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 TO WITHDRAW
THREE MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Currently pending before the Court are three motions for partial summary judgment filed by Defendants between March 27, 2000, and September 19, 2000. In light of the significant developments that affect these motions since they were filed – most notably the decision by the United States Court of Appeals for the District of Columbia Circuit affirming this Court's Order of December 21, 1999, and the creation of the Office of Historical Trust Accounting within the Department of the Interior – Defendants respectfully move the Court to permit withdrawal of their three motions for partial summary judgment.

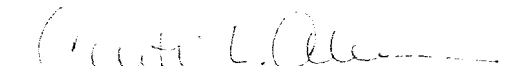
In the event the Court does not permit withdrawal of the motions, Defendants respectfully request the opportunity to file supplemental briefs to address the effect of subsequent events on the arguments made in the motions.

On February 1, 2002, counsel for Defendants attempted to contact counsel for Plaintiffs to determine whether Plaintiffs will consent to this motion, but were unable to reach him.

Respectfully submitted,

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

Dated: February 1, 2002



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Defendants.	)	
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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO WITHDRAW THREE MOTIONS FOR PARTIAL SUMMARY JUDGMENT[1]

Currently pending before the Court are three motions for partial summary judgment filed by Defendants between March 27, 2000, and September 19, 2000. Much has happened in this case affecting the motions since their filing, most notably the decision by the United States Court of Appeals for the District of Columbia Circuit affirming this Court's Order of December 21, 1999, and the creation of the Office of Historical Trust Accounting within the Department of the Interior ("Interior"). In light of these developments and their effect on the pending motions, Defendants respectfully request that the Court permit withdrawal of their three motions for partial summary judgment. In the event the Court does not permit withdrawal of the motions, Defendants respectfully request the opportunity to file supplemental briefs to address the effect of subsequent events on the arguments made in the motions.

[1] As this brief was being finalized, Defendants and their counsel received the Fifth Report and the Sixth Report of the Court Monitor. We will respond to the Court Monitor's Reports separately.

BACKGROUND

On December 21, 1999, following the Phase I trial, this Court issued a Memorandum Opinion and Order in which it decided the Phase I prospective issues, as well as one Phase II issue: the Court held that "the Indian Trust Fund Management Reform Act, 25 U.S.C. §§ 162a et seq. & 4011 et seq., 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 v. Babbitt, 91 F. Supp. 2d 1, 58 (D.D.C. 1999). The Court certified its order for interlocutory appeal, and directed that "further proceedings in this case shall not be stayed during the pendency of any interlocutory appeal that may be taken." Id. at 59. Defendants petitioned for interlocutory appeal; the United States Court of Appeals for the District of Columbia Circuit granted the petition on February 17, 2000. Aware that a ruling by the Court of Appeals regarding Defendants' accounting obligation would be controlling, yet mindful of this Court's directive to proceed with Phase II during the pendency of the appeal, Defendants filed three motions for partial summary judgment to obtain the guidance of the Court on the scope of Phase II.

First Motion. On March 27, 2000, Defendants filed "Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims For An Historical Accounting of IIM Accounts" ("First Motion").[2] In this motion, Defendants sought partial summary judgment on Plaintiffs' claim that IIM account holders are entitled to a common law-style historical accounting that reconciles each credit or debit that was or should have been made to each IIM account from the

[2] Plaintiffs filed a brief in opposition to the First Motion on July 7, 2000. Defendants filed a reply brief on July 28, 2000.

beginning of the IIM trust until October 25, 1994, the effective date of the American Indian Trust Fund Management Reform Act of 1994 ("1994 Reform Act"). Relying on the language of the 1994 Reform Act and this Court's holding that "[P]laintiffs' substantive rights are created by – and therefore governed by – statute," Cobell v. Babbitt, 91 F. Supp. 2d at 29, Defendants argued that neither the 1994 Reform Act nor any other statute requires such an historical accounting or reconciliation. Rather, Defendants argued, the 1994 Reform Act imposes prospective obligations, including obligations to provide periodic, timely reconciliations to assure the accuracy of accounts and to determine accurate cash balances.[3] See Defs.' First Motion at 1; Defs.' Memo. in Supp. of First Motion at 23-35.

