UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORANNA BUMGARNER FELTER, et al.,	)	
Plaintiffs,	)	Civil Action No. 02-2156 (RWR)
v.	)	
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' RENEWED MOTION TO DISMISS

I. INTRODUCTION

The singular question that this Court must answer is "whether P.L.108-108 applies to any of [Plaintiffs'] claims." *Felter v. Kempthorne*, 473 F.3d 1255, 1261 (D.C. Cir. 2007). It is undisputed that recent holdings of the Court of Appeals for the Federal Circuit interpreting a series of Appropriations Acts passed since 1990 have broadened the ability of affected tribes or individual Indians to pursue claims for damages suffered during periods which might have otherwise been barred by the statute of limitations.

When the original Complaint in this case was filed in 2002, Plaintiffs' objective was - among other things - to obtain an accounting for trust funds and judgment monies awarded to them as part of a settlement that *predates* the termination of their Federal

tribal recognition, as well as an accounting for all assets, resources, shares of stock, etc., awarded as part of the implementation of the Ute Termination and Partition Act (UPA). Plaintiffs claim that they maintained vested rights in Indian Claims Commission judgments that were filed *before* the enactment of the UPA but purportedly paid out *after* 1954.[1] Plaintiffs' Exhibit A, "Final Judgment", Docket Nos. 44 and 45, dated June 13, 1960.

The question before the Court is the controlling issue as to whether or not the involuntarily and fraudulently terminated members of the Ute Tribe, commonly referred to as the Mixed-Bloods, will finally receive the accounting to which they have long been entitled. Such an accounting would serve to shed light on a long-neglected reality, to-wit: that the Defendants - holding a fiduciary duty to the Plaintiffs both by treaty and under the terms of the UPA - owe Plaintiffs a full and complete account of all resources, assets, etc., held by the Ute Tribe and/or its individual members prior to termination of the Mixed Bloods, and an accounting and distribution of the proportional share, with accrued interest and any and all relevant penalties, for all resources, monies, assets, etc. due to the individual terminated members of the Tribe *prior to and after* the date of enactment of the UPA. P.L. 108-108 provides that such an accounting shall be made. Plaintiffs respectfully request this Court to order said accounting and appropriate distribution as the

[1] Defendants' Exhibit 1 notes that the Petitions in these Indian Claims cases were filed in January 1949. As a historical note, Arthur V. Watkins, the proponent of the UPA, approved the Indian Claims Commission Final Judgment in Dockets 44 and 45.

results may indicate.

The Federal Circuit's ruling in *Shoshone Indian Tribe v. United States*, 364 F.3d 1339 (Fed. Cir. 2004), *cert. denied* 125 S.Ct. 1824, 1826 (April 18, 2005) affirmed the United States Court of Federal Claims ruling (51 Fed. Cl. 60 (2001)) that the Tribes were not barred from seeking damages for "losses to or mismanagement of trust funds" which may have occurred more than six years before the Tribes filed their Petitions. Further, the Court of Federal Claims held in *Osage Nation v. United States*, 57 Fed. Cl. 392 (2003), relying on its ruling in *Shoshone*, that the Appropriations Acts permitted tribes to pursue eligible claims for mismanagement occurring prior to August 13, 1946, the effective date of the Indian Claims Commission Act, 60 Stat. 1052. Under these recent rulings, which acknowledge Congress's intent to defer the tolling of the statute of limitations for covered claims, the Plaintiffs' Causes of Action should be not be dismissed, but should instead be allowed to proceed.

Defendants base their motion to dismiss on District Court decisions in *Cobell v. Babbitt*, 30 F. Supp. 2d 24 (D.D.C. 1998) and *Cobell v. Norton*, 260 F. Supp. 2d 98, 103 (D.D.C. 2003), *lower* court cases now held to be inconsistent with the governing law of the Federal Circuit. The Federal Circuit's decision explicitly acknowledges that claims for mismanagement occurring during those times alleged in Plaintiffs' First Amended Complaint (Amended Complaint or Am. Compl.) are subject to the Federal Circuit's holding. For the foregoing reasons, the Defendants' motion should be rejected.

