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

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/s/ Kevin P. Kingston  
Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.

Plaintiff,

vs.

Case No. 1: 96CV01285  
(Judge Robertson)


DIRK KEMPTHORNE, Secretary of the  
Interior, et al.,

Defendants.

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Rule 26, FRCP, Disclosure  
And Expert Witness Report of  
Alan S. Newell



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Alan S. Newell

September 12, 2007

## **Introduction**

My name is Alan S. Newell. I am President of, and a Senior Associate Historian with, Historical Research Associates, Inc. (HRA). I have a Bachelor and a Master of Arts degree in American History from the University of Montana. My business address is 125 Bank Street, Fifth Floor, Missoula, Montana, 59802. My curriculum vita is attached as Exhibit A. Included in that vita is a list of my publications within the last ten years and testimony within the last four years.

HRA is a historical consulting firm with offices located in Missoula, Montana, Seattle, Washington and Portland, Oregon. HRA historians and anthropologists specialize in researching historical questions. I have worked as a professional historian for HRA for 33 years. During that time, I have been an active member of a number of professional historical organizations including the Organization of American Historians, the American Society for Environmental History and the National Council on Public History (NCPH). I have regularly attended and presented papers at annual meeting and symposia offered by these organizations. Currently, I am a member of the NCPH where I served on the Board of Directors from 1992-1995 and as the organization's elected president from 2000-2001.

I also have served on the advisory board of the Center for the Rocky Mountain West, a non-profit research institute that is affiliated with the University of Montana. I am a Faculty Affiliate with the Department of History at the University of Montana where I have taught courses in public history and historical research methods. I also have served on graduate committees for students in Western History.

In February 2003, I filed an expert report with this court in support of the Office of Historical Trust Accounting's (OHTA) 2003 accounting plan (Exhibit B). My 2003 report also offered a critique of Plaintiffs' proposed model for determining funds owed to Individual Indian Money (IIM) account holders by the United States. I was subsequently called by the United States to testify at the 2003 trial on that plan and the Department of the Interior's (DOI) efforts to reconcile IIM accounts. Based on this earlier and subsequent work with OHTA, Department of Justice (DOJ) attorneys have asked me to review the recent reports submitted by Paul M. Homan and Richard E. Fasold and to assess whether those reports cause me to change the opinions that I offered in February 2003.

HRA has charged the DOJ an hourly rate of \$185 per hour for my work on this project.

### **Approach**

In preparing the present report, I reviewed my expert report prepared in 2003 and the recent update to OHTA's plan dated May 31, 2007. I also reviewed the "Expert Report of Paul M. Homan" and the "Expert Report of Richard E. Fasold" both dated August 17, 2007. In preparing my current report, I also considered the work that my firm (HRA, Inc.) has undertaken for OHTA since my testimony in 2003.

Over the past four years, our work for OHTA has focused on three areas. We have provided personnel and consulting support for the Litigation Support Accounting (LSA) and the "Land-to-Dollars Completeness Test". Both of these activities are referenced in OHTA's May 31, 2007 plan update.<sup>1</sup> In addition to this work, HRA also has prepared a number of "reservation histories" for OHTA. These histories are short summaries of the legislative and administrative background of leasing and contracting on allotted Indian reservations. HRA has submitted 55 of these histories to OHTA.

### **Opinions**

In my February 2003 report I offered three general opinions: 1) that there is a vast quantity of federal records and data available for use in the IIM reconciliation process; 2) that Plaintiffs' should not, as they apparently explicitly did, ignore this data in developing their "model"; and 3) that OHTA's plan for using these records was a reasonable and prudent approach to reconciling the IIM accounts.<sup>2</sup> After reviewing the above referenced documents and considering the work that HRA has undertaken for OHTA since 2003, I find nothing to cause me to alter my opinions from 2003. Indeed, the Fasold Report dated August 17, 2007 explains that Mr. Fasold has undertaken no additional work on his "model" since he submitted his February 28, 2003 report. The criticism that I had of the Fasold methodology in 2003 remains today. With one notable exception (that having to do with assessing timber harvests on allotted lands) the model specifically ignores primary source data on Indian resources. It also fails to account for the

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<sup>1</sup> United States department of the Interior, "Historical Accounting Project", May 31, 2007, Part 1 "Plan for Completing the Historical Accounting of Individual Indian Money Accounts", p. 12,19.