In the First Motion, Defendants also sought partial summary judgment on Plaintiffs' claim for a court-ordered "restatement" or "correction" of IIM accounts. Defendants argued that this Court's prior rulings and controlling precedent establish that any claim for a restatement or correction of IIM accounts to rectify potential errors in administration of the accounts (such as mispayment or loss of funds, failure to collect income due under a lease, or failure to invest funds properly) is a claim for "money damages" that is beyond the jurisdiction of the Court. See Defs.' First Motion at 2; Defs.' Memo. in Supp. of First Motion at 36-45.

Second Motion. On May 12, 2000, Defendants filed "Defendants' Second Phase II Motion For Partial Summary Judgment (Re: Funds Not Deposited Or Invested Pursuant To The

[3] Defendants acknowledged that compliance with this prospective obligation would require them to address historical deficiencies in IIM account administration. Defs.' First Motion at 1; Defs.' Memo. in Supp. of First Motion at 24.

Act Of June 24, 1938)" ("Second Motion").[4] In the Second Motion, Defendants sought summary judgment that neither the 1994 Reform Act nor any other authority requires Interior to perform an accounting for funds not actually held in trust and deposited or invested pursuant to the Act of June 24, 1938, such as funds paid directly from lessees to the allotment owners. Defendants argued that the plain language and the structure of the 1994 Reform Act establish that Interior's accounting obligation applies only to funds deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. § 162a), and does not, as Plaintiffs allege, extend to funds that never came into Defendants' hands. See Defs.' Second Motion at 1, Defs.' Memo. in Supp. of Second Motion at 10-16. Defendants also argued that the plain language of the 1994 Act on this point is supported by the Indian trust principles announced in cases such as United States v. Mitchell ("Mitchell II"), 463 U.S. 206 (1983), which held that fiduciary obligations attach when "the Federal Government takes on or has control or supervision over tribal monies or properties." Mitchell II, 463 U.S. at 225; see Defs.' Memo. in Supp. of Second Motion at 16-18.

Third Motion. On September 19, 2000, Defendants filed "Defendants Third Phase II Motion For Partial Summary Judgment (Re: Settlement Of Accounts By Treasury And GAO)" ("Third Motion").[5] In this motion, Defendants sought summary judgment that neither the 1994 Reform Act nor any other law requires Defendants to account for transactions that occurred in IIM accounts prior to 1951. Relying again on this Court's ruling that "[P]laintiffs' substantive rights are created by – and therefore governed by – statute," Cobell v. Babbitt, 91 F. Supp. 2d at

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[4] Plaintiffs filed a brief in opposition to the Second Motion on July 7, 2000. Defendants filed a reply brief on July 19, 2000. Plaintiffs filed a corrected surreply brief on July 26, 2000.

[5] Plaintiffs filed a brief in opposition to the Third Motion on November 3, 2000. Defendants filed a reply brief on December 6, 2000.

29, Defendants argued that because Congress defined the obligation to account for individual Indian monies between 1817 and 1951, and established specific procedures for final settlement of the accounts, Defendants were entitled to summary judgment that any obligation to account for transactions occurring prior to 1951 can be satisfied by demonstrating compliance with the requirements of the relevant statutes. See Defs.' Third Motion at 1; Defs.' Memo. in Supp. of Third Motion at 22-27. Defendants also submitted evidence of compliance with the relevant statutes, and argued that Plaintiffs are not now entitled to a second or different accounting or reconciliation of the transactions subject to the detailed and specific accounting procedure Congress mandated for IIM transactions through 1951. See Defs.' Memo. in Supp. of Third Motion at 27-33.

