IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT THAT INTERIOR'S HISTORICAL ACCOUNTING PLAN COMPORTS WITH THEIR OBLIGATION TO PERFORM AN ACCOUNTING AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

The Secretary of the Interior, the Assistant Secretary of the Interior - Indian Affairs ("Interior Defendants" or "Interior") and the Secretary of the Treasury (collectively "Defendants"), move for partial summary judgment pursuant to Federal Rule of Civil Procedure 56(b) and Local Civil Rule 7.1(h) that Interior Defendants' Historical Accounting Plan for Individual Indian Money Accounts ("Historical Accounting Plan" or "Plan"), filed January 6, 2003, comports with their obligation to perform an accounting.[1]

As argued in Interior Defendants' appeal from, inter alia, the Court's September 17, 2002 Order holding them in civil contempt, Defendants are, respectfully, of the view that the Court lacks the authority to undertake a Phase 1.5 trial for the purpose of reviewing Interior Defendants' Historical Accounting and Trust Management Plans (whether or not in conjunction with Plaintiffs' plans) and thereupon entering injunctive relief dictating how they must comply with their obligation

[1] Pursuant to LCvR 7.1(h), Defendants have filed herewith their Statement of Material Facts As To Which No Genuine Issue Exists.

to account to individual Indian money ("IIM") account holders. See Brief for the Appellants (filed Dec. 6, 2002). In Defendants' view, such a trial, held for the purpose of entering the contemplated injunctive relief, would exceed structural and statutory limits on the judicial authority by specifying how Executive-Branch agencies must fulfill their legal obligations, rather than simply requiring them to do so. See id. at 29-33.[2] However, as argued below, if the Court holds the Phase 1.5 trial and proceeds to review Interior Defendants' Historical Accounting Plan, it should rule that Defendants are "entitled to . . . judgment as a matter of law," Fed. R. Civ. P. 56(c), that Interior Defendants' Plan comports with their obligation to perform an accounting for IIM funds.

As the D.C. Circuit indicated in its 2001 ruling in this litigation, final agency action will occur – and thus may be reviewed by this Court – when the accountings for individual IIM account holders are completed. See Cobell v. Norton, 240 F.3d 1081, 1110 (D.C. Cir. 2001) ("Presumably, the district court plans to wait until a proper accounting can be performed, at which point it will assess appellants' compliance with their fiduciary obligations."). The final agency action is not the plan for conducting an accounting, but the end product - the statement of account, which will be reviewable when any applicable administrative remedies are exhausted. Until that time, the D.C. Circuit stated

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[2] See also Merrick B. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 564-65 (1985) (stating that "because the essence of the executive function is the exercise of discretion, a court transgresses the separation of powers when it dictates that an agency take one particular action instead of others within its discretionary prerogative," but that "when a court merely orders an agency to act, leaving the choice of action to the agency's discretion, no trespass occurs"); Catherine Zaller, Note, The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1), 42 Wm. & Mary L. Rev. 1545, 1548 (2001) (observing that the Senate Judiciary Committee report of May 1945 on a draft version of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq., "noted that the authority granted to the judiciary under the [APA's] judicial review clause did not allow the courts to strip agencies of discretion in determining how an agency should carry out legislation[;] . . . [r]ather, the Senate simply wanted the court to direct the agency to act without dictating what process the agency should use" (internal citations omitted)).

that this Court may have jurisdiction to determine whether "in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Id.

As demonstrated below, Interior Defendants' Historical Accounting Plan comports fully with their obligation to perform an accounting and with the Court's September 17, 2002 Order. In no sense does Interior Defendants' Plan describe or contemplate steps that would delay rather than accelerate the provision of the required accounting. In sharp contrast, Plaintiffs' January 6, 2003 submission is not a plan for conducting an historical accounting, but rather is a claim for money damages premised on an assertion that the accounting they seek is impossible. As such, Plaintiffs' submission fails in all respects to comply with the Court's September 17, 2002 Order.

I. Interior Defendants' Historical Accounting Plan Comports Fully With Their Obligation To Perform An Accounting Of IIM Funds.

As this Court has recognized, the Plaintiffs in this action "seek to enforce their statutory right to an accounting as that phrase is meant under the provisions of 25 U.S.C. § 162a(d)(1)-(7) and 25 U.S.C. § 4011." Cobell v. Babbitt, 91 F. Supp. 2d 1, 27 (D.D.C. 1999). The obligation to provide an "historical" accounting, according to this Court and the D.C. Circuit, is found in Section 102 of the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act") (codified as 25 U.S.C. § 4011). See 91 F. Supp. 2d at 40-41; Cobell v. Norton, 240 F.3d at 1102. Interior Defendants' Historical Accounting Plan describes an effort, already underway, that will bring Interior Defendants into compliance with their obligation to provide an historical accounting for "all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, § 102(a), 108 stat. 4239, 4240, codified at 25 U.S.C. § 4011(a). When the historical

accounting work described in the Plan is complete, account holders will possess the best available information about the historical activity in their accounts, the accuracy of the account activity recorded historically in the IIM trust fund system, and the reliability of the IIM trust fund system as a whole, and Defendants will have a sound basis for meeting their accounting obligations in the future. The historical accounting work described in the Plan stands a realistic chance of being funded by Congress, and, assuming adequate funding levels, will be completed in a reasonable period of time.

It is important to note, however, that Interior Defendants' Plan does not address certain questions about the enforceability of Plaintiffs' claims, although they may affect the scope of the accounting. Instead, Defendants determined that such questions were more properly addressed in motions for summary judgment. In particular, they decided to address the effect of the statute of limitation and laches in a separate motion,[3] see Defendants' Memorandum Of Points And Authorities In Support Of Motion For Partial Summary Judgment Regarding Statute Of Limitations And Laches ("Defendants' Motion Regarding Statute Of Limitations") (Jan. 31, 2003) (filed under seal), because this Court held that it would rule at a later date "whether an applicable statute of limitations, if any, precludes any of plaintiffs' claims for an accounting." Cobell, 91 F. Supp. 2d at 32 n.22. Likewise, the D.C. Circuit also recognized that the effect of the statute of limitations is an open question for this Court to decide. See Cobell, 240 F.3d at 1110 ("The district court also identified 'significant legal issues' to be resolved in the second phase [of the litigation], such as whether relevant statutes of limitations preclude some of plaintiffs' claims. . . ."). The scope of the historical accounting described in Interior Defendants' Historical Accounting Plan is necessarily limited to the extent the

[3] Interior Defendants noted in their Plan that they "intend[ed] to present legal issues that might affect the scope of the historical accounting to the Court by way of summary judgment motions." Interior Defendants' Plan at II-2 n.7. Defendants' Motion Regarding Statute Of Limitations is such a summary judgment motion.

statute of limitations bars any of Plaintiffs' accounting claims. In particular, as argued in Defendants' Motion Regarding Statute Of Limitations, if the Court applies the statute of limitations, in conjunction with an applicable tolling provision, it would preclude all claims based on failures to account for transactions in IIM accounts prior to October 1, 1984. Interior Defendants' Historical Accounting Plan, addressed in this motion, sets forth a plan for accounting for transactions from the inception of an IIM account or June 24, 1938, whichever is later, to December 31, 2000.[4] However, should the Court grant Defendants' Motion Regarding Statute Of Limitations, Interior Defendants will account for all transactions in the IIM accounts from the inception of an account or October 1, 1984, whichever is later.

The 1994 Act requires Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a). On December 21, 1999, this Court entered a judgment declaring that the 1994 Act "requires defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Cobell, 91 F. Supp. 2d at 58. The Court of Appeals affirmed most aspects of this Court's ruling, and stated that "'[a]ll funds' [in Section 4011(a)] means *all funds*, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)." Cobell, 240 F.3d at 1102 (emphasis in original). The Court of Appeals questioned how Interior could determine accurate current balances without "first reconciling the accounts, taking

[4] Interior Defendants will close the "historical" accounting period on December 31, 2000 because by that date the relevant Interior offices were fully converted to the Trust Funds Accounting System. Interior Defendants' Plan at II-4. Account information recorded after December 31, 2000, will be considered current accounting activity. Id.

into account past deposits, withdrawals, and accruals." Id. In a footnote in its September 17, 2002 contempt ruling, this Court again clarified the nature of Interior Defendants' accounting duty:

> It is important to note that there is no difference between a "historical accounting" and an "accounting." . . . Any accounting of funds necessarily involves examining past transactions and events that could [affect] the current balance. In this opinion, the Court has predominantly used the term historical accounting to emphasize that the Interior Department must take past transactions into consideration to ensure that the current balances in the IIM trust accounts are accurate.

Cobell v. Norton, 226 F. Supp. 2d 1, 116 n.135 (D.D.C. 2002).

Interior Defendants' Historical Accounting Plan describes an accounting that comports fully with – and perhaps exceeds – the requirements of the 1994 Act. Arguably, Interior Defendants' historical accounting obligation would be satisfied by providing account holders with a transaction history of "past deposits, withdrawals, and accruals," Cobell v. Norton, 240 F.3d at 1102, and determining whether the current balance is correct in light of the account history. The effort described in Interior Defendants' Plan goes further. Interior Defendants are taking significant steps to assess the accuracy of the account histories by reviewing supporting documentation. Moreover, Interior Defendants intend to perform numerous high-level system tests to assess the historical reliability of the IIM trust fund system as a whole. Although not necessarily required by the 1994 Act, Interior believes these are prudent steps that will provide IIM account holders with the best available information about their accounts.

Thus, the goal of the historical accounting effort as described in the Plan is to provide each eligible IIM account holder, as soon as is practicable, with an account transaction history *as well as* a reliable assessment regarding its accuracy. See Historical Accounting Plan at III-1. The Plan describes an appropriate method for accomplishing this goal, which will entail collecting relevant and available trust records and using those records to verify the accuracy of the account activity recorded

in electronic and paper account ledgers. The Court of Appeals, noting that this Court "explicitly left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate," confirmed that "[s]uch decisions are properly left in the hands of administrative agencies." Cobell v. Norton, 240 F.3d at 1104.

Contrary to the reckless allegations of the Plaintiffs that an accounting is impossible because relevant records are unavailable, the experience of Interior Defendants and their consultants, including their experience with the Named Plaintiffs' records, indicates that sufficient records are available to conduct the historical accounting work. See Declaration of Robert L. Brunner (Jan. 30, 2003) (Ex. 1) ¶ 12 (Although "not all records exist, and some gaps exist in the information available," "[m]assive amounts of paper and electronic records exist which relate directly to the transactions in the IIM accounts."); id. at ¶ 13 ("There are sufficient electronic and paper records to expect that the overall approach proposed by Interior is feasible and will provide IIM beneficiaries with an accurate statement of account."); Declaration of Edward Angel (Jan. 30, 2003) (Ex. 2) ¶ 17 ("Professional historians are rarely fortunate enough to have a complete historical record for any topic of research . . . . My twenty years of professional research experience with Federal records relating to Native Americans leads me to support the implementation of the plan developed by OHTA to perform an historical trust accounting as an approach that is based upon solid historical methodology, along with historical research that is supported by skilled forensic procedures and accounting tools."); Declaration of Alan Newell (Jan. 29, 2003) (Ex. 3) ¶ 7 ("A vast quantity of federal documents (from the Bureau of Indian Affairs as well as from other agencies) is available in national and regional repositories for use in performing a historical accounting of Individual Indian Money. To dismiss categorically these documents as incomplete, inaccurate and therefore of little or no value would be a

mistake."); id. at ¶ 10 ("Based on almost 30 years as a professional historian working in federal Indian records, the volume of relevant data that can be derived from historic federal documents supports the Department of the Interior's implementation of a plan to perform a historical accounting of IIM funds.").

Interior Defendants acknowledge in the Plan, as they have in the past, that they will encounter gaps in transaction histories or supporting records as they proceed with the historical accounting work. However, Interior Defendants' Plan neither expects nor requires that all documents be found, see Declaration of Robert L. Brunner (Ex. 1) ¶ 13, and Interior has developed adaptive strategies to take into account record deficiencies, see id.; Historical Accounting Plan at III-13.[5] The Plan states that where supporting documentation is not located for a particular transaction, the lack of information will be reported in the account transaction history. Id. at III-14.

The IIM trust fund contains two distinct types of individual accounts:[6] (1) Judgment and Per Capita Accounts, which are established to receive funds from tribal distributions of litigation settlements and tribal revenues, respectively; and (2) Land-based Accounts, which are established to receive revenues derived from interests in allotted lands. See Historical Accounting Plan at III-1.

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[5] Interior Defendants' previous work regarding tribal trust funds also reveals the existence of government records related to trust fund matters. In the early 1990s, Interior Defendants initiated a project to reconcile tribal trust fund activity occurring over about a twenty-year period. By 1996, the General Accounting Office ("GAO") reported that Interior's effort had verified over 218,000 non-investment tribal transactions totaling $15.3 billion. See Financial Management, BIA's Tribal Trust Fund Account Reconciliation Results, General Accounting Office Report No. AIMD-96-63, at 4 & 16 (May 1996) (Ex. 4). Though documents were not located for all the tribal transactions recorded in the ledger, GAO indicated that the Bureau of Indian Affairs ("BIA") had identified about 20,000 boxes of accounting documents and lease records. Id. at 4. Thus, the volume of records located for the tribal reconciliation project suggests that Plaintiffs' assertion that there has been wholesale loss or destruction of trust records cannot be sustained.

[6] The IIM trust fund also contains administrative accounts, discussed infra.

After analyzing the characteristics of these account types, Interior Defendants determined that tailoring an accounting methodology for each account type was preferable to developing a single, uniform methodology.

Interior Defendants determined that the most appropriate approach for assessing the accuracy of transaction histories for Judgment and Per Capita accounts is to examine and reconcile[7] each transaction in each account. Id. at III-2 - III-4. Because, for a particular judgment or per capita award, nearly all of the affected IIM accounts have identical opening balances (and, therefore, interest transactions), a transaction-by-transaction reconciliation approach for these accounts is relatively efficient, and sampling techniques are not particularly useful where the population of transactions is largely homogeneous. Id. at III-3. Interior Defendants have already reconciled 14,235 Judgment Accounts with balances of approximately $40 million using this transaction-by-transaction methodology. Id.

For Land-based Accounts, Interior considered a variety of methodologies, from reconciling each transaction in each account to employing various statistical sampling techniques. Id. at III-5 - III-6. As noted in Interior Defendants' Plan, proven and reliable mathematical theories support sampling methodologies that can predict how large a sample must be to achieve a desired level of accuracy. See id. at III-7. In light of the tremendous time and cost associated with an effort to reconcile each transaction in each account,[8] and concern expressed by members of Congress[9] about

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[7] The Historical Accounting Plan uses the term "reconciliation" to describe a process by which original financial documents and related records will be examined to determine whether a transaction recorded in an IIM account reflects accurately a proper allocation of collection, interest, or disbursement of funds. See Historical Accounting Plan at I-1, III-1.

[8] In its *Report to Congress on the Historical Accounting of Individual Indian Money Accounts* (filed July 3, 2002), Interior estimated that an accounting utilizing transaction-by-transaction reconciliation methods for all IIM accounts would cost approximately $2.4 billion

the length of time and level of funding required, Interior investigated alternative approaches that would more efficiently utilize available resources without compromising the accuracy of the results. See id. at III-6 - III-7.

Interior Defendants concluded that the most reasonable method for assessing the accuracy of transaction histories for Land-based Accounts combines transaction-by-transaction and statistical

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and require approximately ten years to complete.

[9] For example, in a letter to the Secretary, the Chairman of the House Committee on Resources stated:

> We are sure . . . that the Department recognizes that Congress will necessarily determine the funding for any accounting, and we find the [*Report to Congress on the Historical Accounting of Individual Indian Money Accounts*] troubling in several areas. . . . Given the length of time required to complete the broad accounting outlined in the Report, as well as the costs associated with such an activity, which are likely to come at the expense of other key Indian programs, we request that you promptly consider ways to reduce the costs and the length of time necessary for an accounting. . . . The Committee asks that before committing significant resources to the broad approach described in the Report, the Department consider all available options regarding the use of alternative accounting methods.

Letter from James V. Hansen, Chairman, U.S. House of Representatives Committee on Resources, to Gale Norton, Secretary of the Interior 1 (Dec. 9, 2002) (Ex. 5). Similarly, the Chairman and the Ranking Minority Member of the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations stated in a letter to the Secretary:

> [T]he Committee remains very concerned over the effect the Cobell v. Norton litigation is having on the Department's ability to marshal the resources that are needed for trust reform to be successful. We are particularly concerned about the Department's plan to allocate over $2.4 billion over ten years for an historical accounting. We remain convinced that such a process would not yield the desired results, but instead would simply drain resources away from effectively implementing trust reform.

Letter from Joe Skeen, Chairman, and Norman D. Dicks, Ranking Minority Member, U.S. House of Representatives, Committee on Appropriations, Subcommittee on Interior and Related Agencies, to Gale Norton, Secretary of the Interior 1 (Dec. 10, 2002) (Ex. 6).

sampling techniques. Thus, Interior intends to reconcile each high-dollar transaction in such accounts and reconcile a statistically valid sample of the smaller transactions. The reconciliation process for land-based collection transactions entails tracing the transaction back to the original revenue source, usually a lease or contract. Id. at III-9. The lease or contract is examined to identify the allotment(s) related to the payment. Id. The ownership interests in the allotment are used to verify that the revenue was correctly divided and properly allocated to the relevant IIM account. Id. The reconciliation process for land-based disbursement transactions entails examining, for example, a request from the IIM account holder for funds in the account, the record verifying the issuance of a check and, where available, information confirming the check was paid. Id.

For transactions in the "Electronic Records Era" (approximately 1985 to December 31, 2000), Interior Defendants intend individually to examine and reconcile each of the approximately 73,500 transactions of $5,000 or more (which collectively represent 45 percent of the dollar throughput in the Electronic Records Era), and examine and reconcile two statistically valid samples taken from the approximately 26 million lower-dollar transactions - one sample of approximately 80,000 transactions in the $500 to $4,999.99 range, and a second sample of approximately 80,000 transactions in the $0.01 to $499.99 range. See id. at III-7 - III-8 & App. D. Because electronic transaction histories are already available for Electronic Records Era transactions, this work can begin now. In contrast, transaction records from the "Paper Records Era" (prior to 1985) are in books, on cards, or on other paper media. Id. at III-5. These records must be located, scanned, coded and digitized to create electronic transaction histories before the accuracy of the account activity can be assessed. Id. When these transaction histories are available in electronic form, Interior Defendants intend to design a similar sampling methodology for Paper Records Era transactions. Id. at III-13.

In addition to describing the historical accounting work for individual IIM accounts, the Historical Accounting Plan describes the work underway to distribute properly the funds currently held in Special Deposit Accounts, which are temporary administrative accounts for the deposit of funds that cannot be immediately credited to the proper IIM account holder or other owner of the funds. See id. at III-15. The Plan acknowledges that funds held in Special Deposit Accounts have not always been distributed in a timely manner and that distributions from these accounts have not always included the interest earned while the funds were in these accounts. Id. at III-15. As of December 31, 2000, approximately 21,500 Special Deposit Accounts were inactive, but still contained nearly $68 million. Id. at III-16. To date, Interior Defendants have identified the proper owners of approximately one-third of the money held in these inactive accounts. Id.

The Historical Accounting Plan also includes several high-level system tests designed to assess the reliability of the IIM trust fund system as a whole. These tests will reveal whether data gaps exist; whether account balances were properly transferred during system conversions from paper to electronic records and between electronic systems; whether interest was properly calculated; whether problems with the posting of transactions to the IIM system exist; and whether ownership records are accurate. Id. at III-17 - III-20.

Planning the historical accounting effort required Interior Defendants to make determinations regarding the scope of the accounting required by the 1994 Act as well as determinations regarding the methodology to be employed in conducting the accounting work. That each of the determinations regarding the scope and methodology of the accounting is proper and consistent with Interior Defendants' legal obligations is demonstrated below.

A. Interior Defendants' Plan Describes An Accounting for All Funds Held In Trust By The United States For The Benefit Of An Individual Indian Which Are Deposited Or Invested Pursuant To The Act Of June 24, 1938.

Interior Defendants' Plan comports fully with the unambiguous language of the 1994 Act, which requires an accounting of "all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a) (emphasis added). The scope of the accounting described in the Plan is consistent with the scope of the accounting prescribed by the statute.

First, it is plain that the accounting required by statute is an accounting of "funds" rather than "assets." Nonetheless, the Historical Accounting Plan states that, at the end of the historical accounting process, Interior Defendants "intend[] to be in the position to provide the IIM account holder with information regarding their land assets as of December 31, 2000 . . . [and] [i]n the future, Interior [Defendants] intend[] to provide a listing of trust assets along with a report on the management of the funds generated from those assets and from other sources with each quarterly statement." Historical Accounting Plan at 2.

Second, the 1994 Act requires Interior Defendants to account for funds deposited after the Act of June 24, 1938. The Court of Appeals acknowledged this requirement when it held that Interior Defendants must account for all funds, "irrespective of when they were deposited (*or at least so long as they were deposited after the Act of June 24, 1938*)." Cobell v. Norton, 240 F.3d at 1102 (emphasis added). Plainly, if Congress had not intended to so delimit the accounting obligation, it would have omitted the phrase "deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a). Accordingly, unless the statute of limitations requires a different temporal limitation, Interior Defendants' Plan anticipates that each eligible IIM account holder will receive a

historical statement of account which includes the account history from the later of the inception of the account or June 24, 1938, until December 31, 2000.

Third, the statute requires Interior Defendants to account for funds "held in trust by the United States." 25 U.S.C. § 4011(a). Funds that were never received by the United States because they were paid directly to the Indian beneficiary of the underlying trust asset are not "funds held in trust by the United States" (nor are they "deposited or invested pursuant to the Act of June 24, 1938"), and therefore the statutory duty to account does not extend to such funds. This conclusion is consistent with this Court's ruling that the 1994 Act requires Interior Defendants "to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Cobell v. Babbitt, 91 F. Supp. 2d at 58 (emphasis added).

Although the General Allotment Act prohibited leasing of allotments, Congress concluded in 1891 that not all allottees would be able to make their own allotments productive and therefore authorized Interior to lease to a third party the allotment of any individual who "by reason of age or other disability . . . can not personally and with benefit to himself occupy or improve his allotment or any part thereof. . . ." Chap. 383, 26 Stat. 794, 795 (Feb. 28, 1891) (Ex. 7). By 1910, widespread leasing of allotments was permitted. Act of June 25, 1910, Pub. L. No. 61-313, Ch. 431, § 4, 36 Stat. 855, 856-57 (Ex. 8). Since 1947, Interior's regulations have permitted the payment of various types of lease income directly to individual allotment owners.[10] See Secretarial Order No. 2342, amending Section 171.4 of Title 25 of the Code of Federal Regulations (July 1, 1947) (Ex. 9); see also 25

[10] Even before 1947, Interior's regulations authorized direct payment to allotment owners of certain types of lease payments. See, e.g. Regulations Governing the Leasing of Allotted Indian Lands for Farming and Grazing Purposes, p. 4, ¶ 3 (July 1, 1916) (Ex. 10). Since 1947, the direct-pay regulations have been amended infrequently; thus, from year to year the language of the regulations is largely identical.

C.F.R. Pt. 162 (current regulations permitting lease payments to be made directly to Indian landowners); 25 C.F.R. Pt. 166 (current regulations permitting grazing rental payments to be made directly to Indian landowners); 25 C.F.R. Pt. 212 (current regulations permitting direct payments to Indian landowners after production is established if specifically provided for in mineral lease). Although "direct-pay" leases of the surface of allotted lands required Interior's approval, the regulations did not require the lessee to report payments or otherwise notify Interior whether payments had been made under a lease after it was approved.[11] The individual allotment owner negotiated the terms of the lease, arranged for payment directly to himself, and Interior was not informed of payments after the lease was approved.

When Interior revised its surface leasing regulations in 2001, it sought comments on whether to continue to provide for direct payment to allotment owners. See Proposed Rule - Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held In Trust, 65 Fed. Reg. 43,874 (July 14, 2000). Consistent with the majority of comments, the final regulations continued to permit direct payments as long as direct payment is a specific term in the lease or permit. Interior explained:

> Consistent with the majority of comments, the final regulations continue to provide for direct payment to Indian landowners for leases on their trust lands, as long as direct payment is a specific term in the lease or permit. In order to ensure that the Secretary can properly enforce lease and permit payment terms, leases and permits authorizing direct payments must require that tenants maintain documentary proof of payment. Several respondents suggested that the Secretary should require that proof of payment be submitted to the agency with every direct payment. However, such a requirement would be inconsistent with historic practice and would result in an unsustainable drain

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[11] There are also some oil and gas leases on allotted lands for which the lessee pays the allottee lessors directly and not through the Minerals Management Service ("MMS") and the BIA. Lessees nonetheless must file the required monthly report of sales and royalty with MMS, reporting the products produced, the production volume, sales volume, and royalty value by lease and production month. See 30 C.F.R. §§ 210.52-53.

> on agency resources. Absent a system for tracking such notices, the requirement would not produce the desired goal of ensuring prompt enforcement of payment of trust income. Further, it would be far less effective than relying on the Indian landowner to advise the BIA immediately upon discovering that a payment has not been made and requesting enforcement assistance. Therefore, the final regulations provide that the Indian landowner notify the Secretary that a required payment has not been made. The Secretary then will take prompt and effective action based on that specific information. The Department continues to recognize the advantages to Indian landowners of direct payments. However, this advantage necessarily brings with it increased responsibility of Indian landowners to assist in the enforcement of non-payment of their leases and permits. With this regulatory change, Indian landowners who opt for and negotiate direct payments are clearly notified of their responsibilities to notify the BIA of late payments. Similarly, tenants are notified both by these regulations and in the lease itself that documentary proof of payment will be necessary to demonstrate that a payment was timely made in the correct amount due, should there be any question about a payment.

Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 66 Fed. Reg. 7068, 7080 (Jan. 22, 2001). The final rule also made clear that Interior was not taking on any obligation to manage or account for direct payments:

> The Department <u>is not taking on any obligation to manage or account for funds paid directly to Indian landowners</u> that are not actually held in trust by the United States. <u>This is consistent with section 102(a) of the American Indian Trust Management Reform Act of 1994, 25 U.S.C. [§] 4011.</u> Although we invited the public to comment on the question of accounting for direct payments, no specific recommendations were received beyond a general recommendation to collect proof of payment.

<u>Id.</u> (emphasis added).

Moreover, Interior's trust fund regulations do not permit the deposit of "direct pay" funds into an IIM account unless the direct payment cannot be effectuated. The regulations provide that Interior "will not accept funds from sources that are not identified in the table in § 115.702 for deposit into a trust account." 25 C.F.R. § 115.703. The table in 25 C.F.R. § 115.702 includes only those direct pay funds that have been returned by mail to the payor as undeliverable. 25 C.F.R. § 115.702 (Interior "must accept proceed[s] on behalf of . . . individuals from . . . [f]unds derived directly from trust lands, restricted fee lands, or trust resources that are presented to the Secretary, on behalf of the . . .

individual Indian owner(s) of the trust asset, by the payor after being mailed to the owner(s) as required by contract (i.e. direct pay) and returned by mail to the payor as undeliverable." (emphasis added)). Thus, Interior's direct pay program accommodates the desires of IIM account holders to be more involved in the management of their financial affairs and to enjoy greater privacy about the details of those financial affairs.

Interior Defendants' Historical Accounting Plan describes an accounting for "all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a). Accordingly, Interior Defendants' determinations regarding the scope of the accounting conform to the scope of the accounting mandated by Congress, and are therefore proper as a matter of law.

B. Interior Defendants' Plan Provides For Historical Accountings To All IIM Account Holders With Accounts Open On Or After October 25, 1994.

1. The 1994 Act Establishes Specific Accounting Obligations For Funds Held In Trust On Or After Passage Of The Act.

As noted above, Plaintiffs in this action "seek to enforce their statutory right to an accounting as that phrase is meant under the provisions of 25 U.S.C. § 162a(d)(1)-(7) and 25 U.S.C. § 4011." Cobell v. Babbitt, 91 F. Supp. at 27. The "requirement to account" established by the 1994 Act applies to "all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a) (emphasis added); see also Cobell v. Norton, 226 F. Supp. 2d 1, 116 n.135 (stating that the accounting owed by Interior Defendants "necessarily involves examining past transactions and events that could [affect] the current balance" and that "the Interior Department must take past transactions into consideration to ensure that the current balances in the IIM trust accounts are accurate." (emphasis added)). In setting forth this requirement, the 1994 Act does not contain a retrospective element, such as

requiring an accounting for all funds that "were" or "have ever been" deposited or invested.[12] Moreover, as explained below, the language of the 1994 Act is determinative because it establishes specific accounting obligations that can only be performed for accounts in existence on or after the passage of the 1994 Act on October 25, 1994.[13]

The 1994 Act contains two specific provisions relevant to the Secretary's accounting duties, both of which make sense only in the context of existing accounts. See 25 U.S.C. §§ 162a(d), 4011 (codifying 1994 Act, §§ 101 and 102, respectively). Section 101 of the 1994 Act is captioned "Affirmative Action Required." 1994 Act, Pub. L. No. 103-412, § 101; H.R. Rep. No. 103-778, at 2 (Oct. 3, 1994); codified at 25 U.S.C. § 162a(d). Section 101 provides:

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[12] The Supreme Court has consistently held that statutes are to be accorded only prospective application unless Congress has "directed with requisite clarity that the law be applied retrospectively." INS v. St. Cyr, 533 U.S. 289, 316 (2001) (citing Martin v. Hadix, 527 U.S. 343, 352 (1999)).

> The standard for finding such unambiguous direction is a demanding one. "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation."

533 U.S. at 316-17 (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)) (brackets in original); see also United States v. Zacks, 375 U.S. 59, 65-67 (1963) (cited in Lindh v. Murphy, 521 U.S. at 328 n.4); Automobile Club v. Commissioner, 353 U.S. 180, 184 (1957) (same); Graham v. Goodcell, 282 U.S. 409, 416-20 (1931) (same).

[13] We are mindful of the D.C. Circuit's discussion regarding the Secretary's preexisting trust responsibilities to account to IIM account holders. See Cobell v. Norton, 240 F.3d 1081, 1102-04 (D.C. Cir. 2001). However, the D.C. Circuit's discussion did not contradict this Court's conclusion that Plaintiffs may seek to enforce only statutorily based claims in this APA action. Rather, its discussion simply confirmed that the duties imposed by the 1994 Act necessarily required an analysis of transactions contributing to the balances in existence as of October 25, 1994. Indeed, the question of whether the 1994 Act established enforceable rights with respect to IIM accounts that were distributed and closed prior to October 25, 1994, was not before the appellate court.

> The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:
>
> (1) Providing adequate systems for accounting for and reporting trust fund balances.
> (2) Providing adequate controls over receipts and disbursements.
> (3) Providing periodic, timely reconciliations to assure the accuracy of accounts.
> (4) Determining accurate cash balances.
> (5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.
> (6) Establishing consistent, written policies and procedures for trust fund management and accounting.
> (7) Providing adequate staffing, supervision, and training for trust fund management and accounting.
> (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

25 U.S.C. § 162a(d). Congress's use of forward-looking language demonstrates that it did not intend that section 101 of the 1994 Act apply to accounts distributed and closed prior to the enactment of the 1994 Act. For example, such closed accounts do not have "balances" to which to apply the duty to "[p]rovid[e] adequate systems for accounting for and reporting trust fund balances," 25 U.S.C. § 162a(d)(1), or the duty to "[d]etermin[e] accurate cash balances," 25 U.S.C. § 162a(d)(4), or the duty to "[p]repar[e] and [s]upply account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis," 25 U.S.C. § 162a(d)(5). Nor do such accounts have current receipts or disbursements to which to apply the duty to "[p]rovid[e] adequate controls over receipts and disbursements." 25 U.S.C. § 162a(d)(2).

Section 102 of the 1994 Act, entitled "Responsibility of Secretary to Account for the Daily and Annual Balances of Indian Trust Funds," sets forth three specific accounting requirements. In subsection (a) (entitled "Requirement to Account"), it provides:

> The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title.

25 U.S.C. § 4011(a) (emphasis added). Subsection (b) (captioned "Periodic Statement of Performance") provides:

> Not later than 20 business days after the close of a calendar quarter, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to section 162a of this title. The statement, for the period concerned, shall identify –
>
> (1) the source, type, and status of the funds;
> (2) the beginning balance;
> (3) the gains and losses;
> (4) receipts and disbursements; and
> (5) the ending balance.

25 U.S.C. § 4011(b) (emphasis added). Finally, subsection (c) requires the Secretary to conduct an annual audit of all funds held in trust and directs that the Secretary "shall include a letter relating to the audit in the first statement of performance provided under subsection (b) of this section after the completion of the audit." 25 U.S.C. § 4011(c).

As with section 101, Congress's use of forward-looking language in section 102 confirms that Congress did not intend that section 102 apply to accounts closed prior to the enactment of the 1994 Act. The periodic statement of performance mandated by section 102(b) is to be provided "[n]ot later than 20 business days after the close of a calendar quarter," and the specific elements of the statement described in subsection (b) are to be provided "for the period concerned." 25 U.S.C. § 4011(b). It is, of course, impossible for the Secretary to provide such a statement for any calendar quarter ending prior to October 25, 1994 within twenty business days after the close of the calendar quarter. Insofar as retrospective application of the 1994 Act can only be mandated through a construction leading to this impossible and absurd result, such a construction is improper and must be rejected. See, e.g.,

FTC v. Ken Roberts Co., 276 F.3d 583, 590 (D.C. Cir. 2001) (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982)), cert. denied, 123 S. Ct. 99 (2002).

Section 102 is as significant for what it does not say as for what it does say. For example, Section 102 does not say that the Secretary shall account for all funds that "have ever been" or "were" deposited or invested pursuant to 25 U.S.C. § 162a. Instead, Congress specifically used the present tense and limited the requisite accounting to funds "which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a)-(c) (emphasis added). If Congress had intended the 1994 Act's accounting requirements to apply to funds previously deposited or invested, or to closed accounts, it would have "directed with requisite clarity that the law be applied retrospectively" to those funds or those closed accounts. INS v. St. Cyr, 533 U.S. at 316. No such direction is to be found within the accounting provisions of the 1994 Act. Sections 101 and 102 of the 1994 Act must be construed as applying only to IIM accounts existing on or after the enactment of the 1994 Act and not to IIM accounts that were distributed and closed prior to October 25, 1994.

2. Legislative History Confirms Congress's Intent That The Specific Accounting Requirements Set Forth In The 1994 Act Apply To Those Funds Held In Trust On Or After The Date Of Enactment.

The legislative history accompanying the 1994 Act confirms that Congress never intended that the Secretary prepare an accounting for IIM accounts that had been distributed and closed prior to October 25, 1994. In its report accompanying H.R. 4833, the bill ultimately enacted as the 1994 Act, the House Natural Resources Committee discussed the well-known "Misplaced Trust" Report previously issued by the House Committee on Government Operations. H.R. Rep. No. 103-778, at 9 (Oct. 3, 1994) (discussing Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499 (Apr. 22, 1992) ("Misplaced Trust Report")), reprinted in 1994 U.S.C.C.A.N. 3468-69. In particular, the Misplaced Trust Report described BIA's costly efforts

in the early 1990s to conduct a complete audit and reconciliation of all IIM accounts and concluded that "it might cost as much as $281 million to $390 million to audit the IIM accounts at all 93 BIA agency offices." Misplaced Trust Report at 26. The Report continued:

> Obviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken.

Id. at 26 (emphasis added and internal citation omitted).

The Misplaced Trust Report's reference to the "300,000 accounts in the Indian trust fund," Misplaced Trust Report at 26, is particularly relevant. In its description of the IIM trust fund, the Misplaced Trust Report explained:

> The IIM trust fund is a deposit fund, usually not voluntary, for individual participants and tribes. It was originally intended to provide banking services for legally incompetent Indian adults and Indian minors without legal guardians. In addition to these fiduciary accounts, the IIM trust fund now contains deposit accounts for certain tribal operations and for some tribal enterprises. Approximately 300,000 accounts are held in the IIM trust fund.

Misplaced Trust Report at 2 (emphasis added). Thus, its use of the present tense in describing how many accounts "are held" in the IIM trust fund makes clear Congress's focus on the then-existing trust accounts when it established the specific accounting duties set forth in the 1994 Act. See also H.R. Rep. No. 103-778, at 9 (legislative history also stated that "[t]he BIA is currently managing . . . nearly 337,000 separate IIM accounts" (emphasis added)).

Finally, as this Court noted in its 1999 opinion, Congressman Synar, the principal author of the Misplaced Trust Report, stated during a 1989 hearing of the House Subcommittee on Interior Appropriations:

> I'm going to tell you, speaking on behalf of myself and [Chairman] Yates and four Congresses, it is our clear intention – and let the Record show – it is our clear intention that these accounts will be reconciled and audited before there is any movement or transfer. If you interpret that any other way, or if your lawyers or your personnel do, you're interpreting it wrong.

Misplaced Trust Report at 21 (internal citation omitted), quoted in Cobell v. Babbitt, 91 F. Supp. 2d at 41. Congressman Synar's statement provides yet further indicia of Congress's intent during the debate which led to enactment of the 1994 Act. Congress was concerned regarding then-existing accounts; Interior could not "move" or "transfer" accounts no longer in existence. Thus, Congress clearly did not intend to mandate an historical accounting of accounts which no longer existed when the 1994 Act became law.

Because Interior Defendants' Historical Accounting Plan describes an accounting that extends to all of the funds for which Congress contemplated an accounting, Interior Defendants' plan to provide an accounting for accounts open on or after October 25, 1994 is proper as a matter of law.

C. Interior Defendants' Obligation To Perform An Accounting Does Not Extend To the Closed Accounts Of Deceased IIM Account Holders.

As indicated in the Historical Accounting Plan, Interior Defendants "do[] not contemplate performing historical accounting work for the closed accounts of deceased predecessors" as part of the historical accounting effort for current IIM account holders. Historical Accounting Plan at II-3. As an initial matter, as explained in Section I.B., above, accounts closed prior to the passage of the 1994 Act are not within the scope of the accounting prescribed by Congress.

Nor must Interior Defendants examine the transactions in the account of a deceased predecessor of a current IIM account holder in order to provide an accounting to the current account holder. As explained in Interior Defendants' Plan, Interior intends not only to provide IIM account holders with statements of account activity, but also to assess the accuracy of such statements by

reconciling them to supporting documentation, such as leases, contracts, and probate orders. An IIM account holder who wishes to contest the validity of such underlying transactions may do so in an appropriate proceeding, but not through a request for an accounting.

The validity of Indian probate determinations, which generally conclude one trust relationship and define a new one, must be challenged through applicable statutory and administrative regulations. As described below, such probate determinations are the product of either administrative proceedings or state judicial proceedings that provide a full measure of due process to interested parties.

In some instances, the Department of the Interior makes Indian heirship determinations; in other instances, such determinations are made by state probate courts. In 1910, Congress enacted legislation to provide for the determination of heirs of deceased Indians. Act of June 25, 1910, ch. 431, §§ 1-2, 36 Stat. 855, 855-56 (codified as amended, 25 U.S.C. §§ 372 et seq.) ("Act of June 25, 1910"). Congress gave the Secretary of the Interior broad authority to ascertain the legal heirs of Indians who die without leaving a will.[14] 25 U.S.C. § 372. The Act of June 25, 1910 also specifies that individual Indians may convey their trust or restricted property by executing a will approved by the Secretary. 25 U.S.C. § 373. An exception to this statutory scheme exists with respect to members of Five Civilized Tribes and the Osage tribe of Oklahoma, for whom probate proceedings are conducted in the state courts of Oklahoma. 25 U.S.C. §§ 355, 373c, 375; 25 C.F.R. §§ 16.1-16.9; Act of June 28, 1906, ch. 3572, § 6, 34 Stat. 539, 545; Act of April 18, 1912, ch. 83, § 3, 37 Stat. 86, 87-88; Act of August 4, 1947, ch. 458, § 3, 61 Stat. 731, 733.

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[14] Prior to 1910, authority to make Indian heirship determinations was vested in some instances in federal courts and in other instances in the Secretary of the Interior. Felix S. Cohen, Handbook on Federal Indian Law, at 110 n.262 (1942).

To aid implementation of the Act of June 25, 1910, Congress granted the Secretary express authority to prescribe rules and regulation for probate matters, and required the Secretary to provide notice and an opportunity to be heard to potential beneficiaries before ascertaining the heirs of a deceased Indian. 25 U.S.C. § 372. As set forth in greater detail below, the Department of the Interior has established regulations and an administrative process designed to afford such rights, as well as rehearing and appeal rights, to interested parties. See 43 C.F.R. §§ 4.210 et seq.; 43 C.F.R. §§ 4.30 et. seq.

Interior's probate proceedings have performed functions similar to that of state probate courts: determining the lawful heirs of deceased Indians while ensuring due process to interested parties, including the IIM account holders. Interior's probate procedures[15] comport with constitutional standards of due process. See Kicking Woman v. Hodel, 878 F.2d 1203, 1208 (9th Cir. 1989) (holding that Interior regulations afforded due process and a meaningful appeal and declining to engage in a substantive review of an Indian probate proceeding).

When the BIA is provided notice of the death of an Indian trust property owner, BIA researches its records for information about the decedent's familial relations and identifies the trust property the decedent owned.[16] See 43 C.F.R. § 4.210. BIA then provides the gathered information to the Office of Hearings and Appeals ("OHA"), id., and notice is provided to probable heirs and

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[15] Oklahoma state courts probating the estates of Members of the Five Civilized Tribes and the Osage tribe provide similar due process protections to prospective heirs. Okla. Stat. Ann. tit. 58, §§ 23, 25, 128, 281, 552, and 553 (West 2002).

[16] The accurate inventory of property has been a priority: "As the probate order serves to identify the land interest passing to the heirs, an accurate inventory of these lands is necessary. The accurate preparation of this inventory is one of the most important tasks of the Realty staff." Probates, A Training Manual in Real Property Management, Bureau of Indian Affairs, Division of Real Estate Services 2-4 (Sept. 1985) (Ex. 11).

other interested parties. 43 C.F.R. § 4.211. When the OHA deciding official receives the probate inventory, he or she provides the presumptive heirs with advance notice of the time and place of the hearing at which testimony will be taken to determine the heirs of the decedent and to determine the validity of any will offered for probate. Id. The deciding official provides notice to the presumptive heirs by both mailing and publication, and publication must be made in at least five conspicuous places.[17] Id. Those chargeable with notice of the hearing will be bound by the result. 43 C.F.R. § 4.211(c) ("All parties in interest, known and unknown, including creditors, shall be bound by the decision based on such hearing . . . ."). Interested parties are given the opportunity to take discovery and, thus, gather additional information about the decedent, his heirs, and trust property. 43 C.F.R. §§ 4.220-25. Following discovery, the OHA deciding official holds a hearing with witness testimony, subject to cross examination, recorded in a verbatim transcript. Interested parties may appear with or without an attorney. See 43 C.F.R. §§ 4.230-36. After the hearing, the official issues an order settling and directing the distribution of the decedent's estate, including any IIM account, and decides the "issues of fact and law involved in the proceedings." 43 C.F.R. § 4.240.

Aggrieved parties wishing to dispute a probate order may request a rehearing from the OHA deciding official by filing a request within 60 days after the date on which notice of the decision is mailed. 43 C.F.R. § 4.241. Within three years after a probate decision, interested parties can petition to reopen the probate decision if they can demonstrate that: (i) they had no notice of the proceeding, and (ii) they did not reside on [or near] the reservation during the time when the notice was published. 43 C.F.R. § 4.242. When more than three years have elapsed since a probate decision, an interested party may still seek to reopen probate if, in addition to meeting the criteria for reopening within three

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[17] The notice is to "inform all persons having an interest in the estate . . . to be present at the hearing or their rights may be lost by default." 43 C.F.R. § 4.212(a).

years, a manifest injustice will result if probate is not reopened and the error can reasonably be corrected. Id. Parties wishing to further challenge a probate decision also have the right to appeal to the Interior Board of Indian Appeals. 43 C.F.R. § 4.320.

Judicial review in federal court is available once administrative remedies have been exhausted.[18] Before seeking judicial review, however, a claimant must exhaust administrative remedies. Arenas v. United States, 197 F.2d 418, 422 (9th Cir. 1952) (Indian who did not file administrative appeal could not challenge administrative heirship determination); Mammedaty v. Kleppe, 412 F. Supp. 283, 284-85 (W.D. Okla. 1976) (failure to file timely notice of appeal with Board of Indian Appeals precluded judicial review). However, courts have permitted judicial review of constitutional claims arising from probate notwithstanding a failure to exhaust administrative remedies. See Anderson v. Babbitt, 230 F.3d 1158 (9th Cir. 2000).

In light of the comprehensive administrative and statutory scheme for review of probate decisions, it is proper for Interior Defendants to rely upon probate orders in the course of verifying the accuracy of the account activity to be reported to IIM account holders. Account holders who wish to contest a probate order underlying a distributive IIM account transaction must exhaust their statutory and administrative remedies and, if necessary, seek appropriate review in federal court (to the extent that they are not time barred). With respect to state court probate decisions, the appropriate state court remedies must be sought in state court.

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[18] In 1990, Congress amended the Act of June 25, 1910 to allow for judicial review of Indian probate decisions in federal court. See An Act To Make Miscellaneous Amendments To Indian Laws, and for Other Purposes, Pub. L. No. 101-301, § 12(c), 104 Stat. 206, 211 (1990).

D. Statistical Sampling Methodologies Enhance The Feasibility Of Interior Defendants' Historical Accounting Plan.

The 1994 Act is silent as to the methodology Interior Defendants are to use to comply with their duty to account. Nor has this Court ruled upon "what specific form of accounting, if any, the [1994] Act requires." Cobell v. Babbitt, 91 F. Supp. 2d at 40 n.32. As the Court of Appeals noted, "[s]uch decisions are properly left in the hands of administrative agencies." Cobell v. Norton, 240 F.3d at 1104. The use of statistical sampling methodologies in the Historical Accounting Plan represents a reasonable exercise of the Secretary's discretion and is supported by the legislative history underlying the 1994 Act.

Interior Defendants' Historical Accounting Plan does not contemplate the use of statistical sampling techniques as a substitute for an accounting. As explained above, IIM account holders will receive a detailed transaction history of "past deposits, withdrawals, and accruals." Cobell v. Norton, 240 F.3d at 1102. Statistical sampling methodologies will be used only as a tool for performing the additional step of assessing the accuracy (by a review of supporting documentation) of certain subsets of transactions in the account histories.

Statistical sampling is well-recognized by the courts as providing a reliable and acceptable method for auditing data and obtaining adjudicative evidence. For example, in Chaves County Home Health Serv., Inc. v. Sullivan, 931 F.2d 914 (D.C. Cir. 1991), the D.C. Circuit considered challenges by health care providers to the statistical sampling audit procedures which the Secretary of Health and Human Services ("HHS") employed to review Medicare payments. The providers argued that HHS was required to conduct individual claims adjudication and that its use of statistical sampling violated the Medicare statute and contravened procedural due process. The D.C. Circuit

rejected these arguments, noting that the Medicare statute was silent regarding the use of sampling and holding that HHS's decision to utilize statistical sampling was permissible. Id. at 916-22.

Numerous other federal courts have similarly approved of the use of statistical sampling as a means for auditing records and establishing adjudicative facts. See, e.g., Hilao v. Marcos, 103 F.3d 767, 786 (9th Cir. 1996) (in human rights class action, court approves use of statistical sampling to establish compensatory damages for individual class members and observes that "the time and judicial resources required to try the nearly 10,000 claims in this case would alone make resolution of Hilao's claims impossible."); Yorktown Med. Lab., Inc. v. Perales, 948 F.2d 84, 89-90 (2d Cir. 1991); Michigan Dep't of Educ. v. United States Dep't of Educ., 875 F.2d 1196, 1206 (6th Cir. 1989); Illinois Physicians Union v. Miller, 675 F.2d 151, 155 (7th Cir. 1982); Georgia v. Califano, 446 F. Supp. 404, 409-11 (N.D. Ga. 1977).