<sup>2</sup> "Expert Report of Alan S. Newell" February 26, 2003, p. 2.

numerous ways that reservations were allotted in practice or the way that these lands left Indian ownership.<sup>3</sup>

Mr. Homan apparently bases his opinion of the limitations of the OHTA plan on the need to find every single financial record that documents each transaction in an IIM account. I am not qualified to express an opinion as to whether the accounting requires this level of effort. And, as I noted in my February 26, 2003 report, there are “numerous gaps” in the federal record of Indian affairs dating back to 1887.<sup>4</sup> However, as I noted in that report and as has been confirmed by our work with OHTA since 2003, many of the required documents can be found if sufficient effort is applied. One obvious reason for this conclusion is that, as with any bureaucracy, the Department of the Interior generated multiple documents and copies of documents for leasing and contracting activity. A document that may have been lost in one collection may be found in another. For example, research for the land-to-dollar prototype study at Horton Agency in Kansas in November 2005 made use of lease copies available in the office files of the agency's conservation resources program. The realty department at the agency maintains the original leases, but it ships leases that are no longer current or outside the agency's retention period to AIRR in Lenexa. The lease copies maintained by the conservation program in this case provided a research opportunity for the land-to-dollar study that was then underway at the agency.

DOI's effort to centralize Indian records at the American Indian Records Repository in Lenexa, Kansas has been an important step in making the search for documents, regardless of where they may be in federal agency files, more effective.

There is nothing in the latest Homan report to cause me to change my 2003 opinion as to the value of the extant federal record.

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<sup>3</sup> “Expert Report of Alan S. Newell” February 26, 2003, p. 16-21.

<sup>4</sup> Ibid., p.15.

**EXHIBIT A**

**CURRICULUM VITA FOR**

**ALAN S. NEWELL**

## **TITLE**

President

Senior Associate Historian

## **EXPERTISE**

Litigation Support

Expert witness testimony

Project management on historical, environmental, and legal studies

Archival research

Research materials organization and data base management

## **EDUCATION**

*Master of Arts, History, 1979*

*Emphasis on American West and Conservation*

UNIVERSITY OF MONTANA

*Bachelor of Arts, History, 1970, high honors*

UNIVERSITY OF MONTANA

## **SUMMARY OF EXPERIENCE**

Alan Newell has over 33 years experience as a Project Manager and/or Principal Investigator on studies in Montana, North and South Dakota, Wyoming, Idaho, Washington, Wisconsin, New Mexico, Arizona, Michigan, Minnesota, and Washington, DC. He has conducted studies of historical-legal questions in the areas of water and land use, federal-state-tribal relations, legislative history, and navigability.



## SELECTED LIST OF PROJECT EXPERIENCE

### < EXPERT WITNESS TESTIMONY

*ELOUISE PEPION COBELL, et al. v. GALE NORTON, et al.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, CASE No. 1:96CV01285 (2003)

*MINIDOKA IRRIGATION DISTRICT v. UNITED STATES DEPARTMENT OF THE INTERIOR; et al.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO CIVIL No. 91-0529-S-BLW (2002)

*GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS v. UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF MICHIGAN AND STATE OF MICHIGAN,* UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, No. 1:96-CV-466 (2002)

*E. WAYNE HAGE AND JEAN N. HAGE v. UNITED STATES,* 91-1470L UNITED STATES COURT OF FEDERAL CLAIMS (1998)

*STATE OF MONTANA v. ARCO,* UNITED STATES DISTRICT COURT, DISTRICT OF MONTANA (1997)

*MILLE LACS BAND OF CHIPPEWA INDIANS, et al. PLAINTIFFS, UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR v. STATE OF MINNESOTA, MINNESOTA DEPARTMENT OF NATURAL RESOURCES, et al.* (CIVIL No. 4-90-605). UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION (1994)

*UNITED STATES OF AMERICA, et al. v. STATE OF WASHINGTON, et al. and CONFEDERATED TRIBES OF THE CHEHALIS TRIBES OF THE CHEHALIS INDIAN RESERVATION, et al. v. STATE OF WASHINGTON.* (SUB-PROCEEDING No. 83-3). UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE (1990)

*DAVIDSON et al. v. STATE OF WASHINGTON,* KING COUNTY SUPERIOR COURT No. 83-2-02711-0, (1988)

*STATE OF NEW MEXICO v. L.T. LEWIS et al.,* DISTRICT COURT, NEW MEXICO (1986 - 1988)