Several key events have occurred since Defendants filed the Third Motion. On February 23, 2001, the Court of Appeals issued its opinion, providing significant guidance on many of the issues raised in the three motions for partial summary judgment. See Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). On July 10, 2001, the Secretary of the Interior ("Secretary") issued Secretarial Order No. 3231 establishing the Office of Historical Trust Accounting ("OHTA") to "plan, organize, direct, and execute the historical accounting of Individual Indian Money Trust (IIM) accounts." On September 10, 2001, OHTA issued a "Blueprint for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts," which was filed with the Court on September 12, 2001. On November 7, 2001, OHTA issued a "Report Identifying Preliminary Work for the Historical Accounting," which was filed with the Court on November 9, 2001. Interior's Status Report to the Court Number Eight ("Eighth Report"), filed on January 16, 2002, reports the steps taken by OHTA between August 1, 2001, and December

31, 2001, to implement the projects identified in the Report Identifying Preliminary Work for the Historical Accounting and to develop the Comprehensive Historical Accounting Plan. See Eighth Report at 21-31.

ARGUMENT

Defendants' summary judgment motions properly sought the Court's guidance and refinement of the issues for Phase II when they were filed. However, the landscape of the case has changed so significantly that the motions have been overtaken by events and their withdrawal is appropriate. The Court's role in addressing Phase II issues will, of course, remain.[6]

The February 23, 2001 decision of the Court of Appeals provided significant guidance on Phase II that affects several of the arguments in Defendants' pending motions. For example, while acknowledging that "the government's obligations are rooted in and outlined by the relevant statutes and treaties," Cobell v. Norton, 240 F. 3d at 1099, the Court ruled that the 1994 Reform Act did not create Defendant's fiduciary duties, but "reaffirmed and clarified preexisting duties," id. at 1100. The Court of Appeals also clarified that Interior must provide an accounting 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)." Id. at 1102.

Regarding the methodology for the historical accounting, the Court of Appeals held that decisions such as "how the [historical] accounting would be conducted, and whether certain

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[6] Indeed, we anticipate that the Court will have a significant role in providing guidance on the historical accounting. As explained in the Eighth Report, OHTA is completing its accounting work on approximately 8,400 judgment accounts representing a total of $30.6 million. See Eighth Report at 23-24. We anticipate that the results of that work will be presented to the Court for review shortly. Moreover, we expect to seek the Court's guidance on issues relating to the scope of the accounting before the Comprehensive Plan is issued.

accounting methods, such as statistical sampling or something else would be appropriate . . . . are properly left in the hands of administrative agencies." Id. at 1104. The Court cautioned, however, that "[c]laiming the role of administrator . . . does not absolve the government of its enforceable obligations to the IIM trust beneficiaries." Id. With regard to future proceedings, the Court of Appeals determined that it was premature to rule on the precise scope of the District Court's planned proceedings until the District Court undertakes the second phase of the trial and specific objections to its actions or jurisdiction are brought, but presumed that "the district court plans to wait until a proper accounting can be performed, at which point it will assess [Defendants'] compliance with their fiduciary obligations." Id. at 1110. Nonetheless, the Court in dicta outlined its thinking on jurisdiction:

> It remains to be seen 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, and the detection of such steps would fit within the court's jurisdiction to monitor the Department's remedying of the delay; beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction. Again, however, until these proceedings have begun, and specific objections are brought, these are questions we cannot address.

Id. at 1110.

