely subjected Indians' claims to statutes of limitations. [citations omitted.]
>
> Nor can plaintiffs argue that the limitations period is unreasonable because of the government's trust obligations, as statutes of limitation apply regardless of the existence of an Indian trust. [citations omitted.] Similarly, the fact that the allotments were held in trust neither makes plaintiffs' claims unknowable nor suggests that plaintiffs could not have sought advice during the past half-century about the nature of their claims. Any dependence on the Bureau of Indian Affairs or reliance on the government's trust obligations may excuse plaintiffs from an accusation of *laches* but it does not necessarily exempt them from, or render unreasonable, a statute of limitations that imposes a time limit on their ability to bring suit. [citations omitted.]

681 F. Supp. at 941.

Other cases upholding the applicability of statutes of limitations to Indian trust claims or other claims involving allotted land include United States v. Mottaz, 476 U.S. 834, 851 (1986) (claim challenging Government's sale of plaintiff's interests in Indian allotments was time-barred; the Court held that "even for Indian plaintiffs," the waiver of sovereign immunity provided by a Government statute of limitations "'cannot be lightly implied but must be unequivocally expressed'" (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980)); Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir. 1990) ("Indian Tribes are not exempt from statutes of limitations governing actions against the United States"); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576 (Fed. Cir. 1988) ("statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant"); Wardle v. Northwest Inv. Co., 830 F.2d 118, 124 (8th Cir. 1987) (statute of limitations barred claims for breach of fiduciary duty against the Government in administration of Indian allotment program).

Contrary to the weight of authority set forth above, a minority of cases suggest that, in some circumstances, claims involving Indian trusts should not be subject to the full force of statutes of limitations. For example, this Court's 1998 opinion, 30 F. Supp. 2d at 45 n.26, cited Loudner v. United States, 108 F.3d 896, 901 (8th Cir. 1997), which cited Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973), for the proposition that Indian-beneficiaries are under a lessened duty to discover their claims against the Government, for statute of limitations purposes.

Such cases state a little-held viewpoint that collapses under the weight of the many

Supreme Court, courts of appeals, and other federal cases cited above, which applied the statute of limitations with full force in Indian trust cases. Moreover, the unusual principles stated in Loudner and Manchester Band are to no avail for Plaintiffs in this case. First, even under the relaxed standard mentioned in those cases, the Plaintiffs still must be deemed to have known of their claims at the times discussed above, long before October 1, 1984. Loudner stated that trust beneficiaries are not "exempt" from the statute of limitation. Indeed, Loudner and Manchester Band both adopted the same rule used by this Court, that the statute begins to run "when a trust beneficiary knows or should know of the beneficiary's claim against the trustee." Loudner, 108 F.3d at 901; see also Manchester Band, 363 F. Supp. at 1249. Loudner merely stated that a beneficiary's duty to discover claims is "somewhat lessened." 108 F.3d at 901.[10] Even if adopted here, that mild softening of the rule would not save Plaintiffs' claims, for, as shown below, the facts plainly demonstrate that the allegations of trust violations were so well known that even under a "somewhat lessened" duty, the Plaintiffs knew or should have known of them.

Manchester Band cited the generic principle that a statute of limitations does not run where there is a fiduciary relationship "until the relationship" is repudiated. 363 F. Supp. at 1249. But, as noted in Cherokee Nation of Oklahoma, 21 Cl. Ct. at 571, that principle does not apply where, as here, the claims are not to recover the trust corpus. Thus, as shown in the cases discussed above, alleged breaches of trust obligations start the running of the statute.

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[10] Loudner also stated that the "beneficiary's duty to discover his or her claims against the trust is further diminished when the beneficiary has no idea that the trust even exists." 108 F.3d at 901. In Loudner, the plaintiff class consisted of descendants of a tribe that sought to share in a settlement fund, and the court found that many of those descendants did not even know of the fund. That point is inapplicable here, for clearly the Plaintiffs and the class knew of the trust and of the allegations of breach (see below).

Second, Loudner and Manchester Band rely upon the archaic notion that all Indian people should be subject to a different standard because of "the necessity of dealing fairly with a group of people still placed under a disability of dependancy and to which a greater obligation is owed than a narrowly legalistic view of what constitutes a technical duty.'" Manchester Band, 363 F. Supp. at 1249 (quoting Dodge v. United States, 362 F.2d 810, 813 (Ct. Cl. 1966) (per curiam)). But even if such a patronizing view had any merit in past ages, it lost its force long before this suit was filed.[11]

[redacted - full text is in version filed under seal]

[12] Moreover, the argument rests upon the faulty premise that rules of law depend upon socioeconomic status. As stated in Littlewolf, 681 F. Supp. at 941, "[t]o the extent that plaintiffs argue that their unfortunate socioeconomic circumstances make it inherently unreasonable for them to bring suit within the [applicable statute's] statute of limitations, that argument too cannot withstand scrutiny. Poverty and lack of education have never been deemed sufficient to render a statute of limitations unreasonable under the due process clause" (footnote omitted).

III. Alternatively, the Laches Doctrine Bars Claims for an Historical Accounting Prior to October 1, 1984

The statute of limitations in 28 U.S.C. § 2401(a) "applies to all civil actions whether

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[11] To the extent that cases such as Manchester Band rely upon the premise that all Indian people are under a "disability" (363 F. Supp. at 1248), which precludes their knowing of their claims, that is a gross and unfair overgeneralization that, like all stereotypes of ethnic and cultural groups, should be assumed to be false and, in fact, is false as revealed by the facts of this case.

[12] **[redacted - full text is in version filed under seal]**

legal, equitable, or mixed." Kendall v. Army Bd. for Correction of Military Records, 996 F.2d 362, 365 (D.C. Cir. 1993); Spannaus, 824 F.2d at 55 (same); see also Sisseton-Wahpeton Sioux Tribe, 895 F.2d at 592 (Section 2401(a) "applies to equitable claims as well as claims for monetary damages" (citing Christensen v. United States, 755 F.2d 705, 708 (9th Cir. 1985)); Christensen, 755 F.2d at 707 (9th Cir. 1985) (section 2401(a) applies to legal and equitable claims by Indians regarding their allotted land). Thus, Plaintiffs' claims for an historical accounting are governed by that statute of limitations.

In addition, some courts have looked to the doctrine of laches, which traditionally was applied by courts in equitable actions in which statutes of limitations were inapplicable. As noted above, the distinction between legal and equitable actions, at least in the federal courts, mostly has disappeared with regard to limitations principles. See Geyen v. Marsh, 775 F.2d 1303, 1307 (5th Cir. 1985) (the Federal Rules of Civil Procedure "accomplished the merger of law and equity"). However, in the unusual instances in which no statute of limitations applies, federal courts have applied the doctrine of laches. Saffron v. Department of the Navy, 561 F.2d 938, 941 (D.C. Cir. 1977).

If, for any reason, the doctrine of laches were the applicable principle to assess the timeliness of Plaintiffs' claim for an accounting, that doctrine would bar the claim. For laches to bar a claim, there must be inaction by the claimant and a "change of position to their detriment on the part of the persons against whom the claim is asserted." Wohl v. Keene, 476 F.2d 171, 176 (4th Cir. 1973).

In this case, inaction by Plaintiffs is indisputable; they seek accountings presumably going back to 1887, but did not file suit until 1996. Plaintiffs have no good reason for such

extreme delay. See infra.

Although the court in Littlewolf, 681 F. Supp. at 941, suggested in dicta that Indians' dependence or reliance on BIA or the government's trust obligations may overcome a laches defense, that point is not true in this case.