*LAC COURTE OREILLE BAND OF CHIPPEWA et al. v. STATE OF WISCONSIN,* UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WISCONSIN (1985)

*CROW TRIBE v. STATE OF MONTANA,* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS, MONTANA (1984)

*MONTANA COALITION FOR STREAM ACCESS, STATE OF MONTANA v. DENNIS MICHAEL CURRAN.* FIRST JUDICIAL DISTRICT, HELENA, MONTANA (1980)

### < SELECTED HISTORICAL PROJECTS RELATING TO NATIVE AMERICANS, HISTORICAL LAND USE AND RESOURCE ISSUES

*COBELL v. NORTON, et al.*

Project Manager and principal for historical research relating to Individual Indian Money accounts.

*UNITED STATES v. MICHIGAN*

Project Manager for historical studies focusing on Native American issues in Michigan.

HISTORICAL RESEARCH PROJECT FOR CONFEDERATED TRIBES OF SILETZ INDIANS

Historical studies relating to the establishment of the Coast Reservation in western Oregon.

*MILLE LACS BAND OF CHIPPEWA INDIANS, et al. v. STATE OF MINNESOTA*

Principal Investigator and testifying witness on the history of federal negotiations with the Mille Lac Band of Chippewa.

*R O LIVESTOCK v. UNITED STATES, NEVADA*

Principal Investigator and testifying witness involving the history of private water use on the Toiyabe National Forest.

HISTORICAL INVESTIGATION OF WATER USE BY THE NEZ PERCE TRIBE, SNAKE RIVER BASIN ADJUDICATION, IDAHO

Principal Investigator and testifying witness of federal negotiations with the Nez Perce Tribe.

*UNITED STATES OF AMERICA v. STATE OF MICHIGAN, ISABELLA COUNTY, UNION TWP, et al.*

Principal Investigator for a study of federal relations with the Saginaw Band of Chippewa during the early 20th century.

HISTORICAL RESEARCH OF SNAKE RIVER BASIN ADJUDICATION, IDAHO

Principal Investigator for a study involving non-federal claims to water in the Snake River Basin.

HOOPA VALLEY RESERVATION RESEARCH, CALIFORNIA

Principal Investigator for a study involving the early history of native groups who were located on the Hoopa Valley Indian Reservation in northern California.

DEPARTMENT OF FISH, WILDLIFE & PARKS, MONTANA

Consultant on various studies and issues before the Montana Department of Fish, Wildlife & Parks.

EVALUATION OF NON-INDIAN CLAIMANTS WITHIN THE SILVER CREEK SUB-BASIN, LITTLE COLORADO RIVER DRAINAGE, ARIZONA

Project Director for a study of non-federal water users in the Little Colorado River Basin.

*HAGE v. U.S., NEVADA*

Principal Investigator for a study involving water use in the Monitor Valley, Nevada.

LAC COURTE OREILLES BAND, *et al. v. STATE OF WISCONSIN, et al.*

Principal Investigator and testifying witness on federal relations with the Lac Courte Oreilles and other bands of Chippewa in Wisconsin.

STATE OF NORTH DAKOTA *v. UNITED STATES* (U.S. DISTRICT COURT, NORTH DAKOTA)

Principal Investigator for a study of navigability of the Little Missouri River in North Dakota.

HISTORY OF GEOTHERMAL WATER USE AT FORT BOISE, *STATE OF IDAHO v. UNITED STATES, et al.* (FIFTH JUDICIAL DISTRICT COURT OF IDAHO)

Principal Investigator for a study of the development of geothermal water use at Old Fort Boise, Idaho.

CONFEDERATED CHEHALIS & SHOALWATER *v. STATE AND UNITED STATES v. WASHINGTON*, SUB-PROCEEDING #83-3

Principal Investigator and testifying witness of federal treaty relations with the Chehalis and Shoalwater Tribes of Washington.

LAKE WASHINGTON BOUNDARY SURVEY, KING COUNTY, WASHINGTON

Principal Investigator providing historical research and expert testimony with respect to the propriety of certain harbor lines in connection with *Davidson et al. v. State of Washington*, King County Superior Court No. 83-2-02711-0.

NEBRASKA *v. WYOMING*

Project Manager and Principal Historian on a study of various issues relating to the North Platte River Project in Wyoming.

BUREAU OF INDIAN AFFAIRS, MINNESOTA CHIPPEWA TRIBAL FOREST HISTORY, MINNESOTA

Principal Investigator for book-length, illustrated report of Chippewa forestry, 1854 to 1991.