II. BACKGROUND

Plaintiffs' Amended Complaint was filed January 27, 2003. (Dkt. No. 5). The Eighth Cause of Action, titled "Action for Accounting" and alleged at pages 59 - 61, provides as follows:

> 107. The individually named plaintiffs maintain vested rights [to] and ownership interest [in] a portion of monies derived from the [ordered] disposition of settlement funds earmarked and targeted for distribution to them[. These monies arose] from a $32 million dollar Indian Claims Commission judgment allocated under the "share and share alike" agreement [an agreement now known to have been both forced on the tribe initially *and* later used as a weapon to coerce the Ute Tribe to impose termination on the 490 in order to avoid termination of the *entire* Ute tribe] as approved by Act of Congress on August 21, 1951.
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> 108. Defendants have failed to account for the principal and [accrued] interest [on] funds owed to [Plaintiffs] as members of the Uinta Band[, funds designated for them] by Act of Congress[, and] that was [subsequently] lost to them and their children[through] the mishandling[, misappropriation,] and maladministration of [these funds via illegitimate methods including but not limited to]"offsets" charged against them [even prior to implementation of the UPA before their membership in the Ute Tribe and Uinta Band came under fire].
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> 109. At all times alleged herein, defendants were charged with carrying out the trust obligations of the United States to account and properly withhold the distribution of the claims settlement funds *until the UPA was implemented as intended by Congress.*
>
> 110. On information and belief, [plaintiffs allege that] defendants have grossly mismanaged and continue to grossly mismanage trust funds and they have [utterly] failed [and refused] to account for such funds belonging to plaintiffs.

> 111. Plaintiffs are owed an accounting by defendants, acting as their fiduciaries, of the funds deposited to their benefit [under] mandate issued by Act of Congress on August 21, 1951.
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> 112. Upon precise accounting by defendants of the amounts owed and due to them under the "share and share alike" agreement with the other foreign bands of Colorado Utes, defendants must return such sums to plaintiffs with interest in addition to paying back the value of any "offsets" that were held against them during all times [when] they were full members of the Uinta Band.

In their Prayer for Relief, at p. 64, Plaintiffs requested:

> 1. That the court enter an order directing the defendants to account for and compile a historical accounting of all sums due and owed to plaintiffs as derived from the proceeds of monies set aside for them under the [previously referenced] "share and share alike" provision approved by an Act of Congress on August 21, 1951.
>
> 2. That the court enter an order directing defendants to account for and compile a historical accounting of all sums classified as "offsets" by the defendants and charged against the plaintiffs for all times when plaintiffs were duly enrolled members of the Uinta Band.

Accountings such as those contemplated above would necessarily include a fully compiled data and historical record using commonly accepted accounting and auditing methods (i.e., similar to or precisely those methods routinely employed to satisfy the fiscal reporting requirements of major corporations and/or the United States government), methods that would stand up to scrutiny by all parties and allow for implementation and verification of a full and complete distribution to the intended individual Plaintiffs.

How can this Court know the original intent and purpose of the monetary award and contemplated manner of distribution for that award? By looking to the record - whether formal or informal, archived or privately held, as it was created at the time the legislation was enacted. For example, President Harry S. Truman signed H.R. 3795 into law on August 21, 1951 with the following observations:[2]

> I have approved H.R. 3795, "to provide for the use of the tribal funds of the Ute Indian Tribe of the Uintah and Ouray Reservation, to authorize a per capita payment out of such funds, to provide for the division of certain tribal funds with the Southern Utes, and for other purposes." This legislation marks the fact that a significant turn of events has been reached in the relations between the United States and the Ute Indians.
>
> Grievances which the Ute Indians had against our Nation, for treatment accorded them long ago, have been adjudicated through orderly court procedures. The Government has paid the compensation which the court said was due these Ute Indian citizens. The legislation to which my approval has just been given makes provision for dividing this fund among the three organized tribes of the Ute Indians. In addition, it sets forth a program for use of the share award to the Ute Indian Tribe of the Uintah and Ouray Reservation. Under this program, some part of the compensation will be *used by individual Ute Indians*, some of it will be soundly invested in land and capital goods, and the remainder will be held in reserve to finance future needs of the Indians. I consider this Ute tribal program eminently sound and I am especially pleased to learn that the planning was carried out by the Indians themselves.
>
> One point of significance in this event is that the United States, by settling its score with this group of Indians, has made it possible for the Indians to put their own affairs in order and prepare themselves for the fullest participation in the affairs of our Nation. Another, and perhaps more important, point is that native people of the United States have again demonstrated that once they are given the opportunity and tools to work with, they can contribute to the stability and betterment of our civilization.