Case law endorses the use of statistical sampling generally, and the legislative history accompanying the 1994 Act supports its use in performing the historical accounting specifically. Congress enacted the 1994 Act after considering numerous reports and studies, including the Misplaced Trust Report of the House Committee on Government Operations, described above. The Committee reported on BIA's efforts in the early 1990s to audit selected IIM accounts – those maintained at three of the BIA's ninety-three offices. Misplaced Trust Report at 24-26. The BIA reported "substantial difficulties in completing any IIM account phase I reconciliations" and enormous costs related to these efforts. Id. at 25; see also id. at n.81 (subcommittee "is concerned by the enormity of [BIA] cost estimates to complete the IIM reconciliations"). The Misplaced Trust Report concluded that "it might cost as much as $281 million to $390 million to audit the IIM accounts at all 93 BIA agency offices," id. at 26, and concluded:

> Obviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken.

Id. at 26 (emphasis added and internal citation omitted).

As this Court has previously recognized, Congress enacted the 1994 Act "[b]ased largely on the findings made in Misplaced Trust." Cobell v. Babbitt, 91 F. Supp. 2d at 13. The legislative history underlying the 1994 Act confirms that Congress both recognized the impracticability of expending the money required for a review of every transaction in every individual Indian trust account and explicitly recognized the potential need to "review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund." Misplaced Trust Report, at 26.

Simply put, Congress never mandated a transaction-by-transaction methodology for verifying the accuracy of every transaction constituting the IIM trust fund and, indeed, suggested that statistical sampling could provide a feasible alternative.[19] Interior Defendants' Plan thoughtfully employs statistical sampling by combining a transaction-by-transaction analysis of specific types and dollar levels of transactions with an analysis of statistically valid samples of lower-dollar transactions. See Historical Accounting Plan at 1, I-1 to I-2, II-2 to II-3, App. D. Moreover, Interior Defendants'

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[19] Elsewhere, this Court has rejected an agency's use of statistical sampling where the statutory language and legislative history evinced a clear Congressional intent to prohibit its use. See United States House of Representatives v. United States Dep't of Commerce, 11 F. Supp. 2d 76, 97-104 (D.D.C. 1998) (rejecting the use of sampling to supplement the census headcount used for House apportionment based upon express prohibition in Census Act and unsupportive legislative history), appeal dismissed, 525 U.S. 316 (1999). No such prohibition is expressed or implied in the 1994 Act or its legislative history.

methodology should permit them to determine the accuracy rate of their historical accounting work with a 99 percent confidence level. Id. at 1, II-1 to II-2.

Sampling will expedite the historical accounting without sacrificing reliability, at a sensible cost. Thus, Interior Defendants' use of statistical sampling methodologies not only is entirely consistent with the congressional aims embodied in the 1994 Act, but also promotes the feasibility of the Interior Defendants' Plan in light of recent congressional expressions of concern regarding the cost and delay associated with relying exclusively on transaction-by-transaction methodologies.

II. Plaintiffs' Plan Is A Claim For Money Damages, Rather Than A Plan For Conducting An Historical Accounting, And Is Based On The False Assumption That Insufficient IIM Trust Records Are Available To Undertake The Historical Accounting.

Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust ("Plaintiffs' Plan") is based on the fundamentally flawed premise that because there are admitted gaps in the Indian trust records available to do an historical accounting, it is preferable to rely entirely on estimating techniques, rather than, as Interior Defendants have proposed, to use existing records to perform the accounting work and to rely on forensic accounting methods to address gaps in the records. To support their patently illogical argument, Plaintiffs devote the first thirty-eight pages of their fifty-five page filing not, as the Court ordered, to discussing a plan for undertaking an historical accounting of IIM trust funds, but instead to detailing how, in their view, gaps in the availability of trust records "have ensured that the accounting owed by the United States government and ordered by this Court is impossible." Plaintiffs' Plan at 3.

Because, according to Plaintiffs, the accounting for which they sued is impossible, they argue that the Court must adopt instead their estimating techniques. In so arguing, Plaintiffs not only fail to support their absurd claim that complete guesswork is preferable to Interior Defendants' document-based method, but, in addition, they implicitly admit that their Plan is not an accounting and thus by

definition complies with neither the requirements of the 1994 Act nor the Court's September 17, 2002 Order permitting Plaintiffs to file "a plan for conducting a historical accounting." Cobell, 226 F. Supp. 2d at 162. Indeed, taken to its logical conclusion, Plaintiffs' argument that an accounting is impossible would suggest that this Court lacks jurisdiction over their lawsuit since, as noted below, an accounting is the only remedy that this Court has jurisdiction to impose. Accordingly, the Court should rule that Plaintiffs' Plan is fatally flawed and grant Defendants partial summary judgment that Interior Defendants' Historical Accounting Plan comports with their obligation to perform an accounting.[20]

A. Plaintiffs' Plan Is A Claim For Money Damages, Rather Than A Plan For Conducting An Historical Accounting.

Pursuant to the 1994 Act, Interior Defendants are obligated to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a). As described above, Interior Defendants' Plan fully comports with this accounting obligation, as well as the Court's prior orders, by establishing an appropriate and reliable method for Interior Defendants "to provide eligible IIM account holders . . . a history of all transactions in their accounts back to the inception of their accounts or to the passage of the Act of June 24, 1938, whichever is later." Historical Accounting Plan at II-2. In essence, this method entails gathering relevant and available

[20] As noted below, Plaintiffs' Plan is very imprecise. Thus, pending further discovery, Defendants are not in a position to address many of the Plan's details, which as yet remain unclear. Accordingly, Defendants focus in the following pages on the Plan's overarching structural flaws. That Defendants' comments on Plaintiffs' Plan are focused in this manner, however, should not be read as an approval sub silentio of all aspects of Plaintiffs' Plan which they do not address.

trust records and using these records to verify the accuracy of the account activity in the various kinds of IIM accounts.

As outlined in their Plan, Interior Defendants intend to rely on forensic accounting and statistical sampling techniques in only two circumstances. First, as Interior Defendants have acknowledged, "[i]t is certain that some gaps in the transaction history or in records and documentation will be encountered during the historical accounting." Id. at III-13. To address such gaps, Interior Defendants plan to employ forensic accounting methods. Second, as detailed above, Interior Defendants have recognized (and Congress has expressed great concern) that using transaction-by-transaction techniques to verify the accuracy of each transaction in Land-based IIM accounts would prove enormously (if not prohibitively) expensive and time-consuming. Accordingly, in verifying the accuracy of the account activity in Land-based IIM accounts, Interior Defendants intend to undertake a transaction-by-transaction reconciliation of all transactions of $5,000 or more, and to rely on statistical sampling as the basis for verifying the accuracy of transactions of lesser value. See id. at III-6 - III-8. In sum, Interior Defendants' Plan uses actual trust records to assess the accuracy of account activity and departs from this method only when necessary to fill gaps in the records and when considerations of cost and timeliness leave no other reasonable choice.

In sharp contrast, Plaintiffs' Plan begins with the premise that an historical accounting based on actual trust records is impossible and thus relies entirely on various estimating techniques. Plaintiffs cite Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), to try to clothe these techniques in the mantle of science. See Plaintiffs' Plan at 6-7. However, the simple fact is that, regardless of whether Plaintiffs' estimating

techniques meet these standards for the admissibility of expert testimony,[21] an approach that uses actual trust records (to the extent these are available) is necessarily superior to one based almost entirely on assumptions and extrapolations. Not only is this point self-evident, but it is also made very clearly by one of the main sources on which Plaintiffs rely to demonstrate that Indian trust records are, in their view, unavailable and that an historical accounting is therefore impossible: Paul Stuart, Nations Within A Nation, Historical Statistics of American Indians (1987). See Plaintiffs' Plan at 5. The paragraph cited by Plaintiffs concludes with the following sentence, which, not surprisingly, they fail to include in their analysis: "[O]ne either uses such data as may be available and learns something, however inadequate, or abjures such data and learns nothing." Stuart at 2 (Ex. 12) (internal quotation marks omitted).

Because the United States is the trustee of the IIM trust fund, trust records within its possession or control constitute the best source of records for undertaking an historical accounting. Nonetheless, claiming that "individual Indian trust data available from the trustee-delegate" is "missing, unreliable, incomplete and misleading," Plaintiffs state that their "Plan has sought to use other data sources in every instance possible."[22] Plaintiffs' Plan at 39. Plaintiffs manage to avoid

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[21] Although Plaintiffs cite Daubert and Kumho Tire, they fail to demonstrate or even meaningfully discuss how their various "methodologies" actually meet the evidentiary requirements set forth in these cases. Thus, Defendants express no view at this time as to whether these methodologies meet the Daubert and Kumho Tire requirements.

[22] To the extent even Plaintiffs require concrete data to plug into their various estimating techniques, their Plan is, as elsewhere, remarkably imprecise about the actual source of this data. However, despite their asserted effort to avoid relying on "individual Indian trust data available from the trustee-delegate," it is clear that their Plan relies significantly on such government data. See, e.g., Plaintiffs' Plan at 44-45 nn. 88, 90-92, 94-95 (citing reports issued by the U.S. Geological Survey, the U.S. Bureau of Mines, and the Secretary of the Interior); id. at 47 (stating that "the following sources were used," inter alia, to estimate "[r]evenue from timber production derived from Allotted Lands": "Narrative Annual Reports of the Indian Commissioner," "BIA agency reports from the National Archives," "Forestry section of the Annual reports," "Annual

relying on IIM trust records by relying instead on "methodologies" that seek to estimate in sweeping style the aggregate revenues or royalties generated by the (estimated) sum total of allotted lands.

Their method of calculating aggregate oil and gas royalties is representative. First, for any given reservation, they "estimat[e] historical production volumes" of oil and gas. Id. at 42. Second, they "apply[] historical price estimates" to this estimated volume and thereby derive the reservation's estimated total revenues from oil and gas. Id. Third, "by applying historical royalty rates to total revenues," they estimate the reservation's total royalties from oil and gas. Id. Fourth, they estimate the percentage of land on the reservation[23] that is allotted and thereby derive an "allotted land percentage." Id. at 41-42. Finally, they multiply total oil and gas royalties by this allotted land percentage and thereby derive their estimate of the sum total of oil and gas royalties on that reservation's allotted lands.

Plaintiffs' basic methodology conflicts with the requirements of the 1994 Act, as well as the Court's prior orders, and is fundamentally flawed. First, their methodology fails to take into account whether rights to a resource are, in fact, owned by individual allottees, the tribe, or some other non-Indian entity. In other words, as described above, Plaintiffs' proposal is to estimate the total royalties from a resource earned on reservation land and then to multiply this amount by an "allotted land percentage," thus assuming that rights to the resource are necessarily spread pro rata among all the

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forestry and grazing reports").

[23] Given the extraordinarily vague language that Plaintiffs' Plan employs, Defendants cannot be certain that they have correctly understood the meaning of the term "allotted land percentages," on which, as described above, Plaintiffs' Plan greatly relies. Defendants believe that this term refers to the (estimated) percent of land per reservation that is allotted. It is possible, however, that Plaintiffs intend "allotted land percentages" to refer to the (estimated) percent of Indian land throughout the United States that is allotted.

reservation's landowners (individual allottees, the tribe, and others). However, this assumption is patently false.

Consider, for example, the Nez Perce Indian Reservation in Idaho. As of 1996, of the reservation's total acreage, 85,248 acres were tribally owned, 48,298 acres were held in allotments, 36,950 acres were held in federal trust, and a striking 664,752 acres were owned by non-Indians. See Veronica E. Velarde Tiller, American Indian Reservations and Trust Areas 338 (Washington, D.C.: U.S. Department of Commerce, 1996) (Ex. 13). Since Plaintiffs' methodology, as set forth in their Plan, would fail to take into account the exact location of resources, such as mines, on the Nez Perce reservation – and would thus fail to determine the rightful owners of any proceeds from these mines – it would lead to grave errors in estimating royalties specifically attributable to allotted lands.

Likewise, Plaintiffs' Plan would produce inaccurate results in estimating royalties from oil and gas production because it fails to distinguish between the ownership of surface and sub-surface rights. For example, the 1919 Indian Appropriations Act provided that "any and all minerals, including coal, oil and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct." 4 Charles J. Kappler, Indian Affairs: Laws & Treaties 208 (Government Printing Office, 1929) (Ex. 14). As a result of this statute, the tribe may own mineral rights even where the surface rights for the land on which the production well is located belong to an individual allottee. Thus, Plaintiffs' methodology of simply applying a ratio of allotted to unallotted land would lead, on reservations such as the Blackfeet, to gross inaccuracies in estimating aggregate allotted oil and gas royalties belonging to the reservation's IIM account holders.

Not only does Plaintiffs' Plan falsely assume that rights to the proceeds from any given resource are necessarily spread pro rata among all the reservation's landowners, but it also wrongly presumes that "historical royalty rates" provide a sound basis for estimating a reservation's total

royalties from that resource. Consistent with the highly vague and imprecise nature of their entire Plan, Plaintiffs nowhere explain the basis on which they propose to calculate "historical royalty rates," but presumably this term refers to an average of rates paid for a particular resource at a particular time. There is little reason to conclude, however, that such an average can serve as a viable proxy for royalties actually paid on reservation lands, because royalty rates for resources found on Indian land are frequently established not by market forces, but instead by regulations issued by the Department of the Interior. See, e.g., Royalty Management, 30 C.F.R. §§ 206.50 et seq. (Indian Oil); 30 C.F.R. §§ 206.171 et seq. (Indian Gas).

In short, Plaintiffs' Plan completely ignores legal, economic and historical reality and thus is in no way suited to accomplishing the accounting of "funds . . . deposited or invested," 25 U.S.C. § 4011(a), that Defendants owe to IIM trust account holders. Indeed, as described below, Plaintiffs' Plan is, in all but name, a claim for money damages, rather than a method for accounting to IIM account holders. It proposes that the Court declare that Defendants owes allottees, as a body, immense sums of money, which Plaintiffs' representatives will worry about distributing at some later date, in some as yet undetermined manner. Because Plaintiffs' Plan is really a claim for money damages, rather than a method for accounting to IIM account holders, it not only fails to comport with Defendants' obligation to account, but also constitutes relief that is beyond the scope of this Court's jurisdiction and that Plaintiffs represented to the Court they did not seek. See Cobell v. Babbitt, 30 F. Supp. 2d 24, 39 (D.D.C. 1998) (holding that the Court has jurisdiction over this litigation pursuant to the APA's waiver of sovereign immunity, only upon concluding that, "[g]iven the allegations contained in the Complaint and, importantly, certain representations of the plaintiffs' counsel, . . . the plaintiffs do not seek money damages").

That Plaintiffs' Plan is really a disguised claim for alleged money damages is evident, first, from their own assertion that an accounting is impossible. To the extent Plaintiffs (wrongly) claim that an accounting is impossible, they are necessarily of the view that, whatever their Plan may be, it is clearly not a method for accounting.

More importantly, their Plan contains numerous references to alleged breaches of fiduciary duty by the United States – in particular, (1) mismanagement of the underlying IIM trust assets, and (2) misappropriation of IIM trust funds – that call out for relief in the form of money damages. For example, Plaintiffs complain that the United States permitted "23 natural resources companies to underpay royalty obligations that they owed for the production of oil and gas on Indian trust lands."[24] Plaintiffs' Plan at 12. Similarly, they assert that "Individual Indian Trust Funds Have Been Misappropriated."[25] Id. at 10. Such claims for mismanagement of the underlying IIM trust assets and

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[24] Not only does this statement suggest a claim for mismanagement of the underlying IIM trust assets, but, in addition, it utterly fails to distinguish between allotted and tribal trust lands.

[25] In support of this claim, Plaintiffs, once again, rely on snippets of information so far removed from any context that it is all but impossible to assess their true import. For example, Plaintiffs' extensive citation of the July 7, 1999 trial transcript of the Commissioner, Financial Management Service, is particularly misleading as it suggests that various concerns they raised regarding the Department of the Treasury's management of IIM funds have yet to be addressed. However, Treasury entered a stipulation on July 6, 1999 which "allows Interior to invest any available funds omitted from its overnight investment request as if they had been invested the previous business day." Cobell, 91 F. Supp. 2d at 22. Likewise, "Treasury agreed [during the trial] to conduct a study of its IIM trust check negotiation practices," id. at 23, and it filed this Study with the Court on June 1, 2000, see Financial Management Service, Study of Check Negotiation Practices for Office of Trust Funds Management-Issued Checks ("Study of Check Negotiation Practices") (May 31, 2000), filed as Att. K to Second Quarterly Report on Actions Taken by the Department of the Treasury to Retain IIM-Related Trust Documents Necessary for an Accounting (June 1, 2000). Indeed, Plaintiffs themselves refer to this study in an unrelated discussion, in which they observe that "[the Study of Check Negotiation Practices] found such checks totaled approximately $177 million" and that, "[n]otwithstanding time period differences, th[is] figure is grossly inconsistent with the July 2002, Department of Interior Historical Accounting Plan which reports $336.6 million of disbursements from 1/1/99-12/31/99." See Plaintiffs' Plan at 51 n.99. Plaintiffs conclude from this discrepancy that "only a fraction of the

misappropriation of IIM trust funds are clearly claims for money damages, rather than relief which can be afforded under the APA, and are thus beyond this Court's jurisdiction.[26] Likewise, these claims contradict Plaintiffs' own statements about the scope of this lawsuit. Indeed, precisely because these claims sound in law and are therefore beyond the Court's jurisdiction, Plaintiffs themselves have previously stated that "this action is not one to review the United States' management of the underlying trust assets." Plaintiffs' Revised Memorandum of Points and Authorities in Support of Motion for Class Certification, at 6 (Jan. 14, 1997) (emphasis added). Furthermore, in holding that this is an APA action to require an accounting rather than an action for money damages, the Court made a point of striking the following allegations from Plaintiffs' Complaint:

> (1) '[T]he true totals would be far greater than those amounts, but for the breaches of trust herein complained of.' . . . ; (2) '[Defendants] have lost, dissipated, or converted to the United States' own use the money of the trust beneficiaries.' . . . ; (3) 'and to direct [the defendants] to restore trust funds wrongfully lost, dissipated, or converted.' . . . ; (4) 'Failure to exercise prudence and observe the requirements of law with respect to investment and deposit of IIM funds, and to maximize the return on investments within the constraints of law and prudence.'

30 F. Supp. 2d at 40 n.18 (quoting Plaintiffs' Complaint) (internal citations omitted).

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receipts of the Individual Indian Trust were disbursed in 1999." Id. One obvious explanation for this "discrepancy," however, is that, as the very language quoted by Plaintiffs reveals, the Study of Check Negotiation Practices determined that approximately $177 million in "'IIM U.S. Treasury checks [were] issued.'" Id. (quoting Study of Check Negotiation Practices (emphasis added)). In contrast, Interior's July 2002, Accounting Plan "reports $336.6 million of disbursements," id. (emphasis added), rather than $336.6 million in IIM U.S. Treasury checks, thus including electronic funds transfers in its calculation of total disbursements.

[26] Apparently recognizing that their claims that IIM funds have been misappropriated and subject to fraud have no place in this litigation, Plaintiffs attempt to sweep these into their argument concerning the destruction of IIM trust records. Thus, Section A of their Plan appears under the nonsensical heading, "Indian Trust Data is Subject to Adulteration, Misappropriation and Fraud." Plaintiffs' Plan at 8. Clearly, as later pages reveal, it is not trust records, but trust funds, which Plaintiffs claim were misappropriated and subject to fraud.

Not only do Plaintiffs raise claims that clearly point to relief in the form of money damages, but indeed, they go further and supply the method for calculating such damages. As described above, their Plan is, in their own words, designed "to quantify the monies generated from individual Indian trust lands ('Allotted Lands')." Plaintiffs' Plan at 39. Rather than using IIM trust records to identify the transactions that passed through particular IIM accounts, Plaintiffs' Plan estimates aggregate IIM funds. Accordingly, Plaintiffs' Plan concludes with a discussion of the reliability of the proxies used to estimate monies generated by allotted lands, which reads as if it were drawn from a brief filed in a suit for money damages. Id. at 53-55. In fact, in this discussion, Plaintiffs expressly rely upon excerpts from two damages treatises. Id. at 54-55 and Pls.' Exs. 42 and 43 (citing and quoting from 2 R. Dunn, Recovery of Damages for Lost Profits (5th ed. 1998), and P. Gaughan, Measuring Commercial Damages (2000)).

Finally, as is typical in damages class actions, Plaintiffs propose to rely on a (yet unspecified) mechanism for distributing the aggregate monies they have calculated by means of their various estimating techniques. Thus, Plaintiffs do not purport to identify the particular individuals to whom the aggregate funds belong and the precise amount to which each of these (unidentified) individuals is entitled. Instead, they devote a total of three short paragraphs of their fifty-five page filing to the all-important question of "distribution," and the only guidance they have to offer is that they "have discussed the requirements of the [distribution] project with prospective experts and believe that qualified experts can be retained." Plaintiffs' Plan at 52. In short, rather than advancing a plan for accounting to individual IIM account holders, they assure the Court that unidentified experts will, deus ex machina, swoop in with some unidentified, yet superior method of assigning particular amounts of money to particular individuals – and thus divide up what are in essence money damages.

B. Defendants Have Demonstrated That Sufficient IIM Trust Records Are Available To Undertake The Historical Accounting Set Forth In Interior Defendants' Plan.

Plaintiffs' argument that an historical accounting is impossible and that the Court must therefore adopt their Plan hinges on their claim that the necessary IIM trust records simply do not exist. Accordingly, they devote approximately 70% of their brief (the first thirty-eight pages) to their effort to establish that the requisite IIM trust records are lacking. Nowhere in these thirty-eight pages, however, do Plaintiffs identify any specific types of records that are lacking to accomplish any particular component of the historical accounting. Instead, they cobble together, in anecdotal fashion, snippets of quotes from various sources identifying deficiencies in Interior Defendants' preservation and maintenance of trust records. That deficiencies exist, however, simply does not demonstrate that the information needed to undertake a reliable historical accounting, as described in Interior Defendants' Plan, is lacking.

Plaintiffs boldly assert that "[d]uring the 116 years of Trust management and administration, the majority of source and related Trust documents have been destroyed." Plaintiffs' Plan at 16. In support of this extraordinary assertion, Plaintiffs cite ten specific instances in which Defendants have reported document destruction to the Court. No doubt recognizing that ten cases in which particular sets of documents were destroyed fails to establish the destruction of the "majority" of all IIM trust records that ever existed, Plaintiffs then observe in a footnote that the poor conditions in which some trust records have been kept demonstrates that "massive and un-quantifiable amounts of Trust records have been lost." Id. at 16 n.28.

Interior Defendants acknowledge, as they have in the past, that some IIM trust records have been lost and others have not been maintained in conditions best suited to ensure their preservation. However, the fact that some IIM trust records have been lost or maintained in poor conditions does

not establish that "the majority of source and related Trust documents have been destroyed." Furthermore, Interior Defendants vigorously object to Plaintiffs' lengthy citation of reports issued by the Special Master in April 2002 to sustain their claim that IIM trust records "continue to be at risk of destruction" to the extent they were in the past. Id. at 18. As Plaintiffs are well aware, Interior Defendants have made substantial improvements since April 2002 in their trust-records program, under the guidance of Assistant Deputy Secretary Abraham E. Haspel and Director of Office of Trust Records ("OTR") Ethel J. Abeita. See Letter from Alan L. Balaran, Special Master, to Amalia D. Kessler, U.S. Department of Justice, 2 (December 2, 2002) (Ex. 15) (stating that "OTR, under the leadership of Acting Director[27] Ethel Abeita and Assistant Deputy Secretary Abraham Haspel[], has undergone a dramatic improvement").

As for Plaintiffs' assertion that "The Government's Own Consultants State that Massive and Un-quantifiable Amounts of Individual Indian Trust Records Have Been Destroyed Since the Creation of the Trust," this too is unsubstantiated. Plaintiffs' Plan at 17. Plaintiffs base this broad assertion on a highly selective reading of a Report[28] produced by one of Defendants' consultants, in which they isolate out of context various statements concerning incidents of document destruction. Contrary to their claim that this Report reveals the destruction of massive amounts of IIM trust records, the Report's central thrust is that, while clear evidence of document destruction by Executive

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[27] Ms. Abeita was appointed Acting Director of OTR on July 29, 2002 and became Director on December 19, 2002. See Activity Report, Office of Trust Records at 3 (Dec. 2002), attached to United States' Status Report to the Special Master of January 21, 2003.

[28] To be precise, and as Interior Defendants have previously observed, "[t]he Report that Plaintiffs term the 'Useless Papers Report' (EY0002325-EY0002455) is actually a compilation of two separate Morgan and Angel reports . . . that was [mistakenly] produced to Plaintiffs as a single report in the November 16, 2001 response to Plaintiffs' discovery request to Ernst and Young." See Defendants' Opposition to Plaintiffs' February 15, 2002 Motion for Sanctions and a Contempt Finding Pursuant to Fed. R. Civ. P. 56(g), at 17 (filed Mar. 1, 2002).

Branch agencies exists, little evidence exists that the destroyed documents included IIM trust records. See, e.g., EY0002332 (Ex. 16) ("[W]ithout documentation specifying that sundry Indian trust fund records actually were destroyed by fire, or by other means associated with inadequate guardianship, or by any involuntary instrument, one cannot be certain that such destruction took place." (emphasis added)); EY0002345 ("Although the historical record demonstrates diligence and regularity with respect to destruction [pursuant to an 1889 act mandating destruction of "useless papers"], the Executive Departments of the Federal government . . . were typically imprecise with regard to what they were recommending for destruction."); EY0002349 ("None of these reports [concerning documents submitted for destruction] appears to have included Indian trust fund documents in general and individual Indian moneys reports in particular."); EY0002352 (stating that even after the passage of a 1934 statute creating the National Archives and repealing the 1889 Useless Papers Act, "the ensuing years produced little specificity with regard to items proffered for destruction"); EY0002361 (stating that the Bureau of Indian Affairs' first records disposition schedule "specifically excluded disposal of 'Indian Service Special Disbursing Agent' records or 'originals'"); EY0002363 ("[A]t least by 1945 the GAO had developed instructions that would have prevented the destruction of Indian trust records.").

Plaintiffs' assertion of wholesale destruction of IIM trust records is ultimately belied, however, not only by their failure to establish that such destruction occurred, but more importantly, by the simple fact that Interior Defendants have found sufficient records to commence the historical accounting set forth in their Plan. Thus, the professional historians retained by Interior's Office of Historical Accounting ("OHTA") to assist with Interior Defendants' efforts to provide accountings to IIM account holders are firmly of the view that there are sufficient IIM records available for Interior Defendants to undertake the accounting described in their Plan. According to Alan S. Newell, a

professional historian with almost 30 years experience "working in federal Indian records, the volume of relevant data that can be derived from existing historic federal documents supports the Department of the Interior's implementation of a plan to perform a historical accounting of IIM funds." See Declaration of Alan S. Newell (Ex. 3) ¶ 10; see also id. at ¶ 7 ("A vast quantity of federal documents (from the Bureau of Indian Affairs as well as from other agencies) is available in national and regional repositories for use in performing a historical accounting of Individual Indian Money. To dismiss categorically these documents as incomplete, inaccurate and therefore of little or no value would be a mistake."). Likewise, Edward Angel, an historian with "twenty years of professional research experience with Federal records relating to Native Americans" states that this experience "leads me to support the implementation of the plan developed by OHTA to perform an historical trust accounting as an approach that is based upon solid historical methodology, along with historical research that is supported by skilled forensic procedures and accounting tools." See Declaration of Edward Angel (Ex. 2) ¶ 17.

That sufficient IIM records exist to proceed with the historical accounting presented in Interior Defendants' Plan is the considered view, not only of the historians hired to assist OHTA, but also of the forensic accountants who have been employed for this purpose. Thus, Robert L. Brunner, a principal in KPMG LLP's Forensic practice, who has "worked on a number of projects and disputes relating to trust administration . . . [in which] we were able to successfully reconstruct historical trust account activity, and verify transactions back to available hard-copy records," see Declaration of Robert L. Brunner (Ex. 1) ¶ 5, states that "[c]onsidered together, the existing electronic and hard copy records appear to comprise a relatively complete history of the IIM Trust," id. at ¶ 11. For this reason, he concluded that "[t]here are sufficient electronic and paper records to expect that the overall

approach proposed by Interior is feasible and will provide IIM beneficiaries with an accurate statement of account." Id. at ¶ 13.

CONCLUSION

We respectfully submit that the Court lacks authority to hold the Phase 1.5 trial for the purpose of reviewing the Historical Accounting and Trust Management Plans and thereupon entering injunctive relief. However, if the Court proceeds down this path, it is clear that Interior Defendants' Historical Accounting Plan, unlike that of the Plaintiffs, describes an approach to trust reform that comports with the Defendants' obligation to perform an accounting.

Accordingly, the Court should enter partial summary judgment that, as a matter of law, Interior Defendants' Historical Accounting Plan describes an approach to trust reform that comports with the Defendants' obligation to perform an accounting, and Plaintiffs' Plan does not. Dated:

January 31, 2003

Respectfully submitted,
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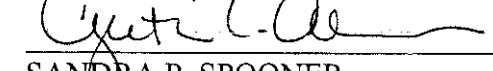
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS FOR MOTION FOR PARTIAL SUMMARY JUDGMENT THAT INTERIOR'S HISTORICAL ACCOUNTING PLAN COMPORTS WITH THEIR OBLIGATION TO PERFORM AN ACCOUNTING

Pursuant to Local Civil Rule 7.1(h), Defendants submit the following Statement of Material Facts as to Which No Genuine Issue Exists, with regard to Defendants' Motion for Partial Summary Judgment That Interior's Historical Accounting Plan Comports With Their Obligation to Perform an Accounting.

1. The Secretary of the Interior and the Assistant Secretary of Interior-Indian Affairs ("Interior Defendants") serve as trustee-delegates of the Federal Government with regard to the administration of Individual Indian Money ("IIM") trust accounts. E.g., Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

2. By its Order filed September 17, 2002, this Court ordered "that the Interior Defendants shall file with the Court and serve upon plaintiffs a plan for conducting a historical accounting of the IIM trust accounts." Cobell v. Norton, 226 F. Supp. 2d 1, 162 (D.D.C. 2002).

3. On January 6, 2003, Interior Defendants filed with the Court their "Historical

Accounting Plan for Individual Indian Money Accounts," pursuant to the Court's September 17, 2002 Order. Interior Defendants' Plan asserts that, upon completion of the historical accounting, they will be in a position to provide the holder of each IIM account covered by the Plan an Historical Statement of Account detailing the account transaction history. See Interior Defendants' Plan at I-1.

4. On January 6, 2003, Plaintiffs filed with the Court "Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust." Plaintiffs' Plan asserts that the historical accounting, which Plaintiffs claim the United States owes to individual Indian trust beneficiaries, is impossible. See Plaintiffs' Plan at 7.

Dated: January 31, 2003

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before the Court on Defendants' Motion for Partial Summary Judgment That Interior's Historical Accounting Plan Comports With Their Obligation to Perform an Accounting. After considering that motion, any responses thereto, and the record of the case, the Court finds that Defendants' motion for partial summary judgment should be, and hereby is, GRANTED. It is further

ORDERED that the Court finds that Interior's Historical Accounting Plan comports with Defendants' obligation to perform an accounting, and it is further

ORDERED that the Court finds that Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust does not comport with Defendants' obligation to perform an accounting.

SO ORDERED this ___ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 31, 2003 I served the foregoing *Defendants' Motion for Partial Summary Judgment That Interior's Historical Accounting Plan Comports with Their Obligation to Perform an Accounting and Supporting Memorandum of Points and Authorities* and *Defendants' Statement of Material Facts as to Which No Genuine Issue Exists for Motion for Partial Summary Judgment That Interior's Historical Accounting Plan Comports with Their Obligation to Perform an Accounting* by hand, in accordance with their Agreement of January 31, 2003, upon:

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by U.S. Mail upon:

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Atlanta, GA 30309-4530

First 25 pages by facsimile; a complete copy to be delivered by hand the morning of February 3, 2003 upon:

Alan L. Balaran, Esq.
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(202) 986-8477

and by Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
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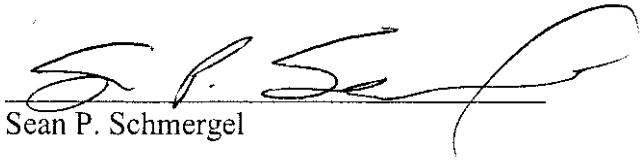

Sean P. Schmergel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

Declaration of Robert L. Brunner

I, Robert L. Brunner being duly sworn, state as follows:

1. I am a Principal in KPMG LLP's Forensic practice in San Francisco, California and am the National Partner-in-Charge of the Firm's Class Action / Complex Data Services practice. I have Bachelor of Science degrees in mathematics, computer science and management science from the University of California at San Diego.

2. I specialize in complex, data-intensive cases including class actions, government investigations and bankruptcies. I have extensive experience in the design and implementation of complex financial, economic, transactional, and document / image management systems. I am an expert in the areas of transactional database design and management, complex data modeling, claims management and administration and document imaging systems.

3. Prior to joining KPMG in May 2002, I was a Partner in Andersen Worldwide ("Andersen"), where I led the Class Action Services and Complex Data Management practices for the firm and the Financial Advisory Services practice in the Pacific Northwest. I led the development of Andersen's Electronic Data Discovery and Legal Information Consulting Practice methodologies.

Defendants' Exhibit No.1
Motion for Partial S/J
Historical Accounting

4. I am a member of the American Records Management Association, Association of Information and Image Management, and the American Society for Information Science and Technology.

5. I have worked on a number of projects and disputes relating to trust administration and the fiduciary duties of trustees. These engagements have included a review of both corporate and private trust accounts in a commercial setting. In some of these projects, the analyses have depended upon my team's successful combination of existing paper and electronic records. Many of these cases involved missing and / or incomplete records. However, we were able to successfully reconstruct historical trust account activity, and verify transactions back to available hard-copy records.

6. My team was retained by the Department of Justice ("Justice") in December 1996 to provide consultation services on the *Cobell* case. Since that time, I have served as a Principal on the project. Since being retained by Justice, my team has undertaken a variety of research projects. These projects involved the use of archival and other records kept by the Office of the Special Trustee, the Bureau of Indian Affairs and other federal agencies.

7. My team was retained by the Department of the Treasury ("Treasury") in 1999. We assisted Treasury with the extensive "Paragraph 19" search for records related to the named plaintiffs in *Cobell* and their agreed upon predecessors in interest. This search included reviewing significant records in the National Archives dating from the 1800s through the 1920s, as well as searching for more recent records from the Bureau of Public Debt, Financial Management Service and other Offices and Bureaus in the National Archives, Federal Records Centers and active sites. As a result, we are very familiar with the document search process for these records.

8. My team was retained by the Department of the Interior ("Interior") in 1999 to assist with the Paragraph 19 search and collection effort. We assisted Interior in planning and conducting an extensive search for records that included searches of National Archive facilities, Federal Records Centers, the Indian Trust Accounting Division (Lanham, MD), Bureau of Indian Affairs Area and Agency offices, and other Bureaus and Offices within Interior. Additionally, we assisted Interior with quality control reviews of the financial records produced for Paragraph 19 through the Office of the Special Trustee for American Indians, Office of Trust Records. Through our involvement in the Treasury and Interior Paragraph 19 searches, we have developed a general understanding of the nature, volume and availability of financial and realty records available from the mid-1800s through the present.

9. Since the establishment of the Office of Historical Trust Accounting ("OHTA") in July 2001, we have assisted that agency in developing a plan for a historical accounting. Specifically, we were retained to provide support for the development and implementation of options for conducting a historical accounting of Individual Indian Money ("IIM") accounts. To date, we have assisted OHTA in preparing the September 10, 2001 *Blueprint for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts*, the November 7, 2001 *Report Identifying Preliminary Work for the Historical Accounting*, the July 2, 2002 *Report to Congress on the Historical Accounting of Individual Indian Money Accounts* and the January 6, 2003 *Historical Accounting Plan for Individual Indian Money Accounts Prepared for the U.S. District Court for the District of Columbia* ("Historical Accounting Plan").

10. My team has performed extensive analyses on the electronically available Integrated Records Management System, IIM data. We understand the nature and organization of the data, how various types of transactions have been recorded and can be traced in the data, and its relevance and potential usefulness to a historical accounting. Additionally, we have received and performed preliminary assessments of Trust

Funds Accounting System data. As a result of these analyses, we are familiar with availability, limitations and nature of electronic data.

11. Considered together, the existing electronic and hard copy records appear to comprise a relatively complete history of the IIM Trust. Hard copy records can be utilized to verify the accuracy of the electronic ledgers, and realty and financial records can be compared to determine if collected amounts were appropriately distributed to beneficiaries. These comparisons will allow Interior to assure IIM beneficiaries that the information provided is reasonably complete and accurate.

12. Massive amounts of paper and electronic records exist which relate directly to the transactions in the IIM accounts. Public statements by Interior officials, and a review of the records to date, confirm that not all records exist, and some gaps exist in the information available. However, copies of records missing from one location sometimes exist in other locations. Ignoring the voluminous records that exist and relate directly to the transactions would be inconsistent with the objective of performing an accounting based on the best available information about the transactions.

13. I have reviewed OHTA's final Historical Accounting Plan. The high-level approach outlined in the Historical Accounting Plan anticipates utilizing the available paper and electronic records. The Historical Accounting Plan neither expects nor requires that all documents be found. Additionally, Interior has developed adaptive strategies to take into account deficiencies in certain locations or timeframes. There are sufficient electronic and paper records to expect that the overall approach proposed by Interior is feasible and will provide IIM beneficiaries with an accurate statement of account.

14. The estimated cost of executing the Plan proposed by Interior is significantly less than the cost of the accounting approach set forth in the Report to Congress. This lower cost, combined with the high number of transactions to be tested, make this a reasonable approach to perform the historical accounting without sacrificing reliability or confidence in the results.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 30, 2003.

Robert L. Brunner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., Plaintiffs, V.	)	Case No. 1:96CV01285 Judge Lamberth
Gale Norton, Secretary of the Interior, et al., Defendant.	)	

DECLARATION OF EDWARD ANGEL

I, Edward Angel, Ph.D., declare that:

1. I am the managing partner of Morgan, Angel & Associates, LLC (Morgan Angel), a consulting firm in Washington, DC established in 1981. I received a doctoral degree in American History from The George Washington University in 1979. My business address is 1601 Connecticut Avenue, NW, Suite 600, Washington, DC, 20009.

2. Morgan Angel is an historical and public policy research firm that specializes in conducting research and preparing studies that analyze Federal policies toward Native Americans, Federal natural resource policies, environmental issues, and other topics in American History.

3. While working at Morgan Angel, I have taught courses in American History at The George Washington University, Trinity College in Washington, DC, and George Mason University. Among other topics, I have taught courses on American Indian Policy, including research and readings seminars. I am an

Defendants' Exhibit No.2
Motion for Partial S/J
Historical Accounting

active member of a number of professional historical organizations, including the American Historical Association, the Western History Association, the Society for Historians in the Federal Government, and other organizations.

4. Along with other members of Morgan Angel, I have researched and written reports concerning Native American issues for the past twenty years. Among other places, my research has been conducted at the National Archives of the United States, including several regional branches; several Federal Records Centers; the Office of Trust Records in Albuquerque, NM; the Indian Trust Accounting Division of the General Services Administration; regional offices and agencies of the Bureau of Indian Affairs; state and local historical societies containing records relevant to Native Americans; and numerous libraries and universities throughout the Nation. As a result of this research I have written many reports on issues concerning Federal policies toward Native Americans, including land, water, natural resource development, and historical accounting issues.

5. The United States Department of Justice retained Morgan Angel to provide historical research and consultation, as well as to prepare reports regarding the above-captioned litigation. Among other draft reports submitted to the Department of Justice, I wrote a study entitled "Audits of Individual Indian Moneys: 1940 to 1990." William A. Morgan, who is now retired from the firm, wrote a study entitled "Disposition or Disposal? An Investigation into the Historical Disposition of Indian Trust Fund Records."

6. In addition, in cooperation with Historical Research Associates of Missoula, MT, Morgan Angel has prepared a catalog of sources that have been examined by the two firms and that would be available in performing an historical accounting. For the most part, the sources reviewed and cited by Morgan Angel in that catalog reflect paper documents from the pre-electronic (that is, pre-1985) period.

7. Since the establishment of the Office of Historical Trust Accounting (OHTA) in July 2001, Morgan Angel also has assisted that agency. Primarily, Morgan Angel has provided an historian's perspective concerning the development of an historical accounting plan and the location of potentially relevant documents. Currently, Morgan Angel is under contract with OHTA to assist its efforts to provide an accounting to individual Indian money account holders.

8. Based on my research as well as that of other staff members of Morgan Angel, the Department of Justice has asked me to prepare a declaration concerning the availability of historical documents that could be used in conjunction with OHTA's accounting for individual Indian moneys.

9. In the course of my research for the Cobell v. Norton litigation, as well as other research pertaining to Indian affairs over the last twenty years, I have reviewed records of the Bureau of Indian Affairs (BIA) found in Record Group 75 at the National Archives in Washington, DC, numerous regional branches of the National Archives, and Federal Records Centers. While reviewing those records, I have found IIM ledgers; leases; audits; reports on timber, grazing, oil and gas, mining, and other natural resources on Indian lands; reports on the banking and investment of individual Indian moneys; vouchers, bills of collection, annuity and per capita payment records, and other financial documents from the nineteenth and twentieth centuries that could be used in an historical accounting.

10. In the course of my research, I and other staff members of Morgan Angel under my supervision and control have reviewed records of the General Accounting Office, specifically Record Group 217, Records of Accounting Officers of the Department of the Treasury, and Record Group 411, Records of the General Accounting Office. These records contain documents relating to efforts to settle Indian agents' accounts. Indian agents were required to submit financial

documentation to support receipt and disbursement activities, for example vouchers, original copies of leases, and statements of receipts and expenditures. Such documents could be used in conducting an historical accounting for individual Indian account holders.

11. In the course of my research, I and other staff members of Morgan Angel under my supervision and control have reviewed the records of other Federal agencies that maintained records concerning the financial affairs of Native Americans. Among other agency records we have reviewed:

- Records of the Office of the Secretary of the Interior (Record Group 48), which contain documents concerning policies, rules, and regulations affecting Individual Indian Moneys;
- Records of the Bureau of Public Debt (Record Group 53), which contain documents regarding the investment of individual Indian moneys;
- General Records of the Department of the Treasury (Record Group 56), which contain files relating to the administration of individual Indian moneys;
- Records of the United States Geological Survey (Record Group 57), which document the administration of oil and gas leases on both tribal and allotted lands;
- Records of the Comptroller of the Currency (Record Group 101), which contain documents concerning banks that held individual Indian moneys; and
- Records of the Financial Management Service (Record Group 425), which contain documents concerning the investment of individual Indian moneys in government securities.

12. The National Archives has published guides that provide descriptions of records concerning the BIA and other Federal agencies involved in the administration of Indian affairs. In this regard, the preeminent work for research in Native American affairs is Edward E. Hill, compiler, Guide to

Records in the National Archives of the United States Relating to American Indians (Washington, DC: National Archives and Records Administration, 1981). This publication details the vast volume of records relating to Indian affairs held by the National Archives. It has not, however, been updated since 1981 to include materials accessioned by the National Archives over the last two decades.

13. In the course of my research, I and other staff members of Morgan Angel under my supervision and control have examined records at the Office of Trust Records (OTR) in Albuquerque, NM. Among other documents we have found IIM ledgers; IIM posting and control records; leases; investment reports; per capita payment data; journal vouchers, bills of collections, deposit tickets and other financial records; contracts; audit reports; savings bond transactions; disbursement data; interest posting data; royalty reports; and other documents that could be used in an historical accounting to individual Indian account holders.

14. In the course of my research, I have reviewed records at the Indian Trust Accounting Division (ITAD) of the General Services Administration in Lanham, MD. Although materials held by ITAD primarily relate to tribal accountings, documents concerning individual Indians are interspersed in these records. In this regard, I have seen leases; finance and trust records; audits; correspondence; materials relating to receipts and disbursements to Native Americans; vouchers; and other documents that could be used in an historical accounting to individual Indian account holders.

15. In the course of my research, I have reviewed documents held by BIA regional offices and agencies. It has been my experience that BIA regional offices and agencies hold the same types of financial records as are found at the National Archives in Record Group 75, at the OTR in Albuquerque, and at ITAD. Typically, however, these records are of more recent origin.

16. The records cited above represent the types of documents historians use when researching Federal issues relating to Native Americans. The volume of records is enormous, though not complete. As William A. Morgan observed in his study "Disposition or Disposal? An Investigation into the Historical Disposition of Indian Trust Fund Records," Federal records have been lost, destroyed in natural calamities, and destroyed under Federal Government records retention policies. It should also be noted, however, that some of the records Mr. Morgan discusses were duplicates of records retained by other agencies.

17. Professional historians are rarely fortunate enough to have a complete historical record for any topic of research; especially one with roots to 1887. My twenty years of professional research experience with Federal records relating to Native Americans leads me to support the implementation of the plan developed by OHTA to perform an historical trust accounting as an approach that is based upon solid historical methodology, along with historical research that is supported by skilled forensic procedures and accounting tools.

18. I declare under penalty of perjury that the foregoing is true and correct. Executed on January 30, 2003.

Edward Angel

Edward Angel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

Declaration of Alan S. Newell

Alan S. Newell declares as follows:

1. 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.

2. HRA is a historical consulting firm with offices located in Missoula, Montana and Seattle, Washington. HRA historians and anthropologists specialize in researching historical questions involving land and water use. Over the past 29 years, HRA and I have worked on a number of historical projects relating to Native American issues. I have researched and prepared reports using federal documents for various federal agencies, including the Bureau of Indian Affairs and the Department of Justice, state agencies and a number of Indian tribes. Specifically, I have worked on a number of research projects involving Native American resources (timber, water, coal, etc.). During the mid 1970s and early 1980s, HRA prepared some of the first administrative histories of timber use on various reservations for the Bureau of Indian Affairs. In 1986, I co-authored a history of the BIA's Division of Forestry for the Department of the Interior.

3. I am a member of several of professional historical organizations, including the Organization of American Historians, the American Society of Environmental Historians and the National Council On Public History (NCPH). I regularly attend and present papers at annual meeting and symposia offered by these organizations.

4. I served as an elected member of the Board of Directors of the NCPH from 1992-1995. I served as the elected president of that national organization 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 an Adjunct Professor in the Department of History at the University of Montana and regularly teach a course in historical methods.

5. HRA was retained by the Department of Justice in December 1999 to provide historical research and consultation services on the *Cobell* case. Since that time, I have served as a co-manager and principal on that project. Since the establishment of the Office of Historical Trust Accounting (OHTA) in July 2001, HRA also has assisted that agency in developing a plan for historical accounting. HRA recently signed a contract with OHTA to continue providing historical services in the coming fiscal year.

6. Since being retained by the Department of Justice in December 1999, HRA has undertaken a variety of research projects, including the preparation of overview narratives of Indian resource leasing and contracting activity and a number of individual case studies of resource use and IIM accounting. All of these projects involved the use of archival and other records kept by the Bureau of Indian Affairs and other federal agencies. The department also asked us to prepare a catalog of pre-electronic (generally pre-1985) sources of information that could be useful in a historical accounting. Based on my past work in federal Indian records and specifically the work that I have undertaken for the United States since December 1999, the Department of Justice has asked me to provide a declaration relating to the availability of trust-related historic documents.

7. A vast quantity of federal documents (from the Bureau of Indian Affairs as well as from other agencies) is available in national and regional repositories for use in performing a historical accounting of Individual Indian Money. To dismiss categorically these documents as incomplete, inaccurate and therefore of little or no value would be a mistake.

8. While acknowledging the difficulties with using historic federal Indian records and, specifically, the gaps in the written financial record, a historical accounting must use the available data to the fullest extent possible. Using these data, HRA developed 34 case studies of historical lease and contract activity. These studies, prepared for the Department of Justice, include 47 volumes and encompass agricultural, timber and mineral activity on 21 sample reservations. To compile the case studies, HRA collected and analyzed data from the following types of repositories and record groups:

National Archives and Records Administration (NARA) Repositories

[This agency, established in 1934, is comprised of three national repositories (National Archives I and II and the Washington National Records Center) and 11 regional archive and records centers]

Records of The Bureau of Indian Affairs (RG 75)

Pre-1907 Records: These are available for the central office as Letters Received and as letterpress books for individual agencies. They contain reports, correspondence and other documents that may reference leasing and contract activity or IIM accounts.

Microfilm Series M1011: BIA Superintendents' Annual Narrative and Statistical Reports, 1907-1938.

