

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____ ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV01285
)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, et al.,)	
)	
Defendants.)	
_____)	

**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ MOTION IN LIMINE
TO PRECLUDE DEFENDANTS’ TESTIMONY AS TO THE DEPARTMENT
OF THE TREASURY IN GENERAL AND AS TO DEFENDANTS’ EXHIBITS
CREATED BY, OR SOURCED FROM, THE DEPARTMENT OF THE TREASURY**

Defendants respectfully oppose Plaintiffs’ Motion in Limine to Preclude Defendants’ Testimony as to the Department of the Treasury in General and as to Defendants’ Exhibits Created By, or Sourced From, the Department of the Treasury (Dkt. No. 3389) (filed Sept. 14, 2007) (“Plaintiffs’ Motion” or “Pl. Mot.”).¹ In their motion, Plaintiffs seek the extraordinary relief of an order barring any of Defendants’ witnesses “from testifying on any matters relating to the Treasury defendant’s administration and management of the [IIM Trust] and matters pertaining to defendants’ exhibits created by, or sourced from, the Department of [the] Treasury and its fiscal agents.” Pl. Mot. at 1. Plaintiffs further seek to bar Defendants “from asserting during the trial on this matter any arguments or conclusions based in whole or in part on defendants’ exhibits created by, or sourced from [the Department of the Treasury and its fiscal agents].” *Id.* For the reasons set forth below, this Court should deny Plaintiffs’ Motion.

¹ In accordance with the Court’s directive, Defendants are filing this response on an expedited basis. *See* Tr. 70:1-7 (May 14, 2007).

I. Plaintiffs' Motion is Meritless Because It Wrongly Confuses Issues Regarding Treasury's Performance as a Trustee With Issues Related to Treasury as a Federal Agency and Mischaracterizes This Court's Rulings During Status Conferences on May 14, 2007 and June 18, 2007

The premise of Plaintiffs' Motion is found in one sentence on the first page of their motion: "Defendants argued (and this Court agreed) that the Treasury would not participate in the upcoming trial." Pl. Mot. at 1. That statement erroneously confuses a trial regarding the Department of the Treasury's ("Treasury") performance as a statutory trustee of the Individual Indian Money ("IIM") trust – which this Court has determined will not be a part of the upcoming hearing – with a trial regarding any facts related to Treasury.

The apparent genesis of this argument is the May 14, 2007 status conference, in which Defendants argued that the upcoming hearing should not address whether Treasury is properly discharging its role as a statutory trustee of the IIM trust. During the course of that status conference, Defendants' counsel stated:

The Court has received summaries and information on a quarterly basis from Treasury regarding its document retention efforts. There's really no issue now that has surfaced related to Treasury. So clarifying that Treasury's fiduciary duties, as it were, are not part of the October 10th hearing will clarify and help us narrow our resources and our work.

Tr. 53:2-7 (May 14, 2007). This statement, which Plaintiffs' Motion only partially quotes, plainly refers to this Court's prior finding that Treasury breached its duty to maintain records necessary to perform an accounting. See Cobell v. Norton, 240 F.3d 1081, 1106 (D.C. Cir. 2001) (affirming determination that Treasury breached its fiduciary duty to maintain potentially relevant IIM-related trust documents). Contrary to the suggestion in Plaintiffs' Motion,

Defendants did not assert that the upcoming hearing should not refer or relate to Treasury in any fashion; Defendants simply argued – and the Court agreed – that the hearing should not address Treasury’s role as a statutory trustee.

Thus, it was after hearing Defendants’ statement that the upcoming hearing should not address Treasury performance as a trustee, with regard to document retention, that this Court concluded: “I do not anticipate that the October hearing will include either the Department of the Treasury or fixing the system.” Tr. 77:10-12 (May 14, 2007). There is no support for Plaintiffs’ broader assertion that this Court held Treasury “would not participate in the upcoming trial.” Pl. Mot. at 1.

Plaintiffs compound their misstatement of this Court’s May 14, 2007 ruling by mischaracterizing events during the subsequent status conference, conducted on June 18, 2007. See Pl. Mot. at 3 and notes 5-7. The issue of “throughput” was introduced into the upcoming hearing after the Court heard a lengthy presentation by Plaintiffs’ counsel regarding Treasury and receipts and disbursements, i.e., “throughput.” See Tr. 51:1-69:9 (June 18, 2007). After hearing arguments by Plaintiffs’ counsel and Defendants’ response, the Court identified the four issues for the upcoming hearing:

What this October trial is all about is going to be -- let me see if I can block this out for you, and I'll try to write this out for you. First, it's going to be about what you're doing and what you're not doing. All right? I mean, you're doing what you're doing; they think you should be doing a lot more. It's going to be about both of those things. Second, what would it cost to do the things that they say that you should be doing and you're not doing? Third, taking into account the cost, because that, I think, I'm required to do by the Court of Appeals, is what you're doing adequate? Is it an adequate accounting? And fourth -- and this is what [Defendants] don't want to hear, but I think [Plaintiffs' counsel] is entitled to at least a record on this point, fourth, what does it all add up to?

Throughput versus what you can prove, what are the big numbers?

Tr. 76:20-77:10 (June 18, 2007) (emphasis added).² Consequently, this Court squarely informed the parties that the issue of throughput – receipts and disbursements – would be addressed at the upcoming hearing, and the Court stated that this issue was to provide Plaintiffs’ counsel “at least a record on this point.” See id.

Thus, the premise of Plaintiffs’ Motion is ungrounded. Defendants have not asserted that the Court should not consider evidence referring or related to Treasury during the upcoming hearing; Defendants simply asserted that the upcoming hearing should address the 2007 Plan produced by the Department of the Interior (“Interior”) for the historical accounting and that it should not address Treasury’s performance as a trustee.³ This Court’s rulings accord with those assertions, with the exception of throughput, which the Court added to the upcoming hearing, following argument by Plaintiffs’ counsel.

² The Court further reiterated that the performance of Treasury, as a trustee, would not be an element of the upcoming hearing:

[T]he way I see it, the way the actual money is handled in Treasury accounts is probably a different subject. . . . Maybe not an off-the-table subject, but a different subject. And that’s not what I want to hear on October 10th, beginning on October 10th.

Tr. 79:5-10 (June 18, 2007). In doing so – and contrary to Plaintiffs’ argument in their motion – this Court did not rule that “Treasury would not participate in the upcoming hearing.” Pl. Mot. at 1.

³ Plaintiffs will suffer no prejudice if, in fact, they “have prepared for a very different trial than one in which Treasury would have appeared as co-trustee-delegate and party defendant.” Pl. Mot. at 6. The Court’s rulings do not suggest that the upcoming hearing will address the issues as to which Plaintiffs claim to be unprepared.