[redacted - full text is in version filed under seal]

Nor can there be doubt that the passage of time since 1887 has operated to the Government's prejudice; that fact is manifest. The more than 115 years since the IIM allotment programs began have seen the deaths of innumerable Government personnel familiar with facts and records pertinent to transactions involving the IIM trust lands and accounts, at a minimum hampering the Government's ability to refute criticisms and challenges to the records it has and accountings it provides.

Laches applies in this case at least as much as in Carnahan v. Peabody, 31 F.2d 311, 313 (S.D.N.Y. 1929), in which descendants of a partner sued the estate of the other partner for an accounting of partnership assets, arising out of transactions that occurred over a century earlier. The court held the accounting claim was barred by laches:

> For a court at this time, after all possibility of adducing proof bearing upon the matters in controversy has gone, with the passage of more than a century, to attempt to determine the right to an accounting and thereupon to direct the defendants to account for the acts of their ancestor occurring over 100 years ago would be an unconscionable act of injustice. If the heirs and next of kin [of the partner] ever had a right to the accounting they now demand, the right has long since been abandoned by failure to assert it in any appropriate proceeding.

31 F.2d at 313.

IV. Standards for Determining When the Plaintiffs "Knew or Should Have Known" of the Claims

As discussed above, the Court correctly held that "[t]he parties agree that the plaintiffs' claims accrued when the plaintiffs knew or should have known that they had a valid right of action for trust mismanagement against the government." 30 F. Supp. 2d at 44 (emphasis added). There can be no genuine issue of material fact that the class members knew or should have known of such claims prior to October 1, 1984.

In determining whether a plaintiff "should have known" of a claim, "the law assumes that 'the means of knowledge are the same thing in effect as knowledge itself.'" Mitchell v. United States ("Mitchell III"), 13 Cl. Ct. 474, 477 (1987) (quoting Wood v. Carpenter, 101 U.S. 135, 143 (1879)). As stated in Mitchell v. United States ("Mitchell I"), 10 Cl. Ct. 63, 67-68 (1986), "where there is reason to suspect there is reason to inquire and, therefore, ' [w]hatever is notice enough to excite attention and put the party on his guard and call for inquiry, is [also] notice of everything to which such inquiry might have led'" (quoting Wood v. Carpenter, 101 U.S. at 141 (alterations in original)), modified on reconsideration, 10 Cl. Ct. 787 (1986) ("Mitchell II"). Further, "[e]ven rumors or vague charges may demand pursuit 'if of sufficient substance to arouse suspicion.'" Id. at 68 (quoting Tobacco & Allied Stocks, Inc. v. Transamerica Corp., 143 F. Supp. 323, 331 (D. Del. 1956), aff'd, 244 F.2d 902 (3d Cir. 1957)).

Such rules are fully applicable to trust beneficiaries, although the threshold for inquiry may be higher in those instances (Mitchell I, 10 Cl. Ct. at 68), and such rules "apply with like force to Indian cases, including situations . . . where the United States stands in the position of a

statutory trustee." Mitchell III, 13 Cl. Ct. at 477. Thus, "the Indian beneficiary of a trust, no less than any other, is charged with notice of whatever facts an inquiry appropriate to the circumstances would have uncovered." Mitchell I, 10 Cl. Ct. at 68 (quoting Menominee Tribe of Indians v. United States, 726 F.2d 718, 721 (Fed. Cir. 1984)).

Other courts similarly interpret the "knew or should have known" standard in a variety of cases, resulting in claims being time-barred, either under statutes of limitations or the laches doctrine. In City National Bank of Florida. v. Checkers, Simon & Rosner, 32 F.3d 277, 283 (7th Cir. 1994), the court applied that standard to a claim by a bank for fraud and negligence against an accounting firm that prepared misleading financial statements of a debtor, upon which the bank relied. The court held that the mere fact that the debtor was unable to repay its loan on time "should have put [the bank] on notice" of a need to investigate why a debtor with such a seemingly large net worth defaulted, and whether the bank had causes of action against anyone, including the accountants. That triggered the running of the statute of limitations, causing the bank's claim to be time-barred. Id. at 284.

In Harvey v. Leonard, 268 N.W.2d 504, 514 (Iowa 1978), the court quoted Bogert:

> A cestui que trust cannot sit idly by and close his eyes to what is going on around him. "One who would repel the imputation of laches on the score of ignorance of his rights must be without fault in remaining so long in ignorance of those rights. . . ." As a Pennsylvania court has said: "Laches is not excused by simply saying: 'I did not know.' If by diligence a fact can be ascertained the want of knowledge so caused is no excuse for a stale claim. The test is not what the plaintiff knows, "but what he might have known, by the use of the means of information within his reach, [which] the vigilance of the law requires of him."

(Quoting Bogert at § 949 (2d ed. 1962)).

Particularly pertinent to this case, the Harvey court held that a claim for an accounting

was untimely. For a number of years, the beneficiary received summary statements, which "were not in detailed form" and did not fully disclose all information about the trust property. However, because the beneficiary "accepted the statements of the trust in former years without complaint," her claim for further accountings at the trustee's expense was "barred by the operation of the doctrine of laches." 268 N.W.2d at 516.

In other contexts, the D.C. Circuit has adopted the "discovery rule," which provides that "if the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time." Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 342 (D.C. Cir. 1991) (union claim that employers failed to report and pay pension fund contributions accrued "when, in the exercise of due diligence, the [union's trustees] would become aware of the [the employer's] inaccuracies"); see also Norwest Bank Minn. Nat'l Ass'n v. FDIC, 312 F.3d 447, 452 & n.4 (D.C. Cir. 2002) (regarding latent injuries, "the right to sue is deemed to accrue when the wrong manifests itself in injury to the plaintiff" even if, at that time, "no more than nominal damages may be proved").

In a class action, a number of ways exist to show that the class should have known, and, therefore, is deemed to have known, of its claims. These include actual knowledge by some class members, public revelation of the alleged claims in Government hearings or publications, substantial "press attention," and public boards or forums discussing the issue. Mitchell I, 10 Cl. Ct. at 68-69 (proof that class members knew or should have know of the violations involving alleged mishandling of timber sales included the fact that dissatisfaction with the prices that BIA received for the timber was a "fact of life for some allottees," the timber sales were the subject of

congressional hearings and a public report, and dissatisfaction over the prices was expressed by a tribal council, and received "substantial press attention" (court noted three newspaper articles)). The same types of evidence – and more – exist in this case.

V. The Class Members Knew or Should Have Known of Their Claims, Including Claims for an Accounting, Before October 1, 1984

A. Overview

The undisputed facts show that each of the class members (except perhaps those continuously under "legal disability or beyond the seas" (28 U.S.C. § 2401(a)) either knew or should have known, and, therefore, must be charged with knowledge, of their claims to trigger accrual of those claims, and, therefore, to begin the running of the statute of limitations long before October 1, 1984. Because those claims accrued prior to October 1, 1984, the six-year statute of limitation in 28 U.S.C. § 2401(a) ran out prior to October 1, 1990 – the date on which the statute of limitations arguably "stopped" running because of the tolling language in Interior's annual appropriations acts. As discussed in part VI, below, the effect that this has on the Plaintiffs' claims for an historical accounting is that claims for an historical accounting of any transactions, balances or other information from periods prior to October 1, 1984 are time-barred, and any challenges to the balances appearing in Interior's records as of October 1, 1984 are time-barred.