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[2] From "The American Presidency Project", Harry S. Truman, XXXIII President of the United States: 1945-1953, 198 - Statement by the President Upon Signing Bill Relating to the Tribal Funds of the Ute Indian Tribe. August 21, 1951. Website address www. presidency. ucsb.edu.

> I congratulate the Indians of the Uintah and Ouray Reservation upon their sound planning. I am hopeful that the other two tribes of the Ute Indians will soon complete plans for the use of their shares of the compensation that has been awarded to them." [Emphasis added.]

Plaintiffs' Amended Complaint describes numerous unscrupulous acts that erode the accuracy of President Truman's version of events that the Indians were at the helm of the ship and controlling their destiny in 1951. *See* Amend. Compl., ¶¶ 62-68, 43-45, 49, 53, 54, 91. Plaintiffs claim the existence of admissible evidence strongly suggesting that the share-and-share-alike agreement and the distribution plans connected with that agreement were, in fact, crafted by federal officials, government and tribal attorneys with hidden self-serving agendas. In other words, they fraudulently held themselves out to the Ute bands in the 1950's as their staunch advocates and next best friends as a means of accomplishing their own undisclosed and sinister objectives. In the 1950's, many of the Plaintiffs spoke only their Native Language and the majority had no understanding of the complex transactions involving millions of dollars of trust funds. *Id.*, ¶ 7.

Further examination of the historical record reveals specific and disturbing findings within a relatively short period after termination that shady dealings were imposed on the Mixed-Bloods of the Uintah Band of Utes (*see* Plaintiffs' Exhibit B, page 1689), to-wit:[3]

> For the most part, the termination process affecting the mixed-blood portion of the Uintah Utes was a highly complex and extensively detailed

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[3] American Indian Policy Review Commission, Task Force Ten, Terminated and Nonfederally Recognized Indians Title Report on terminated and nonfederally recognized Indians: Final Report to the American Indian Policy Review Commission /Task Force Ten, Terminated and Nonfederally Recognized Indians Pub Info. Washington: U.S. G.P.O., 1976.

> set of operations, which would have required several teams of federal attorneys and social scientists, a number of years of study and investigation to comprehend the intricate legal and social processes involved.
> . . . .
>
> However, the Task Force is quite aware of the high stakes involved: A tribe ravaged and divided by termination, a "recognized" Ute tribe subjugated to an impending "termination," and, to further aggravate matters, a reservation rich in vital natural resources, such as natural gas, minerals and water. The Task Force recommends further and immediate investigation into the situation at the Uintah-Ouray Reservation, involving BIA mismanagement of trust assets, and non-ethical and illegal BIA administrative actions throughout each phase of the termination process.

Plaintiffs' Exhibit C comprises statutory provisions culminating in the three (3) separate Bands' "share and share alike" agreement signed into Law on August 21, 1951. *See* Am. Compl., ¶ 42. The Amended Complaint amply describes an atmosphere of chicanery, trickery and other outright deception that both grew out of and resulted in Defendants' failure to account for the management and ultimate distribution of federal trust funds owed to them as part of the Order of Judgment handed down *prior to the Plaintiffs' termination, at a time when they were still fully-recognized as bona fide members of the Uintah Band of Ute Indians of the Uintah and Ouray Reservation. Id.*, ¶¶ 43, 44, 53, 54. In 1977, Task Force Ten, American Indian Policy Review Commission issued its specific findings in support of the preceding allegations in Plaintiffs' Amended Complaint. It is within this mangled maze of federal bureaucratic actions and shoddy-to-nonexistent record-keeping that Plaintiffs rest their action: "On information and belief, defendants have grossly mismanaged and continue to grossly mismanage trust funds and they have failed to account for such funds belonging to plaintiffs." *See* Am. Compl., ¶

110. For the reasons stated below, Plaintiffs' Amended Complaint must be allowed to proceed before this Honorable Court.

III. P.L. 108-108 Applies to Plaintiffs' Claims.

Defendants' argue that Plaintiffs' claims must be dismissed on jurisdictional grounds because: 1) the Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2003) (P.L. 108-108) does not revive long expired claims; 2) P.L. 108-108 does not apply because Plaintiffs were provided with an accounting; and 3) Plaintiffs' claims do not fall within the ambit of P.L. 108-108.