BUREAU OF INDIAN AFFAIRS, HISTORICAL NARRATIVE OF FORESTRY ON THE SPOKANE INDIAN RESERVATION, WASHINGTON

Project Director for a book-length, illustrated document of Spokane Indian forestry.

BUREAU OF INDIAN AFFAIRS, NATIONAL STUDY OF INDIAN FORESTRY

Co-Investigator for a book-length, illustrated narrative of Indian forestry in the United States.

FLATHEAD INDIAN RESERVATION FOREST HISTORY, MONTANA

Co-Investigator for a book-length, illustrated narrative of forestry procedures on the Flathead Indian Reservation.

## < RESOURCE MANAGEMENT STUDIES

BUREAU OF INDIAN AFFAIRS, MINNESOTA CHIPPEWA TRIBAL FOREST HISTORY,  
MINNESOTA

Principal Investigator for book-length, illustrated report of Chippewa forestry,  
1854 to 1991.

BUREAU OF INDIAN AFFAIRS, HISTORICAL NARRATIVE OF FORESTRY ON THE SPOKANE  
INDIAN RESERVATION, WASHINGTON

Project Director for a book-length, illustrated document of Spokane Indian  
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United States.

FLATHEAD INDIAN RESERVATION FOREST HISTORY, MONTANA

Co-Investigator for a book-length, illustrated narrative of forestry procedures on  
the Flathead Indian Reservation.

## PROFESSIONAL AFFILIATIONS

National Council on Public History

(President, 2000)

(Elected Vice-President, 1999)

(Board of Directors, 1992-1995)

(Program Chair, 1994)

Faculty Affiliate, University of Montana (1982 - present)

Advisory Board, Center for the Rocky Mountain West (1991-1994)

Member, National Board of Editors, *The Public Historian* (1995-1999)

## PAPERS, LECTURES, AND SEMINARS

“Did the Secretary Sell Us 'Blue Sky' Inclusion of Warren Act Contractors in The North Platte  
River Project”, Paper Presented to the *Bureau of Reclamation History Symposium*, June 18-19,  
2002, Las Vegas, Nevada

“First In Time: Tribal Reserved Water Rights, General Adjudications And The Public Historian”  
paper delivered at the *Southwest Environmental History Symposium*, May 21-24, 1998, Trinity  
University, San Antonio, Texas

Workshop, lecture, and teaching experience at the University of Montana, Arizona State University, University of California at Santa Barbara, Indiana University/Purdue University at Indianapolis, U.S. Forest Service Region I, and professional meetings.

"THE HISTORIAN'S CRAFT." University of Montana (various semesters: 1997, 1999, 2001).

INTRODUCTION TO PUBLIC HISTORY. University of Montana (various semesters: 1994, 1996, 2000).

ROUNDTABLE. *Public and Private Discourse in Water Resource History*. "Reclaiming Indian Land: The Indian Irrigation Division and Federal Reserved Water Rights." Annual Meeting of the Organization of American Historians and the National Council on Public History, Washington, DC, March 30-April 2, 1995.

WORKSHOP, HISTORICAL CONSULTING. *An Entrepreneurs' Guide to Starting Your Own Business*. Presented at NCPH Conference, Columbia, South Carolina, March 12, 1992.

WORKSHOP. *Historians in Consulting: Preparing Proposals*. Presented at NCPH Conference, San Diego, California, March 10, 1990.

COMMENTATOR. *The Historian Goes to Court*, session at the 26th Annual Conference of the Western History Association, Billings, Montana, October 15-18, 1986.

COMMENTATOR. *National Parks in the West*, session at the 26th Annual Conference of the Western History Association, Billings, Montana, October 15-18, 1986.

GRADUATE COURSE. *Historians and Lawyers: Cooperation in Advocacy*. Department of History, Arizona State University, Tempe, January 13-17, 1986.

PAPER. *Cooperation in Forestry: Private Forest Protective Associations in Western Montana*. Western History Association, Sacramento, California, October 9-12, 1985.

PRESENTATION. *Seventy-Five Years of Indian Forest History*. Intertribal Timber Council, Seattle, Washington, May 1, 1985.

WORKSHOP. *Evaluating Historic Resources*. Presented to U.S. Forest Service Region I, MISSOULA, MONTANA, JUNE 3, 1981, AND MAY 19, 1982.

