U.S. Department of the Interior
Office of Inspector General

Report:

ALLEGATIONS CONCERNING CONDUCT OF DEPARTMENT OF THE INTERIOR EMPLOYEES INVOLVED IN VARIOUS ASPECTS OF THE *COBELL* LITIGATION

June 2002

No. 2001-I-412-PSI

Executive Summary

Introduction

Following the issuance of two reports in July and August 2001 by the Court Monitor in *Cobell, et al. v. Gale A. Norton, Secretary of the Interior, et al. (Cobell)*, the Solicitor, William G. Myers, III, referred to the Office of Inspector General (OIG) seven specific issues relating to allegations that senior managers and attorneys of the Department of the Interior (Department or DOI) engaged in misconduct. Following a preliminary investigation, the OIG determined that further investigation was not warranted in four of the seven issues, and so advised the Solicitor in October 2001.

The OIG pursued an aggressive investigation into the remaining three issues, however, and over the past nine months conducted sixty-six interviews at various locations throughout the country. The three issues subject to investigation arose from the Court Monitor's First Report, the Court Monitor's Second Report and the Electronic Message Retention and Production Opinion issued by the Special Master. The subjects of the reports and opinion were: 1) the process that led to the decision to conduct a statistical accounting of Individual Indian Money accounts and the ratification of that decision by Secretary Norton; 2) the alleged failure to timely and fully notify the Court about the state of the Trust Asset and Accounting Management System (TAAMS); and 3) the failure to retain and produce records in accordance with discovery requests and orders. Our investigation focused on these three areas.

While OIG investigators made significant progress at the outset of the investigation, their progress was also significantly impeded by the pending contempt trial. Understandably, until testimony in the contempt trial concluded on February 20, 2002, a number of witnesses were unwilling to be interviewed by OIG investigators. In the end, all[1] DOI employees agreed to speak with our investigators. On the other hand, all but one former key employee refused to be interviewed. Therefore, in some instances we are unable to provide a complete picture of what happened. In those instances, we take the story as far as we possibly can, but leave conclusions aside. We have made every effort to tie this information together to form a logical account of what happened and, to a certain extent, why.

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[1] One employee agreed, initially, to speak to OIG investigators, but refused requests for a follow-up interview. He subsequently left his position with DOI.

Results in Brief

While we found no criminal behavior or administrative misconduct on the part of any current DOI employees, we uncovered bad judgment, unfocused management, a myriad of definitional issues, and extreme hostility among the players and entities, all fueled by a multitude of motivations, many of which were well-intentioned but among the least of which was to protect and advance the interests of Individual Indian Trust account holders.

We also found factions with extremely myopic views of and approaches to the very complex issues at hand. Furthermore, the issues we investigated were much like moving targets. Definitions evolved, players changed, and perspectives were altered by events. As a result, any snapshot of the conduct or intent of any individual or group at any given time would likely result in an incomplete, if not inaccurate, picture.

Summary of Findings

We endeavored to interview all those individuals who played a key role in the three issues that were the subject of our inquiry. We then independently verified what these people told us through interviews of others to corroborate what was said, together with related documents, e-mails and testimony.

Statistical Sampling Decision and the *Federal Register* Notice

The Court Monitor concluded that "[t]he Interior defendants appear to have been working on parallel tracks"[2] during the historical accounting decision-making process. We believe that several parallel tracks were being followed, but that the various players had no single roadmap and, more importantly, neither a common nor a coordinated destination. The tangled efforts to determine how to accomplish an accounting of Individual Indian Trust monies and the related *Federal Register* Notice decision do not unravel neatly.

We discovered a variety of opinions and motivations behind the *Federal Register* Notice, determined in great part by the role or function for which a given player was responsible. For example, DOI officials representing Indian Affairs believed that it met their obligation, pursuant to Executive Order, to consult with Indians and tribes. Although they did not expect to hear other than "full historical accounting," they thought the *Federal Register* process would serve to validate their beliefs and might reap a "few tidbits" – something they had not yet considered.

[2] First Report of the Court Monitor, page 15.

The Office of Special Trustee (OST) decried the *Federal Register* Notice process from the start and refused to take part, although OST offered no solutions or alternatives. OST claimed to "know" what the results would be and viewed the process as a waste of time and resources, a stalling tactic and a "sham." Although OST acknowledged that the Administrative Procedures Act (APA) was cited in the Court's December 21, 1999 Order, and in fact, OST raised the issue in the context of advising that the *Chevron* deference would not be afforded the Department in this matter, they failed to grasp the legal significance of the *Federal Register* process under the APA. While OST refused to participate in the *Federal Register* process, OST ultimately agreed to the statistical sampling approach. Later, however, OST officials would retract this position, saying they conceded to the statistical sampling approach only because they were sure it would fail, and another approach would have to be taken.

Attorneys for the Solicitor's Office (SOL) and Department of Justice (DOJ) viewed the *Federal Register* Notice as necessary to begin the APA-required administrative process that would serve as the basis of the Government's appeal of the Court's December 21, 1999 Order. For the attorneys, the *Federal Register* process was, in part, litigation strategy, but only in part. The Solicitor General of the United States insisted that the Department institute some administrative process in order to advance the appeal, so it was also the basis for appeal. However, SOL and DOJ attorneys alike firmly believed that an administrative process was legally required under the APA.

Those who were tasked with securing funding for the accounting effort followed a narrow track, focused solely on securing appropriations for a process that they knew had to be accomplished. The *Federal Register* Notice, its timing and legal implications did not even enter into their consideration. They also knew that the funding process had to begin well in advance of any actual accounting effort. Thus, they had to begin their efforts well before they knew what shape or form the accounting would take.

Secretary Norton and her staff were also influenced by various factors in making the decision to ratify the statistical sampling effort. By the time Secretary Norton signed her February 27, 2001 memorandum, however, the term "statistical sampling" had evolved from an apparent substitute for transaction-by-transaction historical accounting to a process that would "fill in a gap where documents [do not] exist."

We do not pass judgment on the validity of these myriad motivations. Rather we point to them as further evidence of the historical inability of multiple entities within the Department of the Interior to effectively coordinate any major undertaking, particularly under time-constraints. The Department had ten days from the date of the Court's December 21, 1999 Order to decide whether to appeal the Order, obtain approval for appeal from the Department of Justice, and establish the basis of appeal if approved.

Simply put, the Department had neither the time nor the institutional ability to coordinate its collective thoughts and piecemeal efforts into any sort of a conspiratorial scheme.

TAAMS

Likewise, we agree with the Monitor that when the true status of the TAAMS project was discovered, "[t]he schisms between managers, offices, and Bureaus caused a bunker mentality to develop. They were not about to communicate or level with each other over the status of their TAAMS' projects for fear of criticism of their performance reaching this Court, Congress, and the public."[3]

The TAAMS project was contentious from the start. OST developed the concept of TAAMS. The Bureau of Indian Affairs (BIA) objected to the concept, as did the General Accounting Office (GAO). Nonetheless, the TAAMS concept was embraced by the Department, in part, to gain control over BIA practices and procedures. Not only did BIA resent the imposition of TAAMS upon it, but ironically BIA also inherited the responsibility of developing TAAMS from OST. The friction increased when OST became the critic of BIA concerning the beleaguered progress of the TAAMS project.

With this inauspicious beginning, the TAAMS effort proceeded down a very bumpy road. Confusion over terms such as "unveiled," "deployed," and "implemented" was pervasive. The Project Manager was ill-equipped for this position of considerable responsibility; he was new to DOI, he had no understanding of how BIA operated, and he had no experience in the trust arena. When he testified at the first trial, the Project Manager was armed with little knowledge of TAAMS and even less experience with BIA and Indian Trust. He was, however, enthusiastic and optimistic about the project, and his testimony was so influenced.

As the failures of the TAAMS project began to materialize, communications between the Project Manager and senior departmental managers were perplexing, particularly to those without Information Technology (IT) knowledge. For example, a test of the system could well have been a test fraught with failures. The IT professionals, however, viewed such a test as "successful" unless it involved "fatal flaws."

On September 8, 1999, a critical meeting was held at DOI. It was clear to everyone present that the Court had to be advised of the problems with TAAMS. Everyone agreed that the Court would be notified by memorandum. Responsibility for drafting the memorandum rested, ultimately, with the Solicitor's Office. In the end, the advisory memorandum was never finalized and the Court was never notified of the problems with TAAMS, a revelation that came as a surprise to every DOI employee we interviewed. At this point, however, all roads lead to three individuals who refused to speak with the investigators. Therefore, we are left to speculate.

[3] Second Report of the Court Monitor, page 118.

However, at that same meeting, a briefing strategy for the Secretary's upcoming testimony to Congress was also developed. That briefing strategy apparently failed and on September 21, 1999, Secretary Babbitt provided inaccurate testimony to Congress, stating that TAAMS "was working." This, at the very same time that he was under investigation by a Special Prosecutor for allegations in an unrelated matter. Had we the opportunity to interview the ultimate decision makers, we would have inquired about the impact that the Secretary's testimony before Congress had on the decision not to inform the Court.

Out of this chaos, the Department was left to glean the actual status of the TAAMS project and, in turn, report the same to the Court. No one, however, knew what was expected in this reporting. As the shortcomings of the TAAMS project became increasingly apparent, the "bunker mentality" overtook the process. OST was quick to criticize; BIA was quick to defend. The whole of Indian trust reform was essentially left in the hands of a hypercritical, disingenuous OST and a zealously defensive BIA.

In retrospect, the Department points to the Revised High Level Implementation Project (RHLIP) and the Quarterly Reports as the vehicles by which the Court was notified of the problems with TAAMS. While the RHLIP was technically accurate and made reference to many of the challenges the Department faced with the TAAMS project, the RHLIP was not a detailed document, and therefore, it obscured the actual status of TAAMS.

Likewise, the Quarterly Reports made oblique reference to the many problems that were arising in the TAAMS effort. Rather than an intentional attempt to cloud the issues, however, the failure of the Quarterly Reports lay in their evolution. The Quarterly Reports were constructed by consensus, a process that contributed significantly to their dilution. Include in the process the almost "feudal" friction between OST and BIA, and the Reports were routinely reduced to the lowest common denominator, the point at which no one involved had cause to object. The result, by all accounts, was less than complete Reports. The Reports were not, however, the product of a deliberate effort to conceal or deceive.

Retention and Production of Electronic Mail Message Backup Tapes

The *Cobell* litigation has redefined a number of terms. As recently as December of 2001, the Court-approved definition of "Individual Indian Trust Data" extended the shutdown of Internet access to the whole of DOI.

So, too, did the Plaintiff's First Set of Interrogatories filed in 1997 redefine the term "documents," a definition ratified by the Special Master in his Opinion issued in July 2001. That definition, however, conflicted with multiple DOI document-retention policies, as well as other recognized authorities, in the form of the Federal Records Act, and the Federal Rules of Civil Procedure.

As a result, confusion reigned over what was, and what was not, to be retained. The SOL thought they knew what was expected of them pursuant to internal policy and external authorities, but they were not complying with the direction of the Court because that had not been effectively communicated as a directive that trumped all.

In summary, we found that electronic documents were not retained, reviewed and produced, as they should have been for the purposes of the *Cobell* litigation. Although clearly creating an appearance of impropriety, this failure was not the result of an orchestrated attempt to withhold information.

Lack of communication among DOI components and employees, the conflict between the discovery request and long-standing policy and practice, and the lack of technical expertise and equipment in outlying SOL field offices, all contributed to the failure. Once this failure was discovered, however, DOI in general and the SOL in particular, took necessary measures to ensure that electronic documents were secured and retained.

Conclusion

Having had oversight responsibility for more than two decades, the Office of Inspector General benefits from having a unique historical perspective of the Department as an institution. During our years of oversight, we have often observed that the components of the Department have no history of, and no particular incentive to, work together. From this vantage point, we are convinced that in a Department whose components are blinded by clouded judgment and crippled by distrust, a singular sinister or conspiratorial plan is impossible to construct.

The Office of Inspector General has seen this "bunker mentality" display itself time and again. The pattern here is the same – begin by protecting one's own Bureau or office, to the detriment of other Bureaus or offices if necessary; then protect the Department, and/or the institution or position it has advanced; finally, protect the public interests for which the Department is responsible, in this case those of Individual Indian Trust account holders.

The historical management failures of this endeavor are profound. DOI has attempted to address its trust responsibilities by assigning collateral duties to individuals who are otherwise preoccupied with their full-time work responsibilities. The effort is further hampered by the lack of a single, dedicated senior-manager, and by a communication system in which critical input from the field rarely reaches the right people.

Finally, the friction between BIA and OST is particularly noteworthy. So long as it continues, we fear little meaningful progress will be made in the arena of Indian Trust reform.

In particular, OST has failed to recognize the inherent conflict in the position it has taken in this matter. OST cannot have it both ways – player and overseer. The framers of the Inspector General Act were wise in mandating that the oversight function must not be involved in programmatic operations. From our perspective we view this as one of OST's critical failings, as it continues to both critique and manage projects related to Indian Trust. The job of oversight extends beyond mere critique to providing solutions to the problems it uncovers. Unfortunately, in this case, the OST has become part of the problem it was designed to solve.

OST is not alone, however. The *Cobell* litigation has so embroiled and angered those involved that they cannot see or think clearly in order to make a correct decision. Every effort is thwarted by internal discord, distrust and a dysfunctional reluctance to assume ownership.

We have concluded that the DOI employees we interviewed[4] did not engage in misconduct. They have done the best they can do in an environment fraught with second-guessing and personal attack. The parochialism of the various groups, coupled with pervasive self-interest and an effort to manage by consensus even when discord reigned, resulted in an unfortunate series of events in which everyone was partly right as well as partly wrong.

In the end, the issues and events underlying this inquiry are best summed up in the words of one DOI official: "a not so humorous comedy of errors."

[4] See Attachment to Executive Summary. In addition to those listed in the Attachment to Executive Summary, we are compelled to highlight two other individuals – one who was not interviewed and one who is not presently a DOI employee. We have also concluded that neither Secretary Norton nor Kevin Gover engaged in misconduct. Because we had the benefit of Secretary Norton's extensive trial testimony, we did not deem it necessary to conduct an interview. Kevin Gover was the only former DOI employee who agreed to be interviewed. When he was interviewed, Mr. Gover was direct, forthright, and wholly cooperative.

Attachment to
Executive Summary

This Attachment identifies all DOI employees that were interviewed by OIG investigators.

Some of the individuals are identified as Contemnors in the October 19, 2001 Plaintiff's Motion for Order to Show Cause:

Edith Blackwell
Sharon Blackwell
James Douglas
Tim Elliott
Robert Lamb
Sabrina McCarthy
Chester Mills
Dominic Nessi
Michael Rossetti
Glenn Schumaker
Steve Swanson
Daryl White

Other individuals were not named Contemnors, but were deemed to have information pertinent to the OIG investigation:

David Anderson
Jackie Balaga
Keith Beartusk
Bill Benjamin
Joe Billerbeck
Charles Breece
Richard Fitzgerald
Arthur Gary
Tammy Harris
Darryl LaCount
Julia Laws
Joseph Lopez
Arlene Markoff
Clark Madison
James McDivitt
Ralph Mihan
John Miller
Larry Money
Wayne Nordwall
James Pace
David Shearer
Thomas Slonaker
Robert Smith
Gabriel Sneezy
John Snyder
Matthew Stewart
Phil Sykora
Thomas Thompson
Katherine Verberg
Ted Weir
SueEllen Wooldridge

Background

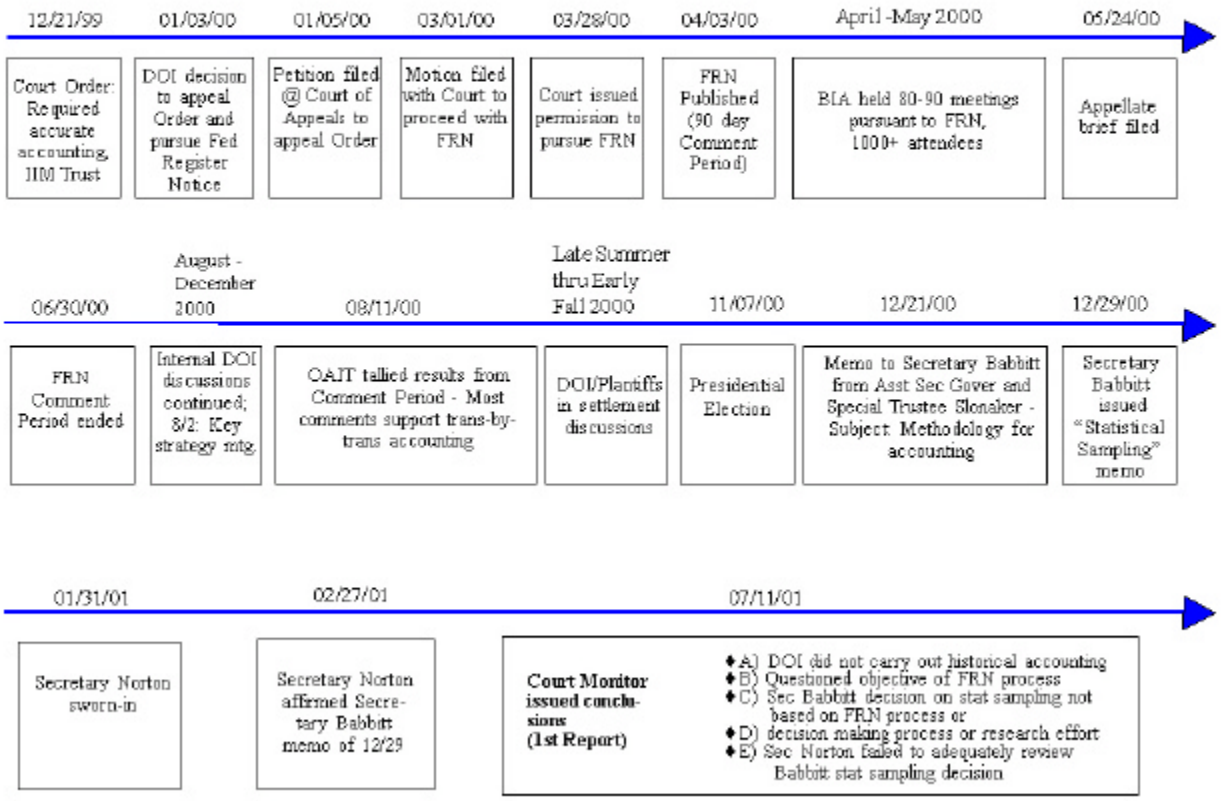
By way of memorandum dated August 17, 2001, the Solicitor advised that senior managers and attorneys of the U.S. Department of the Interior (DOI or the Department) may have engaged in misconduct in connection with their work in the case of *Cobell, et al. v. Gale A. Norton, Secretary of the Interior, et al.* No. 96-01285 (D.D.C.)(*Cobell*). Specifically, the memorandum identified seven instances in which misconduct may have occurred. **(Exhibit i)**

On October 12, 2001, the Office of Inspector General (OIG) advised the Solicitor that further investigation of four of these seven instances was not warranted. The OIG also advised the Solicitor that we had initiated an investigation of the remaining three instances, which concerned the publication of the *Federal Register* Notice (FRN), the alleged provision of false and misleading information to the *Cobell* Court (the Court) concerning the status of the Trust Asset and Accounting Management System (TAAMS), and the retention and production of electronic mail message backup tapes. **(Exhibit ii)**

During the course of our investigation, 66 interviews were conducted at various locations throughout the United States and hundreds of documents were reviewed. In late October 2001, contempt proceedings were initiated against a number of key individuals in the investigation and, as a result, many of these persons declined to be interviewed. This resulted in substantial delays in the investigation. Although some of those persons eventually did agree to be interviewed, to this day some have refused to cooperate. Because the cooperation of these individuals is not anticipated, we consider our investigation to be complete. The purpose of this report is to advise you of our findings.

A number of those who have refused to cooperate are former DOI officials who played key roles in each of the three matters we addressed. These officials include former Secretary Bruce Babbitt, former Solicitor John Leshy, former Assistant Secretary for Policy, Management and Budget (PMB) John Berry, and former Assistant to the Assistant Secretary for PMB Tom Gernhofer. Former Deputy Solicitor Edward Cohen, who according to one witness "was in the middle of this thing more than anyone," also declined to be interviewed, as did former Chief of Staff Anne Shields. The investigation disclosed that Shields and Cohen were the primary decision makers on a number of *Cobell* issues. Michael Carr, who was at one time employed as an attorney in the Solicitor's Office (SOL), also refused to fully cooperate in the investigation. Significantly, although Carr was interviewed during the initial stages of the investigation, he later refused to answer questions and even left his position at DOI after his role in certain critical events, to include the issuance of the FRN and the failure to provide information to the Court became increasingly evident. So long as these persons remain silent, important questions concerning their actions and decisions will remain unanswered.

A discussion of our specific findings relative to each of these three issues follows.



1. Court Monitor's First Report: The *Federal Register* Notice Issue

In his July 11, 2001 First Report, the Court Monitor concluded that DOI had failed to carry out an historical accounting of the trust money held by the United States for the *Cobell* plaintiffs as directed by the Court's December 21, 1999 decision in the June 1999 trial of *Cobell*. The Court Monitor suggested that this failure could, in large part, be attributed to DOI's underlying intentions regarding the issuance of the FRN. Accordingly, our investigation focused on these intentions and the events leading up to the decision to issue the FRN. The Court Monitor also reported that the decision of Secretary Babbitt to do a statistical sampling of the Individual Indian Money (IIM) accounts was not based on the FRN nor on any research leading to the decision. Finally, the Court Monitor reported that Secretary Norton did not conduct an adequate review of Secretary Babbitt's decision. The Court Monitor commented that much of the delay and uninformed decision-making was due to high-level DOI officials focusing on DOI's litigation posture, rather than the need to do a complete accounting.

A. The Court's December 21, 1999 Memorandum and Order and the Subsequent Issuance of the FRN

In its December 21, 1999 Memorandum and Order, issued after the June 1999 *Cobell* trial, the Court stated that the American Indian Trust Fund Management Reform Act of 1994 (Pub.L. 103-412; Oct. 25, 1994 108 Stat. 4239) (U.S.C. § 4001, et. seq.) (the Act) required that DOI provide the plaintiffs with "an accurate accounting of all money in the IIM Trust held in trust for the benefit of the plaintiffs, without regard to when the funds were deposited." The Court also stated that the Act required DOI to "retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting of all money in the IIM trust held in trust for the benefit of the plaintiffs." Further, the Court remanded "required actions to [DOI] for further proceedings not inconsistent with the Court's memorandum opinion issued this date."

Immediately after the Court issued its Memorandum and Order, a series of meetings was held between DOI officials and representatives of the U.S. Department of Justice (DOJ). The meetings were organized by the SOL for the purpose of briefing officials of the Office of the Special Trustee for American Indians (OST) and others on the Court's decision. These meetings were held in the Special Trustee's office at DOI in January 2000 and were attended at various times by the following persons:[1]

- Michael Carr, Attorney, SOL
- Edward Cohen, Deputy Solicitor, SOL
- Anne Shields, Chief of Staff
- John Miller, Deputy Special Trustee for Policy, OST
- Richard Fitzgerald, Trust Policy Officer, OST
- Thomas Thompson, Acting Special Trustee, OST
- Phillip Brooks, Attorney, DOJ
- Edith Blackwell, Deputy Associate Solicitor for Indian Affairs, SOL
- Kevin Gover, Assistant Secretary for Indian Affairs

Subsequent to these meetings a draft FRN was prepared by the SOL and the final version was published in the *Federal Register* on April 3, 2000.

(1) OST Officials

Interviews were conducted with each of the OST officials who attended these meetings:

a. John Miller, Deputy Special Trustee for Policy

John Miller stated that he attended the original meeting concerning the FRN, as well as two additional meetings. Although Miller was unable to recall the exact dates of these meetings, he stated that they were held in late December 1999 or early January 2000. No

[1] Titles are identified as they were at the time of the event.

discussion took place at any of these meetings concerning a course of action other than the issuance of the FRN. Miller explained that at the first meeting, there was some debate between OST officials and the other meeting attendees about the usefulness of the FRN. However, during the course of this debate it became readily apparent to Miller that the decision to issue the FRN had already been made and would not be changed. In fact, Miller said, the discussion at the first meeting led him to believe that the decision to issue the FRN had been made even before the meeting was held.

Miller also stated that during the course of the first meeting he attended on this topic, Phillip Brooks of DOJ stated that the Court's December 21, 1999 Order would be appealed, and "something" was needed in addition to the legal arguments to support the appeal. While Brooks was the one who made the statements, Miller said that Edith Blackwell appeared to support Brooks' position. Although Miller was unable to recall any specific statements made by either Brooks or Edith Blackwell, it was apparent to him that a successful appeal would require something other than just a legal argument. Miller did not recall the phrase "price for an appeal" being mentioned at any of these meetings, but he did say that such a phrase would accurately describe the context of the discussion.

Miller attended the two additional meetings primarily to ensure that OST did not become involved in the FRN process. The discussion at these meetings focused on the logistical aspects of the FRN, including who would file the FRN and how the meetings with the account holders would be organized. Bureau of Indian Affairs (BIA) officials agreed that they would be responsible for these activities. Miller said that it became apparent to him that although a plan was developed to obtain the information, no plan was made as to how the information would be processed once it was received. In fact, Miller said, OST officials asked the meeting participants how the information would be analyzed once it was received, but Miller said no answer was given.

According to Miller, the issuance of the FRN was a "waste of resources" because it was obvious that most or all of the respondents would state that they preferred that a transaction-by-transaction accounting be performed. Miller said that it was his opinion that the FRN was "obviously" not issued for the purpose of obtaining information in furtherance of an historical accounting, and was instead issued in furtherance of the appeal. For this reason, Miller advised the meeting participants that OST would not participate in the FRN process.

b. Richard Fitzgerald, Trust Policy Officer

Richard Fitzgerald stated that he may have first learned that a decision had been made to issue the FRN after receiving a January 24, 2000 document titled "Federal Register Notice Project." This document outlined a timetable for the preparation and issuance of the FRN and identified the persons who would be involved in the process. According to Fitzgerald, this document was probably prepared by Cohen and Carr, who organized and supervised the FRN project. After reviewing his 2000 calendar, Fitzgerald stated that it did not reflect that he attended a meeting on this topic on January 24, 2000. However, his recollection was that he did attend such a meeting with representatives from OST, PMB, SOL, and BIA.