The undisputed facts show that, long prior to October 1, 1984, the named Plaintiffs in particular and the Indian community in general must be deemed to have been sufficiently aware of the alleged violations of the Government's trust duties to give them notice under the Mitchell I standard, quoted infra, that "where there is reason to suspect there is reason to inquire and,

therefore, ' [w]hatever is notice enough to excite attention and put the party on his guard and call for inquiry, is [also] notice of everything to which such inquiry might have led'" 10 Cl. Ct. at 67-68.

[redacted - full text is in version filed under seal] Other evidence reveals that knowledge of the alleged breaches by Interior was so publicly discussed, revealed in numerous official Government reports, received substantial media attention, was addressed in congressional hearings, media coverage, and was the subject of prior reported lawsuits, that all IIM trust beneficiaries (except those excused under 28 U.S.C. § 2401(a)) must be deemed to have known of these alleged breaches.

B. Highlights of Facts Demonstrating That the Class Knew or Should Have Known of the Allegations of Trust Violations Before October 1, 1984

The key facts are set forth in Defendants' Statement of Material Facts, but some of those will be summarized below.

1. Admissions by Named Plaintiffs of Knowledge of Claims Before 1984

Four of the five named Plaintiffs were deposed in December 2002 and January 2003.[13]

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The testimony upon which Defendants rely in the present motion is chronicled in the Defendants' Statement of Material

[13] The complete deposition transcripts are filed herewith as Defs' S/J Exhibit Nos. 1 through 4.

Facts, but some of the testimony is highlighted below.

a. Deposition Testimony of Plaintiff Elouise Cobell

The key points from Ms. Cobell's deposition testimony are set forth in the Defendants' Statement of Material Facts at paragraphs 1 through 10.

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b. Deposition Testimony of Plaintiff James LaRose

[redacted - full text is in version filed under seal]

[redacted - full text is in version filed under seal]

c. **Deposition Testimony of Plaintiff Thomas Maulson**

The portions of Plaintiff Thomas Maulson's testimony upon which the Defendants rely are set forth in the Defendants' Statement of Material Facts at paragraphs 14 through 19

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d. **Deposition Testimony of Plaintiff Penny Cleghorn**

[redacted - full text is in version filed under seal]

[redacted - full text is in version filed under seal]

e. Interrogatory Answers of Plaintiff Earl Old Person

[redacted - full text is in version filed under seal]

2. Government Reports Before 1984

A number of public, Government-issued reports between 1915 and 1983 discussed allegations that BIA was not properly carrying out trust obligations. Even Plaintiffs cited a

number of these reports in their discovery responses[14] and in their January 6, 2003 plan[15] as proof of violations of trust duties regarding IIM accounts, including many of the precise duties listed in Plaintiffs' Complaint. The details are set forth in the Statement of Material Facts at paragraphs 28 through 51.

Having conceded that these public reports reveal the alleged violations of trust duties, Plaintiffs cannot now deny that the reports – when published between 1915 and 1983 – gave the IIM beneficiaries contemporaneous notice of the allegations. Plaintiffs cannot have it both ways, claiming that such reports prove violations, but arguing that the public – including class members – was not on notice of them.[16] Thus, the beneficiaries "knew or should have known" of their

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[14] **[redacted - full text is in version filed under seal**

[15] See Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust, filed January 6, 2003 ("Plaintiffs' Monetary Plan").

[16] **[redacted - full text is in version filed under seal]**

claims at that time.

In addition to the public reports cited by Plaintiffs, other General Accounting Office reports to Congress during the 1950s and in 1966 alleged violations by Interior. See Statement of Material Facts at paragraphs 52 through 58.

In other cases, the existence of such public reports of possible or alleged Government violations has been found to put potential claimants on notice of their claims, thus triggering the running of the statute of limitations. See pages 18-19, supra.

3. Congressional Hearings

In 1981 and early in 1984, Congress held hearings on issues pertaining to, among other things, Indian trusts. Included in those hearings were allegations of Interior's violations of its trust obligations regarding allotted lands. See Statement of Material Facts at paragraphs 59 through 64. In fact, Plaintiff Earl Old Person testified at the February 21, 1984 hearing, in which he complained about Interior's failure to properly manage individual Indian lands, and asserted that BIA kept improper land records. Statement of Material Facts at paragraphs 63-64.

4. Media Coverage Before 1984

Over the years, newspaper and journal articles have reported that BIA allegedly violated its trust obligations regarding IIM trust monies. See Statement of Material Facts at paragraphs 65 through 67. Thus, the public, including the IIM beneficiaries, were on notice of the allegations of trust violations.

5. Other Pre-1984 Litigation That Revealed the Alleged Violations of Trust Obligations

The courts have also found that other public legal proceedings involving similar allegations against a defendant provide the sort of notice that starts the limitations clock running. For example, in Sprint Communications Co. v. FCC, 76 F.3d 1221, 1229 (D.C. Cir. 1996), the court found that plaintiff's administrative challenge was time-barred because it was filed more than two years (the applicable statute of limitations for such complaints) after another company had filed an administrative challenge that asserted similar violations.

In this case, well before October 1, 1984, a number of IIM beneficiaries filed lawsuits (resulting in reported decisions) that asserted that the Government committed violations of IIM trust obligations similar to those at issue in this case. This includes the reported cases of Capoeman, 440 F.2d at 1002 (reported in 1971) and the decisions in Mitchell, including the 1980 decision of the Supreme Court (445 U.S. at 535) and the 1981 decision of the Court of Federal Claims (664 F.2d 265). See Statement of Material Facts at paragraphs 68 through 70.

C. Analysis of the Evidence

The summary judgment evidence discussed above (and set forth in more detail in the Statement of Material Facts) amply shows that the Plaintiffs, and the rest of the class knew or should have known of the alleged trust violations at least decades before this suit was filed.

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[redacted - full text is in version filed under seal] the evidence indicates that such allegations were "general knowledge" in the Indian community. [redacted - full text is in version filed under seal] , and Plaintiffs' heavy reliance upon public reports issued during the more than 65-year period between 1915 and 1983 is indisputable proof that the allegations of trust violations were public knowledge.

The fact that the allegations of trust mismanagement also were aired in other official public reports, congressional hearings (in Washington and elsewhere), and reported decisions of cases further proves the widespread knowledge of the allegations.

These are precisely the types of evidence that led the court in Mitchell I, 10 Cl. Ct. at 68-69, to hold that a class of trust beneficiaries knew or should have known of their claims. See supra.

VI. Effect of the Statute of Limitations or Laches on Claims for an Accounting

As shown below, any claims for accountings of transactions or balances prior to October 1, 1984 are time-barred, and Defendants cannot be required to account for such transactions.

A. Claims Based Upon Failures to Report or Account for Transactions or Periods Prior to October 1, 1984 Are Time-Barred

In a continuing legal relationship, new and separate causes of action may arise repeatedly, each time the defendant breaches its duty. The courts have so held in a variety of cases involving trusts, other fiduciary obligations, and other legal relationships. In such cases, the statute of limitations and laches applies to bar those claims that arose prior to the applicable limitations period.

For example, in Mitchell II, 10 Cl. Ct. at 788, Indian allottees sued for mismanagement of

timber sales on allotted land, including the failure to regenerate land on which timber was cut. The court held that the duty to regenerate the land was a "continuing duty," which "means that on each day the BIA failed in its duty to regenerate a given stand, there arose a new cause of action. And those causes of action which arose in the six-year limitations period may be sued upon." Id. (emphasis added).