The Central Classified Files are available for the Central Office and for each agency (1907-1969). They contain reports, correspondence, leases, contracts and other documents that relate to general administration and policy. Files of particular relevance to IIM issues include:

Decimals 030-031 / 050-051 (Annual Reports)
Decimals 220-224 (finance and trust funds)
Decimal 301 (grazing)
Decimals 320-324 (leases, farming/grazing, oil/gas and minerals)
Decimals 330-332 (resource development)
Decimals 336-337 (oil/gas development)
Decimal 339 (timber)
Decimals 340-341(irrigation development)

Post-1969 Records: A large volume of records is available for the topics listed above. These records are located in various federal records. Many have or will be consolidated at the NARA repository at Lee's Summit.

Financial Records: The identification of BIA financial records in NARA repositories varies by repository, but they generally may be found under the following kinds of record series: individual Indian bank account records, Individual Indian Money (or Individual Indian Account) ledgers, IIM abstracts, IIM registers, journal vouchers, schedules of transfer, collection vouchers, bills for collection, schedules of collections, office (or official) receipts, and special deposit ledgers.

United States Geological Survey (USGS), Conservation Division (RG 57)

Mission Control Files, Entry 370: This collection consists of over 500 boxes that include correspondence, memorandum reports, statistical tables and summaries, and regulations. They relate to leasing Indian lands for oil, gas, and coal mining, royalties accrued from Indian lands, and sale of those lands.

Records of the Minerals Management Service (RG 473)

This record group also includes records of the former USGS Conservation Division, which assisted in the administration of mineral leases on Indian lands from 1925 to 1982. Pertinent documents include Royalty Reports (monthly production reports from the mineral lessee to the USGS), Royalty Statements (monthly statements of accounts from the USGS to the lessee), and Remittance Letters (monthly statements to accompany checks from USGS to BIA). These documents are found in numerous accessions numbering from dozens to hundreds of boxes each, and are located principally in the Federal Records Centers in Denver and Fort Worth.

9. The record groupings listed above contain the kinds of documents that historians typically use when researching federal Indian issues. In undertaking research into

these and other documents (federal as well as non-federal) historians are rarely fortunate enough to have a complete record. By training and experience, we are accustomed to piecing together the factual basis for a historical occurrence from the fragmentary evidence.

10. Based on almost 30 years as a professional historian working in federal Indian records, the volume of relevant data that can be derived from existing historic federal documents supports the Department of the Interior's implementation of a plan to perform a historical accounting of IIM funds.

11. I declare under penalty of perjury that the foregoing is true and correct. Executed on January 29, 2003 [date].

Alan S. Newell

Alan S. Newell

United States General Accounting Office

GAO

Report to the Committee on Indian Affairs, U.S. Senate

May 1996

FINANCIAL MANAGEMENT

BIA's Tribal Trust Fund Account Reconciliation Results

GAO/AIMD-96-63

Defendants' Exhibit No.4
Motion for Partial S/J
Historical Accounting

Scope and Methodology

To provide our observations on the results of the reconciliation and certification efforts, we reviewed reconciliation and certification contracts and issue papers,[4] contractor status reports and memoranda, and prototype reconciliation report drafts. We met with Interior, BIA, and Office of Management and Budget (OMB) officials, including BIA's Special Assistant to the Deputy Commissioner of Indian Affairs for the reconciliation project (Reconciliation Project Manager), Interior's Special Trustee for American Indians, and representatives of the independent accounting firms that BIA contracted with to perform the reconciliation and certification to discuss our concerns about the reconciliation effort and the certification contract. To obtain tribes' views on the reconciliation and certification efforts, we contacted representatives of the Intertribal Monitoring Association (ITMA), which represents a number of tribal account holders, and representatives of non-ITMA member tribes. We attended BIA's February 1996 National Meeting in Albuquerque, New Mexico, to observe Interior's and BIA's presentation on the reconciliation procedures, reports, and results and the tribes' responses.

We conducted our work between April 1995 and March 1996 at BIA's headquarters in Washington, D.C., and its Office of Trust Funds Management in Albuquerque, New Mexico. Our work was performed in accordance with generally accepted government auditing standards. We requested comments on a draft of this report from the Interior Department's Special Trustee for American Indians. On April 2, 1996, we received written comments from BIA's Reconciliation Project Manager. These comments are discussed in the "Agency Comments and Our Evaluation" section of this report. While we are not reprinting these comments, copies are available from GAO.

Reconciliation Results

Although BIA identified about 20,000 boxes of accounting documents and lease records and spent about 5 years attempting to reconcile tribal trust accounts, sufficient records were not available to fully reconcile the accounts. For example, BIA's reconciliation contractor verified 218,531 of tribes' noninvestment receipt and disbursement transactions totaling $15.3 billion, or 86 percent, of the $17.7 billion in transactions that were recorded in the general ledger. However, due to missing records, the contractor was not able to verify 32,901 of these transactions totaling $2.4 billion (gross). In addition, BIA was not able to determine the total amount of receipts and disbursements that should have been recorded and

[4]In addition to contract modifications, issue papers were used to discuss and approve revisions to reconciliation procedures as unforeseen circumstances were encountered.

Reconciliation Procedures and Results

The reconciliation effort was to cover reconstruction of trust fund account activity, to the extent that records were available, using eight major reconciliation procedures. Due to missing records, the lack of an audit trail in BIA's systems, and cost and time constraints, not all reconciliation procedures could be completed and some procedures were not performed BIA's reconciliation contractor performed reconciliation procedures for fiscal years 1973 through 1992. To meet the requirement in the American Indian Trust Fund Management Reform Act of 1994 that the reconciliation reports include the results of reconciliations through September 30, 1995, the reconciliation report packages provided to the tribes include the results of reconciliations performed by BIA for fiscal years 1993 through 1995. The report packages also include the results of reconciliations that BIA performed between the investment system and the Finance System (general ledger) for 26 tribes. The following summary addresses the reconciliation procedures that were performed by the contractor and those that could not be performed or were not completed.

Reconciliation Procedures Performed

The six major reconciliation procedures that were performed covered (1) transactions, (2) investment yields, (3) deposit lag times, (4) selected systems, (5) special procedures for five tribes, and (6) lease receipts.

Basic Transaction Reconciliations

This segment of the reconciliation included tracing 251,432 in total recorded noninvestment receipt and disbursement transactions[1] from the general ledger to source documents, such as deposit tickets, disbursemer vouchers, and journal vouchers. OTFM's reconciliation contractor reporte that $15.3 billion, or 86 percent, of the total $17.7 billion in noninvestmen transactions for fiscal years 1973 through 1992 had been verified. According to OTFM's Reconciliation Project Manager, noninvestment transactions for 83 tribes were fully reconciled under this procedure and for the transactions reconciled, BIA identified a probable error rate of onl .01 percent. Where errors were identified, adjustments were proposed.

Due to missing records, 32,901 of the noninvestment transactions totalin $2.4 billion (gross) could not be reconciled. According to Interior and OT documents, the $2.4 billion included the following transactions which could not be traced to supporting documentation:

[1]These transactions included receipts and disbursements from judgment awards and income from land-use agreements collected by various BIA offices, including grazing, timber, fishing, and rights way.

JAMES V. HANSEN CHAIRMAN

764438

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

December 9, 2002

RECEIVED
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OFFICE OF THE EXECUTIVE SECRETARIAT

The Honorable Gale Norton
Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Secretary Norton:

On July 2, 2002, the Assistant Secretary for Policy Management and Budget submitted the Office of Historical Trust Accounting for the Department of the Interior's *Report to Congress on the Historical Accounting of Individual Indian Money Accounts*. The Committee compliments the Department on its effort to develop a plan that meets the broad parameters described by the Court. We are sure, however, that the Department recognizes that Congress will necessarily determine the funding for any accounting, and we find the Report you presented troubling in several areas.

Specifically, the Report detailed a plan for an accounting that would cost, in 2002 constant dollars, more than $2.4 billion and take ten years. The plan is by its own admission, an enormously complicated, complex, controversial, and costly initiative.

Given the length of time required to complete the broad accounting outlined in the Report, as well as the costs associated with such an activity, which are likely to come at the expense of other key Indian programs, we request that you promptly consider ways to reduce the costs and the length of time necessary for an accounting. Clearly, any such accounting should be sufficient to ensure beneficiaries of the trust that they can rely on their account balances.

The Report notes that the Department will encounter "gaps in documentation" during the historical accounting, and that various options, including forensic accounting methods, can be used to address such gaps. The Committee asks that before committing significant resources to the broad approach described in the Report, the Department consider all available options regarding the use of alternative accounting methods.

The Committee specifically requests that the Department respond to this request within the next 15 days.

Sincerely,

JAMES V. HANSEN
Chairman

Defendants' Exhibit No.5
Motion for Partial S/J
Historical Accounting

C. W. BILL YOUNG, FLORIDA, CHAIRMAN
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Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515–6015

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CLERK AND STAFF DIRECTOR
JAMES W. DYER

TELEPHONE:
(202) 225-2771

December 10, 2002

Honorable Gale Norton
Secretary
U.S. Department of the Interior
Washington, D.C. 20240

RECEIVED
03 JAN -8 PM 1:00
OFFICE OF THE
EXECUTIVE SECRETARIAT

Dear Madam Secretary:

A letter from Lynn Scarlett, Assistant Secretary, Policy, Management and Budget, dated December 4, 2002, proposes a reprogramming to establish a new trust reform organizational structure within the Bureau of Indian Affairs and the Office of Special Trustee for American Indians. This new organizational structure is designed to help facilitate the various trust reform activities that are needed to address the Secretary of the Interior's trust responsibility.

Originally the Department of the Interior proposed to establish a new Bureau of Indian Trust Asset Management. This proposal met with universal opposition from Indian country and facilitated a round of extensive consultations with the Indian community, and the establishment of a tribal task force whose mission was to develop and evaluate various trust reform organizational options. After a comprehensive process of informing the Indian community through exhaustive consultations, the Department has now proposed a new trust reform organizational structure and is seeking approval from the Committee for this reorganization. It is our understanding that for the most part this proposal is consistent with the comments received through the consultation process and from the tribal task force. While this organization will likely result in the need for some additional resources the Department will seek these resources through the fiscal year 2004 budget process.

We believe that the Department must get trust reform back on the right track. It is imperative that the Department prospectively address the long-standing trust problems. This means putting in place the systems, people, and training to allow the Secretary to meet her fiduciary responsibility. However, the Committee remains very concerned over the effect the Cobell v. Norton litigation is having on the Department's ability to marshal the resources that are needed for trust reform to be successful. We are particularly concerned about the Department's plan to allocate over $2.4 billion over ten years for an historical accounting. We remain convinced that such a process would not yield the desired results, but instead would simply drain resources away from effectively implementing trust reform.

We believe that the process for trust reform needs to be changed, and that the Department needs to take a thoughtful and measured approach in adopting trust reform policies. Therefore, we are approving your reprogramming request. This approval is contingent upon the following requirements: senior policy officials and staff brief the Committee on a quarterly basis on the status and accomplishments of each component of the Department's plan for implementing trust reform, with an emphasis on the development of the new trust systems to replace the Trust Asset and Accounting Management System as well as data cleanup, probate, and the status of the ongoing litigation.

Sincerely,

Joe Skeen
Chairman
Subcommittee on Interior
and Related Agencies

Norman D. Dicks
Ranking Minority Member
Subcommittee on Interior
and Related Agencies

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THE

STATUTES AT LARGE

OF THE

UNITED STATES OF AMERICA,

FROM

DECEMBER, 1889, TO MARCH, 1891,

AND

RECENT TREATIES, CONVENTIONS, AND EXECUTIVE PROCLAMATIONS.

EDITED, PRINTED, AND PUBLISHED BY AUTHORITY OF
CONGRESS, UNDER THE DIRECTION OF
THE SECRETARY OF STATE.

VOL. XXVI.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1891.

Defendants' Exhibit No.7
Motion for Partial S/J
Historical Accounting

of the water works supplying the District of Columbia, or any part thereof, and the operations of said company shall always be subject to the control and direction, in this respect, of the Secretary of War, and subject to the right of the Secretary of War, or other lawful public authority, to interrupt the construction or use of said railway whenever necessary for the protection or repair of such water works, or in respect of any increase thereof or additions thereto. If in the course of construction of said railway, or at any time thereafter, it shall be deemed by the Secretary of War necessary for the better protection of such water pipes, fixtures, or apparatus, or for other water pipes, fixtures or apparatus that may be laid or applied, to raise or otherwise fix or adjust any avenue, street, road, alley or public place containing or to contain such pipes, or to otherwise adjust the same so as to produce absolute security for all such pipes and apparatus existing or to be laid or arranged at any point or points on or contiguous to the line of said railway, such changes in grade and otherwise, or works, as shall be deemed necessary by the Secretary of War shall be made, done and performed by and at the expense of said railway company, and its successors and assigns, to the satisfaction of the Secretary of War; and the remainder of width of any avenue, street, alley, road, or other public place, at all such points or places, shall be raised, adjusted, repaved and put in condition, safe for all such pipes and apparatus, and in a manner satisfactory to the Secretary of War, and in conformity to any order of the Secretary of War in the matter, and at the expense of said company, and its successors and assigns. Any structure, work in or change in the condition of any such avenue, street, road, alley or public place, not made in conformity with the provisions in this act contained, shall be unlawful.

Necessary changes in street grades, etc., to be made by order of Secretary of War, at expense of company, etc.

Other changes not lawful.

Amendment, etc.

SEC. 16. That Congress hereby reserves to itself the right at any and all times to alter, amend, or repeal this act.

Approved, February 28, 1891.

February 28, 1891.

CHAP. 383.—An act to amend and further extend the benefits of the act approved February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States over the Indians, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the act entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, be, and the same is hereby, amended so as to read as follows:

Allotment of land in severalty to Indians on Indian reservations, etc.

Vol. 24, p. 388, amended.

"SEC. 1. That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an Act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot to each Indian located thereon one-eighth of a section of land: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual in quantity as above provided the land in such reservation or reservations shall be allotted to each individual pro rata, as near as may be, according to legal subdivisions: *Provided further*, That

To each located Indian one-eighth of a section.

Provisos.

Allotment pro rata, if lands insufficient, as per legal subdivisions.

Allotment by treaty or act, not reduced.

where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty to certain classes in quantity in excess of that herein provided the President, in making allotments upon such reservation, shall allot the land to each individual Indian of said classes belonging thereon in quantity as specified in such treaty or act, and to other Indians belonging thereon in quantity as herein provided: *Provided further*, That where existing agreements or laws provide for allotments in accordance with the provisions of said act of February eighth, eighteen hundred and eighty-seven, or in quantities substantially as therein provided, allotments may be made in quantity as specified in this act, with the consent of the Indians, expressed in such manner as the President, in his discretion, may require: *And provided further*, That when the lands allotted, or any legal subdivision thereof, are only valuable for grazing purposes, such lands shall be allotted in double quantities."

To other Indians.

Under existing agreements or laws.

Vol. 24, p. 388.

Double allotments of lands fit for grazing only.

SEC. 2. That where allotments have been made in whole or in part upon any reservation under the provisions of said act of February eighth, eighteen hundred and eighty-seven, and the quantity of land in such reservation is sufficient to give each member of the tribe eighty acres, such allotments shall be revised and equalized under the provisions of this act: *Provided*, That no allotment heretofore approved by the Secretary of the Interior shall be reduced in quantity.

Existing allotments in certain cases to be augmented.

No existing approved allotment to be reduced.

SEC. 3. That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes: *Provided*, That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.

Leases, by Secretary of Interior, of existing allotments where allottee disabled from occupancy, etc.

Terms, etc.

Proviso.

Leases, by Indian agent, of certain lands occupied by Indian purchasers.

Terms, etc.

SEC. 4. That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children, in quantities and manner as provided in the foregoing section of this amending act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions provided in the act to which this is an amendment. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

Certain Indians may make selection of public lands.

Patents to issue.

Vol. 24, p. 389.

Fees to be paid from the Treasury.

SEC. 5. That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have co-habited together as husband and wife according to the custom and

Determination of descent, etc.

Vol. 24, p. 389.

manner of Indian life the issue of such co-habitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child: *Provided*, That the provisions of this act shall not be held or construed as to apply to the lands commonly called and known as the "Cherokee Outlet": *And provided further*, That no allotment of lands shall be made or annuities of money paid to any of the Sac and Fox of the Missouri Indians who were not enrolled as members of said tribe on January first, eighteen hundred and ninety; but this shall not be held to impair or otherwise affect the rights or equities of any person whose claim to membership in said tribe is now pending and being investigated.

Provisos.

"Cherokee Outlet" lands excepted.

Certain Sacs and Foxes excepted.

Pending rights, etc., unimpaired.

Approved, February 28, 1891.

February 28, 1891.

CHAP. 384.—An act to amend sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes of the United States providing for the selection of lands for educational purposes in lieu of those appropriated for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes of the United State be amended to read as follows:

Public lands. Homestead settlement on, and selections to supply deficiencies in, school lands.

R. S., sec. 2275, p. 417, amended.

"SEC. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever." And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public

Settlements, before survey, on sections 16 or 36, subject to settlers' claims.

Lieu lands, where school lands thus taken.

Where school lands are otherwise disposed of.

Provisos.

Waiver of right to school lands by selecting lieu lands.

Fractional deficiencies of school lands, etc.

Secretary of Interior to ascertain townships included in certain reservations.

Limitation.

Awaiting restoration of reservations to public domain, for school sections.

THE

STATUTES AT LARGE

OF THE

UNITED STATES OF AMERICA,

FROM

MARCH, 1909, TO MARCH, 1911,

CONCURRENT RESOLUTIONS OF THE TWO HOUSES OF CONGRESS,

AND

RECENT TREATIES, CONVENTIONS, AND EXECUTIVE PROCLAMATIONS.

EDITED, PRINTED, AND PUBLISHED BY AUTHORITY OF CONGRESS UNDER THE DIRECTION OF THE SECRETARY OF STATE.

VOL. XXXVI.

IN TWO PARTS.

PART 1—Public Acts and Resolutions.
PART 2—Private Acts and Resolutions, Concurrent Resolutions, Treaties, and Proclamations.

PART 1.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1911.

Defendants' Exhibit No.8
Motion for Partial S/J
Historical Accounting

June 25, 1910.
[H. R. 26349.]
[Public, No. 311.]

CHAP. 429.—An Act To authorize the building of bridges across the Saint Marys River, Georgia, and the Kootenai River, Idaho.

Saint Marys River.
Saint Marys and Kingsland Railroad Company may bridge, at Saint Marys, Ga.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Saint Marys and Kingsland Railroad Company, a corporation organized under the laws of the State of Georgia, is hereby authorized to construct, maintain, and operate a bridge and approaches thereto across the Saint Marys River at a point suitable to the interests of navigation, at or near a point about one mile west of the town of Saint Marys, in the county of Camden, in the State of Georgia, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters," approved March twenty-third, nineteen hundred and six.

Vol. 34, p. 84.

Kootenai River.
Kootenai Valley Railway Company may bridge, at Bonners Ferry, Idaho.

SEC. 2. That the Kootenai Valley Railway Company, a corporation organized under the laws of the State of Washington, is hereby authorized to construct, maintain, and operate a bridge and approaches thereto across the Kootenai River at a point suitable to the interests of navigation at or near Bonners Ferry, in the State of Idaho, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters," approved March twenty-third, nineteen hundred and six.

Vol. 34, p. 84.

Amendment.

SEC. 3. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, June 25, 1910.

June 25, 1910.
[H. R. 26458.]
[Public, No. 312.]

CHAP. 430.—An Act To authorize the construction and maintenance of a dike on Olalla Slough, Lincoln County, Oregon.

Olalla Slough, Oreg.
Olalla diking district may construct a dike across.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the legal officers of the Olalla diking district, organized under the laws of the State of Oregon, be, and hereby are, authorized to construct upon the foundation already laid, and to maintain a dike across the Olalla Slough, in Lincoln County, Oregon, with a gate therein so constructed and maintained as to be readily opened and easily operated for the purposes of navigation. Said gates may be closed for such time as to prevent the overflowing by the tides of the lands above the dike under regulations to be prescribed from time to time by the Secretary of War: *Provided, however,* That the work now existing shall not be legalized nor shall any new work be commenced until the plans therefor have been filed with and approved by the Secretary of War and Chief of Engineers.

Closing gates.

Proviso.
Approval of plans.

Amendment.

SEC. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, June 25, 1910.

June 25, 1910.
[H. R. 24992.]
[Public, No. 313.]

CHAP. 431.—An Act To provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes.

Indian trust allotments.
Disposal to heirs of intestate Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs,

Discretion of Secretary of Interior.

he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold: *Provided*, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of ten per centum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase price is to be paid in deferred payments, a further amount, not exceeding fifteen per centum of the purchase price may be so forfeited for failure to comply with the terms of the sale. All forfeitures shall inure to the benefit of the heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: *Provided*, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent, as their respective interests shall appear: *Provided further*, That the Secretary of the Interior is hereby authorized in his discretion to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death, to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent: *Provided further*, That hereafter any United States Indian agent, superintendent, or other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such bank or banks as he may select: *Provided*, That the bank or banks so selected by him shall first execute to the said disbursing agent a bond, with approved surety, in such amount as will properly safeguard the funds to be deposited. Such bonds shall be subject to the approval of the Secretary of the Interior.

Provisos. Partition.

Rules for sales, etc.

Issue of patents in fee.

Distribution of proceeds.

Competency certificates.

Deposit of Indian funds in banks.

Indemnity bond.

Disposal of trust allotments by will.

Sec. 2. That any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs and the Secretary of the Interior: *Provided further*, That sections one and two of this Act shall not apply to the State of Oklahoma.

Provisos. Approval required.

Not applicable to Oklahoma.

Surrender of trust allotments to children.

Sec. 3. That in any case where an Indian has an allotment of land, or any right, title, or interest in such an allotment, the Secretary of the Interior, in his discretion, may permit such Indian to surrender such allotment, or any right, title, or interest therein, by such formal relinquishment as may be prescribed by the Secretary of the Interior, for the benefit of any of his or her children to whom no allotment of land shall have been made; and thereupon the Secretary of the Interior shall cause the estate so relinquished to be allotted to such child or children subject to all conditions which attached to it before such relinquishment.

Conditions.

Leases of trust allotments.

Sec. 4. That any Indian allotment held under a trust patent may be leased by the allottee for a period not to exceed five years, subject to and in conformity with such rules and regulations as the

Secretary of the Interior may prescribe, and the proceeds of any such lease shall be paid to the allottee or his heirs, or expended for his or their benefit, in the discretion of the Secretary of the Interior.

Inducing conveyances by Indians of trust interests unlawful.

SEC. 5. That it shall be unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, or to offer any such contract, deed, mortgage, or other instrument for record in the office of any recorder of deeds. Any person violating this provision shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five hundred dollars for the first offense, and if convicted for a second offense may be punished by a fine not exceeding five hundred dollars or imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided*, That this section shall not apply to any lease or other contract authorized by law to be made.

Punishment for.

Proviso. Exception.

Timber depredations. Vol. 35, p. 1098, amended.

SEC. 6. That section fifty of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine (Thirty-fifth United States Statutes at Large, page one thousand and ninety-eight), is hereby amended so as to read:

Punishment for depredations on reservation or Indian lands.

"SEC. 50. Whoever shall unlawfully cut, or aid in unlawfully cutting, or shall wantonly injure or destroy, or procure to be wantonly injured or destroyed, any tree, growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both."

Trust allotments included.

That section fifty-three of said Act is hereby amended so as to read:

Punishment for not extinguishing fires on reservations or Indian lands. Vol. 35, p. 1098, amended.

"SEC. 53. Whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or upon any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall, before leaving said fire, totally extinguish the same; and whoever shall fail to do so shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

Trust allotments included.

Indian reservations. Sales of timber on unallotted lands in.

SEC. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided*, That this section shall not apply to the States of Minnesota and Wisconsin.

Proviso. Exception.

Sales of timber on trust allotments.

SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

Lands in severalty to Indians. Vol. 24, p. 389, amended.

SEC. 9. That section three of the Act entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,"

1121

UNITED STATES
DEPARTMENT OF THE INTERIOR
Washington

Promise
Lavender
Flanery
MS White

Order No. 2342

FROM SOLICITOR
JUL 1 - 1947
FOR SIGNATURE

CODE OF FEDERAL REGULATIONS
TITLE 25 — INDIANS

CHAPTER I, OFFICE OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR
SUBCHAPTER Q — LEASES AND PERMITS ON RESTRICTED INDIAN LANDS
PART 171 — LEASING OF INDIAN ALLOTTED AND TRIBAL LANDS
FOR FARMING, GRAZING, AND BUSINESS

5-6
Leases -
Negotiation

Section 171.4 is amended to read as follows:

171.4 Leasing privilege. Notwithstanding any provisions of this Part to the contrary, all adult Indians may negotiate farming and grazing leases on restricted Indian land owned by them or by their minor children. The rentals due under leases so negotiated shall be paid by the lessees of the land directly to the adult owners of the land or to the parents of the minor owners of the land except when the leases approved by the Superintendent or other officer in charge of the reservation provide otherwise. This privilege is revocable by the Superintendent or other officer in charge of the reservation at any time the individual Indian proves himself incompetent or irresponsible in the exercise of the privilege.

Authority: Issues under authority of R. S. 161; 5 U.S. C. 22; Sec. 1, 31 Stat. 229; 25 U. S. C. 395; Sec. 4, 36 Stat. 856; 25 U. S. C. 403; Sec. 1, 41 Stat. 1232; 25 U. S. C. 393.

Regulations

JUL - 1 1947

William E. Warne
Asst. Secretary of the Interior.

copy in
1-15 dist.
5-6 - Leases -
admin

NA RG48 SOI, CCF 1937-53, 5-6 General, Box 3523, Leases-Regulations

Copy for Secretary's [illegible]

Defendants' Exhibit No.9
Motion for Partial S/J
Historical Accounting

REPRODUCED AT THE NATIONAL ARCHIVES

987

REGULATIONS COVERING THE LEASING OF
ALLOTTED INDIAN LANDS FOR FARMING
AND GRAZING PURPOSES.

JUL -1 1916

The policy of the Government in the General Allotment Act was to give each Indian a tract of land which he could call his own, in which he would feel a personal interest, and from the cultivation of which, by the labor of his own hands, he might gain a subsistence and at the same time acquire the arts of civilization. To permit the indiscriminate leasing of these allotments would defeat the purpose for which they were made.

Appreciating that there would be cases in which the allottees could not themselves make beneficial use of their lands, and should therefore be permitted to lease their individual holdings, the Congress has, at various times, enacted legislation authorizing the leasing of individual allotments. The purport of these laws--Acts of February 28, 1891 (26 Stat. L., 794); August 15, 1894 (28 Stat. L., 305); June 7, 1897 (30 Stat. L., 85); May 31, 1900 (31 Stat. L., 229), and May 18, 1916 (Indian Appropriation Act Fiscal Year 1917, Public No. 80)--was that whenever it should be made

To Secretary

JUN 30 1916

For signature

DEPT. OF THE INTERIOR
JUN 30 1916
SECY'S OFFICE

NA RG48 SOI, CCF 1907-36, 5-6 General, Box 1438, Leases-Regulations

Defendants' Exhibit No.10
Motion for Partial S/J
Historical Accounting

REPRODUCED AT THE NATIONAL ARCHIVES

to appear to the Secretary of the Interior that by reason of age, disability, or inability, any allottee could not personally and with benefit to himself occupy or improve the allotment or any part thereof, the same might be leased under regulations to be prescribed by the Department for not exceeding three years for grazing purposes, and five years for farming, mining and business purposes.

The Act of March 3, 1909 (35 Stat. L., 783), permits the leasing of lands allotted to Indians except to members of the Five Civilized Tribes and Osage Indians in Oklahoma by the allottees for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior.

The broadest provision of law with respect to leasing of allotted lands is that contained in Section 4 of the Act of June 25, 1910 (36 Stat. L., 855):

> That any Indian allotment of any Indian held under a trust patent may be leased by the allottee for a period not to exceed five years, subject to and in conformity with such rules and regulations as the Secretary of the Interior may

REPRODUCED AT THE NATIONAL ARCHIVES

The regulations prescribed to govern the leasing of allotted lands for mining purposes are printed in a separate pamphlet which may be had on request.

As but few cases will arise wherein it is desirable to lease allotted lands for business purposes, no special regulations will be prescribed to govern such leases. The form to be used should follow as closely as conditions will warrant that prescribed in connection with farming and grazing leases. No business leases should be approved until authority therefor has first been obtained from the Commissioner of Indian Affairs.

Allottees should be encouraged to go upon their allotments and establish homes and work the lands either themselves or by hired help rather than to depend for a livelihood upon the small rentals received. Leasing should be discouraged, but to govern cases in which it seems to be expedient to make leases, the regulations hereinafter set forth are prescribed to govern the leasing of allotted Indian lands for farming and grazing purposes only, and are not applicable to the Five Civilized Tribes, allotments within the Osage Reservation, and allotments under the supervision of the Seneca Indian School, all in Oklahoma.

REPRODUCED AT THE NATIONAL ARCHIVES

REGULATIONS.

1. All leases shall be executed in quadruplicate on Form 5-180.

2. It is not intended that Indians shall lease their allotments held under trust patents if they can make beneficial use thereof, either personally or by hired help. In considering who may lease, Superintendents must take into consideration the question of whether the allottee cannot personally occupy or improve his allotment or any part thereof either by reason of age, disability, inability, or being employed in some gainful occupation.

3. Any Indian allottees who may be deemed by the Commissioner of Indian Affairs to have the requisite knowledge, experience and business capacity to negotiate lease contracts, may make their own contracts for leasing their lands and the lands of their minor children for farming and grazing purposes, and collect the rentals arising under such leases. These leases shall be made on Form 5-180 and shall be subject only to the approval of the Superintendent. Applications for this privilege shall be made on Form 5-180c

The privilege of leasing inherited lands under this section shall be exercised only when all the adult heirs

REPRODUCED AT THE NATIONAL ARCHIVES

have been declared competent: Provided, That the inherited interest of a minor shall be leased in accordance with Section 8 of these regulations.

4. Indians not deemed competent to manage their own affairs in this respect shall have their leases made in the office of the Superintendent or other officer in charge, and such officer shall negotiate and approve such leases. It must be understood, however, that leases covering allotments of adults shall be made only with the consent of such adults unless the allottees are mentally incompetent. The Superintendent or other officer in charge shall collect all rentals arising under leases negotiated by him and where such rentals are payable in cash, they shall be deposited to the credit of the lessors and paid out in accordance with the regulations in force regarding individual Indian moneys.

5. As a general rule leases for a money consideration alone shall be limited to a term of one year for grazing purposes, and to two years for farming or farming and grazing, but where there is other consideration in addition to money, such as placing substantial improvements on the

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land, leases may be made for two or three years, respectively, and in cases of an exceptional character, where the interests of the allottee will be advanced, leases may be made for three years for grazing, and for five years for farming, when valuable improvements are to be placed on the premises. Provided, however, that leases of allotted lands which are arid but susceptible of irrigation may be made for a period not exceeding ten years, where valuable improvements are to be erected in addition to a money consideration.

6. One of the principal purposes in making a lease on an Indian allotment should be to provide the land with such permanent improvements as will best serve the needs of the allottee when occupying the land and achieving self-support through its use, such as buildings, fences, wells, reducing the land to a proper state of cultivation, seeding alfalfa, planting orchards, etc. Each lease shall provide for some specific improvement unless the land has all the improvements which can be used beneficially and it shall also provide for keeping up repairs to improvements. Leases on behalf of allottees who cannot be expected to personally utilize the lands, such as married women and those who are mentally or physically incompetent, shall provide for such improvements only as will enhance or maintain the market or rental value of the lands. Leases on behalf of minors who will be expected to occupy the lands later

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should, if possible, be made to provide all improvements necessary to a home by the time the minor can be expected to personally need them. Where a house is to be built, and where the rental value is sufficient to permit, it shall be of not less than three rooms, with good foundation, well constructed, painted, etc. The lease shall provide fixed dates when the several improvements shall be completed, which dates shall be, when practicable, not less than one year prior to its expiration, and in case of one-year leases, at such dates as will permit of preventing removal of crops or other property if such is necessary to enforce the terms of the lease. All leases including improvements as part of rental shall provide that such improvements shall be inspected by the Superintendent or a competent employee when completed.

7. Leases of inherited lands in cases where the heirs have not been officially determined shall be made by the Superintendent or other officer in charge, and shall as a rule be limited to periods of one year. The rentals shall be deposited to the credit of the estate of the deceased allottee, and disbursed to the heirs after they shall have been officially determined.

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8. Leases covering allotments of non-resident Indians, of Indians who are non compos mentis, and of minors shall be made by the Superintendent in charge unless authority has been granted to the parents or guardians to lease the minors' allotments. Leases of minors, however, shall not extend beyond the date such minors attain their majority. The age of majority shall be determined in accordance with the laws of the state in which the allotment is situated. Leases made on behalf of non-resident allottees shall be for short periods.

9. Every able-bodied male Indian to whom an allotment of 80 acres or more has been made, whether deemed competent or not to manage his own leasing affairs, shall reserve, as a rule, 40 acres which will best serve his needs for home and agricultural purposes as a homestead to be farmed and worked by himself, and this shall not be leased for either farming or grazing purposes, except in case the allottee earns his livelihood in some other gainful occupation. In case such allotment is less than 80 acres there should be reserved, as a rule, one-half of the whole amount, and in no case less than one-fourth; the character of the land and the ability of the allottee to utilize it

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to be taken into account. This rule shall apply to female allottees who are heads of families and in whose family is one or more able-bodied members who can properly farm or otherwise use the land.

10. As a rule no person, firm or corporation shall be permitted to lease more than 640 acres of ordinary agricultural lands for farming purposes, not to exceed 160 acres under irrigation, and not to exceed four full allotments where the lands must be farmed under intensive methods and are allotted in amounts of not to exceed ten acres per individual.

These maximum limits will not be strictly applied where local conditions justify waiver of the rule, but in no case shall the rule be waived except on authority previously obtained from the Commissioner of Indian Affairs.

No limitation is made on the amount of land which may be leased by any one person, firm, or corporation for grazing purposes.

Leases for farming purposes are preferred to leases for grazing purposes where the lands are at all fit for farming.

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11. No negotiation for a lease shall be entered into more than seven months prior to the date upon which the lease is to become operative. Violation of this regulation will subject the lease to disapproval.

12. Unless the rental is paid in advance, all leases made under these regulations shall be accompanied by a bond guaranteeing the payment of all rents and the performance of all covenants and agreements named in the indenture, signed by two or more individual sureties or by a corporate surety authorized to act as sole surety on bonds running to the United States. The form of bond is included in the lease form.

13. If the land to be leased cannot be definitely described by legal subdivisions or by metes and bounds, the lease shall be accompanied by diagram indicating the tract.

14. The lease and bond shall be executed in accordance with the requirements indicated on the forms with necessary attesting witnesses, and acknowledged before the Superintendent or other officer in charge of the land or before an officer authorized to administer oaths.

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15. All parts of the executed lease shall be filed in the Office of the Superintendent in charge of the allotment within thirty days after execution. If found to conform to the law and to these regulations, and to be for the best interest of the lessor, the Superintendent or other officer in charge shall indicate on the lease his approval thereof. It is not to be understood, however, that it is mandatory upon the Superintendent or other officer to approve the lease. If made by an allottee authorized to negotiate his own leases and collect the rentals, one part of the approved instrument shall be delivered to the lessor, one part to the lessee, one part to the Indian Office, and one part kept in the Agency files. If the instrument is negotiated in the Office of the Superintendent and provides for the payment of the rentals to the Superintendent, one part of the approved lease shall be delivered to the lessee, one part retained in the Agency files, and two parts forwarded to the Indian Office, one of which will be transmitted to the Auditor, and the parts forwarded to the Indian Office shall be accompanied by a liability card (Form 5-395).

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Special Provisions for Certain Reservations.

16. The Act of May 31, 1900 (31 Stat. L., 246), authorizes allottees on the Yakima Reservation, Washington, to lease their unimproved lands for agricultural purposes for not exceeding ten years under regulations to be prescribed by the Secretary of the Interior.

The Act of March 1, 1907 (34 Stat. L., 1015, 1034), authorizes the Indians on the Fort Belknap Reservation, in Montana, to lease allotted and tribal lands, not to exceed 20,000 acres, for a term not exceeding ten years for the culture of sugar beets and other crops in rotation under regulations to be prescribed by the Secretary of the Interior.

The Act of April 30, 1908 (35 Stat. L., 70, 95), permits the leasing of allotted lands on the Uintah and Uncompahgre Reservations, in Utah, susceptible to irrigation, by the Secretary of the Interior under such regulations as he may establish for not to exceed ten years with the consent of the allottee.

The Act of April 30, 1908, also permits the leasing of tribal or allotted lands on the Shoshone or Wind River

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Reservation, in Wyoming, susceptible of irrigation, for not exceeding twenty years in the discretion of the Secretary of the Interior, and under such regulations as he may prescribe. Instructions have heretofore been given the Superintendent regarding the leasing of these lands, which will remain in force until specifically revoked.

The Act of May 18, 1916, making appropriation for the Indian Bureau for the fiscal year ending June 30, 1917 (Public No. 80), permits the leasing for a period not exceeding ten years of allotted lands which are arid but susceptible of irrigation where the allottee by reason of old age or other disability cannot personally occupy or improve his allotment or any portion thereof. This provision of law should be administered under the foregoing rules and care should be exercised in making leases under this Act.

17. No leases shall be made for terms in excess of five years under the special laws cited in the preceding section until prior authority therefor has been obtained from the Commissioner of Indian Affairs.

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The purpose of these regulations is to simplify the requirements with respect to leasing of Indian lands for farming and grazing purposes, and all prior regulations contrary hereto are hereby revoked.

(Sgd) E B. Meritt

Assistant Commissioner.

APPROVED: JUL -1 1916

(Sgd.) BO SWEENEY.

Assistant Secretary.

Bureau of Indian Affairs

Division of Real Estate Services

Probates
A Training Manual in Real Property Management

Defendants' Exhibit No.11
Motion for Partial S/J
Historical Accounting

Probates

A Training Manual in Realty Property Management

Prepared by

Bluewing Enterprises Limited
P.O. Box 1026
Pierre, South Dakota 57501

BIA Contract No. A00C14201388

for

U.S. Bureau of Indian Affairs
Aberdeen Area Office
Aberdeen, South Dakota
and
U.S. Bureau of Indian Affairs
Washington, D.C.

January, 1984

This training manual has been reviewed, corrected and updated by the Bureau of Indian Affairs, Washington, D.C.

September, 1985

Preparation and Submission - Data for Heirship Finding and Family History

To meet the requirements of 43 CFR 4.210 the Superintendent is responsible for filing Form OHA-7, (Handout I) to the Administrative Law Judge within 90 days after the death is reported.

Form OHA-7. The instructions for preparing Form OHA-7, Data for Heirship Findings and Family History appear in Handout I.

In addition to Form OHA-7, information is also required concerning the estate inventory. A format for this inventory appears in Handout I.

(At this point the instructor should review the instructions with the class and as an exercise explain the importance of the information).

Inventory and Appraisal of the Estate. As the probate order serves to identify the land interest passing to the heirs, an accurate inventory of these lands is necessary. The accurate preparation of this inventory is one of the most important tasks of the Realty staff. The inventory lists, by tract number, the legal description and the share owned by the estate in fractions and decimal equivalency and the estimated value of each share. In those cases where the tribe is exercising the option to purchase, value based on appraisal is used. The inventory may also list the money in the IIM account at the time of death.

As a result of Section 207 of the Indian Land Consolidation Act of January 17, 1983, amended October 30, 1984 (25 U.S.C.A. 2206), a fractional interest in any tract of trust or restricted land within a tribe's reservation or jurisdiction will escheat to such tribe, if the interest is two percent or less of the total and is incapable of earning $100 in any one of the five one-year periods after the owner's death. Additional provisions appear in Interim Instructions of January 25, 1985. See Handout IV. (For the period from January 17, 1983, through October 29, 1984, other provisions appear in Interim Guildelines of March 2, 1983. See Handout V.) At the time of this writing (September, 1985), the constitutionality of Section 207 is under question in federal court.

It is the responsibility of the Agency submitting the estate for probate to make sure all inventories including interests at other reservations are included in the initial submission.

Claims. Claims of creditors are allowed against the estate under conditions outlined in 43 CFR 4.250-251. It is necessary to provide an opportunity for such claims to be resolved if properly filed before the close of the first probate hearing. The creditor can submit the claims to either the Agency or at the hearing. The Agency's role is often to examine all such claims for form. In his role as Administrator the Superintendent should evaluate such claims for accuracy. The Agency is to submit the claims to the Administrative Law Judge. (Instructor should refer to the above referenced 43 CFR).

NATIONS WITHIN A NATION

Historical Statistics of American Indians

PAUL STUART

GREENWOOD PRESS
New York • Westport, Connecticut • London

Defendants' Exhibit No.12
Motion for Partial S/J
Historical Accounting

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1

Introduction, Scope, and Purpose

In this volume, an attempt has been made to gather a variety of statistics pertaining to American Indian groups in the United States. Topics such as land holdings, population, migration, vital statistics, federal government activity, health care and education, occupations, and the use of natural resources were covered. It was the intention to provide in one volume data relating to a variety of topics along with suggestions for locating additional sources of data and for further reading. It would be impossible to include in one volume all of the available statistical data on American Indians. Consequently, the data that have been gathered will be a beginning point for most investigations; it is hoped that the additional sources and suggestions for further reading will enable the reader to pursue topics on his or her own.

Historical statistics pertaining to American Indians present the investigator with a bewildering inconsistency. They are found in a variety of locations and reflect differing units of measurement and categories of analysis. Every effort was made to reduce inconsistencies and to give the reader an idea of the shortcomings of the statistical data that have been included. Accuracy is always a serious problem with statistical data, particularly with data pertaining to American Indian groups. In part, this is because of cultural differences between the government officials and others who gathered the data and the subjects of the data, the American Indian people themselves. Because of this cultural difference, those responsible for gathering data—government agents, census enumerators, and others—may not have known of the occurrence of events, or the occurrence of events may have been hidden from them. In addition, some of those responsible for gathering data had interests in distorting

the data to serve their own purposes. For example, Indian agents in the nineteenth century had an interest in appearing to be successful at accomplishing the government's goals; some may have altered reports of school attendance or "progress in civilization." Contracts for the provision of goods were based upon the number of Indians located at any specific agency; some agents exaggerated the number of Indians living at the agency for that reason. For most of the sources of data reported in this book, various estimation procedures were used to fill in for incomplete data. Every effort has been made to indicate the limitations of the data. While providing any data based on estimation or approximation may be questioned, my approach has been to try to provide the best available data with an indication of its shortcomings. As suggested by Henry Dobyns in *Native American Historical Demography*, "one either uses such data as may be available and learns something, however inadequate, or abjures such data and learns nothing."[1]

Many readers will be struck by the relative absence of statistical data from the nineteenth century and the almost complete absence of data from the eighteenth century and earlier. This is not to suggest any evaluation as to the importance of various historical periods. It is an indication of the author's assessment of the quality of the available data. Many series of nineteenth-century data were rejected because of concerns about the accuracy of the available data. Even for those nineteenth-century statistics that are used, particular caution must be exercised. Statistical data-gathering procedures, including the sophistication of estimation procedures, as well as the general volume of statistical production, increased enormously during the twentieth century in Indian affairs, as in many other areas. Consequently, the reader will discern in this compilation a decided "tilt" toward twentieth-century topics. The emphasis on the twentieth century is not entirely fortuitous, however. In recent years, twentieth-century Indian history has become an increasingly exciting and stimulating field. In 1976, Vine Deloria, Jr., called for increased attention by historians to Indian affairs in the twentieth century. That call has been echoed by Francis Paul Prucha and others, and today there is a large and growing literature on Indian affiars in the recent past.[2] Historians of the twentieth century will need to make extensive use of statistical data, not only because it is more readily available, but also because of the increasing complexity of events, the increasing mobility of the Indian population, and the increasingly diverse environments of American Indians, who are found today in urban areas, on reservations, and in the historic Indian areas of Oklahoma and Alaska.

Major sources for the statistical data compiled herein include publications of the Bureau of the Census, and publications of federal government agencies such as the Bureau of Indian Affairs and the Indian

American Indian Reservations and Trust Areas

Compiled and Edited by
Veronica E. Velarde Tiller
Tiller Research, Inc.

Albuquerque, NM

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Economic Development Administration
U. S. DEPARTMENT OF COMMERECE

1996

Defendants' Exhibit No.13
Motion for Partial S/J
Historical Accounting

problems are referred to hospitals in Coeur D'Alene. Students attend the local public school system.

Nez Perce Reservation

Federal reservation
Nez Perce
Nez Perce, Clearwater, Idaho, Latah, and Lewis counties, Idaho

Nez Perce Tribe of Idaho
P.O. Box 305
Lapwai, Idaho
(208) 843-2253
Fax: 843-7354

Total area	750,000 acres
Tribally owned	85,248
Allotted	48,298 acres
Federal trust	36,950 acres
Non-Indian	664,752 acres
Per capita income	$6,102
High school graduate or higher	70.6%
Bachelor's degree or higher education	07.1%
Total labor force	743
Unemployment rate	26.1%
On-reservation Indian population	1,595
Total reservation population	16,159
Tribal enrollment	3,000

LOCATION AND LAND STATUS

The Nez Perce Reservation covers approximately 750,000 acres in north-central Idaho and encompasses five counties. Several small towns are located within the boundaries of the reservation; Lapwai, on the reservation's western edge, serves as the tribal headquarters and is home to the largest population of tribal members. Kamiah, on the reservation's eastern boundary, contains the second highest concentration of tribal members and provides social services through the Wa A'Yas Community Building. Other towns within the reservation, including Orofino, Kooskia, and Craigmont, are predominantly non-Indian.

The Treaty of June 11, 1855 established a reservation of some 7.5 million acres. However, the United States reduced the size of the Nez Perce Reservation to 750,000 acres in 1863 after the discovery of gold in the region. Today about twelve per cent of the land within the reservation is owned by the Nez Perce Tribe or tribal members.

CULTURE AND HISTORY

The Nez Perce are a Sahaptian speaking tribe linked culturally and linguistically to other Northwestern tribes including the Yakama, Umatilla, Klickitat, and Wallawalla. The name "Nez Perce" (French for "pierced nose") was given to the tribe by the Lewis and Clark Expedition in 1805, that the expedition applied this term to the tribe is curious as they did not traditionally practice nose piercing. The Nez Perce call themselves "Ni Mii Pu" meaning literally "The People."

Prior to the mid-19th century, the Nez Perce roamed throughout the vast Columbia Basin practicing a subsistence pattern based on hunting, gathering, and fishing. The arrival of the horse during the early 18th century substantially increased the tribe's mobility and allowed parties to venture eastward onto the Great Plains to hunt buffalo.

Contact with the Lewis and Clark Expedition in 1805 precipitated an era of increasing contact with Euro-Americans. During the early 19th century, the Nez Perce were drawn into the economic orbit of British and American fur trade companies operating in the Northwest. An influx of settlers in the mid-19th century touched off fighting between the United States Army and numerous Northwestern tribes, including the Nez Perce. The Nez Perce signed a treaty on June 11, 1855 which ceded several million acres to the United States and set aside 7.5 million acres for the tribe as a reservation. A second treaty signed in 1863 reduced the reservation's size to 750,000 acres. Several Nez Perce bands refused to sign this treaty, most notably Chief Joseph's Wallowa Valley band. Another treaty in 1868, in tandem with the Dawes Severalty Act of 1887, led to the allotment of the entire reservation and the eventual loss of most tribal lands to non-Indians.

As with many other tribes, the Nez Perce have experienced a cultural renaissance during the past half century. A revival of traditional arts and crafts, dance, and religion has been ongoing since the 1940s. Today, the Nez Perce are involved in writing their own history and reviving the Nez Perce language. The tribe participates in the operation of the Nez Perce Cultural Museum at Spalding, Idaho where Nez Perce artisans sell cornhusk weaving, jewelry, and other crafts.

The tribe currently operates several tribally owned businesses including a tribal store, Nez Perce Limestone Enterprise, and Nez Perce Forest Products Enterprise. The Nez Perce Tribe is also involved in ongoing negotiations over Snake River water rights to guarantee the future appropriation of water for on-reservation agriculture.

GOVERNMENT

The Nez Perce Tribal Executive Committee, a nine member body elected at large, manages economic development, tribal social service programs, natural resources, and tribal investments. Committee members serve three-year terms with elections occurring annually.

The tribe rejected the provisions of the Indian Reorganization Act of 1934. The current constitution and bylaws were adopted on April 2, 1948.