Fitzgerald was not able to recall any information concerning the discussion that took place at this meeting. **(Exhibit 1A)**

On January 27, 2000 Fitzgerald attended a meeting with Thompson, Cohen, Gover, and others concerning the requirements imposed by the Court's December 21, 1999 ruling. Fitzgerald explained that this meeting was held because, while the Court had clearly indicated that DOI needed to conduct an accounting, there was substantial "wrestling" over exactly what type of accounting needed to be conducted. A second meeting on this same subject was held the following day, January 28, 2000. Phillip Brooks of DOJ also attended this meeting. During the course of this meeting, some discussion was held concerning the thinking that led to the issuance of the FRN. According to Fitzgerald, Brooks stated that the FRN was being issued in connection with a "deal" that had been made with the Office of the Solicitor General. Brooks then explained that in order to get permission from the Solicitor General to appeal the December 21, 1999 Order, DOI had to issue the FRN.

Fitzgerald recalled that during the January 28, 2000 meeting, both he and Miller advised the participants that DOI would not be afforded the "*Chevron* deference" through the issuance of the FRN. Fitzgerald explained that the United States Supreme Court has held that courts should assume that Federal agencies are "experts" in their particular fields and, as a result, their administrative decisions and processes should be "held in high esteem" by the courts. This practice is commonly known as the "*Chevron* deference." However, said Fitzgerald, no such deference is given to the agency while in the midst of litigation, given that the agency is presumed to be motivated to defend itself. Given the existence of the *Cobell* litigation, both Fitzgerald and Miller felt strongly that DOI would gain no administrative advantage or deference through the issuance of the FRN and, as a result, the FRN was a "waste of time" and a "sham." Despite these arguments, the other meeting participants stated that DOI would move forward with the FRN.

Fitzgerald recalled receiving a February 2, 2000 memorandum from Carr, Cohen, and John Carlucci of the SOL, the subject of which was "Discussion Draft Federal Register Notice."[2] Attached to this memorandum was an initial draft version of the FRN. Fitzgerald stated that he reviewed this draft and made hand-written comments on it on February 3, 2000. **(Exhibit 1B)**

A review of these comments disclosed that Fitzgerald wrote, "I would be concerned that starting an open end[ed] consultation process will be viewed as only a stalling tactic – only DOI is in a position to know what records can be accessed and the best method to access them under current and historic record management systems – Let's just do it." According to Fitzgerald, by this he meant that DOI should begin to ascertain exactly what records would and would not be available in connection with the conduct of an historical accounting. Fitzgerald provided a copy of a February 17, 2000 memorandum issued by Carr. Attached to this memorandum was the latest draft of the FRN. **(Exhibit 1C)**

[2] When Edith Blackwell was interviewed, she stated that John Carlucci was a SOL attorney who was regarded by Cohen as being a good writer. For this reason, Cohen directed Carlucci to assist Carr in the preparation of the FRN.

c. Thomas Thompson, Acting Special Trustee

Thomas Thompson stated that in early 2000 he attended a "torrent" of meetings concerning various *Cobell*-related issues, some of which concerned DOI's compliance with the Court's December 21, 1999 ruling. Thompson was on vacation in late December 1999 and early January 2000, and thus did not attend all of the meetings held on this subject. However, he did attend at least one of these meetings, which was held in mid-January 2000. At this time Thompson was serving as the Acting Special Trustee, a position he held until the arrival of Tom Slonaker in June 2000.

Thompson stated that during the course of this meeting he expressed his opposition to the issuance of the FRN because he believed that the resulting responses were a forgone conclusion. Thompson said that since at least the mid-1980's IIM account holders had wanted a full and complete transaction-by-transaction accounting, and their response to the FRN question would reflect as much. For that reason, Thompson "refused" to support the issuance of the FRN.

In his testimony before the Court on December 12, 2001, Thompson stated, "My definite sense in the course of these meetings was that the [FRN] process was being driven by the need to support the appeal. It was definitely a factor, one of the reasons given for why we were doing the Federal Register process."

When questioned about this testimony, Thompson explained that during the course of the January 2000 meetings he attended on this subject, someone from the SOL characterized the FRN as being the "price for an appeal." Although Thompson was unable to specifically recall who made this statement, he stated that it most likely was made by Cohen. Thompson explained that it was his impression that the SOL attorneys, and in particular Cohen, believed that DOJ and the Office of the Solicitor General would be unwilling to support DOI's appeal of the December 21, 1999 Order unless DOI could show that it was making an effort to comply with the requirements of the Administrative Procedures Act (APA). Cohen and others believed that DOI could show that it was doing so by issuing the FRN. Thompson noted that the discussion surrounding the need to have the FRN in support of the appeal went on "for some length."

Thompson stated that after his position was articulated at the meeting, Cohen directed him to write a memorandum to Shields explaining why he did not support the FRN. He subsequently prepared a memorandum that outlined his reasons for opposing the FRN, and personally delivered a draft of it to Shields on February 29, 2000. **(Exhibit 1D)**

At that time, he and Shields spoke for approximately 15 or 20 minutes concerning his objections to the FRN. During this discussion, Thompson told Shields that it was his position and that of OST that the FRN was a waste of time and a stall tactic. Thompson recalled that Shields accepted his concerns in a very positive manner, and although not necessarily "sympathetic" to his concerns, she certainly understood them. At the conclusion of the discussion, Shields agreed that OST would not be a sponsor of the FRN. Shields told Thompson that it was not necessary for him to finalize his draft memorandum. According to

Thompson, based upon his discussion with Shields he knew that she supported the issuance of the FRN, and "clearly wanted it to go out."

Note: A hand-written note made by Fitzgerald confirmed that Thompson's meeting with Shields took place on February 29, 2000. Fitzgerald said that he was not at the meeting with Shields, but later discussed it with Thompson. This note confirms Thompson's statements that Shields advised that a final version of the memorandum was unneeded. **(Exhibit 1E)**

(2) Court Documents Reviewed

Court documents associated with the appeal process indicate that the FRN was, in fact, discussed in a number of other contexts:

On January 5, 2000, only two weeks after the Court's December 21, 1999 Order, DOI filed a "Corrected Petition for Permission to Appeal Pursuant to 28 U.S.C. Sec. 1292(b)" with the United States Court of Appeals for the District of Columbia Circuit (the Court of Appeals). In this petition, DOI sought the right to appeal the December 21, 1999 Order, arguing in part, that the Order imposed "new duties" on DOI, and that this imposition exceeded the Court's authority pursuant to the APA. In addition, the petition argued that Congress gave DOI, and not the Court, the authority to determine the manner in which the requirements of the APA were to be implemented. Further, DOI argued that the Court went too far in requiring that the accounting be completed "without regard to when the funds were deposited." Most importantly, however, the Court of Appeals was advised that DOI would "implement a process under the APA to meet its remaining obligations regarding reconciliation and accounting…. That process will include consultation with Indian Tribes, an opportunity for comment by account beneficiaries and the public, and will commence with a notice published in the Federal Register on or before March 1, 2000."

On March 1, 2000, DOI filed with the District Court a "Motion for Entry of an Order Regarding a Public Administrative Process to Implement the American Indian Trust Fund Management Reform Act of 1994." Attached to this motion was DOI's appellate brief, as well as the draft FRN. Through this motion, DOI argued that this "Administrative Process" would allow DOI to "comply with Congressional directives to determine the most reasonable methods for providing accountholders with information to evaluate their accounts and determine whether there are discrepancies due to past management practices." In addition, DOI argued that this process would "assist DOI in fulfilling its statutory responsibilities," given that Congress did not specify the nature of the reconciliation.

The District Court granted this Motion on March 28, 2000, finding that the FRN would "not contravene applicable ethical rules concerning attorney contacts with represented parties." The FRN was then published on April 3, 2000. **(Exhibit 1F)**

On May 24, 2000, DOI filed its "Opening Brief For Appellants" with the Court of Appeals. In this brief, DOI noted that the historical reconciliation effort had recently been initiated by a *Federal Register* announcement.

(3) Other Meeting Participants

Of the six remaining January 2000 meeting attendees, Carr, Cohen, and Shields each declined to answer questions concerning the discussion that took place at these meetings, as well as their individual roles in these discussions. However, Brooks, Edith Blackwell, and Gover did agree to be interviewed. Their views on the purpose and intent of the FRN differ substantially from those expressed by the OST meeting attendees.

a. Edith Blackwell, Deputy Associate Solicitor for Indian Affairs, SOL

Edith Blackwell recalled that when she read the December 21, 1999 Memorandum and Order she understood the ruling to be "clear" that DOI had a duty to conduct an accounting of the IIM funds. However, she also understood the ruling to mean that DOI had the discretion to determine the exact form that the accounting would take. Blackwell stated that she subsequently had several conversations with Brooks over the next few days on the ruling. Both Blackwell and Brooks agreed that DOI was required to conduct an accounting, but that the scope and form of the accounting were unclear. They also both agreed that the Court had affirmed that *Cobell* was an APA case, and as a result DOI's duty to conduct the accounting stemmed as much from the Act as it did from the Court Order. Blackwell said that Brooks rightly concluded that DOI needed to take ownership of the portion of the ruling that required an accounting.

According to Edith Blackwell, shortly after the ruling was issued, she met with Cohen and Shields in Shields' office. During the course of the meeting, Blackwell suggested that it would be appropriate for DOI to immediately initiate some administrative action on this matter, a suggestion that was consistent with her discussions with Brooks. Blackwell explained that she told both Cohen and Shields that the Court had ruled that this matter fell under the APA, and as a result DOI, and not DOJ, needed to initiate the administrative action. Blackwell told both Cohen and Shields that, "We need to do this ourselves." She also explained that she did not want DOJ to initiate the process to conduct the accounting and then be in control of it. She instead suggested that DOI initiate the process and therefore have control over it. Blackwell noted that in her earlier discussion with Brooks he, too, agreed that DOI needed to take action. Some discussion at this meeting also centered on the possibility of initiating the FRN process, and how such a process had been initiated in a previous case involving Seminole gaming issues. The possibility of appealing certain aspects of the Court's ruling was also discussed. According to Blackwell, at the conclusion of the meeting both Shields and Cohen agreed that some administrative action, perhaps an FRN process, would be started and in fact Cohen volunteered that the SOL would begin drafting an FRN. However, the final decision to initiate the FRN had not yet been made.

Blackwell stated that Cohen and Shields subsequently did decide that it would be appropriate to appeal the aspects of the Court's ruling that dealt with the time-period to be covered by the accounting, as discussed and agreed between Brooks and Blackwell. Blackwell did not know exactly when this decision was made, explaining that while the

discussion concerning a possible appeal took place in her presence at this meeting, the final decision was made outside her presence. Blackwell noted that although DOI and DOJ had agreed to move forward with the appeal, such an action had to be approved by the Office of the Solicitor General.

Accordingly, a meeting with the United States Solicitor General was held at his office.[3] According to both Brooks and Blackwell, the following persons attended this meeting:

- Phillip Brooks, Attorney, DOJ
- Seth Waxman, Solicitor General
- Ed Niedler, Office of the Solicitor General
- Malcolm Stewart, Office of the Solicitor General
- Lois Schiffer, Assistant Attorney General, DOJ
- Jim Simon, Deputy Assistant Attorney General, DOJ
- Charles "Spinner" Findlay, Attorney, DOJ
- David Schilton, Attorney, DOJ
- Edith Blackwell, Deputy Associate Solicitor for Indian Affairs, SOL
- Anne Shields, Chief of Staff
- Edward Cohen, Deputy Solicitor, SOL

Blackwell stated that a substantial amount of discussion at this meeting centered on the Court's ruling and the issues that it raised. The rationale for a possible appeal of certain aspects of the ruling was also discussed. Blackwell noted that by this point both DOI and DOJ had prepared written requests for a recommendation to appeal. After this discussion concluded, the focus then moved to the administrative requirements of the ruling.

Blackwell said that it was clear to her that Waxman did not want to send attorneys to the Court of Appeals without an initiation of administrative action by DOI. She noted that DOJ was also concerned about OST's posture in this regard, and specifically if they would be "with us or against us." Blackwell explained that OST was "always willing to throw stones, but never willing to roll up their sleeves and work toward a solution to the problem." Blackwell said that there was "always room for debate" about the best manner in which to address these problems, but OST was unwilling to join the debate in a constructive manner.

Blackwell stated that Cohen and Shields subsequently made the final determination that DOI would, in fact, begin the administrative process through the issuance of the FRN, either immediately before, during, or after the meeting with the Solicitor General. Later that

[3] The investigation was unable to specifically establish the exact timing of this sequence of events, although electronic mail messages sent during this period suggest that the meeting with the Solicitor General took place on or about Monday, January 3, 2000. This is further substantiated by the testimony of Mike Carr, who when interviewed, stated that Cohen advised him sometime before January 5, 2000, that he would be assigned to draft the FRN. Both Brooks and Blackwell explained that all of these meetings and discussions took place in a matter of days, given that a decision on the appeal had to be made within ten days of the December 21, 1999 Order. This timetable was further complicated by the fact that the Court's Order was issued shortly before the Christmas and New Year holidays.

same day, Blackwell and Cohen worked with Niedler and Schiffer to draft language that would be used in the brief advising the Court of DOI's intent to appeal. Blackwell explained that the brief clearly indicated that DOI would begin a process pursuant to the APA whereby DOI could determine the nature and scope of the required accounting.

On January 4, 2000, Shields sent an electronic mail message to Blackwell asking "What did they decide to do?" Later that morning Blackwell responded by writing, "Ed and I negotiated language with Ed [Niedler] and Lois [Schiffer] last night about 8:00…[in which] we committed to meeting all our obligations for account[ing] and reconciliation under the statute. That we had started that with TFAS [4] and TAAMS and would be initiating a process under the APA to determine the scope and extent of our obligations under the Act. We would begin that process by publishing a notice in the Federal Register by March 1, 2000. The upshot is they agreed to what you, Ed, and I discussed last." **(Exhibit 1G)**

Blackwell explained that Shields wrote this message because she wanted to know what language was included in the brief that would advise the Court that DOI intended to appeal the December 21, 1999 Order. Blackwell stated that she used the term "negotiated" in her response message to Shields because DOJ wanted the brief to specifically indicate exactly what steps DOI would take, as well as when these steps would be completed. Blackwell and Cohen wanted to be certain that DOI did not make commitments about either their intentions or the time period in which they planned to complete the intended work, and then later learn that they were not able to meet them.

Review of a January 5, 2000 electronic mail message from Shields to Cohen disclosed that Shields apparently talked to Solicitor General Waxman on the evening of January 4, 2000. During that discussion Waxman apparently advised Shields that he "wasn't sure at the meeting that we really wanted to take the appeal – thought it might be just DOJ." Shields wrote, "I said no, that we were in agreement." Shields also advised Cohen that a meeting had been scheduled for January 10, 2000, to further discuss the Court's Opinion and the specific actions that DOI needed to take in response to it. This meeting was to be attended by a variety of persons from BIA, OST and PMB. This meeting, as well as several subsequent ones, did take place, as described by the OST interviewees. **(Exhibit 1H)**

The scheduling of the January 10, 2000 meeting was confirmed by an electronic mail message from Edith Blackwell to DOJ, attached to which was a draft memorandum from Blackwell and Cohen to Shields. The draft memorandum outlined the Court's decision, the two specific issues that would be appealed and listed a number of specific actions that DOI needed to take.

This memorandum stated, in part, "Immediately, someone needs to be named to lead our effort to "implement a process under the APA to meet [our] remaining obligations regarding reconciliation and accounting, including interpretation of the Act to specify in greater detail the nature and scope of these obligations and determination of reasonable and appropriate methods to meet them." This task includes the development of the Federal Register notice that must be published by March 1 and the consultation effort." The

[4] TFAS – Trust Funds Accounting System

memorandum also raised a number of questions that might be included in the FRN. Specifically, the memorandum stated that "we should consider including in the notice our proposed alternatives to a traditional accounting such as a claims process or legislation." The memorandum also said that the appeal would not stay the Court's Order. **(Exhibit 1I)**

b. Phillip Brooks, Attorney, DOJ

Phillip Brooks stated that the Court's ruling required that an accounting be performed. However, Brooks said that he refused to tell DOI that it must conduct an accounting for the entire period in question until it was absolutely clear that DOI was required to do so. Brooks believed that the Court's December 21, 1999 decision did not clearly state that this was the case. Although it was clear that an accounting was required, the extent of the accounting was in doubt. Brooks therefore believed that it was appropriate to go back to the Court for clarification.

Brooks also said that he knew that an accounting tied to transactions would be a "multi-decade, multi-million dollar project." To further complicate matters, Brooks said, the only accountants employed by DOI were housed in the Office of Trust Funds Management (OTFM), OST, and they had already indicated that they "didn't want to play." Brooks explained that on February 15, 1999, a meeting attended by representatives from OST, DOJ, DOI, and the Office of Management and Budget (OMB) was held in the DOI Secretary's conference room. At that time, representatives from the accounting firm of Arthur Anderson explained the process by which they felt they could accomplish an effective statistical sampling of IIM account balances. In summary, this process involved applying a determined error rate to the financial throughput[5] of the accounts. The cost of this effort was estimated at $17 million.

According to Brooks, subsequent to the Arthur Anderson presentation he was approached by DOI officials who wanted to know if this would be an effective means by which to conduct the accounting. Brooks told these officials that he was not certain that it would. Accordingly, DOJ then went back to DOI, and specifically OTFM, to determine their ability to accomplish such a project. In summary, OTFM officials told DOJ that they "can't do anything." On a number of subsequent occasions Brooks discussed the matter with Thompson, who at that time was the Acting Special Trustee.

Brooks specifically asked Thompson what a reasonable fiduciary could be expected to do. In response, Thompson told Brooks that a reasonable fiduciary should do a full accounting. However, when Brooks asked Thompson if OST could accomplish such a task, Thompson replied that it would be impossible, given that not all of the necessary IIM records were available and that funding for such an effort would not exist. Brooks then asked Thompson how he would suggest that the required accounting be performed. In response, said Brooks, Thompson folded his arms, smiled, and said, "That's not my problem. All I need is a starting balance."

[5] The amount of material processed within a given time especially by an electronic computer. (Random House College Dictionary)

Brooks also recalled that during this same discussion, Miller flippantly stated, "Just pay the Indians," to which Brooks replied, "Pay them what?" Brooks stated that from this point forward he knew that OST apparently had no interest in working toward a solution of these problems and would therefore be of no assistance in resolving them. In fact, said Brooks, he and other DOI officials began to refer to OST as the "We won't, we can't" agency, given their willingness to quickly and extensively criticize possible solutions to how an effective accounting could be conducted, and their unwillingness or inability to offer alternative solutions.

Because of the unwillingness of OTFM to participate in this process, for all intents and purposes, Brooks said, DOI "had no accounting shop." According to Brooks, the massive nature of such a project coupled with DOI's lack of an accounting staff made it a seemingly impossible undertaking. He said, "They might as well have been told to put a man on the moon."

Brooks recalled that during the course of the meeting at Seth Waxman's office, Waxman made it clear that his office would not pursue an appeal if DOI told him that they were merely thinking about proceeding with some type of administrative process and instead would only act if DOI was doing something. Brooks specifically recalled that during the course of the meeting, Waxman turned directly to Shields and Cohen and asked, "What are you doing?" Brooks stated that one of these DOI officials then suggested that DOI would initiate a FRN process to begin this administrative action, although Brooks could not specifically recall which of these two it was. Brooks explained that Waxman also made it clear that if he authorized the filing of the petition for appeal, he would "jerk" the appeal if DOI was unable to show that progress was being made from an administrative standpoint.

Brooks stated that he personally did not agree with the idea of soliciting input from the IIM account holders. Brooks explained that he did not understand what the account holders would be asked, and he additionally did not like the idea of approaching the same persons who had initiated the legal action against DOI. Nonetheless, Brooks said that he did recognize that this process could potentially initiate dialogue with the account holders and may help identify other ways in which the accounting could be accomplished, as well as identify the type of planning that needed to be done. Most importantly, said Brooks, the FRN itself was not important. What was important was that DOI had finally initiated a process by which the accounting could be conducted. "Anything that got DOI started in solving the problem was good," said Brooks. He stressed, however, that the FRN was to be only the beginning of the administrative process, not the end.

Brooks further said that the FRN was not part of a "deal" that had been made with the Solicitor General, but was instead a condition of the appeal. That is, if DOI wanted to show the Appeals Court that they should defer to the administrative process of the agency, then DOI had to be doing something. Brooks said that he may have at one point even stated that the FRN was the "price for an appeal," but only in that it was a condition of initiating the administrative process.

Brooks' position on this matter was further articulated in an electronic mail message he sent to various DOI and DOJ officials on May 22, 2001 after the Court of Appeals issued its ruling in this matter. Although this message was sent well over one year after the meeting at the Solicitor General's office, Brooks did reference his position on the conduct of the accounting. Specifically, Brooks wrote, "The decision of the Court of Appeals does not differ from [DOI's] position on the critical issue of who determines the best approach to do an accounting, and thus the Court agreed with our position that any accounting must, in the first instance, be developed by Interior." **(Exhibit 1J)**

Brooks also stated that he provided a copy of the final FRN to Professor John H. Langbein, Sterling Professor of Law and Legal History, Yale Law School, New Haven, Connecticut. Brooks stated that Langbein is one of the leading experts in the area of trust. After reviewing the FRN, Langbein advised Brooks that the FRN was "very thoughtful," and was an excellent manner in which to begin to address an issue as large as this one.

c. Kevin Gover, Assistant Secretary for Indian Affairs

Kevin Gover also recalled attending the January 2000 meetings concerning the FRN. Gover stated that during the course of these meetings, DOJ attorneys advised the participants that DOI had the authority and discretion to determine the best manner in which to comply with the Court's December 21, 1999 ruling. According to Gover, the Court's order did not state that DOI must do a transaction-by-transaction review of IIM accounts. In fact, Gover said, "no one [in attendance at these meetings] questioned the premise that we had discretion about what kind of accounting needed to be done." Gover also stated that at the time of these meetings, it was well known that $13 million had been spent on a transaction-by-transaction accounting for the five named *Cobell* plaintiffs, and it was well known among those in attendance that Congress would not fund a transaction-by-transaction accounting. Gover stated that as a result, such a "full reconciliation" accounting was "unfeasible" and therefore "off the table." When questioned, Gover stated that he did not view the fact that a transaction-by-transaction accounting was "off the table" as being in conflict with the Court's December 21, 1999 decision because that decision "didn't say we must do a transaction-by-transaction audit."

Gover insisted that the issuance of the FRN was not a "sham" because DOI had an obligation to consult with the tribes prior to determining how to proceed to address the Court's Order. Gover said that DOI was constantly being "pounded" by the tribes for failing to consult with them on major decisions or sensitive issues, and as a result "there was no way we would go out with something this big without consultation." Gover noted that there is a Presidential Executive Order (EO) that requires DOI to consult with the tribes on all sensitive issues. Gover stated that this matter would certainly qualify as a sensitive issue and as such be subject to the EO. Additionally, Gover said that the FRN was useful because "a few tidbits of new information" were learned through the process. According to Gover, the FRN was a "very important" part of the response to the December 21, 1999 Order.

(4) Other Relevant Interviews

a. Jim Pace, Deputy Director, Office of American Indian Trust

Jim Pace stated that in early 2000 he was advised by then-Office of American Indian Trust (OAIT) Director Loretta Tuell that OAIT would be responsible for organizing the meetings that would be held pursuant to the FRN. Pace understood that Tuell had been directed by Gover to do this. The meetings were to be conducted by BIA agency personnel and training on how to run the meetings was held in Phoenix, Arizona. Pace stated that although legal issues caused a delay in the issuance of the FRN, it was ultimately issued and the meetings were held. Between 80 and 90 public meetings were held and they were attended by over 1,000 people.

Pace said that during the time period in which the meetings were held, he "personally made it clear" to both Edith Blackwell and Gover that OAIT did not have the expertise to analyze the FRN results, and instead they could only collect the information. Pace said that OAIT consisted of natural resource specialists, not accountants. In his discussions with Blackwell and Gover, options concerning how the results would be analyzed were discussed. These options included hiring a contractor to analyze the data or providing it to OST. Pace stated that both Blackwell and Gover understood that OAIT would eventually "lateral off" the data to some other organization, and both were "fine" with this concept.

b. James McDivitt, Chief of Staff to the Assistant Secretary for Indian Affairs

James McDivitt, who served as Gover's Chief of Staff, stated that while Gover spent much of his time focused on trust reform, McDivitt focused on other matters involving Indian Affairs. As a result, McDivitt said, much of what he knows about trust reform is "second-hand" from Gover. Most of this information was gleaned during "very frank" and "forthright" discussions between the two. McDivitt stated that he never got the sense from Gover during any of these numerous patio discussions that the FRN was a sham or was intended to be some kind of stall tactic. McDivitt also stated that he believed that if Gover had seen this as a sham, it would have bothered him and he would have told McDivitt about it.

EO Number 13175, "Consultation and Coordination With Indian Tribal Governments," was signed by President Clinton on November 9, 2000. This EO requires, in part, that "When undertaking to formulate and implement policies that have tribal implications, agencies shall…consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes." **(Exhibit 1K)**

Note: Executive Order 13084 signed by President Clinton in 1998 also directs Federal agencies to consult and coordinate with Indian Tribal Governments.

Note: Gover's statements concerning consultation with tribes were echoed in an interview with Edith Blackwell, who stated that it was "worth the effort" to consult the account holders and ask the questions that were asked. Blackwell noted that in November 2001 when DOI put forth a proposal for the establishment of the Bureau of Indian Trust Assets Management (BITAM), they were heavily criticized, primarily by the tribes, for not engaging in a consultation process. Blackwell stated that given that DOI was about to go forth with a "monumental" effort to conduct the accounting, it would be inappropriate to make decisions about it "sitting in Washington, DC."