In Gruby v. Brady, 838 F. Supp. 820, 824, 830 (S.D.N.Y. 1993), participant-beneficiaries of a union pension fund brought a class action suit against the trustees for breach of fiduciary duty and mismanagement of the fund by, e.g., failing to monitor the fund's financial condition, paying out excessive benefits, and giving faulty information to participants. The court held that, although the trustees had a continuous obligation to perform their fiduciary duties, "the defendants' failure to do so gave rise to a new cause of action each time the Fund was injured, that is, each time excessive benefit payments were made." Id. at 831 (emphasis added). Thus, those causes of action that occurred more than six years earlier were time-barred. Id.

In Cherokee Nation of Oklahoma, 21 Cl. Ct. at 572, plaintiffs sought damages, asserting that the Government breached its fiduciary duties by failing to survey tribal lands, failing to evict trespassers, and other mismanagement. Such allegations were deemed to assert a "continuing wrong," which could allow plaintiff to "recover for the [six year] statutory period, but not beyond."

Barash v. Estate of Sperlin, 271 A.D.2d 558, 559, 706 N.Y.S.2d 439, 440 (2000), involved a claim against an estate for withheld profits. The withholding of profits was "a continuing wrong which accrued anew each time the defendants collected income and profits from the allegedly co-owned property and failed to give the proper percentage thereof to the

plaintiff." (emphasis added.) Thus, plaintiff's claims were timely only as to those proceeds collected during the applicable limitations period. Id.

The same result obtains in cases involving back pay or overtime pay. In Adams v. Hinchman, 154 F.3d 420, 422 (D.C. Cir. 1998) (per curiam), federal employees sought review of the Comptroller General's decision denying their claims under the Fair Labor Standards Act. The court held that such claims for back pay or overtime "are continuing claims, a separate cause of action accrues each payday. A six-year statute of limitations means that an employee could recover six years of back pay or overtime compensation dating from the time he or she first filed suit." See also Friedman v. United States, 310 F.2d 381, 385 (Ct. Cl. 1962) ("where payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought").

In the present case, even if Interior was obligated to provide a report of each transaction (e.g., income and disbursements) involving each IIM account, every instance in which Interior failed to do so "gave rise to a new cause of action" (Gruby v. Brady, 838 F. Supp. at 831). The same is true if Plaintiffs assert that Interior was obligated to periodic accountings, or to provide better and more accurate statements of account. Each alleged failure to do so was a separate, distinct violation that gave rise to a new cause of action. Claims based upon such alleged failures that occurred before October 1, 1984 are time-barred.

Based upon these principles, claims for accountings related to any transactions or periods of time prior to October 1, 1984 are time-barred. Plaintiffs cannot escape this result by arguing that all past transactions must be reviewed and reported in order to determine the correct current balances. The law is clear that a plaintiff cannot circumvent the statute of limitations by pointing

to financial consequences during the limitations period that result from breaches that occurred before the limitations period. For example, in Brown Park Estates-Fairfield Development Co v. United States, 127 F.3d 1449 (Fed. Cir. 1997), low-income housing providers alleged that HUD breached housing assistance contracts by failing to make proper rent adjustments for a number of years. Those breaches, however, occurred outside the limitations period (i.e., more than six years before suit) and, therefore, were time-barred. Id. at 1455. Plaintiffs sought to avoid that result by arguing that, because of those earlier miscalculations in rent adjustments, HUD used the wrong base numbers to calculate rent adjustment in later years (during the limitations period). In other words, plaintiffs asserted, HUD made rent adjustments in subsequent years that depended on the allegedly erroneous figures from earlier years. Id. at 1457-58. Therefore, plaintiffs claimed that it was entitled to a recalculation, including recalculating the earlier years' figures. Id. at 1453, 1458.

The court rejected that argument and affirmed dismissal of plaintiffs' claims. Brown Park, 127 F.3d at 1459. The court reasoned that, 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. Id. at 1456-1459.

The same analysis applies to Plaintiffs' argument that, in order to provide them with correct current balances, any errors or omissions that might have occurred in the past must be found and corrected. But if any errors or omissions occurred before October 1, 1984, claims on those are time-barred. The fact that they might have continuing "ill effects" that make today's balances higher or lower does not revive those time-barred claims nor make them actionable. To hold otherwise would, in effect, render the statute of limitations a nullity, for it could always be

avoided by a plaintiff's claiming that he is not seeking to litigate stale claims, merely asking for correct current balances. See Fitzgerald v. Seamans, 553 F.2d 220, 230 (D.C. Cir. 1977) ("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").

In Miele v. Pension Plan of New York State Teamsters Conference Pension Plan & Retirement Fund, 72 F. Supp. 2d 88 (E.D.N.Y. 1999), the court also rejected efforts to avoid the statute of limitations. A pension fund participant sued the plan trustees, alleging that they miscalculated his benefits by disregarding his contributions during an earlier time when he received workers' compensation benefits. Id. at 93-94. The court found his claim accrued when the trustees rejected his arguments that his benefits had been miscalculated, and thus were time-barred. Id. at 99. Plaintiff argued for later accrual dates, asserting that every payment he received was incorrect because it was based upon the old (time-barred) miscalculations, and thus, a new claim accrued every time the fund made a payment to him. Id. at 100. The court rejected that argument, holding that a time-barred wrong does not remain actionable by pointing to "ill effects that continue to accumulate over time." Id. at 102.

If effect, plaintiff in Miele was arguing for the same outcome as Plaintiffs in this case: Reviving claims for old errors in an account by asserting that they must be corrected in order to obtain correct recent and current balances. That argument was rejected in Miele and must be rejected in this case.

B. Treatment of IIM Accounts Based Upon the Above Principles

1. Claims for Historical Accountings of IIM Accounts That Were Closed Before October 1, 1984 Are Barred by Limitations or Laches

If any class members held accounts that were closed before October 1, 1984, claims for an accounting of those accounts would be completely time-barred. Under the principles discussed above, those class members knew or should have known of trust violations before October 1, 1984. Once their accounts closed and no further transactions occurred, no further causes of action for an accounting arose. Thus, all of their claims for an accounting pre-dated October 1, 1984. They had six years to bring suit. For this group, that period expired before October 1, 1990 . Thus, their claims for an accounting became time barred.

2. IIM Accounts That Existed Both Before and After October 1, 1984 May Receive An Accounting Only of Transactions and Balances In Those Accounts After That Date

Those class members with IIM accounts that existed before and after October 1, 1984 may obtain an accounting only for the period since October 1, 1984.[17] At most, upon each transaction or "each day" (Mitchell II, 10 Cl. Ct. at 788), a separate and distinct cause of action for an accounting arose. They had six years to bring each such cause of action. Those that pre-date October 1, 1984 are time-barred. Therefore, no accounting is due them for any transactions

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[17] As noted in Interior's 1/6/2003 Accounting Plan (at II-3), there would be no accounting of closed accounts of deceased predecessors. The question of survivability of a federal claim is a question of federal law. However, for any action to survive and be brought by a personal representative (in the absence of a controlling statute providing such a right), it must have accrued in favor of the decedent during his or her lifetime. Thus, where no potential claim accrued to a beneficiary/account holder during his or her lifetime, no claim existed to survive for the benefit of the decedent's heirs.

or balances prior to October 1, 1984. The balances shown in Interior's records as of October 1, 1984 could not be challenged; any claims over those balances accrued prior to that date and are time-barred.

3. IIM Accounts That Existed Only After October 1, 1984 May Receive an Historical Accounting of Transactions and Balances After That Date

Those who held accounts only after October 1, 1984 would obtain an accounting for the balances and transactions after that date. See also note 17, supra.

VII. Equitable Tolling Does Not Apply

As discussed in sections II and IV, above, limitations periods are not equitably tolled merely because a claim involves a trust relationship or is brought by Indians in a trust relationship. Nor does this case otherwise warrant equitable tolling of the statute of limitations. In Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990), the Court recognized that equitable tolling is potentially available in claims against the Government, but that federal courts typically have imposed that remedy "only sparingly."