ECONOMY

AGRICULTURE AND LIVESTOCK

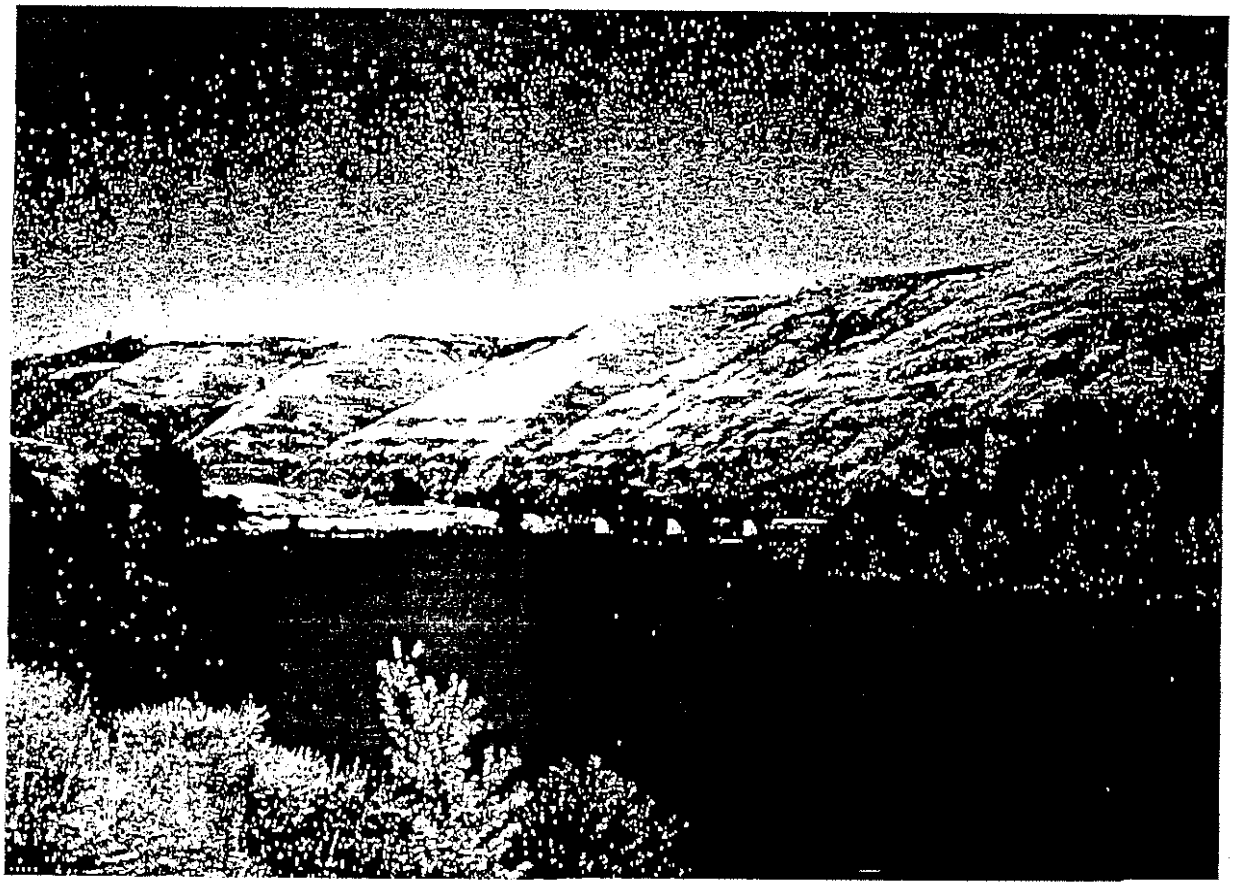
The tribe cultivates 37,639 acres of reservation land; wheat is the major crop. Other crops include barley, dry peas, lentils, canola, bluegrass seed, alfalfa, and hay. The tribe also raises some cattle and has an active program to revive the Appaloosa horse breed.

ECONOMIC DEVELOPMENT PROJECTS

Nez Perce Express I and II are tribally owned convenience/grocery stores which the tribe plans to expand into larger commercial centers. The Ahtwy Commercial Plaza is currently under construction near Lewiston, Idaho. The tribe is also considering a proposal to establish a PET plastics recycling plant on or near the reservation.

FORESTRY

The Nez Perce Forest Resource Management Program manages 40,203 acres of tribally owned timber land, harvesting approximately 7,000 MBF annually on a sustained-yield basis. The forest is primarily composed of mixed conifers. The Nez Perce



Clearwater River

Forest Products Enterprise conducts harvesting, marketing, and replanting of tribally owned timber.

GAMING

The Nez Perce Tribe is currently exploring the feasibility of gaming facilities on the reservation.

GOVERNMENT AS EMPLOYER

The tribe employs 227 persons. Among the federally administered programs on the reservation are the Indian Health Service, employing 23 persons; the Nez Perce National Park, employing 22 persons; and the Bureau of Indian Affairs, employing 51 persons.

MINING

Nez Perce Limestone Enterprise wholesales agricultural limestone and pulp lime to local fertilizer and chemical companies. The tribe currently has a mining plan to improve efficiency at the Mission Creek quarry, a high quality limestone deposit on the reservation.

TOURISM AND RECREATION

The tribe hopes to expand its involvement in the local tourism and recreation market. Currently the Nez Perce National Park, partially located on tribal land, attracts over 26,000 visitors annually. The tribe is presently developing a brochure which will present tribal stories about rock formations on the Snake, Clearwater, and Columbia rivers to tourists and will serve as a reservation road map for visitors. The tribe also plans to open an RV park, grocery, and motel as part of the Alt'Way Commercial Plaza project.

The Nez Perce Reservation lies in the proximity of several outdoor recreational areas including Hell's Canyon, Clearwater River, Clearwater National Forest, and the Nez Perce National Forest. Five Idaho state parks are also located near the reservation.

TRANSPORTATION

The Nez Perce Limestone Enterprise utilizes tribally owned trucks and contracted haulers.

INFRASTRUCTURE

U.S. Highways 12 and 95 run through the reservation. Commercial airlines serve Lewiston Airport, located in Lewiston, Idaho (10 miles east of the reservation). Several truck lines service the area via Lewiston including United Parcel Service, Pony Express, Federal Express, Quick Delivery, Broadway Package Service, and Viking. Camas Prairie, Union Pacific, and Burlington Northern railway services are available in Lewiston. Several freight barge companies operate out of the Port of Lewiston, including Lewiston Tidewater Barge Lines, Brix Maritime, and Gem Chip Trading Company.

COMMUNITY FACILITIES

Community centers are located in Lapwai and Kamiah. Electricity is provided to the reservation by Washington Water Power and Clearwater Power. Natural gas service is available through Washington Water Power. Groundwater wells provide water to the reservation. The reservation is served by U.S. West Communications and Northwest Communications.

The Indian Health Service operates clinics in Lapwai and Kamiah. Health care is also available at St. Joseph's and Tri-State Hospitals in Lewiston. In addition, there are five public schools, a tribal Head Start program, and the Nez Perce Tribal Employment and Training Department on the reservation.

70TH CONGRESS
1st Session

SENATE

DOCUMENT
No. 53

INDIAN AFFAIRS

LAWS AND TREATIES

VOL. IV

(LAWS)

COMPILED TO MARCH 4, 1927

COMPILED, ANNOTATED, AND EDITED

BY

CHARLES J. KAPPLER, LL. M.

OF THE BAR OF THE DISTRICT
OF COLUMBIA

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1929

Defendants' Exhibit No.14
Motion for Partial S/J
Historical Accounting

PUBLIC ACTS OF THE SIXTY-SIXTH CONGRESS, FIRST SESSION, 1919.

June 30, 1919. [H. R. 2480.] 41 Stat., 3.

CHAP. 4.—An Act Making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1920.

Indian Department appropriations.

Be it enacted by the Senate and House of Representative of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and in full compensation for all offices and salaries which are provided for herein for the service of the fiscal year ending June 30, 1920, namely:

Indian reservations.

SURVEYING AND ALLOTTING INDIAN RESERVATIONS (REIMBURSABLE).

Surveying, allotting in severalty, etc. 24 Stat., 388, vol. 1, 33.

For the survey, resurvey, classification, and allotment of lands in severalty under the provisions of the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page three hundred and eighty-eight), entitled "An Act to provide for the allotment of lands in severalty to Indians," and under any other Act or Acts providing for the survey or allotment of Indian lands, $10,000, to be repaid proportionally out of any Indian moneys held in trust or otherwise by the United States and available by law for such reimbursable purposes: *Provided*, That no part of said sum shall be used for the survey, resurvey, classification, or allotment of any land in severalty on the public domain to any Indian, whether of the Navajo or other tribes, within the State of New Mexico and the State of Arizona, who was not residing upon the public domain prior to June 30, 1914.

Repayment.

Proviso. Use in New Mexico and Arizona restricted.

Irrigation on reservations.

IRRIGATION ON INDIAN RESERVATIONS (REIMBURSABLE).

Construction, maintenance, etc., of projects.

For the construction, repair, and maintenance of irrigation systems, and for purchase or rental of irrigation tools and appliances, water rights, ditches, and lands necessary for irrigation purposes for Indian reservations and allotments; for operation of irrigation systems or appurtenances thereto, when no other funds are applicable or available for the purpose; for drainage and protection of irrigable lands from damage by floods or loss of water rights, upon the Indian irrigation projects named below:

Allotments to districts.

Irrigation district one: Sand Creek and Agency projects, Klamath Reservation, $20,000; Round Valley Reservation, California, $2,000; Colville Reservation, $10,000; Total, $32,000.

Irrigation district two: Moapa River, $1,200; Shivwits, $1,200; Walker River, $8,500; Western Shoshone, $5,000; total, $15,900.

Irrigation district three: Tongue River, Montana, $2,000.

Irrigation district four: Agua Caliente Reservation, $3,000; Ak Chin, Maricopa Reservation, $3,200; Big Pine Reservation, $3,500; Grindstone Creek Reservation, $1,300; La Jolla Reservation, $6,000; Martinez pumping plant, $2,000; Morongo Reservation, $1,600; Owens Valley Reservation, $1,000; Pala Reservation, $4,500; Rincon Reservation, $3,000; miscellaneous projects, $7,600; total, $36,700.

Irrigation district five: Southern Ute Reservation, Pine River project, $8,000; San Juan Reservation, $20,000; New Mexico Pueblos, $11,000; Zuni Reservation, $18,200; Navajo and Hopi miscellaneous projects, including Tes-nos-pos, Moencopi Wash, Captain Tom Wash, and Red Lake, $18,200; total, $75,400;

Former grants, etc., not affected.
34 Stat., 1036, 1039, vol. 3, 287.

no additional names shall be added to said rolls: *Provided*, That nothing herein shall be construed to repeal the grants of land made by the Act of March 1, 1907, to religious institutions and to the State of Montana for school purposes, nor repeal the authority of the Secretary of the Interior to dispose of any land within said reservation suitable for town-site purposes, as provided by that Act: *Provided*, That the State of Montana in making indemnity school selections shall be confined to nonmineral and nonirrigable lands: *Provided further*, That the provisions of the Act of March 1, 1907, which require a division of the funds received from the sale of the surplus lands immediately upon the date of the approval of the allotments of land are hereby repealed: *Provided further*, That the lands within said reservation, whether allotted, unallotted, reserved, set aside for town-site purposes, granted to the State of Montana for school purposes, or otherwise disposed of, shall be subject to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country until otherwise provided by Congress: *Provided further*, That any and all minerals, including coal, oil, and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly: *Provided*, That the lands containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe: *And provided further*, That allotments herein provided for shall be made under such rules and regulations as the said Secretary may prescribe, and trust patents shall be issued therefor as provided by the aforesaid Act of March 1, 1907, except as to the homestead hereinbefore mentioned.

State indemnity school selections.

Division of receipts.

Intoxicants prohibited on all lands.

Reservation of all minerals.

Leases permitted.

Trust patents for allotments.

Nebraska.

NEBRASKA.

Genoa School.

SEC. 11. For support and education of four hundred Indian pupils at the Indian school at Genoa, Nebraska, including pay of superintendent, $82,000; for general repairs and improvements, $10,000; in all, $92,000: *Provided*, That the $2,400 and the $3,000 appropriated by the Acts of March 2, 1917 (Thirty-ninth Statutes at Large, page 980), and May 25, 1918 (Fortieth Statutes at Large, page 574), for purchase and erection of a steel water tank are hereby reappropriated.

Proviso.
Water tank.
Reappropriation.
39 Stat., 980; ante, 113; 40 Stat., 574, ante, 160.

Nevada.

NEVADA.

Support, etc., of Indians in.

SEC. 12. For support and civilization of Indians in Nevada, including pay of employees, $18,500.

Carson City School.

For support and education of three hundred and fifty Indian pupils at the Indian school at Carson City, Nevada, including pay of superintendent, $75,750; for general repairs and improvements, $10,000; for enlarging and improving sewerage system, $8,000; for enlarging and improving irrigation system and placing additional land under cultivation, $5,000; in all, $98,750.

Pyramid Lake Reservation.
Irrigation system.

For maintenance and operation of the irrigation system on the Pyramid Lake Reservation, Nevada, $5,400, reimbursable from any funds of the Indians of this reservation now or hereafter available.

New Mexico.

NEW MEXICO.

Albuquerque School.

SEC. 13. For support and education of four hundred and fifty Indian pupils at the Indian school at Albuquerque, New Mexico, and for pay of superintendent, $92,250; for general repairs and improvements, $10,000; in all, $102,250.

LAW OFFICE
ALAN L. BALARAN, P.L.L.C.
ADMITTED IN DC AND MD

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December 2, 2002

VIA FACSIMILE
Amalia Kessler
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division
Commercial Litigation Branch
P. O. Box 875
Ben Franklin Station
Washington, DC 20044-0875

RE: Cobell v. Norton Civil Action No. 96-1285
Records Movement

Dear Ms. Kessler:

This is in response to your letter dated November 27, 2002 wherein you memorialized our "agreement" to modify the current freeze on the movement of records within the agency. I must preliminarily note that, while we did discuss a pilot program that would allow the agency to begin the movement of "inactive" records, I am without authority to unilaterally "agree" to any proposal without the consent of all parties. I can, however, in accordance with my order of reference, monitor the movement of trust records and review any plans by the agency that may impact those records. After reviewing your proposed plan, I believe that the record in this case amply supports both the need to move "inactive" records as well as the need to supervise that movement.

As you are aware, in April 2002, it was brought to the Court's attention that senior officials at the Office of the Special Trustee and the Office of Trust Records ("OTR") were planning to move 32,000 boxes of Indian trust records from Albuquerque, New Mexico to a Federal Records Center in Lee's Summit, Missouri without regard for the consequences. See Emergency Report of the Special Master Regarding Defendant's Proposed Relocation of Records to the Lee's Summit Federal Records Center. Notwithstanding the blatant attempt by Interior's most senior trust officials to orchestrate such a move without benefit of consultation, the Court denied plaintiffs' motion for a preliminary injunction because it was "satisfied that the Special Master can closely monitor the defendants' activities and seek further action by the Court if it is needed on an interim basis, until resolution of the pending contempt and receivership issues." Court Opinion (May 17, 2002) at 2. The Court's decision was, to a great degree, informed by Deputy Secretary Steven Griles' assurance that "the Special Master [will be] timely informed about retention and preservation of trust records, and that the Special Master will have

Defendants' Exhibit No.15
Motion for Partial S/J
Historical Accounting

every opportunity to resolve concerns prior to the Department taking any irreversible actions." Id. at 1.

Much has changed since the events that led to the May 17, 2002 Opinion. OTR, under the leadership of Acting Director Ethel Abeita and Assistant Deputy Secretary Abraham Haspell, has undergone a dramatic improvement and is focused for the first time on serving the needs of the individual beneficiaries whose trust legacy hinges on the accuracy of the information contained in the records in issue. OTR is, however, only one organization and Ms. Abeita and Mr. Haspell can assume only so many responsibilities. While it is not disputed that a freeze on the movement of records can adversely impact the very beneficiaries it was meant to assist, these two individuals can not realistically oversee an agency that historically has little difficulty ignoring directives from the Court – much less those from senior officials. One glaring example of such recalcitrance was the June 12, 2002 draft memorandum generated by the former OTR Acting Director who defiantly stated that she would sanction the movement of records without prior approval.

It is therefore imperative that I act in strict accordance with the Court's May 17, 2002 directive and "continue to monitor closely this matter to ensure that all trust records are preserved and protected, as this Court ordered in 1996." Court Order (May 17, 2002) at 2. I believe your proposed plan is in keeping with the spirit of that Order and I will recommend that it be implemented with the caveat that it include no sunset provision. While it is anticipated that the proposed plan serve as a "pilot" program, it would be premature to yield responsibility within such a short time period. A more prudent course of action would be that, at the end of two months, counsel for both parties and I review the agency's efforts and decide whether to reduce, eliminate or maintain oversight over the movement of records.

Thank you.

Sincerely,

Alan L. Balaran
SPECIAL MASTER

cc: Dennis Gingold, Esq.

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Disposition or Disposal?

An Investigation into the Historical Disposition

of

Indian Trust Fund Records

in

Eloise Pepion Cobell, et al. v. Bruce Babbitt, et al.
Civil No. 96-1285
in the United States District Court for the District of Columbia

Prepared by

William A. Morgan, M.Phil.

March 2000

[redacted]

EY0002325

Defendants' Exhibit No.16
Motion for Partial S/J
Historical Accounting

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Retention or Destruction?
An Investigation into the Historical Disposition of Indian Trust Fund Records

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Disposition or Disposal?

An Investigation into the Historical Disposition of Indian Trust Fund Records

I. Introduction.

On September 3, 1999, William Morgan and Edward Angel met with government attorneys to discuss how Morgan, Angel and Associates could assist in defending the United States in *Eloise Pepion Cobell, et al. v. Bruce Babbitt, et al.*, a case concerning allegations of mismanagement of American Indian trust funds. Government attorneys subsequently asked Morgan Angel to prepare a three-part examination of the following topics:

(1) the history of Individual Indian Money (IIM) Accounts;
(2) the history of Federal audits and investigations of the IIM system; and
(3) the history of destruction of "Useless Papers" of the Federal government.

A contract addressing these matters was approved by the Department of Justice on November 12, 1999. The first two matters of government concern are the subject of a separate report by Dr. Edward Angel. The matter of "useless papers," a term fabricated by Congress in 1889 to describe documents having neither permanent value nor historic interest, will be discussed herein. This discussion is pursuant to Paragraph 19 of the First Order for the Production of Information filed November 27, 1996, by the United States District Court for the District of Columbia. This Order called for the production of

> all documents, records, and tangible things which embody, relate to, or refer to the IIM accounts of the five named plaintiffs or their predecessors in interest.

[redacted]

The Morgan Angel investigation into this matter included the examination of records in several repositories in the Washington, DC area, including the following:

- The Library of Congress
- The Martin Luther King Memorial Library
- The Historical Society of the District of Columbia
- the Department of Interior Natural Resources Library and Law Library
- the Department of the Treasury Library
- the General Accounting Office Law Library and Technical Library
- the National Archives: Records of the
    - Bureau of Accounts, Department of the Treasury (in progress)
    - General Records of the Department of the Treasury
    - Accounting Officers of the Department of the Treasury
    - Treasurer of the United States
    - General Accounting Office (in progress)
    - United States Senate
    - United States House of Representatives
    - Joint Committees of Congress
    - Office of the Secretary of the Interior
    - Bureau of Indian Affairs (in progress)
    - National Archives and Records Administration

As of February 15, 2000, this examination is incomplete.

In order to examine the historical record for information relating to the destruction of "useless papers," it is helpful first to understand the manner in which the papers of the United States have been stored since the beginning of the Republic, that is, how records have been treated, the conditions and quality of their storage, and how the government has determined when papers become useless. This study, therefore, looks at both record keeping and record destruction, particularly in those agencies directly responsible for the administration of IIM accounts. The reader should be warned, however, that there is ambiguity in certain terms selected by the government to describe the records process. The term "disposition" refers to the retirement of files to a Federal Records Center, or to any facility other than the originating agency. The term "disposal" refers to the elimination of records by destruction. From time to time the terms have been used

interchangeably. A request for authority to "dispose" of records generally means that an agency has concluded that the records are of no further value and should be destroyed.[1]

II. The Federal Government and Historical Record Keeping.

The creation, collection, and storage of documents by the executive departments of the Federal government has been a subject of varying interest since the founding of the Republic. The First Continental Congress decided at its first meeting in 1774 that it would be necessary to preserve the records of its debates and deeds and proceeded to produce what would be 490 bound volumes, that is, the archives of the United States from 1774 to 1789.[2] Thomas Jefferson was one who believed in preserving the documentary heritage of the United States. In the early years Jefferson wrote:

> Time and accident are committing daily havoc on the originals deposited in our public offices: the late war has done the work of centuries in this business: the lost cannot be recovered; but let us save what remains; not by vaults and locks, which fence them from the public eye . . . but by such a multiplication of Copies as shall place them beyond the reach of accident.[3]

In 1810 a Congressional Committee concerned with the "Ancient Public Records and Archives of the United States" reported that records were "in a state of great disorder and exposure; and in a situation neither safe nor convenient nor honorable to the nation." Legislation was drafted and the Archives Act of April 28, 1810 appropriated funds for the construction of "as many fireproof rooms as shall be sufficient for the convenient deposit

[1] 44 U. S. C., chapters 29 and 33 [MA-1351].
[2] First Annual Report of the Archivist of the United States for the Fiscal Year Ending June 30, 1935 (Washington: Government Printing Office (GPO), 1936), at 1 [MA-553].
[3] Jefferson as quoted in H. G. Jones, The Records of a Nation: Their Management, Preservation, and Use, with an introduction by W. C. Grover (New York: Atheneum, 1969), at 4 [MA-335].

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of all the public papers and records of the United States, belonging to, or in the custody of the state, war, or navy departments."[4]

By mid-century, however, there was not a program to preserve the national documentary heritage, but there was a legislative inclination to guarantee that there would be increasing accumulations of paper among the governmental departments. Section 4 of the act of February 26, 1853 made it a felony to

> wilfully [sic] and knowingly destroy, or attempt to destroy . . . any record, paper or proceeding of a court of justice . . . or any paper or document or record filed or deposited in any public office. . . .

A person who violated that statute would be

> deemed guilty of felony, and on conviction in any court of the United States . . . shall pay a fine not exceeding two thousand dollars, or suffer imprisonment in a penitentiary not exceeding three years, or both. . . .

Section 5 of the same statute made it a felony for an official to

> fraudulently take away, or withdraw, or destroy any such record, document, paper, or proceeding filed in his office or deposited with him, or in his custody, [whereupon he] shall be deemed guilty of felony, and on conviction in any court of the United States . . . shall pay a fine not exceeding two thousand dollars, or suffer imprisonment in a penitentiary not exceeding three years, or both. . . .[5]

Through the nineteenth century several state governments established public archives but the United States was essentially silent regarding the matter. Fires in 1814, 1833, 1877, and at other times resulted in the destruction of valuable public records. In 1846, for example, a fireproof building was considered "extremely urgent" for the War and Navy Departments because "the most valuable documents are now deposited in

---

[4] H. G. Jones, The Records of a Nation, op. cit., at 5 and First Annual Report of the Archivist, op. cit., at 2. The act passed is at 2 Stat. 589 (1810). The building to house the documents was already constructed and occupied the site of the present-day Old Executive Office Building.
[5] 10 Stat. 170 (1853) [MA-336]. Under this statute a person convicted of bribing a member of Congress would also receive no more than three years in a penitentiary.

[redacted]
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several private buildings, which have repeatedly been on fire."[6] The 1877 fire in the Department of the Interior building was so ruinous that in his annual messages to Congress in 1877, 1878, and 1879, President Rutherford B. Hayes requested that Congress address the problem and appropriate $200,000 for a "cheap building . . . as a hall of records . . . perfectly fireproof. . . ."[7] A commission established by the President concluded that the Second Auditor's Office, the unit responsible for Indian accounts from 1819 to 1894, occupied two buildings of "ordinary construction," one of which housed "papers of great value to the government" and had "no adequate facilities . . . for obtaining water in case of fire." The commission recommended that the "upper ceiling and roof should be removed and rebuilt of fire-proof construction, and iron doors and iron shutters should be supplied to openings exposed to danger from exterior fires."[8]

The suggestion of the President was ignored. In 1880 and 1881 fires in the War Department building inspired the Senate to pass a bill to construct a storage facility; but, that bill, and 42 others before 1912, failed to pass both houses. According to the Archivist of the United States, these bills were supported by "nearly every member of the Cabinet and [by] the several Presidents."[9] In December 1900 President William McKinley reported to Congress that he was

> very much impressed with the statement made by the heads of all the Departments of the urgent necessity of a hall of public records. In every departmental building in Washington . . . the space for official records is not only exhausted, but the walls of rooms are lined with shelves, the middle floor space of many rooms is

[6] First Annual Report of the Archivist, op. cit., at 2-3 and W. L. Marcy and G. Bancroft to The President, 4/10/1846, in U. S. Congress, House, Fire-Proof Building for the War and Navy Departments, 29th Cong., 1st sess, 1846, H. Ex. Doc. 186, at 1-2 [MA-926.1].
[7] First Annual Report of the Archivist, op. cit., at 2-3.
[8] T. L. Casey, J. G. Hill, and E. Clark to The President, 10/22/1877 in U. S. Congress, House, Security of Public Buildings Against Fire, 45th Cong., 2nd sess., 1877, H. Exec. Doc. 10, at 3 and 7 [MA-925.1]. In addition to specific recommendations related to individual buildings, the commission made seven general recommendations for the prevention of fires in all buildings.
[9] First Annual Report of the Archivist, op. cit., at 3.

[redacted]

> filled with file cases, and garrets and basements, which were never intended and are unfitted for their accommodation, are crowded with them. Aside from the inconvenience there is great danger, not only from fire, but from the weight of these records upon timbers not designed for their support.[10]

Officials throughout the Federal government recognized a portentous need for proper storage. The fact that there were 250 fires in government buildings in Washington from 1873 to 1915 should have been a crystalline indicator for decision makers.[11] The record is clear that fire destroyed public records with alarming regularity; but, without documentation specifying that sundry Indian trust fund records actually were destroyed by fire, or by other means associated with inadequate guardianship, or by any involuntary instrument, one cannot be certain that such destruction took place. On the other hand, the historical record does contain abundant and graphic references to inadequate and unsuitable conditions in those buildings in which such records were stored. First, the Secretary of the Treasury, the steward of Indian trust accounting records prior to the 1920s, regularly informed Congress of the inferior conditions that affected the administration of his Department's duties. After those tasks and responsibilities were transferred to the General Accounting Office, the administrator of that agency, the Comptroller General, took up where the Secretary left off, and notified Congress continually that storage and working conditions in the several buildings under his administration were objectionable. These matters will be discussed in detail below.

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[10] First Annual Report of the Archivist, op. cit., at 3.
[11] First Annual Report of the Archivist, op. cit., at 2. We have looked in several record groups at the National Archives; the Library of Congress; the Department of the Interior Libary; the MLK Library; and the Historical Society of the District of Columbia; and have conducted an OCLC search for a report of the Fire Marshall of the District of Columbia cited by the Archivist in 1935. It has not been found.

III. Historical Storage Problems Concerning Fiscal Records.

A. The Department of the Treasury.

Between 1891 and 1904 the Treasury Department constantly reminded Congress of storage problems. In 1891 the Secretary's report provided graphic details:

> The files, valuable as they may be, now in custody of this Bureau, are stored partly in six basement rooms and six attic rooms of this building, and in five basement rooms in the Winder building.
>
> About one-tenth of them are in files room A, in this basement, in fire-proof cases, on iron shelves, closed by iron doors.
>
> All the rest, in bundles tied by twine cords or tape, which soon decay. They are exposed to, and are suffering from, the gnawing of rats, mice, cockroaches and other vermin and insects; and to decay and fire. The exposed ends of bundles from 60 to 90 years old have begun to crumble, so as to destroy them as records.[12]

The Treasury Auditor for the Interior Department, the official responsible after 1894 for documents relating to Indian trust funds, observed in 1896 that the problem was so severe that he could "not now see how this office can, without additional files rooms, preserve the records as the law requires."[13] By 1898 the Treasury Department had leased another Washington building but that structure was not fireproof and the Secretary lamented that it was not possible to "obtain a fireproof building suitable for the purpose."

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[12] U. S. Department of the Treasury, Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1891 (Washington: GPO, 1891), at 647-48 [MA-732]. The Treasury Building was constructed between 1836 and 1842 and extended in 1860, 1864, and 1869. The building, designed by the Architect of Public Buildings, Robert Mills, was very controversial. In 1838 the Senate Committee on Public Buildings and Grounds pronounced the plan inadequate: ". . . the basement rooms would be damp, and unfit not only for personal occupation, but, if closed, for the safe-keeping of records and papers." One-half of the building's basement and attic would be "totally unfit for office purposes." The Committee was "*unanimously* of the opinion, that it would be *unwise* and *inexpedient* to suffer the work of construction upon the present plan of the new Treasury building, to proceed further." See K. Collins, Washingtoniana Photographs: Collections in the Prints and Photographs Division of the Library of Congress (Washington, DC: Library of Congress, 1989), at 179 [MA-1072] and U. S. Congress, Senate, Committee on Public Buildings and Grounds, Report, 25th Cong., 2nd sess., 1838, S. Rept. 435, at 3, 6, and 8 [MA-927]. Italics in original.

The Secretary echoed the words of President Hayes in advising Congress that "a new and proper hall of records" was a "public necessity," and that the fires of 1814 and 1833 remained an "embarrassment to the public business." In 1898 the Secretary estimated the cost of an archives building at $1,200,000; three years later he reported it would cost $2,000,000.[14] In 1904 the Treasury Secretary informed the Speaker of the House of Representatives that "embarrassment to the Departments and danger to the files continue to be the cause of extreme solicitude to officers of the government responsible for their safekeeping."[15]

Even by 1920, one year before the Budget and Accounting Act of June 6, 1921, transferred the responsibilities of the Treasury's Auditor for the Interior Department to the new General Accounting Office (GAO), the Secretary continued to declare his displeasure that the government had not satisfied the "imperative need of adequate and safe housing facilities for its manifold activities." The Secretary not only was concerned about fiscal and financial records; he also wished to have appropriated more than one million dollars for "a modern Treasury vault . . . to replace the antiquated vaults now used to safeguard the Government's reserves and securities."[16]

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[13] U. S. Department of the Treasury, Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1896 (Washington: GPO, 1897), at 729 [MA-737].
[14] U. S. Department of the Treasury, Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ended June 30, 1898 (Washington: GPO, 1898), at LII-LIII [MA-739] and First Annual Report of the Archivist, op. cit., at 3.
[15] U. S. Department of the Treasury, Annual Report of the Secretary of the Treasury on the State of the Finances for the year ended June 30, 1904 (Washington: GPO, 1905), at 253-54 [MA-747].
[16] U. S. Department of the Treasury, Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ended June 30, 1920 (Washington: GPO, 1921), at 253-254. [MA-747] The Civil Division of the GAO was established on April 1, 1923, to handle, among other things, records formerly in the office of Treasury's Auditor for the Interior Department. On December 1, 1923, Indian and other claims were transferred to a new Claims Division. See U. S. Congress, House, Annual Report of the General Accounting Office, 1924, 68th Cong., 2nd sess., 1924, H. Doc. 484, at 4 and 12 [MA-811]. We do not know, nor does anyone at the GAO know, if IIM records were handled by the same section as tribal records. Based on the answers we have received, IIM and tribal records were likely administered in different sections.

B. The General Accounting Office.

The appeals for safe and secure space did not end with the transfer of responsibilities. Operations of the new General Accounting Office were interrupted shortly after the transfer of responsibilities by two fires on the roof of the Treasury building. Although the new Comptroller General was accountable for certain tasks inherited from the Secretary of the Treasury, his fiscal personnel were still operating at their former location. The first blaze, on February 8, was caused by the explosion of a 10-gallon kerosene tank. The Washington Star informed its readers that water ruined drafting and architectural records on the fourth floor, and "soaked through from the fourth to the third, damaging records and books in the office of the Comptroller of the Treasury in rooms 305 and 307." President Warren Harding watched the "spectacular blaze" from the roof of the White House.[17]

On May 2, 1922, another fire raged in the vicinity of the Treasury Department roof. The Washington Star reported that there were several explosions and thick clouds of black smoke. The newspaper reported that "water seeped through the roof into the general accounting office, but not to sufficient extent to hold up the work of the office." Although the firemen used "immense quantities of water" that leaked into the basement, no mention was made with respect to financial or fiscal records.[18]

[17] "Treasury Fire and Explosion Imperil 2,500," The Washington Star, 9 February 1922 [MA-1869] and "10,000 Watch Blaze on Treasury Roof," The Evening Star, 9 February 1922 [MA-1870]
[18] "Fire Again Rages on Treasury Roof," Washington Star, 3 May 1922 [MA-1835].

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In his first annual report, the chief executive of the GAO, Comptroller General J. R. McCarl, informed Congress that

> [t]he supreme need of the General Accounting Office at the present time is a building which will house its entire personnel of more than 2,000 persons and its records. . . . The necessity for a fireproof building that will fully meet the requirements of this office is immediate and it is hoped that the Congress may soon find the way to meet the necessities and relieve this unfortunate and unbusinesslike situation.[19]

McCarl's frustrations were not only with poor and scattered facilities, but also with his work force. He reported that only "in some respects" was the GAO workforce "adequate to meet the needs of the office, the principal need being for high-grade employees with some technical and professional training and Government accounting experience."[20] McCarl's frustrations continued. In 1923, decrying the use of dispersed and hazardous facilities, he advised Congress that "the work can not be done effectively and efficiently until provision is made for a central office having its facilities conveniently located and an increase in high-grade personnel." Regarding the latter, he wrote that the GAO housed an "[i]nsufficient force of competent employees."[21] Presumably among them were the 1,708 employees who were transferred to the new agency from the Treasury Department in accordance with the Budget and Accounting Act of 1921.[22] In 1927 the Comptroller invited the attention of Congress to "the great number of appropriations and

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[19] U. S. Congress, House, Annual Report of the General Accounting Office, 1922, 67th Cong., 4th sess., 1922, H. Doc. 482, at 16 [MA-809].
[20] H. Doc. 482, op. cit., at 16.
[21] U. S. Congress, House, Annual Report of the General Accounting Office, 1923, 68th Cong., 1st sess., 1923, H. Doc. 101, at 2-4 [MA-810].
[22] 42 Stat. 20 (1921) at §310. In the 1920s and 1930s standard language was inserted into these annual reports to inform Congress that the GAO was overwhelmed by Indian tribal claims. In 1924 the Comptroller General reported that a "[l]ack of employees has made it impossible to comply with court orders to furnish data. . . ." In later years he consistently reported that a "large amount of research work is required in connection with the reports on Indian tribal claims, petitions, etc." See Annual Report of the General Accounting Office, 1924, op. cit, at 19 and see acting Comptroller General, letter dated 1/5/1937,

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funds for the operation of the Indian Service. . . . The multiplicity thereof renders virtually impracticable proper and economical control in accord with limitations therein, at least, without very greatly expanding the present appropriation bookkeeping system."[23]

In 1937 acting Comptroller General Richard Elliott notified Congress that some of GAO's buildings were

> poorly heated and lighted, with little or no ventilation, necessitating the use of hand flashlights for light, and men have to work in lumber jackets, heavy shoes, and mittens in winter to keep comfortable.[24]

Two years later the Comptroller General informed the Commissioner of Public Buildings that he was "'astounded'" at the conditions in which GAO employees were required to perform their duties. The GAO, he wrote, would never be efficient and effective until it had adequate quarters. Nonetheless, record housing problems continued.[25] In 1943 the Comptroller General emphasized to Congress that the GAO records were of historical value, records on which the government must rely to adjudicate claims, but were "filed or stored largely on temporary wooden shelves, unprotected from dust, insects, and rodents, in buildings beset with fire and water hazards."[26] In 1944 the Comptroller General brought to the attention of Congress that he was forced to decentralize some "reconciliation and clearance" work to Atlanta, Chicago, Los Angeles, and New York. These actions stripped "the central office of many of the qualified personnel. . . ."

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transmitting the Annual Report of the Comptroller General of the United States, 1936, at 57 [MA-822]. See also R. R. Trask, GAO History: 1921-1991 (Washington: GPO, 1991), at 7 [MA-807].

[23] U. S. Congress, General Accounting Office, Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1927 (Washington: GPO, 1927), at 59 [MA-814].

[24] R. R. Trask, Defender of the Public Interest: The General Accounting Office, 1921-1966 (Washington, DC: The General Accounting Office, 1996), at 156-59 [MA-808]. At this time GAO operated out of 12 buildings in the Washington area. During World War II 38 percent of its employees were working outside Washington; the entire Postal Accounts Division was in Asheville, North Carolina. By the end of the war the GAO was housed in 20 buildings.

[25] R. R. Trask, Defender of the Public Interest, op. cit., at 156.

[26] R. R. Trask, Defender of the Public Interest, op. cit., at 159-60.

Performance of work, he reported, "has been materially affected."[27] In 1947 the acting Comptroller General vented his frustrations with the hazards associated with the keeping of important financial records in 21 buildings:

> In fact, the records have to be carted around so much with attendant delays to the work that the records themselves frequently are completely worn out and have to be sent to a repair shop, which we maintain for disabled records.
>
> . . . some of the 21 buildings, now necessarily in use, because we have no better ones . . . are actually not fit for personnel to work in; nor are they safe for the keeping of the only records the Government has to prove that payments have once been made and should not be made again.[28]

Finally, On May 19, 1948, President Harry S Truman signed legislation authorizing construction of a building on Square 518 in the District of Columbia; but not before Assistant Comptroller General Frank Yates convinced Congress that the agency would rid itself of excess files. To oblige Congress, GAO ground up and sold as wastepaper almost 19 million pounds of records in the 1940s. The Annual Report of the Comptroller General for 1947 was even more explicit:

> During the fiscal year 1947, the General Accounting Office . . . continued the periodic and systematic disposal of records which have no further value warranting their retention. During the year just closed 1,620 tons of records approximating 208 freight carloads were disposed of by sale and the proceeds, totaling $67,684, were covered into the general fund of the Treasury. These figures combined with corresponding disposal figures for the period July 1, 1940 to June 30, 1946, represent an aggregate of 9,357 tons of records approximating 624 freight carloads which if in a continuous train would be more than 4 miles long.[29]

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[27] U. S. Congress, General Accounting Office, Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1944 (Washington: GPO, 1944), at 57 [MA-1316].

[28] U. S. Congress, House, Hearings before the Subcommittee on Public Buildings and Grounds of the Committee on Public Works, House of Representatives on H.R. 3030, 80th Cong., 1st sess., 1947, at 9 and 14 [MA-1293]. The Claims Division, which was responsible for Indian claims, and quite likely for IIM matters, was split at this time between two buildings: one at 1331 U Street, NW, and one at "Tempo T-8, Friendship."

[29] U. S. Congress, General Accounting Office, Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1927, 80th Cong., 2nd sess. 1947, H. Doc. 464, at 4 [MA-1294]. This destruction resulted in the deposit of more than one-quarter million dollars into the United States Treasury. The GAO finally moved into new quarters in 1951.

But, as shall be seen, it is unlikely that fiscal records in general, or Indian trust records, or individual Indian money records, were included in that massive destruction action.

C. The Department of the Interior.

The problems at Treasury and the GAO also plagued the Department of the Interior. In 1896 the Commissioner of Indian Affairs informed the Secretary of the Interior that space allocated to fiscal and financial records was so small that "the clerks are huddled together in such a way as to make the performance of their duties unnecessarily laborious and tedious, the more so by their not having adequate breathing space." Most records dating from previous years were "consigned to a room in the cellar where they are gotten at with much labor and difficulty, and where they are becoming destroyed by the dust and dirt." The situation was so defective, the Commissioner continued, that [s]ome papers recently taken from this basement were completely destroyed from coming in contact with the steam pipes, and it is almost a wonder that a conflagration did not result.[30]

In 1899, after the Bureau of Indian Affairs was moved into the old Post Office building, Secretary Ethan Allen Hitchcock informed the President that it was "doubtful that all of these records can be properly provided for in the space allotted" demonstrating a "necessity for the construction of a hall or building in this city for the accommodation

[30] Commissioner of Indian Affairs to Secretary of the Interior, 3/3/1896, NA RG 56 General "Records of the Department of the Treasury, Letters Received from the Secretary of the Interior, box 15 [MA-1839].

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of the records of the Government."[31] In 1911 the Secretary reported that the BIA and other agencies were "constantly accumulating records of priceless value to the Government. . . ." The records of some agencies, including the BIA,

> have accumulated to such an extent that it is beginning to be a grave question how to provide for future accumulations, and those now existing are crowded in every available space—in corridors, attics, workrooms, basements, and sub-basements—constantly exposed to accumulating dust, dampness, and improper handling, to say nothing of the ever-existent grave danger from fire and consequent total destruction.[32]

The Commissioner of Indian Affairs also discussed the problem of record keeping and storage in 1911:

> In our files are the original documents for a great part of the history of the relations of the Government with the Indians since the middle of the eighteenth century. So far as these records have suffered from time and wear they are being restored; 75 large boxes of unfiled papers are being sorted and filed; and the regular files from the establishment of the office in 1824 are being mended, classified, renewed, and placed in flat files.[33]

This work was terminated the following year when funding ran out for three historians hired to do the work. As late as 1937 the Secretary reported that the "complexity of Indian Office administration is reflected nowhere so clearly as in the office's mail and file system. There are stored records dating back to pre-Revolutionary days. The files had not been reclassified since 1907."[34]

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[31] U. S. Department of the Interior, Annual Report of the Department of the Interior for the Fiscal Year Ended June 30, 1899 (Washington: Government Printing Office, 1899) at CXIII-CXIV [MA-1455].
[32] U. S. Department of the Interior, Annual Report of the Department of the Interior for the Fiscal Year Ended June 30, 1911 vol. I, (Washington: Government Printing Office, 1912) at 21 [MA-1457].
[33] U. S. Department of the Interior, Annual Report of the Department of the Interior for the Fiscal Year Ended June 30, 1911 vol. II, (Washington: Government Printing Office, 1912) at 38 [MA-1458].
[34] U. S. Department of the Interior, Annual Report of the Department of the Interior for the Fiscal Year Ended June 30, 1912 (Washington: Government Printing Office, 1913) at 68 [MA-39] and U. S. Department of the Interior, Annual Report of the Department of the Interior for the Fiscal Year Ended June 30, 1937 (Washington: Government Printing Office, 1937) at 243 [MA-61].

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IV. A Formal Destruction Policy: The "Useless Papers" Act of 1889.

As noted above, the Congress of the United States in the late nineteenth and early twentieth centuries was not disposed to deal with appropriating Federal funds to erect buildings to house records. It is indisputable that neither 43 bills introduced between 1881 and 1912, supported by most cabinet members and all the Presidents, nor the clearly calamitous impact of 250 fires in government buildings during essentially the same period, enkindled the inertia of Congress for a "proper hall of records." Although the need for record keeping did not inspire Congress to act, attitudes toward the national bureaucracy and within that institution were changing. Robert H. Wiebe, in his classic study The Search for Order: 1877-1920, described the emergence of a "fundamental shift in American values, from those of the small town in the 1880s to those of a new, bureaucratic-minded middle class. . . ." During the latter years of the nineteenth century—just before the Progressive Era—a new way of doing business spurt forth and that new middle class created a clamor for efficient administration and management. This was the so-called Gilded Age in which much attention was paid to national issues such as the tariff, currency, government regulation of railroads, and the civil service. But, as Professor Wiebe has put it, "[n]ever had so many citizens held their government in such low regard."[35] There was an outcry for reform and an end to a "spoils system" whereby political parties rewarded member loyalty in wholesale fashion by appointing

[35] R. H. Wiebe, The Search for Order: 1877-1920 (New York: Hill and Wang, 1985), at vii-viii and 4-5 [MA-334]. Another historian observed that the "expanding administrative power of the federal government would become apparent across the country in the early twentieth century. . . ." See R. White, "It's Your Misfortune and None of My Own": A History of the American West (Norman, OK: University of Oklahoma Press, 1991), at 58 [MA-1340].

members to federal positions. It was precisely this new approach that led in 1883 to the nation's first civil service laws and in 1887 to the creation of a Select Committee of the United States Senate to examine the way in which the Federal government was conducting its business and to determine why it was in large measure inefficient.[36]

The Select Committee was appointed under a Senate Resolution of March 3, 1887, and announced its findings in a 269-page report on March 8, 1888. The report, among other conclusions, took note of the massive accumulation of government records already in executive offices and perceived a strong likelihood that such aggregation would grow intensively. The Committee devoted a section to "Files of Worthless Papers, Their Incumbrance and Proper Disposition." The Committee reviewed the history of Federal destruction policies. An act of March 3, 1881 had authorized the Postmaster General "to sell as waste paper, or otherwise dispose of, the files of papers which have accumulated . . . that are not needed in the transaction of current business and have no permanent value or historical interest. . . ." An act of August 5, 1882 had empowered the Secretary of the Treasury to deal similarly with papers in the Office of the Auditor for the Post Office Department. An act of August 7, 1882 provided the same enablement to the Clerk and Doorkeeper of the House of Representatives and the Secretary and Sergeant-at-Arms of the Senate.[37]

The statutes affecting the Post Office Department and the office of the Auditor for the Post Office Department were the only two statutes enacted prior to the Select

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[36] U. S. Congress, Senate, Report of The Select Committee of the United States Appointed Under Senate Resolution of March 3, 1887. 50th Cong., 1st sess., 1888, S. Rept. 507 [MA-308].
[37] S. Rept. 507, op. cit., at 240 and 21 Stat. 385, 412 (1881) [MA-324]; Act of August 5, 1882, 22 Stat. 219, 228 (1882) [MA-325]; and 22 Stat. 302 (1882) [MA-337]. Various Departments of the Federal government, and the Select Committee itself, concluded that there would be additional space in the government buildings once valueless papers were eliminated; but, there appears to be no conscious

Committee's establishment. Not surprising, the Select Committee found that throughout the government it was "manifest that there were large masses of files of papers, which have been accumulating for a long series of years and now occupy much room."[38] The Committee specifically noted that "there were large masses of such valueless files" in the Treasury Department and the War Department.[39] The work of the Select Committee led to the passage of "An Act to Authorize and Provide for the Disposition of Useless Papers." This act of February 16, 1889 provided for three actions by the government. First, whenever it was discovered by an Executive Department that there were papers without "permanent value or historical interest" it was the duty of that Department to report the matter to Congress. Second, when a report from the Executive was received by the Congress a Joint Committee of Congress would be formed to evaluate the report and notify the Executive of its findings. And third, if the Joint Committee agreed that such papers indeed were without "permanent value or historical interest," it would be the responsibility of the Executive to dispose of the papers and report their disposition to Congress. Receipts generated by the destruction would be deposited into the Treasury of the United States.[40]

Congress first created the Joint Committee on the Disposition of Useless Papers in 1889, and re-christened it the Joint Committee on Disposition of Executive Papers in 1935. The body was terminated in 1970. At first the presiding officer of the Senate and the Speaker of the House were to appoint members upon receipt of a report from the

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connection between the perceived potential of additional space and congressional unwillingness to allow the building of a proper hall of records. See S. Rept. 507, op. cit., at 120 and 240-53.

[38] S. Rept. 507, op. cit., at 239-40.

[39] S. Rept. 507, op. cit., at 240.

[40] 25 Stat. 672 (1889) [MA-317]. This statute is represented by a scant legislative history, indicating that the officers of the House and Senate probably had considerably less difficulty than Executive Department

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Executive; eventually, a Committee would be appointed regularly at the beginning of each Congress.[41] In 1895 Congress extended the provisions of the 1889 act by including language that would make its intent unmistakable. The amendment called for the provisions of the earlier to include "any accumulation of files of papers of like character . . . now or hereafter," language that would insure the disposal of any documentation considered unnecessary. The procedure would be altered several times over the next century. In March 1912, for example, President William Howard Taft issued an Executive Order directing that all lists of "useless files of papers to be disposed of" first be submitted to the Librarian of Congress so that the government "may have the benefit of his views as to the wisdom of preserving such of the papers as he may deem to be of historical interest."[42]

Beginning in 1889, then, the United States had in place a formal policy for the eradication of Useless Papers. Government documents were destroyed in accordance with this policy after review by legally constituted officials. In the nineteenth and twentieth centuries government records also were destroyed by accident, primarily as a result of fire. In this regard, some Indian trust fund documents may have been destroyed.