B. Secretary Babbitt's Decision to Conduct a Statistical Sampling Project

The FRN was published on April 3, 2000 and the public meetings were held in April and May 2000. However, it was not until December 29, 2000 that Secretary Babbitt recommended that DOI "use statistical sampling instead of attempting a transaction-by-transaction historical reconciliation of all IIM accounts."

(1) The August 2, 2000 Meeting

A key meeting was held on August 2, 2000 in Shields' office and attended by the following persons.

- Edith Blackwell, Deputy Associate Solicitor for Indian Affairs, SOL
- Tim Elliott, Deputy Associate Solicitor for General Law, SOL[6]
- Thomas Thompson, Deputy Special Trustee, OST
- Bob Lamb, Deputy Assistant Secretary for Budget and Finance
- Tom Slonaker, Special Trustee for American Indians, OST
- Kevin Gover, Assistant Secretary for Indian Affairs
- Anne Shields, Chief of Staff
- John Berry, Assistant Secretary for PMB
- Tom Gernhofer, Assistant to the Assistant Secretary for PMB

Tim Elliott stated that although this meeting was actually called by Shields, he "may have precipitated" it. Elliott explained that in July 2000, settlement discussions relative to the first trial were underway with the plaintiffs. At about this same time, Elliott was contacted by Brooks and Jim Simon, both of whom had attended the early January meeting with the Solicitor General. Brooks and Simon expressed their concerns to Elliott about the apparent lack of progress in DOI's conduct of the historical accounting, and they both advised Elliott that their sense was that not much was being done on this matter.[7] They also reminded Elliott that in early September 2000 arguments before the Court of Appeals would take place, and that it would be important to show the Court of Appeals that some progress had been made from the administrative perspective. Elliott stated that he, too, was concerned about the pending arguments, in part because of the "pressure" he was feeling from the DOJ

[6] After Deputy Solicitor Edward Cohen left DOI in July 2000, Tim Elliott assumed many of Cohen's C*obell*-related duties.

[7] This appears to be consistent with Brooks' testimony that he envisioned the FRN as being only the first step in a continuing series of steps that would be part of the administrative process.

attorneys. Elliott stated that he "made noises" to the Solicitor, John Leshy, about DOJ's concerns, and shortly thereafter the meeting was called.

Edith Blackwell recalled that in July 2000 she and Tom Gernhofer met with Shields to update her on the status of the *Cobell* matter. Blackwell explained that during this time-period, Tom Slonaker was engaged in discussions with the plaintiffs, and it appeared as though a settlement might be possible. Nonetheless, Blackwell said, she wanted to be certain that DOI's obligation to perform an accounting did not cease to be a priority. If no activity took place relative to the accounting, and the settlement discussions were to then break down, the conduct of the accounting would then become a "crisis," an event Blackwell did not want to occur. In addition, Blackwell knew that DOJ would want to know what progress had been made. Blackwell said that she brought these matters to the attention of Shields because she "wanted to be sure that everyone was on the same page."

This is consistent with Thompson's December 13, 2001 testimony before the Court. Thompson stated that, "…there were discussions certainly about keeping the process moving forward. I believe early information was the Solicitor's office was making inquiry about the process not moving particularly rapidly some time before the August 2 meeting."

When Bob Lamb, Deputy Assistant Secretary for Budget and Finance, PMB, was interviewed, he stated that he also recalled attending a meeting with Shields in July 2000, but was not certain that Blackwell was in attendance. Lamb stated that this meeting was held for the purpose of convincing Shields that action needed to be taken relative to the conduct of the accounting. Lamb stated that at that time no one was clearly in charge of the accounting project, and he felt that it was extremely important that Shields name someone to direct the project.

Lamb's testimony before the Court on January 11, 2002 confirmed that Lamb characterized this meeting as "an organizational meeting for what turned out to be the August 2nd meeting." According to Lamb's testimony, no specific decisions were made at the July meeting, in part because Slonaker was not able to attend.

According to Elliott, the August 2, 2000 meeting with Shields lasted approximately 45 minutes. Shields chaired the meeting, and at its outset stated that she, too, was interested in ascertaining information on the current state of the case. Elliott said that Shields made it clear that she understood that the status of the accounting project would come up before the Court of Appeals, as well as the District Court.

According to Edith Blackwell, she began the discussion at the meeting by giving Shields and the other participants background on the various methods for the conduct of the accounting that had been considered by DOI to date. She specifically discussed both the Arthur Anderson model and the Wecker approach.[8] She also discussed the transaction-by-transaction accounting that had just been completed for the five named plaintiffs and their

[8] William E. Wecker Associates, Novato, California, provide statistical and mathematical consulting and data analysis services. According to Edith Blackwell, they were hired by DOJ to identify possible ways in which a non-transaction based accounting could be conducted.

predecessors, as well as the consideration that had been given to allowing Congress to resolve the issues through legislative action. Other accounting methods, including the "rough justice" approach developed by Arthur Anderson, were also discussed. Blackwell noted that her role at this meeting was solely to provide the "policy-makers" with background and options, and to then let them decide on a course of action.

Blackwell stated that during the course of the ensuing discussion, it became apparent that Slonaker and OST did not like the Wecker methodology, and for that reason the meeting participants agreed that it would be discounted.

As the discussion progressed, Blackwell said, the participants all "gravitated" towards a transaction-based statistical sampling, which was similar to the Arthur Anderson approach. Under this method, a transaction-by-transaction accounting would be conducted for a statistically significant population of IIM accounts, and an error rate would be identified for these accounts. This same error rate would then be applied, based on dollar throughput, to the remaining IIM accounts. Blackwell noted that this idea had support from the group because while it was known that, due to missing records, not all account holders could receive a transaction-by-transaction accounting, at least some account holders would receive such an accounting under this approach. Blackwell said that after approximately 30 minutes of discussion, the group reached "unanimous agreement" that a statistical sampling approach similar to the Arthur Anderson method would be used.

The discussion then focused on the time-period to be covered by the sampling. Specifically, the question centered on whether the effort should go back to 1887, or instead should begin in the 1950's. After both Slonaker and Thompson indicated that it should begin in the 1950's, the group concurred. Blackwell stated that the group then turned their attention to the question of who would actually undertake this effort. It was agreed that OST would need to be involved, given that it was their responsibility to oversee the accounts, and Slonaker and Thompson agreed to take on the project. According to Blackwell, "no one objected" to any of these decisions.

Elliott's recollection of the discussion that took place at the meeting was somewhat different than Blackwell's. He did recall approximately 35 minutes of discussion that centered on the various ways in which an historical accounting could be conducted. However, he further recalled that after this discussion took place, Thompson advised the group that "if it were up to" him, he would conduct a statistical sampling. Thompson explained that he would pick between 300 and 500 IIM accounts and cover the period between 1952, when the GAO auditing stopped, and 1994, the year the Act was passed. Thompson explained that it could be assumed that from 1994 forward the records should be available to conduct a full transaction-by-transaction accounting. Thompson then advised the group that the figures from these accounts could be extrapolated to the larger account population. Others at the meeting agreed with Thompson's proposal, in part because a transaction-by-transaction accounting would be cost prohibitive. The group also agreed that the Court's December 21, 1999 Order did not preclude such an effort. Elliott stated that Shields also supported the idea. At one point Slonaker indicated that OST had neither the staff nor the funds to conduct such a sampling. However, Bob Lamb replied to Slonaker's

concerns by stating, "We'll get the money." Shields then pointed out that if limited staffing was a problem, the work could be contracted out. Slonaker objected to this option, though, saying that the contracting process would take too long. As a result, it was determined that OST would perform the work.

Elliott stated that at the conclusion of the meeting all attendees were in agreement that Slonaker and OST would take the lead on conducting the statistical sampling. Elliott stated that the only "naysayer" to this proposal was Slonaker, who had concerns about staffing and funding. After Lamb assured him that funding would be available, Slonaker, too, agreed that the effort should go forward.

In December 2000, Elliott sent an electronic mail message to Edith Blackwell (with a copy to Thompson) referencing that Thompson had suggested that the statistical sampling be used. Elliott stated that he knew that Thompson disputed his recollection of events by way of a January 10, 2001 electronic mail message that Thompson sent to him.[9] Thompson wrote, "The sense of your email, it seems to me, is that I advocated the statistical sampling approach in the August meeting. As I recall, my only contribution to the discussion on statistical sampling, which OST did not initiate, was to point out that a statistical sampling decision needed to be reconciled to the FR Notice, and that a proof of concept of statistical sampling, perhaps via a test pilot approach, was prudent. As you probably know, given our data problems, I am skeptical that a statistical sampling of IIM accounts can be validated."

Thompson confirmed in an interview that he sent the electronic mail message to Elliott because he "wanted to be on record" that he "did not support statistical sampling." Thompson thought that if a statistical sampling was going to be used, it should first be tested through a pilot project. Thompson was also concerned that the decision to do a statistical sampling would be inconsistent with the FRN. **(Exhibit 1L)**

When questioned about Thompson's message, Elliott insisted that Thompson was, in fact, the one who suggested that the statistical sampling method be used. Elliot stated that there was "no question" in his mind that Thompson had suggested this.

Bob Lamb recalled attending the August 2, 2000 meeting. Lamb stated that the purpose of this meeting was to determine who within DOI would manage the statistical sampling pilot project. The purpose of the pilot project was to identify both the strengths and weaknesses of statistical sampling. Lamb stated that he did not recall that Slonaker opposed proceeding with this project. Slonaker did protest the fact that he would be the person managing the project, but did not protest the fact that the project would be carried out.

As reported in the Court Monitor's First Report, Gover stated that at the August 2, 2000 meeting a number of methods by which the historical accounting could be accomplished were discussed. The preferred method, as identified by the FRN, was rejected given that it was assumed that Congress would never provide the funding for such an effort.

[9] Thompson was on vacation in late December 2000 and early January 2001, and thus did not respond to Elliott's electronic mail message until he received it upon his return.

Other options were then discussed and statistical sampling was chosen as the most cost effective of these methods.

The collective recollection of these meeting participants clearly indicates that discussion concerning the various methodologies by which an accounting could be accomplished took place, and that ultimately the decision was made to move forward with a statistical sampling approach as discussed by all. These participants also stated that Slonaker did have concerns about the availability of funding for the project. At the conclusion of the meeting all participants, including Slonaker, agreed that the project should move forward under his direction.

The recollection of Slonaker and Thompson relative to the discussion at these meetings, however, differs somewhat from the other participants.

Thompson stated that he went into the August 2, 2000 meeting with the understanding that the discussion would focus on who was in charge of the conduct of the historical accounting. During the meeting, a number of different accounting options were discussed, to include the Wecker method, a transaction-by-transaction effort, and several others. Thompson stated that he and Slonaker did not like the manner in which Wecker selected the account sample. "We thought it was nonsense," said Thompson, and for that reason they advised the meeting participants that it should be excluded from consideration, and it was. Then, the focus of the discussion turned to statistical sampling, and whether Slonaker and OST would consider conducting a statistical sampling.

Thompson's December 13, 2001 testimony before the Court was consistent with the statements he made when interviewed. Specifically, Thompson testified that the meeting was "a pretty freewheeling discussion initially about approaches, and as I testified earlier, consensus gradually moved toward the thought of a statistical sample as the approach as I read the meeting. Pros and cons were discussed. Certainly we raised issues about reconciling the FRN to the decision being taken." The review of Thompson's testimony confirmed Elliott's recollection concerning the size of the sampling. Specifically, Thompson stated that he may have been responsible for suggesting a sample of 350 IIM accounts. Thompson noted that this was only an estimated figure. Thompson also testified that as the meeting developed, "discussion centered more on statistical sampling as the selected or preferred alternative. There was some discussion of these other ideas, but it was pretty clear towards the end of the meeting that the decision was going to be statistical sampling." According to Thompson's testimony, both he and Slonaker were concerned that the decision to proceed with the statistical sampling was not consistent with the FRN results.

Thompson testified that Shields, as the meeting chair and the highest ranking official present, made the final decision to proceed with the statistical sampling, but that her decision was based on the opinions and views expressed by the other meeting participants. Thompson described these views as "consensus or unanimous." At the conclusion of the meeting, Shields directed Slonaker to prepare a plan for the statistical sampling. Thompson also testified that "…when [Shields] asked [Slonaker] to take the job on, he was willing to do that

at that meeting." When asked if Slonaker at any time protested the statistical sampling approach, Thompson said, "I don't recall."

Thompson also testified that during the course of this meeting, there was "clear recognition" that the Court, through its December 21, 1999 ruling, had ordered that an accounting be performed, and, as a result, the discussion focused on how to best comply with the Order.

Slonaker's court testimony disclosed that he, too, recalled discussion concerning the obligation to conduct an historical accounting. Slonaker testified that he understood that the purpose of the August 2, 2000 meeting was to discuss the results of the FRN and the steps that needed to be taken in response to it. However, the meeting turned out to discuss statistical sampling. Slonaker also testified that during the course of this meeting the Wecker proposal was discussed. According to Slonaker, he did not feel that this would be a proper method by which to accomplish the accounting. At the conclusion of the meeting, he was directed by Shields to carry out the sampling project, and it was his understanding that Secretary Babbitt concurred in this directive. Slonaker further testified that during the course of the August 2, 2000 meeting, he argued against a statistical sampling, had objected to the statistical sampling, but had been overruled by the other participants.

(2) The Rationale Memorandum

By the time of the August 2, 2000 meeting, most of the FRN results had been received and compiled by Pace and OAIT, and Pace subsequently prepared a memorandum for Gover's signature which described the results. A compilation of the data obtained through the FRN was attached to this August 11, 2000 memorandum. Pace noted that he was very careful to not call it an analysis. This memorandum explained that an "overwhelming" majority of the respondents favored a transaction-by-transaction accounting. Pace noted that the responses were "quite obvious" given that they seemed like a "matter of common sense." Pace stated that he wrote this draft in the form of a memorandum from Gover to OST, given that the information clearly belonged with OST. Pace provided this memorandum to Tuell, who then sent it on to Gover. Sometime thereafter Pace asked Tuell about the memorandum, and she told him that it was being "massaged upstairs." Pace said that he interpreted this to mean that changes were being made to his original memorandum. Pace stated that at one point he offered his assistance in re-working the draft to the SOL, but he received no response to this offer. **(Exhibit 1M)**

Edith Blackwell stated that within a few days of the August 2, 2000 meeting, she received a draft version of the memorandum that Shields had directed Slonaker to prepare. After reviewing it, Blackwell determined that it was "insufficient." Specifically, Blackwell explained, the memorandum included a number of caveats concerning funding and staffing that would serve as obstacles to the project. Blackwell said that she was very concerned about these caveats, explaining that if the memorandum was going to be signed by the Secretary, it had to be clear and direct and had to outline a specific course of action. Slonaker's memorandum was not and did not.

Blackwell said that shortly after receiving Slonaker's memorandum, she expressed her concerns about it to Shields during the course of a meeting that she, Shields, Gernhofer, and perhaps Slonaker attended. At that time Shields directed Blackwell to prepare a memorandum that would combine the memoranda of Slonaker and Pace and serve as a "decisional" or "rationale" document. Blackwell noted that she agreed with Shields that it was important that DOI articulate the reasons for the decision that had been made, particularly given that the decision was not consistent with the input from the FRN meeting attendees. Blackwell further stated that this rationale memorandum, which was designed to articulate DOI's decision, was clearly different from the one prepared by Pace, which was more of a factual or statistical review of the FRN results. Blackwell's version would serve to combine all of the factors that were considered at the time the decision was made at the August 2, 2000 meeting.

A December 18, 2000 electronic mail message from Blackwell to Elliott confirmed Blackwell's recollection. In her message, Blackwell wrote, "Among other things, the letter for the Secretary's signature states that the Secretary accepts the Special Trustee's conditions, one of the them being funding. I believe that this and other problems with the Secretary's memo must be fixed and would advise the Special Trustee to update his letter to note that funding has been received." In his response, Elliott wrote that he agreed with Blackwell, and was "particularly concerned that it does not mention the memorandum from Kevin, whose memo is the only one to explain why we are not following the majority of the comments received. Since the Secretary is the decision maker, his memo clearly needs to refer to the reasons for going [with the statistical sampling]." **(Exhibit 1N)**

Blackwell recalled that over the ensuing weekend she combined both memoranda into the rationale document that she believed adequately explained why it was that DOI was moving forward with the statistical sampling approach. She provided copies of her memorandum to both Elliott and Gernhofer, who may have made minor revisions and then returned it to her. She then provided it to Slonaker.

Blackwell also stated that during this period Susan Offley of the SOL worked with Pace to strengthen his memorandum, although Blackwell felt that the original version as prepared by Pace was "decent."

In an August 21, 2000 electronic mail message from Blackwell to Slonaker and others, Blackwell wrote, "Attached is a draft of the memo concerning the Historical accounting. It incorporates the Fed. Reg. Notice and the work by the procurement team (and the edits that Tom G. provided me on an earlier draft.) It also builds on the Special Trustee's memo to the Secretary. As I mentioned at the meeting with Anne Shields last week, I have tried to create a decisional document which provides the rational [sic] for the decision." **(Exhibit 1O)**

Blackwell stated that sometime thereafter, Slonaker left a voice mail message for her in which he said that he did not approve of her version of his memorandum, and would only sign it if changes were made such that it would resemble his original memorandum. Blackwell saved this voice mail message for a few days, and may have even played it for

Gernhofer. Blackwell stated that she was frustrated by Slonaker's voice message and felt that it was yet another example of the continuing "dance" with OST. She explained that it was clear from the instructions given by Shields that a rationale memorandum needed to be prepared for the signature of the Secretary. Slonaker, however, refused to participate in an effort to develop such a combined memorandum and instead would only sign his own. Blackwell said that by this point she had grown weary of OST's uncooperativeness and decided that if Slonaker did not want to work with her to develop the combined memorandum, he could "write his own."

Through early and mid-September, Blackwell was on vacation outside the United States. After she returned, she asked Slonaker several times for his current version of the memorandum that he had been directed by Shields to prepare. Slonaker never provided it to her.

Both Slonaker and Thompson were questioned about these events.

Thompson stated that although the results of the FRN were not yet in at the time of the August 2, 2000 meeting, he already knew what the respondents would prefer. He raised this issue during the meeting and realized that no other participants had apparently considered it. Subsequently, Edith Blackwell took on the job of reconciling the FRN results with the decision to do a statistical sampling. Thompson could not recall if Shields specifically directed Blackwell to perform this reconciliation.

After the meeting, Slonaker and Thompson discussed a number of issues that they felt should be included in the memorandum and Slonaker then wrote the memorandum on his own. Thompson then drafted a separate cover memorandum for the Secretary's signature. These two documents were then forwarded to the Executive Secretariat's office. Several weeks later the documents were returned to OST with "markups." Thompson recalled that he also saw the original draft of the Gover memorandum which also contained hand-written revisions.

Thompson stated that subsequently OST kept their version of the memorandum while waiting for the Gover memorandum to be re-written. Thompson said that OST's version of the memorandum was ready to be issued but "sat for a while" during which time the Gover memorandum was being revised. Thompson said that the only substantive change to the Slonaker memorandum that he recalled concerned the funding for the project. Slonaker's original version had stated that the funding was unavailable, while the final version indicated that it had been obtained. Thompson stated that he was not involved in any communications between Edith Blackwell and Slonaker concerning these memoranda. Thompson noted that during this time-period he was relocating his office from Washington, DC, to Phoenix, Arizona, and for that reason he may not have been present for some discussions.

Thompson recalled that there was "some pressure" on Slonaker to sign a joint memorandum with Gover, but that Slonaker resisted this pressure and felt that it would be inappropriate to sign such a document. Slonaker felt that because Gover and BIA had taken

the lead on the FRN that they should "finish the job." Thompson could not recall who had applied this pressure to Slonaker.

According to Blackwell, in early December 2000, she, Slonaker, Gover, and a number of other persons attended a Trust Management Improvement Project (TMIP) meeting. During the course of this meeting, Blackwell advised Slonaker that something needed to be done with the memorandum for the Secretary's signature. She noted that by this point four months had elapsed since the August 2, 2000 meeting and Slonaker had not yet produced a memorandum as he had been directed by Shields. Further, Secretary Babbitt was about to leave DOI and some action needed to be taken prior to his departure. At the TMIP meeting, Slonaker stated that he would not sign a memorandum that addressed the FRN, because OST had been opposed to it, and he further stated that he would not sign a joint memorandum between OST and the other agencies.

Blackwell recounted that during the meeting Elliott became "a little angry" with Slonaker. She explained that Elliott apparently felt that Slonaker had been directed to do this in August, but still had not done so. Blackwell stated that it was unusual for Elliott to display this type of emotion. At that point Gover "jumped in" and agreed to sign the memorandum prepared by Blackwell at the direction of Shields that would explain the rationale for the decision to proceed with the statistical sampling project. Slonaker would then sign his own memorandum.

Elliott's recollection of these events are consistent with Blackwell's, although he recalled that it was in November 2000 that Blackwell advised him that Slonaker had recently told her that he would not be party to a memorandum to the Secretary concerning the FRN results. Slonaker had explained to Blackwell that since the FRN was issued without the approval of OST, he did not want to be party to the discussion memorandum given that such participation might imply that OST had approved of the FRN.

Elliott also addressed the issue of the "rationale memorandum." He explained that he felt very strongly that the comments solicited from the public through the FRN had to be addressed in the Secretary's memorandum. Elliott explained that he and Blackwell agreed that since DOI had gone to the public and solicited their ideas by way of the FRN, they had an obligation to report the results.

(3) The Decision

On December 29, 2000, Secretary Babbitt issued a memorandum titled "Statistical Sampling of Individual Indian Money Accounts." Attached to this memorandum was both the memorandum prepared and signed by Slonaker as well as the "rationale" memorandum prepared by Blackwell and signed by Gover.

In his memorandum, Babbitt wrote, "I have reviewed the attached memoranda from the Special Trustee for American Indians and the Assistant Secretary – Indian Affairs. I concur with the recommendation of each that the Department should use statistical sampling

instead of attempting a transaction-by-transaction historical reconciliation of all IIM accounts." **(Exhibit 1P)**

In his memorandum, Slonaker wrote, "This outline reflects the conclusions reached at a meeting on August 2, 2000, attended by Anne Shields, John Berry, Kevin Gover, Bob Lamb, Tom Thompson, Tim Elliot, Edith Blackwell, Tom Gernhofer and me." Slonaker explained that by writing this sentence, he meant to suggest that the outline reflected the conclusions reached by the participants in this meeting and that it was not necessarily his own conclusion.

During the course of his testimony before the Court, Slonaker stated that his December 21, 2000 memorandum to Secretary Babbitt was designed to explain how the Secretary could "begin to fulfill his requirements to do a -- or to explore a sampling project as part of the historical accounting effort." Slonaker noted, however, that he was not meaning to convey that he was recommending that this should take place. He also explained that he was attempting to explain that it would be appropriate to initiate a pilot statistical sampling to see if, in fact, such an approach would be feasible. Slonaker noted that there were many unanswered questions surrounding the project, and a pilot could potentially answer some of those questions. When questioned by the Court, Slonaker stated that both he and Thompson felt that the pilot project would reveal that such an approach was not feasible.

This testimony was confirmed by Thompson, who stated that both he and Slonaker felt strongly that statistical sampling would not work and "wanted a chance to prove that it wouldn't work." As a result, Thompson suggested that a pilot study be initiated to "prove up" their position.

Similarly, Slonaker said that during his March 28, 2001 testimony before the Interior Appropriations Committee, he stated that in December 2000, Secretary Babbitt directed him to "proceed in planning, organizing, directing and developing a plan to present to Congress on the feasibility of using a statistical sampling approach that may provide the basis of an historical accounting or some basis for settlement" of the *Cobell* case. Slonaker testified "Secretary Norton has recently reconfirmed this decision. I am hiring a senior project manager and staff presently to begin development of this project." When questioned before the Court, Slonaker stated that he did not mean to suggest to the Committee that he agreed that this was the correct decision, and instead was only pointing out the decision of the Department.

With respect to the memorandum from Gover, Slonaker stated that he did not agree with Gover's statement that a statistical sampling was the "most practical approach, given the enormous potential expense and lengthy time required for a full accounting."

Slonaker's memorandum also states that as Special Trustee, he would "assume oversight and supervision of the project subject to the direction of the Secretary…." Slonaker explained that this language meant that it was his responsibility to "get the job done." Nonetheless, said Slonaker, subsequent to the issuance of Secretary Babbitt's memorandum of December 29, 2000, "very little, except from a planning standpoint," was

done in furtherance of this project. Slonaker stated that OST hired a project manager and performed a substantial amount of planning. Specifically, Slonaker said that there was a "considerable" amount of planning that took place on matters such as budget, staff, and the kinds of experts that would be needed.

(4) The Delay

The four-month delay between the August 2, 2000 meeting and the December memoranda from Secretary Babbitt was caused by several factors. The most commonly cited factor was the ongoing settlement discussions with the plaintiffs.

According to Edith Blackwell, during this time period Slonaker and OST were highly focused on the settlement discussions with the plaintiffs. Blackwell felt that because of this, Slonaker did not put forth any effort on the preparation of the statistical sampling memorandum. Blackwell recalled being present during a discussion between Shields and Slonaker wherein Slonaker told Shields that the *Cobell* case should be settled so that DOI could "move on." Blackwell said that Shields replied that Slonaker should not "put all of his eggs in the settlement basket," and should also work on the statistical sampling effort.

Elliott also cited the ongoing settlement discussions as a cause for the delay. Elliott noted that Slonaker was particularly confident that a settlement agreement could be reached. Elliott stated that Slonaker's focus was clearly on settlement and at one point Slonaker told him, "I know we can settle this."