II. Defendants Will Suffer Real Prejudice If Plaintiffs' Motion is Granted

While the upcoming hearing principally focuses on Interior's 2007 Plan for conducting the historical accounting, it is hardly surprising that Defendants' evidence will include testimony by individuals not employed by Interior and exhibits from sources other than Interior. Even if the issue of throughput had not been introduced into the upcoming hearing, it should come as no surprise that Defendants' testimony and exhibits may include Treasury employees and documents. Even Plaintiffs, in their recently filed Pretrial Statement, include Treasury documents and at least one former Treasury employee among their thousands of potential exhibits and scores of potential witnesses and transcript citations. See Plaintiffs' Pretrial Statement (Sept. 17, 2007) (Dkt. 3398) (including numerous Treasury exhibits and prior trial testimony of Donald Hammond).

The following discussion is hardly an exhaustive presentation regarding Defendants' case, but it serves to illustrate the prejudice Defendants would suffer if Plaintiffs' Motion were granted. Plaintiffs' Motion references four specific categories of "documents . . . clearly sourced to Treasury systems and records": "'CP&R' reports, 'Limited Payability Reports,' 'Mass Cancellation' documents, and 'TFM' volumes." Pl. Mot. at 14 (footnotes omitted). Plaintiffs further refer to documents identified as "1930 MA 4278" and "1958-60 MA 763." Id. (footnotes omitted). For reasons which include, but are not limited to the following, all of these categories of documents are relevant to the issues to be considered during the upcoming hearing:

- Check Payment and Reconciliation ("CP&R") and the Mass Cancellation documents were and are used in the course of Interior's performance of reconciliation procedures related to the Electronic Ledger Era.
- Documents such as the CP&R reports, Limited Payability reports, the Mass

Cancellation documents, and the Treasury Financial Manual (“TFM”) are all relevant to the issues of receipts and disbursements, which are before the Court at the request of Plaintiffs’ counsel.

- The additional two documents cited by Plaintiffs’ Motion – 1930 MA 4278 and 1958-60 MA 763 – are plainly listed among a category of documents regarding “Total IIM Annual Data” in Defendants’ potential exhibits list. See Pl. Mot. Ex. 1, pages 1-2. Again, these exhibits, like so many others generically cited in Plaintiffs’ Motion, are relevant to the issue of throughput.

As the foregoing illustrates, Defendants will suffer clear prejudice if the Court grants Plaintiffs’ Motion.

III. The Court Should Reject Plaintiffs’ Alternative Request for Relief

In their request for alternative relief, Plaintiffs ask for open-ended discovery of virtually anything related to Treasury, with no showing of good cause. See Tr. 89:7-8 (June 18, 2007) (Court rules that with regard to Plaintiffs’ discovery requests, “The answer is none, except on good cause shown.”). Plaintiffs even go so far as to ask the Court to allow discovery as to “matters potentially relevant to a subsequent disgorgement trial” Pl. Mot. at 7.

Putting aside the boundless and extraordinary nature of alternative relief sought in their motion, Plaintiffs indisputably have had years to develop their arguments and evidence concerning Treasury. More than seven years ago, Plaintiffs served broad requests for Treasury documents, and Defendants made responsive documents available for inspection. See Defendants’ Response to Plaintiffs’ Sixth Formal Request for Production of Documents (Mar. 1, 2000) and Defendants’ Supplemental Response to Request 35 of Plaintiffs’ Sixth Formal Request for Production of Documents (June 1, 2000), excerpts of which are attached hereto as Exhibits 1 and 2, respectively. In 2003, Plaintiffs again served broad requests for additional Treasury documents, which were made available for inspection. Defendants’ Joint Response to

Plaintiffs' Eighth Formal Request for Production of Documents. See Exhibit 3 (excerpts).⁴

These materials included CP&R and Mass Cancellation materials. Id. (responses to Requests 1 and 2). In fact, Plaintiffs were provided with a tape of Treasury's Mass Cancellation file in January 1999. See Exhibit 4.

Plaintiffs have not shown that their previous discovery opportunities were insufficient, and the time to develop their case as to Treasury issues was during the past years, not on the eve of trial. No grounds exist for the alternative relief sought by Plaintiffs, and this Court should summarily reject it.

CONCLUSION

In seeking an order that would impose highly prejudicial limitations on Defendants' ability to present their case, Plaintiffs cite no well-grounded authority. Rather, they mischaracterize prior Court rulings and statements by Defendants' counsel, while ignoring their own role in creating the throughput issue at the upcoming hearing. For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion in Limine to Preclude

⁴ We further note that the Treasury Financial Manual is publicly accessible, and Plaintiffs have no ground to complain about Defendants' use of this document. See www.fms.treas.gov (TFM accessible under "Publications").

Defendants' Testimony as to the Department of the Treasury in General and as to Defendant's Exhibits Created By, or Sourced From, the Department of the Treasury.

Dated: September 25, 2007

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2007 the foregoing *Defendants' Opposition to Plaintiffs' Motion In Limine to Preclude Testimony, Documents, and Other Information Regarding Throughput* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
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/s/ Kevin P. Kingston
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

**BRUCE BABBITT, Secretary of the
Interior, et al.,**

Defendants.

**Civil Action
No. 1:96 CV 01285 (RCL)**

**DEFENDANTS' RESPONSE TO PLAINTIFFS'
SIXTH FORMAL REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Fed. R. Civ. P. 26 and 34, Defendants hereby respond to Plaintiffs' Sixth Formal Request for Production of Documents.

GENERAL OBJECTION TO "DEFINITIONS"

Defendants object to the "Definitions" provided in Plaintiffs' Request for Production of Documents (and those incorporated by reference) on the grounds and to the extent that the "Definitions" purport to impose obligations that exceed the requirements of the Federal Rules of Civil Procedure or the local rules.

GENERAL OBJECTIONS TO REQUESTS FOR DOCUMENTS

1. The Court has yet to define the scope of the further proceedings in this action. Plaintiffs' Requests for Documents are clearly premised upon a belief that this action will address all IIM account activity since 1887. Defendants contend that the scope of the issues that remain to be tried, if any, is much more limited than the scope of the Plaintiffs' Requests, and, as

a result, Plaintiffs' requests are not reasonably calculated to lead to the discovery of admissible evidence. Defendants also object to these requests as premature, over-broad, unduly burdensome, and harassing.

2. Department of Interior Defendants provided Plaintiffs with a list of documents potentially responsive to Paragraph 19 of the November 27, 1996 order as Attachment A to the Department of Interior Document Production Plans. Some of the reports identified on that Attachment may be responsive to Plaintiffs' requests once they are properly narrowed. The Interior Defendants are willing to discuss which of those reports provide responsive information.

On January 14, 2000, the Department of the Treasury produced to Plaintiffs lists, dated January 12, 2000, of types of Financial Management Service (FMS) and Bureau of Public Debt (BPD) records that may include summary level information about IIM funds. See Department of the Treasury Combined Records Inventory: Documents Maintained by the Financial Management Service and the Bureau of Public Debt that Contain Summary Level Accounting Information that may be Relevant to Plaintiffs' Claims for an Accounting of the IIM Trust in Cobell, et al. v. Babbitt, et al., (referred herein as "Treasury Combined Records Inventory"). Attached hereto as Attachments D and E are updated versions of those lists. The types of records referred to therein are available for varying periods of time, and in various locations. Moreover, the kinds of records referred to therein may be responsive to one or more of Plaintiffs' Requests. When Plaintiffs identify which, if any, of the listed records they are interested in reviewing, Treasury will meet with Plaintiffs to discuss making such records available.