Equitable tolling, the Court noted, does not apply "where the claimant failed to exercise due diligence in preserving his legal rights," nor "to what is at best a garden variety claim of excusable neglect." Irwin, 498 U.S. at 96 (even though plaintiff's lawyer was out of the country at the time that an EEOC notice was received at his office, this was insufficient to equitably toll the limitations period that ran from date the notice was received); see also Washington v. Washington Metrop. Area Transit Auth., 160 F.3d 750, 753 (D.C. Cir. 1998) ("The court's equitable power to toll the statute of limitations will be exercised only in extraordinary and carefully circumscribed instances") (quoting Smith-Haynie v. District of Columbia, 155 F.3d

575, 579-80 (D.C. Cir. 1998)).

Even if Plaintiffs alleged that the Government committed "fraud," that would not avoid the statute of limitations. In Wood v. Carpenter, 101 U.S. at 141, the Court held that "[a] party seeking to avoid the bar of the statute [of limitations] on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it."

Also, in Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984), the D.C. Circuit stated:

> The doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim. A key aspect of a plaintiff's case alleging fraudulent concealment is therefore proof that the plaintiff was not previously on notice of the claim he now brings. By "notice," we refer to an awareness of sufficient facts to identify a particular cause of action, be it a tort, a constitutional violation or a claim of fraud. We do not mean the kind of notice – based on hints, suspicions, hunches or rumors – that requires a plaintiff to make inquiries in the exercise of due diligence, but not to file suit.

(Emphasis added).

In Sprint Communications, 76 F.3d at 1226, the court stated that, even if the "defendant fraudulently concealed material facts related to its wrongdoing,"the fraudulent concealment doctrine will not apply if "the defendant shows that the plaintiff would have discovered the fraud with the exercise of due diligence." To show this, the "defendant must show that the plaintiff had 'something closer to actual notice than the merest inquiry notice that would be sufficient to set the statute of limitations running in a situation untainted by fraudulent concealment.'" (quoting Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1491 (D.C. Cir. 1989)).

These principles demonstrate that the doctrine of fraudulent concealment does not apply

here. First, as the court in Hobson noted, the fraudulent concealment doctrine only applies "absent laches or negligence on plaintiff's part." 737 F.2d at 33. As shown in section III, above, laches is present in this case.

Second, Plaintiffs were "previously on notice of the claim [they] now bring[]" (Hobson, 737 F.2d at 35), thus precluding equitable tolling.

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Moreover, the numerous pre-1984 agency reports, substantial media coverage, and other litigation (see sections 24-28, above) documented and disclosed to the entire Indian community and the rest of the public sufficient allegations of trust violations to require that Plaintiffs file suit prior to October 1, 1984.

Thus, not only did the Government not actually conceal the claim for an accounting, but, on the contrary, that claim was manifestly self-revealing.

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Thus, the limitations clock began to run before October 1, 1984, and it ran out before the tolling period began on October 1, 1990.

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None of those reasons meets the standard for equitable tolling. "The test of due diligence measures the plaintiff's efforts to uncover his cause of action against what a reasonable person would have done in his situation given the same information." Richards v. Mileski, 662 F.2d 65, 71 (D.C. Cir. 1981). All the facts necessary to allege that the Government supposedly had repudiated its trust obligations and that, therefore, an accounting was due, were public knowledge before October 1, 1984, **[redacted - full text is in version filed under seal]** Nothing more needed to be done to "uncover [the] cause of action" (id.) because it already was uncovered. If equitable tolling is inapplicable where a party "had the means of discovery in his power" (Wood v. Carpenter, 101 U.S. at 141), then, a fortiori, where a party already has actual knowledge of the claim, equitable tolling does not apply.

The facts discussed above demonstrate that Plaintiffs had ample notice of their claims, particularly of their claims for an accounting, before October 1, 1984.

Conclusion

For the reasons stated above, Defendants respectfully request that the Court enter partial summary judgment in their favor, to the effect that Plaintiffs' claims for accountings of transactions or balances prior to October 1, 1984, are time-barred by the statute of limitations or

the doctrine of laches.

Dated January 31, 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 NORTON, Secretary of the Interior, et al.,	(REDACTED VERSION - THIS VERSION NOT FILED UNDER SEAL)
Defendants.	

DEFENDANTS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING STATUTE OF LIMITATIONS AND LACHES

Defendants, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") and the Secretary of the Treasury, pursuant to LCvR 7.1(h) and 56.1, submit the following as their statement of material facts as to which Defendants contend there is no genuine issue.

Section I:
Deposition Testimony by Named Plaintiffs

Deposition Testimony of Plaintiff Elouise Cobell (" Ms. Cobell")[1]

[redacted - full text is in version filed under seal]

[1] See Cobell Deposition Transcript ("Cobell Dep. Tr.") dated December 4-5, 2002, a copy of which (with pertinent deposition exhibits) is filed herewith as Defs.' S/J Exhibit No. 1.

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Deposition Testimony of Plaintiff James LaRose ("Mr. LaRose")[2]

[redacted - full text is in version filed under seal]

[2] See LaRose Deposition Transcript ("LaRose Dep. Tr.") dated January 13, 2003, a copy of which (with pertinent deposition exhibits) is filed herewith as Defs.' S/J Exhibit No. 2.

[redacted - full text is in version filed under seal]

Deposition Testimony of Plaintiff Thomas Maulson ("Mr. Maulson")[3]

[redacted - full text is in version filed under seal]

[3] See Maulson Deposition Transcript ("Maulson Dep. Tr.") dated January 22, 2003, a copy of which (with pertinent deposition exhibits) is filed herewith as Defs.' S/J Exhibit No. 3.

[redacted - full text is in version filed under seal]

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[redacted - full text is in version filed under seal]

[redacted - full text is in version filed under seal]

Deposition Testimony of Plaintiff Penny Cleghorn[4]

[redacted - full text is in version filed under seal]

[4] See Penny Cleghorn Deposition Transcript ("Cleghorn Dep. Tr."), dated January 27, 2003, a copy of which (with pertinent deposition exhibits) is filed herewith as Defs.' S/J Exhibit No. .

[redacted - full text is in version filed under seal]

Section II:

[redacted - full text is in version filed under seal]

[redacted - full text is in version filed under seal]

Section III:
Pre-1984 Public Reports That
Plaintiffs Concede Disclosed Alleged IIM Trust Violations

Public Reports Cited and Relied
Upon By Plaintiffs' January 6, 2003 Plan

28. On January 6, 2003, Plaintiffs filed "Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust" (hereafter, "Plaintiffs' Monetary Plan"), which cited and relied upon public reports referenced below.

The 1915 Report

29. In 1915, the Joint Commission of the Congress of the United States to Investigate Indian Affairs (63rd Cong., 3d Sess.) received a report relative to "Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs" (hereafter, the "1915 Report to Congress"). A copy of applicable excerpts is filed herewith as Defs.' S/J Exhibit No. 7.

30. Plaintiffs' Monetary Plan (at 23) characterizes the 1915 Report to Congress as follows: "A Report to a Joint Commission of Congress States that the Trust is Not Organized to Provide for Independent Audit."

31. Plaintiffs' Monetary Plan (at 23) quotes the following language (among other language) from the 1915 Report: "It is impossible with present methods for the officials of the Indian Office to keep in personal touch with the many varied transactions and the constantly changing status of property and funds." (emphasis omitted).