Establishing a court's subject matter jurisdiction over their claim is Plaintiffs' burden. *See McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Ware v. United States*, 57 Fed. Cl. 782, 784 (2003); *Bond v. United States*, 43 Fed. Cl. 346, 348 (1999). In determining whether it has jurisdiction over a case under Fed. R. Civ. Pro. Rule 12(b)(1) or 12(b)(6), a federal court must accept as true the facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiffs. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974)). "Fact-finding is proper when considering a motion to dismiss where the jurisdictional facts in the complaint . . . are challenged." *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999) (citing *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988)). In the case at bar, Defendants are asking the Court to dismiss this claim without regard for facts that clearly establish subject matter jurisdiction. Court-ordered discovery would help to resolve any disputed

jurisdictional facts and aid the Court in making a fair determination of the question on remand.

1. P.L. 108-108 Revives the *Felter* Plaintiffs' Otherwise Long Expired Claims.

Shoshone Indian Tribe of Wind River Reservation v. United States, 364 F.3d 1339, 1346 (Fed. Cir. 2004) stands for the Federal Circuit's position on the Indian Trust Accounting Statute, which eliminates barriers to Plaintiffs' claims, regardless of when such claims accrued, because plaintiffs had not previously received an accounting: "By the plain language of the Act, Congress has expressly waived its sovereign immunity and deferred the accrual of the Tribes' cause of action until an accounting is provided." Although the underlying dispute in *Shoshone Indian Tribe* was the alleged mismanagement of tribal funds derived from sand and gravel resources on the reservation, the issues share some important features with the First Amended Complaint filed before this Court by the *Felter* Plaintiffs, which similarly alleges therein (at ¶ 54) that:

> On information and belief, defendants' failure to account for all plaintiffs' share of the allocated federal trust funds has resulted in unlawful benefit to defendants and other unintended persons and non-Indian business entities and resulted in an enormous loss of income to plaintiffs, their children and their heirs from funds held by the United States Treasury for their benefit as defined under the UPA.

There is no doubt that *prior to* August 27, 1961, the date the Termination Proclamation was published in the Federal Register, the Defendants' deposited in the United States

Treasury to the credit of the Ute Indian Tribe of the Uintah and Ouray Reservation tribal funds for such purposes designated by the Tribal Business Committee and approved by the Secretary of the Interior. *See* Exhibit C, 25 U.S.C. §§ 671-672. These funds were from a judgment handed down by the Court of Claims on July 13, 1950 to the used by the Ute Indian Tribe, consisting of the Uintah, Uncompahgre and White River Bands. Congress directed that these funds be deposited in the United States Treasury to the "credit" of the "Ute Indian Tribe." These Court of Claims funds were deposited in the United States Treasury at a time when the Plaintiffs, who were ultimately included as part of the original "490", were not terminated.

As noted above, President Harry S. Truman signed H.R. 3795 into law on August 21, 1951. When President Truman issued his statement upon signing the law, it was clear that some part of the judgment money compensation would be used by "individual Ute Indians," some of it would be invested in land and capital goods, and the remainder would be held in reserve to finance *future needs of the Indians*. As averred in the Amended Complaint at numerous locations, these *pre-termination* funds were not included in any division or distribution carried out under the terms of the Ute Partition and Termination Act ("UPA"), 25 U.S.C. § 677 *et seq*. *See* Am. Compl., ¶¶ 53, 54, 66 (" . . . defendants breached their duty toward properly accounting for the earlier enacted federally-approved governing document and an Act of Congress . . ."), 68, 91, 92, 96, 97, 101, 107 - 112. 25 U.S.C. § 671 *et seq.* and 25 U.S.C. § 677 *et seq.* were entirely separate laws enacted three (3) years apart. 25 U.S.C. § 671 *et seq.* addressed distribution of the

$32,000,000 Court of Claims Judgment by crediting "60 per centum" to the Ute Indian Tribe of the Uintah and Ouray Reservation, consisting of the Uintah, Uncompahgre, and White River Utes, and "40 per centum" to the Southern Utes, consisting of the Southern Utes of the Southern Ute Reservation and the Ute Mountain Tribe of the Ute Mountain Reservation. 25 U.S.C. § 677 *et seq*., enacted three years later for completely unrelated purposes, operated to exterminate the federally recognized status of 490 enrolled members of the Uintah Band of Ute Indians. Those 490, may of whom have since died and are represented in this action by children or grandchildren, are the individual plaintiffs herein, plaintiffs who have - for over 50 years - been denied and deprived of their proportionate share of the $32 million judgment awarded to them long before their forced severance from the Ute tribe was ever at issue.