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officials in dealing with papers of any kind. This Act which provided for the "disposition" of records, actually provided for the "disposal" of records.

[41] C. E. Schamel, et al., Guide to the Records of the United States House of Representatives at the National Archives, 1789-1989, 100th Cong., 2nd sess, 1989, H. Doc. 100-245, at 174 and 330-31 [MA-463] and 84 Stat. 320 (1970) [MA-1295]. Of course, the Committee's concern was the disposal of records, not the disposition of records.

[42] 28 Stat. 910, 933 (1895) [MA-326] and Executive Order 1499, 3/6/1912 [MA-365].

V. The Disposal of Indian Trust Fund Records, 1889-1934.

The act of 1889 affected the entire executive branch of the government. At the onset the Second Auditor of the Treasury Department reported that there were "not now in the files of the Indian Division any papers 'of no permanent value,' except a few printed books or pamphlets. . . ." The value of the "papers regularly on file in the division" the official continued, "becomes greater every year and their preservation, not their destruction, is strongly recommended as a proper object of solicitude."[43] This attitude, however, did not last long. In 1891 the Second Auditor was remonstrating about having to process more than 7,800 cash account and claims vouchers each month and being understaffed.[44] By 1893 the Interior and Treasury Departments were reporting sundry documents to the Speaker of the House as being disposable, or having "no permanent value or historical interest." Although the historical record demonstrates diligence and regularity with respect to destruction, the Executive Departments of the Federal government, however, were typically imprecise with regard to what they were recommending for destruction.

Among the disposal reports were some from the Second Auditor of the Treasury that included Indian-related materials, among them a volume of Indian appropriations, a volume of Paymasters' accounts, 13 appropriation journals, and two volumes of Indian

[43] Second Auditor to Auditor of the Department of the Treasury, 7/16/1889, National Archives [NA] Record Group [RG] 217 Records of the Accounting Officers of the Department of the Treasury, Letters Sent by the Indian Division, Second Auditor, box 3, Letter Book, 2/26/1889 to 7/23/1889 [MA-1836].
[44] Second Auditor to Auditor of the Department of the Treasury, 7/16/1889, National Archives [NA] Record Group [RG] 217 Records of the Accounting Officers of the Department of the Treasury, Letters Sent by the Indian Division, Second Auditor, box 4, 12/11/1890-5/25/1891 [MA-1838].

settlements.[45] The precise nature of those documents cannot be determined. In 1904 the Chief of the BIA Record Division notified the Assistant Commissioner of Indian Affairs that there were approximately two wagon loads of papers which, if destroyed, would furnish no "detriment to the public interest." Among that collection were "[s]everal years" of "[s]tatements of funds."[46] In this case the funds were not identified and, as with the previous example, one cannot determine anything beyond the language of the report.

In 1910 the Joint Committee approved the BIA request for destruction of copies of "exceptions in the examination of accounts" and "explanations made by disbursing officers to exceptions taken to their accounts." The originals of both sets of documents were reported to be "on file in the auditor's office," a presumed reference to the Second Auditor for the Treasury.[47] These records were reported by the BIA to have been "delivered to the proper officer, after such mutilation as required, for disposition as waste paper."[48]

The acts of April 30, 1908, and June 25, 1910, authorized an "Indian agent, superintendent, or other disbursing agent" to "deposit Indian monies, individual or tribal" for which he had custody into "such bank or banks as he may select."[49] Beginning in at least 1915 Indian agencies' destruction notices reflected actions authorized by those

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[45] T. S. Farrow to Secretary of the Treasury, 10/26/1893, in U. S. Congress, House, Old Papers on File in the Treasury Department, 53rd Cong., 2nd sess., 1894, H. Ex. Doc. 208, at 19-23 [MA-511].
[46] L. T. Ellis to Assistant Commisioner of Indian Affairs, 3/9/1904, NA RG 128 Records of Joint Committees of Congress, 58th Congress (Senate), On Disposition of Useless Papers in the Executive Departments, box 12 [MA-560].
[47] U. S. Congress, House, Useless Papers in the Interior Department, 61st Cong., 2nd sess., 1910, H. Rept. 828 [MA-1461] and U. S. Congress, House, Useless Papers in the Interior Department, 61st Cong., 2nd sess., 1910, H. Doc. 577 at 3 [MA-1462].
[48] Chief Clerk, BIA to Chief Clerk, Department of the Treasury, 5/18/1910, NA RG 75 Records of the Bureau of Indian Affairs, CCF 1907-39, box 24 [MA-1463]. The Secretary regularly instructed the various bureaus to "mutilate them so as to render the same no longer serviceable, and then turn them over to the proper officer of the department for delivery to the contractor for the purchase of waste paper. . . . See, for example, Assistant Secretary to the Commissioner of Indian Affairs, 3/3/1913, ibid. [MA-1464].

statutes. There were several reports of disposable BIA financial documentation during the 64th and 65th Congresses (1915-1918), but only one that was sufficiently specific for the purposes of this report. There were undated reports concerning the disposability of "2000 - Duplicate Notices of Deposit of Funds prior to 1916," as well as "4000 - Reports of Savings, 1914," among other similarly described records; but, no further clarification has been discovered for these reports. In February 1916 the Office of Indian Affairs of the Department of the Interior reported that 5,000 "bank reports on deposits of Indian funds, prior to 1915" and "5,000 deposits of funds, prior to 1914" were considered disposable.[50] The nature of the funds cited is unclear: it cannot be determined if these moneys were trust moneys or ordinary appropriated funds; it also cannot be discerned if the moneys were tribal funds or individual funds. In December 1916 the Indian Office disclosed that, among those items considered disposable, there were "4,000 reports of savings, 1914" and "2,000 duplicate notices of deposit of funds prior to 1916." Neither report was sufficiently explicit to determine if there were IIM fund materials included. In 1918 the Indian Office again reported that 5,000 bank reports on "deposit of Indian funds" were without permanent value or historical interest and the following year another 2,000 were deemed to be valueless.[51]

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[49] 35 Stat. 70, 73 (1908) [MA-1] and 36 Stat. 855, 856 (1910) [MA-2]. The former specified that deposits be placed in a "national" bank or banks; the latter did not so specify.

[50] Secretary of the Interior to The Speaker of the House, 2/2/1916, in U. S. Congress, House, Disposition of Useless Papers in the Department of the Interior, 64th Cong., 1st sess., 1916, H. Doc. 649 at 1-5 [MA-439.1] and F. K. Lane to The Speaker of the House, 12/29/1916, in U. S. Congress, House, Disposition of Useless Papers, Interior Department, 64th Cong., 2nd sess., 1916, H. Doc. 1814 at 1-3 [MA-438.1].

[51] Secretary of the Interior to The Speaker of the House, 2/15/1918, in Disposition of Useless Papers, Interior Department, 65th Cong., 2nd sess., 1918, H. Doc. 946 at 1-3 [MA-437.1] and Secretary of the Interior to The Speaker of the House, 2/1/1919, in U. S. Congress, House, Disposition of Useless Papers in the Department of the Interior, 65th Cong., 3rd sess., 1919, H. Doc. 1754 at 1-3 [MA-436.1]. Even the backup data associated with these and most other reports is inexplicit. See, for example, two reports of "Schedule of Papers, Documents, etc., in the Indian Office which Are no Longer Useful for Current Business nor Valuable for Historical or Other Purposes," n. d., NA RG 128 Records of Joint Committees of Congress, 64th Congress (Senate), On the Disposition of Useless Papers in the Executive Departments, box

On November 23, 1918, the Secretary of the Treasury referred to records of such deposits. In accordance with the act of February 16, 1889, the Secretary informed the Speaker of the House of Representatives that his Department housed papers "no longer useful or needed in the transaction of current business and . . . without permanent value or historical interest." Among those papers were "[a]bout 900,000 statements of banks with respect to the deposit accounts of individual Indians prior to July 1, 1916." The papers, managed by the Auditor for the Interior Department, comprised almost 130 cubic feet.[52] On March 3, 1919, the Joint Committee on Disposition of Useless Executive Papers reported that those individual Indian moneys papers, and thousands of papers of other descriptions from the various offices and bureaus of the Treasury Department, were"not needed in the transaction of the current business of such departments and bureaus and have no permanent value or historical interest."[53] On March 17 the acting chief clerk of the Treasury Department informed the Auditor for the Interior Department that the "papers and documents mentioned in your letter [of November 23, 1918] can now be placed with the waste paper."[54] No account of actual destruction has been found. Later that year, on June 20, the Joint Committee approved the destruction of another 5,000 bank reports on deposits of Indian funds, as well as "2,000 auditor's statement[s] of

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26 [MA-561 and MA-563]. In January 1915, however, the Department of the Interior reported that nearly 109,000 pounds of "condemned paper and records" had been sold, netting the United States Treasury about $657.00. See U. S. Department of the Interior, "Statement of Proceeds of Sale of Condemned Papers and Records Authorized by Joint Committee of Congress, 7/23/1914, To Be Disposed Of," 1/28/1915, attached to U. S. Congress, House, Disposition of Useless Papers in Executive Departments, 63rd Cong., 2nd sess., 1914, H. Rept. 997 [MA-576].

[52] "Report of Office of the Auditor for Interior Department," 11/23/1918, in U. S. Congress, House, Disposition of Useless Papers, Etc., Treasury Department, 65th Cong., 3rd sess., 1919, H. Doc. 1666, at 2 [MA-306.1]. The Auditor also reported 150 supply catalogs as neither necessary nor useful.

[53] J. W. Weeks, et al., to the Senate and House of Representatives, 3/3/1919, in U. S. Congress, House, Useless Papers in the Treasury Department, 65th Cong., 3rd sess., 1919, H. Rept. 1172, at 1 [MA-307].

[54] Acting Chief Clerk to The Auditor for the Interior Department, 3/17/1919, NA RG56 General Records of the Department of the Treasury, Miscellaneous Records of the Secretary and Assistant Secretaries, 1838-

accounts and certificates of settlement prior to; 1915."[55] No further information has been located.

Document-specific accountings were rare. A 1922 report from the Interior Department to the Speaker of the House noted that 2,000 BIA "[a]uditor's statement[s] of account and certificate[s] of settlement, 1918" and 1,600 "[m]onthly statement[s] of deposits of Indian funds, 1920" were submitted for destruction.[56] Several additional disposal reports were submitted to Congress by the Secretary of the Interior, from various bureaus of the Department to the Secretary, and to and from the Librarian of Congress in the 1920s and early 1930s. These reports concerned the destruction of such remotely related financial documents as "[d]uplicate Cash and Property Accounts of Disbursing Officers, Indian Service." None of these reports appears to have included Indian trust fund documents in general and individual Indian moneys reports in particular.[57] One report concerning BIA records, however, proposed the destruction of "[c]ertificates of settlement of accounts prior to 1926."[58]

The matter of duplication was addressed in 1925. The GAO informed Congress that it had investigated BIA account examination procedures and found that "duplications existed between the Interior Department and the General Accounting Office," and within

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1965, Records Relating to the Authorizations for the Disposition of Useless Papers, 1906-43, "Useless Papers," 1919-24, box 3, folder 1919 [MA-867].

[55] U. S. Congress, House, Disposition of Useless Papers, Department of the Interior and Department of Labor, 65th Cong., 2nd sess., 1918, at 3 [MA-1465].

[56] E. C. Finney to The Speaker of the House, 1/12/1922, in U. S. Congress, House, Useless Executive Papers in the Department of the Interior, 67th Cong., 2nd sess., 1922, H. Rept. 782, at 2 and 6 [MA-435.1]. Congress authorized the destruction of the items on the list.

[57] See, for example, Secretary of the Interior to The President of the Senate, 1/17/1929, NA RG 128 Records of Joint Committees of Congress, 70th Congress (Senate), On the Disposition of Useless Papers in the Executive Departments, box 45 [MA-565]; Librarian of Congress to Assistant Secretary of the Interior, 11/29/1930, ibid., box 49, folder 1 [MA-545]; and Purchasing Officer, BIA to Secretary of the Interior, 4/18/1932, ibid., box 52 [MA-578].

the BIA itself. The BIA responded to the examination by drafting regulations to "eliminate all duplication and coordinate the work of the two offices."[59]

There are indications that the destruction process was not functioning at peak efficiency in these early years. In 1925 the acting Secretary of the Treasury informed his Department that "no uniform method of procedure has been followed in carrying into effect the provisions" of the act of 1889. Treasury headquarters, he asserted, had abandoned its responsibility for retention and destruction to the field offices. Acting Secretary Garrard B. Winston ordered the formation of committees to oversee a "complete survey of the files." Winston decried not only the existence of an inept system of determining what was useless, but also a laxity in eliminating and reporting what was concluded to be useless.[60] Treasury was not alone in not having a systematic records disposal policy.

In 1923, just two years before it criticized the Indian Office for maintaining duplicate files, the fledgling GAO announced its own, albeit frail, destruction policy. J. R. McCarl, the first Comptroller General of the United States, instructed his staff in 1923 to withdraw and properly dispose of "[a]ll surplus clips, rubbers and other waste material, and unnecessary papers such as extra copies of communications, memoranda, contracts,

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[58] Secretary of the Interior to The Speaker of the House, 12/1/1930, in U. S. Congress, House, Useless Papers, Department of the Interior, 71st Cong., 3rd sess., 1931, H. Rept. 2891, at 2 and 4 [MA-440.1]. Congress concurred in the Department's request.

[59] U. S. Congress, General Accounting Office, Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1926 (Washington: GPO, 1926) at 36 [MA-813] and Chief, Finance Division to Commissioner of Indian Affairs, 11/5/1925, NA RG 48 Records of the Office of the Secretary of the Interior, Entry 749A, Central Classified Files [CCF] 1907-36, 5-6 General, box 1427, Accounts, 4/4/1916-5/20/1926 [MA-899]. The latter contains proposed regulations and the signatures of the Commissioner of Indian Affairs and the acting Secretary of the Interior in approving the proposal.

[60] U. S. Department of the Treasury, Office of the Secretary, Disposition of Useless Papers, Department Circular No. 358, 5/16/1925 [MA-776].

and other duplicates of original records. . . ." McCarl emphasized that "[c]are must be exercised not to remove necessary material, papers and evidence from the records."[61]

At the same time McCarl's staff was not fully aware of just what records were on file in the various GAO offices. In 1923 the chief clerk of the BIA advised the Comptroller General that his agency wished to destroy a file entitled Cash and Property Accounts of Disbursing Offers, Indian Service, 1857-1909. If the original documents were part of the GAO's permanent records, the BIA would proceed with destruction plans. The chief of the GAO Civil Division responded. The originals "should be on file," but that "it would be impracticable to advise you definitely" that they were on file. The BIA requested that the file be destroyed and Congress granted its approval.[62]

VI. The Disposal of Indian Trust Fund Records, 1935-1952.

A. The National Archives.

In legislation enacted on June 19, 1934, Congress created the National Archives Establishment of the United States. This new statute repealed the Useless Papers Act of 1889, as amended, and established a National Historical Publications Commission, composed of Federal and private sector historians and librarians, and the Archivist of the United States. The Commission had a duty with respect to records disposal: on the first

[61] U. S. Congress, General Accounting Office, Office of the Comptroller General, Circular No. 11, 3/19/1925, GAO Law Library [MA-1321]. No definition was provided for "necessary" and "unnecessary."
[62] Chief Clerk to The Comptroller General, 11/15/1923 [MA-1342] and Chief, Civil Division to Chief Clerk, 11/23/1923 [MA-1343], NA RG 411, Records of the General Accounting Office Indian Tribal Claims Branch, "C" Series Index, box 4, "Ration Issue Search," Destruction file 87488-1907-146. Underscoring added. See also, U. S. Congress, House, Disposition of Useless Executive Papers in the Department of the Interior, 68th Cong., 1st sess., 1924, H. Rept. 226, [MA-1344].

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day of each year the body was to "transmit to Congress . . . a list or description of the papers, documents, and so forth . . . which appear to have no permanent value of historical interest, and which . . . shall be destroyed or otherwise effectively disposed of." A National Archives Council, composed of cabinet members, members of the House and Senate, the Librarian of Congress, the Secretary of the Smithsonian Institution, and the Archivist himself, also was established to "advise the Archivist in respect to regulations governing the disposition and use of the archives and records transferred to his custody."[63]

The act was not, however, explicit with respect to process, causing the first Archivist of the United States, R. D. W. Conner, to petition the Speaker of the House for clarification. In April 1935 Conner notified Speaker Byrns that it was "not clear" what his duties were under the law. Conner added that "we have encountered evidence of misunderstanding in the application of existing laws." Conner declared he would write to "the various government officials for information and advice. . . ."[64] By 1936, upon publication of the First Annual Report of the Archivist of the United States, Conner was confident. Having appointed a staff of "well-trained Special Examiners," he was able to concur in the destruction of "125 archives serials." An "orderly procedure," Conner reported, was "in place of the more or less haphazard methods heretofore followed."[65]

Haphazard or not, the ensuing years produced little specificity with regard to items proffered for destruction. The Archivist reported several times to Congress

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[63] 48 Stat. 1122, 1123-1124 (1934) [MA-366]. The National Archives Establishment became the National Archives and Records Service, General Services Administration in 1949, and became an independent agency, the National Archives and Records Administration, in 1984.
[64] The Archivist of the United States to J. W. Byrns, 4/11/1935, NA RG 128 Records of Joint Committees of Congress, 74th Congress (House), On the Disposition of Executive Papers, box 92 [MA-566].
[65] First Annual Report of the Archivist, op. cit., at 45-46 [MA-553].

concerning BIA and Treasury documents but nothing has been noted respecting trust records that are the subject of these proceedings.[66] In a widely disseminated report of December 1938 the National Archives reported that there were almost 3,000,000 cubic feet of documentary records in United States government repositories, along with, in post offices across the nation alone, more than 1,500 lists of "useless" records. No indication was given by the Archivist concerning either the magnitude or the disposal of Federal Indian trust fund records.[67] Four years later the act of August 5, 1939 clarified matters somewhat. This new legislation formally established the Archivist of the United States as the middleman who would receive the agencies' lists and reports and, in turn, submit the documentation concerning the useless papers to Congress for its evaluation.[68]

B. The Bureau of Indian Affairs.

The imprecise nature of the reports, however, continued. In 1940, for example, the Archivist submitted to the Joint Committee a list of items furnished by the Interior Department that the Indian Office desired "destroyed or otherwise disposed of." The list included fund allotments, fund advances, journal vouchers, and deposits. The report did not identify what category or categories of funding were involved. Because the materials

[66] See, for example, "Report of the Archivist of the United States on Lists of Papers Submitted on January 4, 1935, October 7, 1935, and February 15, 1936, by the Department of the Treasury for Disposition," 4/29/1936, NA RG 128 Records of Joint Committees of Congress, 74th Congress (Senate), On the Disposition of Executive Papers, box 78 [MA-554] and "Report of the Archivist of the United States on lists of papers, consisting of 292 items, from those recommended to him for disposition, 7/3/1937, by the Department of the Interior," 3/25/1938, ibid., box 94, folder 8 [MA-569]. Typical of BIA records submitted for destruction during this era were those of various Indian warehouses and the Headquarters Purchasing Office.

[67] C. G. Harris to All Employees of the National Archives, 12/11/1938, NA RG 64 Records of the National Archives, Official Memoranda-Alphabetical Subject File, A Memos to 123, box 278 [MA-526].

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had been part of the holdings of Indian Service warehouses in Chicago and St. Louis, where workforces were predominantly non-Indian, it is unlikely that trust funds documentation was included.[69] A similar report later that year recommended destruction of semiannual statements of deposit of funds for fiscal years 1932 to 1938, journal vouchers for fiscal years 1934, 1936, and 1937, as well as numerous other items.[70]

In 1939 the administration of document disposal was enhanced somewhat by the assignment by Federal agencies of a separate and distinct Job Number for each submission. Job Number D41-17, consisting of 34 items, for example, was submitted on National Archives Form M-26 by the Indian Office on August 3, 1940. The new form provided a column in which it could be indicated that an item was an original or a duplicate. Duplicate cash accounts for BIA disbursing officers for the period July 1, 1936, to June 30, 1937, were submitted in Job Number D41-17 for destruction, as were duplicate copies of semiannual statements of deposits of funds for fiscal years 1932 to 1938. The Chief of the Interior Department Archives, Oliver W. Holmes, appraised the records submission, noting that the originals of the cash account documents were retained by the General Accounting Office and that the semiannual statements were not "of sufficient value otherwise to warrant retention." Both items were approved for destruction. Holmes' report was concurred in by the National Archives Accessions

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[68] 53 Stat. 1219 (1939) [MA-327].
[69] The Archivist of the United States to The Congress of the United States, 6/20/1940, in U. S. Congress, House, Disposition of Records in the Department of the Interior, 76th Cong., 3rd sess., 1940, H. Rept. 2789 at 2-3 [MA-443.1]. Congress concurred in the destruction of these records.
[70] R. D. W. Conner to The Congress of the United States, 10/9/1940, in U. S. Congress, House, Disposition of Records in the Department of the Interior, 76th Cong., 3rd sess., 1940, H. Rept. 3085, at 2 [MA-441]. In 1938 the Archivist sought destruction of duplicate disbursing officer cash account records for fiscal years 1930 and 1931, as well as duplicate journal vouchers for 1930. See R. D. W. Conner to The Congress of the United States, 4/18/1938, in U. S. Congress, House, Disposition of Records in the Department of the Interior, 75th Cong., 3rd sess., 1938, H. Rept. 2248, at 2 and 4 [MA-519]. Congress concurred in the destruction of all of these records.

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Advisory Committee and the Congress was so informed by the Archivist. An additional listing of Interior Department documents was recommended by Holmes for retention.[71]

The new procedures—those engendered by the 1939 clarification—may have served the system well in at least one instance. In December 1940 the Superintendent of the Fort Peck Indian Agency in Montana submitted a "sample" list of items "of no permanent value or historical interest" to be considered for destruction. The Superintendent seized upon the 1939 act as one which would "clear individual files of cumbersome paper matter of no consequence," that is "papers of no value from individual Indian folders. . . ." The Commissioner's office identified the submission as Job Number D41-175 and forwarded the Superintendent's letter to the National Archives in January 1941. The BIA received a swift response. The submission from Fort Peck was insufficient, the Archives observed, and considerable amplification and production of samples were necessary prior to making a decision. The Archives noted also that the Superintendent's request was "the first request covering the disposition of records of a field office ever received" from the BIA. There appears to be no further correspondence in the record concerning this unusual request and the Superintendent's description of the

[71] U. S. Department of the Interior, National Archives Form M-26, Recommendation for Disposition of Executive Papers, 8/30/1940, RG 128 Records of Joint Committees of Congress, 76th Congress (Senate), On the Disposition of Useless Papers in the Executive Departments, box 110 [MA-571]; two letters, O. W. Holmes to The Archivist, 9/17/1940, NA RG 64 National Archives and Records Service, External Disposal Jobs, 1935-74, box 79 [MA-581 and MA-579]; M. W. Price to The Archivist, 9/23/1940, ibid. [MA-580]; and The Archivist of the United States to The Congress of the United States, 10/9/1940, ibid. [MA-530]. The duplicate cash account records were considered to be a "continuation of a series previously reported for disposition" by the BIA. The appraising archivist believed those documents to be "valueless" and so informed the Interior Department. The department confirmed that they were valueless and that the originals were on file at the GAO. See Administrative Secretary, The National Archives to Assistant Secretary of the Interior, 12/11/1939 [MA-1346] and Chief Clerk, Department of the Interior to Administrative Secretary, The National Archives, n. d. [MA-1345], NA RG 411, Records of the General Accounting Office Indian Tribal Claims Branch, "C" Series Index, box 4, "Ration Issue Search," Destruction file 87488-1907-146.

documents submitted for dispostion was insufficient to determine if trust records were involved.[72]

A job submitted by the Interior Department in early 1941 provides another example of diligence in the records disposal process. On January 21 the Indian Office proposed that 35 items be disposed of. Among those were duplicates of "Individual Indian Money, abstract vouchers" for fiscal years 1939 and 1940 and "Statements of Earnings on Indian Trust Funds" for fiscal years 1936 to 1939. The Office also submitted for disposal the originals of "Annual Report[s] of deposits of Indian funds in bonded depositories" for the period 1928 to 1933.[73] Neither the Statements of Earnings nor the Annual Reports was identified further as being IIM documents. The National Archives records disposal appraiser found that both the duplicate and original documents could be destroyed because the information was retained in the BIA's Fiscal Division and that "[m]ost of the vouchers" were held by the GAO. The appraisal was upheld by the National Archives Council and destruction was recommended by Congress.[74]

The 1939 act was repealed in 1943. A new statute provided "for the disposal of certain records of the United States Government." Under this guidance the Archivist was to submit to the Congress, "at such times as he shall deem expedient," lists or schedules

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[72] O. C. Gray to Commissioner of Indian Affairs, 12/27/1940, NA RG 64 National Archives and Records Service, External Disposal Jobs, 1935-74, box 79, Job Number D41-175 [MA-534.1]; BIA to The National Archives, 1/13/1941, ibid. [MA-534]; and Administrative Secretary to Commissioner of Indian Affairs, 1/17/1942, ibid. [MA-534.2].

[73] U. S. Department of the Interior, National Archive Form M-26, Recommendation for Disposition of Executive Papers, 1/21/1942, NA RG 64 National Archives and Records Service, External Disposal Jobs, 1935-74, box 79, Job No. D42-321 [MA-585].

[74] C. L. Guthrie to H. Kahn, 2/6/1942, ibid. [MA-587] and U. S. Congress, House, Disposition of Records by Sundry Departments of the United States Government, 77th Cong., 2nd sess., 1942, H. Rept. 1996 at 1-2 [MA-584]. Similar materials were submitted for destruction by the BIA in 1944. See U. S. Department of the Interior, National Archives Form 108, Comprehensive [List] or Disposal Schedule (Papers, etc.), 5/10/1944, NA RG 64 National Archives and Records Service, External Disposal Jobs, 1935-74, box 79 [MA-595].

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submitted to him by government agencies that "do . . . not have sufficient administrative, legal, research, or other value to warrant their continued preservation by the United States Government." As before, a Joint Committee was to be formed, the lists or schedules were to be evaluated, and the Departments were to dispose of the records in accordance with regulations issued by the National Archives Council. The statute also empowered the Archivist to order the destruction of Federal records "[i]f the joint committee fails to make a report . . . on any list or schedule submitted to Congress by the Archivist. . . ."[75]

The 1943 law added another records disposition and disposal responsibility for the agencies and the Archivist, that of developing a disposition plan, a written statement on the actions to be taken with respect to all records produced by Federal agencies. The purpose of this plan was to identify records to be preserved and to develop schedules for their retirement, as well as to identify records that were disposable and schedules for their periodic destruction. Whereas in the past an agency would submit a list of disposable items whenever it considered it necessary to destroy an accumulation of useless records, under the new procedures, an agency, through the submission of a schedule of those types or classes of its records which automatically become useless after a stated period, would obtain continuing authorization for the disposal of such records. The act of 1943 also cautioned agencies to ensure that they gained the written approval of the Comptroller General before destroying "records relating to claims, demands, and accounts" not yet settled and adjusted by the GAO.[76] Following passage of the 1943 law BIA fiscal

[75] 57 Stat. 380 (1943) [MA-444].
[76] 57 Stat. 380 (1943), op. cit. and General Services Administration, National Archives and Records Service, "Disposition of Federal Records," Washington, D.C., 1949, at 15 [MA-795]. To assist the Bureau of Indian Affairs in developing schedules for retention and disposal, the National Archives detailed an archivist to the Bureau in the summer of 1943 to work with Bureau personnel. See Chief, Mails and Files, Bureau of Indian Affairs to R. J. Ballantyne, 2/16/1949 [MA-1604], NA RG 75 Records of the Bureau of

records, including those of individual Indian money accounts, were under a two- to three-year retention schedule. The BIA routinely informed the Archivist that destruction was justified because either the records were of "transitory administrative value" or "other record copies are permanently retained in the central office files of the Office of Indian Affairs, or at the General Accounting Office."[77]

The 1943 act was amended in 1945 to permit the Archivist of the United States to develop schedules proposing the disposal "after the lapse of specified periods of time, of records of a specified form or character common to several or all agencies. . . ."[78] In 1946 the Archivist informed government agencies that "certain basic fiscal and accounting records" were not to be included in such general schedules because he considered those records to be part of "a minimum core of [an agency's] 'housekeeping' records [that were] necessary in order to reflect the major facilitating operations of the organization. . . ."[79] In late 1945 the BIA submitted 46 items for destruction, among them abstracts of checks paid, disbursing account statements, IIM purchase orders and vouchers, applications for payment of individual Indian moneys, IIM account royalties, and "[e]qualization" payments for IIM accounts. These items were considered by the BIA to have been "either of transitory administrative value only, or of which other record

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Indian Affairs, CCF 1940-56, CCF 146, "Correspondence Concerning New Regulations Relative to the Disposition of Federal Records."

[77] See U. S. Department of the Interior, National Archives Form 108, Comprehensive [List] or Disposal Schedule (Papers, etc.), Job No. 344-S13, 3/1/1944, NA RG 64 National Archives and Records Service, External Disposal Jobs, 1935-74, box 79 [MA-593]. A "retention schedule" specifies retention periods, that is, how long records are to be retained in the premises of an agency or offsite storage before being destroyed or transferred to a Federal archive (the National Archives or a Federal Records Center). Agencies transferring records to the National Archives transfer both custody and control. Agencies transferring records to a Federal Records Center transfer only custody.

[78] 59 Stat. 434 (1945) [MA-445]. The statute pointed out that the blanket authorization for disposal was "permissive and not mandatory."

[79] General Services Administration, National Archives, Circular Letter No. 47-2, 8/7/1946, NA RG 64 Records of the National Archives and Records Administration, Official Memoranda-Alphabetical Subject File, A Memos to 123, box 278 [MA-525].

copies are permanently retained in the central office files of the Office of Indian Affairs, or at the General Accounting Office."[80]

The 1940s saw considerable field establishment interest in records disposal, largely generated by diminishing availability of space. In this regard, the Superintendent of the Five Civilized Tribes Agency informed the Commissioner that "it would be difficult to estimate the quantity of useless material we have in the attic but we know there are a great many tons of it."[81] More to the point, however, the United Pueblos Agency in Albuquerque, New Mexico, along with several other field offices, sought disposal guidance with regard to various categories of records, among them individual Indian moneys abstracts and special deposits, as well as statements of depository accounts. The Central Office responded to the United Pueblos request by stating that records of that sort should be "retained indefinitely."[82]

Further attention to Federal records management was provided by Executive Order of the President in September 1946. Executive Order 9784, "Providing for the More Efficient Use and for the Transfer and Other Disposition of Government Records," ordered essentially that agency heads establish and maintain an active continuing program for records disposition and disposal. Agencies were to retain only those records

[80] U. S. Department of the Interior, National Archives Form 108, Comprehensive [List] or Disposal Schedule (Papers, etc.), Job No. 346-89, 10/9/1945, NA RG 64 National Archives and Records Service, External Disposal Jobs, 1935-74, box 79 [MA-538].
[81] Superintendent, Five Civilized Tribes Agency to Commissioner of Indian Affairs, 5/14/1945 [MA-1598], NA RG 75 Records of the Bureau of Indian Affairs, CCF 1940-52, box 5, CCF 146.
[82] See, for example, General Superintendent, United Pueblos Agency to Commissioner of Indian Affairs, 3/14/1945 [MA-1596] and Commissioner of Indian Affairs to General Superintendent, United Pueblos Agency, 4/19/1945 [MA-1597], NA RG 75 Records of the Bureau of Indian Affairs, CCF 1940-52, box 5, CCF 146.

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needed for current business. All other records either were to be offered to the National Archives, or proposed for other disposition.[83]

In 1949, when the National Archives Establishment and its functions, records, and personnel were transferred to the General Services Administration (GSA), the Administrator of General Services assumed all of the responsibilities associated with records management and disposal practices. The Archivist, however, continued to manage and advise on Federal records management matters.[84] In 1949 the GSA also published an extensive treatise on the preservation and disposal of Federal records in which agencies were advised that records "must" have permanent or enduring value to be preserved. Those without enduring value—that is, those without permanent value or historical interest—were to be destroyed.[85] That treatise, based on the acts of 1943 and 1945, laid out explicit procedures for the disposal of Federal records.

In response to the neoteric interest in records retention and destruction, the BIA Central Office conducted a survey of its files and records in 1950. Inactive files were to be returned to the central file room. All copies were to be destroyed. The survey located 36 drawers of unfiled original fiscal records that were considered to be retired, that is records that were not destined for disposal. The survey located another 174 drawers of fiscal records at the Branch level, of which 145 1/2 drawers were considered retired at that level, 14 drawers were to be centrally filed, and 14 1/2 drawers were to be destroyed.[86]

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[83] Executive Order 9784, 9/25/1846, in "Disposition of Federal Records," op. cit., at 39-40.
[84] 63 Stat. 377, 381 (1949) [MA-446].
[85] "Disposition of Federal Records," op. cit., at 17.
[86] Executive Officer, Bureau of Indian Affairs to Branch Chiefs, 1/25/1950 [MA-1605] and U. S. Department of the Interior, Bureau of Indian Affairs, Branch of Property and Supply, "Records

The Bureau's formal response to the requirement to establish a records disposition schedule was introduced in 1950 and the first records destruction under the new Records Disposition Program was carried out in early 1951. "Chapter 3, Records Management Volume IV – Administration Manual, Bureau of Indian Affairs" was issued in April 1951. The chapter outlined "procedures and policies for the evaluation, preservation and disposal" of BIA records both in the Central Office and in the field offices. Under this program, General Schedule No. 4, which was modeled after National Archives General Schedule No. 5, provided guidance for the retention or disposal of fiscal or financial records. The schedule contained instructions for 171 types of records, none of which referred explicitly or implicitly to individual Indian moneys. Record type categories which conceivably could contain individual Indian moneys information, such as journal vouchers, current accounts, or distribution ledgers, specifically excluded disposal of "Indian Service Special Disbursing Agent" records or "originals."[87]

Management Survey" [MA-1606], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1953-54, Accession 59A643, box 13, file 6432-1953-130.0.

[87] Director, Division of Property Management, Office of the Secretary of the Interior, to Commissioner of Indian Affairs, 4/18/1951 [MA-1599] and Bureau of Indian Affairs Manual, Volume IV – Administration, Part III-Property and Supply, Chapter 3, Records Management, 1951 [MA-1600], NA RG 75 Records of the Bureau of Indian Affairs, CCF 1940-52, box 5, CCF 146. Section 301.08 of the Indian Affairs Manual specifically noted that General Schedules produced by the National Archives were "permissive and not mandatory." Nonetheless, the Property Management Division Director informed the Commissioner that the BIA's version of the National Archives' Schedule No. 5 was "contrary" to the intent of the Archives. The BIA's schedule, he stated, was uneconomical as it set forth to "maintain permanently what will be thousands of vouchers and other fiscal records on a chance possibility that occasional reference may be made to a very limited number of them." He recommended closer compliance with the Archives example. It does not appear that his recommendation was adopted.

C. The General Accounting Office.

The official history of the GAO admits that "[u]nlike most federal government agencies, GAO has not routinely offered its records to the National Archives and Records Administration for accession. Consequently the National Archives holds very few GAO documents." Defender of the Public Interest: The General Accounting Office, 1921-1966 further states that "[a]lmost all existing GAO records are either in GAO offices in Washington and elsewhere or in the Federal Records Center in Suitland, MD."[88]

Based largely on the public record, it would appear that the GAO had been sensitive for more than 20 years to the need to retain BIA tribal financial records. From 1925 to 1936 the Indian Tribal Claims Section prepared reports on 103 separate Indian claims brought as a result of jurisdictional acts passed by Congress on behalf of Indian tribes. Beginning in 1938 the GAO processed an additional 13 claims of this nature. The GAO, therefore, dealt with an enormous number of Indian trust records during the 1920s and 1930s. Although these records were tribal records, there is no reliable reason to assume that individual records would have been treated differently.[89] In 1945 the GAO produced Office Order No. 64, "establishing" a records disposal policy, and issued 18 supplements in the ensuing five years that addressed specific types of files in the custody of the GAO that were authorized for destruction. The Comptroller General reported that the disposal policy

[88] Trask, R. Defender of the Public Interest, op. cit., at 541 [MA-808]. The records at Suitland, Maryland, are, of course, under the control of the GAO. According to the published history there are 370,000 records dating from 1921 to 1966. The records at both repositories will be reviewed.
[89] R. R. Trask, Defender of the Public Interest, op. cit., at 192.

> principally has been applied toward disposition of records forwarded to the General Accounting Office by departments and agencies in support of accounts, claims and other fiscal and accounting transactions as well as fiscal, accounting, and other records established or transferred by law to the custody of the Office.[90]

In his Annual Report for fiscal year 1945, the Comptroller General informed Congress that

> illustrative of the papers authorized for disposal are paid money orders and checks, telegrams supporting paid vouchers, entries and manifests and all papers in support thereof submitted in Custom Officers' accounts, and official travel authorization of civilian officers and employees of all United States Government departments and agencies, all of which have served their purposes in the audit and settlement of accounts and claims.[91]

This order provides an important indication that at least by 1945 the GAO had developed instructions that would have prevented the destruction of Indian trust records. More important, however, in 1952, after almost 30 years of processing fiscal records of all stripes, the Comptroller General informed the Speaker of the House of Representatives and the President of the Senate that the GAO was initiating a program by which fiscal records in existence prior to 1900 and as late as September 1, 1939, were to be reported to the National Archives for "appraisal and appropriate disposition. . . ." It is significant that the Comptroller informed Congress at that time that this would be "the first time that original fiscal accounts will be disposed. . . ." Since some of the records predate the transfer of auditing responsibilities to the GAO in the early 1920s, the disposal submission could have included the universe of Treasury Department records; but as we have seen, a significant number of Treasury IIM records were destroyed some

[90] Comptroller General of the United States, "Establishing a Records Disposal Policy and a Committee on Preservation and Disposition of Records," Office Order No. 64, 5/25/1945, GAO Law Library, Office Orders [MA-1270] and Office Order No. 64, op. cit., Supplement No. 12, 9/13/1946. Records created by the GAO itself were brought under the disposal policy in September 1946, as well.
[91] U. S. Congress, General Accounting Office, Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1945 (Washington: GPO, 1945), at 76 [MA-1317].

34 years earlier, pursuant to the Useless Papers Act of 1889. Furthermore, in commencing this first-time disposal program that ordered the appropriate disposal of all settled fiscal accounts and settled claims, the Comptroller General specifically exempted all accounts and supporting documents, whether tribal or individual, "pertaining to the Indian Service." That exemption was included in the disposal request sent by the GAO to the National Archives and the Archives appraiser took special notice of the exemption.[92] It would appear, based on the records studied, that there is little chance that the General Accounting Office presided over the destruction of individual Indian moneys records. It would appear also that, in 1952, while the Comptroller was motivated to seek "ultimate relief" from a collection of 700,000 square feet of non-Indian Service disposable records, some of which "actually antedate the ratification of the Constitution of the United States," he was probably motivated to retain Indian fiscal records by both the experience of the jurisdictional acts of the previous era, and the Indian Claims Commission Act of August 13, 1946, the proceedings of which began on August 13, 1951.[93]

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[92] Comptroller General of the United States to The President of the Senate, 4/21/1952, at 4-5, NA RG 217, Records of the Accounting Officers of the Treasury Department, box 156 [MA-1329]. In separate correspondence to the Administrator of General Services, the Comptroller General referred to the new program as one of "great importance." The Administrator concurred. See Comptroller General of the United States to The Administrator of General Services, 6/23/1952 [MA-1330] and Administrator of General Services to The Comptroller General of the United States, 7/9/1952 [MA-1331], both ibid. See also General Services Administration, National Archives and Records Service, Form 115, Request for Authority to Dispose of Records, 6/24/1952, with accompanying Appraisal Report, 6/25/1952: Disposal Job No. II-NNA-225, ibid. [MA-1332].

[93] Comptroller General of the United States to The President of the Senate, 4/21/1952, op. cit., at 1 and 4 [MA-1329]. The Indian Claims Commission Act is at 60 Stat. 1049 (1946) [MA-1625].

VII. Disposal of Indian Trust Fund Records, 1952-1996.

A. The Bureau of Indian Affairs.

As with previous periods, it is difficult to learn if those records determined by the BIA to be of no permanent value or historical interest included individual Indian money documentation. According to the 1949 Federal records disquisition, noted above, the records were to be described "so accurately that any misunderstanding as to their identity will be avoided." This, of course, was not always done. In apparent recognition of this failing, a representative of the Archives was to inspect the records and "usually visit the agency . . . to obtain additional information about them. . . ."[94] In some cases this dialogue between agency and archivist furnished sufficient information to conclude that the documents submitted for destruction were valueless. For example, in 1953 the BIA recommended the destruction of records from 1908 to 1924 described only as "Finance and Accounts-Banks, Control of" and "Statement of Funds." The archivist apparently investigated and determined that although the file titles were misleading, the materials did "not contain fiscal documents actually needed or used in the audit process." The Comptroller General also evaluated the documents and agreed with the archivist's conclusion.[95] The Joint Committee on the Disposition of Executive Papers authorized the destruction.[96]

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[94] "Disposition of Federal Records," op. cit., at 18 and 31.

[95] General Services Administration, National Archives and Records Service, Appraisal Report: Disposal Job. No. III-NNR-50, 3/25/1953 [MA-700] and L. C. Warren to The Administrator of General Services, 5/27/1953, NA RG 64 Records of the National Archives, Internal Disposal Folders, RG 75, box 7 [MA-597]. Congress concurred in the request for destruction. See General Services Administration, National

During the previous year, however, there was one instance in which the Bureau of Indian Affairs proposed to destroy, among other items, what it described as "Department of the Interior Form 5-367f, Individual Indian Money Purchase Order. November 14, 1938 – November 10, 1939." The National Archives appraisal report agreed with the BIA proposal, noting that those records "consist of routine accounting forms . . . on a low accounting or administrative level. Many are commonly listed for disposal by Government agencies after the expiration of relatively short retention periods." The National Archives submitted the list to Congress with the concurrence of the Bureau.[97]

The use by government agencies of the National Archives form "Request for Authority to Dispose of Records," introduced in the 1949 publication "Disposition of Federal Records," produced a degree of confusion. In submitting these forms, agency representatives had to certify that the records fit into one of three categories of disposal: (1) that they ceased to require further retention; or (2) that they would cease to require further retention by a specified date or occurrence of a specified event; or (3) that they no longer had retention value because they had been properly micro-photographed for retention.[98] In 1954 the BIA submitted a request to dispose of original records that it claimed fit into the second category. Among the records listed were certain individual Indian money files containing correspondence with regard to the expenditure of

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Archives and Records Service, Record of Holdings, 5/27/1954, NA RG 64 Records of the National Archives, Internal Disposal Folders, RG 75, box 7 [MA-598].

[96] U. S. Congress, House, Disposition of Sundry Papers, 83rd Cong., 1st sess., 1953, H. Rept. 573, at 1-2 [MA-1302]. The Committee misidentified the BIA fiscal records as General Services Administration records.

[97] General Services Administration, National Archives and Records Service, Form 115, Request for Authority to Dispose of Records, 1/9/1952, and accompanying Appraisal Report, 2/13/1952 [MA-1601], Archivist of the United States to Commissioner of Indian Affairs, 2/19/1952 [MA-1602], and Executive Officer, Bureau of Indian Affairs to Archivist of the United States, 4/7/1952 [MA-1603], NA RG 75 Records of the Bureau of Indian Affairs, CCF 1940-52, CCF 146. An appropriate report of Congress has not been located.

individual funds by individual Indians, and applications for "surplus funds."[99] Although the BIA recommended the retention of these financial records, the agency previously had not provided a schedule for their retention. As a result the evaluating archivist stamped the request "disposal not approved."[100] The archivist's action, of course, ensured their retention. In this case, Congress approved the disposal of those records so approved by the National Archives.[101]

Individual Indian money records were clearly the subject of a 1957 submission for disposal. Among records of the Pierre (South Dakota) Indian School submitted under the heading "Individual Indian Money Records" were

- Item No. 2: "Schedules and Vouchers, 1912-1917";
- Item No. 3: "Receipts for the Disbursement of Individual Indian Money, 1917-1942"; and
- Item No. 4: "Abstracts of Individual Indian Money and Special Deposits, 1917-1946."

According to the BIA, Item No. 2 consisted of "[o]fficial receipts for money received and disbursed for the use of Indian pupils. . . ." Item No. 3 contained "[m]emorandum copies of pre-numbered official receipts issued by the disbursing officer at Pierre showing sale or purchase of products. . . ." Item No. 4 was described as "[m]emorandum copies of ledger sheet Indian Office Form 5-321. . . ." The form revealed personal census information, as well as "source of funds, remarks, receipts, payment, and balance at close of quarter." The submission contained no reference to the existence of other copies of these materials, a matter also not addressed by the National Archives appraiser and the

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[98] "Disposition of Federal Records," op. cit., at 28-33.
[99] General Services Administration, National Archives and Records Service, Form 115, Request for Authority to Dispose of Records, 4/29/1954 and accompanying Appraisal Report, 5/27/1954: Disposal Job No. II-NNA-1135, NA RG 64, Records of the National Archives, External Disposal Jobs, 1935-74, box 79 [MA-542].
[100] Appraisal Report, 5/27/1954: Disposal Job No. II-NNA-2423, op. cit.

acting Assistant Archivist for Records Disposal. The latter official, however, found the items "disposable because they do not have sufficient value for purposes of historical or other research . . . to warrant permanent retention by the Federal Government." Congress approved the destruction of these records five years later.[102]

A 1963 submission included what appears to be ordinary financial records. For example, the Bureau requested that headquarters check stubs for the period 1864 to 1873 be destroyed, along with check stubs and registers, bank statements, canceled checks, copies of financial reports, journal voucher pages from field offices, and other documentation, for the period 1866 to 1934. All of these items were adjudged by the National Archives to be "disposable because they do not have sufficient value for purposes of historical or other research. . . . Moreover, they do not appear to possess any residual administrative, legal, or fiscal value for the government."[103] Congress approved the requested disposal.[104]

Some BIA financial records, however, are "missing" as a result of unusual circumstances. Indian protesters led by the American Indian Movement occupied the central offices of the Bureau the entire first week of November 1972. During this siege 172 cubic feet of "significant records" apparently were lost as a result. Of the 172 cubic

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[101] U. S. Congress, House, Disposition of Sundry Papers, 83rd Cong., 2nd sess., 1954, H. Rept. 2103, at 1-2 [MA-1301].
[102] General Services Administration, National Archives and Records Service, Form 115, Request for Authority to Dispose of Records, 3/21/1957 with accompanying Appraisal Report, 11/30/1962: Disposal Job No. II-NNA-2423 [MA-544], NA RG 64 Records of the National Archives, External Disposal Jobs, 1935-74, box 79 and U. S. Congress, House, Disposition of Sundry Papers, 88th Cong., 1st sess., 1962, H. Rept. 118, at 1 [MA-1312].
[103] D. J. Proulx to H. Kahn, 9/13/1963 [MA-520] and Appraisal Report, Disposal Job. No. NN-263-18, 3/25/1963 [MA-520.1], both NA RG 64 Records of the National Archives, Internal Disposal Folders, RG 75, box 7.
[104] U. S. Congress, House, Disposition of Sundry Papers, 88th Cong., 1st sess., 1963, H. Rept. 118, at 1-2 [MA-1303]. The Committee misidentified the BIA fiscal records as General Services Administration records.