3. Defendants object to each and every one of the requests to the extent that they call for, or could be construed as calling for, information protected by the attorney-client privilege,

summary information responsive to this Request. Plaintiffs may make arrangements with counsel for Defendants for access to this information.

15. Any and all Documents containing annual business income produced or earned from all allotted Indian lands for each year from 1887 to 1999.

Objection:

Defendants object to this request as vague and ambiguous as to the term "allotted Indian lands." Moreover, this request is over-broad, oppressive and unduly burdensome in that a response would require them to compile, summarize, index, research or otherwise analyze voluminous historical information. This request also seeks information that is beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence.

Response:

Without waiving the foregoing general and specific objections, publications, reports and documents identified in Attachment A included herewith and in other responses may provide summary information responsive to this Request. Plaintiffs may make arrangements with counsel for Defendants for access to this information.

16. Any and all Documents containing annual judgment funds deposited into the IIM Trust Fund for each year from 1887 to 1999.

Objection:

Defendants object to this request as vague, ambiguous and over-broad. Moreover, this request is oppressive and unduly burdensome in that a response would require them to compile, summarize, index, research or otherwise analyze voluminous historical information or information maintained by Tribes. This request also seeks information that is beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence as phrased.

Response:

Without waiving the foregoing general and specific objections, publications, reports and documents identified in Attachment A included herewith and in other responses may provide summary information responsive to this Request. Plaintiffs may make arrangements with counsel for Defendants for access to this information.

17. Any and all Documents containing annual proceeds earned from sales of all allotted Indian lands for each year from 1887 to 1999.

Objection:

Defendants object to this request as vague and ambiguous as to the term "allotted Indian lands." Further, it is unclear if this request is seeking information concerning the sale of land that was originally scheduled for allotment or the sale of trust land on behalf of individual Indian landowners. Moreover, this request is over-broad, oppressive and unduly burdensome in that a response would require them to compile, summarize, index, research or otherwise analyze voluminous historical information. This request also seeks information that is beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence as phrased.

Response:

Without waiving the foregoing general and specific objections, publications, reports and documents identified in Attachment A included herewith and in other responses may provide summary information responsive to this Request. Plaintiffs may make arrangements with counsel for Defendants for access to this information.

18. Any and all Documents containing annual annuity income deposited into the IIM Trust Fund for each year from 1887 to 1999.

Objection:

Defendants object to this request as vague, ambiguous and over-broad. Moreover, this request is oppressive and unduly burdensome in that a response would require them to compile, summarize, index, research or otherwise analyze voluminous historical information. This request also seeks information that is beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence as phrased.

Response:

Without waiving the foregoing general and specific objections, publications, reports and documents identified in Attachment A included herewith, including but not limited to, the Annual Reports of the Commissioner of Indian Affairs, and in other responses may provide summary information responsive to this request. Plaintiffs may make arrangements with counsel for Defendants for access to this information. Also, there are approximately 959 volumes of Annuity Payment Rolls (138 feet) in Record Group 75 (an index is included with Attachment A) that cover the period 1841-1949 at the National Archives for Plaintiffs' inspection.

19. Any and all Documents containing all other income not previously specified produced or earned from all allotted Indian lands for each year from 1887 to 1999.

Objection:

Defendants object to this request as vague and ambiguous as to the term "allotted Indian lands." Moreover, this request is over-broad, oppressive and unduly burdensome in that a response would require them to compile, summarize, index, research or otherwise analyze voluminous historical information. This request also seeks information that is beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence.

Response:

Without waiving the foregoing general and specific objections, publications, reports and documents identified in Attachment A included herewith and in other responses may provide summary information responsive to this request. Plaintiffs may make arrangements with counsel for Defendants for access to this information.

20. Any and all Documents containing annual cash outflows or cash disbursements from the IIM Trust Fund for each year from 1887 to 1999.

Objection:

Defendants object to this request as vague, ambiguous and over-broad. Moreover, this request is oppressive and unduly burdensome in that a response would require them to compile, summarize, index, research or otherwise analyze voluminous historical information. This request also seeks information that is beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence as phrased.

Response:

Without waiving the foregoing general and specific objections, publications, reports and documents identified in Attachments A, B, and C included herewith and identified in Plaintiffs' Request for Documents Nos. 49, 58, and 71 below may provide summary information regarding the IIM pool. Plaintiffs may make arrangements with counsel for Defendants for access to this information. DOI Defendants will also provide for inspection and copying the transaction history for the IIM Pool, IM6039716, from April 1995 through the present.

Information about IIM funds at the pool level may be available for at least some years of the stated period in the Combined Statement of Receipts, Expenditures and Balances of the United States (the precursor to the U.S. Government Annual Report Appendix), which was published through 1983, and its similarly titled predecessors; and Financial Report of the United States Government, which in 1998 contained information about IIM funds. These are Items 87 and 89 on the Financial Management Service Records Inventory attached hereto as Attachment D. Records listed there are available for varying periods of time, and in various locations. When Plaintiffs identify which, if any, of these records they are interested in reviewing, Defendants will meet with Plaintiffs to discuss making such records available.

21. Any and all Documents containing annual interest income produced or earned on IIM Trust Fund moneys for each year from 1887 to 1999.

Objection:

Defendants object to this request as vague, ambiguous and over-broad. Moreover, this request is oppressive and unduly burdensome in that a response would require them to compile, summarize, index, research or otherwise analyze voluminous historical information. It is also unclear if this request seeks information concerning interest paid by the United State or by private institutions. This request also seeks information that is beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence as phrased.

Response:

Without waiving the foregoing general and specific objections, publications, reports and documents identified in Attachments A, B, and C included herewith and in other responses may provide summary information responsive to this request. Plaintiffs may make arrangements with counsel for Defendants for access to this information. DOI Defendants can make available for inspection and copying the transaction history for the IIM Pool, IM6039716, from April 1995 to the present. Defendants are willing to meet with Plaintiffs to further discuss what Money Max or Series II information may be responsive and offered for inspection and copying.

Treasury's Interest Cost by Fund Reports for the month of September in each of the fiscal years 1996, 1997, 1998, and 1999 contain a cumulative fiscal year figure of interest earned on investments made by Interior through Treasury. This report is listed in the Bureau of the Public Debt Records Inventory (attached hereto as Attachment E). When Plaintiffs identify which, if any, records on the Inventory they are interested in reviewing, Defendants will meet with Plaintiffs to discuss making such records available.

Moreover, the various laws and regulations governing interest earnings for individual Indian money may provide the information sought in this request. See Defendants' Responses to the Second Set of Interrogatories, Interrogatories No. 14 and 17.