The UPA was ostensibly enacted for the purpose of providing for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members and for the termination of Federal supervision over the trust. Except for a brief reference in § 677j of the UPA verifying the existence of funds on deposit prior to termination and affirming the management plan for those funds, there appears to be no relationship established between the earlier Act of Congress signed into law in 1951 and the later enacted one, the UPA. The 1954 UPA is silent as to the 1951 monies held by the Department of Interior for the benefit of the Plaintiffs and their lineal descendants. It is the Defendants' arbitrary and unauthorized imposition of the provisions of the UPA upon the Plaintiffs that Plaintiffs allege deprived

(and continue to deprive) them of their right to fully participate and benefit from Court of Claims funds, funds never contemplated to be included in the division of assets connected with enactment of the UPA.[4]

The Defendants' current Motion to Dismiss relies upon a theory that this action is time-barred given rulings by this Court and the D.C. Circuit that "the alleged misapplication of the UPA and the resulting termination of trust status and asset distribution occurred in the 1950s and 1960s." *Felter*, 473 F.3d at 1259; *see also* Ct.'s Order of January 27, 2006, 12. Defendants leave it to the Court's discretion to determine which of the multiple subtle implications it will rule upon: Is the claim time-barred? Was the UPA misapplied? Was the resulting termination and asset distribution illegal? Mitigating circumstances rendering supporting evidence undiscoverable or unavailable can serve to suspend the ticking of the statutory clock until such time as the evidence is uncovered. Although such circumstances surely existed in the scenario that resulted in the termination of the Mixed Blood Uintas, the strict focus of the current discussion must remain on the issue on remand, namely whether PL 108-108 applies in the case of *Felter v. Kempthorne*.

Examination of the decision in *Shoshone Indian Tribe of Wind River Reservation v. United States*, supra., at 1348, strongly supports the premise that treaty and statutory

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[4] Although much data exists to lend support to allegations of fraud, malfeasance, deception, and extortion by the Congressional proponents of the UPA at the time of its implementation, the focus of this brief must remain on the question of whether P.L. 108-108 can be applied to the case at bar to allow Plaintiffs to enforce their right to a review and accounting of judgment funds to which they are undisputedly entitled.

obligations to tribal nations impose the "most exacting fiduciary standards" in the United States' relationship with its Indian beneficiaries. The Court in *Shoshone Indian Tribe* also held that "the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that the breach occurred." *Id.* As Plaintiffs alleged in their Amended Complaint, Defendants engaged in intentional efforts to throw a cloud of confusion over the disposition of Indian Claims Commission settlement funds earmarked and targeted for distribution under Act of Congress enacted on August 21, 1951 that affirmed the "share and share alike" agreement. As a consequence of Defendants' actions, Plaintiffs share of the allocated $32 million dollar judgment and the interest owed to them as members of the Uinta Band was lost to them, their children and their heirs. Am. Compl., ¶ 53. 25 U.S.C. § 671 clearly establishes that *before they were terminated* Plaintiffs maintained legal and beneficial ownership of trust monies that were not included in any plans for distribution of property or assets established in the UPA. At the time Plaintiffs were the owners of their share of the Court of Claims monies located in the United States Treasury, they were federally recognized members of the Uintah Band of Ute Indians.

Cobell v. Norton is a class-action lawsuit filed on June 10, 1996, in U.S. District Court in Washington, D.C. to force the federal government to account for billions of dollars belonging to approximately 500,000 American Indians and their heirs, and held in trust since the late 19th century. As a result of more than a century of malfeasance, the United States government has no accurate records for hundreds of thousands of Indian

beneficiaries and no record keeping or accounting for billions of dollars owed the class of beneficiaries covered by the lawsuit. The suit encompasses approximately 500,000 Indian beneficiaries. The purpose of the litigation - which was filed in this District Court by Elouise Cobell, a member of the Blackfeet tribe in Montana, and her co-plaintiffs - was two-fold: to force the government to account for the money, and to bring about permanent reform of the system.