Brooks also raised the settlement effort. He explained that his impression was that OST was particularly interested in settlement because this was the easiest and cheapest resolution to the problem. Brooks explained that on more than one occasion Slonaker and other OST officials remarked that the "only thing" that OST required was a starting balance for the IIM accounts. Settlement would result in a starting balance for the IIM accounts. Brooks stated that OST did not have any interest in determining the correct amount for the settlement payment and instead only wanted settlement for a starting balance. Without settlement, a starting balance could only be established by way of a costly, complicated accounting effort. Brooks believed that this contributed to OST's unwillingness to work toward a solution other than settlement.

Disagreements among the involved parties also appear to have contributed to this delay. When Thompson testified, he agreed with the Court Monitor's conclusion that the four-month delay was caused by disagreements over how the decision to conduct the statistical sampling should be documented. Blackwell and Elliott cited a different type of disagreement, namely that while refusing to sign any type of memorandum that mentioned the FRN, Slonaker simultaneously refused to work toward the preparation of a revised draft of his original memorandum. Elliott said that on a number of occasions throughout the fall he asked Slonaker if he had prepared his memorandum to the Secretary as he had been directed to do at the August 2, 2000 meeting, and on each occasion he asked Slonaker for a copy of it. However, no such copy was ever provided and Elliott assumed that Slonaker in fact had not prepared the revised memorandum.

Other reasons for the delay were cited. According to Blackwell, after the November 2000 Presidential election there was substantial confusion as to whether or not the political staff at DOI would be staying or leaving. This also caused people's attention to be focused elsewhere.

Pace stated that sometime well after he prepared his August 11, 2000 memorandum he learned that a decision had been made to proceed with a statistical sampling. Pace said that the data that OAIT collected clearly did not support statistical sampling. While he had no information concerning how the decision to do a statistical sampling was made, Pace said, "Just because you put your boots in the oven doesn't make them bread."

(5) Funding

a. Joel Kaplan, Professional Staff Member, House Appropriations Committee -- Interior and Related Agencies Subcommittee

Joel Kaplan confirmed Gover's understanding that Congress would not fund transaction-by-transaction accounting. Kaplan stated that he advised all of the officials he dealt with at DOI, to include Shields and Bob Lamb, that Congress would not expend the funds required to conduct a transaction-by-transaction accounting. Kaplan stated that approximately $20 million was expended to conduct such an accounting for the five named plaintiffs in the *Cobell* case, and that the cost of performing a similar accounting for 300,000 IIM accounts would be astronomical. Kaplan also stated that although Congress told DOI to submit a plan, no one ever stated that Congress would not fund an accounting until there was such a plan.

Kaplan referred to the fiscal year 2002 Committee on Appropriations' Report, which stated that the Committee remained "very concerned over the escalating costs associated with the *Cobell* v. Norton [sic] litigation." This report referenced the Fiscal Year 2001 Conference Committee Report and noted that the Committee managers directed DOI to provide a comprehensive report to the Committee detailing the costs and benefits associated with the Department's proposed efforts to use a statistical sampling methodology for an historical IIM accounting. The report noted that $17 million of the $31 million appropriated for litigation related activities had been used to conduct an historical accounting of the five named plaintiffs and their antecedents. Further, the report stated that the Committee "has no interest in appropriating additional resources for litigation support when these resources come at the expense of on-the-ground Indian programs designed to promote the well being of the Indian and Alaska Native populations. Therefore, the Committee reiterates its position that it will not appropriate hundreds of millions of dollars for an historical accounting that provides funds for a protracted reconciliation process whose outcome is unlikely to be successful."

b. Bob Lamb, Deputy Assistant Secretary for Budget and Finance

Bob Lamb said that at the time of his July 2000 meeting with Shields, he knew that funding would be needed to conduct the accounting. However, Lamb stated, no one in DOI at that time knew exactly what shape or form the accounting would take. To further complicate this matter, DOI officials used the terms "historical accounting" and "statistical sampling" interchangeably. Lamb noted that this synonymous usage had gone on for some time at the Department.

Lamb made this very same point when testifying before the Court. Specifically, he stated, "frequently the term sampling and historical accounting were used interchangeably within the Department and neither term was very well defined. A person could be speaking and they would use both terms in the same sentence and kind of mean the same thing." Lamb further testified that particularly in the 1990's, "the two terms kind of got linked" and "the two were totally interchangeable."

During his testimony before the Court, Lamb also explained that based upon discussions he had with Cohen, it was determined that $30 million would be needed to initiate the accounting, and subsequently a formal request for this amount was submitted to the OMB. Lamb said that he had anticipated that OMB would respond quickly to this request, but they did not. Lamb stated that he eventually became so frustrated with OMB's lack of action that he personally visited a high-ranking career official at OMB and advised that it would be appropriate for OMB to move quickly on DOI's request. Shortly thereafter, they approved most of the originally requested amount. However, said Lamb, the Congressional staff was "very skeptical…on the accounting." Lamb explained that they wanted to know exactly how much the accounting was going to cost, and exactly what it was that they were committing to. Lamb said he had difficulty answering these questions because at the time neither he nor anyone else at DOI knew exactly how the accounting would be conducted.

Lamb discussed these same issues when he was interviewed, stating that although DOI very clearly knew they needed funding to conduct an accounting, they did not know what kind of accounting they would conduct. Lamb said that although at the time Congress wrote DOI a "blank check," they insisted that DOI return to them with a specific plan on how the accounting would be conducted. Lamb stated that DOI did not mislead Congress or OMB with respect to the manner in which they intended to use this funding. Instead, said Lamb, both Congress and OMB knew and understood that DOI did not have a full plan in place as to how they would proceed with the accounting.

When testifying before the Court, Lamb stated that he knew that DOI would never obtain the full amount of needed funding without a plan. He also knew that a plan would never be developed and finalized unless someone within DOI took on a leadership role to ensure that this occurred. Specifically, Lamb said, "What I was mainly concerned about was …. I didn't feel that we had anybody in charge of it, and until somebody became in charge of it and owned it and went to bed thinking about it and waking up in the middle of the night, we weren't going to get the guts of this outlined and done."

When he was interviewed, Lamb explained that this was why he met with Shields in July of 2000. Lamb said that he told Shields and the others at the July 2000 meeting that if they expected him to obtain the funding for an accounting project, he had to be able to answer specific questions about who would lead the project and how it would be conducted. Shields agreed and called the August 2, 2000 meeting for this very purpose.

Lamb stated that he most likely talked to Joel Kaplan as Kaplan was writing the Conference Committee Report and Kaplan may have even read the language of it to Lamb over the telephone. Lamb stated that this language was an "outgrowth" of the discussions that he and Kaplan had. "I knew what he was saying," said Lamb.

C. Secretary Norton's Review of Former Secretary Babbitt's Decision

The Court Monitor concluded that Secretary Norton's decision directing a "statistical sampling historical accounting…was made without any research by her staff into either the decision-making process of her predecessor's subordinates or a review of the most thorough methods possible to accomplish an historical accounting."

Sue Ellen Wooldridge, Deputy Chief of Staff, Office of the Secretary, DOI, said that Secretary Norton was sworn in at approximately 11:00 a.m. on January 31, 2001. Three hours later Wooldridge arrived at DOI. Shortly thereafter, Wooldridge was briefed on numerous issues pending at DOI, including the *Cobell* litigation. Within a few weeks of her arrival, Wooldridge asked for and received a copy of the original *Cobell* complaint, the Court's December 21, 1999 Order, Secretary Babbitt's December 2000 memorandum concerning statistical sampling, relevant pleadings, and "all operative documents," all of which she subsequently read. In addition to the other time she spent reading these documents, Wooldridge specifically recalled that she spent ten hours on February 21, 2001 the President's Day Holiday, reading these documents. She later also read the February 23, 2001 decision of the Court of Appeals.

In addition to reviewing relevant documents, Wooldridge was verbally briefed on the *Cobell* litigation by Tim Elliott, Edith Blackwell, and Sabrina McCarthy of the SOL, as well as several DOJ attorneys, including Phillip Brooks, Spinner Findlay, and Sarah Himmelhoch. During these briefings, Wooldridge learned of the general history of the litigation, including the events surrounding the first contempt trial, as well as other "bits and pieces." None of these briefings ever focused solely on the Court's December 21, 1999 ruling and instead this matter was always discussed within the overall context of the litigation.

While these briefings were specifically on the *Cobell* litigation, Wooldridge said she may have learned more about the case in the context of some other briefing. For example, Wooldridge said that her calendar indicates that she met with Sharon Blackwell, Deputy Commissioner for Indian Affairs, on February 15, 2001. Although this meeting may have been held for the purpose of discussing any number of issues that were pending before BIA, it was likely that some discussion of the *Cobell* matter took place. According to Wooldridge, because *Cobell* was the largest pending litigation matter in DOI at the time, "it was hard to

deal with anyone without this being discussed." Her calendar also reflects that on February 13, 2001 she met with Edith Blackwell, Brooks, Elliott, McCarthy, Slonaker, Thompson, and perhaps others relative to concerns raised by the Special Master. Her calendar also indicates that she met with Secretary Norton later that same day on these issues. Similarly, her calendar shows that on February 20, 2001 she met with SOL attorneys, Slonaker, and perhaps Thompson to discuss these issues, and that on February 22, 2001, she again met with Secretary Norton to discuss the case. She also recalled that on one occasion she even met with the Special Master for three hours in order to understand the issues with which he was concerned. Wooldridge noted that this was a very "hectic" time-period, and it is possible that one or more of the meetings shown on her calendar did not take place, or took place at some other time.

Wooldridge said that she spent a substantial amount of time with Slonaker discussing these issues, and that during these discussions she sensed that he was frustrated with BIA, and felt that BIA as an agency was in some ways unable to manage trust reform. Slonaker's views were supported by Thompson, who at one point advised Wooldridge that he felt that it would be appropriate to reassign certain agencies dealing with trust issues from within BIA to another DOI Bureau. Similarly, the BIA officials with whom she spoke expressed their dissatisfaction with Slonaker and OST. For example, Wooldridge knew that Sharon Blackwell felt very strongly that the agencies dealing with trust should not be removed from BIA and that Slonaker and OST had been unfair to BIA. Wooldridge stated that the lack of trust between OST and BIA was very apparent to her. In addition, the DOJ attorneys with whom Wooldridge met were unhappy with the lack of progress that had been made on trust reform, much of which they attributed to Slonaker.

Wooldridge herself even questioned Slonaker about this lack of progress because she was concerned about it. In response, he advised that certain additional tasks had to be accomplished or that additional monies were needed before better progress could be made. Wooldridge said that it became apparent to her that there were various competing interests or "pushes and pulls" within DOI. "Everyone was playing defense," she said. Wooldridge concluded that, in part, DOI's problems with trust reform were related to the fact that OST and BIA "didn't get along." "The lawyers didn't trust Slonaker, Slonaker didn't trust the lawyers, and BIA felt that the endgame of trust reform was to gut BIA," said Wooldridge. Wooldridge was unable to specifically recall if she discussed this conflict with Secretary Norton, but stated that she "may have."

Wooldridge stated that Slonaker also met personally with Secretary Norton and briefed her on these matters. Although he may have done so on more than one occasion, Wooldridge recalled being present for one of these briefings. She also recalled that Slonaker had prepared a briefing book on the general topic of trust reform, which the meeting participants, including Wooldridge and Secretary Norton, reviewed during the course of the meeting. Wooldridge noted that prior to the meeting she removed the documents behind tab number two in the briefing book because they specifically addressed the *Cobell* litigation. She explained that it was her opinion that discussions concerning the litigation should take place in the context of attorney-client privilege, and persons other than Secretary Norton, Wooldridge and Slonaker were present at the time. She also asked Slonaker to not discuss

the litigation during the briefing for this reason, and he agreed. Wooldridge also advised Secretary Norton of this decision. She concurred. Wooldridge did not know if Secretary Norton ultimately received a copy of the documents that she removed from the briefing book.

According to Wooldridge, during this time period Secretary Norton met on a weekly basis with the Acting Assistant Secretaries and Bureau heads. During the course of these meetings it was likely that some discussion of *Cobell* occurred.

Wooldridge stated that all of the briefings she attended, coupled with her thorough review of all relevant documents, lead her to believe that it was "very clear" that the Court had required DOI, as a fiduciary, to conduct an accounting of IIM funds. "There was never any question that the Court required an historical accounting," said Wooldridge. She noted that this position was affirmed by the Court of Appeals. Wooldridge said that the Court also stated that it would be within the discretion of DOI to determine the appropriate method for conducting the accounting and that the Court would not dictate the method that should be used.

Wooldridge subsequently prepared a draft memorandum for Secretary Norton's signature for the purpose of addressing this issue. Wooldridge explained that there were several reasons for the preparation of this memorandum. First, while it had been over a year since the issuance of the Court's December 21, 1999 Order, no progress had been made. Wooldridge and Secretary Norton believed that it was important to make progress on this issue, or, as Wooldridge said, "Get on with it." Second, Secretary Norton felt that it was important to acknowledge that she and her administration were aware of the decision of the Court and intended to comply with it. Third, Secretary Norton was scheduled to testify before the Senate Committee on Indian Affairs in late February and felt that it would be important to show that, despite being at DOI for less than one month, she was taking steps to address trust reform. Wooldridge wanted this done before the Secretary testified because she knew that the Secretary would be questioned on this topic.

Wooldridge submitted the draft to Secretary Norton, who reviewed and slightly revised it. Specifically, Secretary Norton deleted a sentence or portion thereof in the original draft version that referenced the decision of the Court of Appeals. According to Wooldridge, Norton believed that this was "plussage," and took it out. The final version of the memorandum was signed by Secretary Norton on February 27, 2001.

A comparison of these two documents confirmed Wooldridge's recollection relative to Secretary Norton's editing of this document. Specifically, the draft memorandum stated, "Having reviewed those documents and based on my understanding of the Appellate Court's ruling in *Cobell* v. Norton, [sic] I concur in the directive that the Department proceed with a form of statistical sampling using a methodology which will provide the basis for an historical accounting of the IIM accounts." The final version of the memorandum deleted the reference to the ruling of the Court of Appeals and instead simply stated, "I concur in the directive…." **(Exhibits 1Q and 1R)**

Wooldridge stated that the memorandum did not state that DOI would conduct a full and complete transaction-by-transaction accounting of all IIM accounts for several reasons. First, it was well known that at least some IIM records had been lost or destroyed. Wooldridge stated that she did not want Secretary Norton to give the impression that a transaction-by-transaction accounting would be possible given the fact that some records were unavailable making a complete transaction-by-transaction accounting impossible. Thus, statistical sampling would have to be used to "bridge the gaps." In addition, Wooldridge explained that she had a good understanding of statistical sampling having been involved in a California case involving the Bank of America and "trillions of dollars and billions of transactions." In that case, statistical sampling had been successfully used. Furthermore, DOI knew that even if all of the records were available to conduct a transaction-by-transaction accounting, such an effort would be cost prohibitive. Based on her discussions with Bob Lamb, Wooldridge knew that DOI had "little chance" of obtaining such funding from Congress. Accordingly, Wooldridge felt that it was important to indicate that DOI would be required to use a number of methods to conduct the historical accounting, to include statistical sampling.

Wooldridge's statements concerning the problems created by missing or incomplete records is one that was echoed by a number of interviewees. The statements of these interviewees are probably best summarized by testimony given by Thompson before the Court in March 2000. When asked if it was his understanding that a full accounting was probably not possible, Thompson said, "The general sense was that nobody felt it was fully and completely possible" due to the "state of the documents."

Wooldridge explained that she referenced the memoranda from Slonaker, Gover, and former Secretary Babbitt in Secretary Norton's memorandum because she wanted to "build on" whatever momentum had been gathered as a result of them. Wooldridge stated that by this point, having been at DOI for only three weeks, she had no reason to believe that the Babbitt administration had not attempted to conduct the historical accounting required by the Court.

Wooldridge stated that the purpose of the memorandum was to explain that all methodologies for conducting the historical accounting were still open for consideration, and that, as a matter of necessity, statistical sampling, to include all varieties and types of statistical sampling, would be used to "close the gaps" where records were unavailable. She further stated that this memorandum was not intended to preclude any type of method that could be used in furtherance of the conduct of an historical accounting. Wooldridge also wanted the memorandum to reflect that Secretary Norton had thought about likely impediments to a complete transaction-by-transaction accounting, to include missing records and financial limitations. Wooldridge stated that the Court Monitor's interpretation of this memorandum is "diametrically opposed to what we were saying."

Slonaker's testimony before the Court indicates that he did recall meeting with Wooldridge, during which he was asked questions concerning the meetings that resulted in former Secretary Babbitt's decision to proceed with a statistical sampling. Slonaker was unable to recall what he told Wooldridge about those meetings. He was also unable to recall

if any of the discussion focused on the differences between a "full accounting" and a "limited accounting."

Edith Blackwell recalled meeting with Wooldridge to brief her on the status of the *Cobell* case on a number of occasions. Blackwell stated that Wooldridge's experience in the Bank of America case in California was useful because it gave her some knowledge of complex trust cases, and it specifically allowed her to understand that statistical sampling could serve as a "tool" where records were missing. Blackwell said that the Bank of America case is the only existing case that is remotely comparable to *Cobell*. She also noted that the consultants from Arthur Andersen referred to the Bank of America case when discussing *Cobell*. Blackwell stated that she expressed her concerns to Wooldridge that DOI's failure to move forward on the conduct of an historical accounting was a problem that was "festering," and as such needed to be immediately addressed.

Blackwell stated that Wooldridge drafted the original memorandum for Secretary Norton's signature, and then hand-carried it to Blackwell for review. Both Blackwell and Elliott reviewed the memorandum and, after making one minor change to it, sent it by telefax to Brooks. After reviewing it, Brooks stated that he was "concerned" and wanted to wait to issue the memorandum. Specifically, Brooks wanted more time to ensure that the language in the memorandum was more precise and specific. Brooks also felt that this memorandum was more of a "political document" than a legal document. Despite the objections of Brooks, Blackwell said, it was clear that Wooldridge wanted to issue the memorandum prior to Secretary Norton's upcoming testimony before the Senate Indian Affairs Committee and, therefore, the memorandum was issued. Blackwell stated that all of these events occurred during the span of one day. Blackwell stated that she understood the memorandum to say that statistical sampling would be used as a tool in furtherance of the conduct of an historical accounting given that a complete transaction-by-transaction accounting would be impossible due to the missing records. Based on her discussions with Wooldridge on this matter, she also knew that Wooldridge considered statistical sampling to be a "broad tool" that could be used in furtherance of the conduct of the accounting, and that Wooldridge's understanding of the use of statistical sampling was in large part based on her experience in the Bank of America case.

On February 13, 2002, Secretary Norton testified that she was "familiar" with the December 21, 1999 ruling of the Court, and understood that the Court had ordered an historical accounting of all IIM funds regardless of when the deposits were received. She also understood that the Court had given DOI the discretion to determine how such an accounting should be done. Secretary Norton further stated that the Court of Appeals had acknowledged the discretion given DOI by the Court to determine the manner in which the historical accounting was conducted. Secretary Norton also noted that the Court of Appeals had rejected DOI's argument that the accounting should only go back to 1994 and instead had ruled that it should be back to at least 1938. Secretary Norton also testified that she was certain that, because the *Cobell* litigation covers a period of time from 1887 to the present, some records had been destroyed or lost.

During her testimony, Secretary Norton advised the Court that upon arriving at DOI, she and her staff "were essentially doing triage." They were reviewing and categorizing various issues, to include decisions that had been made by the Babbitt administration. Most of the previous administrations regulations were put on a 90-day hold and some were later held longer. Norton explained that her staff was "in the mindset of just delaying things until our team got there so they could start dealing with issues." With respect to the issue of trust reform, however, Norton said it was an issue that she, "tended to see not so much as a policy issue as a management issue, and that we just hadn't seen the BIA taking action like I thought they ought to take action." After receiving and reviewing the Court of Appeals decision, Norton and her staff "looked at what had previously been going on in the Department, and asked why things weren't getting done more quickly, and what I wanted to do was as a reaction to that Court of Appeals decision to kick people into gear, to say get busy, get things done." Norton further stated that she "wanted to be able to send a message that we weren't going to sit around.…"

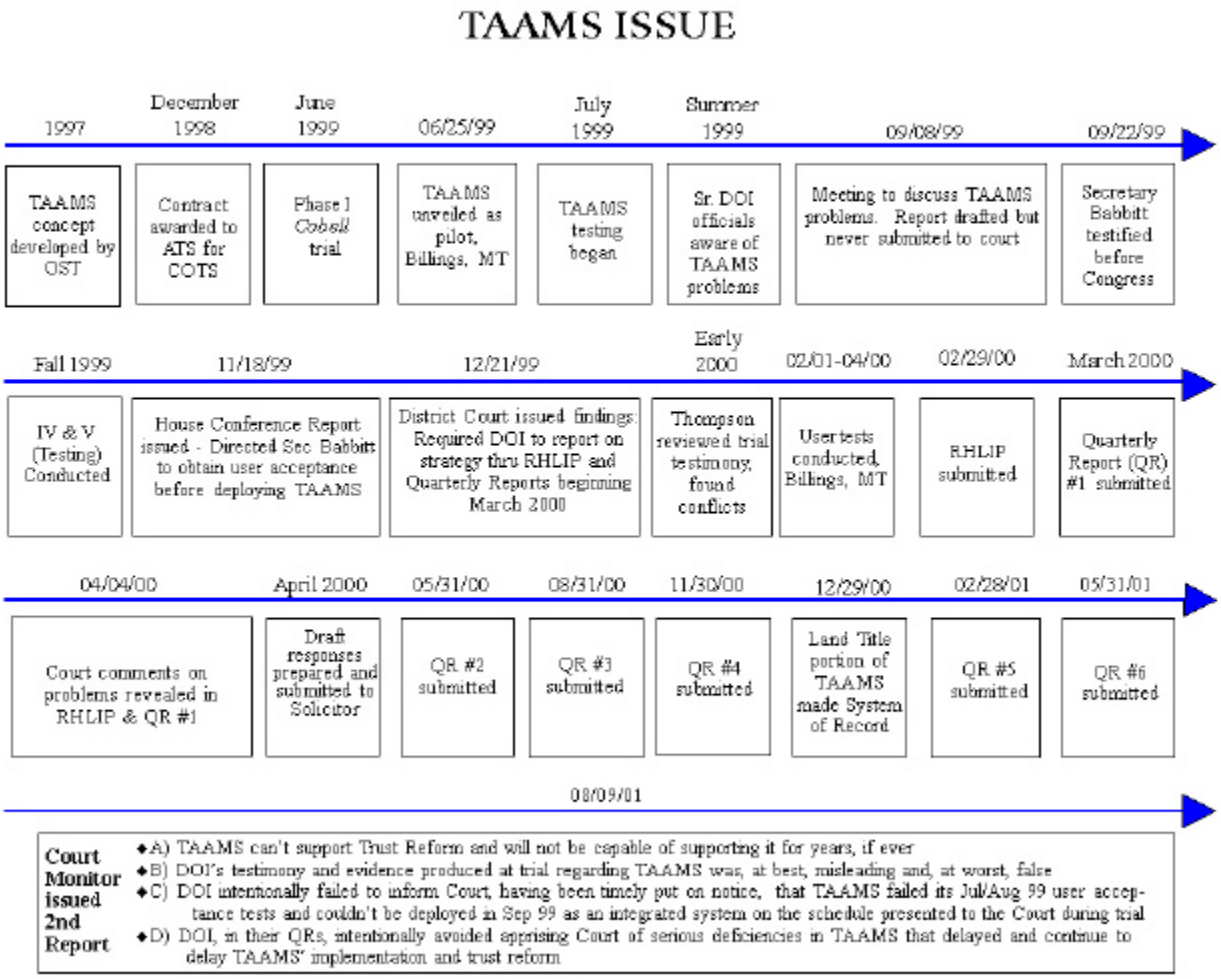
Secretary Norton also stated "I didn't really understand that memo as making a choice on the various models of accounting. I -- the model that I knew of was statistical sampling. I look[ed] at the Court of Appeals decision. It said statistical sampling was something that the Department of Interior could choose, and so without realizing that that might be viewed as contrary to anything that this Court had said, we -- I basically signed it and said get busy, go ahead and start moving on this activity and assigned to the Special Trustee the responsibility to move forward with that. So I viewed that as pushing the Department into doing something as opposed to the other alternative, which would have been to put things on hold and wait for my new leadership to come in."

When questioned concerning the manner in which a statistical sampling of documents that did not exist could be conducted, Secretary Norton stated that it was her understanding that statistical sampling could be used to "fill in a gap when documents don't exist, that a statistical sampling looks at existing documents and then interpolates what the missing documents would say." She went on to state, "If you had, for example….ten years worth of monthly lease payments and you had the first three years and the last three years and you were missing the middle four, you could look at, you know, it was $100 a month for the first three years and $100 a month for the last three years, you can kind of guess that it might have been $100 a month in the middle." Secretary Norton further stated that this example demonstrated how it might be possible to "predict what that missing data is likely to have been."

Secretary Norton also testified that in the Spring of 2001 Michael Rossetti arrived at DOI as her counselor, and he was able to "take a close look at this case." Sometime thereafter the Office of Historical Trust Accounting (OHTA) was created in furtherance of ensuring that all options would be considered in connection with the conduct of the historical accounting.

Michael Rossetti stated that he arrived at DOI on April 2, 2001, at which time he assumed Wooldridge's trust reform responsibilities. Rossetti stated that the first time he saw Secretary Norton's February 27, 2001 memorandum concerning statistical sampling was

when the Court Monitor showed it to him. He later discussed the memorandum with Wooldridge, and she explained that the original version of the memorandum differed slightly from the final version. Rossetti stated that he understood the term statistical sampling to mean "the best accounting we can do," given that a complete transaction-by-transaction accounting would be impossible given the missing records. He also recognized that various players in this matter had different understandings or definitions of the term statistical sampling, and, as a result, he directed DOI officials to discontinue using the term "statistical sampling" and instead begin using the term "historical accounting." Rossetti stated that he and the others at DOI understood that the Court had clearly required that an accounting of IIM funds be conducted, and, as a result, they intended to fully comply with the Court's Order.