22. Any and all Documents containing annual allotted acreage for each state and for each year from 1887 to 1999.

Objection:

Defendants object to this request as vague, ambiguous and over-broad. It is unclear what this request is referring to under the term "annual allotted acreage." Moreover, this request is oppressive and unduly burdensome in that a response would require them to compile, summarize, index, research or otherwise analyze voluminous historical information. This request also seeks information that is beyond the scope of this litigation and not reasonably calculated to

48. All volumes and all years of the Department of the Interior, Office of Indian Affairs' General Data Concerning Indian Reservations, 1929.

Response:

Without waiving the foregoing general objections, Defendants will make a copy of this publication dated 1929 located in the Department of the Interior's main library available for inspection and copying.

49. All volumes and all years of the Department of the Interior, Office of Inspector General's Review of Individual Indian Money Accounts Administered by the Bureau of Indian Affairs.

Response:

Without waiving the foregoing general objections, Defendants will make copies of the reports located to date available for inspection and copying. Also see Response to Request No. 72 below.

50. All documents identified by Defendants' answers to interrogatories contained in Plaintiffs' Second Set of Interrogatories filed this same day, November 21, 1999.

Response:

Defendants will make such documents available for inspection and copying.

51. A computer tape containing an updated HISTRAN, ITRAN and Master Files (through end of 1999).

Response:

Defendants request a meeting with Plaintiffs' counsel to discuss the possible type, format and physical delivery of the requested information that is determined to be relevant and necessary for purposes of the remainder of this litigation, including the costs to Plaintiffs for the transfer of such information and the time it will take to produce such information.

52. All material in electronic form containing data on individual IIM accounts or summary information of IIM accounts or allotments of individual Indians (held in trust or restricted fee) prior to December 31, 1985.

Objection:

Defendants object to this request as vague and ambiguous, over-broad, unduly

burdensome and oppressive and seeks information which is beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence.

Response:

Without waiving the foregoing general and specific objections, the request is unclear as to what information Plaintiffs are seeking and therefore it is difficult for Defendants to respond without further clarification. There is no readily accessible central source to determine the existence of such information and it is possible that various types of electronic data for some periods of time prior to 1985 exist in central, regional and field offices of various bureaus or in other storage locations. If Plaintiffs are seeking particular electronic information or databases that are relevant to the issues remaining in this litigation, Defendants invite Plaintiffs' counsel to provide such information so that further research can be conducted on this request.

Defendants note that the mass cancellation file, which contains information about checks that were issued by the United States Government between 1956 and September 30, 1989 but not negotiated, was produced to Plaintiffs in electronic form in January, 1999. Check information from the file, however, cannot be retrieved without predicate information.

53. All documents, including but not limited to lists which identify specific individuals, relating to individual Indian trust beneficiaries that do not have their transactions recorded on the IIM trust system.

Objection:

Defendants object to this request as vague and ambiguous, over-broad, burdensome and oppressive. The term "individual Indian trust beneficiaries" is vague and over-broad inasmuch as it may encompass individuals and entities other than IIM account holders who are members of the certified class in this case. Moreover, this request seeks information beyond the scope of this litigation and is not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, because it is unclear what information Plaintiffs are seeking, Defendants cannot respond without further clarification. Defendants are willing to meet and confer with Plaintiffs' counsel to further discuss this request.

54. All summary documents, including but not limited to lists which identify specific individuals, relating to individual Indian trust beneficiaries that are classified as "whereabouts unknown" and IIM trust beneficiaries for which the Department of Interior does not have a correct address.

Objection:

Defendants object to this request as vague and ambiguous, over-broad, burdensome and oppressive. Moreover, this request seeks information beyond the scope of this litigation and is

Objection:

Defendants object to this request as over-broad, oppressive and unduly burdensome. Furthermore, this request seeks information that is beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence as phrased. Moreover, as phrased, the request is unclear as to what information Plaintiffs are requesting and Defendants cannot provide a response at this time. However, Defendants are willing to meet with Plaintiffs' counsel to further discuss the nature and scope of this request.

62. All electronic data relating to IIM Trust Fund balance and activity -- including but not limited to receipts, disbursements, investment performance, interest accruals -- for all accounts held for the benefit of individual Indian trust beneficiaries and all suspense, clearing and special deposit accounts for the period 1887 to 1999.

Objection:

Defendants object to this request as vague, ambiguous, and over-broad. Read literally, this request would include all electronic information relating to every IIM account and all other related accounts. This request also seeks information beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence. Without further clarification concerning the specific type of information sought in this request, Defendants are unable to provide a further response.

The Department of the Treasury Combined Records Inventory is attached hereto as Attachments D and E. Records listed there are available for varying periods of time, and in various locations. When Plaintiffs identify which, if any, records on the Inventory they are interested in reviewing, Treasury will meet with Plaintiffs to discuss making such records available.

63. All documents related to any reconciliation or attempted reconciliation of IIM Trust Fund balances between OTFM (or its predecessor(s)) and the Department of Treasury.

Objection:

Defendants object to this request as over-broad, oppressive and unduly burdensome. As phrased, it is unclear what information Plaintiffs are requesting in this request such as the day-to-day reconciliations conducted by OTFM or other related projects. Defendants need further clarification concerning the time periods covered by this request and the type of information included within this request before a further response and a projected time table for the production of documents can be made.

Response:

Without waiving the foregoing general and specific objections, Defendants state that there are documents concerning current reconciliation efforts of accounting discrepancies between the balance maintained by Treasury and the balances maintained by Interior. Interior Defendants will make available the current summary non-privileged or protected briefing information on the accounting discrepancy project, and Treasury will make available related non-privileged documents. Defendants will meet with the Plaintiffs to discuss the scope of this request and the schedule for any further production of responsive documents.

64. All summary documents or lists relating to all IIM Trust beneficiaries that were not sent a statement of accounts during the period 1985 through 1999.

Objection:

Defendants object to this request as vague and ambiguous, over-broad, burdensome and oppressive. It is unclear what "summary" documents other than the reference to lists Plaintiffs are seeking in this request. To the extent that this request requires Defendants to compile lists that do not exist, this request is unduly burdensome. Moreover, the term "individual Indian trust beneficiaries" is vague and ambiguous, over-broad and may encompass individuals and entities other than IIM account holders who are members of the certified class in this case. Defendants cannot respond without further clarification. Defendants are willing to meet and confer with Plaintiffs' counsel to further discuss this request. See Response to Request No. 55.

65. All summary documents relating to accounts held for the benefit of individual Indian trust beneficiaries who were not sent a "statement of accounts" from the period beginning January 1, 1985 through commencement of the Phase II trial. Include in your production any list of specific individuals.

Objection:

Defendants object to this request as vague and ambiguous, over-broad, burdensome and oppressive. Further, the request is premature in scope inasmuch as there is no date set for "Phase II trial". It is unclear what "summary" documents other than the reference to lists Plaintiffs are seeking in this request. To the extent that this request requires Defendants to compile lists that do not exist, this request is unduly burdensome. Moreover, the term "individual Indian trust beneficiaries" is vague and ambiguous, over-broad and may encompass individuals and entities other than IIM account holders who are members of the certified class in this case. Defendants cannot respond without further clarification. Defendants are willing to meet and confer with Plaintiffs' counsel to further discuss this request. See Response to Request No. 55.