The creation of OHTA is another important development since the motions were filed. On July 10, 2001, the Secretary created OHTA to "plan, organize, direct, and execute the historical accounting of [IIM] accounts." United States Department of the Interior, Secretarial Order No. 3231. The Secretary required OHTA to prepare, within sixty days, "a comprehensive description and timetable for completion of all steps that are needed to staff and develop a

comprehensive plan for a historical accounting that meets the Department's fiduciary obligations to IIM beneficiaries." Id. In accordance with the Secretarial Order, OHTA timely issued its Blueprint for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts ("Blueprint") on September 10, 2001. The Blueprint is the initial plan for the development of the comprehensive plan for a historical accounting ("Comprehensive Plan"). See Blueprint at 5. The Secretarial Order also directed OHTA to identify, within 120 days, "the preliminary work that can be done immediately," and to develop detailed plans "so that the affected Bureaus and offices can begin the work." United States Department of the Interior, Secretarial Order No. 3231. OHTA timely issued its Report Identifying Preliminary Work for the Historical Accounting on November 7, 2001.

As explained in detail below, because these developments have significant implications for the pending partial summary judgment motions, withdrawal of the motions will best serve the interests of the Court and the parties.

A. First Motion

Defendants' argument in the First Motion regarding the scope of Defendants' accounting duty was premised on this Court's ruling that "[P]laintiffs' substantive rights are created by – and therefore governed by – statute," Cobell v. Babbitt, 91 F. Supp. 2d at 29, and that "even though the IIM trust is a trust . . . [P]laintiffs must point to rights granted by statute if they are to be enforced against the government," id. at 30. Defendants argued that any rights of Plaintiffs or duties of Defendants regarding an historical accounting for IIM trust accounts must, therefore, be found in federal statutes. Defendants argued that neither the 1994 Reform Act nor any other statute requires the sort of historical accounting or reconciliation sought by Plaintiffs, and that the

obligations imposed by the 1994 Reform Act are prospective obligations, albeit ones that require historical analysis to support them. See Defs.' First Motion at 1; Defs.' Memo. in Supp. of First Motion at 23-35. Defendants also argued that Congress left to Interior the task of defining the scope and extent of the historical effort, keeping in mind considerations such as feasibility, cost, and the interests of the IIM beneficiaries,[7] Defs.' First Motion at 1-2; Defs.' Memo. in Supp. of First Motion at 24, but recognized that "[a] ruling by the Court of Appeals . . . regarding the appropriate roles of the agency and the reviewing court with regard to Interior's obligation to address pre-1994 Reform Act transactions (historical transactions) would be 'controlling.'" Defs.' Memo. in Supp. of First Motion at 3.

The Court of Appeals subsequently observed that "'the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations,'" Cobell v. Norton, 240 F.3d at 1098-99 (quoting Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995)), but held that the 1994 Reform Act "reaffirmed and clarified preexisting duties; it did not create them. . . . [and] did not define and limit the extent of [Defendants'] obligations." Id. at 1100. The Court of Appeals decision obviously affects the premise of Defendants' argument that their accounting duty is defined solely by the 1994 Reform Act.[8]

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[7] Congress directed Interior to "develop a detailed plan for the [accounting] methodology it adopts, its costs and benefits, and the degree of confidence that can be placed on the likely results." H.R. Conf. Rep. No. 106-914, at 150 (2000).

[8] Indeed, the Court of Appeals stated that "[t]he fundamental problems with [Defendants' claims on appeal] is the premise that their duties are solely defined by the 1994 Act." Cobell v. Norton, 240 F.3d at 1100.

The Court of Appeals also held that decisions as to "how the accounting w[ill] be conducted" are "properly left in the hands of administrative agencies."[9] Id. at 1104. See Blueprint at 14-17. This Court will necessarily review the decisions made by Interior regarding the historical accounting when it "assess[es] [Defendants'] compliance with their fiduciary obligations." Cobell v. Norton, 240 F.3d at 1110. Thus, in light of the guidance provided by the Court of Appeals and the availability of review by this Court of Interior's decisions regarding the historical accounting or the provision of guidance in the course of making such decisions, Defendants' argument in the First Motion regarding the statutory obligations imposed by the 1994 Reform Act and other federal statutes should not be decided by the Court at this time.