2. Court Monitor's Second Report: The Alleged Provision of False and Misleading Information to the Court Concerning TAAMS

In his August 9, 2001 Second Report, the Court Monitor outlined his findings relative to the BIA Trust Asset and Accounting Management System. The Court Monitor concluded that senior DOI managers and attorneys provided misleading information to the Court and "created a record of opposition to and actions against the provision of open and honest communications to [the Court]." Specifically, the Monitor asserted in this report that A) TAAMS has neither been deployed nor implemented as testified to at trial, and that testimony and evidence produced at trial regarding TAAMS was at best misleading and at worst false; B) that between the trial and the date of the Court's findings, significant problems were identified, but not reported to the Court; and C) that neither the Revised High Level Implementation Plan (RHLIP) nor the Quarterly Reports (QRs) advise the Court of the true status of TAAMS.

A. Testimony and Evidence Produced at the June 1999 Trial Regarding TAAMS was at Best Misleading and at Worst False.

The concept of TAAMS was developed by OST beginning in 1997. A contract was awarded in December 1998, to Applied Terravision Systems, Inc. (ATS) to provide a commercial-off-the-shelf (COTS) software program designed to meet trust reform needs. The General Accounting Office (GAO) criticized this decision, and pointed out several weaknesses in DOI's approach in a report entitled *Indian Trust Funds – Interior Lacks Assurance that Trust Improvement Plan will be Effective*, dated April 1999. Notwithstanding these criticisms, DOI decided to continue.

Various BIA officials and employees made it clear that they did not believe that a COTS existed to accomplish the proposed trust reform and advised against it. BIA understood that it would be difficult to find a standard product to deal with over 500 individual tribes and over 300 legal statutes. In the opinion of Sharon Blackwell, in order to accomplish an integrated, standardized system, especially concerning realty and conveyance, existing laws would need to be changed.

Acting Special Trustee Thompson was a major supporter of TAAMS as a COTS. He believed that this was the answer to trust reform for two reasons. First, COTS would be quicker than a system development. Second, it would establish a standardized, disciplined approach that had been lacking in BIA. Both OST and DOI officials agreed that BIA practices were diverse among its various regions and needed to be standardized. They believed that a COTS program would force this standardization. According to several DOI officials interviewed, the idea was to "cram it down [BIA's] throat."

Daryl White, Chief Information Officer (CIO), DOI, authored a memorandum, dated November 19, 1998, supporting the TAAMS initiative and rebutting the GAO critique. White has since stated that knowing what he now knows, he would no longer defend TAAMS as a COTS. He now understands it should have been a much larger program. He was not aware that BIA users had recommended against COTS. Rather, he understood that a source selection team, including users, had previewed TAAMS and had been in favor of it. **(Exhibit 2A)**

On June 25, 1999, during the trial, TAAMS was "unveiled" as a pilot in the BIA Area Office in Billings, Montana. Former Secretary Babbitt participated in a high profile ceremony generating considerable publicity.

At the time of the first trial in June 1999, TAAMS was still a COTS with only a few modifications having been made. It was in the process of being developed to meet the specific needs of trust management. Responsibility for the TAAMS project had passed to BIA and Domenic Nessi was brought on as Program Manager.

At trial, DOI officials, including Nessi, Thompson, Gover, and Secretary Babbitt, and ATS' Senior Vice President David Orr testified concerning TAAMS and its proposed ability to accomplish trust reform. In addition to the many touted attributes of TAAMS, the Court

was provided an ambitious deployment schedule. The Court relied on this testimony in making its findings on December 21, 1999.

In interviews conducted during the course of this investigation, several of the witnesses offered explanation of their testimony:

Nessi denied that his testimony was false in any way. It was based on what he knew, or believed to be true at the time of the trial. He insisted that, prior to trial, he did express concerns to DOJ attorneys that he was not very familiar with BIA business practices. DOJ guidance to him was to only testify about what he knew. Nessi claimed that he did not mean to imply that he had "restricted" his testimony. Rather, he meant to imply that during the trial, questions posed to him would require a distinction between TAAMS as an entire system and TAAMS as a software application. He did not believe that the questioner at trial understood these distinctions.

Nessi pointed out that at the time of trial, testing of TAAMS had not yet been completed. It was scheduled for the first systems test in early July 1999. Interviews of contractors and other DOI officials and employees have corroborated this assertion. There is no evidence of any external test result, prior to the trial, nor any other specific data to suggest that the trial testimony was false. Any testing prior to the trial would have been internal to ATS.

Nessi acknowledged that at the time of trial neither data conversion nor interfaces had actually been accomplished. However, he insisted that he had no reason to suspect that these functions would not be accomplished. He stated that ATS continued to assure him that they were fixing the problems. Similarly, he acknowledged that the deployment schedule was aggressive, but he believed it could be accomplished.

The Court Monitor interviewed Nessi several times. In his Second Report, the Court Monitor reflects that Nessi told him that he had spoken to a DOI attorney in July or August 1999 about his concern that his testimony at trial had not been accurate and might need to be corrected with the Court based on the problems he was observing with the TAAMS software and data. According to the report, Nessi told the Monitor that the attorney told him that they would not change what they told the Court regardless of the current status. During our interview of Nessi, he denied the foregoing. He advised that, prior to a TMIP meeting, he made an offhand remark to Edith Blackwell questioning DOI's responsibility to the Court since TAAMS was not progressing as expected. No response was expected or received, and the matter was dropped.

Edith Blackwell did not recall having any such conversation with Nessi. She did recall that DOJ attorneys contacted her based on information they had picked up from Thompson. DOJ reported that Thompson had asked what should be done if the Court testimony was wrong. Blackwell stated that she checked with Thompson, and he told her this was just a theoretical question; that he did not have any specific knowledge of incorrect testimony. Blackwell added that if she had discovered that testimony was false or incorrect, she would have taken immediate action to notify the Court and to correct the testimony.

Thompson recalled that sometime in early 2000 he reviewed the testimony given at trial, because he and others were concerned that TAAMS was not progressing as planned. During this review he discovered that both Nessi and Orr had testified that interfaces were completed. Thompson, however, had testified that interfaces were not complete. He recalled that this was a matter of discussion at meetings. He does not recall specifically speaking with any attorney about this concern, but believes that someone from the SOL would have been at the meetings. He said he would guess that person would have been Edith Blackwell. He does not recall indicating to her that any concerns he had were merely "theoretical."

A review of the trial testimony confirms that Nessi stated that the TFAS/TAAMS interface "programming" was completed. Orr testified that both the Minerals Management Service (MMS) and TFAS interfaces were written as a "computer program," but they were still only in a test mode.

Orr and Deborah McLeod, TAAMS Project Manager, ATS, Dallas, Texas, were interviewed and stated that the prototype presented to the Court at trial worked. However, after the 1999 trial the requirements changed significantly, causing many problems and delays. They attributed these changes to the unanticipated and increased user input and participation. They were also concerned about the aggressive deployment schedule, but believed that it could in fact be met.

Clark Madison, the BIA Realty Officer in Billings, was interviewed and stated that he believed that Nessi erroneously testified about the status of data conversion. He, along with Keith Beartusk, Billings Area Director, and Darryl LaCount, Billings Land Title Records Officer, thought that the deployment schedule was unrealistic and that TAAMS would not be ready for deployment within 100 days as was presented to the Court

During a hearing on November 30, 2001, the plaintiffs alleged that the first trial was a fraud on the Court. The Court responded that it would not re-examine trial testimony, stating that at the time of trial, it understood that TAAMS might not work. The Court was not aware of anything at trial to indicate that DOI knew about failures with TAAMS.

Information developed during the course of our investigation supports the Court's conclusion as stated at the hearing.

B. <u>Before the Court's December 21, 1999 Decision, DOI Failed to Report that TAAMS had Failed its Tests and Could Not Be Deployed on the Schedule Presented to the Court.</u>

The Second Report of the Court Monitor identified numerous items of correspondence generated subsequent to the first trial showing that senior officials and managers became aware of problems with TAAMS as early as July 1999. On September 8, 1999, Shields convened a meeting to discuss TAAMS. The agenda for this meeting identified the attendees and discussed the need to advise both the Court and the Congress. **(Exhibit 2B)**

The following persons attended this September 8, 1999 meeting:

- John Berry, Assistant Secretary for PMB
- Anne Shields, Chief of Staff
- Kevin Gover, Assistant Secretary for Indian Affairs
- Bob Lamb, Deputy Assistant Secretary for Budget and Finance
- Thomas Thompson, Acting Special Trustee
- Daryl White, Chief Information Officer, DOI

Shields and Berry declined to be interviewed.

Gover, White, and Lamb each stated that although their recollection of this meeting was limited, they left the meeting with the understanding that a report outlining the problems with TAAMS was being prepared for presentation to the Court. They were surprised to learn that a report had not been provided to the Court. They also agreed that the SOL had the lead on this task.

These same interviewees stated that at the conclusion of the meeting, Shields tasked Cohen by way of an electronic mail message with preparing a report for the Court, based on a report from Nessi. Cohen, in turn, delegated this task to Carr. Cohen and Carr have both declined to be interviewed concerning this matter. Gernhofer prepared a draft report. He, too, has declined to be interviewed. John Snyder, of the office of the CIO, prepared two draft reports. Snyder provided these draft reports to the SOL for presentation to the Court. He did not see a report in final form, and does not know the status of the report after he provided it to the SOL. **(Exhibits 2C, 2D, 2E, 2F, and 2G)**

Thompson stated that Nessi had drafted a three or four page report on the status of TAAMS, and the September 8, 1999 meeting focused on this document. Specifically, discussion focused on the fact that the impression given to the Court in the June 1999 trial was not being accomplished. Thompson stated that he reviewed the document prepared by Nessi and found it to be accurate and consistent with his knowledge and understanding of the status of TAAMS at the time. According to Thompson, at the conclusion of the meeting Shields stated that she was comfortable with the notion of making such a notification to the Court and agreed that the document should be sent. Thompson added that it was his understanding that Shields sent an electronic mail message to this effect to Cohen on September 9, 1999.

Thompson was also "surprised to learn" that this report had not been provided to the Court, because at the conclusion of the meeting he expected the report to "find its way to the Court in short order." He also stated that, although he was not certain, the "breakdown" seemed to occur within the SOL. Thompson further stated that in his opinion the reason this report was not provided to the Court was due to a "bureaucratic blunder" and that there was no effort to hide or conceal it from the Court. Thompson explained that everyone in attendance at the September 8, 1999 meeting agreed that the report should and would be

provided to the Court, and he could think of no other explanation as to why it would not have been provided.

Edith Blackwell was interviewed and stated that she was on vacation in early September 1999. She was vaguely aware that a report was being prepared for the Court. She recalled that Nessi had sent her an electronic mail message listing problems with TAAMS, and asked her to forward it to Carr. She did not have any specific knowledge about this report nor does she recall ever seeing a draft or copy of it. Blackwell added that since she was the primary representative to BIA for *Cobell* issues, she is fairly certain that before being forwarded to DOJ, any such report would have been routed through her. Since she did not see it, she concluded that no report was ever submitted to DOJ for filing with the Court.

The other purpose of the September 8, 1999 meeting was to prepare a briefing for Secretary Babbitt who was to testify before Congress later that month on the status of TAAMS. On September 22, 1999, Babbitt testified before Congress, utilizing a prepared statement that was reportedly drafted by Gernhofer. Neither the statement nor Babbitt's testimony mentioned the problems that were the subject of the September 8, 1999 meeting. In fact, Thompson, who accompanied Babbitt to the Congressional hearing, opined that Babbitt had "freelanced" during his oral testimony, and made additional statements about TAAMS that Thompson believed to be inaccurate. For example, Babbitt described TAAMS as being further along than Thompson thought it was. In addition, Babbitt stated that TAAMS "was working." According to Thompson, it was not. Thompson stated that he was surprised at Babbitt's testimony, and he was not comfortable with the accuracy of it. Thompson, however, did not apprise Babbitt or any other official of his concerns. **(Exhibit 2H)**

A review of the reports and related documents associated with the September 8, 1999 meeting disclosed that the final draft report did not mention the problems that apparently precipitated it. For example, the draft report does not mention that the schedule had undergone three revisions; that the pilot in Billings had been postponed based on testing and data conversion problems; and that a tentative decision by TAAMS program staff had been made to scrap the initial plan to deploy TAAMS as a complete package throughout BIA, and instead to only deploy the title portion. Likewise, Secretary Babbitt's testimony to Congress also failed to mention all of the above listed problems. These problems were eventually reported to the Court, but not until February 29, 2000, with the submission of the RHLIP. Secretary Babbitt declined to be interviewed.

Thompson explained that various persons, including Gover and Sharon Blackwell, had been briefing Babbitt on TAAMS. Thompson said that in meetings he attended with these persons and others from BIA, "it was a struggle to keep the BIA people from puffing or spinning information in a positive manner." Thompson stated that he understood that Gover and Blackwell were receiving their information on TAAMS from Nessi, and that both Gover and Blackwell relied heavily on and trusted Nessi. Thompson, however, thought Nessi was overstating the progress that had been made on TAAMS.

DOI officials, employees and contractors agreed, in general, that before the June 1999 trial, the problems with TAAMS were not believed to be significant. It was not until after the trial that testing began, and when those tests were not successful, problems began to be presented to top management. After trial, it became widely recognized that the system required much more development than originally thought. There were concerns among some DOI officials, including Thompson, White and Snyder, that the deployment schedule was too aggressive.

Senior DOI officials, contractors and employees who are familiar with software development were interviewed and stated that although the testing of TAAMS that commenced immediately after the June 1999 trial was largely unsuccessful, the problems were not such as to cause them undue alarm, or to believe that TAAMS was not going to work. Also, reports indicated that while problems remained, there was progress being made from test-to-test. It was understood that deployment schedules were "slipping."

They all stated that while the problems were serious, they never thought these problems indicated that TAAMS would not succeed. They were instead encouraged that each test seemed to be an improvement over the previous test, and, as a result, they believed that progress was being made. Nessi acknowledged that throughout most of 1999 he was a major "cheerleader" for TAAMS.

An additional factor that impeded the progress of TAAMS after the trial was a November 18, 1999 House Conference report, which required the Secretary to obtain user acceptance before deploying TAAMS. While TAAMS had initially been designed to force standardization and discipline on BIA, where regional and agency offices used various methodologies and practices relative to their trust work, the new requirement imposed by the House Conference Report provided the user community with the opportunity to insert individual and specific changes. **(Exhibit 2I)**

When Sharon Blackwell was interviewed, she stated that shortly after she assumed the position of Deputy Commissioner for Indian Affairs (May 2000), she was briefed by Nessi on TAAMS. She recalled that Nessi was concerned about the length of time it was taking to accomplish tasks and that the schedule for TAAMS was not being met. She does not recall that Nessi expressed concern that TAAMS was not or would not be capable of performing its stated objective. She also recalled that Nessi explained to her that the word "deploy" meant that the software was in the computer, while the word "implement" meant that the software was actually being used. Blackwell opined that one of the reasons for management problems in trust reform is that each subproject in the RHLIP was "built like a silo" (i.e., stove-piped or stand-alone, with little to no correlation with the other subprojects), but they needed to be coordinated.

The investigation has clearly established that at the conclusion of the September 8, 1999 meeting, the SOL was tasked with leading the effort to provide a report to the Court concerning problems with TAAMS. It has also clearly established that such a report was prepared, and ultimately provided to the SOL for submission to the Court. There is no evidence that the report was ever provided to DOJ for submission to the Court. Shields,

Cohen and Carr, the DOI officials who could most likely explain why the report was not forwarded to the Court, have all declined to be interviewed.

C. The Quarterly Reports have Intentionally Sought to Avoid Apprising the Court of the Serious Deficiencies in the TAAMS System.

While the Court relied on testimony about TAAMS in its December 21, 1999 findings, the Court also required DOI to report on the strategy of trust management by preparing an RHLIP, and to report on the status of trust reform progress on a quarterly basis, commencing in March 2000. The RHLIP was finalized on February 29, 2000 and at the time of the Second Report of the Court Monitor, six QRs had been submitted to the Court.

The RHLIP was finalized by consensus. Bob Lamb coordinated the effort with all of the subproject managers. They reviewed the entire RHLIP together, page-by-page. They did not move on until everyone agreed that the final product was right. By all accounts, this was a very tedious process.

Interviews of DOI officials, employees, and contractors identified a general consensus that the QRs do, in fact, tend to reflect positive events, are not as complete as they could have been, and do not generally reflect the results of testing, most of which were unsuccessful. However, no evidence was found to substantiate a deliberate attempt to provide false information to the Court. In particular, Nessi and Thompson both take exception to any assertion that there was any intent to mislead the Court.

Slonaker stated that he believed that based on incompleteness in reporting, the QRs could be construed as misleading. He also said that senior officials in the TMIP committee edited his "Observations" section to the extent that the "edge" was taken off his comments. However, Slonaker could not identify any specific information or details that were false. He stated that he did not feel comfortable with subproject management not under his (OST) control. His thought was that the reporting was not very detailed and thus incomplete, and that incomplete information could be construed as misleading.

Other TMIP committee members, including Gover, White, Sharon Blackwell, Edith Blackwell, and Lamb agreed that there was considerable discussion about Slonaker's observations. However, they denied that any undue pressure was exerted to affect any changes. Thompson agrees that the TMIP meetings were often "grueling," and boiled down to a contest between OST and BIA. He stated that OST was pressured to make the changes because they could not "prove" their critical remarks. Thompson agreed with Slonaker that this changed the tenor of the Observations.

The other TMIP members argued that unsupported comments should not be included. If something was going to be provided to the Court, they wanted to be certain that it was true, and could be supported by facts, not innuendo. They all said that if Slonaker had been able to verify his comments they would have not objected to them. They did not object to the content of his comments, rather the clarity and accuracy of them.

Thompson stated that during meetings to discuss the QRs, the attorneys, both DOI and DOJ, would often ask questions like, "How is this going to play to the Court?" However, he could not recall any occasion where the attorneys directed that something be included or excluded. Thompson agreed with Slonaker that some of the reported information might be perceived as inaccurate or misleading. However, Thompson stated that he was certain that there was no intent to do so. Thompson stated that he is not aware of any false information provided to the Court.

In regard to the suggestion that QRs were incomplete, Thompson advised that no one really knew what was required to be reported in the QRs. He added that the idea of reporting details of testing never entered his mind. He concurred with other interviewees that one of the purposes of testing is to find problems. Thompson stated that he never received any indication that the Court wanted more information. He does not believe that the attorneys ever met with either the judge or the Court Monitor to discuss requirements or to seek clarification.

White opined that the litigation was a consideration during TMIP meetings. He noted that attorneys did not attend other meetings involving computer systems. He also recalled that the lawyers were fully engaged during these meetings, interacting and asking questions. He did not recall any instance where the lawyers (or anyone else) ever told the TMIP members that they could or could not include a particular statement in a QR. He recalls that the lawyers would bring the conversation back to the litigation, but in the context of advising the Court of what was occurring.

TMIP committee members noted that commencing with the Third QR, Slonaker assumed responsibility for the QRs. He chaired the meetings, set the agenda, and prepared the final copy of the report. These members did not feel that Slonaker, as the ranking committee member, should have felt intimidated. Sharon Blackwell stated that Slonaker had the "power of the first and last draft." Sharon Blackwell and James McDivitt both noted that during a period of time in late 2000 or early 2001, Slonaker was the Acting Secretary of the Interior.

Thompson disagreed with these committee members. He stated that the QRs were a DOI product, and that OST was merely orchestrating the effort in its oversight role. Thus, it was important to have consensus among all participants. Notwithstanding Slonaker's rank and position, Thompson does not believe that Slonaker had the authority to say whatever he wanted. If the committee disagreed with him, it could not be said.

TMIP members reported spending a significant amount of time during meetings discussing the Special Trustee Observations. The committee members stated that they received drafts of the subproject portions of the reports well in advance of the meetings, so they had already addressed concerns pertaining to those issues. They did not receive drafts of the Special Trustee Observations until the day of the meeting.

One particular instance of conflict regarding the Special Trustee Observations was reported by Sharon Blackwell, Edith Blackwell, Stephen Swanson of the SOL, Rossetti,

McDivitt, and Arthur Gary, Director, Trust Improvement**,** BIA, relating to either the Fifth or Sixth QR. According to these witnesses, Slonaker had proposed to state that Secretary Norton had been fully briefed on problems with TAAMS. When questioned about the nature and scope of this briefing, however, Slonaker apparently conceded that rather than a formal briefing, he had instead had a passing conversation with the Secretary in the hallway. TMIP members insisted that Slonaker's observations could therefore not declare that the Secretary had been fully briefed.

Slonaker and Thompson stated that shortly after Secretary Norton arrived, they provided her with a briefing on OST. Thompson stated that they also provided her with a briefing book, which included an overview of trust management projects, including TAAMS.

Thompson added that the actual briefing was more ad hoc and did not follow the briefing book. A review of that briefing book disclosed that the projects essentially follow the RHLIP. There is nothing in that briefing book to suggest concerns or problems with TAAMS or any of the other projects. Thompson stated that the briefing with Secretary Norton lasted approximately one hour, and that Slonaker did mention problems with TAAMS. He recalled that the problems were articulated in a very general sense, and identified project planning, management and resources, not the technical system. Thompson recalled that the Secretary took notes during this meeting. **(Exhibit 2J)**[10]

Most interviewees emphasized that the RHLIP and the first QR that testing had identified serious "challenges," and that the proposed milestones were not being met. They also stated that these reports do, in fact, tell the Court that there were problems with TAAMS. In fact, during an April 4, 2000 hearing, the Court acknowledged that the RHLIP and the first QR provided notification of serious problems with TAAMS. **(Exhibit 2K)**.

As a result of the concern expressed by the Court during this April 4, 2000 hearing, Nessi prepared a response and provided it to Brooks. Similarly, Edith Blackwell prepared a draft report for the Court. Both of these responses provide more detail and reasons why TAAMS was not progressing as had been anticipated during the trial. Neither of these reports, however, was ever provided to the Court. **(Exhibits 2L and 2M)**

Brooks explained that DOJ attorney David Shuey was responsible for the TAAMS issues. Brooks and Shuey determined that a response to the April 4, 2000 hearing was not required, and that unless DOI provided substantial documentary support to refute the Court's opinion, they would not file such a report.

According to Edith Blackwell, the draft report she prepared was based on a summary provided to her by Shuey. She advised that she substantially re-wrote this information, and circulated her draft throughout DOI. She recalled that Nessi, Slonaker, and Thompson appeared to be pleased with the response.

[10] Sue Ellen Wooldridge also provided relevant information concerning these briefings. Her statement is documented elsewhere in this report.

Blackwell provided a copy of an electronic mail message dated May 31, 2000, the subject line of which was "TAAMS response for tomorrow." The final draft of her response was attached to the message, which indicated that the intent was to file it the next day, June 1, 2000. Blackwell said that on June 1, 2000, she met with Cohen, Slonaker, and Thompson. Gover joined the meeting by telephone from Oklahoma. During the meeting, Slonaker stated that he did not want the response to be filed. According to Blackwell, Slonaker was concerned that the response "made it look like management bungling" and would not be good for DOI. She recalled that Slonaker used the term "keystone cops." According to Blackwell, she and Cohen told the group that they thought it was important to get the facts out, but Slonaker insisted that it not go out. Blackwell said that Gover acquiesced to Slonaker, and the report was not filed. **(Exhibit 2N)**

With the exception of Slonaker, all interviewees stated that the reporting of the tests of TAAMS as failures would not be accurate. By this time, TAAMS had evolved to require more development and it was understood that computer development testing is not simply a "pass or fail" proposition. The Information Technology (IT) personnel involved in the TAAMS process agreed that the true purpose of testing is to identify problem areas in order for further progress to be made.

No one interviewed, including SRA, International Inc., (SRA) the independent verification and validation (IV&V) contractor hired by White to evaluate the feasibility of TAAMS, could identify any test in which the results were so negative that they thought TAAMS was in danger of failing. Interviewees agreed with White that as long as problems did not present a "fatal flaw," they should continue with TAAMS. Thompson added that TAAMS was a "rolling operation," and BIA wanted everything in it. Until and unless it was stabilized, it was difficult to know for sure whether a test was successful.

GAO officials Mike Koury and Chris Martin, when interviewed, also agreed with Nessi and others that although there were numerous problems identified by the testing, there was progress being made from test-to-test following the November 1999 test. They stated that they could not confirm that the documented results of any test faithfully represented the actual condition of the software. Nonetheless, they believed that the April 2000 test did reflect much better results, and the test was more disciplined. Defects previously identified in the February 2000 test were addressed. Koury and Martin acknowledged that the April 2000 test only looked at the title portion. They were comfortable with the results because in this instance, DOI brought in land title experts from throughout BIA to design, conduct, and review the test, and to confirm that the tested transactions fully represented BIA's title workload. Koury and Martin believed this was an appropriate action, and helped achieve the positive results.

Koury and Martin added that because of an overall lack of discipline in the testing, they could not really give an opinion as to whether or not tests were "successful." They did state that based on what they observed, they could understand how someone might characterize a test as successful, while someone else might characterize the same test as unsuccessful. They also quoted well-known computer systems expert Glenford J. Meyers,

who wrote in The Art of Software Testing, "Testing is the process of executing a program with the intent of finding errors."

Koury and Martin further stated that in their opinion, the users displayed a positive outlook, and wanted to make TAAMS work. Regarding criticism that TAAMS was portrayed mostly in a positive manner, they stated that this is very common in system development. They also felt that it was important to use a team approach, adding even they wanted TAAMS to succeed.

Koury and Martin pointed out that in their report, GAO recommended that the TAAMS initiative not be "schedule driven." Instead it should be driven by events. They noted that this did not occur. It was very apparent to them that DOI wanted TAAMS to be completed within three years. They did not believe that DOI had the disciplined processes to support such a date, especially since TAAMS turned out to be an information system development, and not a COTS. Slonaker, who pointed out that someone reviewing the schedule driven milestones in the QRs would most likely conclude -wrongly - that TAAMS was essentially completed, echoed this sentiment.