66. All documents, data or other materials related to any reconciliation or attempted reconciliation of balances of IIM accounts between the General Ledger and OTFM (or its predecessor(s)).

Objection:

Defendants object to this request as over-broad, oppressive and unduly burdensome. As phrased, it is unclear what information Plaintiffs are requesting. This request, as phrased, is confusing and unintelligible. As phrased, it is unclear what information Plaintiffs are requesting in this request such as the day-to-day reconciliations conducted by OTFM or other related projects. Defendants need further clarification concerning the type of information included within this request before a response can be made.

67. All documents, data or other materials related to interest earned on the IIM Trust Fund for the period 1887 to 1999.

Objection:

Defendants object to this request as vague, ambiguous and over-broad. Read literally, this request would include all documents regarding all transactions in every IIM account. Moreover, this request is oppressive and unduly burdensome in that a response would require them to compile, summarize, index, research or otherwise analyze voluminous historical information. It is also unclear if this request seeks information concerning interest paid by the United States or by private institutions. This request also seeks information that is beyond the scope of this litigation and not reasonably calculated to lead to the discovery of admissible evidence as phrased.

Response:

Without waiving the foregoing general and specific objections, Treasury refers Plaintiffs to the Bureau of Public Debt Records Inventory, attached hereto as Attachment E, which lists materials related to investment by Interior through Treasury of IIM funds for at least some part of the stated period. In addition, materials that relate to investment by Treasury of IIM funds, and which include some part of the stated period, include Investment and Redemption Requests (requests by Interior that Treasury purchase or sell securities), Advice of Investment (confirmations of investments made at Interior's direction), and Investment Ledger Cards (records of investments). These are items 66, 67, and 68 on the Financial Management Service Records Inventory attached hereto as Attachment D. Records listed there are available for varying periods of time, and in various locations. When Plaintiffs identify which, if any, records on the Inventory they are interested in reviewing, Treasury will meet with Plaintiffs to discuss making such records available.

68. All documents, data or other materials related to interest rates, investment portfolio composition and interest calculation methodology used by the Department of Interior and Department of Treasury for the IIM Trust Fund from 1887 to 1999.

Objection:

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

**BRUCE BABBITT, Secretary of the
Interior, et al.,**

Defendants.

**Civil Action
No. 1:96 CV 01285 (RCL)**

**DEFENDANTS' SUPPLEMENTAL RESPONSE TO REQUEST 35 OF PLAINTIFFS'
SIXTH FORMAL REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Fed. R. Civ. P. 26 and 34, Defendants hereby supplement their response to Request 35 of Plaintiffs' Sixth Formal Request for Production of Documents. The General Objections, both to Definitions and Requests, contained in Defendants' Response to Plaintiffs' Sixth Request for Production of Documents are incorporated herein by reference and are thereby made applicable to this Request.

35. All audits and reports from the General Accounting Office relating to allotted Indian trust lands or the IIM Trust Fund or both from the period 1887 to 1999.

Objection:

Defendants object to this request as vague and ambiguous, over-broad, unduly burdensome and oppressive and not reasonably calculated to lead to the discovery of admissible evidence. It is unclear from this request which GAO reports or audits Plaintiffs are requesting, as

Plaintiffs have already obtained and utilized many GAO reports in the course of this litigation and at trial. Moreover, this request seeks documents which are available to Plaintiffs at various libraries and public sources.

Response:

Without waiving the foregoing general and specific objections, defendants supplement their prior response to this Request. Information potentially responsive to this Request is located in the National Archives II in College Park, Maryland, in Record Group 411 (Records of the General Accounting Office).

Record Group 411 contains records of settled accounts of Indian Disbursing Agents for the period from approximately 1920 to approximately 1950, when such audits were conducted by the General Accounting Office. These records are housed in approximately 16,000 boxes and can be accessed using the National Archives II index system as well as index books which contain the Indian Disbursing Agent's name and location. They are available for inspection at the National Archives facility in College Park, Md.

In addition, Record Group 217 (Treasury) contains records of settled accounts of Indian Disbursing Agents prior to 1920, when such audits were conducted by the Department of the Treasury. These documents are also located in the College Park facility, where they are available for inspection.

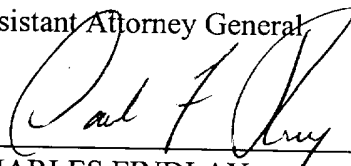
Defendants also attach a Supplement to Attachment B of their Response to Plaintiffs' Sixth Request for Production of Documents, which contains additional GAO reports that may be made available for Plaintiffs' inspection and copying.

Dated: June 1, 2000

Respectfully submitted,

AS TO OBJECTIONS

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____ ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV01285
)	
GALE A. NORTON, Secretary of the Interior, <u>et al.</u> ,)	(Special Master Balaran)
)	(Special Master-Monitor Kieffer)
Defendants.)	
_____)	

**DEFENDANTS' JOINT RESPONSE TO PLAINTIFFS'
EIGHTH FORMAL REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendants provide this joint response ("Response") to Plaintiffs' Eighth Formal Request for Production of Documents ("Requests"). This Response reflects the Defendants' good faith diligent efforts to consider and investigate the subject matters covered by the Requests and to respond to each of the requests within the allotted time. The statements made herein are based upon the information known as of the date of this response and are subject to correction, modification and supplementation if and when additional relevant information becomes known to a Defendant. This Response is, therefore, subject to change, and Defendants reserve the right to correct, modify or supplement any or all of the responses herein as Defendants determine to be necessary or appropriate.

The Requests as propounded seek production of documents responsive to one or more of 224 individual request "categories." All of these requests are subject to one or more objections, which are asserted below. General Objections are objections that apply to every "category" in

not include investment transactions for the pool or in the name of individual beneficiaries in trust form of registration, since the result of the investment transactions would remain within the trust.

2. "Negotiable Instrument." A financial instrument is considered negotiable when it is freely transferable from a seller to a buyer.
3. "Treasury Defendant" refers to the defendant party the Secretary of the Treasury.
4. "Interior Defendants" refers to defendant parties the Secretary of the Department of the Interior and the Assistant Secretary for Indian Affairs.
5. "Production" and "produce" shall be read to include delivering a copy of responsive documents or making responsive documents available for inspection and copying, as determined by the responding party. Defendants object to all demands that they must make and deliver a copy of all responsive documents whenever allowing an inspection of responsive documents is determined by a Defendant to be more appropriate or reasonable under the circumstances.

RESPONSES TO PLAINTIFFS' EIGHTH REQUEST FOR PRODUCTION OF DOCUMENTS

Without waiving the foregoing objections and subject to them, Defendants respond to each individual request as follows:

CATEGORY NO. 1: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the decade of the 1990's.