Defendants' second argument in the First Motion – that Plaintiffs' claim for a "correction" or "restatement" of account balances cannot be granted in this Court – also need not be decided at this time. In Plaintiffs' Response To Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims For An Accounting Of IIM Accounts, Plaintiffs assert that Defendants are confusing "the accounting Plaintiffs seek" with "what may be an outgrowth of that accounting." Pls.' Resp. to First Motion at 26 (emphasis in original). Plaintiffs state:

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[9] In his September 28, 2001 Opinion and Order addressing the impact of the Court of Appeals decision on the scope of discovery, the Special Master noted that, in light of the Circuit Court's determination that decisions as to how to conduct the accounting are properly left in the hands of the Defendants, and "the Circuit's general admonition to the District Court to remain 'mindful' of its jurisdiction, it appears that if there is any arena within which defendant agencies might be expected to exercise their discretion and expertise, it should be in the choice and implementation of an accounting method." Sept. 28, 2001 Opinion and Order of Special Master (filed Oct. 1, 2001) at 13-14. The Special Master added that "[p]ermitting the agencies to formulate their own methodology without subjecting every nuance of their decision-making process to inspection and challenge is ultimately in the interest of the plaintiff class, insofar as it should expedite the ultimate resolution in this case." Id. at 14.

> After the accounting is performed and information is revealed, there may be certain additional relief emanating from the knowledge learned that this Court can grant. There may very well be information that points to relief that this Court cannot grant. But that discussion is purely speculative and premature, because all [P]laintiffs currently seek is the first step – the garnering of the necessary information through enforcing their right to an accounting – an action that seeks specific relief with obvious independent value.

Id. at 28-29. Inasmuch as Plaintiffs represent that they are seeking only an accounting at this time, not a "correction" or "restatement" of balances, the Court need not address the issue at this time.[10]

B. Second Motion

Defendants' Second Motion sought summary judgment that neither the 1994 Reform Act nor any other authority requires Defendants to account for funds never received by the United States, such as funds paid by lessees directly to the allotment owners. Defendants argued that the plain language and the structure of the 1994 Reform Act establish that the accounting obligations apply only to funds "held in trust" and "deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. § 162a)." Defs.' Second Motion at 11-16 (quoting 25 U.S.C. § 4011(a)). Defendants also argued that, even if reference to common law is warranted, case law reveals that no fiduciary duty attaches to funds that are never "held" by, "deposited or invested" by, or controlled by Defendants. Id. at 16-18.

While the Court of Appeals' decision suggests that analysis of the "direct pay" issue cannot stop at the language and structure of the 1994 Reform Act as the Second Motion

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[10] This Court has already stricken from Plaintiffs' complaint all references that could be interpreted to seek an infusion of cash into the IIM accounts. See Cobell v. Babbitt, 30 F. Supp. 2d 24, 40 n.18 (D.D.C. 1998).

contends, Defendants' argument that Indian trust principles at common law do not attach a fiduciary duty unless the government "takes on or has control or supervision over tribal monies or properties," see Second Motion at 16 (quoting Mitchell II, 463 U.S. at 225), is unaffected by the Court of Appeals' ruling. While we anticipate that the "direct pay" issue will, in any event, require review by the Court, either in the first instance or after the agency makes an initial decision, the issue must be reformulated in light of the Court of Appeals decision and the creation of OHTA. Accordingly, the Second Motion should also be withdrawn.

C. Third Motion

Like the First Motion, Defendants' Third Motion is premised on the argument that Defendants' duties are defined exclusively by statute. In the Third Motion, Defendants argued that, prior to 1951, Congress defined the government's obligation to account for individual Indian monies in the Act of March 3, 1817, the Act of July 31, 1894, and the Budget and Accounting Act of 1921.[11] Defendants also argued that regulations and formal opinions issued by Interior, the Department of the Treasury ("Treasury"), and the General Accounting Office ("GAO") demonstrate that these agencies interpreted these statutes as setting the standard for accounting for individual Indian monies prior to 1951. Def's Memo. In Supp. of Third Motion at 22-27. Accordingly, Defendants sought summary judgment that any obligation to account for transactions prior to 1951 could be satisfied by demonstrating compliance with these statutes. Id.