TMIP members, including McDivitt, Lamb, Sharon Blackwell, and Edith Blackwell advised that during briefings they received on TAAMS, they were always told that the TAAMS software was or would be acceptable. The problems resulted from the data or data conversion and interface. They said that because the tests did show that progress was being made, it did not seem to be necessary to report the problems to the Court. Significantly, they also stated that they were never certain of exactly what it was that they should or should not tell the Court, noting that there were volumes of information available on TAAMS. They, therefore, reasoned that it was not appropriate to provide all information to the Court.

The Second Report of the Court Monitor refers to a memorandum from Nessi, dated April 3, 2000, entitled "Trust Reform may be Hazardous to One's Health." This memorandum was critical of the support the TAAMS team was receiving and referenced the "continued scrutiny and subsequent reporting (much of it erroneous or misleading) on TAAMS…." When interviewed, Nessi stated that this comment referred to information being released in the media by the plaintiffs, and not to DOI reporting to the Court. (Exhibit 2O)

(1) The Revised and Updated HLIP dated February 29, 2000

In the cover letter attached to the RHLIP, Secretary Babbitt wrote, "TAAMS is operational at the pilot site in Billings, Montana…." During the second contempt trial, this statement was highlighted as being inaccurate or false. When testifying at the second contempt trial, Nessi stated that the statement made by Babbitt was not true. When interviewed, Nessi agreed that the term "operational" connotes "working." Nessi stated that this was true at Billings because the "pilot" was ongoing in Billings, and therefore it could be deemed "operational." **(Exhibit 2P)**

White supported Nessi's explanation, stating that the key word in Secretary Babbitt's statement was "pilot." Neither Nessi nor White had input in the preparation of the cover letter, nor do they know who drafted it.

Thompson believed that Gernhofer had drafted this letter. Thompson, Nessi, and White all agreed that Babbitt would probably not have had detailed knowledge about the "operability" of TAAMS.

The RHLIP and Quarterly Reports were to be the vehicles by which the Department informed the Court. With respect to the TAAMS subproject, the RHLIP states:

- "…TAAMS has undergone considerable change since …June 1999."
- "The initial design meetings did not fully capture the entire scope of …needed functionality."
- "…it became apparent during the systems tests… during July and August 1999 that a significant level of analysis and system modification remained."
- "The net result of these events during the late summer and early fall was that the deployment schedule outlined in the TAAMS contract could not be achieved as originally planned."
- "In retrospect, the plan to purchase two off-the-shelf systems independently (TAAMS and TFAS) and interface them with an existing system (MMS) had inherent difficulties from its inception."
- "Data conversion…will continue to be a challenge."

These comments also appear to advise the Court of problems and challenges, but again lack detail.

Those interviewed believe that these comments inform the Court that there had been changes since the trial, that problems were identified and that the deployment schedule was not going to be met. However, it is equally clear that the scope and nature of the problems were not described in any detail.

The RHLIP also reported: "A pilot site…was identified and the site's data has been cleaned and converted." This suggests that data cleanup was complete. Those interviewed, however, stated that data clean up was not complete and was still ongoing, and while current title data had been converted, title history and realty information had not. There was some difference of opinion between interviewees about the actual status of data clean up and conversion. In conclusion, everyone interviewed about these comments acknowledged that these comments in the RHLIP, while technically accurate, are not complete and could be construed as misleading.

According to Thompson, at some point before the RHLIP was issued he reviewed the testimony that was given during the June 1999 trial. During this review he determined that when testifying, Nessi had indicated that data conversion and data cleanup were not problem areas. However, Thompson said, both of these issues became significant problems. Thompson said that he talked to Nessi about his concerns, and the need to tell the Court about changes. Thompson believed that Nessi reported these changes, and highlighted the problems, through the RHLIP. Thompson believed the RHLIP was very accurate, although he felt that it should have a detailed plan behind it. It did not, nor does it today.

White generally agreed with Thompson with respect to the RHLIP, adding that a High Level Implementation Plan (HLIP) is not typically a detailed document and is instead intended for the average, non-technical reader. White agreed that there should have been a more detailed, more technical plan behind the RHLIP.

Additional examples from the RHLIP underscore its opacity:

In Subproject Action Plan K, "Complete System Modification Effort," the RHLIP states:

- "…the BIA plans to deploy TAAMS to its title plants while continuing to test and solidify all aspects of the leasing modules, including the interface between TAAMS, TFAS and MMS."

This suggests that the realty module and interface development is progressing. Everyone interviewed about these comments acknowledged that by this time a decision had been made to only deploy the title module, while continuing to develop the other modules. Although the focus was on current title, interviewees believe that, in fact, there was continuing effort to develop the other modules of TAAMS. As of mid-May 2002, however, interfaces have still not been accomplished and the realty module has not been successfully tested.

In Subproject Action Plan M, "Conduct System Testing," the RHLIP states:

- "Testing was conducted the weeks of September 27 and November 22, 1999."

This statement does not address the poor performance identified by these tests. Again, interviewees acknowledge that elaboration and more detail would have been prudent. Many interviewees suggest that this milestone was very poorly written, and in its current state did not require the reporting of test results. Thompson recalled that Nessi had noted that "system" testing was a contractor responsibility and therefore was not an issue for DOI.

According to Nessi, he at one point asked Thompson if he could change one of the milestones, but was told he could not. Nessi advised that OST had "ownership" of the

RHLIP, and did not want it altered. Edith Blackwell agreed with Nessi, stating that OST resisted recommendations to change milestones.

Thompson disagreed with these statements. When interviewed, he stated that OST had prepared the original HLIP, but that the actual status plan was deferred to each operating element. It was true that OST would have been required to approve any requests to change a milestone. Thompson stated that in the earlier stages of the project he told Nessi that he thought Nessi's plan was too aggressive, and that if Nessi needed more time, he should take it. Nessi declined, stating that he thought he could do it on time.

Further, Thompson recalled that occasionally a subproject manager would ask for a change in the milestone, but that this would usually be a request for an extension in time. Before approving, OST would require that a plan be provided to show how the problem would be resolved and how the new date would be met. Thompson could not think of a specific example of this occurrence.

In Subproject Action Plan O, "Complete Independent Verification and Validation of TAAMS," the RHLIP implies that the IV&V gave tacit approval to TAAMS:

- "The IV&V team concluded… 'Assuming the foregoing recommendations and risk mitigation strategies are implemented, the IV&V team (SRA) feels that deployment beyond the Rocky Mountain Region could proceed with minimized risk and a reasonable assurance of success.'"

The RHLIP goes on to qualify:

- "However, some of the scripts would require additional modification to test the critical functions not totally validated (partially tested, not tested, or failed validation) by the IV&V team."

- "Testing of one critical area – the TFAS and MMS interfaces – remained incomplete and the IV&V contractor advised against full deployment of TAAMS until that functional area was fully tested."

While identifying the incompleteness of the IV&V as it pertains to all of TAAMS, these comments suggest that TAAMS was ready for deployment. The "recommendations and risk mitigation strategies" mentioned above are not detailed in the RHLIP.

Jerry Manesis of SRA, who performed the IV&V, stated that the recommendations and strategies were very realistic. He said that since TAAMS began as a COTS, testing proved quite difficult and the contractor had to develop test scripts once it evolved from a COTS to a development project. Manesis also pointed out that after the decision to first deploy the title function, the other critical functions of TAAMS were excluded from the IV&V. This information was not reported in the RHLIP.

An electronic mail message from White stated, "The IV&V…report…was favorable." The reply that White received from Manesis stated, "…the overall report…was not favorable." Manesis explained that he provided this response to White because although TAAMS was improving, it was not complete, and he was aware that there were still problems within the system. Manesis stated that his comments were not intended to give the impression that TAAMS would not be a viable product. He believes that if DOI followed through with his recommendations, TAAMS would indeed be viable. **(Exhibits 2Q and 2R)**

White acknowledged that he had hired SRA to perform the IV&V, with the concept that if the IV&V did not recommend TAAMS, then DOI would not proceed with it. White stated that his discussions with Manesis centered on TAAMS' capabilities. Having just experienced an "IT disaster" with the Bureau of Land Management's (BLM) Automated Land and Mineral Record System (ALMRS), White said that he was very sensitive to "fatal flaws" which would indicate that TAAMS was not going to work. White stated that after reviewing the IV&V and discussing it with Manesis, no fatal flaws were identified. Further, White had feedback from the users that TAAMS was already an improvement over the old system. Thus, although some problem areas remained, such as a lack of interface, White agreed that the IV&V supported a decision to continue with TAAMS. He was aware that it was limited to the title portion, but believed that this was an appropriate action.

In Subproject Action Plan Q, "Perform User Testing at Pilot Site to Determine Adequacy of TAAMS under 'Live' Conditions," the RHLIP states:

- "A user test was conducted in the Billings Regional Office the week of February 1-4, 2000."

- "Initial results from the User Test were positive…. The transaction analysis indicated no major problems and demonstrated that the core functionality for TAAMS existed…"

- "It is anticipated that the remaining concerns will be few and can be addressed without any major delay."

A review of reports and relevant documents, as well as interviews of employees and contractors, reveals that this test was limited and probably only involved the current title portion of TAAMS. Interviewees, including Thompson and Nessi, agree that saying the results were "positive" might be an overstatement and thus could be misleading. However, they claim the statement is true in its overall context.

In Subproject Action Plan S, "Deployment to BIA and Tribal Sites," the RHLIP discusses a general deployment plan.

- It defines "deployment" as the loading of software onto computers.
-
- It defines "implemented" as occurring after the data has been cleaned up and converted and the office is using TAAMS full time.

- It concludes, "…it is not possible to project a complete deployment schedule at this time."

This section distinguishes between "deploy" and "implement" and advises that the original deployment schedule will not be met. When interviewed, both Lamb and Thompson stated that Nessi wrote these comments because of confusion between the two terms. When he was interviewed, Nessi stated that he made the distinguishing definitions based on a suggestion from Cohen, who told him there was confusion over the meaning of these terms. Nessi agreed that generally the terms "deploy" and "implement" are used interchangeably.

Thompson stated that it was his understanding that these two words were used interchangeably throughout most of 1999. He was concerned because if the two words meant the same thing, one would surmise that TAAMS was working. Thompson advised that the use of these words was discussed at meetings and it was his impression that the distinction between them was a way to explain the lack of progress.

Wayne Nordwall, Area Director, Phoenix Area Office, Phoenix, Arizona, stated that he authored a memorandum to Gover questioning these distinctions. He said that Nessi made the decision to change the definitions of these two terms in order to show the Court and others that progress was being made. Nordwall stated that Nessi told him and others that the TAAMS contractor was to be paid based on "deploying" TAAMS at the pilot site and assisting in "implementing" it at other sites. In order to assure that the contractor got paid for work it was doing, and already had done, Nessi had to affirm that "deployment" had occurred.

Nessi denied that payment of the contractor had anything to do with making the distinction between these terms. Nordwall advised he made the comment that this could open them to accusations of being deceptive because he was concerned that someone, and in particular the Court, might think that TAAMS was completed when it was "deployed" under this definition.

(2) Quarterly Reports to the Court

Linda Richardson, Trust Improvement, BIA, stated that she drafted the First QR, dated March 2000, in its entirety. She drafted this report by extracting information from the RHLIP. In some instances she contacted the individual program managers for input and provided drafts of the report to the program managers for comment before finalizing it. She did not recall any specific interaction with, or concerns from, Nessi. Richardson stated that it was her understanding that the purpose of the QRs was to report accomplishments, and thus work in progress or setbacks were not her focus in putting together the report. Richardson said that she developed the format for the QR. Since she had taken information from the RHLIP, it seemed logical to her to follow that format in the QR.

The First QR stated:

- "At the time of trial, Nessi testified that he hoped to have the majority of the work completed in the Billings Area (Rocky Mountain Region) around October 1, 1999, and that TAAMS would then be deployed in Juneau, Aberdeen and Minneapolis. In his testimony, Thompson indicated concerns that the proposed schedule might not be met."

- "Since the time of trial, it has been determined that deploying TAAMS on first a functional rather than a geographical basis is a better approach,"

- "The interfaces between TAAMS, TFAS and MMS are not yet complete. Completion of all mandatory realty functions and the interfaces is scheduled for December 2000."

- "…BIA at this time has not projected a schedule for full deployment of TAAMS. The actual deployment schedule…is dependent upon progress in data cleanup…."

This is the first time that the Court was advised that the schedule testified to by Nessi was no longer an accurate projection. This report, which was contemporaneous with the RHLIP, pointed out that not only will the schedule not be met, but realty functions and interfaces were not completed and will follow deployment of the title function.

The First QR also lists "Accomplishments Since June 10, 1999," including:

- "System testing for the pilot site was successfully conducted during September and November 1999."

A draft of this QR had the word "successfully" scratched out. Annotated in the margin were the words "results? findings? conclusions?" The author of these notes has been identified as White. White stated that he could not specifically recall making these notes, but he agrees that he questioned characterizing this test as successful. He further stated that since the word "successfully" had been left in the final version, he is certain that he satisfied his concerns about the test. He elaborated that he would have been satisfied if the problems encountered were not "fatal flaws," that is, if they indicated TAAMS could not proceed. He added that after SRA had come in for the IV&V, test scripts came in at 85% to 90%. This factor further affirmed his recommendation to continue to proceed with TAAMS. **(Exhibit 2S)**

Edith Blackwell stated that she does not recall whether or not the issue of characterizing the tests as successful ever came up. However, she advised that if it had, she and the other TMIP members would have looked to White for clarification. She stated that if it had been asserted that the tests were not successful, she would not have allowed this report to falsely assert that they were successful.

Also, most interviewees believed that tests were not to be viewed as "pass or fail," therefore, they strongly disagree with any assertion that reporting them as successful is "patently false."

However, interviewees agreed that the tests did not reflect that TAAMS was ready for deployment, even under the definition noted in the RHLIP. Nessi pointed out that by this time the decision had been made to first deploy only the title portion of TAAMS, that this decision was detailed in the RHLIP and was also referred to in the First QR. According to Nessi, the tests, particularly the November test, were successful in regards to the title portion.

The Second QR, dated May 31, 2000, was reviewed. Commencing with this report, subproject managers compiled their individual portions of the report, following the guidelines and format set up with the First QR and submitted them to the TMIP. They continued to report on the milestones as established in the RHLIP.

With respect to Milestone K, "Complete System Modification Effort," the Second QR states that the title portion of TAAMS, which was targeted for completion on May 30, 2000, was actually completed on April 17, 2000.

- It states, "A User Test conducted April 21-24, 2000 concluded that the land title functionality of TAAMS was sufficient to initiate deployment to all BIA and tribal land records offices."

- It further states that "Upon completion of the April User Test, the DOI decided to deploy the land title and records function of TAAMS."

The Second Report of the Court Monitor points out that this report fails to mention that only the current title portion could be deployed on a conditional basis, and that the title history function had not been developed. It also points out that the land title and records function had not been deployed to "all BIA and tribal land records offices" as implied.

Nessi stated that breaking TAAMS down to individual modules and completing them one at a time is the preferred method of developing a complex software system. White, Thompson, and GAO auditors Koury and Martin concurred with Nessi. They believe that this was an appropriate action. In fact, GAO pointed out that by testing title only, the April 2000 test was significantly improved. White stated that breaking out the title portion first was very useful. He agreed with the Court Monitor that at this time it was not possible to do the realty portion. However, since realty was separable, it made sense to split the modules.

TAAMS users, such as LaCount, and Madison, and DOI officials including Nessi, White and Snyder, opined that the lack of title history in TAAMS is not a significant matter. They advised that the historical data is present in the legacy systems, and that TAAMS was building history as it developed. Missing data is more readily identified by TAAMS, and manual research is conducted before a transaction is finalized.

The Third QR, dated August 31, 2000, included a new section titled "Special Trustee Observations." The Second Report of the Court Monitor points out that there was an initial draft of this section that included the following statements:

- "…Significant management intervention will be required to ensure that all BIA users accept TAAMS. It is expected that the DOI decision…will not occur by August 31, 2000 as planned."

- "BIA business rules and practices supporting TAAMS have not yet been completed."

According to the Court Monitor, these comments were removed from the Third QR, and he determined that the Special Trustee was "pressured" by senior DOI managers and attorneys to exclude these comments.

However, the Special Trustee Observation in the Third QR did state:

- "It is expected that the DOI decision on the deployment of the realty portion of TAAMS beyond Billings will occur later in the fall of this year."

- "Management intervention will continue to be required to ensure that all BIA users accept TAAMS.

- "Given the historical variances…BIA and OST are working to develop uniform business rules and practices."

- "…interfaces are not yet operational."

Slonaker agreed that he was pressured to change his comments. He stated that this editing "softened" and "took the edge off" his comments. TMIP committee members disagreed with this characterization. They believed that the final report was written after a consensus of opinion was reached.

Most attendees acknowledge that there appeared to be friction between Slonaker and Sharon Blackwell. However, when interviewed Sharon Blackwell did not agree with this characterization. She described her relationship with Slonaker as "congenial." She added that she did in fact try to defend BIA against assertions by Slonaker that BIA was not accomplishing its projects.

In handwritten notes taken by White during a TMIP meeting discussing these observations for the Third QR, Sharon Blackwell is noted as saying, "grave concerns re: 'observations': difficult/negative statement. May be 'subjective.' Includes ½truths." **(Exhibit 2T)**

Sharon Blackwell stated that she was concerned that Slonaker was presenting negative information aimed at BIA, without having facts to support his comments. She stated that in her opinion, Slonaker was quick to criticize BIA projects, but overlooked problems in projects under OST control. This sentiment was echoed by all BIA participants as well as Edith Blackwell.

In those same notes, Sharon Blackwell is also noted as saying, "Agrees TS [Tom Slonaker] s.b. [should be] open & truthful to the Court. Suggesting that TS resp. is to Secy of Interior. Suggest ltr goes to Secy (& it is 'discoverable')."

Sharon Blackwell explained these notes by stating that she was concerned about Slonaker's negative comments because, at the same time this was going on, he had assumed the role of negotiating a settlement with the *Cobell* plaintiffs. She had heard rumors that one of his senior employees, Miller, was passing information to Dennis Gingold, the plaintiffs' lead attorney. Blackwell could not recall the comment regarding "discoverable," and stated that it seems out of context, because everything in the report was for the Court and was available to the Court.

Miller acknowledged that he is a former law partner of Gingold, and that he still has a relationship with him. However, Miller denied that he has passed information regarding TAAMS or any other litigation issue to Gingold.

Similarly, in these same notes Edith Blackwell is noted as saying, "Distinction between 1/4y report & sep ltr that is 'discoverable.' If you put it before the Court then you have a different solution." Edith Blackwell does not recall these comments, and believes that White may have had his own interpretation of a discussion on discovery. She does not specifically recall any such discussion at this meeting.

Note: When interviewed, White could not recall the background or circumstances that generated his handwritten notes contained in Exhibit 2T. He was unable to shed any further light on them.

Thompson stated that he and Slonaker came up with the idea to include the "Special Trustee Observations" section. According to Thompson, the inclusion of this section was an effort to highlight and acknowledge the "fight between BIA and OST." In summary, OST wanted the QRs to contain substantially more information than BIA did. Thompson said that the version supported by BIA, although not false, was "definitely watered down" through "spinning and favorable comments." Thompson explained that it was his position that Sharon Blackwell, with support from Edith Blackwell, felt that some of the information that OST wanted to include in the QRs would be "unfair to BIA." By way of example, Thompson stated that it was OST's view that "BIA was working hard, but TAAMS still doesn't work." Sharon and Edith Blackwell's view would be "BIA is working hard." Thompson stated that while not false, these kinds of statements were "misleading and incomplete." Thompson further stated that the discussions at these meetings were "heated and contentious," and the entire day's worth of discussion could be focused on only a few pages. As time went on, the meetings, while still not good, were not quite as combative.

Thompson said that it was his opinion that if OST's statements were included in the QRs, they would have been more accurate and complete. Thompson stated that during the meetings, it was frequently brought up and agreed by all participants that they needed to be open and honest.

In the Third QR, the TAAMS section reports:

- "The Land Title and Records functionality of TAAMS has been completed…."

- "…leasing functions underwent extensive testing from August 14-25. Initial results from the contractor and the users participating in the systems test were positive, and the limited errors discovered during the system test have been fixed and retested satisfactorily."

The Second Report of the Court Monitor points out that this report did not clarify that the actual title module had not been deployed beyond Billings, and that it does not mention the failed TAAMS realty module "UAT" started in August 2000. While the decision to only deploy the title function had been disclosed, it was not disclosed that title history was not completed.

The Fourth QR was dated November 30, 2000. The Special Trustee Observations section noted:

- "Some projects may require the inclusion of additional milestones in order to better track task progress…."

A number of changes to the milestones were affected in this QR.

The Second Report of the Court Monitor identifies that these observations do not include comments submitted in the first draft, to include "BIA Data Cleanup remains an increasingly serious time challenge. Data may require another data conversion…." and "Data cleanup production during September continued to be hindered due to TAAMS software limitations."

Slonaker stated that he believed that the data cleanup subproject continues to be a problem and that the reporting of DOI's efforts in this area through the QRs has been incomplete.

The TAAMS section addressed the problems cited above in the draft Special Trustees Observations, as follows:

- "…conversion, data cleanup, data analysis, etc., were far more intensive and required far more resources than originally estimated."

- It also reports that three milestones were missed, and then states, "…the TAAMS team also reviewed the ongoing eight-week leasing, accounts receivable, distribution and interface test. The test was very successful in that it presented a clear picture of what has been accomplished and what tasks remain…."

This section also reported that the schedule to complete title history was planned for January 26, 2001.

The Second Report of the Court Monitor states that this QR shows that some acknowledgement has been made of these problems. The report also asserts, "Whether the IV&V in September 2000 was successful in helping…understand their problems with all phases of TAAMS, it was *not* a successful test."

The Fifth QR was dated February 28, 2001. The Special Trustee Observations section of this QR reported:

- "Effective December 29, 2000, the *land title* portion of TAAMS was made the system of record (meaning that it was the officially designated system for the recordation and maintenance of Indian title documents reflecting current ownership) for current title processing in four BIA Regions: Alaska, Eastern Oklahoma, Rocky Mountain and Southern Plains. The title history data is not yet complete."

The TAAMS section also reported on the land title portion being declared the system of record without mentioning the limitations placed on that designation.

The Second Report of the Court Monitor referenced a December 6, 2000 memorandum from Sharon Blackwell that announced that TAAMS had been made the system of record. The Monitor points out that neither the Special Trustee Observations nor the TAAMS Section of the QR report the limitations that were included with this announcement. **(Exhibit 2U)**

The limitations noted in this memorandum are summarized below:

- For both the Alaska Region and the Eastern Oklahoma Region, TAAMS is to be the system of record regarding all transactions for which data has been loaded into TAAMS.

- For the Southern Plains Region, TAAMS is to be the system of record at the conclusion of the Title and Records Office initial review and a parallel test of the system.

- For the Rocky Mountain Region, the following actions needed to be accomplished before TAAMS is considered the system of record:

  - Name and address information and tract unity information to be reconciled,
  - The manner in which to enter encumbrance data must be determined,
  - Run-time error regarding the global I.D. is still being fixed, and
  - Additional ownership interests to be resolved.

Slonaker advised that he had not seen Blackwell's memorandum and was not aware of the limitations when he wrote his comments.

Thompson stated that he believed he had seen the memorandum, but did not really understand the limitations. He added that he believes OST was misled because no one offered to explain the limitations.

Sharon Blackwell defended her memorandum. She advised that in Alaska the records only dated from 1970, so that did not present a problem. In Eastern Oklahoma there was no data cleanup background, because all of the records were in County Courthouses. In Anadarko (Southern Plains), she relied on information from Bruce Maytubby, a BIA employee in Tulsa, Oklahoma, assigned to the TAAMS project, whom she described as very gifted and talented, that he believed TAAMS could be deployed as the system of record. Blackwell added that it is her understanding that TAAMS is the system of record at the four areas, except that in Southern Plains it is only at the title plant, and legal issues have hindered further development. She disagreed that in order to be declared the system of record, legacy systems had to be turned off.

According to James McDivitt, the deployment issue was discussed at the TMIP meetings. He believed the issue needed further clarification. However, that clarification was never made. He had a problem with it, because Alaska and Eastern Oklahoma had no previous system. He concluded that calling TAAMS the system of record at these locations could be construed as misleading.