The 1929 Comptroller General Report to the Senate

32. Plaintiffs' Monetary Plan (at 24 & n.49) cites a February 25, 1929 Report to the President of the Senate, entitled "Report of the Amount of Funds of the Indians, the Investment

Thereof, the Rate of Interest Thereon Together With Comments Pertinent to the Uses Made of Such Funds" (hereafter, the "1929 Comptroller General Report to the Senate"). A copy of excerpts is attached as Defs.' S/J Exhibit No. 8.

33. Plaintiffs' Monetary Plan (at 24) states as follows regarding the 1929 Comptroller General Report to the Senate: "A Report to the President of the Senate States Revenues and Expenditures Could Not be Examined (1929)."

34. The 1929 Comptroller General Report to the Senate (Defs.' S/J Exhibit No. 8) states (at 115): "While property accountability is provided for in the accounting system, it was observed that at many of the [BIA] agencies the records are not properly maintained, entries not being current and otherwise incomplete."

The Meriam Report - 1928

35. Plaintiffs' Monetary Plan (at 4-5 & n.5) cites the following report: Lewis Meriam, The Problem of Indian Administration (The Johns Hopkins Press, Baltimore, Maryland, 1928) at 438-39, and Plaintiffs' Monetary Plan designates that document as the "Meriam Report." A copy of excerpts is filed herewith as Defs.' S/J Exhibit No. 9.

36. Plaintiffs' Monetary Plan (at 4) states that the Meriam Report "was published in 1928 and is one of the earliest public reports that found that Indian trust data is wholly unreliable and utterly useless as an accurate measurement of anything, except to confirm the manifest neglect and malfeasance inherent in Indian trust management . . . ." (emphasis added).

Comptroller General 1982 Report to Congress

37. Plaintiffs' Monetary Plan (at 24 n.50) cites a report submitted to Congress in 1982 by the Comptroller General, entitled: "Major Improvements Needed in the Bureau of Indian

Affairs' Accounting System" (hereafter, the "Comptroller General 1982 Report to Congress"). A copy of excerpts is filed herewith as Defs.' S/J Exhibit No. 10.

38. Plaintiffs' Monetary Plan (at 24) characterizes the Comptroller General 1982 Report to Congress as follows: "The GAO Reports the BIA Has Lost Accountability for Trust Funds, the Data is Unreliable, BIA Has Lost Control of Receipts and Disbursements, and BIA Has Not Discharged Its Fiduciary Duties (1982)."

39. The Comptroller General 1982 Report to Congress (Defs.' S/J Exhibit No. 10) states:

> a. "Operating deficiencies preclude the proper discharge of trustee responsibilities" (at 13).
>
> b. The BIA's "automated accounting and finance system does not provide for accountability for the more than $900 million of Indian trust funds managed by the Bureau. The system lacks the internal controls necessary to assure that receipts are properly accounted for and disbursements made only in proper amounts to entitled persons" (id.).
>
> c. "The local offices we visited did not maintain adequate controls over cash receipts" (id. at 14).
>
> d. "The local offices also did not maintain adequate controls over cash disbursements and related blank Government checks . . . . There was no assurance that disbursements were made in proper amounts to entitled persons and that funds had not been misappropriated" (id. at 15).

Public Reports Cited and Relied
Upon By Plaintiffs' Answers to Interrogatories

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Section IV:
Other Pre-1984 Comptroller General
Reports That Asserted IIM Trust Violations

November 1955 Audit by Comptroller General Regarding
BIA's Administration of Individual Indian Moneys (Defs.' S/J Exhibit No. 29)

52. In November, 1955, the Comptroller General issued a report (the "1955 Audit Report") on the audit of the administration of individual Indian moneys by the Bureau of Indian Affairs. A copy is filed herewith as Defs.' S/J Exhibit No. 29. This was transmitted to the Speaker of the United States House of Representatives.

53. Among other things, the 1955 Audit Report (Defs.' S/J Exhibit No. 29) stated:

> 1. Disbursements of individual Indian moneys are not always supported adequately (at 5)
>
> 2. Our audit disclosed certain deficiencies in accounting for IIM, such as overdrafts in individual Indian money accounts, subsidiary records not in agreement with general ledger control accounts, and the total of the cash balances in the Bureau's general ledger accounts not in agreement with the cash balance reported by the Treasury at June 30, 1955 (id. at 6).

December 14, 1956 Letter With Report from the Comptroller General
(Government S/J Exhibit No. 30)

54. On or about December 14, 1956, the Comptroller General issued a letter and report to the Committee on Appropriations, United States House of Representatives, setting forth findings of the General Accounting Office with regard to various civil departments and agencies of the Government. See Defs.' S/J Exhibit No. 30 at 2.

55. With regard to the Bureau of Indian Affairs, the report described in the preceding paragraph stated (at 28), in part:

> Poor accounting
>
> In our report on audit of the Bureau of Indian Affairs, submitted to the Congress on March 9, 1955, and in reports to the Commissioner of Indian Affairs, we pointed out a number of deficiencies in the administration of individual Indian moneys and recommended that the Bureau take action to insure that regulations set forth in the Indian Affairs Manual be followed closely. . . . Our audit in 1955 disclosed that some progress had been made in correcting the deficiencies, but serious weaknesses still existed in varying degrees at the locations visited. These included disbursements of individual Indian moneys without adequate support, deficiencies in accounting for cash and bonds and in the computation and distribution of interest income, and other weaknesses in internal procedures.

March 1966 Report

56. On March 11, 1966, the Comptroller General submitted to the Congress a letter and report (the "March 1966 Report") entitled, "Need for Improvements In the Management of Moneys Held in Trust for Indians." A copy is filed herewith as Defs.' S/J Exhibit No. 31.

57. The letter dated March 11, 1966 from the Comptroller General states (at 1), "[h]erewith is our report on the need for improvements in the management of moneys held in trust for Indians by the Bureau of Indian Affairs, Department of the Interior."

58. The March 1966 Report states (at 12), "Trust assets not recorded[.] The Aberdeen and Billings [Indian Service Special Disbursing Agents] did not record all trust funds for which they were accountable."

Section V
Congressional Testimony

1981 Hearings Before the Select Committee on Indian Affairs

59. In 1981, the Select Committee on Indian Affairs, United States Senate (97th Cong. 1st Sess.) held a series of three hearings on " Federal Supervision of Oil and Gas Leases on Indian Lands." The first two hearings were on February 27, 1981 (in Billings, Montana) and April 6, 1981 (in Washington, D.C.). Copies of the title pages and excerpts from each of those proceedings are filed herewith as Defs.' S/J Exhibit Nos. 32 and 33.

60. At the February 27, 1981 hearing in Billings, Montana, one of the witnesses, James Henry (Chairman of the Turtle Mountain Ban of Chippewa) offered a statement that included the following, regarding oil and gas producing wells on allotted land of members of his tribe: "Seven years ago, I came out to meet with [BIA] Fort Belknap and Fort Peck agencies, and at that time, they – in fact, they admitted that they had failed in their trust responsibility to properly administer those lands . . . ." Defs.' S/J Exhibit No. 32 at 26.

61. The third hearing occurred on June 1, 1981 (in Albuquerque, New Mexico). A copy of excerpts (the "June 1981 Hearing Excerpts") is attached as Defs.' S/J Exhibit No. 34.