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[11] Each of these statutes established settlement procedures for government accounts, including Indian trust accounts. These statutes are discussed at length in Defendants' Memorandum in Support of the Third Motion and the exhibits referenced therein. See Defs.' Memo. in Support of Third Motion at 4-20 (and referenced exhibits).

Defendants further argued that all available records indicate that, until at least 1951, the government acted in accordance with the accounting requirements established by Congress.[12] Id. at 27-32. In support of this argument, Defendants submitted annual reports from Treasury, Interior, and GAO showing that Interior subjected all of the accounts of its disbursing agents to the settlement procedures required by the applicable statutes. See id. at 27-29 (and referenced exhibits). Defendants submitted documentation from the named plaintiffs' accounts

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[12] Defendants are aware that during the contempt proceedings currently underway the Court inquired about the status of Defendants' partial summary judgment motions in light of an August 27, 1999 letter from the Principal Assistant Comptroller General to John Berry, then the Assistant Secretary for Policy, Management and Budget at Interior. The letter contains the following statements:

> Over the past several weeks, GAO staff have had numerous telephone conversations with members of your staff and attorneys from the Justice Department, as well as a meeting with Treasury officials, to answer questions and share information. In response to questions, we have explained that our records do not establish that GAO conducted a "final" GAO comprehensive audit of IIM accounts, nor do they establish any regular practice of auditing IIM accounts. We have referred the staff of Interior and Treasury to books and reports that might be of assistance in generally explaining GAO's pre-1950 standards and auditing procedures and its evolution from an agency conducting strict voucher reviews and audits to one largely engaged in government program reviews.

Letter from Gene L. Dodaro, Principal Assistant Comptroller General, to John Berry, Assistant Secretary for Policy, Management and Budget, Department of the Interior (Aug. 27, 1999).

The statement that GAO records "do not establish that GAO conducted a 'final' GAO comprehensive audit of IIM accounts" or "any regular practice of auditing IIM accounts" does not appear relevant to the argument made in Defendants' Third Motion. Defendants did not argue that GAO conducted a "final GAO comprehensive audit of IIM accounts," or that GAO had any "regular practice of auditing IIM accounts;" rather, they argued that relevant statutes in effect prior to 1951 defined Defendants' accounting duty, and that Defendants complied with those statutes. The evidence submitted with the Third Motion demonstrates Defendants' compliance with the relevant statutes.

demonstrating that the records of the disbursing agents were checked and corrections made when necessary to the accounts in accordance with the statutory procedures. See id. at Ex. 12 (SEALED EXHIBIT). Defendants attached correspondence indicating that the records of banks were also checked and audited as part of this procedure. See id. at Exs. 10, 11 (SEALED EXHIBITS). Finally, Defendants attached the declaration of Frank Sapienza, Director of the Indian Trust Accounting Division, who has worked for over twenty years with Treasury, GAO, and Interior records relating to accounting for Indian funds and has significant experience with the records of the settled accounts of Indian disbursing agents. Mr. Sapienza declared that the accounts of Indian disbursing agents were settled in accordance with the procedures set forth in the Act of March 3, 1817, the Act of July 31, 1894, and the Budget and Accounting Act of 1920. See id. at 30-31 & Ex. 7.

