

**THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>ELOISE PEPION COBELL et al.</b>	)	
	)	
<b>Plaintiffs</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No.</b>
	)	<b>96-1285 (RCL)</b>
<b>GALE A. NORTON</b>	)	
<b>SECRETARY OF THE INTERIOR, et al.</b>	)	
	)	
<b>Defendants</b>	)	
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**SEVENTH REPORT OF THE COURT MONITOR**

**I. INTRODUCTION**

This is the seventh report in a series of reports submitted by the Court Monitor pursuant to this Court’s Order of April 16, 2001, to review and monitor “all of the Interior defendants’ trust reform activities and file written reports of (the Court Monitor’s) findings with the Court.”<sup>1</sup>

This report will address the Court Monitor’s review of the progress of trust reform with respect to the Secretary of the Interior’s actions regarding the Special Trustee and the Office of Special Trustee since her “Notice of Proposed Department of the Interior Reorganization to Improve Indian Trust Assets Management” submitted to this Court on November 14, 2001 notifying this Court of a reorganization process underway “to improve the management of trust assets” to “effectively implement trust reform and eliminate problems identified by the Court, the Court Monitor, Interior, and Interior’s consultant, Electronic Data Systems Corporation (‘EDS).” *Id.* at 1.

Secretary Gale Norton had concurred with a joint recommendation of the Special Trustee for American Indians and the Assistant Secretary – Indian Affairs, “to begin the process of reorganizing Interior’s trust asset management.” *Id.* at 2.

A “Declaration of J. Steven Griles” (Deputy Secretary of the Department of the Interior) accompanied the Notice and stated in part that:

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<sup>1</sup> The term of the Court Monitor’s appointment was extended for an additional year by Order of this Court on April 15, 2002.

**“10. The proposed reorganization consolidates Indian trust asset management functions in a single agency separate from the OST and BIA: the Bureau of Indian Trust Assets Management. Segregating these trust functions is intended, as in the private sector, to facilitate the development of performance measures, processes, controls, and systems that are designed to meet Interior’s fiduciary obligations.**

**11. The Bureau of Indian Trust Assets Management will report to an Assistant Secretary for Indian Trust Assets Management (BITAM). This new Assistant Secretary will have authority and responsibility for Indian trust asset management. The Special Trustee will continue to perform oversight for Interior’s trust reform efforts. BIA, under the supervision of the Assistant Secretary – Indian Affairs, will continue to provide those services to Indian tribes and individuals that are not related to trust assets.”** *Id.* at 3.

In the “Sixth Report of the Court Monitor” filed on February 1, 2002, the BITAM proposal was discussed at some length. The fact was noted that it was not much more than an organizational chart devoid of details regarding the identity of the officials to lead the organization’s trust reform and operations and any idea of their background in trusts, systems, or management of large government or commercial agencies involved in the provision of fiduciary trust services to hundreds of thousands of beneficiaries. *See* Report at 36-37.

Also, The Court Monitor addressed the proposition that, while the Deputy Secretary stated the Special Trustee would continue to perform oversight of BITAM and the Department of the Interior’s (DOI) trust reform efforts, the more important questions regarding his role would be whether he would be given the resources and personnel to permit him to appropriately oversee the BITAM’s development and operations, and the authority and ability to assure the Secretary and the Congress that trust reform was finally on the road to recovery and trust operations were functioning properly. Finally, the Court Monitor expressed concern regarding whether the Secretary’s counselors and BITAM would follow the Special Trustee’s observations and advice (if not direction) any better than DOI officials had in the past as reported in the Court Monitor’s prior Reports. *Id.* at 36.

The Court Monitor also stated:

**“The Special Trustee’s observations on the proposed reorganization are not addressed within the Eighth Quarterly Report. It might be of interest to this Court and the Congress to determine what his opinion is about the reorganization’s potential to meet the strict Indian Trust fiduciary obligations of the Defendants, what role he has established with the Secretary for the Office of Special Trustee regarding BITAM, and what is the position of the Defendants on supporting that future role with resources, staff and counsel. Without a strong oversight function by the Office of Special Trustee, only this Court will be able to confirm the Defendant’s reports of trust reform progress through further oversight and discovery. Congress will have no ability to obtain the information the 1994 Reform Act sought by establishing a Presidential appointee as their source of oversight and control over Defendant’s (sic) activities and compliance with Congress’ trust reform provisions in that Act.”** *Id.* at 37, fn. 20.

The Secretary of the Interior, in her February 13, 2002 testimony at her contempt trial, responded to a series of questions from this Court addressing the Special Trustee's role in the ongoing trust reform effort regarding her announcement of the reorganization of DOI to address trust reform and involving the establishment of a separate organization outside of the Bureau of Indian Affairs (BIA) – BITAM. She was asked:

**THE COURT:** And what do you see the role of the Special Trustee in putting that together?

**THE WITNESS:** He would be one of the people involved, first of all, as part of our management team council that would be working on issues on a regular basis. Some of them are things that would involve the Special Trustee specifically. There are a lot of things in terms of the procedures that need to be followed, the avoidance of conflicts of interest, the necessary accounting standards, those types of things, where I would see the Special Trustee having particular expertise to be involved.

And we also have the Special Trustee's role that will be an oversight role, and that's something that he performs by virtue of his statutory responsibilities as well as the consistent role that we have seen for him through the reorganizational process.

**THE COURT:** Do you anticipate him having the same budget authority he has now about helping in the process of allocating the money out to the components, or do you see his role changing in that?

**THE WITNESS:** He has a statutory role in terms of certifying the budget, and obviously that would continue. There also is a significant portion of the budget that goes through his office and so that is something - - certainly in the short run our funding is allocated either to BIA or to the Office of Special Trustee, and there's no in-between for the new bureau, however that is created. And so he - - his - -

**THE COURT:** He necessarily will be involved in that funding, then?

**THE WITNESS:** Yes.

**THE COURT:** Now he had a statutory role for the development of the strategic plan. The original Special Trustee developed one that Secretary Babbitt then threw out the window. What do you see as his role now in terms of the strategic plan, and what's the difference in that strategic plan and this business plan that you're talking about? Is there a difference and why isn't his responsibility to develop it?

**THE WITNESS:** I think it has grown far beyond just a one-person job, and it's something in which everybody in trust reform is going to have to be involved. We're going to have to have our consultants, our BIA people, our Mineral Management Service, BLM, everybody is going to have to be involved in this process. And I see it as much more detailed than I think the kind of strategic plan that would be submitted to Congress would be.

**THE COURT:** So you see this more in terms of an operations plan?

**THE WITNESS: Yes. I mean this is going to outline everything we're going to live by. It's our complete to-do list. It's our way of charting our course for the future and making sure that all of those pieces fit together."** Trial Tr. at 4384-4386.

But Congress did not speak in terms of an "operations plan" for what the members wanted the Special Trustee to design. Specifically, the 1994 Reform Act stated:

**"The Special Trustee shall prepare and, after consultation with Indian tribes and appropriate Indian organizations, submit to the Secretary and the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, within one year after the initial appointment is made under section 302(b), a comprehensive plan for all phases of the trust management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians in compliance with this Act."** See 25 USC 4042, Section 303 (a) (1) et seq.

The Act went on to outline the Plan requirements that included 1) "identification of all reforms to the policies, procedures, practices and systems of the Department...necessary to ensure the proper and efficient discharge of the Secretary's trust responsibilities in compliance with this Act;" 2) "provisions for opportunities for Indian tribes to assist in the management of their trust accounts and to identify for the Secretary options for the investment of their trust accounts, in a manner consistent with the trust responsibilities of the Secretary, in ways that will help promote economic development in their communities;" and 3) a timetable for implementing the reforms identified in the plan." *Id.*

The Special Trustee's "Duties" outlined by the 1994 Reform Act included:

- **"The Special Trustee shall oversee all reform efforts within the Bureau, the Bureau of Land Management, and the Minerals Management Service relating to trust responsibilities of the Secretary to ensure the establishment of policies, procedures, systems and practices to allow the Secretary to discharge his trust responsibilities in compliance with this Act.**
- **The Special Trustee shall monitor the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders, with a fair and accurate accounting of all trust accounts."**
- **The Special Trustee shall ensure that the Bureau establishes appropriate policies and procedures, and develops necessary systems....**
- **The Special Trustee shall ensure that the Bureau establishes policies and practices to maintain complete, accurate, and timely data regarding the ownership and lease of Indian lands."** *Id.*

The Act included similar duties for the Special Trustee regarding the Bureau of Land Management and the Minerals Management Service as well as the overall coordination of policies, standardization of procedures, and integration of land records, trust funds accounting, and asset management systems among agencies. The Special Trustee was assigned the responsibility for developing for each fiscal year a consolidated Trust Management program budget proposal for submission to the Secretary, the OMB, and the Congress. He was to certify the adequacy of each budget request to discharge, effectively and efficiently the Secretary's trust responsibilities under the Act.

The history of the implementation of the 1994 Act and the resulting controversy between the first Special Trustee and Secretary Bruce Babbitt will be addressed later. However, what has the present Special Trustee said about the Secretary's present plans to reorganize the DOI to address future trust reform and trust operations and create The Bureau of Indian Trust Asset Management (BITAM) out of whole cloth? In testimony to Congress, he has specified what he believes to be necessary to include in the role of the Special Trustee to fulfill his responsibilities under the Act.

On February 26, 2002, the Special Trustee submitted written testimony to the Senate Committee on Indian Affairs that addressed his views on the current state of trust reform and the continuing role of the Office of Special Trustee in exercising his Congressionally mandated duties under the new organizational plan (**Tab 1**).

First, with regard to the DOI's current trust reform picture, he wrote:

**“Trust reform, as well as the ongoing delivery of trust services to these individual and tribal beneficiaries, has reached a point where radical measures need to be undertaken now. Specifically, the Department's discharge of its trust responsibilities, as it is now organized, is inadequate to the demands placed upon it.**

**The primary problems are as follows. First, there is the need for a clear understanding of the Government's trust obligation to the beneficiaries. Second, there is a great need for experienced trust management, and, finally, there is the need to ensure accountability by those responsible for delivering trust services....**

**Today the Department cannot perform its trust duties at the level required by the Reform Act. Trust reform to date has not achieved an acceptable level of success, and, indeed, to speak of *trust reform* is misleading. The implementation of selected trust systems and data cleanup efforts is only the prelude to trust reform. It is the acquisition of the basic tools to do what needs to be done. It is selecting and buying the plow. Cutting the furrows lies far ahead. Actual trust reform must be accomplished. By properly serving the best interests of these Indian beneficiaries, the trustee – the Government – protects itself from the high risk of liability that OMB spoke to in 1980.**

**The problems that trouble the Department are management problems. The lack of management capability is signaled by the evident need for senior managers with experience in delivering trust services and operating trust systems in the private sector. Additionally, there is a critical need for senior level, project management skills applicable to large trust operations projects. The execution of those Federal fiduciary obligations must be rationalized.**

**The lack of accountability refers to the need to have all staff that are charged with trust responsibilities perform as directed by informed and responsible senior managers.**

**Until a clearer understanding of the trust obligation, better management, and more accountability are in place *regardless of what the trust organization looks like*, it will be difficult for the Government to come into compliance with the 1994 Reform Act.”**

**I concur with the Secretary’s concept of a single organizational unit responsible for the management of the Indian trust assets. That organization has the potential of addressing the accountability concerns by placing one executive, responsible to the Secretary, in charge of the delivery of the appropriate, required trust services to tribes and individual Indians. I believe a single organization with its own chain of command, that is one not diluted by intersecting other Departmental chains of command, can work better than the present organization. The devil, however, is in the details, and the new organization must have the best trust executive direction and actually hold people accountable. I also believe that the trust organization needs to be separated from other activities of the Bureau of Indian Affairs and placed on its own footing.**

....

**Finally, let me comment on the notion advanced by some parties these days that the administration of the Government’s trust can be split into seemingly separate organizations, one for individual Indians and one for the tribes. I understand that litigation issues prompted this alternative. It is highly impractical in my opinion, however, to split administratively and operationally those trust responsibilities that have virtually identical characteristics of accounting, beneficiary reporting, land management (sometimes overlapping), investment management, and tribal distributions to individuals. Its only result would be to create two similar organizations that would be at odds with each other.**

*Id.* at 3-6, emphasis in original.

Addressing the need for that clearer understanding and accountability, the Special Trustee advised the Senate Committee on Indian Affairs of his view of the appropriate role of the Office of Special Trustee (OST) regarding the reorganization:

**“I believe that the Special Trustee must have the opportunity to provide candid and informed guidance directly to the Secretary as she seeks the more effective management of the trust responsibilities under her control. The Office of Special Trustee (OST) will continue to focus on its oversight responsibilities. Therefore, OST must be provided appropriate resources and pursue every opportunity to ensure that trust reform is carried out effectively and efficiently.**

**Last July, the Secretary authorized the Special Trustee to issue written directives requiring the adoption of appropriate changes in existing policies that hinder trust reform. Although such directives can be overruled by the Secretary on appeal, the authority to issue such directives may prove a valuable tool. However, it is not as effective as active direct line authority over those in the Department who implement trust policies and practices. Also, I am concerned that the fundamentals of trust reform can be diluted by political considerations arising out of the consultation process.**

**Currently, the Office of Special Trustee receives appropriations for trust reform activities, no matter where in Interior the reform project is managed. OST then initiates the funding of projects when and if adequate plans and management appear to be satisfactory. In some instances, we have found it necessary to interrupt funding when expected project success is not being achieved. This process has proven helpful to the reform process and has given the Special Trustee a useful and independent voice in that effort. I believe this budget control over the reform of the trust function should continue to be a part of OST's oversight responsibility. The independence and informed objectivity of the OST is essential to achieving lasting trust reform." *Id.* at 4-5.**

On February 25, 2002, the Special Trustee also provided the Congressional committees with oversight responsibilities for the DOI and the Secretary's trust reform efforts with a letter outlining the OST's statutory responsibilities (**Tab 2**). The letter had as an attachment a memorandum, dated February 4, 2002, that he had sent to his staff entitled, "Trust Reform Oversight."

The letter indicated that the Special Trustee supported the Secretary's proposal to reorganize the existing management process placing one executive in charge which would enable, in the view of the Special Trustee, the DOI to provide for the more effective management of, and accountability for, the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians. However, the Special Trustee characterized the effort to create a new organization as a "daunting task." *Id.* at 1.

The Special Trustee also described his task as one to "ensure the implementation of all reforms necessary for the discharge of the Secretary's trust responsibilities to the Indian beneficiaries no matter where those responsibilities are located with the Department." *Id.*

The Special Trustee stated:

**"The Secretary's proposal to create a new and discrete management unit for these Indian assets is a bold and important element in the eventual successful reform needed to bring the Department into conformity with the Trust Reform Act. The work necessary to create and maintain controls, consistent written policies and procedures, appropriate staffing, supervision, and training must be aggressively pursued even as the Department and Indian Country consider the Secretary's proposed course of action. As the overseer of the Department's trust reform effort, I intend to remain focused on the direction set out for this Office in the Reform Act." *Id.***

The Special Trustee provided guidance and direction to the OST in his memorandum to his staff for the period during the reorganization of the management of DOI's trust responsibilities. He clarified the extent of the responsibilities and authorities held by the Special Trustee by stating:

**"Line Operations: Until such time as responsibility for the Office of Trust Funds Management (OTFM), the Office of Trust Records (OTR), and other line operations for which OST becomes responsible, are transferred to the Bureau of Trust Asset Management**

(sic) or to another organization, the Special Trustee will be the managing official for those offices to the same degree that existed prior to the proposed reorganization....

**Background:** In proposing the creation of a new Bureau, the Bureau of Indian Trust Asset Management (BITAM) in order to consolidate all Indian Trust asset management functions, and establishing the Office of Indian Trust Transition to plan and implement the transition of the Department's trust functions to BITAM, the Secretary stated 'the Office of the Special Trustee for American Indians will continue to exercise oversight responsibilities for trust reform ...'. Those responsibilities have been supplemented by certain line management and operating duties by delegations to the Special Trustee in Secretarial Orders and the Departmental Manual.

....

As overseer for trust reform, the Special Trustee will continue to provide objective and informed oversight as the Department seeks the more effective management of its trust responsibilities to Indian tribes and individual Indian beneficiaries....

The scope and reach of the Special Trustee's oversight role extends to all DOI Bureaus and Offices engaged in Indian trust management. While the Reform Act specifically mentions the Bureau of Indian Affairs, the Bureau of Land Management, and the Minerals Management Service, other Bureaus and Offices within the DOI are engaged in trust management and, therefore, fall within the scope of trust reform. The Reform Act also details specific duties and responsibilities regarding particular trust management functions and activities of identified Bureaus and Offices within the DOI. However, the jurisdiction of the Special Trustee is not limited to those specific management functions. *Id.* at 1-2.

In closing, the Special Trustee informed his staff (and Congress) that:

**"In order to better ensure the continued proper discharge of our statutory responsibilities for the more detailed work of trust reform, The Special Trustee will expand, within the immediate Office of the Special Trustee, a staff with varied trust expertise. The purpose of that staff is to assist the trust reform effort in such areas as asset management and records; trust operations and systems; project designs, implementation, and management; trust policies, procedures, laws, practice, and fiduciary conduct. Other needed skills supportive of the more effective management of Indian trust assets may be identified and acquired as we proceed. *Id.* at 3.**

The Special Trustee attached to the memorandum to his staff another memorandum from Richard Fitzgerald, the Deputy Special Trustee for Policy, dated February 4, 2002, and entitled, "Responsibilities of the Special Trustee." Fitzgerald listed the significant responsibilities and authorities of the Special Trustee found in both the letter and spirit of the American Indian Trust Fund Management Act of 1994 (1994 Reform Act). Among those responsibilities, he listed several of significance for this Report:

**"Because the Reform Act talks in terms of 'the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities...' and places in the hand of the Special Trustee the responsibility to determine when 'all reforms...have been implemented....' the scope of the Special Trustee's jurisdiction and the authorities of his**



**Office are necessarily very extensive. Traditional trust principles hold that a trustee, here the Secretary trustee designate, has such powers as are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust. Therefore, the Special Trustee’s oversight role extends to all things necessary or appropriate to achieve responsible fiduciary conduct.”** *Id.* at 2, citation omitted.