DEFENDANTS' RESPONSE: Defendants object to this request as vague and ambiguous as to the term "negotiable instrument." Defendants further object on the ground that

this request seeks information beyond the scope of discovery pursuant to Fed. R. Civ. P. 26 generally, and more specifically, for the Phase 1.5 trial also, and is not reasonably calculated to lead to the discovery of admissible evidence. Moreover, this request is over broad, oppressive and unduly burdensome to the extent that a response would require any Defendant to compile, summarize, index, research or otherwise analyze voluminous historical information and to incur substantial expense without payment in advance to defray the cost. Interior Defendants' further object to this request as oppressive and unduly burdensome because the Department of the Interior does not maintain files of canceled disbursement checks denominated as such.

Subject to and without waiving the foregoing general and specific objections, Defendants understand this request to be seeking documentation to verify the extent to which disbursements issued to IIM account holders were received. For this discovery purpose, it is not necessary to undertake the enormously expensive, time consuming and laborious task¹ of finding and copying negotiated checks. In lieu of copying millions of negotiated checks or making microfilm or digital images of these checks available for viewing, the process could be shortened and be just as effective if Plaintiffs were willing to accept a listing generated by Treasury as evidence that the checks were negotiated or cancelled.

The Department of the Interior determines the amount of each IIM disbursement and issues the IIM checks to effect those disbursements. While the Department of the Treasury has no role in issuing IIM checks, it does, through its Financial Management Service ("FMS") have information to verify that those checks were negotiated. In order to accomplish this approach, it will be necessary for Interior to provide Treasury properly formatted input files of the check

¹The degree of effort required to see cancelled checks is addressed infra.

symbol and serial number of checks that OTFM/BIA issued to IIM beneficiaries in the decade of the 1990's. Once Treasury has the files, they can be processed through FMS' Check Payment and Reconciliation (CP&R) System² and generate a paper listing showing the date, dollar amount and status for each check, payee name (provided the payee name is on Interior's input files) and the document identification number (DIN) for negotiated checks. This approach will show the total number and dollar amount of checks that were issued to IIM beneficiaries, the total number and dollar amount of checks that were negotiated and, the total number and dollar amount of checks that have been cancelled pursuant to the Competitive Equality Banking ACT of 1987 ("CEBA").³ It will also show the total number and dollar amount of any checks that involved the return of funds to OTFM/BIA for nonreceipt claims and any checks that were voided.

As Treasury has reported earlier, pursuant to Stipulation 8, in May 2000 Treasury completed a study of IIM check negotiation practices to determine the average time between issuance and negotiation of IIM checks. That study showed that 99% of the checks in the sample were negotiated and it also showed that most were promptly negotiated. The study also indicated that checks that had not been negotiated within one year were being cancelled under CEBA.⁴

²CP&R is a centralized computer system that serves as the repository of information about checks issued by the Federal Government. The CP&R System houses billions of check records. With appropriate predicate information (check symbol number and check serial number provided by the agency issuing the payment), FMS can determine the status (whether the check was cashed or cancelled) of checks issued since 1986.

³Under CEBA, also known as "limited payability", FMS cancels any Treasury check that has not been negotiated within one year and credits the paying agency with the proceeds from any such cancelled check.

⁴This was confirmed by a Department of Treasury Inspector General report dated May 30, 2000. That report, while making some recommendations, found that "The current limited payability cancellation process adheres to CEBA."

With the approach described above, the time for and cost of searching for images and making photocopies of checks would be avoided. What this approach will show is a listing of the status of the checks that have been issued, which of those checks have been negotiated and the amount reccredited to Interior as a result of cancelled checks. Consequently, all of the useful information on check issuance and negotiation would be obtained through this approach. The one piece of information that wouldn't be obtained is whether the amount of the check is the amount that should have been paid to the IIM account holder, but that information would not be evident from the original check either.

It is estimated that the above approach (providing the CP&R listing) would cost approximately \$60,000 and could be completed within six weeks after Interior provides Treasury with properly formatted input files of the check issues data.

To the extent that Plaintiffs will insist on production of actual checks or check images, Defendants reassert that the additional information contained on the checks is so far removed from the issues in the case as to be beyond the proper scope of discovery. Even if there were some tenuous connection to some issues in this case, the sheer burden of producing the checks far outweighs their marginal relevance. Subject to and notwithstanding all foregoing specific and general objections, the Treasury Defendant is willing to consider other means of producing the requested checks for inspection, provided that Plaintiffs are willing to underwrite the extensive costs involved with the option, summarized below.

If n order to accomplish this approach, it will be necessary for Interior to provide Treasury with properly formatted input files of the check symbol and serial number of checks that OTFM/BIA issued to IIM beneficiaries in the decade of the 1990's. Once Treasury has the

files, the files would be processed through FMS' CP&R system to generate a paper listing showing the date, dollar amount and status for each check, payee name (provided the payee name is on Interior's input files) and the document identification number (DIN) for negotiated checks. (DINs are used to locate check images, either on microfilm or in digital format.) For this part of the approach, and assuming Interior provided the check symbol and serial number information all at one time and that the information was properly formatted, it would take FMS approximately 6 weeks to process the files and cost approximately \$60,000.

For the time period of this request, FMS has microfilm copies or digital images of negotiated Treasury checks from 1990 to the present, and original, negotiated Treasury checks from 1991 to the present. FMS could arrange to provide Plaintiffs with an opportunity to inspect copies of IIM checks. An estimated 4.3 million checks were issued by OTFM/BIA in the 1990s under disbursing symbol 4844. These 4.3 million checks would include tribal fund payments, judgment fund payments and IIM payments. Without the input tapes from Interior mentioned above, Treasury has no mechanism for estimating how many of the 4.3 million checks are IIM checks. Although we suspect a substantial portion of the 4.3 million checks are IIM checks, for estimation purposes, we are assuming all 4.3 million checks are IIM checks.

FMS estimates that there may be as many as 3,456,000 IIM check images on microfilm. FMS would make all microfilm cartridges in its library available to the plaintiffs to inspect, and plaintiffs would manually retrieve cartridges, search for the checks by DIN and make copies of the checks. FMS would provide an employee to accompany/monitor plaintiffs while plaintiffs inspect the microfilm. Since the microfilm includes images of all Treasury checks during this time period, it includes information, such as name, address, and Social Security number, of

millions of Americans and this information must be properly safeguarded. The FMS employee would ensure that only IIM checks were copied. The time frame depends on the staff people plaintiffs would apply. FMS estimates that a staff person supplied by plaintiffs could process approximately 300 checks per day. FMS' costs would be \$73,000 per year.

FMS would request any necessary copies of original checks from the Federal Records Center, on plaintiffs' behalf and at their expense (copies of some microfilm images of checks may be difficult to read as a result of the age of the microfilm).

Plaintiffs would provide their own microfilm readers, photocopy machines, and staff to search microfilm and make copies.