However, the ruling by the Court of Appeals that Defendants' obligations, while "rooted in and outlined by the relevant statutes and treaties, . . . are largely defined in traditional equitable terms," id. at 1099, and that courts "must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary," id., undermines the premise of the Third Motion that the government's trust duties were defined exclusively by the applicable statutes during this period.[13] That is not to say the settlement of accounts process undertaken by Treasury and GAO in accordance with these

[13] Nonetheless, as this Court observed, "'the [g]overnment is simply not in the position of a private litigant or private party under traditional rules of common law or statute.'" Cobell v. Babbitt, 91 F. Supp. 2d 1, 29 (D.D.C. 1999) (quoting Nevada v. United States, 463 U.S. 110, 142 (1983)).

statutes will be irrelevant in providing IIM account holders with an historical accounting.[14] Indeed, OHTA's Blueprint states that OHTA is researching the prior audits and settlements by Treasury and GAO, see Blueprint at 10, and that the Comprehensive Plan will determine the extent, if any, to which Interior will rely on the results of these settled accounts in the historical accounting:

> Before 1951, accounts of the United States were "settled" by the Department of the Treasury (until 1921), and then by the U.S. General Accounting Office (until 1951). Records indicate that all accounts managed by Indian Disbursing Agents, which included IIM funds, were initially audited by the Bureau of Indian Affairs and its predecessor agencies, and then subjected to a second audit and "settled" by Treasury or General Accounting Office auditors, who relied on contemporaneous ledgers and receipts. The Comprehensive Plan will determine to what extent, if any, the Department will rely on the results of these already settled accounts in the rendition of the historical accounting.

Blueprint at 16. This procedure comports with the Court of Appeals' determination that decisions as to how the accounting will be conducted are "properly left in the hands of administrative agencies." Cobell v. Norton, 240 F.3d at 1104. Of course, this Court will have the opportunity to review the decisions made by Interior regarding the Treasury and GAO settlement of accounts.

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[14] Plaintiffs make this point in their opposition brief: "Documents supporting settlement of the accounts of individual accountable officers may lead to the discovery of additional evidence and, ultimately, they may be of assistance in providing plaintiffs with a full and complete accounting of the Individual Indian Trust." Plaintiffs' Opposition To Defendants' Third Phase II Motion For Partial Summary Judgment (Re: Settlement Of Accounts By Treasury And GAO) at 20.

CONCLUSION

For the reasons set forth above, Defendants request that the Court permit them to withdraw their three pending motions for partial summary judgment. In the event the Court does not permit withdrawal of the motions, Defendants respectfully request the opportunity to file supplemental briefs to address the effect of subsequent events on the arguments made in the motions.

Dated: February 1, 2002

Respectfully submitted,

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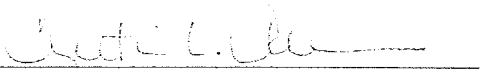
Director



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of Defendants' Motion To Withdraw Three Motions For Partial Summary Judgment and Plaintiffs' Response, it is hereby

ORDERED that Defendants' motion is GRANTED, and the following motions are withdrawn:

(1) Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claim For An Historical Accounting of IIM Accounts, filed on March 27, 2000;

(2) Defendants' Second Phase II Motion For Partial Summary Judgment (Re: Funds Not Deposited Or Invested Pursuant To The Act Of June 24, 1938), filed on May 12, 2000; and

(3) Defendants' Third Phase II Motion For Partial Summary Judgment (Re: Settlement Of Accounts By Treasury And GAO), filed on September 19, 2000.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 1, 2002 I served the foregoing Defendants' Motion to Withdraw Three Motions for Partial Summary Judgment and Memorandum in Support of Defendants' Motion to Withdraw Three Motions for Partial Summary Judgment by facsimile upon:

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By Fax February 1, 2002 and

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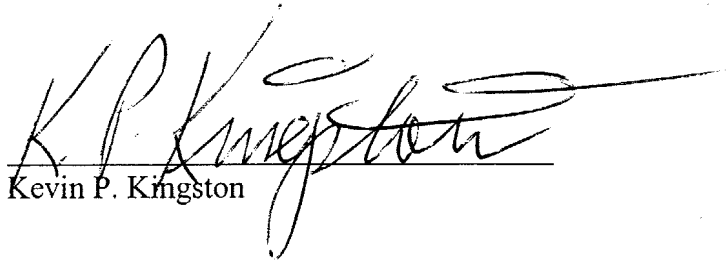

Kevin P. Kingston