After listing three pages of responsibilities, Fitzgerald discussed the Secretarial designations that had increased the Special Trustee’s authority to include the authority to issue written directives requiring DOI bureaus to adopt changes in policy and practices felt appropriate by the Special Trustee. He also addressed the Secretary’s stated commitment to trust reform and her placing the Special Trustee in charge of trust reform:

**“Commitment to Reform – In its response to the Third Report of the Court Monitor dated October 1, 2001, and filed with the United States District Court for the District of Columbia in the Cobell litigations (sic), the Department stated that it ‘is committed to fulfilling its trust obligations to the American Indians by enacting trust reform as quickly as possible and will continue to work with the Court Monitor to explore all options to improve the process.’ The Department also acknowledged its efforts to reform the management of the trust accounts for which it is responsible still face substantial challenges. More over, it advised the Court that it will review the task before it to determine ‘what additional actions or directives’ may be needed to ensure that the Special Trustee has the requisite authority to perform effectively. The Secretary has clarified that the special trustee is in charge of trust reform and that if she and he believe that further authority is required within the Office of the Special Trustee Interior will work to provide it.”** *Id.* at 5.

Having stated what he viewed as the “daunting” tasks ahead of DOI and his and his office’s responsibilities and authorities to help accomplish them and oversee their implementation; and having told Congress and the Secretary of his views and responsibilities, what actions has the Special Trustee taken to bring about trust reform during the reorganization? Some indication of his intended actions can be gained by the review of further memoranda.

The Special Trustee informed the Deputy Secretary of the Interior on February 19, 2002 of his responsibilities and intentions in a note (**Tab 3**) to the Deputy Secretary that responded to the Deputy Secretary’s request that the Special Trustee join an in-house executive-level body to discuss trust reform, identify defects in the current system, and review the options for resolving them.<sup>2</sup> In that memorandum, in speaking about the new management body, he stated:

**“However, it must be understood, both inside DOI and outside of it, that my offices’ participation in that group’s discussion does not signify my agreement or endorsement of the decisions or recommendations for trust reform it may make. I believe the role of the Special Trustee is to give informed and objective advice directly to the Secretary when needed. I believe that the independence and objectivity of this Office is an asset of value to the Secretary as she formulates the specifics of trust reform. Nevertheless, I will be pleased to share my views, opinions, and guidance with the group.**

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<sup>2</sup> He attached his February 4, 2002 memorandum to his staff previously addressed in this Report.

**I do not intend to participate in any discussion that concerns the Cobell litigation. In my opinion, the Department's defense of those things done or left undone in the past should play no role in constructing the policies, procedures, and philosophy that will guide the proper discharge of the Secretary's trust responsibilities in the future." *Id.***

The Special Trustee has also recently attended the March 2002 Phoenix meeting of the Trust Management Reform Task Force (Tribal Task Force) composed of 24 Indian tribal delegates and 12 alternates for the 12 Indian Country Regions considering the Tribal proposals for an alternative to the DOI's BITAM proposal and the related activities by EDS and other DOI, BIA and OST officials to reform the systems and processes for both the Tribal and IIM trusts.

Following that meeting and the Special Trustee's presentation to the Task Force (at their request<sup>3</sup>), Richard Fitzgerald again wrote the Special Trustee in a memorandum, dated March 22, 2002, entitled, "Trust Reform 2002" (Tab 4). He stated in part:

**"Our recent trip to Phoenix to meet with the Advisory Board and appear before the Transition Task force was very instructive. The Board, once again expressed yours and their continuing extreme frustration with the lack of progress in trust reform. And while the Task Force is composed of serious and knowledgeable tribal leaders, discussing the wisdom and particulars of the proposal to remove trust management from the BIA will not achieve improvement in the management of the Indian trust assets within the foreseeable future. Indeed, placing that management some place else within DOI does not by itself achieve compliance with the Reform Act. It must be acknowledged that trust reform to date has largely failed.**

....

**Given parts of her testimony before the House Committee on Resources of February 6, 2002, and her article of March 8, 2002, in Writers on the Range, you and the Secretary agree that the trust reform problems that beset the Department are management problems.... Bringing more centralized management and accountability to the process requiring little more than changing the authorities delegated by the Secretary to the twelve regional offices. That should be a very easy task to achieve.**

**The continued failure to successfully implement the 'selected trust systems improvements and data cleanup' remains an unconquered barrier to trust reform. To overcome that barrier the Department must do three essential things.**

**First, it must set as its first priority the creation and maintenance of a Department-wide integrated financial information trust data management system. Without such a system, the Department will never be able to manage the Indian trust assets or discharge its trust duties as required by existing law.**

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<sup>3</sup> The Special Trustee had attended only one of the previous eight "consultations" held by DOI with the Tribes regarding trust reform and the proposed BITAM-based trust reform reorganization. This was his first invitation to attend a consultation or Tribal Task Force meeting made by any party including DOI.

Second, it needs a clear and widely accepted understanding of the Government's trust obligations to these tribal and individual beneficiaries. While the litigators may continue to debate the details of *US v Mitchell*, 463 US 206 (*Mitchell II*) in order to defend the past, our notion of the trust obligation should be guided by the overall finding in that case. The Court found; '... that the United States has consented to be sued for statutory violations and other departures from the rules that govern private trustees' (emphasis added) even though none of those statutes contains any provision that expressly makes the United States liable for its alleged mismanagement of Indian trust assets (see the dissenting opinion).

To foster that understanding, the Department needs a small core management group that understands 'the rules that govern private trustees.' Such people know that a trustee is called upon to employ its best efforts to serve the best interest of the trust beneficiaries. Such people recognize the distinction between what is fitting, proper, and appropriate and that which is merely required by statute. It is a concept at odds with usual Government practice. It is my view that the provisions of Federal law that relate to Indians do not diminish these traditional trust rules, but rather add to them.

Third, and most importantly, there is a critical need to ensure accountability from those who deliver trust services. The active monitoring of operations and continuing evaluation of performance are fundamental management responsibilities. The apparent unwillingness of senior managers to impose appropriate consequences on individuals for continued poor performance is a serious obstacle to long-term success in trust reform. A system that refuses to acknowledge its weaknesses and avoids addressing those weaknesses through the possible use of justified sanctions is a system that cannot be properly managed. It is one thing to issue an order. It is quite another to ensure that it is implemented." *Id.* at 2-3, emphasis in original.

## II. THE SPECIAL TRUSTEE'S MEMORANDUM TO THE SECRETARY OF THE INTERIOR

Apparently responding to his subordinate's concerns and those of others as well as his own, the Special Trustee drafted a memorandum to the Secretary that he sent to her under cover of a March 29, 2002 forwarding memorandum entitled, "Attached Draft Memorandum" (Tab 5). In the forwarding memorandum he requested a meeting with her to address his plan of action as described in the draft memorandum that he indicated he would send to her in formal form in another week. He stated in that draft memorandum in part:

**"As you know, I am firmly committed to a successful conclusion to Indian trust management reform and the installation of critically needed trust management practices and systems. You have indicated that you are committed to these goals, as well. The purpose of this memorandum is to update you on my views on the current status of trust reform and to reiterate the availability of the trust and management expertise of the OST team going forward.**

**I support the two concepts vital to trust reform that you have espoused: First, that a single comprehensive organization dedicated to trust asset management is needed, and second, that the standard for performance of the Department's trust responsibility to Indians**

should conform to common law and private trust standards. In my view these two issues are pivotal to trust reform in the Department.

Beyond these basic trust policy issues, the additional keys to successful trust management going forward are:

- Executive leadership
  - Accountability
  - Project management
  - Trust experience
- Risk management/oversight

I have previously identified these factors in discussions with you and your senior management team, in reports to the Court, and in testimony to the Congress. I believe the critical failures in trust reform to date relate to failures in these basic management areas. Successful progress going forward is rooted in performing well in these areas.

*Several key trust reform initiatives appear not to be moving forward expeditiously. For instance, while the Department has taken some steps to rationalize the implementation of what was TAAMS, repair the probate process, and begin to address the data cleanup process more efficiently, it has not dedicated sufficient resources to these core efforts beyond what OST itself established last fall. The leader of that combined project, Deputy Special Trustee Donna Erwin, has the necessary knowledge and experience to achieve success. To support her and help ensure her success, I have instructed my management team to collaborate with Donna and recruit and hire - - within OST's structure - - the additional trust experience and project management staff that she needs to be successful.*

To date, there has not been a concerted and disciplined effort to evaluate and make recommendations to you regarding the EDS II report of January 24, 2002. Unlike the quick response and action on the November 12, 2002, EDS report concerning TAAMS and BIA Data Cleanup, the January EDS report languishes in the face of Tribal Task Force meetings on reorganization, efforts to re-connect DOI IT systems, and Cobell litigation activities.

Work on the review of the EDS report must be a high priority.

*Moreover, the Department continues to focus on Cobell and Tribal litigation activities at the expense of basic trust reform. The legal advice and counseling currently provided is driven by the litigation posture, as opposed to actually fulfilling the fiduciary responsibility. It is absolutely essential that we keep our focus on establishing and improving basic trust management practices and systems.*

*Based on these and other considerations, I have come to the conclusion that OST needs to step beyond its oversight role and provide direction for trust reform. I have two specific recommendations to assist you going forward.*

**First, OST should assume responsibility for completing an action plan to implement trust reform.** It is timely to 're-plan' the implementation of trust reform, but the new plan must improve on the HLIP and be properly executed. Accordingly, OST will work to develop an action plan encompassing your general goals and the objectives for the Department's performance of its fiduciary responsibility as outlined in the Reform Act. OST has both the trust expertise and the planning experience to complete this task in a reasonable time. I will supplement the existing staff with the necessary seasoned executives.

**Second, OST should assume line responsibility for the development and management of the trust systems including but not limited to data cleanup, probate, and policy and procedures, as well as the business processes. While design and implementation of a new trust organization is important, it is also important to ensure the necessary trust systems are put in place as soon as possible. I will need your support for dedicating some people in various parts of DOI who can provide assistance, too.**

**As I see it we have two goals: Establishing the trust systems needed going forward, and setting up the future organization that will house those systems. It is my opinion that OST should manage the former, which is where its expertise is grounded. OITT should manage the latter, which is where its expertise is grounded. OST's Donna Erwin is currently building the staff and contractors needed to carry forward expeditiously the basic trust operations. Without a basic trust system, DOI will never be able to discharge its trust responsibility properly. OITT is dealing with longer-term issues related to the Tribal Task Force and the shape of the future trust organization.**

**In summary, the advantages for the Department and trust reform of these two steps are that they:**

- **Place a senior political executive - - who was selected for his trust and management experience in large financial institutions - - in charge of trust reform and the development of basic trust operations.**
  - **Draw on the trust skills on the OST senior management team.**
- **Provide a stronger effort for the future of trust reform within DOI” *Id.* at 1-4, emphasis in italics added.**

Receiving no response, the Special Trustee sent the memorandum to Secretary Norton, entitled, “Going Forward on Trust Reform,” in final form without change on April 8, 2002 (**Tab 6**).

On April 9, 2002, a day after sending the above-quoted memorandum to the Secretary in final form, the Special Trustee responded to a letter request from the Co-Chairman of the Trust Management Reform Task Force and President, National Congress of American Indians, Tex Hall, requesting that he respond to questions from the Task Force relating to the involvement of the Special Trustee in the efforts to reform the management of Indian trust assets within the DOI (**Tab 7**). That response was, in part, relevant to the subject of this Report:

***“1. Did the Office of the Special Trustee recommend or concur with the Secretarial Order establishing the Office of the Trust Transition (OITT)?***

**The creation of OITT was an initiative of the Secretary to explore and identify the many details associated with the creation of a single organizational unit within the Department to be responsible for the management of Indian trust assets. I support the concept of the Secretary’s proposal to consolidate the management of these assets within the Department.**

***2. Does OST have any input or line authority over the OITT?***

**OST has no line authority with respect to OITT. The (Reform Act) instructs the Special Trustee to ‘ensure the implementation of all reforms necessary for the proper discharge of the Secretary’s trust responsibilities to Indian Tribes and individual Indians.’ This duty, in my opinion, extends to and includes the oversight of OITT activities related to trust reform.**

*Please provide an update of OITT and OST activities and accomplishments. Explain the coordination between OST and OITT.*

**OITT has sought comment from OST regarding ‘trust strategy,’ which might be called the ‘elements of a trust organization.’ Deputy Special Trustee Donna Erwin has been working in conjunction with the three major trust reform projects, TAAMS, Probate, and BIA Data Cleanup, and coordinating her efforts with OITT. She also assisted OITT in the compilation of the eighth quarterly report to the Court.**

*How will your office coordinate with the OITT mandate?*

**OST’s role is one of oversight. OST will review OITT activities (see above) to determine if they are consistent with the responsibilities of a trustee as established in the Reform Act, and to ensure that trust reform is being attained.**

*How are you proposing to develop the required strategic plan and what is the time frame for providing a draft to Tribes for comment?*

**The Reform Act requires the development of a strategic plan detailing the method of fulfilling the trust obligation of the Government. The first Special Trustee, Mr. Paul Homan, submitted the required strategic plan to Secretary Babbitt in February 1997. At that time, the Secretary chose to implement some of the recommendations contained within that strategic plan, and delayed the implementation of others. OST does not now see the need for another strategic plan. Rather, the need is for an ‘implementation plan; to replace and expand upon the existing High Level Implementation Plan, in order to make it more comprehensive and to provide for better integration among trust reform activities. The work of Electronic Data Systems (EDS) in reviewing the efficacy of the Department’s trust reform efforts to date will assist the creation of a new implementation plan. OST would propose to provide this new implementation plan, given its trust experience, in the coming months. *Id.* at 1-2.**

With regard to his statutory reporting responsibilities he stated:

**6. *What relationship or line authority exists between the office of the OST and the Deputy Secretary of Interior, now headed by Stephen Griles?***

**The Special Trustee reports directly to the Secretary as required by the 1994 Reform Act. *Id.***

The Special Trustee’s penultimate paragraph addressed what specific things he could do to assist the Task Force in the development of a plan for comprehensive trust reform. Once again, he stated what he believed were his responsibilities to bring about trust reform:

**“The Special Trustee and the OST staff can assist the Task Force in a number of ways including:**

- **Understanding the scope of the trust obligation as clarified by the Reform Act.**
- **Determining the elements of a trust organization that will provide for the more efficient management of and accountability for the proper discharge of the Secretary’s trust responsibilities.**
- **Fostering an effective working relationship between the Government’s trust organization and the role of the compacting/contracting tribes.**
- **Providing OST senior managers to assist in the identification and understanding of the issues as well as the attributes of well managed trust functions, e.g., accounting, investments, records, and compliance (risk management).**
- **Determining and understanding the best alignment of trust business processes.**
- **Continuing the development of the systems needed to comply with the 1994 Reform Act.**
- **Determining what resources are available from the private sector to assist the Department in the administration of trust functions and trust reform.**
- **Providing an independent assessment of those trust activities currently performed in various parts of DOI.” *Id.* at 3.**

### **III. ANALYSIS OF THE SPECIAL TRUSTEE’S CONCERNS AND RECOMMENDATIONS**

It will come as no surprise to this Court to learn of the concerns expressed by the Special Trustee to the Secretary in his April 9, 2002 memorandum for he expressed almost the exact same concerns during his testimony in the Secretary’s contempt trial on January 8-9, 2002.

The following dialogue between plaintiffs’ counsel Dennis Gingold and the Special Trustee early in his direct examination gives an example of those concerns:

**Q Do you know why the quarterly reports have consistently failed to provide this Court with a truthful, accurate, clear picture of the status of BIA data?**

**A. I think it’s inadequate management, project management. In some instances you could say that the project was not designed well, was not managed well. Some of the lack of information I believe was simply for - - due to mismanagement of the project. In fact, as time went on, after I took over the quarterly reporting compilation, it became very evident, particularly in that subproject, that the project not only wasn’t managed properly, but it didn’t have - - it didn’t envision - - the management didn’t envision the scope of the project as it should have, and we became - - my office became increasingly restive at that situation.**

**I believe it's fair to say that in much of this, it comes back to a lack of solid management, particularly with project management skills, and probably due to a lack of appropriate staffing.**

**Q As of today, January 8<sup>th</sup>, 2002, have those problems been corrected?**

**A. No, I wouldn't say they have been corrected. Some moves have been made to correct them, but I think we've got a ways to go.**

**Q. Do you know if they will be corrected?**

**A. I think they have a good opportunity, given the appropriate management, the appropriate executive direction, and the appropriate accountability down the line, yes, I think they have a chance. Trial Tr. at 2222-2223.**

In answer to Gingold's question regarding whether he still lack confidence in the accuracy of the Quarterly Reports he replied:

**A. Yes, I do. I'm not certain where some of these subprojects really stand....**

....

***But the long and short of this is that, to answer your question, I don't have a great deal of confidence in the subprojects and trust reform generally as I sit here right now. What we're doing is putting more monitoring effort into this and, of course, the Department and the Secretary are certainly taking moves to put more commitment and more resources and more effort behind the whole trust reform effort. Id. at 225-2226, emphasis added.***

The Special Trustee addressed the experience existing within the DOI to bring about trust reform in the following colloquy:

**Q. Okay. So do you believe today that the people involved in trust reform have sufficient knowledge and skill and expertise to do it?**

**A. I think there are people who are very capable who are trying to learn a great deal about the obligations of a trustee in a big hurry and are very sincere about it. Do they come from trust backgrounds? I don't believe so, other than some of the people on my staff. Id. at 2249.**

And on cross-examination by the government, with regard to executive leadership, the Special Trustee had the following dialogue with the defense counsel and the Court:

**Q. What's your take on the reorganization realignment? Have you supported that idea?**

**A. I have supported it in concept, because I think somebody does need to be in charge. I think it probably makes sense to take the organization away from the rest of Interior and make it a separate, freestanding equivalent of a commercial trust department.**



**Q. Gong back to the Secretary's - -**

**A. Could I continue?**

**Q. Oh, sure.**

**A. Excuse me just for a minute. But what I wanted to add to that is the devil is in the details, because as others have said before me, possibly, a lot of this can amount to nothing more than moving around the chairs on the deck of the Titanic. *What's really important is to have strong executive leadership and accountability and consequences for non-accountability down the line. That's the secret ingredient. It's no secret, I mean it's just good management.***

**THE COURT. And how does that occur?**

**THE WITNESS. It's difficult in the present environment. People are not doing the job are moved to other jobs that are of the same grade, and there's no real penalty. There's no consequence. And other people who should be leading are not leading. *Id.* at 2406-2407, emphasis added.**

And with regard to his role in trust reform, the Special Trustee had the following comments in response to the government's questions:

**Q. Now – you talked about the notion of having somebody directly in charge. The Secretary's June 10<sup>th</sup>, 2001 orders, one of those set up a different structure, correct, to by its terms put you in charge of trust reform? Correct?**

**A. Not really.**

**Q. Why do you say not really? Because as I understood the order, you were given the same authority as the Secretary, meaning the ability to direct members of the Department, of the Bureau of Indian Affairs, unless a specific order was appealed to the Secretary. So that's a fairly broad authority, isn't it?**

**A. *Not really. What I really wanted was to have line authority. This is what came out of that. The problem with what I've got now, which I have used once and I may use again fairly soon, is that it is appealable. I believe the Secretary will back me up, frankly, but nevertheless the effectiveness of something like this is often in the eyes of the beholder who may be the person who wants to get away with something or not do the job properly. And the right of appeal undercuts a large part of this. Id.* at 2407-2408, emphasis added.**

The Special Trustee's discussed his not being given line authority by the Secretary over those Bureaus engaged in trust reform:

**Q. What did you convey to him (Deputy Secretary Griles) about that?**

**A. *I told him that somebody needed to be in charge, and had to have clear line control, and probably should be an organization that's separated away from the rest of the Department.***

**Q.** *Did you express your view that you didn't think that you should be the person that has that ultimate authority?*

**A.** *No, I told him I should.*

**Q.** *You thought you should?*

**A.** *Yes.*

....