The *Cobell* class-action deals with accounts managed by the Department of the Interior titled "Individual Indian Monies" (IIM) accounts. The *Felter* Plaintiffs also seek an accounting of monies that were deposited in United States Treasury accounts pursuant to 25 U.S.C. § 671 for their use and *future* benefit, including per capita payments. To be consistent with P.L. 108-108, this Court must find that the factual allegations set out in *Felter* are sufficient to bring it within the scope of *Cobell* and PL 108-108, thus requiring an accounting of trust funds held by the federal fiduciary, the Defendants here, for the use and benefit of the Plaintiffs.

In *Wolfchild v. United States*, 62 Fed. Cl. 521 (Fed. Cl. 2004), the property at issue consisted of land, improvements to land, and monies derived from special funds provided by the United States in appropriations statutes enacted in 1888, 1889, and 1890. The span of time covered in *Wolfchild* is over 117 years. *Wolfchild* meticulously examined the imposition and effect of a 1980 Act of Congress used by the Department of Interior as a basis for disbursing property and funds to three Indian communities that are not exclusively comprised of lineal descendants of the loyal Mdewakanton Sioux. Prior to

the 1980 Act, the Department of Interior consistently treated the "1886 lands" as being held in trust for the exclusive benefit of the loyal Mdewakanton and their descendants. *Wolfchild* establishes a basis for this Court to consider claims that a later enacted Act of Congress, in this case the UPA, can collide with an earlier Act to damage the rights of Indians to trust funds appropriated by Congress for their benefit. As averred in Plaintiffs' Amended Complaint, at ¶ 66, Defendants intentionally failed to respect the "share and share alike" agreement, and ultimately breached their duty to properly implement an earlier Act of Congress and to account for the assets involved.

Plaintiffs argue that *Shoshone Indian Tribe of Wind River Reservation v. United States*, supra., and *Wolfchild v. United States*, supra., provides a firm basis for this Court to maintain jurisdiction over this case and find that P.L. 108-108 applies to Plaintiffs' claims.

2. P.L. 108-108 Applies Because *Felter* Plaintiffs Were Not Provided With An Accounting.

Defendants argue that the combination of their Exhibits 1 and 2 "slams the door shut" on Plaintiffs' allegations that Defendants never gave them an accounting of the final disposition of the Court of Claims judgment that was the subject of 25 U.S.C. § 671 *et seq.* Defendants' assert that Exhibit 1 consists of information concerning the amounts of the various judgment funds awarded to the Ute Indian Tribe, attorneys fees, and offsets. Defendants miss the target by attempting to paint a picture to this Court that their Exhibit 1 constitutes an accounting of the Court of Claims judgment funds to Plaintiffs as individual Indians. Plaintiffs agree that Exhibit 1 *may* account for distributions of the

monies to various Ute Tribes. However, this Exhibit falls short of proving itself up as an accounting to Plaintiffs as *individual* Indians with rights vested in the judgment monies *before* the enactment of the UPA. *See* Am. Compl., ¶¶ 107-108. Exhibit 1 clearly does *not* prove any amounts were received by the individual "full-blood" members or individual "mixed-blood" members. When the Department of Interior distributed Court of Claims judgment funds to the "full-blood" and "mixed-blood" members of the Ute Tribe, it was under a strict fiduciary duty to establish IIM accounts for each and every person, adults and minors alike, who were members of the Uintah Band of Ute Indians in 1951 (and not April 6, 1956). Exhibit 1 provides no information that would allow the Department or the Plaintiffs to "track" whether such funds owed to and ostensibly claimed by the individual Plaintiffs were deposited or paid into their IIM accounts. In fact, the footnotes (Nos. 1, 5 and 9) on the origins of the figures presented are difficult even for a professional accountant or attorney to understand and they certainly present nothing close to the kind of detailed, unequivocal proof that the Plaintiffs are entitled to and as is required by P.L. 108-108.

Likewise, Defendants' Exhibit 2 fails in all regards as an "accounting" of the true and accurate final disposition of the § 671 Court of Claims judgment funds to the individually named Plaintiffs:

> In summary, the property of the Ute Indian Tribe of the Uintah and Ouray Reservation subject to equitable and practicable distribution under the Termination Act, Act of August 27, 1954, 68 Stat. 868, was either distributed in kind to the Mixed-Blood and Full-Blood groups with appropriate cash adjustments to reflect any imbalance in value of the

> distributed property, or it was sold and the proceeds shared by the two groups.