WORKSHOP. RECORDING HISTORIC RESOURCES. PRESENTED TO U.S. FOREST SERVICE REGION I, Missoula, Montana, December 17, 1979.

PRESENTATION. *Expansionist Ideals and the California Land Act of 1851*. Phi Alpha Theta, Portland, Oregon, March 3, 1973.

TEACHING ASSISTANT. *American History Survey, Recent American History*. Department of History, University of Montana, Missoula, 1972-1974.

## SELECTED PUBLICATIONS

### < BOOKS AND BOOK-LENGTH REPORTS

Newell, Alan S., Frank R. Grant, Theodore Catton, and Richmond Clow. *The Forests of Anishinabe: A History of Minnesota Chippewa Tribal Forestry, 1854-1991*. Prepared for U.S. Department of the Interior, Bureau of Indian Affairs, Branch of Forestry, Minneapolis Area Office, 1992.

- Grant, Frank, Theodore Catton, Kathryn Schneid, and Alan S. Newell. *A Forest and a Tribe in Transition: A History of the Spokane Indian Reservation, 1870 - 1994*. Prepared for the Spokane Tribe of Indians and USDI Bureau of Indian Affairs, Branch of Forestry, Spokane Agency, 1994.
- Newell, Alan S., Richmond L. Clow, and Richard N. Ellis. *A Forest in Trust: Three-Quarters of a Century of Indian Forestry*. Washington, D.C.: USDI Bureau of Indian Affairs, Branch of Forestry, 1986.
- Newell, Alan S., David Walter, and James R. McDonald. *Historic Resources Study, Glacier National Park, Montana*. Denver: USDI National Park Service, 1979.
- Newell, Alan S. and Gary Williams. *Historic Resources Study, Coulee Dam National Recreation Area, Washington*. Denver: USDI National Park Service, 1978.
- Newell, Alan S. "J. Hugo Aronson, 1953-1961," pp. 882-883; "Frank H. Cooney, 1933-1935," pp. 878-879; "William Elmer Holt, 1935-1937," pp. 879-880; "Edwin L. Norris, 1908-1913," pp. 875-876; "John Ezra Rickards, 1893-1897," p. 874, in *Biographical Dictionary of the Governors of the United States, 1789-1978*, edited by Robert Sobel and John Raimo, Vol. 4, *Profiles of Montana Governors*. Westport, CT: Meckler Books, 1978.
- Newell, Alan S. and Gary Williams. *Timber, Tribes, and Trust: A History of Forest Management on the Flathead Indian Reservation (1855-1975)*. Confederated Salish and Kootenai Tribes, Dixon, Montana, and USDI Bureau of Indian Affairs, Billings, Montana, 1977.
- < ARTICLES
- Newell, Alan S. "Environmental Historian As Expert Witness: A Practical Evil?" in *Public History and the Environment*, Kreiger Press, 2004
- Newell, Alan S. " 'Home Is What You Take Away With You': K. Ross Toole and the Making of a Public Historian." *The Public Historian* (Summer, 2001). Presidential address to the 23rd Annual Meeting of the National Council on Public History.
- Newell, Alan S. "First in Time: Tribal Reserved Water Rights and General Adjudications in New Mexico," in *Fluid Arguments: Five Centuries of Western Water Conflict* (University of Arizona Press, 2001), pp 95-119.
- Newell, Alan S. "Public History," in *Encyclopedia of Local History*, Carol Kammen and Norma Prendergast, editors. (Walnut Creek, California: Altamira Press, 2000).
- Newell, Alan S. "The Importance of Indian Forestry", *Evergreen*.
- Newell, Alan S., Guest Editor. "Public and Private Interests in Our National Parks." *Forest and Conservation History* 34 (April, 1990).
- Newell, Alan S. "Identification and Interpretation: Managing Cultural Resources in the U.S. Forest Service." *The Public Historian* 9 (Spring 1987):143-149.
- Newell, Alan S. and Dick Ellis. "Mount Haggin: Living History." *Montana Outdoors* 13 (1982):27-31.
- Newell, Alan S. "Tracing Historic Trails: A Question of Approach." *Archaeology in Montana* 21 (September-December 1980):217-228.

< BOOK REVIEWS

Reviews in *The New Mexico Historical Review*, *The Western Historical Quarterly*, *The Public Historian*, *CRM, Technology and Culture: The International Quarterly of The Society For The History of Technology*, and *Pacific Northwest Quarterly*.