**THE COURT:** *But your preference would have been that organization would be under you.*

**THE WITNESS:** *Yes.*

**THE COURT:** **The Special Trustee.**

**THE WITNESS:** **I think it makes some sense to put it under the Office of Special Trustee.**

**THE COURT:** **And was there something in the statutory scheme contrary to that or why do you think that was rejected?**

**THE WITNESS:** **I was told it was rejected because I would have a conflict in my role of Special Trustee in oversight. I don't agree with that, but that's what I was told.**

**BY MR. HARRIS:**

**Q.** **Who said that?**

**A.** **Mr. Griles. *Id.* at 2410-2411, emphasis added.**

Continuing on later under re-direct examination with the same dialogue about the decision to place the Deputy Secretary in charge of trust reform rather than the Special Trustee, the following colloquy took place:

**Q.** **And is it correct that Mr. Griles has now assumed both personal and official responsibility for ensuring that trust reform is implemented effectively?**

**A.** **That appears to be the case, yes.**

**Q.** **Mr. Griles felt it would be a conflict for you, for the Office of Special Trustee, to have a let's say a restructured operation under you that would be operating in the trust area? Is that a fair statement?**

**A.** **Yes.**

**Q.** **Isn't OTFM, the Office of Trust Funds Management, under the Office of the Special Trustee?**

A. Yes, it is.

Q. And isn't the Office of Trust Funds Management substantively involved in the processing of all financial information regarding the - - at least the individual Indian trust?

A. Yes.

Q. Well, why is it a conflict for you to have the restructured operations and not a conflict for you to have OTFM?

A. *My view of that is that it's not a conflict under the law for the Special Trustee to have responsibility for all of trust improvement as well as oversight of trust generally. I am, on the other hand, uncomfortable, frankly, with the - - with having a portion of the trust operation - - you named OTFM. I could also name the Office of Trust Records. I could also name the Office of Trust Risk Management. All three of those are under the Special Trustee - - to have those units separated out and be under the Special Trustee for the simple reason that the Special Trustee can be perceived as playing favorites in his or her oversight responsibility. This is treating his own units more favorably than he would treat some other unit in some other part of the Department.*

Q. And as a matter of fact, the Act specifically contains imperative language in that the trustee, Special Trustee, shall ensure that trust reform get done; correct?

A. That's correct.

Q. And it would certainly be a lot easier, would it not, if you had the operating divisions under you and you would have the responsibility and the accountability to ensure it gets done under those circumstances?

A. Well, I don't think it has a conflict with the Act.

**THE COURT:** That's why you suggested you should have the line authority.

**THE WITNESS:** Yes. *Id.* at 2446-2448, emphasis added.

The Special Trustee has been as consistent in his written statements about his concerns and recommendations regarding trust reform as presently being carried out as he was at trial. What can be gained from these written statements in the way of a picture of the progress of the Secretary's and the Deputy Secretary's trust reform activities through the eyes of a senior executive highly experienced in trust fiduciary operations from the private sector? Quoting from his past statements in this Report gives this Court a sense of his view of trust reform – 2002 – and what needs to be done about it that is not being done.

With regard to trust reform progress:

**“Trust reform, as well as the ongoing delivery of trust services to these individual and tribal beneficiaries, has reached a point where radical measures need to be undertaken now. Specifically, the Department's discharge of its trust responsibilities, as it is now organized is inadequate to the demands placed upon it.**

....

**First, there is the need for a clear understanding of the Government's trust obligation to the beneficiaries. Second, there is a great need for experienced trust management, and, finally, there is the need to ensure accountability by those responsible for delivering trust services....**

....

**Today, the Department cannot perform its trust duties at the level required by the Reform Act. Trust reform to date (February 26, 2002) has not achieved an acceptable level of success, and, indeed, to speak of *trust reform* is misleading. The implementation of selected trust systems and data cleanup efforts is only the prelude to trust reform.**

....

**Until a clearer understanding of the trust obligation, better management, and more accountability are in place *regardless of what the trust organization looks like*, it will be difficult for the Government to come into compliance with the 1994 Reform Act.” Tab 1 at 3-6, emphasis in original.**

With respect to the Special Trustee's role:

**“I believe that the Special Trustee must have the opportunity to provide candid and informed guidance directly to the Secretary as she seeks the more effective management of the trust responsibilities under her control.**

....

**Last July, the Secretary authorized the Special Trustee to issue written directives requiring the adoption of appropriate changes in existing policies that hinder trust reform. Although such directives can be overruled by the Secretary on appeal, the authority to issue such directives may prove a valuable tool. However, it is not as effective as active direct line authority over those in the Department who implement trust policies and practices. Also, I am concerned that the fundamentals of trust reform can be diluted by political considerations arising out of the consultation process.**

....

**...I believe this budget control (by the Special Trustee) over the reform of the trust function should continue to be a part of OST's oversight responsibility. The independence and informed objectivity of the OST is essential to achieving lasting trust reform.” *Id.* at 4-5.**

And further:

**“...I have come to the conclusion that OST needs to step beyond its oversight role and provide direction for trust reform. I have two specific recommendations to assist you going forward.**

**First, OST should assume responsibility for completing an action plan to implement trust reform....**

**Second, OST should assume line responsibility for the development and management of the trust systems including but not limited to data cleanup, probate, and policy and procedures, as well as business processes.**

....

**In summary, the advantages for the Department and trust reform of these two steps are that they:**

- **Place a senior political executive - - who was selected for his trust and management experience in large financial institutions - - in charge of trust reform and the development of basic trust operations.**
  - **Draw on the trust skills on the OST senior management team.**
  - **Provide a stronger effort for the future of trust reform within DOI”**

**Tab 6 at 1-4.**

And as stated to this Court:

**Q. What did you convey to his (Deputy Secretary Griles) about that?**

**A. I told him that somebody needed to be in charge, and had to have clear line control, and probably should be an organization that’s separated away from the rest of the Department.**

**Q. Did you express your view that you didn’t think that you should be the person that has that ultimate authority?**

**A. No, I told him I should.**

**Q. You thought you should?**

**A. Yes.**

**THE COURT: But your preference would have been that organization would be under you?**

**THE WITNESS: Yes**

**THE COURT: The Special Trustee.**

**THE WITNESS: I think it makes some sense to put it under the Office of Special Trustee. Trial Tr. at 2410-2411.**

Why did the Special Trustee come to this conclusion and recommendation that he take over authority for trust reform? His views on the management of trust operations and trust reform within the DOI as submitted to the Senate Committee on Indian Affairs on February 26, 2002 are informative:

*“The problems that trouble the Department are management problems. The lack of management capability is signaled by the evident need for senior managers with experience in delivering trust services and operating trust systems in the private sector. Additionally, there is a critical need for senior level, project management skills applicable to large trust operations projects....*

**The lack of accountability refers to the need to have all staff that are charged with trust responsibilities perform as directed by informed and responsible senior managers.”** Tab 1 at 3, emphasis added.

And, with regard to meeting with an executive level in-house body to discuss trust reform he told the Deputy Secretary the following:

**“I do not intend to participate in any discussion that concerns the Cobell litigation. In my opinion, the Department’s defense of those things done or left undone in the past should play no role in constructing the policies, procedures, and philosophy that will guide the proper discharge of the Secretary’s trust responsibilities in the future.”** Tab 3 at 5.

And as described by his Deputy in a memorandum sent to him:

*“...The apparent unwillingness of senior managers to impose appropriate consequences on individuals for continued poor performance is a serious obstacle to long-term success in trust reform. A system that refuses to acknowledge its weaknesses and avoids addressing those weaknesses through the possible use of justified sanctions is a system that cannot be properly managed. It is one thing to issue an order. It is quite another to ensure that it is implemented.”* Tab 4 at 3, emphasis added.

And finally, in his April 9, 2002 memorandum to the Secretary:

*“Several key trust reform initiatives appear not to be moving forward expeditiously. For instance, while the Department has taken some steps to rationalize the implementation of what was TAAMS, repair the probate process, and begin to address the data cleanup process more efficiently, it has not dedicated sufficient resources to these core efforts beyond what OST itself established last fall.... To date, there has not been a concerted and disciplined effort to evaluate and make recommendations to you regarding the EDS II report of January 24, 2002. Unlike the quick response and action on the November 12, 2001, EDS report concerning TAAMS and BIA Data Cleanup, the January EDS report languishes in the face of Tribal Task Force meetings on reorganization, efforts to re-connect DOI IT systems, and Cobell litigation activities. Work on the review of the EDS report must be a high priority.*

**Moreover, the Department continues to focus on Cobell and Tribal litigation activities at the expense of basic trust reform. The legal advice and counseling currently provided is driven by the litigation posture, as opposed to actually fulfilling the fiduciary responsibility. It is absolutely essential that we keep our focus on establishing and improving basic trust management practices and systems.**

**Based on these and other considerations, I have come to the conclusion that *OST needs to step beyond its oversight role and provide direction for trust reform.*** Tab 6 at 1-2, emphasis added.

Slightly over a year since the former TAAMS and BIA Data Cleanup project manager, Dom Nessi, sent a memorandum to the Special Trustee stating that trust reform was “imploding,” the Special Trustee has now written the Secretary of the Interior that he views trust reform in significant peril for the same or similar reasons expressed by Nessi. He captured his reasons in his April 9, 2002 memorandum by listing the keys to successful trust management:

- Executive leadership
- Accountability
- Project management
- Trust experience
- Risk management/oversight

What has he stated or inferred about each of these critical factors within the context of the Secretary’s trust reform efforts at DOI?

#### **A. Executive leadership/Project Management**

The Special Trustee not only does not believe that there is sufficient leadership within DOI over trust operations and reform, he believes it has neither the focus on trust reform or the experience to bring it about successfully without his management of it. There is some evidence other than the Special Trustee’s on words to support his position.

First, although the Deputy Secretary has taken charge of trust reform and is an energetic leader, he only has two primary subordinates to rely on – Associate Deputy Secretary Jim Cason and the Director of Indian Trust Transition, Ross Swimmer. He is also the Chief Operating Officer of the Department of the Interior with many high-level responsibilities to fulfill for the Secretary. Mr. Swimmer has been put in charge of not only developing a Strategic (or Operations) Plan; direction of Deputy Special Trustee Donna Erwin’s management of the TAAMS, BIA Data Cleanup, and Probate reform; supervision of the EDS Corporation (with the assistance of Mr. Cason) who are responsible for at least five projects – determining the “as is” model of current trust operation to later develop the “to be” model for implementation; evaluation and recommendation for the Secretary’s consideration of the BITAM and Task Force reorganization proposals; review and revision of the BIA Data Cleanup subproject; the direction for DOI of the joint DOI/Tribal Task Force consultations, and, finally, the direct supervision of the Office of Historical Accounting (OHTA).<sup>4</sup>

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<sup>4</sup> Mr. Swimmer is also responsible to the Deputy Secretary for the preparation of the Defendants’ Quarterly Reports. For this Report, the Court Monitor’s review and monitoring of the progress of trust reform has centered on the role and opinions of the Special Trustee and DOI upper-level management, their operations and experience. The operations and progress of OITT and EDS, as well as OHTA, will be reviewed in subsequent Reports.

Mr. Cason, as this Court and the Special Master are all too well aware, has been and is in charge for the DOI of the IT Security reorganization – a job which the Deputy Secretary has testified before Congress occupies most of a never-ending work day.

While they may be dedicated to their effort, the Special Trustee was correct for stating the obvious – trust reform is not moving forward in part because of the lack of sufficient experienced senior managers.

### **B. Trust Experience**

These same executive-level managers, including the Deputy Secretary, have no trust experience, nor, but for Donna Erwin, do they have anyone working for them who does. The two officials who are preparing the Strategic Plan that will be the foundation for DOI trust operations and standards of performance have no trust experience and come from the Office of Surface Mining and the US Geological Survey. While they may have extensive experience in strategic planning, they have no foundation in trust operations. EDS, a DOI contractor central to the DOI's trust reform efforts, as mentioned previously and as testified to by the Secretary at her trial, have several employees on their project teams who come from a trust background.

The only senior management personnel with trust experience within the DOI reside within the OST. None are present in any operation presently directed by the Deputy Secretary.<sup>5</sup>

### **C. Accountability**

It also will be no surprise to this Court that the Special Trustee does not believe that trust reform can be brought about unless the Secretary institutes strict accountability within the trust operations and reform management. This Court has questioned both the Secretary and the Deputy Secretary on their statements concerning the present contemnors that consist mainly of DOI attorneys and officials. Their responses bear quoting.

First, Mr. Griles:

**THE COURT: I just have a couple of other things I wanted to pursue. One was your concern about getting the people back to work, but I have some concern that some of where we are is because of people that got the Department in the posture that it's in, and to the extent that the Department is still relying on those people, it gives me some pause. I haven't dealt with what to do with the 39 individuals yet because I've tried to deal with the overall question, but tell me a little more about your thoughts on that question.**

**I guess ultimately, there is a - - there is a serious problem about accountability and how people are accountable, which then enforces in the future that they are accountable when things don't happen or things happen wrong. So see if you can take a stab at that general area. And I'm not going to pin you down.**

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<sup>5</sup> Donna Erwin is still part of OST and relies upon OST for her personnel hiring and monies to fund her projects. In effect, she has two bosses, the Director, OITT, on trust transition policy, and the Special Trustee as head of OST.



**THE WITNESS:** No, I understand.

**THE COURT:** And I know you have an IG. I know the IG has done some looking at some things. I don't know how much. But how does all this fit into your thought process?

**THE WITNESS:** It's not a thought process. What I will tell you is more coming off the cuff here, I guess, Your Honor. Some of the people who - - I mean, the best of - - the best example is Bob Lamb. I mean, his historical perspective, his budgeting needs, and his understanding of it, are just so - - it's so important to have him. I mean, I could take each one on the list and discuss it.

I know that there are issues in some instances where people - - what people said to certain individuals maybe in their minds wasn't truthful and in the minds of the individual, that doesn't exist. But I do think that there are just some people that have knowledge. You cannot find that knowledge outside. It only resides in government because they have lived it, they know it, they have been there. So I guess I would ask the Court to free them of the contempt and let us try to marshal their forces and make sure that we believe that they can do the right job. We will scrutinize that.... Sometimes I am pretty naïve, but, you know, most public servants do what they want - - they do what they think is right and they do it for the right reasons. There is no conspiracy in the Department of the Interior to not fulfill the desires of satisfying the IIM accountholders. We want to solve that problem....

...but to the individuals in Interior, I know most of them, work with them day to day. I make my own judgments about how to best use them and I ask you to let us continue to do that.

There's just some really good people, Your Honor, some who others may not believe and have had a bad experience with or in their minds have had a bad experience with, but I just don't think there is any of them that we need to put a red cross on them and say they no longer should be doing trust reform. They have valuable information we can use.

We will be selective and careful because of the issues of the past to make sure that they are not put in the position where that could become an issue in the future. I guess that's the only thing I can ask Your Honor." Trial Tr. at 4180-4183.

Next, the Secretary of the Interior:

**THE COURT:** ...But I have some concern that you have people in the process here, and I haven't tried to deal with the conduct of the 39 alleged individual contemnors yet, but you have people involved in the process here who are still involved or may be involved, depending on what the Court does, and whether it's the same people that led to the current situation that are going to continue to be running the situation, and I guess I want to give you an opportunity to say whatever you can say about that.

Secretary Griles said the most important thing - - I asked him at the end what could I do to help, and he said the most important thing is free up all these people. That gives me some concerns, as you might expect. But tell me a little bit more about how you look at that issue.

**THE WITNESS:** Well, we are going to have to figure out how to use people to their best advantage, and how our human resources fit what needs to be accomplished.

There are some people who are on the list of alleged contemnors who are outstanding public servants. I think Bob Lamb testified here - -

**THE COURT:** I will agree with you on Bob Lamb. I don't have any quarrel with Bob Lamb. I've been impressed that he understands the questions. He may not always do exactly the way I would want it, but he understands what he's doing, I agree with you on that. And he understands the budget process as well as anybody I've ever known in government.

**THE WITNESS:** He is truly outstanding and has been very helpful to us in all of the other areas where we've dealt with him.

There are some others that I have not worked with personally, and we are just going to have to be evaluating people and seeing where they fit. There are some people that may have done a poor job because they were doing five other things in addition to trust reform, and they may not have had the resources to do what they needed to do, or they may not have had the training to do what they needed to do. And so those people, given the right circumstances, might turn out to be good managers.

There may be other people that really need to look at doing other activities, and as we go through and figure out how our organization needs to be responsive to the tasks we have to accomplish, we are going to have to look at who is the best available talent for the particular jobs, and that's something we'll have to do on a case-by-case basis." Trial Tr. at 4392-4394

There is a distinct lack of recognition on the part of the Secretary and Deputy Secretary of the potential that those DOI officials under the plaintiffs' citation for contempt of the Court might actually have committed acts sufficient to render their present or future service on trust reform inadvisable and harmful to trust reform progress. Their testimony casts doubt on their understanding of the fiduciary obligations owed to the IIM accountholders and the legal obligations owed to this Court.