FMS estimates that there may be as many as 864,000 IIM checks in digital format. Assuming Interior provided the properly formatted input files for all IIM checks at one time, FMS would submit a request for digital images to the Boston FRB. Images for 1997-1999 are maintained in long-term storage on tapes. There are 326,244 volumes on 2,214 tapes that will need to be accessed. The FRB estimates it will take approximately 4,800 hours to find the images and put them on a CD. These costs are estimated to be \$347,000, thus bringing FMS' total estimated costs to \$480,000. FMS would work with Boston FRB to ensure that digital images of checks are placed on a CD and provided to the plaintiffs prior to the completion of the microfilm review by the plaintiffs.

CATEGORY NO. 2: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the decade of the 1980's.

DEFENDANTS' RESPONSE: Defendants object to this request as vague and ambiguous as to the term “negotiable instrument.” Defendants further object on the ground that this request seeks information beyond the scope of discovery pursuant to Fed. R. Civ. P. 26 generally, and more specifically, for the Phase 1.5 trial, and is not reasonably calculated to lead to the discovery of admissible evidence. Moreover, this request is over broad, oppressive and unduly burdensome to the extent that a response would require any Defendant to compile, summarize, index, research or otherwise analyze voluminous historical information. Interior Defendants further object to this request as oppressive and unduly burdensome because the Department of the Interior does not maintain files of canceled disbursement checks denominated as such.

Subject to and without waiving the foregoing general and specific objections, the Treasury Defendant responds that the Department of the Treasury does not have check copies or original checks for this time period since Treasury followed the NARA-approved document retention schedules that were in effect prior to this litigation. In lieu of checks, Treasury has information about checks issued from 1986-1989, in FMS’ CP&R System, described in the response to Category No. 1.

Treasury also has check information in a database called the Mass Cancellation File. The Mass Cancellation File lists all Treasury checks that were issued from 1956 through September 30, 1989, that were outstanding (i.e., not negotiated) for more than one year as of November 30, 1990, and therefore cancelled pursuant to the Competitive Equality Banking Act of 1987. For the period 1956 through September 30, 1989 for OTFM/BIA disbursing symbol number 4844, a total of 57,374 checks cancelled for a value of \$1,847,270. BIA also used 22 other disbursing

symbol numbers during this time period for which a total of 3,708 checks were cancelled for a value of \$67, 258. Treasury previously produced the Mass Cancellation File to the plaintiffs pursuant to a letter dated January 8, 1999.

CATEGORY NO. 3: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the decade of the 1970's.

DEFENDANTS' RESPONSE: Defendants object to this request as vague and ambiguous as to the term “negotiable instrument.” Defendants further object on the ground that this request seeks information beyond the scope of discovery pursuant to Fed. R. Civ. P. 26 generally, and more specifically, for the Phase 1.5 trial, and is not reasonably calculated to lead to the discovery of admissible evidence. Moreover, this request is over broad, oppressive and unduly burdensome to the extent that a response would require any Defendant to compile, summarize, index, research or otherwise analyze voluminous historical information. Interior Defendants further object to this request as oppressive and unduly burdensome because the Department of the Interior does not maintain files of canceled disbursement checks denominated as such.

Subject to and without waiving the foregoing general and specific objections, the Treasury Defendant responds that they do not have check copies or original checks for this time period since the Treasury Department has followed the NARA-approved document retention schedules that were in effect prior to this litigation. In lieu of checks, FMS has information about checks issued during this time period that were cancelled, in the Mass Cancellation File, described in the response to Category No. 2.

CATEGORY NO. 4: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the decade of the 1960's.

DEFENDANTS' RESPONSE: Defendants object to this request as vague and ambiguous as to the term “negotiable instrument.” Defendants further object on the ground that this request seeks information beyond the scope of discovery pursuant to Fed. R. Civ. P. 26 generally, and more specifically, for the Phase 1.5 trial, and is not reasonably calculated to lead to the discovery of admissible evidence. Moreover, this request is over broad, oppressive and unduly burdensome to the extent that a response would require any Defendant to compile, summarize, index, research or otherwise analyze voluminous historical information. Interior Defendants further object to this request as oppressive and unduly burdensome because the Department of the Interior does not maintain files of canceled disbursement checks denominated as such.

Subject to and without waiving the foregoing general and specific objections, the Treasury Defendant does not have check copies or original checks for this time period since FMS followed the NARA-approved document retention schedules that were in effect prior to this litigation.

CATEGORY NO. 5: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the decade of the 1950's.

DEFENDANTS' RESPONSE: Defendants object to this request as vague and

ambiguous as to the term “negotiable instrument.” Defendants further object on the ground that this request seeks information beyond the scope of discovery pursuant to Fed. R. Civ. P. 26 generally, and more specifically, for the Phase 1.5 trial, and is not reasonably calculated to lead to the discovery of admissible evidence. Moreover, this request is over broad, oppressive and unduly burdensome to the extent that a response would require any Defendant to compile, summarize, index, research or otherwise analyze voluminous historical information. Interior Defendants further object to this request as oppressive and unduly burdensome because the Department of the Interior does not maintain files of canceled disbursement checks denominated as such.

Without waiving the foregoing general and specific objections, FMS has 15 boxes of negotiated uncurrent checks⁵ that were issued in the 1940s and 1950s. In lieu of checks, FMS has information about checks issued during part of this time period (i.e., from 1956-1959) that were cancelled, in the Mass Cancellation File, described in the response to Category 2. FMS also has disbursing officers’ files (covering the period 1932 – 1956) containing listings of Treasury checks that were outstanding for more than one year. Only some of the listings include payee names. Plaintiffs may make arrangements with counsel for Treasury Defendant for access to uncurrent checks and disbursing officers' files. Such review will require an appropriate protective order in place in accordance with the Privacy Act.

CATEGORY NO. 6: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable

⁵Negotiated "uncurrent" checks are checks that have a 3-digit check symbol number that were presented for payment following a conversion to a 4-digit check symbol number. Because the checks could no longer be processed through Federal Reserve Bank systems, the Federal Reserve Banks forwarded the checks to FMS as they were received.

instruments were issued in the decade of the 1940's.

DEFENDANTS' RESPONSE: Defendants object to this request as vague and ambiguous as to the term “negotiable instrument.” Defendants further object on the ground that this request seeks information beyond the scope of discovery pursuant to Fed. R. Civ. P. 26 generally, and more specifically, for the Phase 1.5 trial, and is not reasonably calculated to lead to the discovery of admissible evidence. Moreover, this request is over broad, oppressive and unduly burdensome to the extent that a response would require any Defendant to compile, summarize, index, research or otherwise analyze voluminous historical information. Interior Defendants further object to this request as oppressive and unduly burdensome because the Department of the Interior does not maintain files of canceled disbursement checks denominated as such.

Without waiving the foregoing general and specific objections, the Treasury Defendant states that FMS has 15 boxes of negotiated uncurrent checks that were issued in the 1940s and 1950s. GAO was the responsible agency from 1921 through 1950 for settling disbursing officers accounts, so any other potentially responsive information would likely be located at the Archives in Record Group 411, *Records of the General Accounting Office*, for this time period. Those are publicly available historical records stored at the National Archives II facility located at 8601 Adelphi Road, College Park, Maryland.