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feet, there were 40 cubic feet identified by the Bureau as being records of the Financial Management unit and 10 cubic feet from the Credit and Financing unit. The Financial Management records included performance bonds, checks payable to the BIA as lease payments, and "90 bundles of GAO records on loan from the National Archives." The latter records were described as "Navajo Finance records (Accounts of Disbursing Officers) for the period 1937-1951." The BIA employee who reported the materials to be missing commented that these records "are essential for 3 or 4 Court of Claims cases now pending." The Credit and Financing records were not related to matters in these proceedings.[105]

In 1952 the Administrator of General Services instituted a government-wide program for the protection of personnel and fiscal records for emergency use. Following a study by his agency and by the Civil Service Commission, the Bureau of the Budget, and the General Accounting Office it was decided that those fiscal records to be protected should be those that "insure the constant flow of revenue into the Treasury and those involving, generally, the Government's credit. . . ." The BIA noted that the Indian Service collected "payments and rentals on timber contracts and land and grazing leases" that are deposited in the Treasury to the "credit of the tribe or the individual Indian." Such revenue, one official concluded, did not constitute income-producing records of the government. The Administrator's program was strictly observed by the Bureau. As a result, IIM fiscal records were not protected at the onset of the new program. The only

[105] W. B. Evans to Director of Management Systems, 12/4/1972, NA RG 48 Office of the Secretary of the Interior, CCF 1969-72, box 263 [MA-928]. Over 150 cubic feet of loose records alone were recovered from stairwells and hallways. The occupation led to the resignation of both the Commissioner of Indian Affairs and his chief deputy, as well as an Assistant Secretary of the Interior. See R. M. Kvasnicka and H. J. Viola, eds., The Commissioners of Indian Affairs, 1824-1977, with a Foreword by Phileo Nash (Lincoln,

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fiscal records identified as qualifying for this extraordinary protection were individual retirement records.[106]

In July 1956 the National Archives approved a disposal schedule for the BIA. Records were identified by the decimal-subject classification system adopted in 1907. Under the disposal schedule certain records were to be destroyed after eight or 15 years. Certain records in the Finance and Accounts series—decimal 2XX—such as Control of Banks (203), Statement of Funds (220.2), Deposit of Funds (220.3), and Checks – Warrants & Drafts (221) were to be destroyed after eight years; others such as Investments – Bonds (231) and Accounts of Disbursing Officers (251) were to be destroyed after 15 years. Not included in the disposal list was decimal 225, described in the BIA classification system as "Funds from Sales, Rents, Pupil Labor, Thumb Marks," but, more to the point, the file category for individual Indian moneys. It would appear, then, that as of 1956 BIA individual Indian moneys files were still maintained at the BIA.[107]

In 1962 the BIA issued 43 IAM, thereby establishing a records control schedule for its general and administrative records. Files of the Central Office were to be broken every three years and transferred to the Washington National Records Center one year

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NE: University of Nebraska Press, 1979), at 338-39. A check of court records revealed only tribal claims on the various dockets.

[106] Administrator of Government Services to Heads of Federal Agencies, and "Recommended Program for the Protection of Personnel and Fiscal Records for Emergency Use," 11/16/1951 [MA-1613], C. J. Wingate to Executive Officer, Bureau of Indian Affairs, 3/24/1952 [MA-1614], and Executive Officer, Bureau of Indian Affairs to Director, Division of Property Management, 3/31/1952 [MA-1615], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1940-1956, Accession 68A-4937, box 18, file 188 15-1951-103.3, "Protection of Personnel and Fiscal Records for Emergency Use.

[107] "Supplemental Disposal List for Central Office Files," Supplement 1, 43 IAM 3.1, Appendix A, Release 43-120, 8/7/1963 [MA-1347], Joe Walker Collection, U. S. Department of the Interior. A similar list produced subsequent to 1952 indicated that many of the same decimal-subjects were to be disposed of by transferring them to Federal archives. No retention schedule was provided in that document. See "Bureau of Indian Affairs Classification Headings for Records in Archives & Federal Records Center,"

later; files of area offices and agencies were to be treated similarly. The records control schedule, however, did not control the disposal of fiscal records relating to trust funds and records dated before 1921, which were designated for permanent retention. Individual Indian moneys records, that is, those relating to proceeds from sales of real and personal property of individual Indians, rentals of allotments, shares of per capita payments not paid direct, voluntary deposits, pupils' funds, coupon bonds and similar securities, interest credited to accounts, and collections from miscellaneous sources, were to be retained permanently. All Central Office case files, ledgers and cards (original and duplicate), and posting and control media (collection vouchers, journal vouchers, and check copies, original and duplicate) were to be transferred to the Washington National Records Center when inactive. Records held at Indian agencies were to be controlled differently: all case files, original ledgers and cards, and original posting and control media were to be retained permanently; duplicate ledgers and cards and duplicate posting and control media were to be destroyed after five and three years respectively. Original schedules of collection, certificates of deposit, and "similar" accounting documentation were not considered IIM supporting documentation, even if they covered IIM funds. Such documentation was considered by the BIA to be regular accounting records, and official record copies of such items were considered records of the GAO to be disposed of according to GAO regulations.[108]

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n. d., NA RG 411, Records of the General Accounting Office Indian Tribal Claims Branch, Index to "C" Series, box 1 [MA-1341].

[108] U. S. Department of the Interior, Bureau of Indian Affairs, "Records Control Schedule," Supplement 1, 43 IAM 3.1, Release 43-120, 8/7/1963 [MA-1348], Joe Walker Collection, U. S. Department of the Interior. See also Assistant Commissioner (Administration) to All Area Directors, et al., 2/26/1963 [MA-1610], NA RG 75, General Service 1964, CCF 1957-69, box 104.

In 1967 the BIA cooperated with the National Archives to dispose of field office records created from 1881 through 1925 and stored in the Federal Records Centers. Among those records approved for destruction were "Accountable Officers Records" and "Bank Records." The former category included current accounts, schedules, abstracts of disbursement, and paid vouchers, among other items; the latter category included bank statements, notices of deposit of funds, and interest paid on deposits. No reference was made to individual Indian money accounts. The disposal was approved by all concerned, including Congress.[109] At the same time the Bureau was beginning to place records "designated as being of enduring value" already in the Federal Records Center into the newly created archives areas of the respective centers. According to the Assistant Archivist of the United States, the BIA records would represent the "first series of records to be incorporated in the regional archives of the United States."[110]

There was additional motivation for disposition and disposal in those mid-1960s. On September 22, 1966, President Lyndon Baines Johnson launched a government-wide attack on unneeded records and papers. Declaring a "moratorium on the purchase if new file cabinets," he instructed all agencies to destroy "old records" and to transfer records to Federal records centers.[111] The Bureau informed its field agencies that the campaign goal

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[109] Director, Records Appraisal Division, National Archives and Records Service to Director of Administration, Bureau of Indian Affairs, 6/16/1967 [MA-1646], General Services Administration, National Archives and Records Service, Form 115, Request for Authority to Dispose of Records, 6/15/1967, and accompanying Appraisal Report, 6/16/1967: Disposal Job No. NN-167-130 [MA-1647], and Chief , Branch of Property and Supply, Bureau of Indian Affairs to All Area Directors, 12/7/1967 [MA-1648], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1967, Accession 73A-1106, box 58, file 3306-1967-103.1.

[110] Assistant Archivist of the United States to Director of Administration, Bureau of Indian Affairs, 11/9/1967 [MA-1649], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1967, Accession 73A-1106, box 58, file 3306-1967-103.1.

[111] The White House, President of the United States, "Memorandum for Heads of Departments and Agencies," 9/22/1966 [MA-1652],], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1963, Accession 70A-2935, box 118, file 4512-1963-1032.

was to reduce the volume of records and equipment in offices and other spaces by 20 per cent over one year, consistent with the current disposition and disposal schedules. The BIA proceeded with alacrity. By the end of the campaign, August 31, 1967, the Bureau had accomplished the transfer or destruction of 15,564 cubic feet of records and other materials, effecting a 19.3 per cent reduction. The Phoenix area agencies led the Indian Service, having reduced it holdings by 37 per cent.[112] There is no way to determine if IIM records were destroyed in this large effort.

Bureau record keeping, however, did not meet government standards. In 1968 the National Archives, on behalf of the General Services Administration, initiated a government-wide evaluation of the records management programs of the various executive agencies. National Archives evaluators visited the Central Office, as well as four BIA area offices, three Indian agencies, and the BIA Office of Consolidated Services in Albuquerque, New Mexico. The resultant report, "Managing the Records of the Department of the Interior, Bureau of Indian Affairs," pointed out, among other findings, that the Bureau was deficient in the establishment of "definite records management objectives. . . ."[113] The BIA, according to the evaluators, had no "formal, on-going plan for managing records," and had not set goals "by which actual progress can be measured." BIA records management was hampered by "fragmented lines of responsibility," the report stated, and many retention periods should be shortened. The

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[112] "Records Cleanout Campaign," n. d., with attached "Nationwide Clean-Out Campaign Progress Report Form" [MA-1653] and Commissioner of Indian Affairs to All Area Directors, 12/12/1967 [MA-1654], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1963, Accession 70A-2935, box 118, file 4512-1963-1032.

[113] Administrator of Services to Secretary of the Interior, 11/3/1967 [MA-1607], Commissioner of Indian Affairs to Various Area Directors and the Executive Officer of Consolidated Services, 4/30/1968 [MA-1608], and Administrator of General Services to Secretary of the Interior, 6/24/1969 [MA-1609], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1968, Accession 75-73-1, box 54, file 2162-1968-103.0.

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evaluators noted that records holdings proportionately were far greater than at other Federal agencies: "[f]ar too many of the Bureau's records are marked for permanent retention and shipped to the Federal Records Center for permanent retention." The problem in the field was considered to be "even more acute." The evaluators recommended that field facilities be encouraged to send more materials to the record centers.[114] The National Archives evaluators also studied the "vital records" of the Bureau. Among those records are land title documents, deeds, probates, and "certain fiscal records." The evaluators found the Bureau of Indian Affairs, at the Central Office and in the field establishment, essentially not to be in compliance with current directions with regard to vital records. The BIA program was described as "incomplete" and "inadequate," and vital records were being stored at all locations in unprotected space.[115]

In 1971 the Bureau of Indian Affairs took steps to straighten out some of the problems of its field establishment. The Bureau prepared a Field Office Records Retention Plan, making it retroactive to 1926. The Plan was not a records control schedule, but rather a means to describe the types of records in the field that "are to be retained permanently (never destroyed)."[116] The records in the Plan were divided into eight categories, one of which directly affected IIM records. Category 4, "Assisting the Indians, as Trustee, in Making the Most Effective use of Their Lands and Other Resources," included probate and heirship files, land allotment and assignment records, lease files and, most important, individual Indian money ledger cards and IIM status

[114] General Services Administration, National Archives and Records Service, "Managing the Records of the Department of the Interior," 1/1969, at 8, 24, 62-65, and 83-85 [MA-1612].
[115] "Managing the Records of the Department of the Interior," op. cit., at 69-73.
[116] Chief, Management Research Staff, Bureau of Indian Affairs to Area Directors and Central Office Jurisdiction Staff, 8/5/1971 [MA-1650] and Bureau of Indian Affairs, Management Research Staff, "Part II, Retention Plan for Records of the Bureau of Indian Affairs Area Offices and Field Offices After 1926:

ledgers, case files of individual Indian money. The latter files constitute a "history of the management of an individual Indian money account, including receipts for money collected, authority for disbursement, copies of purchase order[s], vouchers, royalty and production statements, heirship data, etc."[117]

In 1980, 1989, and 1990 the National Archives revisited the BIA's records management program. The 1989 evaluation "revealed that BIA is deficient in all areas of its records management program." The evaluators noted "virtually no improvement" since the 1980 study, and the matter "in many respects has worsened." The 1990 study found, among other things, "[l]arge volumes of inactive records (many of which are permanently valuable or are potentially permanent) maintained in agency space, some under adverse environmental conditions."[118]

In 1977 the rules for disposition of individual Indian money records were changed with the issuance of 15 BIAM. From 1977 to 1989 IIM case files at the Central Office, area offices, and Indian agencies were retired to Federal record centers three years after probate and "other" actions were completed, and offered to the National Archives 20 years after retirement. Duplicate copies were to be destroyed when no longer needed. Heirship files, maintained at the BIA's title plants, were to be retired to Federal record centers when no longer active, and offered to the National Archives 20 years after retirement. At the agencies, original IIM ledgers and cards were to be held for three years, or when volume required, then transferred to the Federal record centers. These

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Identification of Records to be Retained Permanently" [MA-1651], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1967, Accession 73A-1106, box 58, file 3306-1967-103.1.

[117] "Retention Plan for Records of the Bureau of Indian Affairs," op. cit., at 4a and 4o-p.

[118] National Archives and Records Administration, Office of Records Administration, "Evaluation of the Records Management Program of the Department of the Interior, Bureau of Indian Affairs," 8/1990 [MA-694].

records would be offered to the National Archives 20 years after being sent to the record centers. Those IIM posting and control records at area offices and Indian agencies that were not considered GAO records were to be organized by fiscal year and retired to Federal record centers following BIA audit, or three years subsequent to the end of each fiscal year. All such records were to be offered to the National Archives 20 years after retirement. All duplicate records were to be destroyed within five years of their creation.[119]

The BIA issued 16 BIAM in 1989 and this manual remains in effect today. The 4800 series of the new records control document is reserved for "Trust Funds and IIM." Under the new system IIM Case Files (requests for withdrawals and related correspondence, authorities for disbursement, vouchers, royalty and production statements, heirship data, canceled checks, and related documents) are to be retired to Federal Record Centers five years after probate and "other actions" are completed, and offered to the National Archives 20 years after retirement. All record copies of IIM ledgers and cards and IIM posting and control cards essentially are to be held for five years, retired to the records centers, and offered to the National Archives 20 years after retirement. Paper copies of Cash Collection Files (deposit tickets, receipts, bills for collection, and checks written to the BIA for deposit into the Treasury) and General Ledger Detailed Listings (deposits, disbursements, transfers of funds between agencies, cash balance, and repayments) are to be held for three years, retired to the record centers, and temporarily frozen. These records are to be destroyed five years after retirement after the freeze is lifted. Individual Indian money Deposit Ticket Files are to be held

[119] U. S. Department of the Interior, Bureau of Indian Affairs, "Records Control Schedule," 15 BIAM Supplement No. 3, Appendix 2, 3/23/1978, at 137-138 and 149-54 [MA-1349], Joe Walker Collection, U.

three years, retired to record centers, frozen, and destroyed ten years after retirement once the freeze is lifted. Paper copies of IIM Balance Forward Files (a listing of IIM accounts reflecting the money balance) are to be held for three years following the fiscal year in which they are created. Magnetic tape data are to be handled the same way. All duplicates are to be destroyed when no longer needed.

B. Storage of IIM Records at the Agencies of the Five Named Plaintiffs and Their Predecessors in Interest.

In 1954 the Office of Defense Mobilization identified an additional category of records to be protected, those "essential to the preservation of legal rights of individual citizens." The Secretary of the Interior brought this change to the attention of his bureau chiefs. The BIA commenced reporting the existence of such records but did not identify the nature of the records.[120] The program was reoriented toward "vital records," that is, those records not only vital to the Bureau's essential functioning during an emergency but also those records "essential to the preservation of legal rights and interests of individual citizens and their Government." The BIA continued to protect retirement records, placing them under this new heading, and the Bureau recognized that IIM records were related to the "rights and interests" of American Indians. Individual Indian money ledgers would thenceforth be protected in the same manner. Those records to be

S. Department of the Interior.

[120] Executive Office of the President, Office of Defense Mobilization to The Heads of Executive Departments and Agencies, 12/23/1954 [MA-1616], and Director, Division of Property Management, Office of the Secretary of the Interior to Bureau Chiefs, 12/31/1954 [MA-1617]. The program required semi-annual reporting; see, for example, Donald J. Proulx, "Status Report, Indispensable Records for Emergency Use, 1/7/1955 [MA-1618], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1940-1956, Accession 68A-4937, box 18, file 23690-1950-103.2.

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protected would be "the last sheet for each individual or, where a centralized IIM operating unit prepares a list of balances of individual accounts, the last periodic list."[121]

Under this modification, some Area Offices not only reported that IIM ledger sheets were being protected, but reported also the location where the sheets were housed. There appears to have been no universal reporting standards. There was reporting, however, with respect to the seven Indian agencies at which the IIM records of the five named plaintiffs in these proceedings and their predecessors in interest were probably filed or stored. For example, the Phoenix Area Office reported in 1964 that the Uintah and Ouray Agency, Fort Duchesne, Utah, housed IIM ledger sheets in "two separate buildings." The Billings Area Office reported that same year that the original IIM ledgers for the Blackfeet and Wind River Agencies, at Browning, Montana, and Fort Washakie, Wyoming, respectively, however, were "kept in the main office building in [a] walk-in vault." One copy was provided annually to owners, and one copy was "bound and stored in an adjacent building in a fire resistant safe."[122] The Portland Area Office, which included the Fort Hall Indian Agency, reported that it had not yet implemented the program.[123]

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[121] Chief, Branch of Property and Supply, Bureau of Indian Affairs to All Area Directors, et al., 8/5/1964 [MA-1619], NA RG 75 Records of the Bureau of Indian Affairs, General Service,1960-1961, Accession 68A-2045, box 298, file 12904-1961-103.2. Underscoring is as in the document. The first "Vital Records Protection Status Reports" were actually submitted by the field facilities on June 30, 1964.

[122] Bureau of Indian Affairs, Phoenix Area Office, General Services Administration Form 2035, "Vital Records Protection Status Report, Part II, Rights and Interests Records," for the Uintah and Ouray Agency, 6/30/1964 [MA-1627], ibid., Billings Area Office, 6/30/1964 [MA-1622]; ibid., for the Blackfeet Indian Agency [MA-1626], and ibid., for the Wind River Indian Agency [MA-1623], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1960-1961, Accession 68A-2045, box 298, file 12904-1961-103.2. The records at the Uintah and Ouray Agency were handled the same way in 1966. See ibid., 6/30/1966 [MA-1630].

[123] Bureau of Indian Affairs, Portland Area Office, General Services Administration Form 2035, "Vital Records Protection Status Report, Part II, Rights and Interests Records," for the Fort Hall Indian Agency, 6/30/1964 [MA-1628], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1960-1961, Accession 68A-2045, box 298, file 12904-1961-103.2. In 1958 the General Services Administration requested that all "old records, particularly those produced during the 19th century, be released to the

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In 1966 the Billings Area Office reported that its IIM ledgers for the Blackfeet and Wind River Agencies still were maintained at the agency in Browning, Montana, in a walk-in vault. The ledgers were stored and distributed as they had been in 1964. The records were moved from Browning to Billings during fiscal year 1967.[124] The Portland Area Office apparently commenced implementation of the Bureau's vital records program, indicating at this time that Fort Hall's IIM ledgers were stored at the Fort Hall Agency in Fort Hall, Idaho, but did not describe what protective measures may have been associated with the storage. The Minneapolis Area Office reported in 1966 that it housed the IIM records of the Great Lakes Agency, the organization responsible for the Lac du Flambeau Indians, but also declined to elaborate.[125] The Anadarko Area Office, which includes the Fort Sill Reservation in its jurisdiction, reported that IIM account records were "adequately protected in vault area," at various locations. Since Anadarko is, by far, the closest listed location to Fort Sill, it may be presumed that the Fort Sill IIM

National Archives and Records Service." Records were to be offered to the Archivist of the United States or to the Federal Records Centers. If the records "cannot be so transferred," agencies were to notify the Archivist. The BIA listed its old records and their repositories. It is curious that not one agency that reported old records included IIM records among them. Of the agencies associated with the five named plaintiffs and their predecessors, Winnebago reported tract books and allotment schedules, Blackfeet reported correspondence files, Great Lakes [Lac du Flambeau] reported timber-related materials, and Uintah and Ouray reported patents and probates. There was no reporting for the Fort Sill, Fort Hall, and Wind River Agencies. See General Services Administration, Circular No. 153, "Retirement of Old Records," 4/7/1958 [MA-1644] and Director, Division of Property Management, Bureau of Indian Affairs to Commissioner of Indian Affairs, 7/7/1958 [MA-1645], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1958, Accession 66A-641, box 129, file 9643-1958-103.1.

[124] Bureau of Indian Affairs, Billings Area Office, General Services Administration Form 2035, "Vital Records Protection Status Report, Part II, Rights and Interests Records," for the Billings Area Office, and subordinate agencies, 6/30/1966 [MA-1629] and ibid., 6/30/1967, [MA-1635], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1966, Accession 72A-8022, box 89, file 3495-1966-103.2.

[125] Bureau of Indian Affairs, Portland Area Office, General Services Administration Form 2035, "Vital Records Protection Status Report, Part II, Rights and Interests Records," for the Portland Area Office, 6/27/1966 [MA-1631] and ibid., for the Minneapolis Area Office [MA-1632], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1966, Accession 72A-8022, box 89, file 3495-1966-103.2.

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records were stored in a vault at Fort Sill. Copies of IIM records were indicated to be at the "Riverside Indian School 3 miles from Anadarko."[126]

In 1967 the Aberdeen Area Office reported that the IIM records for the Winnebago and Great Lakes Agencies were housed at that Area Office. The Great Lakes IIM records apparently had been separated from other Great Lakes vital records, since, in its report for 1967, the Minneapolis Area Office did not include Great Lakes Agency IIM documents in its list of vital records.[127]

In 1970 the Phoenix Area Office submitted a Records Protection Status Report but did not list IIM records of any of its subordinate agencies. The Billings Area Office reported that original IIM account ledger records continued to be retained at in Billings, one copy being distributed to individual owners, and one copy in bound form at the Blackfeet and Wind River Agencies. The IIM records of the Fort Hall Indian Agency still were housed at Fort Hall, according to the Portland Area Office; but, again, did not offer a description of the conditions in which the records were stored. At this time the Minneapolis Area Office continued to report that Great Lakes Agency records were stored at the agency in Asland, Wisconsin, but did not include IIM materials in its list of vital records. The Aberdeen Area Office reported that the Winnebago Agency IIM records still were at Aberdeen, but, like Minneapolis, did not indicate the location of Great Lakes [Lac du Flambeau] IIM records. In 1970 the Anadarko Area Office reported

[126] Bureau of Indian Affairs, Anadarko Area Office, General Services Administration Form 2035, "Vital Records Protection Status Report, Part II, Rights and Interests Records," for the Anadarko Area Office, 6/27/1966 [MA-1637], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1966, Accession 72A-8022, box 89, file 3495-1966-103.2.

[127] Bureau of Indian Affairs, Aberdeen Area Office, General Services Administration Form 2035, "Vital Records Protection Status Report, Part II, Rights and Interests Records," for the Aberdeen Area Office, 6/30/1967 [MA-1633] and ibid., Minneapolis Area Office, for the Great Lakes Agency [MA-1636], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1966, Accession 72A-8022, box 89, file 3495-1966-103.2.

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no changes, indicating that the Fort Sill IIM materials still may have been in a vault at that location.[128]

C. The General Accounting Office.

The importance of the government's disposal program was clearly reflected in a GAO request for authority to dispose of records, just two years after the initial GAO request for authority for disposal in 1952, and in subsequent submissions. In May 1954 the GAO requested disposal of several sets of fiscal records. The submission, which received extraordinary scrutiny at the National Archives, included, among other items:

- accounts of the 2nd Auditor, 1851-1899, with some exceptions (Item 9);
- Interior Department accounts, 1851-1899, excluding Indian accounts (Item 11);
- miscellaneous Treasury accounts, 1894-1899 (Item 20); and
- quarterly accounts of the Treasurer of the United States, 1826-1908, with gaps (Item 36).

In his appraisal report, the appraising archivist referred to the 1952 GAO submission described above. He noted that the appraisal of those records had been a "grave responsibility" and the results constituted a "sufficiently significant development in Federal records management." The National Archives believed that similar scrutiny was required with respect to this submission. The records, which included fiscal transactions of "practically all" agencies of the three branches of the government, were examined first by several archivists who worked in cooperation with GAO personnel for six months.

[128] Bureau of Indian Affairs, Aberdeen Area Office, General Services Administration Form 2035, "Vital Records Protection Status Report, Part II, Rights and Interests Records," for the Phoenix Area Office, 6/30/1970 MA-1638], ibid., for the Billings Area Office [MA-1639], ibid., for the Portland Area Office [MA-1640], ibid, for the Minneapolis Area Office [MA-1641], ibid., for the Aberdeen Area Office [MA-1642], and ibid., for the Anadarko Area Office [MA-1643], NA RG 75 Records of the Bureau of Indian Affairs, General Service, 1966, Accession 72A-8022, box 89, file 3495-1966-103.2.

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Following their appraisal, three prominent scholars—two professors of history and one professor of political science—spent two weeks studying the records and the appraisal. Each submitted his own report of his findings and recommendations. As a result, the accounts of the 2nd Auditor (Item 9) and the miscellaneous Treasury accounts (Item 20) were approved for retention. The Interior Department accounts component (Item 11), that specifically excluded Indian accounts, was marked for destruction, as were the quarterly accounts of the Treasurer. The final appraising official observed that the GAO routinely excluded Indian records from destruction.[129]

In 1963 the GAO submitted a disposal request for personal ledgers, showing "receipts, expenditures and detailed balances due the United States" in disbursing officer accounts for 1921 to 1937. Again, those portions "of the Department of the Interior designated Indian" would be "reserved from disposal." That same year the GAO proffered the disposal of Indian "Approval of Heirship" files for 1918 to 1928, after being assured by the BIA that the original documents "are available and are presently filed or in process of being filed at the field stations" of the BIA. In that same submission, however, the BIA also proffered for disposal farming and grazing leases

[129] General Services Administration, National Archives and Records Service, Form 115, Request for Authority to Dispose of Records, 5/18/1954, with accompanying Appraisal Report, 7/13/1954: Disposal Job No. II-NNA-1186, ibid. [MA-1333]. The item describing quarterly accounts of the Treasurer was listed among those records to be retained but a subsequent discussion indicated that those records were "duplicated physically or in substance" and therefore "had no discernible value. . . ." The exclusion from disposal was extremely broad, and occurred even in the cases of Indian claims against the United States for such matters as freight and passenger transportation charges. See, for example, General Services Administration, National Archives and Records Service, Form 115, Request for Authority to Dispose of Records, 5/26/1960, NA RG 217, Records of the Accounting Officers of the Treasury, boxes containing GAO disposal files, box 157 [MA-1334].

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made on restricted Indian lands during 1911 to 1915. Disposal was approved by the National Archives records appraiser and Congress approved his decision.[130]

[130] General Services Administration, National Archives and Records Service, Form 115, Request for Authority to Dispose of Records, 4/8/1963 [MA-1338] and 3/13/1963 [MA-1339], both NA RG 217, Records of the Accounting Officers of the Treasury, boxes containing GAO disposal files, box 157. Restricted Indian land is property in which the United States has an interest, land generally that cannot be leased, mortgaged, or alienated. The land is usually allotted. The Act of May 27, 1908, 35 Stat. 312, provided that government control and preserve the property and provided in part for the removal of restrictions from part of the land.

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III. The General Accounting Office, the BIA, and Individual Indian Moneys

Introduction

As discussed in chapter two, Individual Indian Moneys were used to buy Liberty Bonds during World War I. In December 1925 Assistant Secretary of the Interior John Edwards wrote the Secretary of the Treasury, "Liberty Loan Bonds aggregating $23,300,000 have been purchased from time to time through your Department. . . ."[1] This purchase represented in microcosm one domestic problem the United States encountered as a result of the war: a large national debt. The bonded debt combined with relatively high taxes underscored to many Americans the need to improve financial management in government. Indeed, this idea had been prevalent during the Progressive Era prior to World War I, advocated by such public interest groups as the Bureau of Municipal Research, the organization that had critiqued the BIA's bookkeeping and accounting practices in 1914. By the early postwar period, efficiency and economy in government proved political rallying cries for many in the United States.[2]

In this regard Congress passed two laws in 1921 that greatly affected the operations of the Bureau of Indian Affairs. "An Act Authorizing appropriations and expenditures for the administration of Indian affairs, and for other purposes," commonly known as the Snyder Act in honor of its chief sponsor, gave formal sanction to BIA expenditures of

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[1] Assistant Secretary of the Interior to Secretary of the Treasury, 12/23/1925 [MA-872].

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congressional appropriations. The same year, the Budget and Accounting Act established the General Accounting Office, which, among its many other functions, audited and investigated individual Indian moneys practices and procedures.

A. The Snyder Act

On July 19, 1921, Representative Homer P. Snyder of New York introduced House bill 7848, "authorizing appropriations and expenditures for the administration of Indian Affairs. . . ."[3] The House Committee on Indian Affairs supported passage of the measure, observing that for many years Congress had appropriated money for BIA activities that had lacked specific legislative authority. This had caused some congressmen to raise points of order questioning the legality of funding certain BIA activities. The Committee report endorsed the prudence of a law that would resolve this dilemma.[4]

In support of Snyder's bill, Representative Melville Kelly of Pennsylvania examined the course of Federal Indian policy. Discussing the period since the Dawes Act of 1887, Kelly affirmed that for "an entire generation it has been the express purpose of the American Congress to individualize the Indians, to give them homes of their own, to help them become self-supporting, and to make them citizens of the United States." He criticized the BIA, which he stated circumvented the intent of Congress. According to

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[2] Roger R. Trask, GAO History, 1921-1991 (Washington, DC: General Accounting Office, 1991), p. 2 [MA-807] and Darrell H. Smith, The General Accounting Office: Its History, Activities and Organization (Baltimore: The Johns Hopkins Press, 1927), pp. 57-58 [MA-777].
[3] U. S. Congress, House, Public Bills, Resolutions, and Memorials, 67th Cong., 1st sess., Congressional Record, vol. 61 (7/19/1921), p. 4081 [MA-412].
[4] U. S. Congress, House, Appropriations and Expenditures for the Administration of Indian Affairs, 67th Cong., 1st sess., 7/20/1921, H. Rept. 275, serial 7921 [MA-413].

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Kelly, the Bureau was guilty of increasing its operations rather than decreasing "its activities until it functioned only for the benefit of the old Indians, who, in 1887, had no education and no opportunities to know the duties and obligations of American citizenship."[5] Among other questionable actions, he censured the BIA for its restrictive control of individual Indian moneys: "In the American community there are banks, where depositors control their own accounts. In the Indian community there are no banks and Indians have no right to control their own money."[6] The representative concluded that the time had come to emancipate the Indian "from the autocratic control of a money-wasting bureau" and declare Indians "citizens with the rights and duties of citizens." Kelly's lengthy address was greeted with applause from his fellow congressmen.[7]

If some representatives denounced the BIA, it also had its share of defenders. Speaking in favor of House bill 7848, Representative Elmer Leatherwood of Utah acknowledged that some mismanagement of Indian affairs had occurred. Nevertheless, he opposed efforts to strike "down that agency of the Government. I do not believe that reform should come in any such manner. If there are wrongs to be righted, let us right them more gently."[8] Representative Carl Hayden of Arizona admitted that the BIA contained "the usual proportion of job holders and drones such as are found in other branches of the Government. . . ." His experience with the Bureau, however, led him to conclude that "[n]owhere else are there to be found better examples of men and women

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[5] U. S. Congress, House, Statement of Melville Kelly, 67th Cong., 1st sess., Congressional Record, vol. 61 (8/4/1921), pp. 4659-4661 [MA-414].
[6] U. S. Congress, House, Statement of Melville Kelly, 67th Cong., 1st sess., Congressional Record, vol. 61 (8/4/1921), p. 4664 [MA-414].
[7] U. S. Congress, House, Statement of Melville Kelly, 67th Cong., 1st sess., Congressional Record, vol. 61 (8/4/1921), p. 4667 [MA-414].

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who with the true missionary spirit have devoted their lives to the advancement of the dependent and uncivilized people over whose affairs they have been given supervision."[9]

Much of the debate drifted from the central point of House bill 7848, the necessity to provide a legal foundation for BIA expenditures. Snyder eventually moved the congressmen back on track. He noted that in the previous Indian appropriation bill, "more than 90 per cent of the items of appropriation in that bill were subject to a point of order. . . ." He asserted that since the 1830s, appropriations for Indian affairs simply had grown without specific legislative authority. Passage of the measure would establish a lawful basis while reasserting the House of Representatives' constitutional authority over appropriations. "This House ought to have the right to say what appropriations shall be made for this service," Snyder proclaimed, "and if this present bill is enacted it will have that right." After various recommendations were considered, the amended bill easily passed the House on August 9, 1921.[10]

The Snyder Bill then moved to the Senate, where the Committee on Indian Affairs recommended its passage without amendment. The Committee report included a letter from acting Secretary of the Interior E. C. Finney to Chairman Charles Curtis supporting H. R. 7848. Finney remarked that there had been "no specific law authorizing many of the expenditures for the benefit of the Indians. Congress, however, has continued to

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[8] U. S. Congress, House, Statement of Elmer Leatherwood, 67th Cong., 1st sess., Congressional Record, vol. 61 (8/4/1921), p. 4677 [MA-414].
[9] U. S. Congress, House, Statement of Carl Hayden, 67th Cong., 1st sess., Congressional Record, vol. 61 (8/4/1921), p. 4679 [MA-414].
[10] U. S. Congress, House, Statement of Homer Snyder, 67th Cong., 1st sess., Congressional Record, vol. 61 (8/4/1921), pp. 4683-4691 [MA-414] and U. S. Congress, House, Vote on H. R. 7848, 67th Cong., 1st sess., Congressional Record, vol. 61 (8/9/1921), pp. 4776-4777 [MA-415].

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make appropriations to carry on the activities of the Indian Service."[11] The bill then passed the Senate with little debate on October 20, 1921.[12]

On November 2, 1921, President Warren G. Harding signed "An Act Authorizing appropriations and expenditures for the administration of Indian affairs, and for other purposes." This act authorized the BIA to "direct, supervise, and expend" congressional appropriations for the "benefit, care, and assistance" of Native Americans. The statute sanctioned numerous operations, including education, health, and industrial assistance; the general administration of Indian property; irrigation; buildings and plant improvements; the employment of superintendents, inspectors, and others; the suppression of liquor; the purchase of vehicles for official use; and "general and incidental expenses in connection with the administration of Indian affairs."[13] As Congress and the Interior Department both observed, the Snyder Act provided a legislative foundation for BIA functions. The law also reflected the political temper of the times regarding the need to bring order to the budget process and to institute greater oversight of Executive Branch agencies. In this respect, Congress debated the Snyder Act after it had created a national budget system and a new, powerful Federal agency, the General Accounting Office.

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[11] U. S. Congress, Senate, Authorizing Appropriations and Expenditures for the Administration of Indian Affairs, 67th Cong., 1st sess., 7/20/1921, S. Rept. 294, serial 7918 [MA-417].
[12] U. S. Congress, Senate, Administration of Indian Affairs, 67th Cong., 1st sess., Congressional Record, vol. 61 (10/20/1921), pp. 6529-6530 [MA-418].
[13] 4 Kappler 330 [MA-410].

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B. The Budget and Accounting Act of 1921

On June 10, 1921, President Harding signed "An Act To provide a national budget system and an independent audit of Government accounts, and for other purposes." Cited as the "Budget and Accounting Act, 1921," the statute contained three titles: "Definitions," "The Budget," and "General Accounting Office." The budget title required the President to transmit a budget to Congress on the first day of each regular session, and defined what must be included in the President's request. This title also created the Bureau of the Budget and specified its duties, as well as the obligations of each department and establishment seeking funding.[14]

Title III created the General Accounting Office "independent of the executive departments and under the control and direction of the Comptroller General of the United States." The Comptroller General and his assistant were appointed for 15 years. The Comptroller General immediately assumed many of the duties previously held by Treasury Department officials. In this regard, section 304 of the act proclaimed:

> All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants . . . relating to keeping the personal ledger accounts of disbursing and collecting officers, shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921.[15]

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[14] 42 Stat. 20, 20-23 [MA-305].
[15] 42 Stat. 20, 23-24 [MA-305].

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Congress conferred many powers on the Comptroller, among them the authority to investigate and report to Congress. Indeed, Roger Trask, the longtime historian of the General Accounting Office, has called section 312 of the Budget and Accounting Act "the heart of the law." The Comptroller could "investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds. . . ." He could undertake such investigations independently or as the result of an order from either house of Congress. Section 313 of the statute required all departments and establishments to furnish necessary information to the Comptroller and to allow his employees the right of access to examine "any books, documents, papers, or records of any such department or establishment."[16]

The Budget and Accounting Act of 1921 was the consequence of nearly two years of debate. A House resolution in July 1919 had authorized the creation of a select committee to study the budget. The resultant House bill 9783 sought to provide both a national budget system and an independent agency that would audit government accounts.[17] After congressional hearings and reports, the Budget and Accounting Act of 1920 passed Congress only to be vetoed by President Woodrow Wilson. In his veto message Wilson expressed "entire sympathy with the objects of this bill" but considered one provision unconstitutional. Although the President appointed the Comptroller General with the advice and consent of the Senate, the chief executive had no role in the

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[16] 42 Stat. 20, 25-26 [MA-305] and Roger R. Trask, GAO History, 1921-1991, (Washington, DC: General Accounting Office, 1991), p. 4 [MA-807].
[17] U. S. Congress, House, National Budget System, 66th Cong., 1st sess., 10/8/1919, H. Rept. 362, pp. 1-3 [MA-637] and U. S. Congress, Senate, National Budget System, 66th Cong., 2nd sess., 4/13/1920, S. Rept. 524, serial 7649, pp. 4-6 [MA-639].

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removal of that official.[18] The Budget and Accounting Act of 1921, which President Harding approved, gave the chief executive a role in the removal process. Harding selected John Raymond McCarl, formerly the Executive Secretary of the National Republican Congressional Campaign Committee, to serve as the first Comptroller General. McCarl quickly began the process of organizing the new Federal agency.[19]

A review of congressional reports, hearings, and debates from 1919 to 1921 indicates that BIA operations did not play a significant part in the passage of the Budget and Accounting Act of 1921. The newly created General Accounting Office (GAO), however, would assume a major role in BIA activities in general and in oversight of Individual Indian Moneys in particular. The GAO would audit IIM accounts and investigate BIA trust fund practices, and the Comptroller General would decide many issues regarding IIM procedures.

C. The GAO and Individual Indian Moneys, the Early Years

An important part of J. R. McCarl's early tenure involved the organization of the GAO. By early 1922 the GAO contained six divisions to handle audits of executive departments, as well as a Division of Law (eventually the Office of the General Counsel), a Bookkeeping Section, and an Investigations Section. Reorganizations led to the

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[18] U. S. Congress, House, Veto Message Relating to a National Budget System, 66th Cong., 2nd sess., 6/4/1920, H. Doc. 805, serial 7768, pp. 1-2 [MA-642] and Trask, GAO History, 1921-1991, pp. 2-3 [MA-807].
[19] 42 Stat. 20, 24 [MA-305] and Trask, GAO History, 1921-1991, p. 7 [MA-807].

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creation of a single Audit Division by 1926.[20] The function of this division was to audit and settle the accounts of executive branch agencies, including the BIA. As Roger Trask has observed, "[a]fter Congress appropriated money, GAO's duty was to see that there were no violations of the congressional purpose as embodied in appropriations legislation." The bulk of GAO's audit work involved checking vouchers.[21]

After initial reorganizations, the Miscellaneous Section of the Audit Division took charge "of the work of balancing individual Indian money accounts." During fiscal year 1928 this process moved to the Check Section of the Audit Division. The Comptroller stated in his annual report that the move "resulted in a centralization of check reconciliation work, the use of a uniform system of check accounting and a large personnel saving."[22] This change came after a GAO study "found that duplications existed between the Interior Department and the General Accounting Office, and that certain features of the examination were being performed partly in one office and partly in another." As a consequence of the study, regulations were issued to "eliminate all duplication and coordinate the work of the two offices."[23] According to a study published in 1927, the Check Section consisted of approximately 120 employees, including a chief, 26 auditors, 19 reconciliation clerks, 7 bookkeeping clerks, and numerous administrative and support personnel including machine operators, "computers," and others. In his

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[20] Trask, GAO History, 1921-1991, pp. 7-8 [MA-807].
[21] Roger R. Trask, Defender of the Public Interest: The General Accounting Office, 1921-1966 (Washington, DC: General Accounting Office, 1996) pp. 203-204 [MA-808].
[22] U. S. General Accounting Office, Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1928 (Washington, DC: GPO, 1928) p. 46 [MA-815]. Hereafter, Annual Report of the Comptroller General for the Year. . . .
[23] Annual Report of the Comptroller General for the Year 1926, (Washington, DC: GPO, 1926) pp. 30-31 [MA-813].

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annual report for 1938, the acting Comptroller General described the audit process for Individual Indian Moneys:

> These accounts embrace an accounting by agents of the Indian Service for private funds of individual Indians received and disbursed. The audit consists of a determination as to compliance with the laws, regulations and decisions governing the expenditure of Indian moneys. The complete accounting embraces both collections and disbursements for the account of the individual Indian. The decisions for application are those of the former Comptrollers of the Treasury, the Comptroller General, the Secretary of the Interior, and the Courts.[24]

The Investigations Section worked closely with the Audit Division. If the bulk of the Audit Division's work involved examining vouchers, the Office of Investigations had been established to investigate and make recommendations regarding the receipt and disbursement of public funds, both in Washington and in the field. As noted above, the Comptroller General could order investigations or Congress could command them. By the early 1920s, McCarl had established procedures for investigations initiated by the GAO. As Roger Trask has observed, the "chief investigator was to submit for approval by the comptroller general or the assistant comptroller general all initiatory actions in investigations, examinations, and inspections, and he was to submit all reports and recommendations based on the section's work to the comptroller general through the assistant comptroller general."[25] One example of an investigation of BIA practices occurred in March and April of 1927. At that time, GAO officials inspected Indian boarding schools and agencies in Arizona and New Mexico "for the purpose of observing field operations, and learning from personal contact the field conditions and how

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[24] Smith, The General Accounting Office, p. 164 [MA-777] and Annual Report of the Acting Comptroller General for the Year 1938, (Washington, DC: GPO, 1938) p. 21 [MA-824].
[25] Trask, Defender of the Public Interest, pp. 206-208 [MA-808].

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appropriated moneys were being used and accounted for."[26] As will be seen, two years later the GAO would present a study of Indian trust funds to Congress.

In addition to organizing the new agency, the Budget and Accounting Act also empowered McCarl to exercise responsibilities formerly held by the Comptroller of the Treasury. Under this authority the Comptroller General decided questions regarding administrative practices and procedures followed by Federal agencies. In this regard, he issued decisions regarding Individual Indian Moneys and related BIA practices. In 1922, for example, the Secretary of the Interior asked the Comptroller General to determine the legality of a suggestion that would alter procedures for drawing checks on accounts of individual Indians not deemed competent. Under the recommendation, the superintendent would be allowed to endorse "the checks for the Indians as their ex-officio guardian under whose supervision the proceeds must be spent. . . ." McCarl reviewed legislation regarding Indian trust funds and the duties of superintendents, then decided that such "checks should be drawn to the order of the superintendent and endorsed by him. . . ." In addition, the Comptroller specified a format for the endorsement. McCarl affirmed, however, that the "recognition by this office of the procedure sanctioned . . . applies only to the class of checks pertaining to incompetent Indians."[27]

In a subsequent ruling, McCarl drew a legal distinction between disbursing officers and Indian agents. The Comptroller found that when a statute imposed an obligation on an Indian agent it was "personal to the agent alone," and could not be assumed by a

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[26] Annual Report of the Comptroller General for the Year 1927, (Washington, DC: GPO, 1927) p. 60 [MA-814].
[27] Comptroller General to Secretary of the Interior, 6/1/1922 [MA-627].

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disbursing officer.[28] McCarl also addressed nagging questions regarding the responsibilities of superintendents who managed small sums of money for individual Indians. In 1927, for example, he permitted agency superintendents who held small amounts belonging to Indian students whose whereabouts were not known to place the money in a Treasury account entitled, "unclaimed individual Indian moneys (special fund)."[29] The following year he allowed the creation of an account similar to unclaimed individual Indian moneys (special fund) to hold proceeds for individual Indians when checks for small amounts had been unclaimed for several years.[30]

McCarl's decisions in regard to these issues represented but one facet of the GAO's supervision of Individual Indian Moneys. Since its creation, the GAO audited IIM funds and investigated BIA activities. In the meantime, the BIA continued to adopt new procedures and revise existing methods regarding Individual Indian Moneys.

D. The BIA and Individual Indian Moneys during the 1920s

As has been noted, the Bureau of Indian Affairs sought to disburse individual Indian moneys as quickly as possible to Indians it deemed competent. In 1920, for example, IIM regulations were modified to allow superintendents "to turn over directly all funds to patent-in-fee Indians, to make payment of not to exceed $100 to reasonably competent adult Indians without obtaining specific authority from the office, and disburse directly from the lease roll not to exceed $200 per annum to incompetent adults when

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[28] Comptroller General to Secretary of the Interior, 3/20/1924 [MA-631].
[29] 7 Comp. Gen. 355 [MA-346].

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their needs require. . . ."[31] The following year Commissioner of Indian Affairs Charles Burke stated that the Bureau had increased disbursements from IIM accounts for the benefit of soldiers returning from wartime service and for others.[32] Despite the BIA's avowed efforts, the amount of individual moneys "in banks and in [the] hands of superintendents" generally continued to grow during the 1920s. In 1921 this amount stood at $28,088,371, then ranged in the mid-$30,000,000 level for the next three years. In 1925 the amount jumped to $56,808,419. After dipping to $22,926,481 in 1926, the total skyrocketed to $73,905,778 the following year.[33] Oil, gas, and mineral leasing represented a significant element in this equation. In 1925, for example, Commissioner Burke stated that 80,001.36 acres of restricted individual Indian lands were leased for oil and gas mining purposes, which yielded a gross oil production of 13,532,856.81 barrels. Viewing only the Five Civilized Tribes of Oklahoma, Burke confirmed that the Bureau credited $7,379,551.06 to individual Indian accounts.[34] Two years later, the BIA estimated the value of oil, gas, and minerals on individual Indian lands at $223,962,597.[35]

Charles Henry Burke of South Dakota served as Commissioner of Indian Affairs from 1921 to 1929. Earlier in his political career Burke had sat on the House Committee on Indian Affairs. In fact, in 1906 he had authored legislation to amend the Dawes Act of

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[30] 8 Comp. Gen. 249 [MA-347].
[31] Commissioner of Indian Affairs Annual Report for the Year 1920 (Washington DC: GPO, 1920), pp. 47-48 [MA-76].
[32] Commissioner of Indian Affairs Annual Report for the Year 1921 (Washington DC: GPO, 1921), p. 27 [MA-48].
[33] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill, 1929, 70th Cong., 1st sess. (Washington, DC: GPO, 1928), p. 86 [MA-189].
[34] Commissioner of Indian Affairs Annual Report for the Year 1925 (Washington DC: GPO, 1925), p. 30 [MA-52].

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1887. As his biographer has noted, the Burke Act "was designed to provide additional protection for Indians during the twenty-five-year probationary period during which their land allotments were held in trust by the federal government." Despite his credentials, controversy and criticism marked Burke's eight-year tenure as Commissioner. Some of the problems involved Burke's superior, Secretary of the Interior Albert Fall, who attempted to initiate programs which many Native Americans and reform groups found objectionable. Furthermore, the whole policy of individualization and assimilation that had been the focus of Federal efforts since the Dawes Act encountered increasing criticism by the 1920s.[36]

During Burke's administration the BIA revised procedures related to Individual Indian Moneys, leasing, and bookkeeping and accounting practices. In October 1921, for example, the Commissioner informed disbursing agents of a new system for numbering and accounting for blank checks on IIM deposits.[37] Burke also amended paragraph 5 (A) of the IIM regulations, which again revised the amount that could be disbursed "to adult Indians, who are reasonably competent." In 1922 Burke issued a circular regarding funds belonging to minors. He stated that such funds were "to be conserved as far as

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[35] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill, 1929, 70th Cong., 1st sess. (Washington, DC: GPO, 1928), p. 86 [MA-189].
[36] Lawrence C. Kelly, "Charles Henry Burke, 1921-1929," in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 251-252 and 258-260 [MA-1158]. Secretary Fall eventually would be imprisoned for his part in an oil-leasing scandal involving public lands.
[37] Commissioner of Indian Affairs to All Disbursing Officers of the Indian Service, 10/10/1921 [MA-1074].

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practicable until the child becomes of age, or if used, such use must be shown to be for the undoubted benefit of the minor, either directly or indirectly."[38]

As had been customary during the 1910s, each circular instructed the disbursing agent where to paste the revision in his IIM manual. In 1928 the BIA finally issued new regulations regarding IIM, which the Secretary of the Interior approved on January 30. These regulations incorporated the regulations of 1913, along with revisions that had remained in effect since that time. The 1928 regulations retained the definition of Individual Indian Moneys as "funds, regardless of derivation, which belong to individual Indians, and which come into the custody of a disbursing officer."[39] Such often amended sections as paragraphs five, eight, and nine, regarding the authority of disbursing officers to draw checks against the accounts of living and deceased Indians were stated plainly, thus ending (at least temporarily) the agent's need to insure that he had the latest revision.[40] Paragraph 17 authorized disbursing agents to pay the entire balance of an adult Indian's account if the total was $50 or less and no future payments were anticipated.[41] Paragraphs 19 and 20 continued the policy of not using individual Indian moneys to pay the debts of Indians unless a specific prior arrangement had been made.