A specific example of that tone deafness is the further testimony of the Deputy Secretary concerning the role played by one of the attorney contemnors in the decision-making process on the reorganization. Under cross-examination by Plaintiffs' counsel about the decision-making process and who was involved in briefing the Deputy Secretary and other executives on the legal ramifications concerning the trust obligations of the new organization, the following colloquy took place:

**Q.** ...The Court of Appeals decision was broader than that, with regard to the trust responsibilities. So I'm asking you whether or not you compared the trust principles that had been adopted by Secretary Babbitt prior to the February 23<sup>rd</sup>, 2001 Court of Appeals decision to the principles that you were ruling on to formulate the restructuring plan.

**A.** Well, what I relied on, sir, was the Solicitor's Office who came in and laid out the Secretary Babbitt principles and policies, procedures, the trust policies that are laid out in the secretarial order.

**Then they discussed the various court cases, including that - - the Judge's decision in the Circuit Court and how it affected all that.**

**So all of that was merged into the thought process as we went through it. We had the appropriate solicitors come in and brief us on all that prior to making any choices or recommendations.**

**Q. Do you recall who the appropriate solicitors were?**

**A. I think it was Ms. Blackwell. There was a couple other solicitors who - - I can't think of them. John McClanahan, I believe, is another individual who was involved. So there were several other individuals who came in and gave us information.**

**Q. And you relied on the Solicitor's Office. Is that a fair statement?**

**A. Well, we had the policies that were set forth, and we had briefings on Mitchell 1, Mitchell 2, which were Supreme Court decisions on trust, and the integration of all of those. So we felt like we had - - the purpose of this was to get a general outline and make sure that we had captured the trust responsibilities of the Department.**

**Q. Are you aware that Ms. Blackwell was involved throughout this - - for much of this litigation in advising Secretary Babbitt and your predecessors with regard to how the trust should be interpreted? Did you know that?**

**A. I'm aware of Ms. Blackwell's expertise and knowledge, yeah.**

....

**Q. All right. So the individuals who provided advice with regard to how the trust should be managed from the Solicitor's Office, you still relied on to prepare the restructuring; correct?**

**A. No. What I relied on, sir, was to make sure that the court decisions, that we had all the information and policies that came out of them, and that we had taken into account there wasn't anything out of the concentric circle that was not - - that was trust. The organization in itself, there was no one - - Ms. Blackwell was not involved in that determination or anything else.**

**Q. No. I'm not asking you about a determination. She provide (sic) advice; correct?**

**A. No, she provided us briefings on what the Court's decisions had been and the secretarial orders that had been written, which were general in nature.**

**Q. And did she provide you advice on the Solicitor's opinions as well in that regard?**

**A. No, she did not. Trial Tr. at 4080-4082.**

Whatever advice Edith Blackwell provided the Secretary and Deputy Secretary about trust case and statutory law, her involvement with these senior DOI executives was ill advised. She was not only a contemnor central to the core of the Court Monitor's First

and Second Reports regarding the false and misleading statements made to this Court and the Circuit Court in filings and in the Quarterly Reports about the Historical Accounting and trust reform progress in general, she had been excused from further work on trust reform by the present Solicitor long before she was called on to brief the DOI leadership during their decision-making meetings regarding reorganization of the trust operations and reform efforts.

**D. Risk management/oversight**

Why would the Special Trustee want to enlarge that direct line authority he presently holds instead of remaining in a primary oversight role? The question might best be answered by examining once again the success, or lack of success, he has had with the Defendants' subordinates regarding his inclusion in their confidence with regard to his oversight responsibilities and attempts to provide risk assessments to the DOI leadership.

As discussed in the First Report of the Court Monitor, both the Special Trustee and the Deputy Special Trustee (and former Acting Special Trustee), Tommy Thompson, had objected to the use of statistical sampling as a method to conduct the historical accounting. However, the Special Trustee was directed by Secretary Babbitt's Chief of Staff to conduct that statistical sampling or at least a pilot project involving statistical sampling. *See generally*, First Report of the Court Monitor. In his testimony at the Secretary's contempt trial, the Special Trustee was asked about his involvement in the decision by both Secretaries to carry out a statistical sampling historical accounting:

**Q. You've read the Trust Reform Act of 1994, have you not, Mr. Slonaker?**

**A. Yes.**

**Q. Isn't there an imperative requirement in the Trust Reform Act of '94 that the Special Trustee is to ensure a number of different matters?**

**A. Yes.**

**Q. Including that an accounting be provided to the trust beneficiaries?**

**A. Yes.**

**Q. Then why wasn't the Special Trustee involved in what appears to be the decisionmaking process first to go forward with the statistical sampling, and then to go forward with other alternatives or other considerations; do you know?**

**A. No.**

**Q. Wasn't that mandated by Congress that the Special Trustee had not only a responsibility but actually the language stated the Special Trustee shall ensure? Do you recall that?**

**A. Yes, I recall the language.**

**Q. And nevertheless you were never consulted by the Secretary; is that fair to say?**

**A. I think that's accurate.**

**Q. Do you know why?**

**A. No. Trial Tr. at 2201-2202.**

And later, he testified that his objection to the statistical sampling was overruled and he was directed to do it:

**THE COURT: I'm sorry. That instruction having come from the chief of staff?**

**THE WITNESS: Though the chief of staff, yes.**

**THE COURT: Through the Chief of Staff. From the Secretary?**

**THE WITNESS: Yes.**

**THE COURT: That was your understanding?**

**THE WITNESS: That was my understanding?**

**THE COURT: The Secretary had directed you do it?**

**THE WITNESS: That was my understanding.**

....

**THE COURT: Well, you had tried, I take it from Mr. Thompson's testimony, you were in agreement with him at the August 2<sup>nd</sup> meeting that this was the wrong way to go?**

**THE WITNESS: That's right.**

**THE COURT: You were still arguing against it.**

**THE WITNESS: That's right.**

**THE COURT: And you got overruled.**

**THE WITNESS: Basically, yeah. Trial Tr. at 2391-2392**

As reported in the Second Report of the Court Monitor, the Special Trustee also was subjected to a contentious review process of his Observations to the Quarterly Reports starting with the Third Quarterly Report. He refused to "verify" those Reports beginning with the Sixth Quarterly Report. *See* Second Report at 98-99 and 103-105. He testified at trial to both these events:

**Q** The statement is Interior defendants have intentionally sought apprising the Court of information regarding the serious deficiencies in the TAAMS system that have delayed and continue to delay TAAMS implementation of court-ordered trust reform. The failure to inform the Court, you believe that was intentional and not an accident? Correct?

**A.** You know, my own take on it has been that there was a concern about giving all bad news. There was an effort in my Special Trustee's observations, as I think you know, to take the edge off those remarks that I was planning to make. So I think that's the way I would characterize what was happening.

**Q.** Why – did anyone explain why it was necessary to take the edge off of the remarks?

**A.** Not really. I heard comments to the effect that information, good information ought to be balanced with bad information, or perhaps I should say the reverse. Bad results ought to be balanced with good results. A fairer view, terms like that.

**Q.** Fairer view or a more optimistic view?

**A.** I'll leave you to answer that. I don't know.

**Q.** Was there an effort to conceal the bad news?

**A.** I can't say that there was an effort to conceal.

**Q.** But there was no desire to - -

**A.** For certain.

**Q.** There was no desire to go out and disclose it fully and accurately to the Court, was there?

**A.** Not as fully as it should have been. Trial Tr. at 2218-2219.

And with regard to his refusal to verify the Sixth and Seventh Quarterly Reports:

**Q.** Do you see there's an October 15<sup>th</sup>, 2001 memorandum?

**A.** Yes.

**Q.** From you to Joseph Kieffer? Do you see that?

**A.** Yes.

**Q.** And its subject matter is the Department's quarterly report to the Court.

**A.** Yes.

**Q.** Have you ever seen this before?

**A.** Yes, indeed.

**Q. Did you draft it?**

**A. Yes.**

....

**Q. I'd like to direct your attention to the third line from the bottom of the first paragraph.**

**A. Yes.**

**Q. Make it the fourth line from the bottom of the paragraph. The sentence begins: 'My office became responsible for gathering the information that went into those reports with Report Number 3.'**

**A. Yes.**

**Q. 'As had been the prior practice, I was asked to verify the report. I complied with that request. As I became more aware of the possible interpretations of my act of verification, I ceased the practice.'**

**Can you explain what possible interpretations were provided to you which were different from your understanding and therefore caused you no longer to verify the reports?**

**A. As I got further into the examination of all the subprojects, I discovered, as I have suggested earlier, that there were certain elements of incompleteness or lack of objectivity, certain inaccuracies that led me to quickly believe that there was little reason for me to use the word verification or verify on the quarterly reports, since they go to the Court, because I really couldn't stand here and say that what was in those reports was accurate, complete and so on. So I became much more concerned about the use of that kind of language. Trial Tr. at 2256.**

And further:

**Q. What you say here is, 'To the best of my knowledge, the word 'verify' as used in the transmittal to DOJ and signed by me was part of language recommended, in fact urged, by DOJ.'**

**A. I believe so, yes.**

**Q. Do you know who recommended you use the term?**

**A. No.**

**Q. Do you recall what explanation was provided to you when it was recommended that you use the term 'verify'?**

**A. I don't recall that there was any explanation. Trial Tr. at 2280**

The Special Trustee also refused to verify the Seventh Quarterly Report and submitted Observations included with it that questioned the accuracy and completeness of the Report. *See* Fourth Report of the Court Monitor at 1-3. He stated:

**“The Special Trustee is not satisfied with the completeness or the quality of the information provided in this quarterly report. As our investigations are carried further and we receive the analysis from EDS of all subprojects, we will implement changes to this report designed to improve the format, completeness, and content of future quarterly reports.”** *Id.* at 2.

He also informed the Secretary’s Solicitor and Counselor that he would not verify the report and did not agree to requesting an extension of the deadline for filing the report with the Court in order to allow his concerns with the report to be allayed. His Deputy stated in a memorandum to the Solicitor’s office:

**“I expressed the Special Trustee’s opposition to the proposed motion to extend the filing deadline for the quarterly report based on the Special Trustee verifying the contents of the report. As I stated in a voice mail message and directly to you with Mike Smith present, the Special Trustee would not verify the report under any conceivable scenario encompassed by the proposed motion.”** *Id.* at 4.

But the Secretary, instead of meeting with him or contacting him by phone, wrote to him asking for him to explain his concerns and sending her Solicitor to meet with him. In her memorandum she stated, in part:

**“However, in the final paragraph of the Observations, you noted a concern that ‘(t)he Special Trustee is not satisfied with the completeness or the quality of the information provided in this quarterly report.’ Since I have not heard from you on this subject prior to my review of the draft, and since your office compiled the report, I assume your concerns were of insufficient severity or immediacy for you to recommend a delay in filing the report. If that assumption is incorrect and you believe that the draft report needs to be amended materially prior to filing, we need to know immediately. The Solicitor will call you later today regarding the immediacy of your concerns.** *Id.* at 2.

He provided her with a response in a memorandum describing and listing his Observations’ concerns in past Quarterly Reports stating in part:

**“Since assuming responsibility for compiling the Quarterly Reports for the Department with the third report, I have noted a number of concerns about specific areas of trust reform in the Special Trustee’s Observations section of the Reports. Many of these concerns were expressed in terms of the serious and complex management problems faced by the Department. These concerns included, but are not limited to, the inability of the BIA subproject manager to obtain meaningful metrics to measure the progress of the BIA data cleanup effort and the continued failure of TAAMS to operate in an acceptable manner. The delays in some critical subprojects suggest that those people involved in those projects do not have or cannot get or will not acknowledge an accurate description of problems present in the projects. Therefore, the problems are either not addressed or addressed ineffectively.”** *Id.* at 3.



At the time, the Court Monitor commented on the implications of this dialogue between the Special Trustee and the Secretary and her senior staff over the content and verification of the Seventh Quarterly Report by stating in the Fourth Report of the Court Monitor:

**“Congress created the Office of Special Trustee to bring responsible and experienced trust management to bear on this historical institutional failure. But it sought to have the Special Trustee provide oversight and advice to the DOI and its leadership who were thought (and) expected by Congress to be willing to accept his *advice* rather than *direction* on trust reform.**

**There is no clearer indication of the failure of this concept than the litany of concerns expressed by the Special Trustee in his Quarterly Report Observations since August 2000 about the mismanagement of trust reform projects and his repeated requests for authority to correct them. The most recent example of the lack of support he has received is the failure of the Secretary of the Interior to accept his advice and repeated requests and place line authority over all trust reform operations in him.”** *Id.* at 26, emphasis in original.

The conclusion of the Court Monitor drawn from the episode of the verification (or lack of verification) of the Seventh Quarterly Report by the Special Trustee and the Secretary of the Interior’s failure to obtain his verification was noted in the Fourth Report:

**“The source of the problem with the truthfulness, accuracy and completeness of the Quarterly Reports and the inability of the Special Trustee to resolve his concerns or verify those reports is the lack of experienced, knowledgeable, and responsible senior management at least within the BIA. The underlying and deep-seated management problems spread throughout the trust reform subprojects, symptoms of which are the inaccurate and incomplete Quarterly Reports, are the result of this management vacuum and are perpetuated by it.”** *Id.* at 23.

Little wonder that the Special Trustee has now cited to the need for good project management in his April 8, 2002 memorandum to the Secretary recommending his taking over management of trust reform. If his advice and observations are given little or no credence by the Secretary, if DOI and BIA management thwart his direction at every turn, it will continue to be impossible for him to conduct his role as the Congressionally appointed overseer. Better to take over the active management of trust reform to “ensure” to Congress that trust reform is making progress than continue a fruitless attempt at oversight when no one including the Secretary of the Interior, accepts his Congressionally mandated role or his advice.

#### **IV. THE SECRETARY OF THE INTERIOR’S MEMORANDUM RESPONSE TO THE SPECIAL TRUSTEE**

On April 17, 2002, the Secretary responded to the Special Master’s April 8, 2002 memorandum with a memorandum of her own entitled, “Trust Reform” (Tab 8). The memorandum speaks for itself and will be quoted here in part:

**“Earlier in my tenure as Secretary of the Interior, I recognized that in the American Indian Trust Fund Management Reform Act of 1994, Congress had conveyed broad duties and**

responsibilities to the Special Trustee for American Indians. It seemed reasonable to believe that the Special Trustee would provide executive leadership to assist the Department in pursuing its trust agenda. Later, on July 10, 2001, I signed Secretarial Order 3232 to support further the Special Trustee's ability to exercise executive leadership, improve accountability and to ensure trust reform projects were properly managed. Subsequently, it became apparent additional executive leadership would be required to coordinate trust reform and trust assets management activities throughout the Department, hence by decision to ask the Deputy Secretary to get involved.

....

In a recent letter to Tex Hall, you implied that OST operates independently of the Deputy Secretary. Let me clarify so that there is no question. The Deputy Secretary has broad authority to operate for me and with me in overseeing all of the Presidential appointees and other officials in the Department, in addition to his coordinating role on trust reform. Accordingly, you report to him in the same way you report to me.

In your memorandum, you offered to assume responsibility for completing an action plan and for assuming line authority over several projects. Frankly, your performance to date does not justify expansion of your responsibilities. Instead you should be focusing your efforts on strengthening your execution of tasks already assigned to you.

As you know, I have directed Ross Swimmer, Director of the Office of Indian Trust Transition (OITT), to be responsible for the action plan and for data cleanup, probate, trust systems and the development of the EDS business process analysis. I am confident that Mr. Swimmer is very qualified to undertake these duties, and I don't want to interrupt the progress that is being made by OITT under the leadership of Ross Swimmer and Donna Erwin. Therefore, OST should support this effort rather than undertake a duplicate planning process.

I also wanted to provide you with some general comments. Your initiative to have EDS review the status of trust reform was very helpful; EDS's independent evaluation pointed out a broad array of challenges for the Department to overcome. In the aftermath, however, instead of relatively ambiguous observations, I expected more robust contributions from OST in identifying concrete solutions or taking actions to improve program accountability. I expected that the Special Trustee would participate as an integral part of the senior management team to address these challenges; your memorandum and other feedback suggest otherwise. While OST's preparation of the quarterly reports to the Court has been a learning process over time, to the best of my knowledge the only report to have received any positive feedback is the Eighth Report supervised by Ross Swimmer.

Finally, I have asked the Deputy Secretary to review with you the relative performance of OST. I am concerned with several items including: projects that have been transferred to other organizations without material progress (collection of missing information, historical accounting, etc.); our most recent financial audit findings that suggest room for improvement (inadequate policies & procedures, unreconciled cash, trust fund and special deposit account balances); OST funding that was not provided in a timely manner to accommodate important trust initiatives (Indian land consolidation, improving BIA computer systems security); and the Special Master's concerns over OST's records management program (policies & procedures, lost records, program objectives).

**In conclusion, I trust that you can appreciate the need to make expeditious progress in trust reform and that we need to coordinate the Department’s activities through the Deputy Secretary. The Special Trustee has a crucial role to play within the Department’s senior management team. I expect you to improve your performance in working with the rest of our Departmental team to serve trust beneficiaries.”** *Id.* at 1-3.

Before beginning an analysis of this memorandum, it should be noted that it is doubtful that the Secretary of the Interior compiled any part of it. Comments that may appear critical of the substance of the memorandum are in no way meant to denigrate the office of the Secretary or the Secretary herself. However, she did sign this memorandum and must have agreed with or accepted as true the statements and positions taken within it. If she did prepare it, she must have relied, at least in part, on subordinates for the information on which to base her opinions. In any case, whether this memorandum was of her own composition or that of her subordinates, it reveals a critical lack of understanding of the history of trust reform under the past and present administrations and a lack of appreciation for and a misunderstanding of the role of the Special Trustee.

**A. For The Intent Of Congress To Be Fulfilled, The Special Trustee Must Operate Independently of the Deputy Secretary.**

The Secretary has now directed the Special Trustee that he is to report to and work within the Department’s “senior management team.”<sup>6</sup> But Congress had a different idea for their trust reform overseer:

**“There is hereby established within the Department of the Interior the Office of Special Trustee for American Indians. The Office shall be headed by the Special Trustee who shall report directly to the Secretary.** 25 USC 4042, Section 302. (a), emphasis added.