There are no specific references in Exhibit 2 to the 1951 Court of Claims judgment funds. Further showing the inadequacy of Defendants' Exhibit 2 to a P.L. 108-108 accounting are the last two pages which list figures relevant to the "status" of Inter-Tribe accounts *only to December 1956.* The *Felter* Plaintiffs wonder where their share of the Docket 44 and 45 judgment monies went. *See* Exhibit A. Consequently, it is factually impossible for Defendants' Exhibit 2 to account for the final distribution of these funds and other monies. Moreover, reconciling Defendants' Exhibits 1 and 2 against one another raises the distinct possibility that the $19,043,084.06 amount listed in Exhibit 2 was included in UPA divisions and distributions without specific Congressional authorization.

Further discovery is key – to clarify these and other points of confusion created after an examination of these Exhibits – to understand if these exhibits do somehow rise to the level of an official federal government "accounting." Without discovery allowing Plaintiffs to seek production of detailed information, there is absolutely no factual basis to conclude that Defendants' Exhibits 1 and 2 were created as part of the application of standard and acceptable accounting methods. Defendants' Exhibits are merely conclusions of some person of dubious credibility and intent attesting that he compiled figures provided by other persons. None of the signatories on the Exhibits was a certified accountant or was otherwise verifiably capable of determining whether Plaintiffs received their fair share of the Court of Claims judgement pursuant to 25 U.S.C. § 671 *et seq.* and

Dockets 44 and 45 and not under the later enacted UPA. Plaintiffs submit an example of the type of detailed information necessary to draw any conclusion that an "accounting" of the type envisioned in P.L.108-108 was given to them at any time. *See* Exhibit D.

3. *Felter* Plaintiffs' Claims Fall Within the Ambit of P.L. 108-108.

At a minimum, the Court must grant Plaintiffs' demands for an accounting. Like the plaintiffs in *Cobell*, the *Felter* Plaintiffs seek an accounting of trust funds to determine the extent to which those funds have been and continue to be grossly mismanaged. The trust, created by an Act of Congress signed into law by President Truman in 1951, together with Court of Claims judgment monies to which they were lawfully entitled, were placed under Defendants' control and management, and Defendants were rightfully charged with the fiduciary responsibilities attendant thereto. Defendants breached their duty to Plaintiffs when the UPA was applied in a manner that deprived Plaintiffs of their right to benefit from their proportional share of these segregated trust funds.

Illustrative of the problems caused by the lack of a P.L. 108-108 accounting is the sworn Declaration of Calvin Hackford, a lead plaintiff in this case. Exhibit E. Mr. Hackford states that monies held in trust for the use and benefit of the individual members of the Uinta Band, before their termination, and subject to the share and share alike agreement were to be invested in land. These purchased lands would become the property of the Ute Indian Tribe. Did the federal fiduciary, the Department of Interior, Bureau of Indian Affairs, buy land with the trust monies as he believes? If he and other Plaintiffs maintained a vested right to benefit from the land purchases when they were

made, what was the final disposition of these lands? Plaintiffs have long contended that when their status as federally recognized Indians was terminated in 1954 and 1961 the federal fiduciary took a position that it owed no legal obligation to account for any land, minerals and water that they owned separate and independent from the operation from the UPA.

Overall, Hackford's Declaration presents a scenario where his *pre-UPA* user water rights appurtenant to his land are trapped in the confusing mess and twisted maze of bureaucratic management that Task Force Ten aptly described in its 1976 Final Report. With no final P.L. 108-108 accounting, there remains the question of who owns the user right to water on allotted individual lands within the Uinta and Ouray Reservation. This question of who is entitled to the value of the water has resulted in undeserving entities, non-Indian individuals and corporations gaining the benefit of revenues generated from other valuables such as monies flowing from oil and gas mineral exploitation under lands subjected to the continuing mismanagement of the Defendants.

IV. Conclusion.

Based on the foregoing, Plaintiffs respectfully request that the Court deny Defendants' Renewed Motion to Dismiss. Plaintiffs request oral argument in this matter.

Dated: September 27, 2007

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I hereby certify that, on September 27, 2007, I electronically transmitted the foregoing document to the Clerk of the Court, using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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