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[38] U. S. Department of the Interior, Office of Indian Affairs, Regulations Concerning the Handling of Individual Indian Money (Washington, DC: GPO, 1913) [MA-15]. Both circulars are inserted following page 3 of the regulations.
[39] U. S. Department of the Interior, Regulations of the Indian Service, Individual Indian Moneys (Washington, DC: GPO, 1929), p. 1 [MA-285].
[40] U. S. Department of the Interior, Regulations of the Indian Service, Individual Indian Moneys (Washington, DC: GPO, 1929), p. 1 [MA-285]; compare to U. S. Department of the Interior, Office of Indian Affairs, Regulations Concerning the Handling of Individual Indian Money (Washington, DC: GPO, 1913) [MA-15].
[41] U. S. Department of the Interior, Regulations of the Indian Service, Individual Indian Moneys (Washington, DC: GPO, 1929), p. 2 [MA-285].

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Those who chose to "extend unauthorized credit to Indians do so at their own risk. . . ."[42] One debt, however, would be honored. If an adult Indian deserted his or her family, the disbursing agent was authorized to expend up to $25 per month for the support of minor children.[43]

The IIM regulations came one year after the BIA adopted new bookkeeping and accounting regulations. Approved by the Secretary of the Interior on February 4, 1927, the bookkeeping and accounting regulations discussed Individual Indian Moneys and other financial transactions in detail. The stated purpose of the bookkeeping and accounting system was to "enable disbursing officers properly to account for all receipts and disbursements by appropriations and funds and to show the location of their balances; that is, whether they are on hand or deposited, and, if the latter, in what depositories." For individual moneys the disbursing officer needed "to show only the amount of disbursing officer's cash under the several subtitles and the amount in individual Indian money banks."[44]

The regulations continued to emphasize that individual Indian moneys should not be deposited to the credit of the United States, "except when specifically directed by the Indian Office."[45] Section 254 identified eight classes of Individual Indian Moneys: proceeds derived from the sales of real and personal property of individual Indians; rentals of Indian allotments; shares of per capita payments not paid directly to the

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[42] U. S. Department of the Interior, Regulations of the Indian Service, Individual Indian Moneys (Washington, DC: GPO, 1929), p. 3 [MA-285].
[43] U. S. Department of the Interior, Regulations of the Indian Service, Individual Indian Moneys (Washington, DC: GPO, 1929), p. 4 [MA-285].
[44] U. S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting (Washington, DC: U. S. Department of the Interior, 1927), p. 1 [MA-135].

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designated recipient; voluntary deposits by individuals; pupils' funds; coupon Liberty Loan Bonds and similar securities; interest credited to individual accounts; and collections from miscellaneous sources. The BIA required disbursing officers to "take up in their accounts daily all collections of Individual Moneys. For this purpose, an official receipt will be issued to each person making an initial payment." Receipts had to be posted daily in the cashbook, the appropriation ledger, and individual ledgers. Furthermore, all moneys collected for individuals had to be "deposited daily to the official credit of disbursing officers either in local bonded depositories or with the Treasurer of the United States," unless a satisfactory reason existed for delay. The disbursing officer would be held responsible for any losses incurred as a result of his failure to comply with deposit provisions.[46] Except in certain specified instances, the Bureau prohibited cash payments to individuals and required that disbursing officers make all payments using official checks.[47] The regulations also established procedures for pupils' funds, which would be handled in the same manner as other individual moneys with a few exceptions.[48]

The bookkeeping regulations assumed some of the provisions that had been a part of the IIM regulations of 1913. In this regard, the bookkeeping regulations recounted the duties and obligations of banks holding individual funds. The BIA required banks to

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[45] U. S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting, p. 9 [MA-135].
[46] U. S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting, p. 27 [MA-135].
[47] U. S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting, p. 28 [MA-135].
[48] U. S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting, p. 31 [MA-135].

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remit interest semiannually on individual moneys.[49] When a disbursing officer expected to open new accounts, he "must issue timely invitations to all banks, both State and National, in reasonable proximity, to submit proposals of the rates of interest they will pay on open accounts and time deposits." The agent would then submit proposals from banks seeking Indian business to the Commissioner. The BIA stated criteria for the selection of the banks as well as surety bonds requirements. Liberty Loan Bonds, which represented a significant IIM investment, were to be placed in the custody of local banks for safekeeping.[50]

The bookkeeping and accounting regulations also detailed procedures for the transmittal of records to GAO auditors.[51] The regulations included general accounting procedures and discussed how accounts would be designated.[52] The BIA cited specific provisions for property records, cost ledgers, and various registers, along with a description of the appropriate forms for recording the data. The regulations concluded with a section regarding the preparation of reports.[53]

Shortly after the Secretary of the Interior approved the Bookkeeping and Accounting Regulations, the Comptroller General recommended a new method for the submission of IIM accounts to the GAO. On June 20, 1927, J. R. McCarl wrote

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[49] U. S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting, p. 33 [MA-135].
[50] U. S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting, pp. 35-36 and 38 [MA-135].
[51] U. S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting, pp. 33-35 [MA-135].
[52] U. S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting, pp. 40-44 [MA-135].
[53] U. S. Department of the Interior, Regulations of the Indian Office, Bookkeeping and Accounting, pp. 44-53 [MA-135]. The BIA revised its bookkeeping and accounting regulations again three years later; see U. S. Department of the Interior, Office of Indian Affairs, Revised Regulations of the Indian Office Bookkeeping and Accounting (Washington, DC: GPO, 1930) [MA-651].

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Secretary Hubert Work suggesting a plan to simplify the audit of IIM accounts while reducing the workload on BIA disbursing officers. To this point, Indian agencies furnished ledger sheets with individual Indian accounts to the GAO on a quarterly basis. The Comptroller believed that it would "serve the purpose of this office and undoubtedly be much more satisfactory to the various disbursing officers involved if individual ledger sheets are furnished semiannually as of December 31 and June 30 of each year. . . ."[54] The Interior Department asked to alter the Comptroller's recommendation insofar as some Indian agencies were concerned. "Inasmuch as complete monthly accounts are desired wherever they can be furnished," Assistant Secretary Edwards wrote, "it is requested that . . . your letter be modified so as to require detailed statements of individual accounts to be furnished with regular monthly accounts or with the accounts for June and December of each year, in the discretion of the Commissioner of Indian Affairs."[55] On October 6, the Comptroller replied that he agreed with Edwards' proposal "whereby the individual Indian money accounts at agencies where the volume of business is not large be forwarded monthly. . . ."[56] The following day, E. B. Meritt sent a list of disbursing agents who would render monthly accounts and those who would transmit their documents semiannually.[57]

During the 1920s the BIA continued to develop rules for a number of issues that affected moneys entering individual Indian accounts. For example, in 1923 the Interior Department published Regulations Relating to the Determination of Heirs and Approval

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[54] Comptroller General to Secretary of the Interior, 6/20/1927 [MA-908].
[55] Assistant Secretary of the Interior to Comptroller General, 9/13/1927 [MA-904].
[56] Comptroller General to Secretary of the Interior, 10/6/1927 [MA-903].
[57] Assistant Commissioner of Indian Affairs to Comptroller General, 10/7/1927 [MA-902].

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of Wills Except Members of the Five Civilized Tribes and Osage Indians. Citing the Secretary's authority to determine heirs under the act of June 25, 1910, the Interior Department set procedures for the examination of heirship claims and the approval of Indian wills.[58] As has been noted, leases on allotted lands produced revenue for individual Indians. During the 1920s the BIA adopted or revised leasing provisions. In July 1923 the Interior Department sanctioned "Regulations Governing the Execution of Leases of Indian Allotted and Tribal Lands for Farming, Grazing, and Business Purposes."[59] Two years later, on July 7, 1925, Assistant Secretary Edwards approved "Regulations Governing the Leasing of Restricted Allotted Indian Lands for Mining Purposes."[60]

While the Interior Department and the Bureau of Indian Affairs established or modified regulations, Congress moved to codify the permanent laws of the United States. On June 30, 1926, President Calvin Coolidge signed "An Act To consolidate, codify, and set forth the general and permanent laws of the United States in force December seventh, nineteen hundred and twenty-five." This statute created the United States Code of Law, Title 25 of which concerned Indians.[61] Information regarding Individual Indian Moneys is found throughout the original code. For example, section 8 of Chapter 1 acknowledges that accounts for claims and disbursements would be transmitted to the Commissioner for

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[58] 3 Kappler 476 [MA-517] and U. S. Department of the Interior, United States Indian Service, Regulations Relating to the Determination of Heirs and Approval of Wills Except Members of the Five Civilized Tribes and Osage Indians (Washington, DC: GPO, 1923) [MA-936].
[59] Commissioner of Indian Affairs, "Regulations Governing the Execution of Leases of Indian Allotted and Tribal Lands for Farming, Grazing, and Business Purposes," 7/7/1925 [MA-1002].
[60] Commissioner of Indian Affairs, "Regulations Governing the Leasing of Restricted Allotted Indian Lands for Mining Purposes," 7/7/1925 [MA-995].
[61] 4 Kappler 563 [MA-457]. Kappler has published the entire, original Title 25 of the United States Code; see 4 Kappler 563-899.

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administrative review, then passed to the GAO.[62] Chapter 4 of Title 25 explicates the "Performance by United States of Obligations to Indians." Among other topics, this chapter discusses tribal and individual funds in sections on the "disbursement of moneys and supplies" and the "deposit, care, and investment of Indian moneys."[63] Subsequent chapters address the statutory, historical, and judicial basis for several matters that could affect receipts and disbursements for individual Indians, including rights-of-way, allotment, heirship, and leasing.[64]

During the 1920s the Interior Department and Congress altered the system of Individual Indian Moneys that largely had been established from the late nineteenth to the early twentieth century. Laws and regulations, both new and revised, affected a wide range of BIA operations, including Individual Indian Moneys. During this period, however, both the BIA and the Federal policy of individualization came under increasing scrutiny from reformers--Indian and non-Indian--and Congress.

E. The Problems of Indian Administration

During the early 1920s numerous reformers publicized the plight of Native Americans. Secretary of the Interior Albert Fall's efforts to undermine Pueblo Indian land claims in New Mexico, questionable activities regarding oil leases on Indian lands,

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[62] 4 Kappler 563, 568 [MA-457].
[63] 4 Kappler 563, 603, and 608-631 [MA-457].
[64] 4 Kappler 563, 726, 736, 839, and 872 [MA-457].

EY0002404

and many other issues became rallying points for Americans angered by the direction of Federal policy and its consequences for Native Americans.[65]

The first investigation of Indian affairs contained no widespread criticism of the BIA. In 1923 Secretary of the Interior Hubert Work, who succeeded Fall, appointed "The Committee of One Hundred." Many prominent advocates of Native Americans sat on the Committee, which issued a report to Congress on January 7, 1924.[66] Committee member Joseph E. Otis reviewed "The Indian Problem" for Secretary Work. Otis condemned some elements of Federal policy. For example he asserted that leasing discouraged Indian initiative while providing revenue which was "barely enough to allow them to exist." Nonetheless, the report disparaged neither Commissioner Burke nor the BIA.[67] Malcolm McDowell, a veteran reformer and a longtime member of the Board of Indian Commissioners, wrote a memorandum that was included with the Committee report to Congress. McDowell gainsaid those who complained that the United States lacked an Indian policy. In fact, he affirmed that the Federal government had a "constructive, forward-looking, workable Indian policy." The policy centered on the principle that Indians should be trained for "the best type of American citizenship looking to their absorption into the general citizenship of the Nation. This may be called the principal plank in the Government's Indian-policy platform."[68]

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[65] See, for example, Kelly, "Charles Henry Burke, 1921-1929," in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 251-252 and 258-260 [MA-1158] and Prucha, Great Father, vol. II, pp. 797-806 [MA-681].
[66] Prucha, Great Father, vol. II, pp. 807-808 [MA-681] and U. S. Congress, House, Committee of One Hundred, The Indian Problem, 68th Cong., 1st sess., 1/7/1924, H. Doc. 149, p. 1 [MA-494].
[67] U. S. Congress, House, The Committee of One Hundred, The Indian Problem, 68th Cong., 1st sess., 1/7/1924, H. Doc. 149, pp. 7, and 14-15 [MA-494].
[68] U. S. Congress, House, Committee of One Hundred, The Indian Problem, 68th Cong., 1st sess., 1/7/1924, H. Doc. 149, pp. 18-19 [MA-494].

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Despite the report by The Committee of One Hundred, criticism of the BIA intensified. In 1926, at the recommendation of the Board of Indian Commissioners, Secretary Work contacted the Institute for Government Research (known today as the Brookings Institution) to conduct a thorough investigation of the economic and social conditions of American Indians. Philanthropists funded the work, which was conducted under the direction of Dr. Lewis Meriam. On February 21, 1928, the Institute for Government Research submitted The Problem of Indian Administration, often called the Meriam Report, to Secretary Work.[69]

The Meriam Report assailed the allotment system. The Institute's report observed that when the United States

> adopted the policy of individual ownership of the land on the reservations, the expectation was that the Indians would become farmers. . . . It almost seems as if the government assumed that some magic in individual ownership of property would in itself prove an educational civilizing factor, but unfortunately this policy has for the most part operated in the opposite direction.

Like The Committee of One Hundred, Meriam and his staff disparaged the widespread leasing of Indian land, which they considered the fruits of the allotment policy. In some cases, BIA officials encouraged leasing, because non-Indians wanted to use the land "and it was far easier to administer property leased to whites than to educate and stimulate Indians to use their own property. The lease money, though generally small in amount,

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[69] Lewis Meriam, et al., The Problem of Indian Administration (Baltimore: Johns Hopkins Press, 1928), pp. vii-x [MA-81]; Prucha, Great Father, vol. II, pp. 808-809 [MA-681]; and U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill, 1929, 70th Cong., 1st sess. (Washington, DC: GPO, 1928), p. 80 [MA-189].

EY0002406

gave the Indians further unearned income to permit the continuance of a life of idleness."[70]

The sale of surplus lands, the leasing of allotments, and per capita payments, among other revenues, "added to the unearned income of the Indian. . . ." Because Native Americans were unskilled in certain aspects of business, unscrupulous non-Indians sometimes victimized Indians. As a result, BIA officials "often took the easiest course of managing all the Indians' property for them. The government kept the Indians' money for them at the agency. When the Indians wanted something they would go to the government agent, as a child would go to his parents, and ask for it."[71] This outcome represented exactly the opposite of what reformers and statesmen had envisioned when the Dawes Act was passed in 1887, when the United States authorized the individual allotment of tribal trust funds in 1907, and when Congress allowed the establishment of individual bank accounts in 1908.

The Meriam Report called for new Federal policy initiatives. It even urged that the "policy of individual allotment . . . be followed with extreme conservatism [because] it has largely failed in the accomplishment of what was expected of it." Allotment had spawned numerous complications, including leasing and probate issues that undermined both Native Americans and the BIA. In this regard, the Institute recommended that the BIA sharply curtail the leasing of land, which created unearned income. It also called for a thorough study of heirship, which had become an increasingly complex dilemma. The authors doubted whether "the serious nature of this problem was appreciated at the time

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[70] Meriam, et al., The Problem of Indian Administration, p. 7 [MA-81].
[71] Meriam, et al., The Problem of Indian Administration, p. 8 [MA-81].

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the allotment acts were passed." After an allottee died, the division of his land among many heirs often proved impracticable. This instigated either the sale or the lease of the allotment and created "an enormous increase in the details of administration" for the BIA.[72] The Problem of Indian Administration acknowledged that land sales and leasing contributed materially to individual Indian income.[73] Both of these factors, however, "also increased the labor as well as the complexities and difficulties of administration by the government."[74] As will be discussed, difficulties in managing individual Indian moneys grew proportionately with the increasing fractionation of the Indian estate.

The Meriam Report had not examined the issue of Indian trust fund management in great detail. In 1928, the same year the independently funded Institute for Government Research presented its findings to Secretary Work, Congress authorized a publicly funded study of this issue. This investigation was proposed in accordance with Senate resolution 79 of December 17, 1927, which directed the Senate Committee on Indian Affairs "to make a general survey of the condition of the Indians. . . ." Reflecting the growing criticism of the BIA, the resolution observed that "numerous complaints have been made by responsible persons and organizations charging improper and improvident administration of Indian property. . . ." Five months later, by the act of May 29, 1928, Congress appropriated $20,000 for a GAO study of the amount of funds held by Indian tribes, their investments, and their interest earnings.[75]

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[72] Meriam, et al., The Problem of Indian Administration, pp. 39-41 [MA-81].
[73] Meriam, et al., The Problem of Indian Administration, p. 454 [MA-81].
[74] Meriam, et al., The Problem of Indian Administration, p. 461 [MA-81].
[75] U. S. Congress, Senate, Survey of Conditions of Indians, 70th Cong., 1st sess., Congressional Record, vol. 69 (12/17/1927), p. 786 [MA-491] and 45 Stat. 883, 887 [MA-362].

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On February 28, 1929, Comptroller General McCarl transmitted to Congress the GAO study entitled Indian Funds. Prepared by the Office of Investigations, the report encompassed many different funds: Indian Moneys, Proceeds of Labor; Tribal Trust Funds; and Reimbursable Agreements, among others.[76] In its section on Individual Indian Moneys, the GAO stated that for the most part, these funds were generated by contracts negotiated by superintendents for allottees. Like The Committee of One Hundred and the Institute for Government Research, the GAO emphasized the importance of leasing as a source of income for individual Indians. The report observed that individual Indian moneys typically were on deposit in banks or in the United States Treasury, and, in some cases, had been "invested in United States Government securities and in real estate."[77] As of June 30, 1928, the GAO reported, the total amount of Individual Indian Moneys stood at $74,676,600.78.[78]

Indian Funds also inspected procedures for banking and accounting for individual Indian moneys. After examining bank records, the investigators found that "the amount on deposit in certain banks slightly exceeded the bonded capacity." Interest rates ranged "from 2 to 4 per cent, depending largely on the amount deposited and whether the money is a time deposit or in an active checking account."[79] Underscoring its own important role in the IIM oversight process, the GAO stated that at fixed periods banks sent statements both to the BIA disbursing agent and to the GAO. The investigators noted further that with "the exception of the checks for account of the Five Civilized Tribes

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[76] U. S. Congress, Senate, Indian Funds, 70th Cong., 2nd sess., 2/25/1929, S. Doc. 263, pp. iv and 1 [MA-6].
[77] U. S. Congress, Senate, Indian Funds, 70th Cong., 2nd sess., 2/25/1929, S. Doc. 263, p. 76 [MA-6].
[78] U. S. Congress, Senate, Indian Funds, 70th Cong., 2nd sess., 2/25/1929, S. Doc. 263, p. 77 [MA-6].
[79] U. S. Congress, Senate, Indian Funds, 70th Cong., 2nd sess., 2/25/1929, S. Doc. 263, pp. 77-78 [MA-6].

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EY0002409

which are forwarded through the disbursing office, all paid checks are sent by the banks direct to the General Accounting Office." Following an audit of tribal and individual moneys in banks, the GAO determined that $39,602 had been deposited in banks that were defunct as of June 30, 1928.[80]

The GAO also looked at individual Indian moneys at various agencies. For example, an inspection of the records of the Fort Belknap Agency in Montana showed that individual Indian moneys primarily came from leasing and interest on bank deposits. At the Winnebago Agency in Nebraska, timber sales, allotted land sales, leases, pensions, and interest from banks provided most of the moneys to individuals.[81] Indian Funds also analyzed the Bureau's accounting system. After discussing the evolution of the system over the years, the GAO informed Congress of problems in the Bureau's implementation of the system:

> While property accountability is provided for in the accounting system, it was observed that at many of the agencies the records are not properly maintained, entries not being current and otherwise incomplete. This condition applies not only to nonexpendable property, but also to bonds and securities representing investments of individual Indian moneys, reference being had not only to the office of the Five Civilized Tribes and to the Quapaw Agency in Oklahoma but also to the Indian Office in Washington, where the records of investments held by the Government for the Indians were found to be inaccurate, in that they showed bonds as being held which in [reality] had been turned over to the Indian owners, while other bonds were in the custody of the Treasurer of the United States without having been fully recorded.[82]

The GAO report of 1929 added to the growing criticism of BIA management policies during the decade. Moreover, the document was published just as a new administration came to power in Washington, DC.

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[80] U. S. Congress, Senate, Indian Funds, 70th Cong., 2nd sess., 2/25/1929, S. Doc. 263, p. 78 [MA-6].
[81] U. S. Congress, Senate, Indian Funds, 70th Cong., 2nd sess., 2/25/1929, S. Doc. 263, pp. 87-88 [MA-6].

EY0002410

F. Heirship Problems Intensify

Ten days after McCarl transmitted Indian Funds to the Senate, newly elected President Herbert Hoover accepted Commissioner Burke's resignation. As noted, those who favored reform in the BIA had targeted Burke, and the recent Institute for Government Research and GAO reports did not enhance the Commissioner's standing. Shortly before his resignation, Congress had criticized his handling of a well-publicized Indian probate scandal, which further undermined the South Dakotan.[83] Following Burke's departure Hoover appointed Charles James Rhoads to the Commissioner's office. A noted advocate of Native American causes, Rhoads had served as President of the Indian Rights Association. He accepted the appointment only after Hoover assured Rhoads that the White House was committed to the reforms advanced in the Meriam Report. Rhoads selected his close friend and fellow activist J. Henry Scattergood to be Assistant Commissioner.[84] Despite the excellent reform credentials of the new team at the BIA, Rhoads and Scattergood soon found themselves under attack from reformers. To the dismay of those who opposed allotments, Rhoads and Scattergood believed that the system should be ameliorated, not ended. Allotment and heirship problems troubled the two men almost from the start.[85]

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[82] U. S. Congress, Senate, Indian Funds, 70th Cong., 2nd sess., 2/25/1929, S. Doc. 263, pp. 113-116 [MA-6].
[83] Kelly, "Charles Henry Burke, 1921-1929," in Kvasnicka and Viola, Commissioners of Indian Affairs, p. 260 [MA-1158].
[84] Lawrence C. Kelly, "Charles James Rhoads, 1929-1933," in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 263-264 [MA-1158].
[85] Kelly, "Charles James Rhoads, 1929-1933," in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 264-267 [MA-1158].

EY0002411

Shortly after Hoover became President, the Great Depression began. As political leaders attempted to battle the calamity, many recommended greater economy in government. At the same time, Rhoads and others recognized that the BIA needed greater funding to tackle the growing administrative problems associated with allotment and heirship issues, vital components of individual Indian moneys. In 1930, for example, Rhoads testified before a House subcommittee of the Committee on Appropriations. He told Committee members that in an effort to "relieve the Washington office of many details and by so doing increase the efficiency of the service, more responsibility has been thrown upon the field force." Nonetheless, he complained that divisions of the Bureau were understaffed and not able to keep their work current. In this regard, for example, he pointed to the Land Division which handled matters "in connection with allotments, purchase and sale of land, issuance of patents in fee, leasing for oil, gas and other mining purposes. . . ."[86]

The following year, Samuel Dodd, the Chief Finance Officer of the BIA, appeared before the subcommittee seeking increased funding to handle probate matters. Dodd testified that the Bureau was rapidly falling behind in this operation:

> A few years ago this work was practically up to date, and appropriations were accordingly reduced. Due, however, to increasing deaths from old age and other conditions prevailing among the Indian population a large number of cases have accumulated, and heirs or beneficiaries are protesting against delays in obtaining determination and the financial benefits from these sources. Efforts have been made to handle some of the less complicated determinations without awaiting action by an examiner in the field.

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[86] U. S. Congress, House, Subcommittee of House Committee on Appropriations, Hearings, Interior Department Appropriation Bill, 1932, 71st Cong., 3rd sess. (Washington, DC: GPO, 1930), pp. 695 and 723-724 [MA-192].

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EY0002412

The BIA had instructed agency superintendents to prepare less complicated cases and send them to the office for settlement. Superintendents, however, already were burdened with numerous other responsibilities. Moreover, a large number of these cases were complicated and required a probate examiner. The BIA was hampered further by the fact that the appropriation in 1931 had been "insufficient to permit the employment of a field staff of examiners with their assistants for the entire year and it became necessary to furlough all field employees paid from this appropriation for about one week at the close of the year." Dodd included a table showing the current status of probate cases, which he explained to the subcommittee.[87]

Despite the statements of Rhoads and Dodd, Congress continued to cut funding for certain BIA activities. In 1932 Dodd testified that the Senate had slashed appropriations for the Commissioner's office. As a result, the BIA had been unable to fill new positions that had been authorized by the House of Representatives and the Bureau of the Budget. The loss of two employees who dealt with probate matters meant that it would be impossible to process heirship claims in a timely fashion. The Finance Officer acknowledged that the BIA could not "handle all accumulated cases expeditiously, and much of the correspondence with the bureau in Washington related to delays in final disposition of cases." During the current year, he declared, fewer positions combined with the necessity "to furlough for indefinite periods some of the examiners and clerks now on duty" would result in harm to the Indians. Because "the Indian beneficiary is

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[87] U. S. Congress, House, Subcommittee of House Committee on Appropriations, Hearings, Interior Department Appropriation Bill, 1933, 72nd Cong., 1st sess. (Washington, DC: GPO, 1932), pp. 239-240 [MA-193].

EY0002413

usually in urgent need of whatever funds are due him from an estate," Dodd told the congressmen, "determination of heirs should be made as rapidly as possible."[83]

In the midst of the Bureau's complaints regarding inadequate numbers of personnel, the Senate Committee on Indian Affairs considered a proposal that would require the Commissioner to submit annually "a report of Indian funds, tribal and individual. . . ." Rhoads objected to the measure for a number of reasons, including insufficient staffing to address an estimated 20,000 individual accounts. In this regard, he contended that for the BIA "to furnish each individual Indian with an annual statement of his personal account would appear to be physically impracticable without an increase in the clerical force." Moreover, the Commissioner believed it would be poor policy to give each Indian such a statement. "It should be borne in mind that many Indians having individual accounts are unable to read, write, or understand the English language," Rhoads argued. Information about their financial status might be revealed "to unscrupulous persons who would persuade the Indians to expend their money for unnecessary, if not harmful, purposes." Rhoads said that in his opinion, an individual Indian's account was "a matter between him and the superintendent, who is required by existing instructions to furnish a statement of account to any Indian at any time upon request of the party in interest." Legislation requiring the "wholesale distribution of statements," he declared, would be of no beneficial use and carried the potential for great harm to the Indian account holder.

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[83] U. S. Congress, House, Subcommittee of House Committee on Appropriations, Hearings, Interior Department Appropriation Bill, 1934, 72nd Cong., 2nd sess. (Washington, DC: GPO, 1932), pp. 518 and 546 (MA-194).

EY0002414

He concluded by claiming that the Senate proposal would place more duties on an already overburdened BIA staff.[89]

Commissioner Rhoads wrote this memorandum in May 1932. By this time, Rhoads faced unremitting attacks from such Indian advocates as John Collier, who criticized the Commissioner's inability to alter the direction of Indian policy. Moreover, a parsimonious Congress proved unbending on numerous issues, ranging from support staff to basic services for Native Americans.[90]

On February 8, 1933, Senator William King of Utah delivered a fierce condemnation of the Bureau of Indian Affairs. He termed the government "a faithless guardian of its wards" and called for essential changes in Federal Indian policy. Among other charges, King asserted that the BIA had dissipated Indian tribal funds in order to fatten its own payroll.[91] The senator denounced Rhoads for obstructing such basic measures as accounting and budgeting reforms.[92] King also addressed flaws in individual Indian moneys. As he had traveled to Indian reservations with a subcommittee of the Senate Committee on Indian Affairs, the subcommittee had

> become accustomed to endless queries and complaints by individual Indians and by tribes of Indians having to do with their stated inability to obtain from the Indian Bureau an accounting for their money, individual and tribal, which is held and administered under trust.

King and the other senators termed it a matter of "elementary necessity for the Indians whose funds are in the hands of the Indian Bureau as trustee to be able to obtain an

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[89] Commissioner of Indian Affairs, "Memorandum for the Secretary," 5/19/1932 [MA-147].
[90] Kelly, "Charles James Rhoads, 1929-1933," in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 268-270 [MA-1158] and Prucha, Great Father, vol. II, pp. 935-939 [MA-681].
[91] U. S. Congress, Senate, Condition of the Indians in the United States, 72nd Cong., 2nd sess., 2/8/1933, S. Doc. 214, serial 9665, pp. 2 and 11-12 [MA-431].

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accounting or satisfactory reporting when they ask for it." In fact, the subcommittee recommended legislation requiring that this provision be added to the Interior Department appropriations act.[93]

Senator King's lengthy censure of Indian policy in general and the BIA specifically served as somewhat of a parting shot at Rhoads. Three months earlier, Franklin Delano Roosevelt had won the Presidential election and would begin his term on March 4, 1933. Soon after coming to power, President Roosevelt would appoint John Collier as Commissioner of Indian Affairs. The new Commissioner came to office promising fundamental changes in Federal Indian policy. In many respects, however, he would be unable to escape from preexisting problems involving heirship, allotment, and Indian trust funds.

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[92] U. S. Congress, Senate, Condition of the Indians in the United States, 72nd Cong., 2nd sess., 2/8/1933, S. Doc. 214, serial 9665, pp. 12-13 [MA-431].
[93] U. S. Congress, Senate, Condition of the Indians in the United States, 72nd Cong., 2nd sess., 2/8/1933, S. Doc. 214, serial 9665, pp. 16-17 [MA-431].

EY0002416

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February 1, 2000

David Shuey, Esq.
United States Department of Justice
601 Pennsylvania Avenue, NW
Room 845
Washington, DC 20004

Dear David:

Enclosed, please find two copies of chapter four of my draft report entitled "The Status of Individual Indian Moneys, 1933-1956." This installment examines the period from the beginning of the New Deal through the General Accounting Office audit of IIM presented to Congress in 1956. I have also included the report on an IBM formatted disk in Word Perfect 5.0. Please let me know if you have any difficulty with it.

I'm also enclosing two copies of our updated chronology. Items in bold text have been added to our collection since December 9, 1999. I have put the updated chronology on the enclosed disk as well. Next week I'll send copies of recently acquired documents to John Most for scanning. Also, we'll submit our recent abstracts of the documents in the near future.

I hope that you find the enclosed helpful. I look forward to speaking to you in the near future.

Sincerely,

Edward Angel

Enc.

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IV. The Status of Individual Indian Moneys, 1933-1956

Introduction

The United States suffered through the nadir of the Great Depression during the winter of 1932 to 1933. When Franklin Delano Roosevelt assumed the Presidency in March of 1933, many Americans were prepared for significant change. During Roosevelt's New Deal, transformations occurred in the direction of Indian policy, including the end of allotment. In addition, Individual Indian Moneys procedures were altered when disbursing agents began to use the United States Treasury as the main depository for individual funds.

During and following World War II, however, congressional criticism of the Bureau's administration of Indian affairs intensified. As a result, Congress attempted to weaken the Washington headquarters of the BIA by decentralizing control over Indian matters. Also, beginning in the 1940s, Congress and the Executive moved toward a policy known as Termination. Federal officials hoped that this policy, ultimately, would eliminate Federal supervision over Indian tribes. In the spirit of this policy the United States permitted individual Indians greater access to their own funds.

Among the steps proposed to accomplish Termination in the 1950s, Congress twice ordered the General Accounting Office to investigate the status of Indian trust funds. During the period 1933 to 1956 the GAO had maintained an active role in the IIM process. The GAO continued to audit individual Indian money accounts, to inspect Indian agencies, and to help the BIA improve its bookkeeping and accounting system. In addition, the Comptroller General continued to decide questions involving various IIM procedures. In

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October 1956 the GAO issued an audit report to Congress on Individual Indian Moneys. In his transmittal letter to the Speaker of the House of Representatives, Comptroller General Joseph Campbell recognized that solving problems in the management of IIM funds represented a vital prerequisite to the accomplishment of Termination.[1]

The Termination policy of the 1950s, however, represented a far cry from the designs of Federal Indian policy makers in the 1930s.

A. New Deals and Old Problems

1. Individual Indian Moneys Move to the Treasury

One of Franklin Roosevelt's first actions as Chief Executive was to address the banking crisis that plagued the nation. The banking industry, which had undergone a major trauma since the onset of the Great Depression in 1929, neared collapse by March 1933. Recognizing the perilous state of the nation's banks, a special session of Congress approved Roosevelt's Emergency Banking Act the same day he transmitted the legislation. Shortly after this, on June 16, 1933, the President signed one of the major reforms in the history of American banking, the Banking Act of 1933. This legislation is best known for creating the Federal Deposit Insurance Corporation.[2] But it also had an important effect upon the deposit of Individual Indian Moneys.

As Interior Solicitor Nathan Margold subsequently noted, the Banking Act of 1933 contained a provision regarding interest payments by banks that affected the deposit of

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[1] Comptroller General to Speaker of the House of Representatives, 10/7/1956, in U. S. General Accounting Office, "Audit Report to the Congress of the United States: Administration of Individual Indian Moneys by the Bureau of Indian Affairs, Department of the Interior, November 1955," p. 1 [MA-12].
[2] William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal, 1932-1940 (New York: Harper & Row, 1963) pp. 39-45 and 60-61 [MA-1372] and 48 Stat. 162 [MA-1373].

[redacted]

individual Indian moneys. In this regard, the Solicitor pointed to section 11b, which stated:

> No member bank shall, directly or indirectly by any device whatsoever, pay any interest on any deposit which is payable on demand: Provided, That nothing herein contained shall be construed as prohibiting the payment of interest in accordance with the terms of any certificate of deposit or other contract heretofore entered into in good faith which is in force on the date of the enactment of this paragraph; but no such certificate of deposit or other contract shall be renewed or extended unless it shall be modified to conform to this paragraph, and every member bank shall take such action as may be necessary to conform to this paragraph as soon as possible consistently with its contractual obligations.[3]

This requirement contradicted section 28 of the act of May 25, 1918, which pronounced that neither tribal nor individual Indian moneys could be deposited in a bank that did not furnish a reasonable rate of interest. As a result of the conflict, the BIA removed IIM funds from banks and deposited them in the United States Treasury. Solicitor Margold observed that the act did not prohibit "deposits of Indian money to banks paying interest, but operated merely to exclude certain banks from the category of eligible depositories."[4]

Following the Banking Act of 1933, the Interior Department closed IIM accounts in most banks and deposited the money in the United States Treasury instead. Acting Secretary of the Interior T. A. Walters informed the Comptroller General that the act of June 16, 1933 effectively required

> the Department to discontinue the use of local member banks of the Federal Reserve System as Individual Money checking depositories. Except in five or six instances, all checking accounts have been closed and practically all disbursements of such funds are now made by check on the Treasurer of the United States.[5]

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[3] 1 Op. Sol. Int. Ind. Aff., p. 604, [MA-461] and 48 Stat. 162, 181 [MA-1373].
[4] 40 Stat. 561, 591, [MA-4] and 1 Op. Sol. Int. Ind. Aff., p. 604, [MA-461].
[5] Acting Secretary of the Interior to Comptroller General, 8/11/1934 [MA-918].

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The Bureau of Indian Affairs accounting manual incorporated this change as well. Section 371 of the manual stated that all "collections of individual moneys must be deposited daily to the official credit of disbursing agents with the Treasurer of the United States."[6]

A subsequent act of Congress created some disagreement between the Interior Department and the GAO regarding IIM deposits to the Treasury. On June 26, 1934, the President approved the "Permanent appropriation repeal Act." Section 20 of the new statute demanded that certain procedures for moneys be "classified on the books of the Treasury as trust funds." This section contained a long list of trust funds, but did not specifically mention individual Indian moneys.[7] The Comptroller General determined that section 20 applied to individual Indian moneys in the Treasury. The Interior Department countered that section 20 only related to appropriated funds, whereas individual moneys represented "in the most part income which has accrued to ward Indians from leasing of their lands for farming, grazing and mining purposes and from the investment of their moneys. No part of these funds represents charges against public funds in the Treasury except indirectly in a few instances. . . ." The acting Secretary of the Interior stated that BIA disbursing officers already deposited individual moneys in their official checking accounts with the Treasurer of the United States. If the BIA had to abide by section 20, the disbursing officer would have to follow 10 "additional operations between the collection and expenditure of this money."[8]

Comptroller General J. R. McCarl disagreed. After reviewing the act, McCarl affirmed that "funds belonging to individual Indians and held by the Indian Service constitute trust funds within the purview of section 20 . . . and should be deposited in the Treasury and accounted for as such." He did, however, allow the Interior Department the

[6] Bureau of Indian Affairs, "Bureau of Indian Affairs Accounting Manual," 1935, p. B127 [MA-134].
[7] 48 Stat. 1224, 1233-1236 [MA-1374].
[8] Acting Secretary of the Interior to Comptroller General, 9/25/1935 [MA-1058].

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opportunity to submit its case to Congress. On June 25, 1936, President Roosevelt signed "An Act To modify section 20 of the Permanent Appropriation Repeal Act, 1934, with reference to individual Indian money." Secretary of the Interior Harold Ickes informed the Comptroller that section 20 had been altered "so as to remove from the operation thereof funds held in trust for individual Indians, associations of individual Indians, or for Indian corporations."[9]

The United States again addressed the issue of interest rates for Individual Indian Moneys in the act of August 23, 1935. Solicitor Nathan Margold believed that the Banking Act of 1935 contained language in section 324 (c) that effectively repealed section 28 of the act of May 25, 1918, requiring the payment of interest on tribal and individual Indian moneys. He stated, therefore, that Indian moneys could be placed in banks that did not pay interest. Margold added, however, that the act did not mandate the "deposit of Indian moneys in banks, and such deposits, it may be assumed, will be made only when special circumstances call for such action."[10] Congress finally resolved the question of whether the BIA could deposit individual Indian moneys in banks that did not pay interest. The act of June 24, 1938 authorized the Secretary of the Interior "to deposit in banks to be selected by him the funds held in trust by the United States for the benefit of individual Indians; Provided, That no individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate, subject, however, to the regulations of the Board of Governors of the Federal Reserve System. . . ."[11]

By the late 1930s, then, Congress had provided for the deposit of IIM funds into both the United States Treasury and qualified banks. Changes to the management of IIM

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[9] Comptroller General to Secretary of the Interior, 12/16/1935, p. 4 [MA-1059] and 49 Stat. 1928 [MA-1375] and Secretary of the Interior to Acting Comptroller General, 8/29/1936 [MA-1060].
[10] 49 Stat. 684, 714-715 [MA-479] and 1 Op. Sol. Int. Ind. Aff., p. 604, [MA-461].
[11] 52 Stat. 1037 [MA-3].

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deposits reflected the hazardous state of the American banking industry during the Great Depression and its subsequent regulation. During this period the United States adopted other New Deal measures that had a major impact upon the direction of Federal Indian policy.

2. The Indian Reorganization Act of 1934

Commissioner of Indian Affairs John Collier represented one of Franklin Roosevelt's most controversial appointments. As noted in chapter three, Collier had been an avowed critic of Commissioners Charles Burke and Charles Rhoads. As executive director of the American Indian Defense Association, Collier advocated cultural pluralism at a time when many Americans favored assimilation. After becoming Commissioner, Collier sought to encourage tribal life and traditions. An avowed foe of the allotment system, he came to office in the spring of 1933 determined to restore allotted lands to tribal ownership.[12]

By the early 1930s more and more Americans had come to see the validity of both ending allotment and increasing the authority of tribal governments. In this regard Congressman Edgar Howard introduced a bill in the House of Representatives that would end allotment and permit Native Americans to have a role in Indian policy. Howard stated, "this is the day of new deals, and one of the best new deals, in my view, is presented in H. R. 7902, now pending before the House." Howard included a letter from the President dated April 28, 1934, supporting the measure.[13] On May 18 1934, Senator Burton K.

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[12] Kenneth R. Philp, "John Collier, 1933-1945," in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 273-277 [MA-1158].

[13] U. S. Congress, House, The Wheeler-Howard Bill, 73rd Cong., 2nd sess., Congressional Record, vol. 78 (5/1/1934), p. 7807 [MA-1361]. Howard had presented an earlier version of this bill in 1932; see, U. S. Congress, House, Public Bills and Resolutions, 72nd Cong., 1st sess., Congressional Record, vol. 75 (4/4/1932), p. 7424 [MA-1360].

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Wheeler introduced Senate bill 3645, "to conserve and develop Indian lands and resources. . . ." The Wheeler-Howard measure, after debate and amendment, became the Indian Reorganization Act of 1934.[14]

The Senate Committee on Indian Affairs endorsed Wheeler's version of the bill and listed its seven purposes: to stop alienation of land; to provide for the acquisition of land for Indians; to vest tribal organizations with "real, though limited, authority"; to permit Indians to form business ventures; to establish a system of credit for Indians; to supply a better system of education; and to help Indians hold positions in United States government. The Committee also acknowledged the failures of the allotment system, including the heirship dilemma. The Senate Report observed that the "multiplication of heirs of deceased allottees, frequently" resulted in allotments that were so fractionated that Indians had been unable to use the land. In this regard, section 4 of the bill provided that "the allotted lands of deceased allottees may be bequeathed only to the Indian tribe or corporation or to the individual Indian heirs, and that the allotted lands belonging to living and deceased allottees may be purchased by or for the Indian tribe."[15]

John Collier sought to go further than simply preventing the alienation of land: he proposed restoring allotments to tribal ownership. The Commissioner recommended that tribes be authorized to take allotments from members and pay them for the tract. This would be done "to consolidate the lands into economically productive units." He also proposed that "all restricted lands [pass] to the tribal community upon the death of a tribal member. The land could not descend to the Indian heirs." As Vine Deloria and Clifford Lytle have noted, although many in Congress recognized the problem of fragmented

[14] U. S. Congress, Senate, Bills Introduced, 73rd Cong., 2nd sess., Congressional Record, vol. 78 (5/18/1934), p. 9071 [MA-1362].
[15] U. S. Congress, Senate, Authorizing Indians to Form Business Councils, Corporations, and for Other Purposes, 73rd Cong., 2nd sess., 5/10/1934, S. Rept. 1080, pp. 1-2 [MA-1363].

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holdings, "committee members nevertheless rebelled against a measure that would automatically deprive Indian heirs of their lands."[16] Moreover, Collier found that many Indians were "reluctant to return their allotments to tribal ownership."[17]

On June 18, 1934, President Roosevelt signed "An Act To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes." Section 1 of the act answered the longtime demands of many Indian reformers by prohibiting future allotment in severalty. Section 4 proclaimed that with limited exceptions, restricted Indian lands had to remain in Indian hands; ownership had to descend to the tribe, to an Indian corporation, or to Indian heirs.[18]

The Indian Reorganization Act encompassed a wide range of BIA activities, like education and forestry. The act also provided for the organization of tribal councils and tribal business enterprises. The statute, however, did not directly address the IIM program. Perhaps more importantly, it did little to ameliorate the growing fractionation of inherited lands, which was becoming more serious with every passing year.

3. The Heirship Dilemma and IIM

In his annual report for 1937 Commissioner Collier noted the increasing gravity of the allotted land situation. He remarked that probate issues had become more complex with each passing generation of allottees and heirs. In this regard, the Commissioner wrote that

[16] Vine Deloria and Clifford Lytle, The Nations Within: The Past and Future of American Indian Sovereignty (New York: Pantheon Books, 1984), pp. 88-89 [MA-1304].
[17] Philp, "John Collier, 1933-1945," in Kvasnicka and Viola, Commissioners of Indian Affairs, p. 277 [MA-1158].
[18] 48 Stat. 984 and 985 [MA-1366].

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there were "cases of expenditure by the Federal Government on heirship lands totaling seventy times the value of the lands in question, and still, under existing law, destined to go on running." The effect of fractionation was especially notable on receipts for individual Indians. Collier cited "cases of allotments which have more than a hundred heirs entitled to various shares, and whose total annual rental of, say, $40, is divided into the heirs' respective varying shares of cents and fractions of cents, and credited to the heirs on the agency books."[19] Collier made the same point in his opening statement to the House subcommittee of the Committee on Appropriations on April 6, 1937. He gave an example of an allotment valued at $1,200, which had already cost the BIA $3,600 to determine the heirs. Regarding receipts from that allotment for individual Indians, Collier stated that "to distribute the rent from this 80 acres among the heirs, we have to divide the number of heirs into a common denominator which is 1,740,000,000." Because the Interior Department would not issue a check for less than one dollar, some heirs would have to wait 1,500 years to receive their share.[20]

In the course of the hearing Collier expressed his dismay about the failure to resolve the heirship problem at the time of the Indian Reorganization Act. Representative Emmet O'Neal asked if the Commissioner was prepared "to submit some kind of a plan" to address fractionation. Collier responded that the "plan we have submitted, which was so soundly trounced in 1934, was the right plan." He recalled that his proposal "was denounced as confiscatory, Bolshevist, Naziist, Fascist, and everything else terrible that

[19] Commissioner of Indian Affairs Annual Report for the Year 1937 (Washington DC: GPO, 1937), p. 247 [MA-61].
[20] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1937, 75th Cong., 1st sess. (Washington, DC: GPO, 1937), pp. 776-778 [MA-198].

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you can think of. We got no sympathy. And they have not quit talking about it yet."[21] Historians have acknowledged the validity of Commissioner Collier's lament. Michael Lawson, for example, has found that even leasing allotted land became progressively more difficult. By 1935, Lawson has observed, 92% of the Lake Traverse Reservation (Sisseton and Wahpeton Sioux) was owned by heirs and the fractionation had become so extreme that the land was virtually useless to any single heir. In fact, Lawson maintains, at that time the cost of obtaining signatures from heirs to lease the land exceeded the actual value of the lease. The heirship problem greatly complicated the handling of individual Indian moneys and other administrative matters at agencies.[22] It is interesting to note that Lawson's study was printed in a Senate Committee on Indian Affairs hearing in 1984, which examined Indian heirship: a quandary that has remained unsolved to the year 2000.

In 1938 Collier again appeared before the House subcommittee of the Committee on Appropriations. Once more Collier linked the heirship problem to individual Indian moneys in testimony regarding how severely the problem drained agency resources:

> The land is divided among the heirs, and when they die, the land goes to their heirs. You have many hundreds of heirs interested in a single allotment, each with a separate equity. In order to dispose of the allotment, we have to get the consent of all the heirs in interest. In the administration of those lands we have to keep books, and we do keep books showing the accrued income down to one-tenth of a cent a year. We must do all kinds of things in connection with that work, and every time an heir dies we must go over the probating process again. The time will come when some Congress will refuse to continue spending money thus unproductively.[23]

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[21] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1937, 75th Cong., 1st sess. (Washington, DC: GPO, 1937), p. 787 [MA-198].
[22] Michael L. Lawson, "Heirship: The Indian Amoeba," in U. S. Congress, Senate, Select Committee on Indian Affairs, Hearing on S. 2480 and S. 2663, 98th Cong. 2nd sess. (Washington, DC: GPO, 1984), pp. 83-84 [MA-495].
[23] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1938, 75th Cong., 3rd sess. (Washington, DC: GPO, 1938), p. 113 [MA-199].

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The amount of time the BIA spent to address the land situation and the growing backlog of casework plagued Bureau officials. In 1935 the BIA produced a study entitled Indian Land Tenure, Economic Status, and Population Trends, which assessed the condition of the Indian landed estate. At that time the Bureau estimated that the total Indian population stood at 327,958. Indian Land Tenure stated that the "problem of the Indian, of his land, and of the use of his land affects 26 States."[24] The report declared that the Indian Reorganization Act had not rectified the heirship dilemma; rather it had created "a definite certainty that the area of heirship lands will steadily increase in the immediate future. . . ." In this regard the BIA contended that the "allotment system in the heirship stage falls of its own dead weight, and Indians are inevitable losers."[25] Indian Land Tenure presented data from 44 allotted reservations to prove "the enormous waste of money and time now entailed in unproductive real-estate transactions." Indeed, the report emphasized that a morass of administrative details regarding land and heirship matters prevented personnel at local agencies from accomplishing more productive tasks.[26]

Bureau officials repeatedly sought additional funding from Congress to confront this workload; but, instead, often had to battle efforts to cut the BIA budget. In 1935, for example, John Collier praised the members of his agency in testimony before Congress. The erstwhile archcritic of the BIA testified that the "local personnel was astonishingly good considering the low pay and the hardship. . . . In my judgment the entire Bureau personnel in the field is as good as any other Government service, although it is still the poorest paid." Samuel Dodd, the Bureau's Chief Financial Officer, however, had to fend off congressional efforts to slash the budget. For example, one congressman asked if Dodd could suggest "where this committee might cut with the least damage?" Dodd replied

[24] Office of Indian Affairs, Indian Land Tenure, pp. 67 and 1 [MA-515].
[25] Office of Indian Affairs, Indian Land Tenure, pp. 15 and 19 [MA-515].
[26] Office of Indian Affairs, Indian Land Tenure, pp. 21-23 [MA-515].