Not only is the Special Trustee required by Congress to report directly to the Secretary, his functions, as envisioned by Congress, cannot be performed if he must report to the DOI executive who has been put in charge of trust reform. The legislative history of the 1994 Reform Act makes this clear:

**“At the top of needed reform must be one entity with the knowledge and authority to ensure that reform takes place and coordinates that action....**

....

**This legislation contains a provision to create an Office of Special Trustee within the Department of the Interior to ensure that trust management reforms take place and are coordinated with MMS, BLM, and the BIA.”** P.L 103-412, page 14.

As codified by Congress, this legislative intent took the form of the following mandate:

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<sup>6</sup> That she meant what she said is indicated by an article entitled, “Bush Policies Have Been Good to Energy Industry in *The New York Times* National edition on Sunday, April 21, 2002 including an organizational chart that shows the Special Trustee reporting directly to the Deputy Secretary (**Tab 9**).

**“The Special Trustee shall oversee all reform efforts...”** 25 USC 4042, Section 303 (b) (1) emphasis added.

And further:

**“COORDINATION OF POLICIES. –**

**(1) IN GENERAL –The Special Trustee shall ensure that –**

- (A) the policies, procedures, practices, and systems of the Bureau, the Bureau of Land Management, and the Minerals Management Service related to the discharge of the Secretary’s trust responsibilities are coordinated, consistent, and integrated, and**  
**(B) the Department prepares comprehensive and coordinated written policies and procedures for each phase of the trust management business cycle.”** *Id.* at (c).

The Special Trustee cannot perform his Congressionally mandated duties working for and reporting to the DOI official in charge of trust operations and reform. He, not unlike an outside regulator or inspector general, must be able to review and critique the performance of those DOI officials working for the Deputy Secretary such as the Director, OITT, Mr. Swimmer, as well as the policies and procedures developed by the Deputy Secretary. It is inconceivable that the Secretarial memorandum’s direction is meant to and would do anything less than curtail the oversight role and independence of the Special Trustee and his staff.

The Special Trustee correctly spelled out this conflict in responding to the Deputy Secretary’s February 2002 offer to him to join the Deputy Secretary’s senior-level executive committee to discuss trust reform policy and procedures. As he stated in part:

**“However, it must be understood, both inside DOI and outside of it, that my offices’ participation in that group’s discussion does not signify my agreement or endorsement of the decisions or recommendations for trust reform it may make. I believe the role of the Special Trustee is to give informed and objective advice directly to the Secretary when needed. I believe the independence and objectivity of this Office is an asset of value to the Secretary as she formulates the specifics of trust reform. Nevertheless, I will be pleased to share my views, opinions, and guidance with the group.”** Tab 3 at 1, emphasis added.

He cited to the need for his office to remain independent of any decision-making process or control by DOI management as previously was the case in the TMIP committee whose members so often badgered and bludgeoned him into modifying and weakening his Quarterly Report Observations. He did not, as the Secretarial memorandum inferred when stating that he was expected to “participate as an integral part of the senior management team” and that he should “improve your performance in working with the rest of our Departmental team to serve trust beneficiaries,” refuse to work with the Deputy Secretary and his senior trust reform staff; he merely stated the obvious.

As the Congressional overseer for the DOI’s trust reform efforts, the Special Trustee cannot be expected by the Secretary or the Deputy Secretary to function as just another member of the Deputy Secretary’s staff subject to the acceptance or rejection of his advice and observations by that body or the Deputy Secretary. Nor can he be part of litigation strategy meetings which he, himself, has found and reported in the past (and

presently in his April 8, 2002 memorandum to the Secretary) to have been detrimental to the IIM accountholders and Tribal trust beneficiaries – “*Moreover, the Department continues to focus on Cobell and Tribal litigation activities at the expense of basic trust reform. The legal advice and counseling currently provided is driven by the litigation posture, as opposed to actually fulfilling the fiduciary responsibility.*” **Tab 6** at 2.

## **B. The Special Trustee’s Observations**

The Secretarial memorandum alludes to the Special Trustee’s “relatively ambiguous observations” and asked for his “more robust contributions...in identifying concrete solutions or taking actions to improve program accountability.” The Secretary’s subordinates’ apparent prior misinformation provided to her about the Special Trustee’s role in compiling and making observations to the Quarterly Reports or his more broad oversight responsibilities became a matter of testimony before this Court in the Secretary’s contempt trial. In the following colloquy it became evident how badly she had been informed about the Special Trustee’s role in this regard:

**THE COURT:** How do you usually look at recommendations from the Special Trustee?

**THE WITNESS:** I have - - he has had some very good recommendations. The hiring of EDS was something that I think has been very beneficial and I think has really provided us with some very good insights. There have been some situations where the Special Trustee has raised concerns where I’ve had a hard time pinning down exactly what his concerns are. We went through this with the preparation of the seventh quarterly report, where he said the report was not complete and was inaccurate, and then I couldn’t quite get from him what he thought was incomplete or inaccurate in that report, and so I wished he had been more specific in helping me understand that a little sooner.

**But I think overall he has a knowledge of trust issues and I think that it has been beneficial to us to have someone with the private sector trust experience involved in this.**

There was an existing history of not only the Special Trustee’s Observations from the Third Quarterly Report on, but also the Court Monitor’s First and Second Reports on the historical accounting and TAAMS that addressed the panoply of events leading to the Special Trustee’s refusal to verify the Seventh Quarterly Report and the reasons for his Observations. Someone did not serve the Secretary well in not addressing his previous reported concerns and Observations and the Court Monitor’s Reports with her before she signed her memorandum to the Special Trustee.

## **C. The Present Team Put In Place By the Secretary and Deputy Secretary To Carry Out Trust Reform, With One Exception, Have No Trust Experience Nor Have They Received Sufficient Trust-Experienced Staffing.**

In advising the Secretary of his intended actions regarding the core trust reform programs that he believed were not moving forward expeditiously, he sought to place his expertise and that of his staff at her disposal to carry out the many complicated and critical

fiduciary management and systems development projects to bring about meaningful trust reform.<sup>7</sup> The Secretary rejected his overture out of hand without even addressing his concerns as Congress envisioned any Secretary would do in light of its creation of an office within the DOI reporting to the Secretary of the Interior for the exact purpose the Special Trustee wrote his memorandum. Instead, the Secretary has rejected his offer, criticized his management and stated “*I am confident that Mr. Swimmer is very qualified to undertake these duties, and I don’t want to interrupt the progress that is being made by OITT under the leadership of Ross Swimmer and Donna Erwin.*” **Tab 8** at 2,

Mr. Ross Swimmer may be a very experienced manager with a considerable history in the BIA as Assistant Secretary – Indian Affairs in the Reagan and early Bush administrations. He may have been a tribal chief and a bank president. But repeated inquiries by the Court Monitor about his trust experience have not received any response that he has ever been educated in or performed any trust fiduciary operations to the extent required to fulfill the role he has now been given by the Deputy Secretary.<sup>8</sup>

As discussed previously, he has been placed in charge of every single trust reform effort in existence within DOI with the exception of the few projects under the supervision of the Special Trustee. The only experienced trust official assigned to Mr. Swimmer’s staff with a proven record of trust reform accomplishment is Donna Erwin who is on loan from the OST. But the Special Trustee, who is her boss, does not believe she has been given the resources to do her job. The rest, with the possible exception of several EDS personnel must rely on the trust experience and assistance of the Special Trustee and his staff for they have none.

The Secretary has placed the Deputy Secretary, with the help of Messrs. Cason and Swimmer, in charge of trust reform and its development without sufficient trust management experience and support to effectively bring about trust reform – at least in the view of the Special Trustee, the official placed in her Department by the Congress to advise her on such critical trust reform management issues and to:

*”ensure the establishment of policies, procedures, systems and practices to allow the Secretary to discharge his trust responsibilities in compliance with this Act.”* 25 USC 4042, Section 303 (1).

**D. The Secretary’s Listing Of The Performance Failures Of The Special Trustee Exhibits A Lack Of Knowledge About DOI’s Past Trust Reform History And Does Not Identify The Responsible Parties For Those Failures**

*“While OST’s preparation of the quarterly reports to the Court has been a learning process over time, to the best of my knowledge the only report to have*

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<sup>7</sup> The only successful trust related system that has been put into place since the passage of the 1994 Reform Act was TFAS, the computer system handling the financial records of the trust beneficiaries that was the responsibility of the Special Trustee and, specifically, Deputy Special Trustee Donna Erwin.

<sup>8</sup> And he has been the subject of criticism by Indian Country, deserved or not, for his past actions to reform the BIA’s trust operations. See Trial Tr. at 4046-4052.

*received any positive feedback is the Eighth Report supervised by Ross Swimmer.” Id.*

As has been stated repeatedly in the Reports of the Court Monitor and by the Special Trustee in testimony at the Secretary’s contempt trial, the Special Trustee took over *compilation* of the Quarterly Reports from the Office of Plans, Management and Budget for the Third Quarterly Report filed with this Court on August 31, 2000. The *preparation* of those reports was the responsibility of the respective Bureaus and project managers within those organizations.<sup>9</sup> The record of inaccurate, incomplete and untruthful reports compiled by most of these subproject managers (certainly with regard to the TAAMS and BIA Data Cleanup subprojects addressed in the Second and Third Reports of the Court Monitor) was the subject of repeated Observations of the Special Trustee over the ensuing months.

As also reported in all of the Reports of the Court Monitor addressing the Special Trustee’s attempts to bring some semblance of transparency to those Quarterly Reports, including those during the administration of the present Secretary, he has received little support in that effort and the direct obstruction of not only the BIA but also attorneys within the Office of the Solicitor. But for his tenacity in criticizing the Quarterly Reports’ content, the subprojects’ status and the subproject managers’ abilities, this Court would have had little or no indication that all was not well with trust reform.

But for the Special Trustee’s refusal to “verify” the Sixth and Seventh Quarterly Reports, the Eighth Quarterly Report would not have had any more objectivity than its predecessors. His refusal and the Court Monitor’s review of that refusal (in the Fourth Report of the Court Monitor and the Supplemental Report Amending the Second and Fourth Reports of the Court Monitor) forced the DOI to closely examine their own employees’ knowledge and competency to even understand what they did not know they were not reporting.<sup>10</sup>

But for the Special Trustee’s retention of EDS and recommendation to the Secretary that EDS examine the true status of trust reform, this Court would never have known from the Defendants the abysmal state of trust reform finally addressed in the Eighth Quarterly Report.

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<sup>9</sup> As stated in testimony during the contempt trial: **Q. And the first sentence of the memorandum reads as follows: ‘The Office of the Special Trustee for American Indians has assumed responsibility for the preparation and submission of the quarterly status report to the Court.’ So this is a - - is that a correct statement as of July 14<sup>th</sup>, 2000? A. Yes, it is. Preparation and submission, I probably ought to clarify preparation. Preparation is the accepting of the subproject reports from the respective subproject managers, doing any editing and formatting that’s required, trying to make certain that the reports have some accuracy, that there aren’t glaring inaccuracies that we might otherwise question, and then submitting that eventually to the Court.** Trial Tr. at 2259-2260.

<sup>10</sup> It should also be noted that but for this Court’s refusal to allow the Secretary to substitute the EDS reports on trust reform for the Eighth Quarterly report, the Court would not have had the more complete but still inadequate (according to the Special Trustee) Eighth Quarterly Report.

It is because of the Special Trustee's actions and performance of his Congressionally-mandated oversight role in the face of strong resistance by the subordinates of the past and present Secretaries of the Interior that the IIM accountholders, the Tribal beneficiaries of the Indian Trust, and this Court now know what the Secretaries' Bureaus and project managers as well as their senior staffs were not reporting about the state of trust reform and the unprofessional and possibly contemptuous performance of these same DOI officials and attorneys.

*"I am concerned with several items including: projects that have been transferred to other organizations without material progress (collection of missing information, historical accounting, etc)." Id.*

Again, there is such a level of misinformation that would have had to have been supplied to the Secretary for her to have cited these two projects as failures in the performance of the Special Trustee that it defies belief. In her testimony to this Court, she indicated that she had read "a large portion" of the Court Monitor's reports.

**Q. Have you read the six court monitor reports and the one supplemental report of the court monitor?**

**A. I have read most of all of those reports. I have read summaries of some aspects of it. So I have read at least a large portion of those monitor reports.** Trial Tr. at 4366.

The Secretary could not have read or received correct summaries of at least the First Report of the Court Monitor. That report clearly pointed out that not only had the Acting Special Trustee, Thomas Thompson, and later the Special Trustee, opposed the statistical sampling historical accounting but their testimony at trial indicated they never believed it would work and stated as much to anyone interested in asking them about it.<sup>11</sup> They further had no official written Secretarial direction to accomplish the statistical sampling historical accounting until Secretary Babbitt signed the December 29, 2001 memorandum to the Special Trustee and others to begin the planning for the statistical sampling project.

The funding for that project was not to be touched until the new administration came into office and reviewed the statistical sampling decision. Even before the present Secretary's affirmation of Secretary Babbitt's memorandum in her February 27, 2000 memorandum directing the statistical sampling project go forward, the Special Trustee had begun to form a staff by hiring a project manager who continues to this day to work on the historical accounting.<sup>12</sup> However, two months later, in May 2001, the Court Monitor apprised her Counselor that all was not well with her decision:

**"There are two questions posed by Secretary Norton's actions so soon after her assumption of her duties as Secretary of the Interior and within four days of the Court of Appeals' ruling. First, what did she know of her subordinates' past activities regarding the process used to reach the determination that the only approach to an historical accounting could and would be a statistical sampling project, and, second, when was she informed about the**

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<sup>11</sup> See Trial Tr. at 2392 and 2397.

<sup>12</sup> See generally the First Report of the Court Monitor.



**status and substance of the statistical accounting? In other words, was she aware that Secretary Babbitt's decision did not comply with this Court's order nor was it in compliance with the Court of Appeals' decision just rendered.**

**In light of the Court of Appeals' ruling affirming this Court's decision requiring an historical accounting of all accounts and all funds whenever deposited (and related breach projects) could it have been expected that someone in The Secretary's office would have been tasked to review the past decisions made prior to the Court of Appeals holding?**

**Initially, these questions were put to the Secretary's Counselor, Michael Rossetti, on May 4, 2001, outlining the Court Monitor's review of the historical accounting project since February 23, 2001 and highlighting for him the apparent lack of research done on which to base a finding that statistical sampling was the best means for conducting the historical accounting. That the decision appeared to have been a "back of the envelope" determination without any research into, or requisite understanding of, what the project was meant to accomplish or what the Court had ordered. Finally, that it had been one and one-half years since this Court's December 1999 decision directing an historical accounting. There had been little or no progress except for the questionable decision to do a statistical sampling accounting and the recent hiring of a project manager.**

**Rossetti was asked to determine what research the Secretary had directed or her subordinates had done in preparation of her memorandum concurring in the statistical sampling project first directed by Secretary Babbitt. It was pointed out that if there had been no research or review of the foundation of Secretary Babbitt's decision or the recommendations of Slonaker and Gover, or an independent review of possible historical accounting methodology, the Secretary should consider whether her memorandum was in compliance with this Court's direction.**

**On May 15, 2001, Rossetti responded that the Court Monitor's comments about the lack of historical accounting progress and the statistical sampling project's weaknesses had borne fruit. Rossetti indicated that the statistical sampling project would be restructured by DOI to consider all options for an historical accounting. However, the Secretary would not withdraw or change her memorandum decision on statistical sampling. The project manager, Jeff Zeppin, would begin the review by hiring a statistician to consider the options available. They would then prepare a plan for Congress which would serve as notification to this Court. First Report of the Court Monitor at 37-38.**

The Secretary followed up this notification to the Court of her decision to restructure the historical accounting project with a memorandum under her signature on July 10, 2001 (accompanied by a Secretarial Order of the same date) that stated in part:

**Therefore, to insure (sic) that we begin this comprehensive planning process promptly but at the same time have the necessary information for due deliberation, *I have today issued a Secretary's Order creating the Office of Historical Accounting. This office will be headed by an Executive Director under the direction of my office.... This office will be responsible for planning and completing the historical accounting. Specifically, the Secretary's Order directs the Office of Historical Trust Accounting to begin its work....***" First Report at Tab 25, emphasis added.

The historical accounting project, as it existed before this memorandum and order, was not transferred from the Special Trustee's office because of "lack of material progress." A new Office of Historical Accounting was established by the Secretary to *begin* to plan for how to properly do an historical accounting based on the warnings of the Court Monitor that a report about the project's insufficiency and problematic origination would be forthcoming.<sup>13</sup>

The historical accounting project – a key fiduciary obligation of the Secretary as Trustee Delegate to the Indian Trust beneficiaries – was without "material progress" because of the direct actions of the former and present Secretaries of the Interior and their senior staffs. It was not the lack of performance of the Acting Special Trustee or the present Special Trustee that caused this situation to be the case. As reported in the First Report of the Court Monitor, it was because these same DOI officials had ignored or rejected the advice of the Acting Special Trustee, the Special Trustee and other OST officials to forego an effort to mislead this Court and the Circuit Court of Appeals (and their own Indian Trust beneficiaries) by concocting Federal Records and statistical accounting processes that would never suffice as an historical accounting.

Nor could those advising the Secretary have read the Court Monitor's Reports sufficiently to have a scintilla of proof on which to base a determination that the Special Trustee had not performed his duties with respect to the collection of missing information breach project.

It is accurate that this project made little or no progress during the period from this Court's December 21, 2002 decision creating that particular breach project and the transfer of it to the Office of Historical Trust Accounting. But the reasons for that failure have absolutely nothing to do with the Special Trustee's ability or desire to proceed with that project.

