

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE  
TO PRECLUDE TESTIMONY, DOCUMENTS, AND OTHER  
INFORMATION REGARDING THROUGHPUT**

Defendants respectfully oppose Plaintiffs' Motion in Limine to Preclude Testimony, Documents, and Other Information Regarding Throughput (filed Sept. 19, 2007) (Dkt. No. 3401) ("Plaintiffs' Motion" or "Pl. Mot."). Plaintiffs' Motion seeks an order barring Defendants from presenting any "throughput" testimony unless based on documents and other information which, they contend, should have been produced pursuant to the Scheduling Order of July 11, 2007. The Court should deny Plaintiffs' Motion.<sup>1</sup>

During the June 18th prehearing conference, the Court used the term "total throughput" to describe all money that has "passed through" the IIM accounts. Tr. 80:3-4 (June 18, 2007).<sup>2</sup>

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

<sup>2</sup> The term "throughput" connotes transactional activity, including receipts, accruals, and disbursements. But the term plainly excludes money that did not "pass through" the IIM accounts. Plaintiffs refer, among other things, to "information regarding throughput for direct-pay class members." *Id.* at 2-3. This concept of throughput is irrelevant. It embraces money that never went into, much less "passed through," IIM accounts and was paid to individuals who are not members of the Plaintiff class, which includes only IIM account holders, not direct payees.

Defendants understand that the Court's use of "throughput" envisions IIM account information on an aggregate basis. However, aggregate IIM statistics are available only to a limited extent. The hundreds of thousands of individual trusts, of which Plaintiffs are the beneficiaries, do not form a single, consolidated trust. Even as a certified class action, this case asserts the individual rights of the class members, and Interior's accounting plan is directed toward providing statements to individuals showing activity in their individual accounts.

Nevertheless, in response to the Court's stated interest in throughput and in having the trial begin on October 10th, Defendants have made a concerted effort to gather relevant information for inclusion in the record. Contrary to Plaintiffs' Motion, Defendants have produced numerous documents relating to throughput,<sup>3</sup> including, but not limited to, the following:

Exhibits listed in Defendants' Pretrial Statement:

DX-27 BIA Reports for 1927, 1932, 1933, 1935, 1938, 1940 from the Department of the Interior to the Secretary of the Treasury, Bates # 027-00001 027-00016

DX-94 Total IIM Chart: Morgan Angel Associates LLC, Bates # 094-00001 094-00005<sup>4</sup>

DX-99 Table: The estimated total cost difference associated with accounting for all IIM accounts between 1909 to 2006 (not including Tribal IIM), Bates # 099-00001 099-00001

DX-236 OST Disbursement Composition by Type for IIM 1999 vs 2003 – Tables

DX-237 OST OTFM Disbursements Table for FY 2003

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<sup>3</sup> Plaintiffs seemingly claim that Defendants were obligated to identify all "throughput" documents as such to comply with the Court's directive. Yet, Plaintiffs rely upon their "Fasold Expert Report" and its purported "assertions regarding throughput," Pl. Mot. at 2, and the term "throughput" does not appear in that report.

<sup>4</sup> See also DX-32 through DX-93 (documents supporting DX-94).

DX-238 OST Receipts & Disbursements by Type for IIM FY 1999 – Tables

DX-240 OST Reports to Treasury FMS of Monthly Transactions for July 2007 – Forms 224, 1219, 1220

DX-241 OST Treasury Fund Balance Reconciliation of Account Statement Balances to TFAS-Cash

DX-242 Treasury FMS 1998-99 Check Negotiation Study – Attachment K to Treasury QR No. 2

DX-258 Compilation of Sec of the Treasury's Annual Reports 1949-1973 Bates # 258-00001 258-00096

DX-259 Excerpt of 1997 Financial Report, Bates # 259-00001 259-00004

DX-260 Excerpt of 1998 Financial Report, Bates # 260-00001 260-00004

DX-261 Excerpt of 1999 Financial Report, Bates # 261-00001 261-00003

DX-262 Excerpt of 2000 Financial Report, Bates # 262-00001 262-00005

DX-263 Excerpt of 2001 Financial Report, Bates # 263-00001 263-00006

DX-264 Excerpt of 2002 Financial Report, Bates # 264-00001 264-00006

DX-265 Excerpt of 2003 Financial Report, Bates # 265-00001 265-00005

DX-266 Excerpt of 2004 Financial Report, Bates # 266-00001 266-00005

DX-267 Statement Note for FYs 04-05, Bates # 267-00001 267-00006

DX-268 Statement Note for FYs 05-06, Bates # 268-00001 268-00011

Documents contained in the Administrative Record:

AR-116 Briefing for Accountants Roundtable: Prepare the Historical Accounting of Individual Indian Money Accounts, D000-000-HTA-WDC-000055-0017-0001

AR-171 Materials Requested by Special Trustee Ross O. Swimmer (3/25/07) (AR Bates No. D000-000-HTA-WDC-000056-0002-0001)

AR-172 Government Spending FY 2006 Year End Review - OHTA (11/29/06) (AR Bates No. D000-000-HTA-WDC-000056-0003-0001)

AR-173 IIM Trust Fund Revenue Estimate (6/30/06) (AR Bates No. D000-000-HTA-WDC-000056-0004-0001)

AR-174 Revenue Estimate (6/28/06) (AR Bates No. D000-000-HTA-WDC-000056-0005-0001)

AR-175 \$13 Billion Revenue Estimate (6/20/06) (AR Bates No. D000-000-HTA-WDC-000056-0006-0001).

AR-233 IRMS Database Analysis Procedures and Findings Report, D000-000-HTA-WDC-000010-0020-0001

AR-255 Individual Indian Monies Total Receipt Dollars by Region Fiscal Years 1986-2001, D000-000-HTA-WDC-000008-0022-0001

AR-342 FTI Department of the Interior Office of Historical Trust Accounting Data Completeness Validation Interim Status Report, D000-000-HTA-WDC-000034-0001-0001

AR-561 Report to Congress on the Historical Accounting on Individual Indian Money Accounts, filed with the Court July 1, 2002, Dkt. No. 1365, Bates # D000-000-HTA-WDC-000025-0002-0001

Plaintiffs' Motion fails to note any of this documentation. Nor do Plaintiffs cite any authority that prohibits a witness from testifying about a subject absent a document in the record addressing every aspect of that subject. As our previous filings have asserted, Interior believes its plan provides for an accounting that will fully satisfy its obligation under the 1994 Act. Nevertheless, Interior intends to present testimony that, to the extent possible, will respond to the Court's questions regarding how much throughput is and is not addressed by Interior's plan. This effort requires estimating not only aggregate activity but also subsets thereof. The latter effort is especially complicated because it requires quantifying the number of accounts in certain categories during certain time periods as well as the share of total activity those accounts represented.

Determining the portion of historical account activity represented either by Interior's plan or any non-included subcategory of accounts requires extensive factual research. That effort is

ongoing. But Interior's first notice that the upcoming trial would include throughput issues came at the June 18, 2007 prehearing conference, and only a limited number of individuals can assist in answering the Court's questions within the time constraints imposed by an October 10th start date for trial. Those same individuals have been working on other aspects of trial preparation as well as on the accounting itself.

As noted above, documents relevant to throughput issues, to the extent they have been identified to date, have been provided to Plaintiffs. Interior expects that those many documents will provide the basis for its witnesses' testimony and does not intend to introduce "surprise exhibits" at trial. The effort to answer the Court's questions regarding throughput is ongoing, however, and it remains possible that additional data, not yet identified, could be required to provide the information desired by the Court. In that event, Defendants would seek the Court's permission to use such data and would not object to allowing Plaintiffs an opportunity to review the data prior to the introduction of any testimony that would refer to it.

#### CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied.

Dated: September 25, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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/s/ Kevin P. Kingston  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

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**ORDER**

This matter comes before the Court on *Plaintiffs’ Motion In Limine to Preclude Testimony, Documents, and Other Information Regarding Throughput* [Dkt. No. 3401]. Upon consideration of the Plaintiffs’ Motion, Defendants’ Opposition, and the entire record of this case, it is hereby

ORDERED that said Motion In Limine is DENIED.

SO ORDERED.

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UNITED STATES DISTRICT JUDGE

Date: \_\_\_\_\_