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that the Bureau was "woefully undermanned in the Washington office at the present time, so that there is nothing there that can be cut."[27]

Bureau officials told Congress that they needed a larger staff to handle issues related to individual Indian moneys. In 1939 the BIA sought an increase of $3,000 over its previous budget to enable the Fiscal and Accounting Division to hire two new employees. Finance Officer W. B. Greenwood explained that the division faced a growing volume of work in part because of duties associated with handling individual Indian funds.[28] The Bureau encountered an increasingly reticent Congress during World War II. In 1943 the Bureau requested funds to pay six additional field auditors. Greenwood emphasized that the BIA wanted to audit each field office every year in order to inspect appropriated funds and individual Indian moneys. With the present staff, however, the Bureau was able

> to cover about two-thirds of the field agencies each year, but we are gradually falling behind.
>
> In addition to the expenditure of appropriated money in these agencies for which audits are made we have a very considerable amount of trust money. There is about $50,000,000 of individual Indian money carried on the books of the various agencies, belonging to the restricted Indians, which must be audited.[29]

The following year the BIA recalled that it had requested $25,200 in 1943 in order to compensate six field auditors. The House, however, had allowed only half that amount, leaving three vacant auditor positions. Furthermore, the Bureau reported, because it had installed a new accounting system, "a considerable amount of the time of the present staff has had to be devoted to the instruction of field personnel in the maintenance of the system.

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[27] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1936, 74th Cong., 1st sess. (Washington, DC: GPO, 1935), pp. 657 and 1117 [MA-196].

[28] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1940, 75th Cong., 1st sess. (Washington, DC: GPO, 1939), pp. 43-44 [MA-200].

[29] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1944, 78th Cong., 1st sess. (Washington, DC: GPO, 1943), pp. 292 and 296 [MA-204].

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As a result, the regular audit work has suffered and is now seriously in arrears." Congress balked at the Bureau's petition for more money. Congressman Jed Johnson proclaimed that the request indicated that the "Indian Service does not know our Nation is at war." Paul L. Fickinger, Chief of the Bureau's Administrative Branch, replied, "Mr. Chairman, we consider it our responsibility to let this committee know what we feel to be our needs in carrying out the responsibility of the job Congress has entrusted to us, and I think we would be remiss in our obligations were we not to do so. The action this committee takes is beyond the scope of our responsibility."[30]

At least some of the animosity between Congress and the Bureau of Indian Affairs reflected the legislative body's growing disenchantment with the often acerbic John Collier. In fact, Collier resigned in the face of growing congressional criticism in 1945.[31] During his 12-year long tenure as Commissioner, however, the BIA made significant changes both to its bookkeeping and accounting system and to regulations that affected individual Indian moneys.

B. Revisions to the BIA's Bookkeeping and Accounting System

On August 11, 1934, acting Secretary of the Interior T. A. Walters informed the Comptroller General that "a complete revision of the regulations of the Indian Service is now in process and it is thought advisable to refer some contemplated changes to your office for such advance criticism and suggestions as you may wish to offer." He asked for comments on several proposed changes, including those related to Individual Indian

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[30] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1945, 78th Cong., 2nd sess. (Washington, DC: GPO, 1944), pp. 210-212 [MA-205].
[31] Philp, "John Collier, 1933-1945," in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 279-280 [MA-1158].

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Moneys. In this regard, for example, Walters pointed to new procedures for depositing individual moneys in the United States Treasury, requirements for transmitting lists and statements to the GAO, and accounting procedures for unclaimed individual Indian moneys in small amounts.[32] The Comptroller General agreed to most of the modifications, while insisting that one copy "of the checks drawn on the Treasurer of the United States will be required by this office."[33]

In 1935 the BIA published a new accounting manual. The Bureau continued to define IIM as "funds the ownership of which has been determined to vest in individual Indians."[34] As noted above, the accounting manual reflected new procedures for the deposit of individual Indian moneys into the Treasury.[35] Provisions continued, however, for the "Selection and Bonding of Banks as Depositaries for Indian Moneys."[36] In this case, banks had to be in compliance with the act of May 25, 1918, which, it will be recalled, required the payment of a reasonable rate of interest.[37] The manual also instructed agents regarding Liberty Loan Bonds held in trust for individual Indians. The BIA authorized renting safe deposit boxes at local banks to protect the bonds.[38] The manual also prescribed rules for the expenditure of individual moneys. The BIA cited the proper form to be used when drawing checks for individuals. Section 497 of the manual explicated dollar amounts that could be expended to pay for specified activities relating to farming. Agents were told how to handle "dead" accounts: inactive IIM accounts that were

[32] Acting Secretary of the Interior to Comptroller General, 8/11/1934 [MA-918]
[33] Comptroller General to Secretary of the Interior, 9/5/1934 [MA-919].
[34] Bureau of Indian Affairs, "Bureau of Indian Affairs Accounting Manual," 1935, p. B125 [MA-134]; compare to Office of Indian Affairs, Accounting System, 1917. p. 17 [MA-11].
[35] Bureau of Indian Affairs, "Bureau of Indian Affairs Accounting Manual," 1935, p. B127 [MA-134].
[36] Bureau of Indian Affairs, "Bureau of Indian Affairs Accounting Manual," 1935, pp. B145-151 [MA-134].
[37] Bureau of Indian Affairs, "Bureau of Indian Affairs Accounting Manual," 1935, p. B145 [MA-134] and 40 Stat. 561, 591 [MA-4].
[38] Bureau of Indian Affairs, "Bureau of Indian Affairs Accounting Manual," 1935, p. B151 [MA-134]. Detailed procedures for the bonds are discussed on pages 151-157 of the manual.

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likely to remain so and consisted of $100 or less. The manual also informed disbursing officers with respect to voluntary deposits, moneys placed in the disbursing agent's hands by an individual Indian for safekeeping.[39]

The manual reflected changes in the bookkeeping and accounting system due to recent events. The bookkeeping and accounting system, however, remained essentially the one developed by the Bureau of Efficiency in 1917.[40] In 1939 the Interior Department turned to the GAO and requested a study of the BIA accounting system. Comptroller General Fred Brown answered that his office would "be pleased to comply with the request as soon as practicable."[41] With the help of GAO representatives, the BIA developed the "Standard System of Administrative Accounts for Indian Service Field Offices" in 1941. In addition to assisting in the preparation of the new system, GAO officials were authorized to go to conferences with BIA field officials who would actually employ the procedures.[42]

The BIA submitted budget requests to Congress in order to implement the accounting system. In the spring of 1941, for example, the Bureau asked for $3,200 for the Fiscal Division in order to implement the new system. In its justification, the BIA observed that previously it had operated under "an accounting system that was devised and installed by the United States Bureau of Efficiency," almost 25 years earlier. The Bureau told Congress that the GAO had assisted in creating a modern system, and now funds were needed to execute the new procedures.[43] The following year BIA officials sought $5,760

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[39] Bureau of Indian Affairs, "Bureau of Indian Affairs Accounting Manual," 1935, pp. B157-159, 161, and 162 [MA-134].
[40] Acting Secretary of the Interior to Comptroller General, 7/27/1939 [MA-1146]; see also, U. S. Department of the Interior, Office of Indian Affairs, Accounting System for the United States Indian Service (Washington, DC: GPO, 1917) [MA-11].
[41] Comptroller General to Secretary of the Interior, 8/30/1939 [MA-1145].
[42] Assistant Secretary of the Interior to Comptroller General, 4/11/1941 [MA-1149] and Comptroller General to Secretary of the Interior, 4/22/1941 [MA-1150]
[43] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1942, 77th Cong., 1st sess. (Washington, DC: GPO, 1941), pp. 47-48 [MA-202].

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to pay four punch card operators. The BIA stated that the "success of the new accounting system will depend upon provision being made for sufficient competent personnel to operate it properly. These 4 punch-card operator positions are an essential part of the new system and it is important that funds for their establishment be provided."[44]

The Interior Department and the GAO remained active partners in bookkeeping and accounting matters involving the BIA. On August 23, 1941, for example, the Assistant Secretary of the Interior E. K. Burlew wrote the Comptroller General that the Bureau had proposed that it no longer send copies of individual Indian account ledger sheets to the Washington office of BIA or to the GAO. Instead, the field officer would submit a certificate "to the effect that all funds received during the period covered by his report have been accounted for and properly posted to the accounts; that all expenditures have been made in accordance with the regulations and authorizations of the Indian Office and are accounted for; that the individual accounts have been totaled and found to be in agreement with the control account and the report as submitted at the close of the accounting period." Field auditors of the BIA would audit IIM accounts at the respective agencies. Burlew asked the Comptroller General if the GAO wanted carbon copies of all individual Indian accounts in the future, for auditing purposes. If the GAO did not require carbons, it would "be possible to eliminate this additional work, thereby releasing the employee's time for other important duties."[45]

Comptroller General Lindsay Warren raised no objection to eliminating "the copy of such individual ledger sheets now being used by the Bureau if it has been administratively determined that the actual administrative audit of the various accounts can be accomplished

[44] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1943, 77th Cong., 2nd sess. (Washington, DC: GPO, 1942), p. 20 [MA-203].
[45] Assistant Secretary of the Interior to Comptroller General, 8/23/1941 [MA-1152].

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as effectively in the field offices by field auditors of the Indian Service." He affirmed, however, that the GAO needed its copy of the individual Indians account ledger sheet because it represented "the only evidence received here for audit purposes in support of transactions involving the individual Indian accounts, and to dispense with such evidence would practically nullify the basis and usefulness of the audit now being made of such accounts."[46] The GAO continued to work with the Interior Department regarding bookkeeping and accounting procedures. For example, in 1944 the GAO reviewed forms produced by the BIA relative to individual Indian accounts.[47] As will be discussed, the GAO would help the BIA develop yet another new system in 1953.

While the BIA modernized its bookkeeping functions during John Collier's tenure, it also revised regulations that directly influenced the receipt, deposit, and expenditure of individual Indian moneys.

C. Regulations and Laws

Like Commissioners before him, John Collier reviewed and changed regulations affecting Individual Indian Moneys. As has been noted, one of the major sources of individual moneys had been the sale of allotments that had belonged to deceased Indians. Shortly after the passage of the Indian Reorganization Act, Collier informed superintendents and examiners of inheritance that "an Indian can now devise his real property only to his heirs at law or to a member of the same tribe as the testator. He cannot devise to a white person who is not an heir." He affirmed that new regulations were being prepared regarding wills. In the interim, superintendents and examiners of inheritance

[46] Comptroller General to Secretary of the Interior, 3/6/1942, p. 3 [MA-1153].
[47] See, for example, Assistant Secretary of the Interior to Comptroller General, 10/21/1944 [MA-1156] and Comptroller General to Secretary of the Interior, 11/11/1944 [MA-1155].

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must secure affidavits from those who prepared wills regarding their "relationship to those to whom he gives his property, and whether or not they are members of the same tribe."[48] On May 31, 1935, Assistant Secretary of the Interior Oscar Chapman approved "Regulations Relating to Determination of Heirs and Approval of Wills," which incorporated section 4 of the Indian Reorganization Act. The regulations listed the duties of examiners, provided guidelines for probate hearings, and generally attempted to expedite the entire process.[49]

During the 1930s the Interior Department also examined mineral leasing on allotted lands. In September 1936 Secretary Ickes issued Order No. 1112 in respect to the "Supervision of Operations under Oil and Gas Leases on all Indian Lands under the Jurisdiction of the Secretary of the Interior (except Osage Reservation)." This order modified regulations that had been approved in 1925.[50] The new regulations defined the respective duties of BIA and United States Geological Survey employees relative to oil and gas leasing on restricted lands and royalty accounting procedures. The acting Comptroller General reviewed and accepted Ickes' Order regarding this important source of revenue.[51] The BIA also revised rules for depositing Indian moneys. On March 5, 1938, Assistant Secretary Chapman approved the Bureau's "Regulations Governing the Deposit of Indian Funds in Banks." These regulations defined the authority for such deposits and discussed

[48] Commissioner of Indian Affairs to All Superintendents and Examiners of Inheritance, 8/6/1934 [MA-969].
[49] Commissioner of Indian Affairs, "Regulations Relating to Determination of Heirs and Approval of Wills" approved by Assistant Secretary Chapman 3/31/1935 [MA-944].
[50] Secretary of the Interior, "Supervision of Operations under Oil and Gas Leases on all Indian Lands under the Jurisdiction of the Secretary of the Interior (except Osage Reservation)," 9/4/1936 [MA-654]; see also Commissioner of Indian Affairs, "Regulations Governing the Leasing of Restricted Allotted Indian Lands for Mining Purposes," 7/1/1925 [MA-995].
[51] Secretary of the Interior, "Supervision of Operations under Oil and Gas Leases on all Indian Lands under the Jurisdiction of the Secretary of the Interior (except Osage Reservation)," 9/4/1936 [MA-654] and acting Comptroller General to Secretary of the Interior, 10/15/1938 [MA-1126].

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the application procedures banks had to follow.[52] The regulations also specified the bank's obligation to provide security for Indian moneys. The Bureau also provided standards for such issues as the payment of interest and the bank's duty to furnish statements semiannually on a designated form.[53]

The Federal government adopted a new method of codifying regulations by the late 1930s. In 1939 the United States published the first edition of Title 25 of the Code of Federal Regulations (CFR). Part 221 of Subchapter S pertained to Individual Indian Moneys. The CFR maintained the same basic definition of IIM that had been in effect since the 1913 regulations: "funds, regardless of derivation, belonging to individual Indians which come into the custody of a disbursing agent."[54] The IIM regulations approved by the Secretary of the Interior on January 30, 1928, as amended, provided the source for this portion of the CFR. Part 221 of the Code contained 39 sections and assigned rules for the full spectrum of IIM activities. The regulations addressed the needs of Native American account holders from health, education, and welfare, to funeral, tombstone, and probate expenses. Provisions existed for married minors, runaway pupils, and deceased Indians' funds. The regulations also prescribed procedures for topics that soon would become targets for those who favored the termination of Federal supervision over Native Americans: voluntary deposits and the withdrawal of individual funds.[55] Section 230 of the Code of Federal Regulations explained the deposit of tribal and individual moneys. This section was based on numerous laws and the regulations issued by the Bureau on

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[52] Assistant Commissioner of Indian Affairs, "Regulations Governing the Deposit of Indian Funds in Banks," 3/2/1938, p. 1 [MA-655].
[53] Assistant Commissioner of Indian Affairs, "Regulations Governing the Deposit of Indian Funds in Banks," 3/2/1938, pp. 2-4 [MA-655].
[54] 25 CFR § S, part 221 (1939), p. 401 [MA-166].
[55] 25 CFR § S, part 221 (1939) [MA-166]; see also U. S. Department of the Interior, Regulations of the Indian Service, Individual Indian Moneys (Washington, DC: GPO, 1929), p. 1 [MA-285].

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March 5, 1938.[56] Title 25 of the Code of Federal Regulations was not the only title to consider Native Americans. Section J, part 176 of the 1940 edition of Title 43, Public Lands, for example, related to Indian allotments on the public domain.[57]

The original Code of Federal Regulations, of course, has been revised repeatedly over the years since 1939. It has served as the regulatory basis for BIA operations. For example, in 1945 the Department of the Interior issued the "Indian Service Manual." Subchapter 243C of this manual discussed the obligations of special disbursing agents concerning individual Indian accounts. As authorities for such accounts, the manual cites:

> Regulations pertaining to individual Indian moneys, interest, and securities, tribal and individual, are contained in Part 221, Code of Federal Regulations, Department of the Interior, Office of Indian Affairs, Title 25 - Indians. Special disbursing agents and employees who issue purchase orders and checks against individual account balances of individual Indians or tribes of Indians shall familiarize themselves with the requirements of Part 221, Title 25, and its supplements.[58]

The Indian Service Manual was published in November 1945, shortly after John Collier left office. His replacement, William Brophy, would be left to confront a hostile Congress determined to weaken the Bureau of Indian Affairs and to embark on the new Federal policy of Termination.

D. The Termination Movement following World War II

With its emphasis on cultural pluralism the Collier Administration had been somewhat of an aberration in Federal Indian policy since the late nineteenth century. As Francis Prucha has observed, by 1946 "the executive branch of the government joined the

[56] 25 CFR § S, part 230 (1939) [MA-166.1]; see also Assistant Commissioner of Indian Affairs, "Regulations Governing the Deposit of Indian Funds in Banks," 3/2/1938 (approved-3/5/1938) [MA-655].
[57] 43 CFR § J, part 176 (1940), pp. 334-346 [MA-657].
[58] U. S. Department of the Interior, "Indian Service Manual, 11/15/1945, p. 243C2(1) [MA-17].

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Congress in a massive drive to assimilate the Indians once and for all and thus to end the responsibility of the federal government for Indian affairs." Those who advocated the termination of Federal supervision over Native Americans proposed four steps to accomplish this goal: repealing legislation that distinguished Indians from other citizens, ending BIA services, freeing individual Indians from Federal restrictions, and ceasing Federal supervision over specified tribes.[59] Following World War II the United States studied methods to streamline the Federal government. Former President Herbert Hoover chaired the Commission on Organization of the Executive Branch of the Government. The Commission's task force on Indian Affairs endorsed the policy of assimilation and of diminishing the role of the BIA while increasing the role of the States. In this regard, Prucha has remarked:

> The commission's special task force on Indian affairs asserted in its report that 'assimilation must be the dominant goal of public policy,' that in fact there was no other choice. . . . The full commission picked up and endorsed the task force's position as 'the keystone of the organization and of the activities of the Federal Government in the field of Indian affairs.' It recommended complete integration of the Indians into the mass of the population as taxpaying citizens, and until that could occur it wanted the social programs for Indians to be transferred to the state governments, thus diminishing the activities of the Bureau of Indian Affairs.[60]

The endeavor to free individual Indians from Federal restrictions would have a major influence on IIM policies.

Collier's successor at the BIA was William A. Brophy of New Mexico. A noted advocate of Indian reform measures, Brophy had served as Special Attorney for the Pueblo Indians from 1934 to 1942. Brophy assumed office at a time when Congress sought to limit the power of the central office of the BIA.[61] When Brophy appeared before the House subcommittee of the Committee on Appropriations in February 1946, he presented a

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[59] Prucha, Great Father, vol. 2, pp. 1013-1014 [MA-681].
[60] Prucha, Great Father, vol. 2, pp. 1028-1029 [MA-681].
[61] S. Lyman Tyler, "William A. Brophy, 1945-48," in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 283-284 [MA-1158].

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program to reorganize the BIA by establishing area offices. The Commissioner told the Committee members that he expected "to complete practicable plans for the reorganization of the Indian Service. As an initial step, I am proposing in this budget the consolidation of all our scattered independent district offices into five units, each under the direction of a district manager."[62] On August 8, 1946, President Harry S Truman signed "An Act To facilitate and simplify the administration of Indian affairs," which served as the basis for the establishment of the area offices.[63]

During the appropriations hearing in 1946 Congressman Jed Johnson questioned Brophy about Individual Indian Moneys. The issue had been raised by Indians who had suggested the elimination of IIM accounts. The Indians, who preferred anonymity, asserted that the Bureau should "[t]urn the Indian's money over to him as he is as capable of using it as wisely as the average white man." The Bureau subsequently replied:

> We recognize that the administering of individual Indian money presents a problem which has not been solved satisfactorily. Nevertheless we do not agree that all accounts of Indians could or should be eliminated. Some could be closed out. Our regulations give the superintendents a wide range of authority in the handling of these funds and small balances are usually paid over to the Indians at once.

The Bureau's response also emphasized the impact of the heirship problem on individual Indian moneys, observing that the "complicated land ownership situation practically compels the agencies to lease the land and collect the rentals, otherwise the land would not be used."[64] During 1946 Congress continued to examine Bureau policies concerning the

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[62] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1947, 79th Cong., 2nd sess. (Washington, DC: GPO, 1946), p. 816 [MA-207].
[63] 6 Kappler 318 [MA-1421] and Tyler, "William A. Brophy, 1945-48," in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 284-285 [MA-1158].
[64] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1947, 79th Cong., 2nd sess. (Washington, DC: GPO, 1946), pp. 823 and 826 [MA-207].

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Indians' use of property. The Senate Committee on Indian Affairs held hearings to discuss the repeal of the Indian Reorganization Act. Moreover, in the aftermath of World War II, the Committee studied measures to end restrictions against Native Americans who had served in the military.[65]

As the BIA moved to decentralize its operations, it also reviewed proposals to close out greater numbers of individual accounts. For example, Paul Fickinger informed Congress that the BIA permitted closing accounts of up to $500 whenever possible.[66] Fickinger expressed his personal discontent with the Bureau's management of the IIM system in a letter to the Commissioner dated January 2, 1948:

> Our insistence on maintaining an antiquated control of his individual money, still requiring the money to be deposited in the superintendent's accounts and the Indian, when he needs money, being required to come and present his needs to some employee who can say 'yes' or 'no,' and then the delay incident to finally giving him whatever portion of his own funds it is finally determined by this employee he should have. Such controls may have been desirable a hundred years ago.[67]

In 1948, at the time of Fickinger's letter, the United States Treasury held about $43,663,000 in "Individual Indian trust funds." Since 1939, this amount had fluctuated between a low of $40,545,000 in 1941 and a high of $47,802,000 in 1945.[68]

Congressional interest in Indian trust funds was not limited to Individual Indian Moneys. In 1949 Congress studied a measure to transfer control of Indian tribal funds to

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[65] U. S. Congress, Senate, Committee on Indian Affairs, Repeal of the Wheeler-Howard Act, 79th Cong., 2nd sess. (Washington, DC: GPO, 1946) [MA-661] and U. S. Congress, Senate, Committee on Indian Affairs, Removal of Restrictions on Property of Indians Who Served in the Armed Forces, 79th Cong., 2nd sess. (Washington, DC: GPO, 1946) [MA-660].

[66] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1949, 80th Cong., 2nd sess. (Washington, DC: GPO, 1948), p. 71 [MA-209].

[67] District Director to acting Commissioner of Indian Affairs, 1/2/1948, in U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1949, 80th Cong., 2nd sess. (Washington, DC: GPO, 1948), pp. 637-639 [MA-209].

[68] Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1949, (Washington DC: GPO, 1950), p. 493 [MA-757].

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the tribes.[69] The legislature's preoccupation with divesting the Federal government's control of Indian moneys, tribal and individual, represented a significant part of the Termination movement.

E. Termination at High Tide: the 1950s

Dillon S. Myer was sworn in as Commissioner of Indian Affairs in May 1950. Under Myer's leadership the BIA moved to cut back services to Indians and to move forward with Termination. Myer's biographer has observed that by 1952 the BIA "had totally abandoned the Indian reorganization program of the New Deal and set out with enthusiasm to take the government out of the Indian business."[70] Former Commissioner John Collier and former Secretary Harold Ickes denounced Myer for his commitment to Termination. Indeed the Commissioner advanced proposals to remove the United States from the business of Indian trust fund management.[71]

On April 1, 1951, Myer proposed a revision of IIM regulations to the Secretary of the Interior. The Commissioner stated that current regulations restricted an individual's right to withdraw his own funds too severely. He added that the regulations were "unrealistic in terms of amounts of money that could be used without special authorization from this office, and, most serious of all, have made the Indians dependent upon review and decision by the Bureau in order not to violate the regulations." Myer recommended that individuals be allowed to "withdraw funds upon their own request for such purposes as they consider

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[69] U. S. Congress, House, Transferring Control over Indian Tribal Funds to the Indian Tribes: Report to Accompany H. R. 4025, 81st Cong., 1st sess., 7/12/1949, H. Rept. 1029, serial 11300 [MA-470].
[70] Patricia K. Ourada, "Dillon Seymour Myer, 1950-1953." in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 293 and 295 [MA-1158].
[71] Ourada, "Dillon Seymour Myer, 1950-1953," in Kvasnicka and Viola, Commissioners of Indian Affairs, pp. 293 and 295-296 [MA-1158].

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necessary." The superintendent would retain the authority to protect minors and those considered incompetent. A second proposed revision would end voluntary deposits by Indians. Myer believed this would strengthen "the position of encouraging Indians to use normal facilities."[72] Solicitor Mastin White found no legal impediment to Myer's suggestions. The Solicitor did warn the Secretary, however, "to give careful consideration to the important policy question that is involved in this proposal," especially in regard to certain tribes. If Indians were swindled out of their funds or dissipated their money as a result of these new regulations, White admonished, "the Secretary of the Interior could not evade his responsibility for the consequences. . . ."[73]

On June 19, 1951, Secretary Chapman issued a revision to Title 25 of the Code of Federal Regulations. The change excluded the Osage Agency from the new provisions. In accordance with Myer's recommendation, individual Indians would now be permitted "to withdraw funds in their Indian money accounts and upon their request the superintendent shall disburse the funds to them at such convenient times and places as the superintendent may designate. . . ." In addition to the Osage Agency, minors and adults under legal disability were exempted from this provision. Secretary Chapman also approved the Commissioner's other proposal ending voluntary deposits and encouraging Indians who required banking services to use commercial institutions.[74]

In his annual report for 1951, Myer discussed the need for "a fundamental liberalization of the regulations governing the disbursement of money held by the Bureau's disbursing agents in the accounts of individual Indians (25 CFR 221.1-221.40)." Previously, he noted, only small amounts could be disbursed to individuals, "and large

[72] Commissioner of Indian Affairs to Secretary of the Interior, 4/4/1951 [MA-1138].
[73] Solicitor to Secretary of the Interior, 5/16/1951 [MA-1137].
[74] Secretary of the Interior, Revision of Title 25, CFR Subchapter 8, part 221, 6/19/1951 [MA-1136]. Chapman, the longtime Assistant Secretary of the Interior, became Secretary in 1949.

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numbers of the withdrawals had to be approved by the Washington office." Now, Myer proclaimed, the Bureau's policy was to transfer increasing responsibility for decisions to the Indians themselves. Citing the changes approved by Chapman, the Commissioner asserted that "the great majority of the approximately 80,000 individual Indian money accounts were freed of all Bureau supervision."[75]

In spite of the enthusiasm of Congress and Myer for Termination, complexities relating to the fractionation of Indian land undermined efforts to implement the policy. In January 1952, for instance, Myer appeared before the House subcommittee of the Committee on Appropriations. He requested an increase of $879,500 for the management of Indian trust property. Like his predecessors, the Commissioner explained how the heirship dilemma had complicated the administration of trust lands. Like his predecessors, the Commissioner explained the linkage between fractionated Indian allotments and the supervision of individual Indian moneys. Myer testified that when he became Commissioner he had been told that the Bureau

> had a backlog in our Washington office of land actions that would involve 21/2 years' work for the staff we then had, so we are trying to clean up the backlog; we are trying to get current and we are trying to expedite the disposal of those lands where Indians . . . want to get themselves and the Bureau out of business.[76]

The following year W. B. Greenwood appeared before the subcommittee. He again told the congressmen of the Bureau's growing caseload involving probate matters. The BIA sought an increase of $453,900 for the management of trust property. Greenwood echoed Myer's testimony at the previous hearing:

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[75] Commissioner of Indian Affairs Annual Report for the Year 1951 (Washington DC: GPO, 1951), p. 352 [MA-64]. The changes appear in 25 CFR § S, parts 221.3 and 221.6 (1952), p. 60 [MA-172].
[76] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1953, 82nd Cong., 2nd sess. (Washington, DC: GPO, 1952), pp. 208-209 [MA-213].

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> We had a great backlog of work as of the close of the last fiscal year, and the work is constantly increasing. It is just impossible for the present manpower to make a dent in the backlog and keep the current work flowing.
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> We have about 132 man-years available to us for the performance of this work, which is not enough. As a result, the Indians are complaining. Members of the public who are interested in Indian land are complaining, and even Members of Congress are complaining because we cannot keep on top of this job.[77]

In the course of his testimony in 1954, Greenwood estimated that the Bureau's trust management staff would have to be doubled in order to clear the cases.[78]

Despite problems with the implementation of Termination, Congress continued to endorse the policy. Congress sanctioned the principle of Termination in House Concurrent Resolution 108. The House Committee on Interior and Insular Affairs advocated the Resolution and elucidated its twin goals: "First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and, second, termination of the subjection of Indians to Federal laws applicable to Indians as such." The Committee stated that to accomplish Termination, Congress must consider legislation to repeal "statutory provisions which set Indians apart from other citizens. . . ." The congressmen also urged the enactment of measures to end certain services provided by the BIA to tribes and individuals, and to cease Federal control over individual Indian property.[79] The Senate Committee on Interior and Insular Affairs supported House Concurrent Resolution 108 without amendment, virtually repeating the House report.[80]

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[77] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1954, 83rd Cong., 1st sess. (Washington, DC: GPO, 1953), pp. 799 and 860 [MA-214].
[78] U. S. Congress, House, Committee on Appropriations, Hearings Before a Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1955, 83rd Cong., 2nd sess. (Washington, DC: GPO, 1954), pp. 576-577 [MA-215].
[79] U. S. Congress, House, Expressing the Sense of Congress that Certain Tribes of Indians should be Freed from Federal Supervision, 83rd Cong., 1st sess., 7/15/1953, H. Rept. 841, pp. 1-2 [MA-1367].
[80] U. S. Congress, Senate, Expressing the Sense of Congress that Certain Tribes of Indians should be Freed from Federal Supervision, 83rd Cong., 1st sess., 7/30/1953, S. Rept. 794 [MA-1368].

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Congress passed House Concurrent Resolution 108 on August 1, 1953. The resolution proclaimed the intent of Congress to make Indians "subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards. . . ." The resolution also called for the termination of Federal supervision over numerous tribes. Furthermore, Congress declared that the "Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties . . . and report to Congress . . . not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution."[81]

Two weeks later, President Dwight D. Eisenhower signed two statutes that further embodied the tenets of Termination. On August 15, 1953, the President signed "An Act To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes." This law reflected the efforts of those who sought to turn Indian matters over to the States, thereby ending the special status under Federal law held by Indians.[82] The same day Eisenhower signed "An Act To terminate certain Federal restrictions upon Indians." This act repealed statutes restricting the "sale, purchase, or possession by Indians of personal property which may be sold, purchased, or possessed by non-Indians. . . ." It also amended earlier legislation relating to Indian livestock and other issues.[83]

While Congress and the BIA cooperated to achieve Termination, the General Accounting Office continued its active role in Indian matters, especially Indian trust funds.

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[81] 67 Stat. B132 [MA-1369].
[82] 67 Stat. 588 [MA-1370].
[83] 67 Stat. 590 [MA-1371].

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F. The GAO, the BIA and Termination

From the late 1940s to the early 1950s the GAO engaged in two activities that directly influenced the development of IIM matters. First, the GAO assisted in the creation of a new bookkeeping and accounting system for the BIA. Second, the GAO investigated BIA operations. The GAO audited BIA area offices and made recommendations regarding the disposition of individual Indian moneys. Also, as the request of Congress, the GAO issued reports in 1952 and 1956 concerning the Bureau's management of Indian trust funds.

On February 23, 1949, Comptroller General Lindsay Warren wrote the Secretary of the Interior that an "informal inquiry" by the GAO had disclosed that the BIA "had not been maintaining an adequate accounting system, including a balanced set of general ledger accounts, which would enable the Bureau to exercise proper control of its financial affairs and provide information for effective management." To ameliorate this condition Warren offered the assistance of the Joint Program to Improve Accounting in the Federal Government (Joint Program). Under the Joint Program, the Comptroller General, the Secretary of the Treasury, and the Director of the Bureau of the Budget cooperated to design technically sound and efficient accounting systems for Federal agencies.[84]

At first the Joint Program was an informal organization established by agreement among the three in December 1947 to assist agencies in improving accounting and reporting procedures. In 1949 the Commission on Organization of the Executive Branch of the Government had described the Federal government's accounting system as outdated and unwieldy. This charge led to the Budget and Accounting Procedures Act of 1950.[85] This

[84] Comptroller General to Secretary of the Interior, 2/23/1949 [MA-1139].
[85] Trask, GAO History 1921-1991, pp. 29-30 and 32-33 [MA-807].

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statute legitimatized what heretofore had been the informal work of the Bureau of the Budget, the Treasury Department, and the GAO in the Joint Program. Following consultation with his two colleagues, the statute authorized the Comptroller General to "prescribe the principles, standards, and related requirements for accounting to be observed by each executive agency, including requirements for suitable integration between the accounting processes of each executive agency and the accounting of the Treasury Department." The act also allowed the Comptroller General to designate financial documents that agencies must retain on location for GAO site audits.[86]

After the passage of the Budget and Accounting Procedures Act, the Interior Department inquired about IIM ledgers. The Assistant Secretary informed the Comptroller General that "approximately 80,000" IIM accounts existed in 1951. Because the "preparation and shipment to Washington of the carbon copies of the individual Indian money ledgers for audit purposes is a time consuming and expensive procedure," the Assistant Secretary asked to discontinue the practice.[87] The Comptroller General approved the request in May 1951. The acting Director of the Bureau's Division of Budget and Finance acknowledged, however, that the Comptroller's assent was based on the understanding that the BIA would maintain internal procedures "whereby the individual ledgers in the 80 field offices will be reconciled monthly or at other intervals with the control accounts maintained at the 11 area offices. It is important that this be done. . . ."[88]

Meanwhile, the Joint Program cooperated with the BIA to replace its accounting system. On December 4, 1952, the Comptroller General announced that a "completely revised system of accounting for the Bureau of Indian Affairs was started as of July 1,

[86] Trask, GAO History 1921-1991, pp. 33-34 [MA-807] and 64 Stat. 832, 835, and 837 [MA-1290].
[87] Administrative Assistant Secretary of the Interior to Comptroller General, 5/14/1951 [MA-1141].
[88] Acting Director, Division of Budget and Finance to Commissioner of Indian Affairs, 6/4/1951 [MA-1142].

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1952." He noted that a final draft of the system was being written for his consent. The Comptroller remarked that the new procedures would be more responsive to Federal reporting and accounting requirements and would both streamline and improve BIA services.[89] Comptroller General Warren approved the BIA's accounting system "after a test period of operation. This year has been devoted to standardizing procedures in accordance with the accounting manual, modifying the manual to reflect accounting refinements, and expediting the rendering of accounting reports."[90] The Commissioner of Indian Affairs concurred with the Comptroller's favorable assessment. In 1954 the Commissioner reported progress "in refining and improving the new accounting system installed in Bureau accounting offices the preceding year. The budget procedures are being integrated with the system so that information supplied from the accounts will be susceptible of use for both budgeting and management purposes."[91]

In addition to its bookkeeping and accounting functions, the GAO also investigated BIA activities. During the 1950s the Audit Division of the GAO made numerous field inspections of BIA Area Offices. Typically, the resulting reports encompassed the wide range of Area Office responsibilities, medical facilities, and education, as well as the administration of individual Indian moneys. In many respects, the Audit Division reports demonstrated the government's commitment to Termination. For example, in 1953 GAO auditors visited the Billings Area Office. There, auditors reviewed records of the Flathead Indian Agency and found that it was not complying with the policy "to transfer more responsibility from the federal Government to the Indian. One of the means of carrying out

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[89] Comptroller General, Fourth Annual Progress Report under the Joint Program to Improve Accounting in the Federal Government, 12/4/1952, pp. 40-43 [MA-787].
[90] Comptroller General, Fifth Annual Progress Report under the Joint Program to Improve Accounting in the Federal Government, 1/7/1954, pp. 59-60 [MA-788].
[91] Commissioner of Indian Affairs Annual Report for the Year 1954 (Washington DC: GPO, 1954), pp. 258-259 [MA-65].

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this policy is to close out adult Indians' accounts of less than $500 if it can be determined that the owners are reasonably capable of managing their affairs." The GAO recommended that the Area Director distribute interest income from individual accounts and close out those containing less than $500.[92]

In 1954 GAO auditors visited the Aberdeen, South Dakota, Area Office of the BIA. In their review of IIM matters, they noted that 22 accounts had been overdrawn at a total of $416. They also found instances when IIM funds had been issued without using the proper form. As had been the case in Billings, the inspection noted numerous small and dormant accounts that should be closed.[93] The GAO frequently revisited Area Offices to determine if improvements had been made. For example, in 1955 the Division of Audits returned to the Anadarko, Oklahoma, Area Office. There, the auditors found improvements to the administration of individual Indian moneys. Some problems, however, remained. Auditors reviewed 62 individual accounts containing 923 disbursements and discovered that roughly 10 percent of the transactions were not supported by the proper form or other appropriate documents. Moreover, at times the completed applications were prepared improperly or signed by a person not authorized to do so.[94] The auditors also urged that greater care be taken to see that IIM holders received their account statements. At this time, the BIA furnished statements upon an individual's request rather than as a matter of routine.[95] Furthermore, the GAO team recalled that in its

[92] United States General Accounting Office, Division of Audits, "Report on Audit of Billings Area, Bureau of Indian Affairs, Department of the Interior, For the Fiscal Year Ended June 30, 1953," p. 11 [MA-933].
[93] United States General Accounting Office, Division of Audits, "Report on Audit of Aberdeen Area Office, Bureau of Indian Affairs, Department of the Interior, For the Fiscal Year Ended June 30, 1954," pp. 9-11 [MA-843].
[94] United States General Accounting Office, Division of Audits, "Report on Audit of Anadarko, Oklahoma, Area Office, Bureau of Indian Affairs, Department of the Interior, For the Fiscal Year Ended June 30, 1955," pp. 1-3 [MA-932].
[95] United States General Accounting Office, Division of Audits, "Report on Audit of Anadarko, Oklahoma, Area Office, Bureau of Indian Affairs, Department of the Interior, For the Fiscal Year Ended June 30, 1955," p. 5 [MA-932].

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report for fiscal year 1954, it had "recommended that the copy of Form 5-796, Individual Indian Account Ledger sheet, submitted for storage to a Federal record center for safekeeping, be discontinued because we were unable to obtain a valid reason for this requirement." The auditors' review of the Kiowa subagency, however, showed that the practice still existed, and they again suggested that the practice be ended. In addition, the GAO uncovered overdrafts of IIM accounts totaling $59 at the Kiowa subagency.[96]

The GAO also visited the Phoenix Area Office in successive years. The audit report for the fiscal year ending June 30, 1954 focused on problems at the Fort Apache Agency. The investigators observed that BIA officials at Fort Apache had failed to send account statements semiannually and should close small, inactive accounts for adult Indians. The study also mentioned that officials had been lax in their use of "Form 5-139, Individual Indian Accounts Application," needed to withdraw moneys for individuals. The GAO admonished that to "prevent payments of Indian moneys to unauthorized persons, which could result in claims against the Government, and to train the tribes in the management of their own affairs, we recommend that the Area Director enforce compliance with the minimum safeguards referred to above in the disbursement of Indian moneys."[97] The GAO revisited Phoenix the following year. Auditors found some improvements but continued to see many of the same types of problems that existed at other BIA facilities: withdrawals from IIM accounts were sometimes made without following correct procedures; small, inactive accounts needed to be liquidated; and IIM statements were not

[96] United States General Accounting Office, Division of Audits, "Report on Audit of Anadarko, Oklahoma, Area Office, Bureau of Indian Affairs, Department of the Interior, For the Fiscal Year Ended June 30, 1955," pp. 6-7 [MA-932].
[97] United States General Accounting Office, Division of Audits, "Report on Audit of Phoenix Area Office, Phoenix, Arizona, Bureau of Indian Affairs, Department of the Interior, For the Fiscal Year Ended June 30, 1954," pp. 25-26 [MA-844].

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distributed regularly to Indians.[98] Moreover, the auditors located discrepancies between IIM accounts subsidiary records and general ledger control accounts. The GAO also detected $286.87 in overdrafts of IIM accounts at the Uintah and Ouray Agency.[99]

In addition to auditing BIA Area Offices, the GAO conducted two studies of the Bureau's management of Indian trust funds. In each instance, Congress had requested the investigation with an eye toward the eventual termination of Federal supervision over Indian trust funds.

G. The General Accounting Office Audits of 1952 and 1956

On July 23, 1951, the Senate passed Senate Resolution 147, authorizing the General Accounting Office "to make a study and investigation for the purpose of ascertaining the amounts of the funds and securities of the several Indian tribes . . . whether held in the Treasury of the United States, in private banks or elsewhere, and the rates of interest on such funds . . . for the period beginning on July 1, 1928. . . ." This study was to update the previous report submitted by the Comptroller General pursuant to the Second Deficiency Act of fiscal year 1928.[100] The GAO investigated financial data from Treasury Department records, BIA records in Washington and in field offices, and private banks, "to

[98] United States General Accounting Office, Division of Audits, "Report on Audit of Phoenix Area Office, Phoenix, Arizona, Bureau of Indian Affairs, Department of the Interior, For the Fiscal Year Ended June 30, 1953," pp. 17-19 [MA-934].
[99] United States General Accounting Office, Division of Audits, "Report on Audit of Phoenix Area Office, Phoenix, Arizona, Bureau of Indian Affairs, Department of the Interior, For the Fiscal Year Ended June 30, 1953," pp. 21 and 23 [MA-934].
[100] U. S. Congress, Senate, S. Res. 147, 82nd Cong., 1st sess., 7/23/1951, reprinted in U. S. Congress, General Accounting Office, Office of Investigation, "Report of Study and Investigation of the Funds and Securities of the Several Indian Tribes, Including those of Tribal Organization, Pursuant to Senate Resolution No. 147, Eighty Second Congress," 4/1/1952, unnumbered page preceding p. 1 [MA-662]. The GAO study submitted to Congress in 1929 is discussed in chapter 3 of this report; see U. S. Congress, Senate, Indian Funds, 70th Cong., 2nd sess., 2/25/1929, S. Doc. 263 [MA-6].

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the extent practicable to substantiate the data reported." On April 1, 1952, W. L. Ellis, the GAO's Chief of Investigations, transmitted his section's report to the Comptroller General.[101]

The bulk of the more than 200-page report addressed various tribal moneys, including tribal funds, tribal organization funds, accounts receivable, tribal income producing assets, various security investments, loans payable, tribal claims, and proceeds from submarginal lands. The seventh section of the study examined Individual Indian Moneys, termed "Indian Money Accounts" in this investigation.[102] The GAO found a total of $29,403,404.56 in Individual Indian Moneys, which it described as "only those funds of individual Indians, exclusive of Tribal Organization Funds, on deposit with the Indian Service Special Disbursing Agents as of June 30, 1951, together with the balances of . . . undistributed interest accounts. . . ." These moneys were derived from the proceeds of timber sales, mineral royalties, leasing, distribution of tribal funds, and voluntary deposits. The report noted that voluntary deposits had "been discouraged by recent Indian Service regulations," and cited the change in the CFR. The investigators cautioned that the IIM funds described in the report "in no way reflect the economic well-being of the individual Indian or his monetary status since it has been impracticable to canvass all private banks to ascertain the amounts of individual Indian accounts maintained."[103]

In 1952 the GAO primarily investigated the status of tribal accounts and admitted that it had not examined IIM records in all depositories. A few years later, however, the GAO

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[101] U. S. Congress, General Accounting Office, Office of Investigation, "Report of Study and Investigation of the Funds and Securities of the Several Indian Tribes, Including those of Tribal Organization, Pursuant to Senate Resolution No. 147, Eighty Second Congress," 4/1/1952, pp. I-IV [MA-662].
[102] U. S. Congress, General Accounting Office, Office of Investigation, "Report of Study and Investigation of the Funds and Securities of the Several Indian Tribes, Including those of Tribal Organization, Pursuant to Senate Resolution No. 147, Eighty Second Congress," 4/1/1952, pp. I-IV [MA-662].
[103] U. S. Congress, General Accounting Office, Office of Investigation, "Report of Study and Investigation of the Funds and Securities of the Several Indian Tribes, Including those of Tribal Organization, Pursuant to Senate Resolution No. 147, Eighty Second Congress," 4/1/1952, pp. X and 171 [MA-662].

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conducted a more comprehensive study of Individual Indian Moneys. In October 1956 Comptroller General Joseph Campbell forwarded to Congress an audit report on the "Administration of Individual Indian Moneys by [the] Bureau of Indian Affairs, Department of the Interior," covering IIM activities through November 1955.[104]

This GAO audit ascertained that special disbursing agents of the Indian Service each year performed banking services for about 88,000 IIM accounts totaling approximately $66,000,000. Campbell informed Congress that "precautions usually taken by private banking institutions have not always been followed" by authorized BIA fiscal agents.[105] The GAO elaborated upon a number of these deficiencies, which largely reiterated the conclusions of auditors who visited various Area Offices. First, the report asserted that in many instances, disbursements from IIM accounts had not been supported by proper paperwork. Among other procedural deficiencies, the report mentioned disbursements made without proper BIA consent, the lack of signature or thumbprint records for proper identification of authorized accountholders, the absence of certificates of competency in IIM account files, and withdrawals allowed to persons other than the accountholder without proper approval.[106] The GAO audit also found discrepancies among various general or control accounts and the subsidiary accounts maintained under them.[107] Moreover, the Comptroller General reported that some moneys were retained too long in certain suspension accounts without being disbursed to the proper beneficiaries. And, in some

[104] Comptroller General, "Audit Report to the Congress of the United States: Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior," 11/1955 [MA-12].
[105] Comptroller General, "Audit Report to the Congress of the United States: Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior," 11/1955, p. 2 [MA-12].
[106] Comptroller General, "Audit Report to the Congress of the United States: Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior," 11/1955, pp. 5 and 10-17 [MA-12].
[107] Comptroller General, "Audit Report to the Congress of the United States: Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior," 11/1955, pp. 6-7 and 18-22 [MA-12].

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cases, he found that interest had been calculated improperly.[108] Furthermore, the report criticized the fact that some agencies had concentrated all fiscal responsibility into the hands of one officer. The Comptroller feared that without a division of fiscal accountability, there would be no checks or balances on the accounting processes.[109]

In addition to these deficiencies, Campbell addressed several improprieties that hampered the administration's policy to terminate BIA supervision over Indian affairs. In this regard, the audit discovered a number of inactive IIM accounts that should have been closed. In other instances, the GAO determined that royalties or other income could be paid directly to the accountholder without transfer through the BIA. The report also recommended that "the eventual liquidation of the IIM activity will be expedited by transferring the activity to local banking institutions wherever possible."[110] The GAO chastised the BIA for its continuing failure to provide Indians with semiannual statements of their accounts. Without periodic knowledge of this information, the Comptroller General affirmed, "the account owner is not given the opportunity to evaluate his financial position, which is contrary to the Bureau's policy of giving the Indian more responsibility in order to develop his ability to administer his own financial affairs."[111]

The 1956 General Accounting Office audit of Individual Indian Moneys informed the House and Senate of numerous problems with BIA records keeping, disbursement procedures, and account maintenance. It also condemned certain fiscal practices that

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[108] Comptroller General, "Audit Report to the Congress of the United States: Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior," 11/1955, pp. 8-10 and 28-32 [MA-12].
[109] Comptroller General, "Audit Report to the Congress of the United States: Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior," 11/1955, pp. 9 and 32-33 [MA-12].
[110] Comptroller General, "Audit Report to the Congress of the United States: Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior," 11/1955, pp. 7-8 and 22-27 [MA-12]. The quotation may be found on page 27.
[111] Comptroller General, "Audit Report to the Congress of the United States: Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior," 11/1955, pp. 9 and 33-34 [MA-12].

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hindered the Indian from attaining self sufficiency, which would expedite the Bureau's termination of its supervision over Indian matters. Although the "Audit Report to the Congress of the United States" made numerous recommendations to improve the IIM system, the GAO did not attempt to reconcile IIM accounts in 1956.

In his transmittal letter to the Speaker of the House of Representatives, the Comptroller General noted the connection between solving dilemmas associated with individual Indian moneys and Termination. Campbell concluded, "the possibility of eventually eliminating the individual Indian money activity is dependent to a great extent on finding solutions to the problems encountered by the Bureau in administering Indian lands and in carrying out the objective of an orderly withdrawal of Government supervision of Indian affairs."[112]

Almost 45 years after the Comptroller General's letter to Congress the problems still remain.

[112] Comptroller General to Speaker of the House of Representatives, 10/7/1956 in Comptroller General, "Audit Report to the Congress of the United States: Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior," 11/1955, p. 1 [MA-12].