Had whoever advised the Secretary of the genesis of the failure of this breach project merely turned to the Section of the First Report of the Court Monitor entitled, "Collection of Missing Information from Outside Sources – Breach Project," beginning on page 29, they would have found the following paragraphs describing what happened to that project:

**In February 2000, the Court-ordered 'Report on Collecting Information From Outside Sources' was published by the Interior Defendants and provided this Court. In addressing**

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<sup>13</sup> The decision to begin again with a new Secretarial level office of historical trust accounting was made without even consulting the Special Trustee. During his testimony this fact was brought out: **Q. Isn't there an imperative requirement in the Trust Reform Act of '94 that the Special Trustee is to ensure a number of different matters? A. Yes. Q. Then why wasn't the Special Trustee involved in what appears to be the decisionmaking process first to go forward with the statistical sampling, and then to go forward with other alternatives or other considerations; do you know? A. No. Q. Wasn't that mandated by Congress that the Special Trustee had not only a responsibility but actually the language stated the Special Trustee shall ensure? Do you recall that? A. Yes, I recall the language. Q. And nevertheless you were never consulted by the Secretary; is that fair to say? A. I think that's accurate. Q. Do you know why? A. No. Trial Tr. at 2201.**

the time period covered by the proposed project in the Executive Summary at page 2 the report stated:

***‘Although the Order did not define the period to be covered by the directed accounting, the question of the scope and nature of Department’s responsibility to render an accounting prior to October 25, 1994, the effective date of the Indian Trust Fund Management Reform Act, is under appeal. Therefore, this document details the proposed strategies for collecting missing information to meet Interior’s statutory obligation. The approach for providing information to account holders for the prior period will be determined after the proposed information gathering with account holders, their representatives, and other interested parties.’***  
**Emphasis in original.**

....

On May 31, 2000, the ‘Quarterly Status Report to the Court Number 2’ was published and provided to the Court. Again, under the ‘Breach’ project entitled ‘Collection of Missing Information From Outside Sources,’ a significant activity listed at page 24 was:

**‘An electronic file documenting debits and credits for IIM accounts from October 1994 to present has been prepared and is currently being analyzed by a contractor.’**

**‘Quarterly Status Report to the Court Number 3,’ published on August 31, 2000, repeated at page 36 the quotation above found in the original Missing Information report. It also reported at page 37 that:**

**‘It will be feasible to assemble, using data and information existing for the most part in electronic formats, an electronic transaction history file for IIM account holders for the period October 1994 forward.’**

....

**The project was now managed by a team of senior trust managers headed by the Deputy and former Acting, Special Trustee Tommy Thompson.**

**In interviews held with Thompson and Ken Moyers, who worked initially on setting up the missing information project with Thompson, the question was posed why had this project been limited from the start and was as of the fifth Quarterly Report only considering missing information, whether electronic or documentary, from 1994 to the present?**

**Thompson stated that he and Moyers initially conceived the project to support a full accounting going back in time as far as possible. They began to draft plans for how best to locate missing documents that could not be found in the BIA documents and not just the financial management documents.**

**He explained that in meetings with the Office of Solicitor attorneys, they stated they did not care for his approach and wanted the project limited to 1994 forward to correspond with their appellate argument regarding the meaning of the 1994 Act. He wrote the draft as he had planned calling it an accounting project and without placing any limitation on timeframe. The Solicitor’s attorneys took out his language regarding the project’s support of an accounting and limited it to a 1994-forward timeframe. In their opinion, DOI had no**

**responsibility to reconcile the historical records regarding the IIM accounts before 1994 based on the 1994 Act's language.**

**It should be noted that the project is still in the early stages and has missed a substantial number of milestones.**

**At the time of the last interview with Thompson in June 2001, it was his belief that the missing information project would be subsumed under the new accounting project directed to be accomplished by the present Secretary of the Interior and under revision to consider other options than just a statistical sampling historical accounting.**

**Moyers confirmed Thompson's account of the meetings with the Solicitor's office. Moyers was assigned the missing information project soon after the December 1999 court decision. They worked on it together. It was his understanding that the collection in the field of BIA transactional and financial management records and documents would be the foundation of the historical accounting. He argued for an approach using these documents to research and determine how thorough, accurate, and cost effective an accounting could be made or whether other techniques would be needed in addition to approximate the figures in an account if some key documents were missing. The only way to do an accounting was with the documents.**

**In a meeting with DOJ and Office of Solicitor's attorneys, he and Thompson were told that there would not be an accounting but merely a project to come up with ways to do a collection of missing documents going back to 1994. A heated debate followed over whether such a project for an accounting would ever qualify as an accounting or appropriately addressed this Court's ruling. The attorneys were adamant that the law would support their position that there was no requirement in the 1994 Act to do an historical accounting other than from 1994 forward." *Id.* at 31-33**

In the Court Monitor's interviews with Solicitor's Office attorneys at the time of these OST officials' interviews, they confirmed that their legal opinion was that there was no statutory responsibility to consider any missing information except from 1994 forward. *Id.* at 33.

While the Court Monitor opined at the time that their position had no basis for such a limitation, the legal argument is not important now. What is of significance is that it was not the Special Trustee's performance that severely limited the progress of the collection of missing information project but the direction of the Solicitor's office and their vigorous opposition to OST officials doing anything more than a review of missing information from 1994 forward.

Again, senior OST officials, as they did with the statistical sampling historical accounting project, informed the Solicitor that DOI was not allowing the completion of the collection of missing information project in a manner consistent with this Court's decision or sufficient to meet their fiduciary obligations to the IIM accountholders. It was also the decision of the Secretary's Solicitor that held up the project. It was then the decision of the Secretary to include it within the responsibilities of the Office of Historical Accounting as part of what that office would need to do to arrive at an historical accounting.

*“OST funding that was not provided in a timely manner to accommodate important trust initiatives ...” Id.*

Suffice it to say that the Special Trustee has testified that he has withheld funds under his statutory obligations to ensure that the appropriate actions were taken on trust reform. He has refused to fund trust reform projects that were not properly planned or where no plans were in existence to support BIA and other Bureaus’ funding requests.<sup>14</sup> It is not the object of this Report to delineate all such instances or whether he was right or wrong to have so done. However, the implication of the Secretary’s criticism is that it was because of poor performance that monies were held up for trust reform projects. She is correct – partially. It was poor performance. But it was not the poor performance of the Special Trustee that caused delays in funding of such projects as TAAMS and BIA Data Cleanup. To the contrary, it was his and his staff’s good performance in recognizing the poor performance of the BIA officials charged with trust reform duties that prevented more money from being wasted than the apparent \$614 million reported by some sources as the appropriate tab for trust reform implosion.

#### **E. “Relative Ambiguous Observations”**

The Secretary began her general comments about the Special Trustee’s performance with the statement:

**“Your initiative to have EDS review the status of trust reform was very helpful; EDS’s independent evaluation pointed out a broad array of challenges for the Department to overcome. In the aftermath, however, instead of relatively ambiguous observations, I expected more robust contributions from OST in identifying concrete solutions or taking actions to improve program accountability.” Tab 9 at 2.**

She also testified to her concern about his Observations at her contempt trial:

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<sup>14</sup> Q. Do you know how much money has been invested in TAAMS so far in direct and related costs? A. I believe the number is something in the order of \$36 million. Q. And climbing? A. Oh, sure. Hopefully not very fast right at the moment. Q. But you don’t know that, either, do you, Mr. Slonaker. A. Yes, I do. Q. Oh, you do. Well, how do you know that? A. We are responsible as the Office of Special Trustee for controlling the money that flows to the various subprojects, including TAAMS. Q. And as a result, you get reports with regard to the flow of money? A. Yes. Q. And who provides these reports to you? A. My budget officer. Q. And where does he get his information? A. He gets his information from the transaction that he has actually performed on my behalf with respect to the subprojects. Q. So he does his own independent review of the information that’s provided to him by subproject managers? A. He is responsible for allocating money in response to requests from the subproject managers. Q. So if the request hasn’t been made, you don’t have to give them any money. A. That’s right. Q. And that’s the reason you know there isn’t a significant increase in funding, because the requests haven’t been made; is that a fair statement? A. Some requests have been made. Q. Have you denied those requests? A. In large part, yes. There is some ongoing activity that we deem to be worth funding, but substantially the requests have been denied. Trial Tr. at 2211-2212.

**THE COURT:** How do you usually look at recommendations from the Special Trustee?

**THE WITNESS:** I have - - he has had some very good recommendations. The hiring of EDS was something that I think has been very beneficial and I think has really provided us with some very good insights. There have been some situations where the Special Trustee has raised concerns where I've had a hard time pinning down exactly what his concerns are. We went through this with the preparation of the seventh quarterly report, where he said the report was not complete and was inaccurate, and then I couldn't quite get from him what he thought was incomplete or inaccurate in that report, and so I wished he had been more specific in helping me understand that a little sooner.

But I think overall he has a knowledge of trust issues and I think that it has been beneficial to us to have someone with the private sector trust experience involved in this. Trial Tr. at 4378-4379.

What had the Special Trustee provided the Secretary regarding his concerns about trust reform up to the time of and including the Seventh Report that were so ambiguous as to fail to enable the Secretary to "pin down" what his concerns were?

In the draft Seventh Quarterly Report, the Special Trustee had made the following statement in his Observations:

**"The Special Trustee is not satisfied with the completeness or the quality of the information provided in this quarterly report. As our investigations are carried further and we receive the analyses from EDS of all subprojects, we will implement changes to this report designed to improve the format, completeness, and content of future quarterly reports."** Third Report of the Court Monitor at Tab 4D, page 6.

On August 29, 2001, two days before the filing date of the Seventh Quarterly Report, the Secretary wrote to the Special Trustee, quoted the above statement and requested that:

**"Since I have not heard from you on this subject prior to my review of the draft, and since your office compiled the report, I assume that your concerns were of insufficient severity or immediacy for you to recommend a delay in filing the report. If that assumption is incorrect and you believe that the draft report needs to be amended materially prior to filing, we need to know immediately. The Solicitor will call you later today regarding the immediacy of your concern."**

**If your concerns are not of such a nature as to require a delay, I nevertheless want to address your concerns quickly."** *Id.* at Tab F.

As reported in the Fourth Report of the Court Monitor, the Special Trustee did respond to the Secretary that his concerns were *not* of insufficient severity. Specifically, he stated in his memorandum to the Secretary of September 10, 2001 forwarding his past Observations in the Quarterly Reports that:

**Many of these concerns were expressed in terms of the serious and complex management problems faced by the Department. These concerns included, but are not limited to, the**

**inability of the BIA data cleanup effort and the continued failure of TAAMS to operate in an acceptable manner. The delays in some critical subprojects suggest that those people involved in those projects do not have or cannot get or will not acknowledge an accurate description of problems present in the projects. Therefore, the problems are either not addressed or addressed ineffectively. The successful reform of the Department's Indian trust asset management process depends on the objective analysis of the process, the candid communication of the results of that analysis, and the firm commitment to reshape the process where necessary. Third Report at 31-32.**

Two of his Observations' statements included with the memorandum were directed at the TAAMS and BIA Data Cleanup subprojects.

First, with regard to BIA Data Cleanup:

**"The original charts (not shown here) were placed in the report in response to my efforts to get BIA to provide performance metrics for BIA Data Cleanup.**

**These charts represent only the work accomplished by DataCom, The BIA contractor, and show no work performed by BIA staff. Therefore, this information is not comprehensive in scope.**

**There is no consistency in the information reported within the same region from one quarter to the next quarter. Moreover, there is no consistency between any two regions in the information that is provided in the report. These inconsistencies are inexplicable. *Id.* at 32.**

With respect to TAAMS, he stated:

**"In the current HLIP, TAAMS has 24 milestones, of which 19 are completed, one is an ongoing milestone, and four are 'to be determined' status. If one were to use the record of published milestones completions, then TAAMS would be almost completed. This stretches credibility. Obviously additional milestone and project planning is required. *Id.***

He also informed the Solicitor that he would not agree to requesting an extension for the Seventh Quarterly Report on the grounds that his concerns needed to be addressed based on the fact that they were too serious and extensive to be addressed in one month. As reported in the Fourth Report of the Court Monitor, his Deputy Special Trustee, John Miller wrote a memorandum dated September 4, 2001 to an attorney in the Solicitor's Office stating:

**"This is to recap and confirm our conversation of 8/31/01. I expressed the Special Trustee's opposition to the proposed motion to extend the filing deadline for the quarterly report based on the Special Trustee verifying the contents of the report. As I stated in a voice mail message and directly to you with Mike Smith present, the Special Trustee would not verify the report under any conceivable scenario encompassed by the proposed motion. As you are aware, I repeated this to the Solicitor when we met with him later in the afternoon. I have not seen what was filed, but I hope DOJ did not represent a contrary position to the Court." Fourth Report of the Court Monitor at 4-5**

Unfortunately, that motion was filed over the objections of the Special Trustee, apparently at the direction of the Secretary. *Id.* at 5-6.

There was nothing ambiguous about the Special Trustee's statement of his concerns. There was no difficulty for anyone to understand or "pin down" his concerns. What was difficult for the Defendants was accepting that the Special Trustee shared the same concerns that had been addressed in the Second Report of the Court Monitor about TAAMS' failures. He knew even more about other projects' failed status including the BIA Data Cleanup subproject that the Court Monitor later confirmed was in extremis in the Third Report of the Court Monitor.

The Secretaries representatives – her Solicitor and Counselor – understood fully what the concerns of the Special Master were. As he testified at the contempt trial, they had come to see the Special Trustee about his concerns:

**Q. So you and Mr. Myers and Mr. Rossetti had a conversation?**

**A. Yes. That wasn't strictly on the subject of verification; it was prompted by the fact that I had made the statement that I wasn't comfortable with the completeness of the report. I don't know that verification was anything more than perhaps a side issue in that conversation.**

**Q. And do you recall what was discussed in that regard?**

**A. In that conversation?**

**Q. Correct.**

**A. It was more on the subject of how the Department could satisfy my concerns about completeness so that the report could be verified, certified, surnamed. I use those together because they tend to be used interchangeably at times.**

**Q. Are they the same, as you understand?**

**A. I'm not sure to this day that I know for certain what the difference is.**

**THE COURT: What did you say it would take to satisfy you?**

**THE WITNESS: I wrote a memo back to the Secretary and cited I believe it was four examples of why I was concerned about completeness, and the outcome of that was to instead as the subproject managers to certify or surname their portions of it.**

**THE COURT: And just go around you.**

**THE WITNESS: You could say that.**

**THE COURT: That was the Secretary's decision.**

**THE WITNESS: I can't say for certain, but I assume it was.**



**THE COURT:** She's the one that told you to tell her why you wouldn't sign off.

**THE WITNESS:** That's true.

**THE COURT:** You addressed your memo to her.

**THE WITNESS:** That's true.

**THE COURT:** You assume it was her decision to go around you, right?

**THE WITNESS:** I think so, yes.

**BY MR. GINGOLD:**

**Q.** Do you know why the decision was made to go around you?

**A.** No, sir.

**Q.** Anyone explain to you why it was done?

**A.** No, sir.

**Q.** As of today, they still haven't, correct? Explained to you why they've gone around you.

**A.** No, sir. Trial Tr. at 2242-2243

On cross-examination, the Defendants' counsel challenged the concept that his Observations were not anything that was new or unexpected for the Secretary or her senior staff:

**Q.** And when you submitted - - let me ask you this questions, first: Your first draft of the Special Trustee observations, that didn't have the language in it about not being satisfied with the completeness of quality of the information included in the reports, did it? Do you remember that?

**A.** I believe it did.

**Q.** You believe your first draft of it did?

**A.** I believe so.

**Q.** Let me ask you this question. What effect did you think that the inclusion of this language would have internally within the Department? Did you think that this might raise any alarms within the Department? Inclusion of this language, 'The Special Trustee is not satisfied with the completeness or the quality of the information provided in this quarterly report.'

**A. I didn't think about the ramifications within the Department; I just felt like that had to be said.**

**Q. Did it cross your mind that people might find that to be a fairly dramatic statement that needed to be addressed?**

**A. No, it shouldn't have been, because if you read the quarterly reports – Special Trustee's observations from the third quarterly report up, it's like a crescendo of concerns.**

....

**Q. And you can see why it would cause some concerns among people at the Department.**

**A. It shouldn't have.**

**Q. Why is that?**

**A. Well, one way to think about it is that if you go back to the way I originally drafted my observations for quarterly reports 4 and 5 in particular, had they stood the way they were originally drafted, by the time we got to the seventh and made this statement that you have just referred to, it would not have been a surprise at all.**

**Q. But they weren't submitted like that.**

**A. That's right.**

**Q. They were submitted with your comments and - - correct?**

**A. I think what you need to understand is that I had expressed concern about the status of trust improvement quite clearly verbally to a lot of subproject managers, and my people had, too. And I don't consider this to be an abrupt change, which I think is what you're suggesting, from the sixth to the seventh or even the fifth to the seventh, as you are suggesting.**

....

**Q. And in this statement, you are saying, aren't you, that you are not happy with the completeness of the report, so isn't that something that would cause a significant amount of concern for people who are going to be submitting that report to the Court?**

**A. It should. So should the preceding Special Trustee's observations. Trial Tr. at 2424-2428.**

And in perhaps the most telling exchange on cross-examination:

**Q. Wouldn't you agree that it is important for the Secretary to know whether your concerns were of sufficient severity and gravity that they should keep the report from being filed? Isn't that an important thing for her to know?**

**A. Would you repeat the question?**

**Q.** Isn't it an important thing for the Secretary to know, since it's her reporting obligation under the Court's December '99 order, whether your concern about the completeness and quality of the information contained in the quarterly report were significantly severe and significant that they should delay the filing of the report? Isn't it important for her to know that?

**A.** I think it's important for her to know that. What I am troubled by is the presumption that she knew nothing about it up to this point. Trial Tr. at 2430-2431

Whether or not the Secretary had read the Special Trustee's memorandum to her outlining his concerns – or has to this day – the Deputy Secretary was put on notice of the requisite major management and systems restructuring that needed to be accomplished through the Special Trustee's Observations and his memorandum addressing his concerns about the Seventh Quarterly Report. In his testimony about that report he stated as follows in response to the Court's questions:

**THE COURT:** That did focus attention on who was running things when I asked that question, didn't it?

**THE WITNESS:** Yes, sir, and it became quite evident to the Secretary that she - - and that's the reason she asked me to take it on, sir. Yes, sir.

**THE COURT:** And your November 14<sup>th</sup> affidavit was the first public indication then of who was in charge?

**THE WITNESS:** I think, Judge, that is an accurate reflection of how the events unfolded. I think from the Secretary's perspective, in her opinion, when she signed the July 10<sup>th</sup> directive, she thought she'd put the Special Trustee in charge.

**THE COURT:** But it didn't work out that way.

**THE WITNESS:** *Well, it was evident from the seventh quarterly report that we needed to reshape and reorganize in order to get someone who could be in charge, get an organization that had true line responsibility, without conflicts, and that we can move forward in a manner that absolutely would provide to the beneficiaries what we hoped would be an organization that could be responsive in the long term.*" Trial Tr. at 4075-4076, emphasis added.