62. The June 1981 Hearing included:

a. A statement by Senator John Melcher that a prior, February 27, 1981 hearing "revealed that the [U.S. Geological Survey's] gross inability to account for the production of oil on Federal and Indian leases over a period of years has been very pervasive and continuous." See June 1981 Hearing Excerpts (Defs.' S/J Exhibit No. 34) at 1.

b. The April 13, 1979 from the Comptroller General entitled, "Oil and Gas Royalty Collections-Serious Financial Management Problems Need Congressional Attention," (Defs.' S/J Exhibit No. 20), discussed supra. Defs.' S/J Exhibit No. 34 (at 58 et seq).

c. A statement of Richard Tecube, Vice President, Jicarilla Apache Tribe, who stated: "While the hearing is concentrating primarily on oil theft, we feel that it is an indicator of a much larger problem of leasing on Federal lands; many problems are involved. . . . One is leasing; second is accounting; the third problem is recordkeeping . . . ." Id. at 141.

February 21, 1984 Congressional Testimony by Mr. Old Person

63. On February 21, 1984, Plaintiff Earl Old Person ("Mr. Old Person") provided testimony in hearings before a subcommittee of the Committee on Appropriations, House of Representatives (98th Cong., 2d Sess.). A copy of that testimony is filed herewith as Defs.' S/J Exhibit No. 35 .

64. In the testimony described in the preceding paragraph, Mr. Old Person stated (Defs.' S/J Exhibit No. 35 (at 331)):

We [the Blackfeet Tribe] do have people that own individual lands. We have – we look to these lands mainly for income purposes. Whether it is individually or tribal.

A lot of our individual landowners receive very little income from these lands because of the way it is managed. I think it was concurred by the committee that came out investigating and kind of going over the various programs on Indian reservations.

They found that in one of the areas, our land base was not adequately being cared for. I just want to read one of their findings. It says, "Our review of Reservation land records maintained by the BIA and Tribe disclosed that land records are duplicative, inaccurate, and incomplete. Basically, we concluded that BIA's commitment to improve the Tribe's land records and to eliminate costly duplications has been insufficient and disregards the importance of this trust responsibility."

Section VI
Pre-1984 Media and Other Popular Sources
Of Allegations of IIM Trust Violations

65. In 1928, the journal AMERICAN INDIAN LIFE published an article, *Now It Can Be Told*, excerpts of which are filed herewith as Defs.' S/J Exhibit No. 36, which includes the following statements:

a. The article (Defs.' S/J Exhibit No. 36 at 1) states: "The Comptroller General, on request of the Senate Committee and under authority of both Houses of Congress, has begun a probe of the Indian Bureau's handling of Indian trust moneys. More will be told of these investigations below."

b. After referring to a dispute over the coverage of "tribal reimbursable debts," in a report by the Institute for Government Research, the article (at 16) continues:

> Almost as little will the seeker learn about the more important and more scandalous, handling of individual Indian trust moneys by the

> Indian Bureau. $25,000,000 and upward of individual Indian trust income is handled each year by the Bureau, under no regulation of law, with no review by the courts and no accounting to any authority whomsoever.

66. In December, 1978, the American Indian Historical Society published volume 6, number 11 of WASSAJA A NATIONAL NEWSPAPER OF INDIAN AMERICA, which included an article, *Suit Charges BIA Misappropriates Indian Funds*. A copy of that article is filed herewith as Defs.' S/J Exhibit No. 37. The article states in pertinent part (at 1):

> Oklahoma City, Oklahoma. A lawsuit charging the Bureau of Indian Affairs has misappropriated Indian funds has been filed here in U.S. District Court.
>
> The class action suit claims that the BIA office in Anadarko, Ok. "improperly handles money held in trust for Indians."
>
> * * *
>
> The plaintiffs in the suit are three Oklahoma Indians who have had money held in trust by the BIA. They seek a full accounting of all monies held in trust on behalf of Indians and payment to the Indians of all interest due from the investments.
>
> Amos E. Black III, Anadarko attorney, is one of four lawyers representing the Indians. "The suit stems from the practice of the BIA of holding oil and gas and grazing land lease bonuses paid to restricted Indians while the lease agreements are finalized, Black stated.
>
> "The BIA acts as a trustee for many individual Indians in agreements of this type . . .
>
> * * *
>
> **Further, investments are not made through standard procedures, Black contended, guaranteeing the highest interest return. "This is an abuse of the BIA role as trustee," Black said.**
>
> The attorneys are calling for a thorough investigation of the use of funds held by the BIA for Indians, and an explanation of how the money is

invested, where it is invested, and how much interest has been earned over the past years.

(emphasis in original).

67. On November 20, 1983, the DENVER POST published its EMPIRE MAGAZINE, which included an article by John Aloysius Farrell, *The New Indian Wars - Empty Promises, Misplaced Trust*. A copy is filed herewith as Defs.' S/J Exhibit No. 38 . Among other things, the article:

a. Quotes an attorney for the Native American Rights Fund as saying, "The BIA breached its trust responsibility in approving [] commercially unreasonable agreements." (at 17).

b. States (at 22) as follows regarding oil leases on Indian property: "Once negotiations are complete, there are serious flaws in the federal government's efforts to ensure that oil is not stolen from Indian lands, and that royalties are paid promptly and in full – as *The [Denver] Post* detailed in an extensive series of investigative reports throughout 1981.

Section VII:
Pre-1984 Litigation Asserting Trust Violations

68. On or about April 16, 1971, the Court of Claims issued its decision in Capoeman v. United States, 440 F.2d 1002 (Ct. Cl. 1971), which indicated that an Indian holding an interest in allotted land asserted that the Government as trustee improperly deducted charges from the proceeds of timber sales. Id.

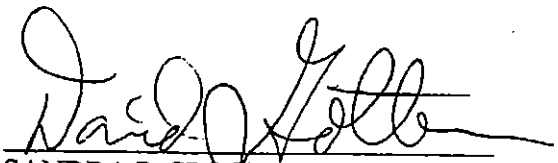
69. On or about April 15, 1980, the Supreme Court issued its decision in United States v. Mitchell, 445 U.S. 535, 536-37 (1980), which recited that individual Indian allottees sued the Government, alleging mismanagement and breach of its fiduciary duty regarding forests and timber sales on the allotted land.

70. On or about October 21, 1981, the Court of Claims issued its decision in Mitchell v. United States, 664 F.2d 265 (Ct. Cl. 1981), which was affirmed by the Supreme Court in a decision issued on or about June 27, 1983, 463 U.S. 206 (1983), and each of those decisions recited the allegations by individual allottees that the Government had breached its fiduciary obligations in connection with individual Indian allotted land.

Dated: January 31, 2003

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 31, 2003 I served the foregoing *Defendants' Statement of Material Facts In Support of Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches - Redacted* by hand in accordance with their Agreement of January 31, 2003:

Keith Harper, Esq.
Native American Rights Fund
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Dennis M Gingold, Esq.
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By U.S. Mail upon:

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By hand the morning of February 3, 2002 upon:

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By Hand upon:

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K. P. Kingston

Kevin P. Kingston

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.,	)	
	)	(REDACTED VERSION -
Defendants.	)	NOT FILED UNDER SEAL)
	)	

DEFENDANTS' APPENDIX OF EXHIBITS SUBMITTED IN SUPPORT MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING STATUTE OF LIMITATIONS AND LACHES

Defendants, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants"), and the Secretary of the Treasury, submit the attached exhibits in support of their Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches.