In lieu of checks, FMS also has disbursing officers' files (covering the period 1932 – 1956) containing listings of Treasury checks that were outstanding for more than one year. Only some of the listings include payee names. Plaintiffs may make arrangements with counsel for the Treasury Defendant for access to this information. Such review will require an appropriate

protective order in place in accordance with the Privacy Act.

CATEGORY NO. 7: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the decade of the 1930's.

DEFENDANTS' RESPONSE: Defendants object to this request as vague and ambiguous as to the term “negotiable instrument.” Defendants further object on the ground that this request seeks information beyond the scope of discovery pursuant to Fed. R. Civ. P. 26 generally, and more specifically, for the Phase 1.5 trial, and is not reasonably calculated to lead to the discovery of admissible evidence. Moreover, this request is over broad, oppressive and unduly burdensome to the extent that a response would require any Defendant to compile, summarize, index, research or otherwise analyze voluminous historical information. Interior Defendants further object to this request as oppressive and unduly burdensome because the Department of the Interior does not maintain files of canceled disbursement checks denominated as such.

Without waiving the foregoing general and specific objections, the Treasury Defendant states that Treasury does not have check copies or original checks for this time period. GAO was the responsible agency from 1921-1950 for settling disbursing officer accounts, so any potentially responsive documents, if they exist, would likely be located at the Archives in Record Group 411, *Records of the General Accounting Office*, for this time period. Those publicly available historical records are stored at the National Archives II facility located at 8601 Adelphi Road, College Park, Maryland.

CATEGORY NO. 8: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute

disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the decade of the 1920's.

DEFENDANTS' RESPONSE: Defendants object to this request as vague and ambiguous as to the term “negotiable instrument.” Defendants further object on the ground that this request seeks information beyond the scope of discovery pursuant to Fed. R. Civ. P. 26 generally, and more specifically, for the Phase 1.5 trial, and is not reasonably calculated to lead to the discovery of admissible evidence. Moreover, this request is over broad, oppressive and unduly burdensome to the extent that a response would require any Defendant to compile, summarize, index, research or otherwise analyze voluminous historical information. Interior Defendants further object to this request as oppressive and unduly burdensome because the Department of the Interior does not maintain files of canceled disbursement checks denominated as such.

Without waiving the foregoing general and specific objections, the Treasury Defendant states that Treasury does not have in its possession or control check copies or original checks for this time period. GAO was the responsible agency from 1921 - 1950 for settling disbursing officer accounts, so any potentially responsive documents, to the extent they exist, would likely be located at the Archives in Record Groups 217 and 411 for this time period. See Response to Category No. 7. Record Group 217 contains historical records originating from Treasury that have since transferred to the permanent archives under the custody and control of the National Archives and Records Administration. There are 912 Entries within Record Group 217. Entries 525 and 717 are entitled, *Settled Indian Accounts and Claims* and *Settled Accounts of Indian Agents* respectively. There are 4,166 boxes in Entry 525 covering the time period 1816-1894 and

9,146 boxes in Entry 717 covering the time period 1894-1923. There are some paid checks in Entry 717 drawn on commercial banks during the time period when IIM accounts were maintained in commercial banks. Those are publicly available historical records stored at the National Archives II facility located at 8601 Adelphi Road, College Park, Maryland.

In lieu of checks, FMS has 6 Ledgers from 1866-1922 that list handwritten entries about Treasury checks that were reported to be outstanding for more than one year. The entries in these ledgers do not identify the federal agency that issued the checks. There are some disbursing officer names and check serial numbers listed. These ledgers would not aid in identifying IIM payments/disbursements since Treasury has no indication whether the checks were cancelled, cashed, or re-issued. Plaintiffs may make arrangements with counsel for Defendant Treasury for access to the FMS ledgers. Such review will require an appropriate protective order in place in accordance with the Privacy Act.

CATEGORY NO. 9: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the decade of the 1910's.

DEFENDANTS' RESPONSE: Defendants incorporate by reference their objections and response to Request No. 8 above.

CATEGORY NO. 10: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the decade of the 1900's.

DEFENDANTS' RESPONSE: Defendants incorporate by reference their objections and response to Request No. 8 above.

CATEGORY NO. 11: A copy, front and back, of all checks or other negotiable

instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the decade of the 1890's.

DEFENDANTS' RESPONSE: Defendants incorporate by reference their objections and response to Request No. 8 above.

CATEGORY NO. 12: A copy, front and back, of all checks or other negotiable instruments that the United States government or any of its agents paid that constitute disbursements to individual IIM trust beneficiaries with respect to their trust property, which checks or other negotiable instruments were issued in the period 1887 to 1889.

DEFENDANTS' RESPONSE: Defendants incorporate by reference their objections and response to Request No. 8 above.

CATEGORY NO. 13: ALL VERSIONS OF DOCUMENTS that discuss, concern or reflect a matter material to the management of the IIM Trust. With respect to this Category only, defendants are not required to produce DOCUMENTS that pertain exclusively to only one IIM TRUST BENEFICIARY or allotment.

DEFENDANTS' RESPONSE: Defendants object to this request as over broad, oppressive and unduly burdensome inasmuch as a plain reading of the request requires each Defendant to search for and retrieve voluminous materials that are not centrally located. The request seeks "all versions" of any documents that "discuss, concern or reflect" any matter that is or may be "material" to IIM accounts, unrestricted as to date. Thus, any fair reading of this request seeks all documents stored in any place, written at any time, that may be (or may have been) of importance in any respect to all or part of the IIM accounts at any time. The request is so broad that it conceivably encompasses nearly any and all documents relating to the IIM account program. As such, this request is oppressive, harassing and seeks to impose an undue burden and hardship on Defendants. Furthermore, Defendants object to this request as vague and ambiguous as to the undefined terms "matter material" and "management." Defendants further



U.S. Department of Justice

Environment and Natural Resources Division

124793

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90-2-4-1834

January 8, 1999

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Native American Rights Fund
1712 N Street, N.W.
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Re: Cobell, et al. v. Babbitt, et al.

Gentlemen:

Enclosed please find a computer data tape representing the 1990 Mass Cancel file of the Department of the Treasury. The tape is a format of Unisys LC 40-175.

Very truly yours,

Susan V. Cook

Responsive to first request
for Production

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96cv01285JR
)	
DIRK KEMPTHORNE,)	
Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

ORDER

This matter comes before the Court on *Plaintiffs’ Motion In Limine to Preclude Defendants’ Testimony as to the Department of the Treasury in General and as to Defendants’ Exhibits Created By, or Sourced From, the Department of the Treasury* [Dkt. No. 3389]. Upon consideration of the Plaintiffs’ Motion, Defendants’ Opposition, and the entire record of this case, it is hereby

ORDERED that said Motion In Limine is DENIED.

SO ORDERED.

United States District Judge

Date: _____