And the Deputy Secretary also testified about the confusion of the Secretary about what the Special Trustee's role was at the time of the Seventh Quarterly Report and, perhaps, at the time of her testimony at trial and today:

**Q.** Now if Mr. Slonaker had authority with regard to trust reform, would that authority include the quarterly reports? The preparation of the quarterly reports? Do you recall?

**A.** My recollection is that this term preparation and who is responsible for preparation of the quarterly reports, Mr. Slonaker I think has indicated that he was gathering of the quarterly reports and not, quote, preparing the quarterly reports. I think in the Secretary's mind, she believed that he was preparing the quarterly reports. So I - - you know, I

**understand that is a distinction that has real meaning here, and that in the mind of the Secretary, he was preparing the quarterly reports.** Trial Tr. at 4085.

And he also testified to his understanding of the Special Trustee's concerns:

**THE COURT:           Go ahead.**

**THE WITNESS:       Thank you, sir. We digress, Sir. And let me see if I can move back to the point you wanted to make here.**

**Mr. Gingold, what we were confronted with, sir, was a - - two days before a quarterly report that this Court had ordered us to file, we had someone indicating that this report to be filed on the part of this Secretary was not complete and inaccurate, or accuracy was in question.**

**When we discussed this with the Special Trustee, he indicated that he had concerns about the report. We then engaged in a process of discussing with him what specific concerns he was engaged in, what could we do to make the report complete or correct any inaccuracies. And we thought that was a legal obligation we owed this Court. And to simply submit that report with that language in it, in my opinion, would have been a disservice to this Court.**

**So we engaged in a process of trying to figure out what were the particular issues the Special Trustee had. The Special Trustee told me specifically, 'I don't think that some of the subproject managers understand the scope and the depth of the particular task they are engaged in, and I don't think they really understand what they have to do.'**

**And he then said, 'And I don't think I can get them to verify - - I can't accept their - - I cannot verify the report because I don't know if they understand the scope and depth of what they were doing.'** Trial Tr. at 4091-4092.

In summary, the Secretary has now placed the Special Trustee's performance and ability to communicate with her and her senior staff in question. She has not addressed his concerns and may not fully understand them due, possibly, to her subordinates' incomplete explanations. The Secretary did not at the time of the filing of the Seventh Quarterly Report. She did not even address them in criticizing his attempt to carry out his fiduciary duties as Special Trustee by reporting to her and stating his concerns about the failure of the progress of trust reform – concerns serious enough that he has recommended that he take over all line authority for every trust reform project except for the determination of the organization that those processes will become part of.

The Secretary does not want him to report to her but to the DOI official that she has designated to be in charge of trust reform and about whose performance and that of his subordinates the Special Trustee has expressed concerns. She has set up in her memorandum a scenario for the continued failure of the DOI to comply with the 1994 Reform Act and Congress' desire and direction that the Special Trustee ensure the success of trust reform through his statutory authority and responsibilities.

The exchange of memoranda between the Special Trustee and the Secretary and the Special Trustee's and his staff's written memoranda preceding those memoranda portray

an organization that continues to founder at the most senior management levels. Trust reform continues to languish due to the internal political, cultural, fiduciary and legal morass in which they unfortunately have allowed events and their reaction to them to trap them.

## **V. ANALYSIS**

### **A. The Special Trustee**

What the Special Trustee attempted to do in first sending his memorandum “Going Forward on Trust Reform” to the Secretary of the Interior in draft, requesting a meeting with her, was to privately apprise her of his view of the problems with her reorganization efforts that he must oversee. In effect, as has been his continual mode of operation over the last two years, he was attempting to work with the Secretary in devising a solution to problems that she and her senior staff apparently do not understand they have. He was also recommending a solution to those problems and to one additional one – the failure of the Defendants to live up to their testimony to this Court about involving experienced trust officials in the direction and management of trust reform. He was offering to work with the Secretary and Deputy Secretary to bring his and his staff’s expertise to bear on the problems he had observed in the direction trust reform was taking once again – litigation driven agendas carried out by senior managers without the requisite trust fiduciary experience to institute proper trust reform operations and organizations.

To avoid another ship scuttling, he proposed to take over the trust reform operations that require his and his staff’s expertise. In so many words, couched in courteous but urgent form, he was repeating what he has been saying to the Congress and this Court (and most likely anyone in the DOI who would listen) – trust reform requires much more leadership, accountability, project management, trust experience, and oversight than it is being given by this administration for all of the activity that this Court has been told is going on.

His bottom line to the Secretary was simple: trust reform is not advancing, is hampered by the attorneys who continue to force trust reform decisions to fit litigation strategy goals, and it requires an objective and experienced trust reform leadership to be put in place to bring true trust reform to all Indian trust beneficiaries including the Plaintiffs – IIM accountholders.

He could have chosen the easier course that would have been appropriate under the 1994 Reform Act. Merely inform the Secretary and the Congress under his oversight authority in a public forum what he attempted to provide her in private. Once again, he took the conciliatory path with DOI officials as he has so often done in the past and, rather than openly criticizing them for their inexperience and mistakes (or their attacks on him and his staff), has sought to be the calm voice or reason and trust experience. Once again, he proposed a solution based on his and his staff’s trust experience and years of working

with DOI and its Bureaus to bring about meaningful trust reform. Once again, he tried to be a team player.

He provided his memorandum in final form upon receiving no acceptance of his request to meet privately with the Secretary. Her response, and the potential fallout from her memorandum, was not what this gentleman deserved. Nor are there any indications that he was wrong in his evaluation of the status of the Defendant's trust reform activities.

To the contrary, as has been previously discussed in this Report, he was right. His mistake, if it can even be called that, was expecting that he and his warning call would have a responding positive reception.

The Secretary of the Interior has now told him that his *own* performance is suspect. However ill conceived and fundamentally flawed, The Secretary has given him many examples supporting her belief that he has not done his job and may not be capable of doing his job.<sup>15</sup> He has been told to limit his duties to oversight and those operational projects for which he has responsibility.

This "performance report" is interesting in itself for what it reveals about the Secretary's apparent view of whom should be held accountable for the past trust reform failures of this and the last administration. As previously discussed in this Report, both the Secretary and the Deputy Secretary have appealed to this Court to release those DOI officials, who the Plaintiffs have named as contemnors, from possible contempt citations. Without any completed investigation or knowledge of their past activities, the Secretary and Deputy Secretary have opined that these or some of these same individuals must be brought back to continue working on trust reform for the Defendants to be successful in their latest attempt at resuscitating a corpse allegedly killed by the same officials' nonfeasance, misfeasance, or malfeasance.

This Court and the Plaintiffs' counsel have questioned them about their views of accountability and why no action has been taken against these officials. They have taken no action against anyone and continue to appear skeptical that these employees have done anything wrong. The Secretary and Deputy Secretary have testified that they continue to rely upon at least one of these contemnors – the attorney Edith Blackwell – to provide them with the "history" of trust reform and statutory and legal precedent.

But now, finally, they have taken action against someone – *the Special Trustee* – for poor performance regarding trust reform and two of the most glaring failures of this and the past administration – the statistical sampling historical accounting and the collection of missing information projects. In the words of one OST official commenting on the historical accounting machinations of the last administration, it is "passing strange" that Mr. Slonaker, who has testified before this Court (as did his Principal Deputy, Thomas Thompson) about just who was responsible for the actions that have brought the

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<sup>15</sup> The Court Monitor takes no position on the Secretary's reference to the Special Master's concerns found in the two most recent reports filed by the Special Master with this Court as they are still under investigation and outside of the scope of this Report.

Secretary before this Court, would now find himself and his staff under review and criticism by the Secretary and Deputy Secretary.<sup>16</sup>

What is also troubling about the Secretary's memorandum is that it does not even address the Special Trustee's reasons for his decision to advise her that he needed to take over the trust-specific operations of the DOI in response to the lack of progress being made on trust reform. Either the Secretary believes he is wrong and her own appointed leadership is making the requisite progress or she doesn't know but is not intending to find out. She did not question his opinion or direct him to look further into his allegations. She specifically rejected his advice.

The Special Trustee apparently does not want to continue to have his advice ignored, his concerns waived away, and his motives attacked. If his oversight function has resulted in no more than the continuation of the same type of operational mistakes or litigation-driven decisions being made by the present administration, then let him take over with the only staff of experienced trust officials within DOI who are experienced at bringing about trust reform for the beneficiaries. The only success in the DOI's trust reform failure has been those financial management functions within Office of Trust Fund Management supervised by the Special Trustee. Perhaps his idea of leading trust reform with true line authority is not a bad solution. But it is one the Secretary has chosen not to accept and firmly rejected in her April 17, 2002 memorandum.

## **B. The Secretary of the Interior**

It is beyond comprehension that the Secretary would go before this Court and testify to the advances being made under her November 2001 directive to reorganize trust reform operations under the leadership of the Deputy Secretary and so soon thereafter reject the oversight role of the Special Trustee at the very moment he exercised his authority under the 1994 Reform Act to advise her that trust reform is once more in danger of failure before it has even really begun. This action casts doubt on whether the Secretary understands the actual status of her subordinates' trust reform planning and activities or has been correctly advised about the statutory role of the Special Trustee. He cannot report to the Deputy Secretary for both the statutory proscription that he must report to her (and Congress) on his oversight responsibilities and the practical reason that *he would be supervised by the very official whose performance he must oversee*.

The Deputy Secretary is now in charge of trust reform. Both he and the Secretary testified to his role that she assigned to him in lieu of the Special Trustee who previously had been placed in charge of trust reform by her in her July 2001 order (albeit with less authority than the Deputy Secretary commands). The Special Trustee is to oversee that

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<sup>16</sup> This Court has had occasion to caution the Defendants against taking adverse personnel actions against their employees for speaking publicly about the problems with DOI's trust reform operations and has taken action where necessary. The Secretary's memorandum can have no other result than a chilling effect upon those OST officials carrying out their Congressionally mandated oversight functions. It, in itself, due to its patently false assertions and misinterpretation of past events, could qualify for such prohibited retaliation. Certainly any further actions of Defendants regarding OST career employees would qualify for judicial examination and possible action in light of the long shadow cast by the Secretary's memorandum.

reform and ensure that it takes place. He must and can work with the Deputy Secretary in many ways. But he cannot report to him.

It is clear that the Deputy Secretary wants control over the Special Trustee regarding his oversight role. This is not a concern peculiar to this particular Presidential appointee. Certainly an outside “auditor” is not someone that any government executive wants to allow to roam around at his leisure without knowing what he is up to or being able to influence what he reports. But that is the role of the auditor. The problem with the position of the Special Trustee as created by Congress is that he is to oversee and report publicly on the DOI’s trust reform operations but is to do it as an *internal* member of the Secretary of the Interior’s staff. It is an untenable position for this Special Trustee and was for his predecessor.

If you have the opportunity and authority to control someone who has been placed within your midst to report on your performance – not only to Congress but, due to the *Cobell* litigation, to the Court – you will find a way to exercise that control. So it was with the first Special Trustee and Secretary Babbitt; so it is and will be with Mr. Slonaker, Secretary Norton and Deputy Secretary Griles.<sup>17</sup>

### C. The First Special Trustee and the former Secretary of the Interior

“What Is Past Is Prologue” reads an inscription on the National Archives building in Washington, DC. Another found engraved on the building states “Study The Past.” A perfect example of the situation the present Special Trustee and Secretary of the Interior find themselves in is contained in the history of Mr. Paul Homan’s tour of duty as the first Special Trustee as testified to by him before this Court twice in 1999.

At **Tab 10** is a May 13, 1999 affidavit by Mr. Homan describing for this Court on behalf of the Plaintiffs’ the history of some of the events occurring during his tenure and the reasons for his resignation as the first Special Trustee for American Indians. His testimony states in part:

**“From September 1995 to January 1999 I was the Special Trustee for American Indians....**

....

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<sup>17</sup> The roles of the Deputy Secretary and the Special Trustee do not necessarily have to be incompatible. If the Secretary does not view the Special Trustee as capable of managing trust reform from a *management* as opposed to an *oversight* role, the Deputy Secretary and the Special Trustee could work together to bring both that management leadership and trust experience to bear on trust reform. The Special Trustee and his staff could work hand in glove with Mr. Swimmer and his staff to advise the managers what was necessary from a trust perspective. Only if the managers refused to introduce the needed trust processes or did so incorrectly and refused to correct it would the Special Trustee have to exercise his oversight role and report the failure to the Secretary and Congress. If the mistrust and other management barriers that have been created between the DOI and the OST personnel could be breached by the Deputy Secretary, which would seem an easy task for someone of his experience and position, and they began to work together instead of opposing the Special Trustee’s role, trust reform would likely advance. But this has not been the case in the past and the result has been the mistrust and hostility so apparent today.



**It is true, as is stated ... that I submitted the Strategic Plan for correcting Indian trust fund management mandated by the 1994 Act to Congress and the Secretary of the Interior in April 1997.... It is also true that this was some three years after the Act was adopted and over sixteen months after I took office.**

....

**This delay in reporting the Strategic Plan was largely owing to the failure of the Interior Department to take steps to obtain and allocate sufficient funds to the Office of Special Trustee for the preparation of the Strategic Plan or for an outside study to verify my conclusions. In my initial months I was allocated little more funding than what was needed for my own salary and modest basic support. Moreover, I had advised the Senate at my confirmation hearing, and had made a request of the Department, that the office would need over \$1.5 million in fiscal 1996 to hire a professional planning staff and to hire an outside contractor to verify my conclusions. No action was taken for an extended period to enable this to be done.**

**It is true ... that the Office of Trust Fund Management (OTFM) was transferred to the Office of Special Trustee in February of 1996. However, this did not provide me with any "staff" for carrying out my statutory duties, for OTFM was an operational entity engaged full time in trust fund management duties. ...**

....

**It is also true that sums have been appropriated for the Office of Special Trustee.... It is also true, however, that the money appropriated is not sufficient to comply with the mandates of the 1994 Act, either in quantity or in the purposes for which they were requested, and that defendant Babbitt did not request sufficient funds to comply with the mandates of the 1994 Act.**

....

**During my entire tenure of office defendant Babbitt never met alone with me but twice. Lawyers from the Solicitor's office were present at every other meeting.**

**Soon after my arrival I wrote a memorandum to defendant Babbitt pointing out the self-evident fact that the government was in breach of its trust obligations to Indian trust beneficiaries. I promptly received a letter from the Solicitor admonishing me against expressing such judgments. As late as the submission of the Strategic Plan to Congress I was required to omit any reference to this fact from my testimony.**

....

**Notwithstanding the fact that the 1994 Act categorically required me to submit my Strategic Plan to both the Secretary and to Congress, Anne Shields, defendant Babbitt's chief of staff, directed me to submit it first to the Office of Management and Budget. Nevertheless, I obeyed the command of the statute and submitted it to Congress as well as to the Secretary....**

....

**It was evident to me from early in my tenure that the goal of the Department was to put off meaningful action until the next administration takes office in 2001. It was also evident that the work of the Special Trustee was perceived as “rocking the boat” as far as vested organizational interests were concerned, and that these interests, rather than the interests of the trust beneficiaries, were the primary consideration of the Interior Department. In my observation, the activities of Interior, rather than working towards curing the problems of trust management and administration, have aggravated them.**

**Eventually, in January of 1999, defendant Babbitt “reorganized” the Office of Special Trustee in such a fashion that I could only resign my office.” *Id.* at 1-7, citations and numbering omitted,**

At the first contempt trial before this Court, against Secretary of the Interior Bruce Babbitt, Mr. Homan testified on January 14, 1999 to these events and others. The reasons for his testimony was provided by this Court:

**THE COURT: Okay. As you know, the point of this hearing is that I had issued an order that was agreed upon by the government and the plaintiffs in November of '96 to produce documents relating to the named plaintiffs and the government admits they still haven't produced them all as of today. And I wonder if you could just give me a general overview of your perspective of what you know about the subject. And I take it - - the reason I wanted to call you as a witness is what the government submitted to me on Wednesday last week was this reorganization order by the Secretary. And then of Friday, the plaintiffs gave me the memo the Secretary had sent to you, in which he assessed some blame on the special trustee for the fact that the order hadn't been complied with. So I wanted to give you the opportunity to tell me what you thought of all that, and what your views were on the problems with the production pursuant to the Court's order. Trial Tr. at 600.**

During his testimony about an attempt by Secretary Babbitt to place blame for trust reform and litigation failures on the Special Trustee, Mr. Homan also testified about management issues relevant to the predicament in which Mr. Slonaker now finds himself and his staff. In discussing the actions of Joe Christie, his records manager, the following dialogue with the Court took place:

**THE COURT: Overruled. Go ahead.**

**THE WITNESS: There was - - there was a general disagreement, particularly from the Justice Department representatives, our Solicitor's Office representatives, and the Office of Policy Management and Budget representative.**

**One attorney from the Department of Justice raised the issue that Joe may have committed perjury in a declaration before this Court. I objected immediately. I had read his declaration and the particular issue was over a scenario that I thought he had qualified on the assumptions that he was using.**

**John Miller later found those assumptions in the declaration, pointed that out to the attorney, and he dropped the issue, but never withdrew his comment. I felt that the comment was completely inappropriate in a forum like that in the first place.**

**John Miller also raised the issue that Joe had, for various reasons, and because of various encounters, indirect threats and the like, had not trusted the attorneys in the case. And so in the end we all decided that John Miller, who was in charge of the overall policy at that point and was following this on my behalf, would be the better witness. And that is the long and the short of why he was the witness, not Joe Christie.**

**THE COURT:** What do you know about the reassignment of Joe Christie then last week?

**THE WITNESS:** Well, I was called in, and as part of the briefing that the Secretary gave me, he informed me that the day before - - actually, he didn't inform me the day before, but the order which you have before the Court was signed on January 5<sup>th</sup>. I was called in to his office, and met with him, with John Miller and Tom Thompson, on January 6<sup>th</sup> at 11:30, and was informed that Mr. Christie had been reassigned.

**THE COURT:** And you hadn't been consulted about the reassignment?

**THE WITNESS:** I was not consulted, nor did I have any prior knowledge that this was going to occur.

**THE COURT:** Was a reason stated for the reassignment?

**THE WITNESS:** Only reason stated in the Secretary's memorandum to me, which was that there was a problem in record-keeping, words to that effect. Trial Tr. at 609-610.