Dated: January 31, 2003

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

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

Defendants' Summary Judgment Exhibit Number ("Defs.' S/J Exhibit No.")	Description
1	Cobell Deposition Transcript ("Cobell Dep. Tr.") dated Dec. 4-5, 2002 **(REDACTED - EXHIBIT FILED UNDER SEAL)**
	A **(GOVT. DEPOSITION EXHIBITS REDACTED-FILED UNDER SEAL)**
	B **(GOVT. DEPOSITION EXHIBITS REDACTED-FILED UNDER SEAL)**
	C **(GOVT. DEPOSITION EXHIBITS REDACTED-FILED UNDER SEAL)**
	D **(GOVT. DEPOSITION EXHIBITS REDACTED-FILED UNDER SEAL)**
	E **(GOVT. DEPOSITION EXHIBITS REDACTED-FILED UNDER SEAL)**
	F **(GOVT. DEPOSITION EXHIBITS REDACTED-FILED UNDER SEAL)**
2	LaRose Deposition Transcript ("LaRose Dep. Tr.") dated Jan.13, 2003 **(REDACTED - EXHIBIT FILED UNDER SEAL)**
	A **(GOVT. DEPOSITION EXHIBITS REDACTED-FILED UNDER SEAL)**
3	Maulson Deposition Transcript ("Maulson Dep. Tr.") dated Jan. 2003 **(REDACTED - EXHIBIT FILED UNDER SEAL)**

A **(GOVT. DEPOSITION EXHIBITS REDACTED-FILED UNDER SEAL)**

B **(GOVT. DEPOSITION EXHIBITS REDACTED-FILED UNDER SEAL)**

4 Penny Cleghorn Deposition Transcript ("Cleghorn Dep. Tr."), dated Jan. 27, 2003 **(REDACTED - EXHIBIT FILED UNDER SEAL)**

A **(GOVT. DEPOSITION EXHIBITS REDACTED-FILED UNDER SEAL)**

5A Defendants' Second Set of Interrogatories to Class Representatives

5B Defendants' Second Set of Interrogatories to Class Representatives (Other than Elouise Pepion Cobel

6 Answers of Plaintiff Earl Old Person to Defendants' Second Set of Interrogatories to Class Representatives, dated Jan. 28, 1998 **(REDACTED - EXHIBIT FILED UNDER SEAL)**

7 U.S. Congress, Joint Commission to Investigate Indian Affairs, Aug. 1915, Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs

8 Report to the President of the Senate, Report of the Amount of Funds of the Indians, the Investment Thereof, the Rate of Interest Thereon Together With Comments Pertinent to the Uses Made of Such Funds [excerpt]

9 Lewis Meriam, The Problem of Indian Administration (The Johns Hopkins Press, Baltimore, Maryland, 1928) [excerpt]

10 GAO Publication: Major Improvements Needed in the Bureau of Indian Affairs' Accounting System

11 Answers of Plaintiff Elouise Pepion Cobell to Defendants' Second Set of Interrogatories to Class Representatives, dated May 12, 1997 **(REDACTED - EXHIBIT FILED UNDER SEAL)**

12	Supplemental Answers of Plaintiff Elouise Pepion Cobell to Defendants' Second Set of Interrogatories to Class Representatives, dated Jan. 26, 1998 **(REDACTED - EXHIBIT FILED UNDER SEAL)**
13	Answers of Plaintiff James Louise LaRose to Defendants' Second Set of Interrogatories to Class Representatives, dated Jan. 26, 1998 **(REDACTED - EXHIBIT FILED UNDER SEAL)**
14	Answers of Plaintiff Thomas Maulson to Defendants' Second Set of Interrogatories to Class Representatives, dated Jan. 28, 1998 **(REDACTED - EXHIBIT FILED UNDER SEAL)**
15	Comptroller General/GAO Report to the Subcommittee on Indian Affairs: *Increased Income Could Be Earned on Indian Trust Monies Administered by the Bureau of Indian Affairs* (April 28, 1972) [excerpt]
16	Letter from GAO to Director of Bureau of Land Management re: Survey of the Bureau of Land Management's Accounting System (Apr. 8, 1975)
17	Letter from GAO to Acting Chief, Division of Accounting, Bureau of Indian Affairs, Land Management re: Survey of the Bureau of Indian Affairs's Accounting System (Oct. 1975)
18	GAO Survey of Accounting System of the Bureau of Indian Affairs, Department of the Interior (March 1976)
19	GAO Letter to the Secretary (Feb. 3, 1978)
20	Comptroller General/GAO Report to the Congress: *Oil and Gas Royalty Collections-Serious Financial Management Problems Need Congressional Attention* (Apr. 13, 1979)
21	GAO Letter to the Secretary (Oct. 2, 1980)
22	Comptroller General/GAO Report to the Congress: *Inappropriate Use of Indian Trust Fund to Subsidize BIA Activities* (Oct. 7, 1980)
23	GAO Report to the Secretary: *Interior's Minerals Management*

Programs Need Consolidation to Improve Accountability and Control (July 27, 1982)

24 Comptroller General Letter to the Secretary (Aug. 16, 1982)

25 Comptroller General/GAO Report to Congress: *Major Improvements Needed in the Bureau of Indian Affairs' Accounting System* (Sept. 8, 1982)

26 Comptroller General Letter to Chairman, Subcommittee on Oversight and Investigations, Committee on Interior and Insular Affairs, House of Representatives (Oct. 18, 1982)

27 GAO Report to the Secretary: *Interior Should Solve its Royalty Accounting Problems Before Implementing New Accounting System* (Jan. 27, 1983)

28 GAO Letter to the Secretary (Sept. 6, 1983)

29 Audit by Comptroller General Regarding BIA's Administration of Individual Indian Moneys (Nov. 1955)

30 Comptroller General Letter and Report (Dec. 14, 1956) [excerpt]

31 Comptroller General/GAO Report to The Congress of the United States, *Need for Improvements In the Management of Moneys Held in Trust for Indians* (March 1966)

32 U.S. Senate Select Committee on Indian Affairs *Hearing On Federal Supervision of Oil and Gas Leases on Indian Lands*, Part 1, Feb. 27, 1981 (Billings, Montana) [excerpt]

33 U.S. Senate Select Committee on Indian Affairs *Hearing On Federal Supervision of Oil and Gas Leases on Indian Lands*, Part 2, Apr. 6, 1981 (Washington, D.C.) [excerpt]

34 U.S. Senate Select Committee on Indian Affairs *Hearing On Federal Supervision of Oil and Gas Leases on Indian Lands*, Part 3, June 1, 1981 (Albuquerque, New Mexico) [excerpt]

35 Testimony in Hearings Before a Subcommittee of the Committee on

Appropriations, House of Representatives (98th Cong., 2d Sess.) [excerpt]

36 *Now It Can Be Told*, American Indian Life, 1928 [excerpt]

37 Wassaja A National Newspaper of Indian America, *Suit Charges BIA Misappropriates Indian Funds,* American Indian Historical Society, Vol. 6, No. 11 (Dec. 1978)

38 Article by John Aloysius Farrell, *The New Indian Wars - Empty Promises, Misplaced Trust*, Empire Magazine, Denver Post, (Nov. 20, 1983)

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 31, 2003 I served the foregoing *Defendants' Appendix of Exhibits Submitted in Support Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches - Redacted* by hand in accordance with their Agreement of January 31, 2003:

Keith Harper, Esq.
Native American Rights Fund
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Dennis M Gingold, Esq.
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By U.S. Mail upon:

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Atlanta, GA 30309-4530

By hand the morning of February 3, 2003 upon:

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Special Master
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By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
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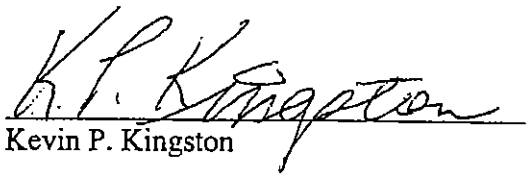
(202) 478-1958



Kevin P. Kingston