The TAAMS portion of the Fifth QR stated:

- "Currently, the focus of the TAAMS initiative is on completing a final review of the realty module…"

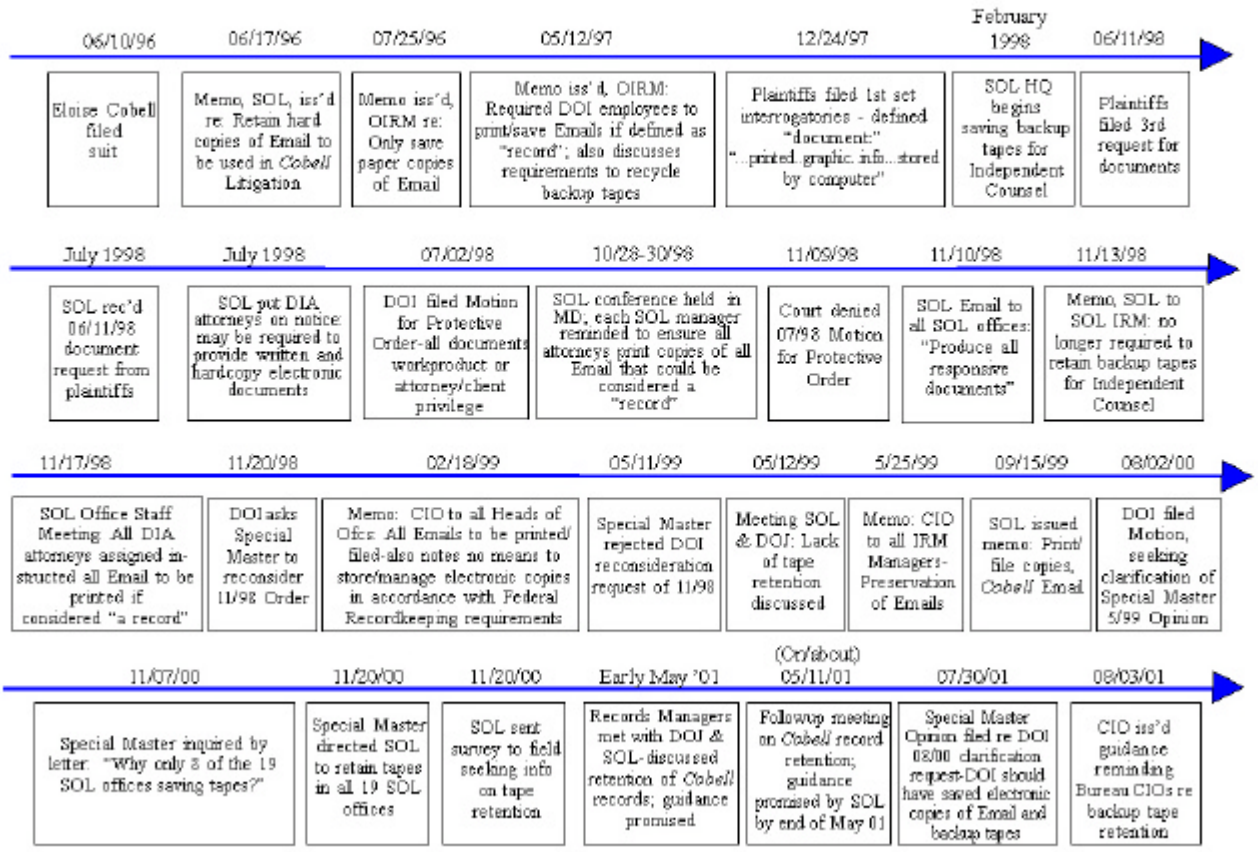
- "TAAMS title and realty modules are scheduled to be fully implemented by June 1, 2001 in the Rocky Mountain Region."

The Second Report of the Court Monitor points out that it failed to mention that BIA had made a decision in December 2000 not to deploy the realty module because of the results of the IV&V tests in September to October 2000. Interviewees acknowledged the Monitor's statements, but advised that the testing referred to was not an IV&V.

The Special Trustee Observations section of the Sixth QR, dated May 31, 2001, discussed a February 23, 2001 letter from Nessi which expressed serious reservations about the trust reform effort. **(Exhibit 2V)**

The Second Report of the Court Monitor details this letter and its assertion that "trust reform is slowly imploding." The Monitor concluded that this letter reveals that the Court has not been informed of the complete and accurate status of TAAMS.

The TAAMS section of the Sixth QR reported a system test completed on April 12, 2001 and a Test Readiness Review conducted on April 18, 2001 in positive tones. It also reported, "Title history will be converted" while this milestone continued to reflect that the title portion has been completed.



3. Special Master Opinion: Retention and Production of Electronic Mail Message Backup Tapes

The Special Master Opinion dated July 27, 2001, and filed on July 30, 2001, indicated that all Bureaus and offices within DOI, to include the SOL, should have been saving tapes on which electronic messages were backed up, rather than overwriting these tapes. The Special Master indicated that this should have been done in part because the electronic versions of messages contain information not found on the printed version of these messages. Further, the Special Master opined that DOI should have been reviewing these tapes and producing the information on them as part of the discovery process in *Cobell*. The Special Master's Opinion implied that DOI has failed in its duty to retain and produce records in accordance with the plaintiff's discovery requests.

A. Conflict Between Plaintiff's Discovery Requests and DOI Policy and Practice

A review of relevant court documents revealed that in the "Plaintiff's First Set of Interrogatories," dated December 24, 1997, the term *documents* was defined to include "any printed, typewritten, or handwritten or graphic matter" and "information stored by a computer disk, diskette, tape, card, or other form of computer memory storage." However, a

number of Departmental memoranda and directives issued both before and after December 24, 1997 were inconsistent with this definition. In general, these memoranda and directives advised DOI employees that because DOI's existing electronic mail system did not meet the requirements established by the National Archives and Records Administration (NARA) for an electronic record keeping system, only the printed versions of documents, to include electronic mail messages, would be considered official records.

For example, on July 25, 1996, Gayle F. Gordon, Acting Director, Office of Information Resources Management (OIRM), DOI, issued a memorandum to all Assistant Secretaries, Heads of Bureaus and Offices, and Bureau/Office Records Managers, entitled "Policy and Guidance for Managing the Creation, Retention, and Disposition of Electronic Mail Documents." This memorandum states, "Until new records software is developed, piloted, and installed, **all E-Mail messages or Exhibits that meet the definition of a Federal record must be added to the organization's files by printing them out (including the essential transmission data) and filing them with all related paper records.** This should be done as soon as possible after the message is sent or received. The message or Exhibit should then be deleted from the E-Mail system." **(Exhibit 3A)**

On May 12, 1997, William S. Pfancuff, Acting Director, OIRM, issued a memorandum to Information Resources Management (IRM) Coordinators, Local Area Network (LAN) Administrators Work Group Members, Bureau/Office Records Managers, and Bureau/Office FOIA Officers entitled "Departmentwide Standards for the Retention of Electronic Mail (e-mail) 'System' Messages and E-mail System Backup Tapes." The purpose of this memorandum was to establish and immediately implement Departmentwide standards and practices for the retention of electronic mail messages. These standards required that DOI employees "print out and properly file any message on his or her system (including transmission and receipt information) which meets the definition of a record." With respect to backup tapes, the Departmentwide standards required that daily system backup tapes be maintained for one week and then reused, and that weekly backup tapes be maintained for one month and then reused. **(Exhibit 3B)**

White issued a February 18, 1999 memorandum to all Heads of Offices and Office of the Secretary Employees concerning "Transitioning to Lotus Notes Electronic Mail – Records Management Guidance." This memorandum noted that the Office of the Secretary's "current recordkeeping system is the existing paper records filing system." As a result, "all official E-mail messages and Exhibits that meet the definition of a Record must be added to the organization's files by printing them out (including the essential transmission data) and filing them with all related paper records." The memorandum also advised "we have no means to electronically store and manage E-mail Records in accordance with Federal recordkeeping requirements." **(Exhibit 3C)**

On June 17, 1996, Cohen issued a memorandum to the Special Trustee for American Indians, the Assistant Secretary for Indian Affairs, the Assistant Secretary for Policy, Management and Budget, and the Deputy Commissioner for Indian Affairs, the subject of which was "IIM Litigation." In this memorandum, Cohen wrote, "This is a reminder that all documents, including e-mails, related to management of trust funds and IIM accounts should

continue to be retained. In addition, if any documents are ever subject to disposal (such as the automatic periodic deletion of e-mails), you should be sure to retain hard copies for potential use in the litigation." This memorandum was issued only seven days after the *Cobell* complaint was originally filed. **(Exhibit 3D)**

All of these memoranda very clearly emphasized that for official record keeping purposes, hard copies of electronic mail messages should be printed and saved. These memoranda also emphasized that electronic message backup tapes did not meet Federal record-keeping requirements and in fact would be disposed of periodically.

Review of a declaration signed on May 20, 1999, by Edith Blackwell disclosed that from October 28 through 30, 1998, she attended the Solicitor's Conference in Solomons, Maryland. The Conference attendees were supervisory and management attorneys from throughout the SOL. On October 29, 1998, the attendees discussed issues relating to records management. At that time, the July 25, 1996 memorandum from Gayle Gordon was distributed. In her declaration, Blackwell stated that it was agreed at the Conference that each SOL manager would be responsible for ensuring that attorneys in their respective offices would be reminded that they were required to print copies of all electronic mail messages that could be considered to be a record.

According to Blackwell's declaration, on November 17, 1998, a Division of Indian Affairs (DIA), SOL, staff meeting was held. At that time, Blackwell and Associate Solicitor Derril Jordan instructed all those in attendance that it was DOI policy that all electronic mail messages that were records should be printed.

When interviewed, Blackwell stated that throughout the course of the *Cobell* litigation, DOI produced hard copies or printed versions of electronic mail messages to the plaintiffs. Blackwell stated that this practice was consistent with existing DOI policy and the requirements of the Federal Records Act. In addition, Blackwell stated that the Federal Rules of Civil Procedure (Fed. R. Civ. P.) require that defendants preserve "records" that are responsive to discovery requests and, pursuant to DOI policy, a "record" of an electronic message is the printed version of it, not the electronic one. For this reason, the electronic versions of electronic mail messages were not produced to the plaintiffs. Further, Blackwell noted that *Cobell* is the only litigation in which DOI has become involved where the production of both the electronic and hard copy versions of documents is currently being required.

Elliott recalled that all SOL employees had been directed on multiple occasions to print all electronic mail messages related to *Cobell*, even if they did not meet the definition of a record.[11] Elliott stated that these directions were given by way of electronic mail messages, memoranda and even videotape. Elliott stated that these actions were consistent with the SOL's policy of adhering to NARA guidelines. Elliott also recalled that on more than one occasion he and other SOL attorneys were required to provide copies of these printed

[11] Certain documents, such as those used solely for the purpose of scheduling meetings, are not considered to be records by NARA.

messages to one of the SOL attorneys assigned to *Cobell* such that they could be provided to the plaintiffs.

Swanson stated that the Fed. R. Civ. P. requires that defendants keep "records." According to Swanson, it is the practice of DOI that electronic tapes are not considered to be and should not be treated as records, and instead only printed versions of electronic messages can be considered records. While a defendant cannot destroy documents in their possession, said Swanson, they similarly cannot be required to create documents or records. In addition, Swanson stated that only NARA, and not the *Cobell* plaintiffs, could determine the definition of a record. Like Blackwell, Swanson noted that no other plaintiffs have asked that DOI produce both the electronic and hard copy version of documents. Swanson also stated that DOI has become the "poster child for what happens when the Fed. R. Civ. P. [which require the preservation of "records"] didn't keep up with technology." According to Swanson, the Federal Rules Committee recently recognized this problem and is taking steps to address it.

Glenn W. Schumaker, Management Information Systems (MIS) Team Leader, SOL, was interviewed. This interview, coupled with a review of the five declarations submitted by Schumaker in the *Cobell* litigation, disclosed that Schumaker has been the MIS Team Leader in the SOL since 1983, and as such he is responsible for directing all computer network operations in the SOL. The SOL has 19 office locations nationwide and employs approximately 260 attorneys and 100 support personnel. Schumaker noted that in some SOL field office locations, networks and electronic mail systems are operated by DOI client agencies, or agencies in the geographic area that receive legal assistance from the SOL, because the SOL does not have its own system in that area. For example, in the SOL's Billings, Montana office, the Bureau of Reclamation (BOR) provides electronic mail services to the SOL. In this situation, Schumaker relies on BOR to supervise the network operations.

Schumaker explained that in order to recover from a catastrophic failure of its MIS system, the SOL routinely backed up their computer systems. This would allow for the recovery of data in the event of a catastrophic failure. Backups are made on both a daily and weekly basis. Daily backup tapes were recycled or overwritten every two weeks, and weekly backup tapes were recycled or overwritten every four weeks. Schumaker stated that this is the "industry-wide standard" in both government and private industry. Schumaker noted that the retention of backup tapes has "never, ever" been considered to be a record-keeping system.

A number of MIS employees from both MMS and BLM were also interviewed. Like Schumaker, these individuals stated that electronic message backup tapes are only retained for use in the event of a catastrophic systems failure and are not considered to be any type of record-keeping system.

B. SOL's Response to the Court's Opinions and Orders and Corresponding Events

On June 11, 1998, the *Cobell* plaintiffs propounded their third document request which sought "all documents prepared or signed by past or present attorneys in the Solicitor's Office and relating to the administration of the IIM Trust which express legal advice,

conclusions, opinions, assessments, instructions or directions…." The same definition of "documents" contained in the "Plaintiff's First Set of Interrogatories," dated December 24, 1997, applied to this third document request.[12]

According to Edith Blackwell's May 20, 1999 declaration, in July 1998 she received the plaintiff's June 11, 1998 document request. Shortly after receiving this request, Blackwell convened a meeting of DIA attorneys and circulated a copy of this request. Blackwell stated that at this time she put these attorneys on notice that they may be required to gather documents responsive to the request, to include drafts and electronic mail messages. When interviewed, Blackwell explained that she used the phrase "may be required," rather than "will be required," because at that time it was thought that the documents being sought by the plaintiffs were privileged, and they therefore would not have to be produced.

In response to the June 11, 1998 document request, DOI filed a "Motion for a Protective Order" on the grounds that these documents were subject to the attorney work-product, the attorney-client and deliberative process privileges. This motion was consistent with Blackwell's position that these documents were, in fact, privileged. However, DOI's Motion was denied by the Court's Order of November 9, 1998.

Blackwell stated that on November 10, 1998, Cohen sent an electronic mail message to all SOL offices requesting that they produce all documents responsive to the plaintiff's request. The specific language of the plaintiff's request was included in this message. Blackwell said that she asked Cohen to send this electronic mail message in direct response to the fact that the Court's Order of the previous day required that these documents be produced, although she was unable to recall if she assisted Cohen in writing this message.

Blackwell stated that based on Cohen's directive, by November 1998 all SOL attorneys should have been aware of the requirement to produce documents described in the June 11, 1998 request. She also stated that pursuant to the July 25, 1996 Gayle Gordon memorandum concerning records retention that had been circulated at the SOL conference only a few weeks earlier, as well as the agreement reached at the conference by SOL managers that they would remind their employees of the requirements of the Gordon memorandum, all SOL attorneys should have been printing and saving any electronic mail messages that could be considered records. Blackwell stated that it was her impression based on feedback that she was receiving from both DIA and other SOL offices that attorneys were, in fact, printing and producing electronic mail messages.

Schumaker stated that in approximately February 1998, his team was directed to begin saving all backup tapes for the SOL HQ office. This directive may have been in the form of an electronic mail message or memorandum from Cohen, and resulted from an Independent Counsel investigation related to matters surrounding the Hudson Dog Track in Wisconsin. As a result, rather than overwriting backup tapes for the SOL's HQ office,

[12] DOI's August 2, 2000, "Motion For Protective Order Clarifying Duty to Produce E-Mail Records" indicates that each of the plaintiff's six document requests incorporated the same definition of documents contained in their first set of interrogatories.

Schumaker and his staff began to append the tapes and "stack" them with consecutive backup runs until the tapes were full. Schumaker noted that this directive only concerned backup tapes for the SOL HQ office, and thus tapes from other offices continued on the regular rotation and overwriting process.

When interviewed, Schumaker was shown a November 13, 1998 memorandum issued to himself and two other DOI employees by Cohen. The subject of the memorandum was "Retention of Backup Tapes." The memorandum states that the Independent Counsel had advised the SOL that "effective immediately, but with respect to documents created from November 3, 1998, forward, you may reinstate your normal procedure for electronic backup and for the retention of backup tapes for your office systems." After reviewing this memorandum, Schumaker stated that he recognized it as being the one he received which instructed that he no longer needed to save the backup tapes from the SOL HQ office pursuant to the Independent Counsel investigation. He received this memorandum sometime on or about November 20, 1998. After receiving it, Schumaker and his staff again began to recycle backup tapes for the SOL HQ office. Schumaker stated that the "normal practice of overwriting tapes on a rotating basis" resumed on November 23, 1998. **(Exhibit 3E)**

Note: The memorandum that Cohen issued to Schumaker directing him to recycle electronic mail message backup tapes was issued only three days after Cohen's November 10, 1998 electronic mail message directing SOL employees to produce documents responsive to the plaintiff's discovery request.

Schumaker stated that he had no discussions with Cohen, Blackwell or anyone else concerning the potential conflict between Cohen's November 13, 1998 memorandum and any records retention issues or requirements related to the *Cobell* case. Schumaker stated that at this point he "had never heard of *Cobell*" and had been given no instructions to save any backup tapes related to the *Cobell* matter.

As a result of the practice of saving backup tapes for the SOL HQ office in connection with the Independent Counsel investigation, a total of 185 backup sets (a backup set contains data from a single backup run) contained on 206 separate tapes covering the period November 21, 1997 through November 20, 1998, in addition to one tape dated April 1, 1995, which had been misfiled and was therefore not overwritten in the normal tape rotation cycle, were accumulated.

On November 20, 1998, DOI asked the Special Master through their Motion for Reconsideration to reconsider the section of the November 9, 1998 Order that required the production of electronic mail messages retrieved from the backup tapes, claiming that it would be "unreasonable and duplicative" and would place a heavy burden on them. DOI also argued that their electronic mail backup system was not designed to store, search, or retrieve records, but was instead designed only to recover data in the event of a system failure. Further, it was argued that the process through which they would retrieve relevant data would require a substantial commitment of resources. DOI additionally suggested that they could satisfy the request by providing hard copies of the electronic mail information rather than electronic versions. In sum, the DOI argued that compliance would be "overly

burdensome, require a tremendous expenditure of resources and be of doubtful utility in light of the production of paper documents responsive to Plaintiffs' request."

When interviewed, Blackwell stated that Cohen was "pushing hard" to convince the Special Master that it was unnecessary to review these tapes, given the substantial amount of work involved in doing so.

This was confirmed by Swanson, who stated that he participated in the eventual review of electronic mail messages. Swanson described this process as being "very labor intensive" and "very burdensome."

The Special Master rejected DOI's Motion for Reconsideration on May 11, 1999, stating that the DOI's burden did not outweigh the need of the *Cobell* plaintiffs to obtain this information. He also ordered DOI to produce the documents sought through the Third Request. This Opinion and Order was filed on May 12, 1999.

Schumaker recalled attending a May 12, 1999 meeting with Cohen; Robert More, Associate Solicitor for Administration, SOL; Edith Blackwell; Susan Cook, DOJ; and David Knight, DOJ. The purpose of this meeting was to discuss the Special Master's Opinion and Order that had been filed earlier that day. While reviewing a copy of the Order during the meeting, Schumaker noticed that the Special Master had written that DOI "has been maintaining all backup tapes created from November 21, 1997 to the present." After reading this, Schumaker advised the meeting participants that this statement was incorrect, and that he had not been retaining backup tapes subsequent to November 23, 1998 based on the directions he received through Cohen's November 13, 1998, memorandum. Schumaker stated that after hearing this, Cohen became visibly "agitated" and "upset," and "his face turned white as a ghost." Cohen then stated something to the effect of, "I didn't want to hear that." In response, Schumaker advised Cohen that while he understood why he was upset, he had only done what Cohen had instructed him to do through the November 13, 1998 memorandum. Cohen then acknowledged that he had issued the memorandum, and that Schumaker had only done what he had been instructed to do.

Edith Blackwell recalled attending the May 12, 1999 meeting. She stated that up until this meeting, it was her understanding that, even though paper copies of electronic mail messages were being saved and produced, the SOL HQ office had also been maintaining the electronic backup tapes that contained these same messages. Blackwell explained that she knew that the SOL had been saving tapes in connection with the Independent Counsel investigation, and assumed that if Cohen, who supervised the SOL's activity with respect to the Independent Counsel investigation, had given a directive that backup tapes should again be recycled that he would have notified her of such. Blackwell stated that she did not learn of the November 13, 1998 memorandum from Cohen until the time of the meeting and did not assist in its preparation. Blackwell recalled that when Schumaker told Cohen that he had stopped saving tapes pursuant to his memorandum, Cohen said, "What memorandum?" Schumaker then retrieved a copy of the memorandum and showed it to Cohen, at which time Cohen acknowledged issuing it.

According to Schumaker, either Blackwell or Cook then advised Schumaker that he should begin saving backup tapes, and Schumaker asked if this was for all SOL offices or only certain ones. In response, either Blackwell or Cook stated that backup tapes should be saved only for HQ and the seven SOL field offices that might have information relevant to the plaintiff's request, which were Alaska, Albuquerque, Billings, Phoenix, Portland, Tulsa, and the Twin Cities. Schumaker stated that he was "sure" that this verbal directive to begin saving backup tapes was followed-up with an electronic mail message to him from one of the SOL attorneys.

Blackwell stated that she thought that Cohen was the one who issued the directive that backup tapes were to be saved only in the seven field offices and HQ office. However, Blackwell concurred with Cohen's directive given that trust reform work is primarily done in the HQ office, and there is very little "administration of trust" in the field. Further, only those SOL offices located in Indian Country would have such records, and these were the offices that Cohen identified.

Brooks recalled that Susan Cook of his office attended the May 12, 1999 meeting. Sometime subsequent to this meeting, Brooks learned, perhaps from Cook, that "we had made representations that we were keeping tapes, but we were not." The following Monday, Brooks telephoned the Special Master about the problem, and then later confirmed the discussion in writing. Brooks also recalled that Cohen told him that he was "not so sure" that DOI had represented to the Court that these tapes were being kept. Brooks, however, was certain that DOI had made these representations, and needed to correct them.

Schumaker said that "immediately" after receiving this verbal directive, he and his staff telephoned each of the seven field offices. Schumaker said he was certain that sometime after this discussion either Blackwell or Cohen provided him with a written list of the offices for which he should be saving backup tapes. The written list noted that these were the only SOL offices that would be doing work that could be *Cobell*-related. Schumaker recalled that the SOL field offices that he and his staff contacted and directed to begin saving backup tapes expressed some concerns about having to do so. For example, they were concerned that the tapes were too expensive not to recycle and there was no storage space in which to store the saved tapes. In addition, he and his staff received "an incredible amount of resistance" to this direction from the client agencies for the same reasons. As noted earlier, the SOL relies upon these client agencies to administer their systems in many regional and field offices.

Schumaker specifically recalled that he telephoned John Soucy, the BOR LAN Administrator in Billings, Montana, who was responsible for running the SOL's electronic mail system there, in order to request that he retain all backup tapes. Their conversation deteriorated into a "heated discussion" during which Soucy profanely "screamed" at Schumaker and stated that he was not going to save the tapes. Schumaker recalled that Soucy was "ranting and raving," and that he had "never had someone cussing at me like this" before. In response, Schumaker told Soucy that this was a serious matter and he was required to save the tapes. Schumaker subsequently reported this matter to either Blackwell or McCarthy in the SOL office. It was his understanding that Soucy was contacted about this

by one of these two attorneys. Schumaker stated that the verbal directions he received on May 12, 1999 were the first directions that he had ever received relative to the retention of electronic backup tapes related to *Cobell.*

Edith Blackwell stated that although she never discussed this matter with Soucy, she did discuss it with Rich Aldridge, a SOL employee in Billings. Blackwell recalled that she told Aldridge to direct Soucy to save the backup tapes and not be concerned with their cost.

A May 25, 1999 memorandum from Daryl White to all IRM Coordinators and Records Management Officials of the Office of the Secretary, OST, BIA, MMS, and BLM, the subject of which was "Preservation of Backup Files – *Cobell* Trust Funds Litigation" states: "The Solicitor's Office has notified us that we need to preserve existing and future backup electronic files belonging to individuals who (1) may have in the past or will in the future respond to document requests from the plaintiffs in the *Cobell* v. Babbitt [sic] trust fund litigation, or (2) may create electronic files relating to trust fund management." The timing and text of this memorandum are consistent with the events of the May 12, 1999 meeting as described by Blackwell and Schumaker. **(Exhibit 3F)**

Brooks recalled reading a draft of the memorandum that Cohen sent to White requesting that this directive be issued. Cohen told Brooks that he wrote this memorandum because he wanted to "make sure we have no more problems."

Blackwell recalled that some discussion at the May 12, 1999 meeting centered on the original 206 tapes saved from the Independent Counsel investigation. At the conclusion of the discussion, it was agreed that a search of these 206 tapes for information responsive to the plaintiff's third request would have to be conducted. Blackwell said that Cohen might have sent a memorandum to other SOL staff directing that these tapes be searched.

When Swanson was interviewed, he also recalled discussion concerning the 206 tapes saved from the Independent Counsel investigation. Swanson stated that Cohen "insisted" that because these tapes existed and were in the possession of the SOL, they had to be searched for responsive information.

According to Blackwell, the Special Master's May 11, 1999 Opinion and Order clearly required that the 206 existing backup tapes from the Independent Counsel investigation be searched for responsive documents. However, it was not clear that the backup tapes being saved in both the SOL HQ office and seven SOL field and regional offices pursuant to the May 12, 1999 meeting also had to be searched.

On August 2, 2000, DOI filed a motion seeking "clarification" of the Special Master's May 11, 1999 Opinion. Although the DOI agreed that the May 11, 1999 ruling "unequivocally mandated restoration and searching" of 206 existing backup tapes from the SOL HQ office that were created pursuant to the Independent Counsel investigation, they questioned whether the ruling "required the continued saving and searching of backup tapes for the headquarters office." DOI further queried if the Special Master "intended that backup

tapes for the Solicitor's regional and field offices be saved," given that no tapes from these offices were included in the original 206 tapes.

The review of relevant court documents also revealed that in a November 7, 2000 letter, the Special Master "attempted to elicit the defendant's justification for retaining backup tapes in only eight of the 19 branches of the Solicitor's Office (main headquarters and seven field and regional offices)." Two weeks later, on November 20, 2000, the Special Master directed the SOL to retain electronic mail backup tapes in all of its 19 main, field, and regional offices until it could "present compelling evidence why the information originating at any of these locations falls outside the purview of the plaintiffs' discovery requests."

Schumaker stated that in November 2000, he learned that the Special Master had directed that all backup tapes in all SOL offices be retained and not overwritten. He recalled that McCarthy notified each of the SOL offices that they had to begin retaining tapes. In addition, Schumaker may have also sent an electronic mail message to all offices reminding them that they were required to maintain the tapes. Schumaker stated that by this point "we were so gun-shy that we sent all kinds of notices out." He added that McCarthy may have done some follow-up to ensure compliance with this directive.

In response to DOI's August 2, 2000 motion for clarification, the Special Master filed an Opinion on July 30, 2001. In this Opinion, he stated that all responsive documents and electronic mail tapes had to be produced from all SOL offices, including regional and field offices. Further, the Special Master stated that once the DOI motion was denied on November 9, 1998, they "should have immediately produced all responsive e-mails to plaintiffs and continued to do so…." The Special Master further stated that the SOL's practice of recycling backup tapes should have ceased at the time the litigation began in 1996. The Special Master rejected DOI's claim that it should be relieved of its obligation to backup, restore, search, and turn over information contained on electronic mail tapes given that the Court's December 21, 1999 ruling had substantially narrowed the issues in the case. The Special Master also rejected DOI's claim that it should not be required to produce both hard-copy and electronic versions of the same electronic mail messages given that both would contain identical information, stating that DOI could not demonstrate that these two media did, in fact, contain the same information. Further, the Special Master rejected the argument that since SOL employees were routinely reminded to save electronic mails in hard copy form, it would be unnecessary to review the backup tapes.

Schumaker stated that between June 1996, when the initial *Cobell* complaint was filed, and May 1999, when Schumaker advised Cohen and others that the Special Master's May 1999 Opinion and Order was incorrect and that they had not been continuously retaining backup tapes since November 1997, no backup tapes were saved by the SOL for purposes of *Cobell.* However, between late 1997 and early 1999 a number of backup tapes from the SOL HQ office had been saved for purposes of the Independent Counsel, and these tapes were eventually searched for documents related to *Cobell*. Beginning in May 1999, the HQ office plus seven field offices began to save backup tapes for the specific purpose of *Cobell*. Further, beginning in November 2000 and at the specific direction of the Special Master, all SOL offices began saving backup tapes.

According to Schumaker, subsequent to November 2000, the SOL made a "good faith" effort to save and retain all backup tapes from all offices. Schumaker said that although "mistakes were made," he and his staff did everything they had been directed to do by SOL management.

Schumaker stated that he believed that the Special Master and others who have been highly critical of the SOL's efforts to produce electronic message backup tapes do not understand the relationship that the SOL has with its field and regional offices. Schumaker explained that his office, with a limited staff and limited budget, is required to administer various systems in 19 different SOL offices. The electronic mail systems in many of these offices are operated by the client agencies themselves, and not the SOL, and these agencies use different software and different procedures for managing their systems. These client agencies "do things their own way." For example, Schumaker said, the BOR uses "groupwise" electronic mail. They have installed this system in the SOL offices doing BOR work so that SOL employees in those offices could communicate with BOR employees. However, those same SOL employees must use "cc mail" electronic mail to communicate with other SOL offices. Schumaker stated that he knows nothing about "groupwise" electronic mail, and does not "have anything to do with" administering these systems. As a result, he was not able to address issues or problems relative to the saving of "groupwise" backup tapes. Schumaker stated that these kinds of problems and inconsistencies caused failures in the SOL's tape saving efforts. In addition, the personnel responsible for making the backup tapes in the field and regional SOL offices have no technical training or background. This further complicates the tape-making process. He also stated that although he understands why the *Cobell* plaintiffs believe that DOI has been misleading, none of the mistakes were made intentionally, and instead resulted from miscommunications and "judgment calls."

C. Actions of Other DOI Bureaus and Offices

(1) Bureau of Land Management

David Shearer, Deputy CIO, Division of Information Resources Management, BLM; Ted Weir, Bureau Records Administrator, BLM; Matthew Stewart, Group Manager, IT Services, BLM; and Larry Money, Policy and Records Group Manager, BLM, were interviewed concerning BLM's practices for retaining electronic mail messages and corresponding system backup tapes.

According to these individuals, the first directive that BLM received relative to the retention of *Cobell* records was the May 25, 1999 memorandum from White which directed that electronic mail backup tapes for those individuals working on *Cobell* or trust fund management issues be saved. However, Shearer and the others noted that this is not a static group, and that individuals change jobs, change duties, and move into and from acting jobs. This made it difficult to specifically identify those persons whose backup tapes had to be saved. They also recalled receiving the September 15, 1999 memorandum issued by Cohen that directed all personnel to print and file copies of all electronic mail messages concerning

the *Cobell* litigation and related matters. The memorandum also directed that electronic mail messages should remain on a computer overnight such that it can be copied to a "non-archival" backup tape. Shearer noted that this directive focused on the fact that electronic mail messages had to be printed and filed, and thus at the time he and others within BLM viewed it as a paper records matter rather than an electronic tape matter. **(Exhibit 3G)**

According to Weir, shortly after he became BLM's Bureau Records Administrator on February 5, 2001, he recognized that there were a number of Instructional Memoranda (IMs) "floating around," and he wanted to collect and organize them. While doing so on May 2, 2001, he identified BLM IM 2000-021, which stated that "Employees receiving or sending e-mail discussing the above mentioned Indian Trust information [i.e., The Cobell [sic] litigation, High Level Implementation Plan or any of its sub-projects, the Individual Indian Money Trust Administration, or Trust Reform] shall not delete the e-mail messages from their computers until the messages have remained on their equipment overnight and are captured by the daily computer backups or saves. Refer to BLM Manual 1220 for further information on backup tape procedures and the appropriate retention time." Weir stated that BLM Manual Section 1220 states that monthly system backup tapes will be maintained for a period of six months and then recycled. Attached to this IM was the September 15, 1999 memorandum from Cohen. After reading these documents, it became apparent to Weir that there was a "possible discrepancy" between the "intent" of Cohen's September 15, 1999 memorandum and BLM's policy at the time concerning the retention of backup tapes. Weir explained that he did not understand why the memorandum would direct that electronic mail messages be left on a computer overnight such that they could be recorded on backup tapes, but goes on to state that the backup tapes were "non-archival" and provide no information relative to the length of time that the tapes should be retained. Further, Weir knew that backup tapes are not considered to be Federal records, and that the term "non-archival" meant that they could not be preserved. In summary, Weir stated that he found the September 15, 1999 memorandum to be conflicting and confusing.

On the evening of May 2, 2001, Weir attempted to contact McCarthy in the SOL to discuss the discrepancy with her. However, she was not available and he instead discussed the matter with Swanson. During their discussion, Weir explained the apparent conflict between Cohen's memorandum and BLM policy and practice, and after doing so Swanson agreed that there appeared to be a possible conflict.

Sometime later that month, Weir and Stewart and other record managers from BIA, MMS, BLM, and OST met with DOJ and SOL attorneys to discuss the retention of *Cobell* records. The purpose of this meeting was to obtain more specific directives and instruction on the retention of these records. During this meeting, the record managers were advised by the SOL that they would soon issue guidance for both individual employees and CIOs and system administrators relative to retaining *Cobell* information. A follow-up meeting was held sometime on or before May 11, 2001. At this meeting Alan Burke of the SOL began to distribute copies of the promised guidance. However, McCarthy, who stated that all necessary parties had not yet approved the document, stopped him from doing so. McCarthy further advised the meeting attendees that the SOL would issue specific guidance on the issue before the end of May 2001. Weir stated that he did not raise the discrepancy that he had

identified for discussion at the meeting because the SOL had indicated that they would soon be providing additional guidance to address the discrepancy.

By late May 2001, no guidance had been received from the SOL as promised. As a result, Weir telephoned McCarthy to discuss the matter with her and obtain the guidance he was seeking. Weir said that either he spoke to McCarthy directly and she stated that the guidance was still not ready for distribution, or she never returned his calls. In either case, he did not receive the information he was seeking. By June 25, 2001, Weir had still not received any guidance from the SOL and felt that BLM was in a "vulnerable" position. On June 25, 2001, in an attempt to "force the issue," Weir sent an electronic mail message to McCarthy, attached to which was a draft version of an IM that Weir had prepared. Weir advised McCarthy that his office would issue this IM, with her concurrence, "in lieu of guidance from the Solicitor's Office." After sending this message, Weir "quickly" received a telephone call from McCarthy, who told him that the IM could not be issued because they were in the process of negotiating strategy for upcoming court proceedings and did not want BLM to issue a directive that might conflict with this strategy. Weir again told McCarthy that BLM needed written guidance from the SOL and she assured him that it would be forthcoming.

Weir stated that throughout the rest of the summer of 2001, BLM was in "suspended animation," waiting for guidance from the SOL. Such guidance eventually came by way of an August 3, 2001 memorandum from Daryl White, which reminded CIOs of the requirement to preserve existing and future electronic mail system backup tapes related to Indian trust management and IIM accounts. Shearer stated that this memorandum seemed to be a "re-issuance" of the May 1999 memorandum from White. However, Weir noted that in some respects this memorandum "muddied the water further." For example, the August 3, 2001 memorandum introduces the concept of records by discussing the "appropriate protection and retention of records…." In contrast, the September 15, 1999 memorandum rules out the concept of records by stating, "This also includes electronic messages which may not be considered Federal records…." Weir further stated that while the CIO's memorandum applies to those offices that send or receive Indian trust electronic mail, the instructions in the SOL memorandum apply to all employees. Weir stated that further confusion resulted because backup tapes are not considered to be Federal records by the NARA. **(Exhibit 3H)**

After BLM received White's August 3, 2001 memorandum, Shearer convened a conference call meeting with all BLM CIOs from the various BLM offices and directed that they immediately begin saving all electronic mail backup tapes and that they do so indefinitely.

Because BLM routinely recycled or overwrote their backup tapes every six months, tapes were in existence as far back as approximately November or December 2000. Accordingly, each BLM office should have all backup tapes from this time period forward, excluding those that have failed or are otherwise unreadable. Shearer noted that there are 17 different state and "center" offices operated by BLM.

(2) Minerals Management Service

Phil Sykora, Manager, Information Technology Center (ITC), Royalty Management Program (RMP), MMS, DOI; Robert Smith, Deputy Manager, ITC, RMP; Joseph Lopez, Manager, Policy and Security Group, ITC, RMP; and Alene Markoff, Manager, Technology Infrastructure Group, ITC, RMP, were interviewed.

According to these individuals, MMS received the May 25, 1999 memorandum from White concerning the preservation of existing and future electronic mail message backup tapes related to the *Cobell* litigation. In response to it, by approximately June 1999, MMS was saving backup tapes from all six on-site locations where electronic mailboxes are maintained, including Denver, Colorado; Metairie, Louisiana; Herndon, Virginia; Washington, DC; Camarillo, California; and Anchorage, Alaska. Sykora noted that MMS employs the services of a private contractor to manage their electronic mail system, to include making backup tapes. All backup tapes are made from the Denver location. According to Markoff, approximately 800 tapes have been made and saved. Sykora stated that notwithstanding technical and tape failures, MMS should have all electronic backup tapes from all sites from approximately June 1999 forward, although in some instances this is not necessary for purposes of *Cobell*. For example, no Indian leases are located offshore.

Sykora also noted that due to the technical failures of backup tapes, "the only safe way" to ensure that all messages are captured is by printing them.

D. Actions by Specific DOI Employees and Offices

(1) Edith Blackwell

In his July 27, 2001 Opinion, the Special Master noted that in Blackwell's December 5, 2000 response to his November 7, 2000 letter, she "referred to a "recent" survey generated (on November 20, 2000) and disseminated by the Solicitor's Office to all of its field offices "to better determine which offices may have responsive materials to any *Cobell* discovery request."" The Special Master questioned the issuance of this survey, writing that the timing of the survey "naturally begs the question why the Office of the Solicitor would disseminate a questionnaire on November 20, 2000 to determine which of its field and regional offices were most likely to contain responsive information to a discovery request filed on July 11, 1998."

When interviewed, Blackwell explained that she, McCarthy, and Elliott developed this survey. Although she was not certain, Blackwell recalled that the idea for the survey was probably her own. When questioned about the need for this survey, Blackwell stated that for a number of months she had been receiving verbal assurances that all SOL offices were complying with the electronic message backup tape retention requirements as well as the printing requirements, and, as a result, she had a "good faith" basis to believe that compliance was occurring. However, Blackwell "wanted to be sure" that these offices were, in fact, complying, and that there would be "no surprises" at some later point. "I wanted something in writing," said Blackwell.

As a result, she issued the survey in order to be absolutely certain that the SOL offices were complying with Orders of the Court and the Special Master. Blackwell stated that this was not a belated attempt to gather information, but instead an additional attempt to confirm that her understanding about information already being gathered was correct. Review of a November 20, 2000, electronic mail message authored by Blackwell disclosed that Blackwell described the purpose of this survey as to "better determine those offices that must retain backup tapes." Blackwell noted in this message that employees were still required to print and save all relevant electronic mail messages. **(Exhibits 3I and 3J)**

When Elliott was interviewed, he stated that he had only a "very vague" recollection of this survey, but that he probably reviewed it. He was unable to recall the purpose of the survey.

The Special Master also wrote in his July 27, 2001 Opinion that Blackwell wrote in a December 5, 2000 letter that it was "incumbent" upon DOI to file their November 20, 1998 Motion for Reconsideration because the Court's November 9, 1998 Order was "silent" regarding the issue of backup tapes. According to the Special Master, "Ms. Blackwell's contention concerning the "silence" of the Court's November 9, 1998 Order simply does not square with her own July 22, 1998 declaration wherein she explicitly acknowledges that, "Plaintiff's definition of 'documents' … include paper documents and information stored on computers." The Special Master further stated that "[s]ince Ms. Blackwell, in July 1998, understood plaintiffs' request to include computer-encoded data, she must have been aware that the Court's November 1998 denial of defendant's motion necessarily required the agency to, at a minimum, retain all potentially relevant backup tapes." **(Exhibit 3K)**

When interviewed, Blackwell stated that she believes there is nothing inconsistent between her July 1998 declaration and her December 2000 letter. She explained that from the outset of the litigation DOI had been producing hard copies of "information stored on computers," and as a result there was no need to produce the exact same information in an electronic version. She also stated that DOI was producing information that was stored electronically, but was producing it in a hard copy form.[13]

Blackwell further stated that the first time the SOL had been asked to save electronic mail message backup tapes was in connection with the Independent Counsel investigation. Although the SOL was saving these tapes, they were not providing them to the Independent Counsel. Instead, they provided printed versions of certain messages. This practice further supported the notion that only the printed version of these messages needed to be produced.

Blackwell stated that with the "20/20 hindsight" they now have, the SOL certainly would have "done things differently." At the time, however, decisions were made based upon existing practice and policy within the SOL and DOI.

[13] In May 2001, a consulting firm hired by the Special Master reported that the information contained on backup tapes can be different from the information that would be contained on an accurate paper copy generated by either the message sender or recipient.

(2) Nancy Jemison and James Douglas

In his July 27, 2001 Opinion, the Special Master wrote that, "…on August 7, 1999, it came to light that Bureau of Indian Affairs Director of the Office of Trust Reform Nancy Jemison was regularly deleting e-mails from her computer system while printing and saving only the last in a string of messages."

Jemison was interviewed and stated that sometime in early 1999, a one-page directive was issued by Cohen concerning the retention of electronic mail messages and documents. At that time Jemison served as the Director of BIA's Trust Management and Improvement Project. Jemison stated that rather than print each individual electronic mail message that she sent or received, she printed only the last in a string or series of related messages. Jemison stated that by doing so, she did not lose any transmission data and did not lose any information that she should have otherwise saved. Jemison noted printing these electronic mail messages was an "onerous" task, and she oftentimes worked on the weekends to accomplish this. Based on her conversations with other employees, including Gover, she knew that these employees were also printing only the last in a string of messages, like she was, rather than each individual one. In August 1999, Jemison learned that she should print each and every electronic mail message individually, and, as a result, began to do so. In sum, Jemison admitted that it was her practice to print only the last in a string of related messages, rather than each individual message. However, she believed that by doing so she was complying with the directive from Cohen regarding the retention of electronic mail messages. Once specifically instructed to print each and every electronic mail message individually, she did so.

A review of relevant correspondence revealed that on August 31, 2001, the Special Master was advised by DOJ that on or about August 16, 2001, James Douglas, Chief of Staff, OST, had destroyed approximately nine months worth of his own electronic mail messages. In addition, questions about whether Douglas was printing hard copies of these electronic mail messages, as all DOI employees had been instructed to do, were also raised. Douglas was interviewed and stated that in response to a request for information from the Special Master, he conducted a review of his own electronic mail messages. While doing so, these messages were inadvertently deleted. However, they were subsequently restored and provided to the Special Master.

When Gover was interviewed, he stated that he printed all official electronic mail messages that he sent and received, and left "reams and reams" of printed versions of his electronic mail messages in his files when he left DOI on January 3, 2001. In addition to printing these messages, Gover left them on his computer system overnight such that they would be copied to a backup tape. Gover stated that rather than print each individual electronic mail message that he sent or received, he instead printed only the last in a string or series of related messages. Gover said that he thought that by doing so, he did not lose any transmission data and did not lose any information that he should have retained. However, sometime towards the end of 2000 he discussed this matter with Jemison, who advised him that she had engaged in the same practice of printing only the last in a string of messages but

had since been directed to print each message individually. After this discussion, he, too, began to print each message individually.

(3) SOL HQ System Failure

In his July 27, 2001 Opinion, the Special Master wrote that "Even after the May 1999 Order, defendant's compliance with its discovery obligations can best be depicted as spotty." As evidence of this "spotty" compliance, he cited a number of instances wherein electronic mail backup tapes were missing, lost, or unaccounted for. The Special Master specifically noted that "…the entire e-mail system at the Solicitor's Office Headquarters "crashed" on October 6, 2000."

When interviewed, Schumaker acknowledged that in early October 2000, the entire electronic mail system at the SOL HQ did "crash" after the database became corrupted. Schumaker stated that he and his staff ran diagnostic routines provided by the publisher of the electronic mail system and ultimately learned that the system had crashed because it was holding four gigabytes of information, which is the limit for this particular system. Because it had reached its maximum capacity, the repair programs would not run. In order to repair the system, all messages over one year of age were deleted from the existing system, which allowed it to return to an operationally acceptable level of two gigabytes. Schumaker noted that all of these messages were contained on one or more backup tapes and therefore nothing was lost by doing this.

Schumaker explained that the system became overloaded with information because SOL employees stopped deleting messages from their inbox due to the "paranoia" surrounding the deletion of information. Schumaker noted that he found it quite ironic that by attempting to comply with the directives concerning the saving of electronic messages, SOL employees actually caused the system to crash.

The crash was confirmed by Elliott, who recalled that Schumaker told him that the system had crashed because it had become overloaded. According to Elliott, the system was "down" only a short time, and the only messages that were lost were those that had been sent within the SOL that morning.

(4) Albuquerque SOL Office

As further evidence of DOI's "spotty" compliance with its discovery obligations, the Special Master in his July 27, 2001 Opinion pointed out that "twelve backup tapes from the Albuquerque Regional Office were lost in the mail."

Wheeler Green, former Administrative Technician, Southwest Regional Office (SWRO), SOL, Albuquerque, New Mexico, was interviewed and stated that as Administrative Technician, he was responsible for making electronic message backup tapes in the SWRO. However, Green said that he had received no technical training concerning this process. Although Green could not recall specifically when this occurred, he did recall that at some point he was advised by Schumaker's office, perhaps by way of electronic mail

message, that his office should cease overwriting backup tapes and instead save all original backups. Green stated that sometime in late 1999 or early 2000, he sent twelve original backup tapes to Schumaker's office in a box by way of the U.S. Mail. Green stated that the box was sent by "regular" mail, and was not registered, certified or insured. Green stated that he subsequently learned that this package was never received by Schumaker's office. Attempts to ascertain the status of the package by both Green and SOL HQ employees were unsuccessful.

When Schumaker was interviewed he stated that at one point his office telephoned all of the regional and field SOL offices and requested that they forward their accumulated backup tapes. At some subsequent point Schumaker realized that no tapes had been received from the Albuquerque office. He contacted the Albuquerque office and learned that the tapes had been mailed, but had apparently been lost in the mail. Schumaker noted that some of these messages would have been captured on the backup tapes of other SOL offices.

(5) San Francisco SOL Office

Review of an August 27, 2001 letter from the Special Master to DOJ disclosed that some backup tapes from the SOL's San Francisco Field office might have been destroyed.

Ralph Mihan, Field Solicitor, San Francisco Field Office (SFFO), SOL, Oakland, California, was interviewed and stated that he recalled receiving, completing, and returning the November 20, 2000 survey issued by the SOL HQ office relative to *Cobell* documents. Mihan stated that he has been employed in the SFFO since 1967, and that the SFFO has "absolutely, never, ever" performed any work related to BIA or IIM accounts, and he completed the survey in a manner that reflected this fact. The survey was returned to the SOL HQ on November 22, 2000, and Mihan received no further instructions or response from them.

Review of a draft letter from the SOL to DOJ dated September 6, 2001, confirmed that the survey as described by Mihan and Blackwell was issued by way of electronic mail message at approximately 12:30 p.m. on November 20, 2000. At 6:04 p.m. that same day, however, the SOL received the Special Master's November 20, 2000 letter directing that all SOL offices retain all backup tapes. The SOL HQ office subsequently notified the field and regional offices of this new directive by way of a second electronic mail message issued later that evening. This second message directed that the regional and field offices retain backup tapes "until you can present compelling evidence why the information originating at any of these locations falls outside the purview of the plaintiffs' discovery requests."[14] According to this letter, the SFFO "became confused by these two communications and assumed they could continue overwriting email backup tapes because they answered every question on the survey "no," and performed no Indian trust work."

When interviewed, Mihan stated that there was no "confusion" in his determination that his office was not required to save backup tapes. Instead, the survey very clearly stated that if "compelling" evidence was available to show that the work product of a particular

[14] This identical language was used in the Special Master's letter of the same date.

office fell outside the purview of the *Cobell* litigation then that office did not have to save backup tapes. Mihan stated that he viewed the fact that in his 34 years of experience at the SFFO the office had "absolutely, never, ever" done any BIA or IIM work to be "pretty compelling" such that his office did not have to save tapes.

Mihan stated that in August 2001 while on vacation in Nevada, SFFO Deputy Field Solicitor Bill Silver contacted him. Silver advised him that he had been contacted by SOL HQ and advised that the office should immediately begin to save backup tapes. Since that time the SFFO has been saving all tapes.

Review of Mihan's August 23, 2001 *Cobell* declaration disclosed that Mihan wrote that in the spring of 2001, a secretary who has since left the SFFO disposed of many old backup tapes in preparation for the office move from San Francisco to Oakland. When interviewed, Mihan identified this secretary as Lynn Ng, who had been employed by the SFFO for ten years, but who left the office in April 2001. Mihan explained that in preparation for the office move from San Francisco to Oakland, which was originally scheduled for March 2001, all employees in the office were "strongly urged" to dispose of old and non-essential items. Mihan charged Ng with taking care of the office computer room, which had one full wall covered with book shelves containing ten years worth of accumulated "junk," such as obsolete computer manuals, software books, diskettes, training videos, computer equipment, and other items. Mihan recalled that Ng discarded "a couple of trash bins full" of such material, and backup computer tapes may or may not have been included in this material. Mihan stated that if tapes were disposed of it was done inadvertently. Mihan noted that although in his declaration he had stated that backup tapes were disposed of by Ng, he subsequently learned that such tapes may or may not have been destroyed.

After arriving at their new office space in Oakland, Mihan learned that 17 backup tapes had been saved and transported to the new office. These tapes were provided to the SOL HQ in October 2001. Mihan said that it was possible that these 17 tapes were the only ones in the possession of the SFFO, and that no tapes had been discarded during the move. Mihan further stated that in approximately July 2001, the SOL HQ office "did something" electronically such that the SFFO could no longer recycle backup tapes, and they instead would append the tapes with each new backup. Mihan stated that his office was not advised that this had been done until sometime well after July 2001.

Mihan also noted that his office does not employ a person with technical background relative to electronic mail or computer systems. Instead, their system is operated and maintained by the National Park Service (NPS).

(6) Phoenix SOL Office

Review of the Special Master's July 27, 2001 Opinion and November 20, 2000 letter disclosed that by way of this letter, the Special Master directed DOI to produce "a representative sample backup tape of each type generated by the Office of the Solicitor's main office in Washington, D.C., by the Anchorage and Albuquerque Regional Offices and

by the Billings, Portland, Phoenix, Tulsa, and Twin Cities Field Offices…." Between November 22, 2000, and December 6, 2000, DOI produced 30 backup tapes, two compact discs, and one zip disc in response. Of these 30, four tapes generated by the Billings and Phoenix offices were delivered to a private firm for analysis. Three of these tapes were in 8 mm format while the fourth was a 50gb cartridge. In his July 27, 2001 Opinion, the Special Master wrote that, "Curiously, the tape labeled "PX-1," from the Phoenix office, was virtually empty and contained no email or data files. There is one small text file that was created by the tape backup software that is present."

Katherine Ott Verburg, Field Solicitor, Phoenix Field Office (PFO), SOL, Phoenix, Arizona; Jackie Balaga, Secretary, PFO; and Joe Billerbeck, Computer Specialist, BOR, Phoenix, were interviewed concerning these tapes. Verburg explained that the PFO does not employ a person with technical background relative to electronic mail or computer systems, and they instead rely on the services of Billerbeck and BOR.

Verburg stated that between May 1999 and December 21, 2000, her office was unable to make any backup tapes due to incompatibilities between their existing hardware and software. However, in late December 2000 her office received "hand-me-down" equipment from BOR that they then began to use to make backup tapes. Billerbeck stated that this equipment consists of 8 mm tape machines, which he described as being "somewhat dated," but generally reliable. Verburg stated that in November 2000 the PFO moved into the new Federal courthouse building in Phoenix. Through late 2000 and early 2001 the building was plagued with numerous electrical failures and these problems may have resulted in some backup tapes not being made.

According to Balaga, 8 mm tapes are the only type of tape that the PFO has used since they began making backup tapes. Neither Verburg, Billerbeck, nor Balaga had any explanation for the fact that one of the tapes described above was virtually "empty." Balaga stated that no one from the PFO labeled the tape "PX-1," and someone must instead have done this after the tape left the PFO. Balaga noted that the Special Master's Opinion does not specifically identify what kind of tape was "virtually empty." She noted that it might have been possible that the SOL HQ office sent them a 50gb for use as a backup tape that did not work in their system. This same tape may have been returned to the SOL HQ and then forwarded to the private firm.

In summary, Verburg stated that she had no explanation for the existence of the blank tape. However, she stated that PFO does not perform any work involving IIM or allotment asset transfers. She also stated that, "Even if there was something I wanted to erase [from a backup tape], I wouldn't know how to do it."