With regard to his ability to put funds toward what he, as Special Trustee, viewed as important trust functions he testified:

**Q.** How hard would it be for you to reprogram, say, \$200,000 in your department, your office?

**A.** When I originally came to the office, I asked them to reprogram a million to help me conduct the study which I was compelled by law to do and it was turned down. So I'm not sure whether - - I know they would turn down a million at my request. They've turned down every single reprogramming request in the first three years I was here. So I don't know what the effect of a \$200,000 request would have been. Trial Tr. at 647.

During the Phase I trial held by this Court in the summer of 1999, Mr. Homan also testified. His testimony, in part, is directly relevant to the issues faced by Mr. Slonaker almost three years later under a different administration.

In response to a question concerning the qualifications of the DOI and BIA to manage a trust Mr. Homan opined:

**A.** In general, the Bureau and the Department itself have allowed through mismanagement and neglect the trust systems in general to deteriorate over a 20-year period. Through no fault of their own, these employees are dealing with antiquated structures. They are not capable as a management team. They don't have the skills, the education or the background or the experience to run a modern trust department.

**Q.** When you say through no fault of their own, you are referring to those employees, I take it?

**A.** That's correct. They have not received the correct training. They are not required by background to have a particular expertise in banking.

The only person that had a background in banking at a senior level when I came on was Donna Erwin, who headed up the Office of Trust Fund Management.

**Q.** Since you are clear that it is through no fault of the employees, where does the fault lie?

**A.** I think the fault lies in two places. One, I just - - my experience and my observations of what's happened over the last 25 years - - and I said this in my strategic plan - - was that I believed that neither the executive or legislative branches have had the political will to provide the necessary financial and managerial resources to satisfactorily address or reform these longstanding problems.

Secondly, as I said, I don't believe the Department itself has the institutional will, the culture, or the management capacity to effect (sic) a decent reform and address these longstanding problems even if they were provided the financial resources. Trial Tr. at 141-142.

He also testified to what the Secretary of the Interior did to his office, not unlike Mr. Slonaker's present dilemma, that forced his resignation:

**Q.** So is it true that during much of your time, you outranked everybody in the Department except the Secretary?

**A.** Yes.

**Q.** Is that right? Did the Secretary, nevertheless, give lower-ranking figures or (sic) veto over your activities?

(Objection overruled)

**THE WITNESS:** In my opinion, the order that he signed on January 5<sup>th</sup> of 1999 usurped my office, appropriated the rank and the power by placing two junior executives without trust management experience, both of which were required by the law, and I was to report to them. They were to supervise the day-to-day activities of the office. Trial Tr. at 176.

With respect to Mr. Homan's relationship with the Solicitor at the time, which has also been a subject of reporting in the Court Monitor's reports about the same or similar issues with Mr. Slonaker in the past and today, Mr. Homan testified in response to questioning:

**Q.** Let me ask the questions, sir. Isn't it true, though, that those letters occasionally contained legal opinions or legal conclusions offered by you?

A. They contained my professional opinion. I had a long-standing dispute with the Solicitor during my entire tenure as to whether I was entitled to state an opinion publicly or privately to the Secretary, which I did. In my view, the tantamount - - the conditions here amounted to a substantial breach of trust. He - - he - - he consistently wrote me back and said, 'Well, that has to be legally determined by him or a court.' I'm entitled, as Special Trustee, to my opinion, and I was true to that. I still think I am. Trial Tr. at 260.

And in summation, responding to this Court's question:

**THE COURT:** I have a few things, naturally. Can you talk philosophy - -

**THE WITNESS:** Yes.

**THE COURT:** - - for a little while? What happened between you and the Secretary? You've had some time to reflect on it. I saw you very shortly after that - -

**THE WITNESS:** Yeah.

**THE COURT.** - - when I saw you last. What happened? Why did this all go awry, and how are we ever going to fix it now?

**THE WITNESS:** First of all, I'd like to say that I have a lot of respect for the Secretary, and we had - - throughout this period, I never observed any personal rancor on his part, and certainly, I did not have any personal rancor against him in this.

It think, though, that from the very beginning, we differed on one key issue, and it is reflective in the first two principal problems reflected in my strategic plan, and that is that I felt that the management of the Bureau of Indian Affairs, the management, if you will, of not only the Bureau, but the Department of Interior, in governing these obsolete trust systems was so bad that they couldn't timely resolve the issue.

Any reform effort that I had ever been associated with and had observed always required an outside agent to reform. I knew a good many of the Indians had advised me that over the course of the last 20 years, several different attempts had been made at reform, and none successful.

The Secretary and I had an honest disagreement with that. He insisted, as I indicated earlier, that this be done within the present structure of the BIA and the Department of the Interior. I still believe that that is not going to be successful.

Secondly, while he may have - - while he may have had a best effort in terms of providing reform, funding for this, I became aware about a year after I got there that the long-term plan of the President in terms of their long-term planning - - ant this was given to me secondhand - - was that this reform effort was to be done over a 10- year period, and all of the money and all of the staffing principally was - - or substantially was to start after this administration left office.

I told the Secretary in August of 1997 that I would not accept that, that this program could be done in one year in the private sector, given proper staffing and funding, but given the

**Government's approval process and other things, I accepted the 3-year duration of that original plan.**

**They then delayed it. The high-level implementation plan was supposed to be produced within 60 days. It was not produced until a year later, and it has unrealistic goals in terms of the Department's ability to clean up the records and implement these highly sophisticated systems by the end of the year 2000. There is no way it is going to get done in my professional view.**

**Secondly, from the very beginning, I told him that he need not wait. This was 2 months after I got there. That this amounted to what I felt was a serious breach of trust. It didn't require a special trustee, any expert to cure that breach of trust. It required basic record-keeping initiatives, which they were never bale (sic) to support in terms of staffing and funding, and in that, we disagreed.**

**Second, the attitude of the Department of the Interior is to treat the trust management activities of the Indian beneficiaries with the same - - at the same level in terms of what they consider higher priorities. This is a trust relationship.**

**I've been taught from my early days as a bank examiner and later as a banker that you have no choice as trustee. You have no choice but to provide the appropriate staffing and funding to meet the exacting fiduciary responsibility. They have not, and this is not the Secretary of the Interior at the present time, but they have not for 25 years.**

**I don't believe they have the will to do it. It's not a political priority. They are able to get by with the excuses that have been set forth today that, well, you know, somebody didn't provide us with funding, and who is responsible for that certainly involves the Congress of the United States as well.**

**So I believe, as I believe the plaintiffs believe, that when you don't have recourse to the executive branch of Government to solve and address these problems, when you don't have resource to the Congress to do it, that leaves only one branch left, and I side with them. I hope that the judicial branch finally does something to address these longstanding problems and compels them to do it. I don't think it's going to happen any other way.**

**THE COURT: How do you think the judicial branch can do it?**

**THE WITNESS: If I were a bank examiner, I told you how I would do it. I would appoint a receiver and compel it to be done.**

**We went through, again, philosophically - - I said to the Congress from the very beginning that I would only be able to accomplish so much directly, and in an oversight capacity, you do end up, as one of the quotes indicated, as another critic, and there have been plenty of critics here over a long period of time. Trial Tr. at 385-389.**

**Change the names on the doors and you would have almost the same picture today regarding the relationship between the Special Trustee and the Secretary and her senior management staff including the attorneys within the Solicitor's Office and the DOJ. Nothing has changed. Where Mr. Homan may have *knock down* the doors to *forcefully state his position*, Mr. Slonaker has attempted to *knock on* them and *create the***

*opportunity for a dialogue.* The result has been the same. The Special Trustee has been thwarted in his efforts to bring about trust reform through oversight or even direction by DOI's and BIA's institutional recalcitrance and intransigence. They are culturally and politically incapable of accepting his authority or the concept that trust reform is a fiduciary obligation of the highest order owed to the Indian Trust beneficiaries including the IIM accountholders. Both Messrs. Homan and Slonaker became mere critics, in Mr. Homan's words, unable to bring about change unless the Secretary of the Interior would accept their expertise and the role expected of them by Congress.

Messrs. Homan and Slonaker suffered and are suffering respectively the same fate. They were demoted by their respective Secretaries for trying to do their jobs and required to report to an underling. Their staffs were criticized for their performance and, in Mr. Homan's case, OST reorganized by Secretary Babbitt without so much as telling him beforehand. Will Mr. Slonaker's staff suffer a similar fate? With the previous record before this Court of the Defendants' potentially contemptuous actions, there should be no more "Joe Christies" found by Defendants within the OST.

The Office of the Special Trustee is involved in its own "Groundhog Day" with history repeating itself over and over again. The trust reform oversight system has again been dismantled. In the institutional and cultural environment at DOI there can be no effective OST oversight or direction of trust reform, central to the success of Defendants' trust reform reorganization.

## **VI. FURTHER MEMORANDA BETWEEN THE OFFICE OF THE SPECIAL TRUSTEE, THE SECRETARY OF THE INTERIOR, AND THE OFFICE OF THE SOLICITOR**

### **A. The Special Trustee's Response To The Secretary's April 17, 2002 Memorandum.**

Perhaps the last chapter has been written in this struggle between the Secretaries of the Interior and the Office of the Special Trustee for American Indians observed by this Court over the past six years. In increasingly hostile exchanges between these two antagonists, a new pattern of a much more serious nature than a battle for authority and control of trust reform has emerged. It also is documented in correspondence between the Office of the Special Trustee and the Secretary and her subordinates.

On April 30, 2002, the Special Trustee replied to the Secretary's memorandum to him of April 17, 2002 with his own, entitled, "Going Forward on Trust Reform" (**Tab 11**).

In at renewed attempt to begin a dialogue with the Secretary on his concerns, he again expressed his concerns and desire to work with her to solve them. Quoting him in part:

**"I was pleased to have had the opportunity to meet with you and the Deputy Secretary on Wednesday, April 17. At that meeting, you gave me your memorandum of that date which responded to my memo to you of April 8. I will, of course, follow your direction.**

**The purpose of my memo was to inform you that trust reform is not moving forward as efficiently and effectively as it must and to offer my services. I continue to be troubled with the Department's limited progress toward achieving compliance with those duties codified at 25 U.S.C. 4011.**

**That section of the 1994 Reform Act defines the primary objective of trust reform. The Secretary is required to be able to produce a daily and annual balance for each beneficiary's account, provide quarterly statements of each account's performance to each account holder, and conduct an annual audit of the assets held in trust. A trustee is expected to keep complete and accurate accounts and render accountings showing in detail the nature and amount of the trust property and its administration. The Department cannot do that today. The 1994 Reform Act provides that the Special Trustee 'shall oversee all reform efforts' relating to the trust responsibilities of the Secretary to ensure the establishment by the Department of the policies, procedures, systems, and practices to enable the Secretary to discharge her fiduciary duties more effectively going forward. The product of the Special Trustee's oversight is informed, objective and independent comment, advice, and guidance rendered to the Secretary on the progress and likely success of the Department's efforts to reform the current trust administration process. In this effort I am assisted by my Advisory Board as a sounding board.**

**The first objective of the Department must be to design and implement Department-wide a basic trust information data management system. As I said in my April 8<sup>th</sup>, memorandum, the Department cannot discharge its trust responsibilities properly or get itself out of breach of trust without such a system. The Bureau of Indian Affairs or any successor organization must have such a system. It should be designed to allow the Department to manage its trust responsibilities as an integrated and auditable whole.**

**Your proposal to consolidate all Department Indian trust asset management functions in a new Office or Bureau is an idea I support and applaud. Indeed, it is a concept that in some important respects concurs with the recommendation made in this Office's Strategic Plan of April 1997. The thought then, as now, is that the management of the trust funds and trust resources by an entity limited to that purpose will focus and strengthen the attention given to these functions by the Government as trustee. Because the trust management systems have seldom if ever commanded the immediate and undivided attention of the most senior staff, they have been consistently underfunded, understaffed, and thus mismanaged. It was precisely because of this state of affairs that this Office was created by the 1994 Reform Act.**

**I am of the opinion, however, and recommend that the creation of a new Bureau and the associated transfer of programs to it from other offices within the Department must be viewed as a goal that will take considerable time to achieve. The administrative history of the 1994 Reform Act and the history of the last six years teaches that the many reform efforts undertaken over the past 20 or so years have been successfully resisted by some in the Department and Indian Country who want to maintain the status quo. I will be pleased to work closely with Mr. Swimmer and the Task Force to implement your proposal.**

**However, the implementation of the necessary Department-wide basic trust information data management system cannot await the creation of a new office to house it. Therefore, the design of that system and the business practices, the policies, and procedures that will guide its use must be supported by a significant investment of the correct resources, time, talent, and money. The current resources are too thin.**



As you suggest, the compilation by my Office of the Department's Quarterly Reports to Judge Lamberth has been a learning process. I learned, for example, that in some projects not only was progress inadequate but the information to be reported was inaccurate and most likely misleading. On August 29, 2001, you sent me a memorandum expressing surprise at my comments attached to the Quarterly Status Report to the Court Number Seven. In my response to you of September 10, I noted that the failures in trust reform to that date suggest 'that those people involved in those projects do not have or cannot get or will not acknowledge an accurate description of the problems present in those projects.' The result is that the problems are not addressed or addressed ineffectively. I agree the Eighth Report was an improvement over the prior seven because but only because the Judge ordered the Secretary to sign all subsequent Reports. Therefore, the most senior people in the Department took a more active role in its preparation.

I take my responsibilities under the 1994 Reform Act very seriously, and I am committed to fulfill my oversight role. Therefore, I am obligated to point out my doubts about programs and the progress of trust reform. I am disappointed that my efforts are perceived as less than robust and that I am not seen as a team player. Nevertheless, genuine reform must be complete and verifiable. I have attached a chronological progression of trust reform for the last fourteen months so that you can better view my contribution and that of OST to the reform effort." *Id.* at 1-2.

The Special Trustee went on to list the history of trust reform progress in his view and responded also to the Secretary's particular concerns about his performance listed in her April 17, 2002 memorandum. Reiterating what the Court Monitor's Reports and this Report have reviewed, the Special Trustee made these additional comments of interest to the Court and the IIM accountholders:

*"Projects that have been transferred to other organizations without material progress (collection of missing information and historical accounting):* The direction, both from the Department and the lawyers on the litigation team, that resulted in less than apparently desired progress for obtaining missing information necessary to perform historical accountings are well documented in the Court Monitor's report. Even though OST had prepared a plan to both conduct an accounting or reconciliation and identify and pursue acquisition of any documentation found to be missing post 1994, we were instructed to revise the draft plan to eliminate references to performing an accounting and only (1) assess the state of documentation and (2) identify options to pursue missing information. *Had that plan to account for post-1994 transactions been pursued, a useful portion of the historical might now be complete. Instead, only some categories of accounts, primarily Judgment and Per Capita distributions were reconciled and these are the only accomplishments the current OHTA project can report as results.*

Further, attempts to exercise existing legal authority to freeze retention of mineral records under FOGRMA was not pursued by the Solicitor's Office, even though OST had obtained MMS's concurrence to pursue such action to preserve records relating to Indian mineral production that were still in the hands of third-party operators and purchasers. Similar authority to demand records from lessees of other Indian resources was not found to exist.

OST was never assigned responsibility for conducting an historical accounting. Rather it was asked to assess the feasibility of conducting such an accounting. Because of the incomplete nature of the IIM records and the lack of any security measures designed to

**protect the trust data in the numerous data systems employed within the Department over the years, I do not believe an accounting, as that term is generally understood in the established trust scholarship, acceptable to either the beneficiaries or the Special Trustee can be constructed. Short of a settlement, the best that might be able to be accomplished is the identification of the gaps in the information. With that, the Department could, perhaps, seek some instructions from the Judge on how to proceed. I remain concerned, however, that I have not heard anyone in the Department define the characteristics of an accounting to include anything more than the funds actually collected by the Department. That, of course, is inadequate.”** *Id.* at 5, emphasis added except for emphasis on first sentence in original.

The Special Trustee has taken exception to the Secretary’s criticisms of his performance regarding the historical accounting and collection of missing information subprojects, among others, and, by so doing, has cast further doubt on the trust reform efforts of the past and present including a first time opinion that a proper historical accounting now under planning by the OHTA cannot be performed.<sup>18</sup>

## **B. Potential Interference With The Special Trustee’s And This Court’s Oversight Functions**

At the same time the Secretary has seen fit to place the Special Trustee’s performance of his duties in question, her direct DOI executive-level subordinates, Department of Justice, and possibly Office of the Secretary officials, have carried out what only can be described as questionable activities regarding the Special Trustee and the Special Master’s investigational activities.

On April 24, 2002, Thomas Thompson, Principal Deputy Special Trustee sent a memorandum, through and with the endorsing signature of the Special Trustee, to the Solicitor, William Myers, and the Counselor to the Solicitor, Larry Jensen, entitled, “Document Production” (**Tab 12**). In that memorandum he stated:

**“I wish to know why the Solicitor and the Department of Justice (DOJ) did not share in a timely manner with the Office of Special Trustee (OST) the letter transmitted March 29, 2002 by Ms. Sandra P. Spooner of DOJ. A copy of that letter, accompanied by voluminous attachments, was received April 22, 2002 (Attachment 1, without exhibits).**

**Ms. Spooner outlines DOJ concerns about Interior’s compliance with document production requests presented by the Special Master, and specifically points to the Office of the Special Trustee, and I believe to me in particular, as a ‘management and organizational difficulty’**

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<sup>18</sup> Again, in light of the Special Trustee’s opinion, it is respectfully suggested that this Court consider setting a date and a discovery schedule for a Phase II trial on the Defendants’ historical accounting effort as has been requested in “Plaintiffs Motion To Set A Trial Date For Phase II Of This Action, The Correction Of Accounts And Restatement Of The Individual Indian Trust, and Memorandum In Support Thereof,” submitted to this Court on August 3, 2001. While Defendants have argued in the “Department of the Interior’s Response to the Fifth Report of the Court Monitor,” submitted on March 1, 2002, that “setting a trial date would prematurely compel the completion of the historical accountings by a date certain,” *Id.* at 20, there may never be the possibility of an accounting if the Special Trustee is right. Better to know by a date certain whether that is the case than wait until the year 3000 to find out.

suggesting ‘Interior and the Office of the Special Trustee could suffer serious consequences.’ This statement, besides being obviously self-serving, is particularly troubling since, although Ms. Spooner’s document was not provided to the Special Trustee, it was produced to the Special Master in response to on-going document production.

Ms. Spooner’s letter could lead the Special Master to be concerned further about the diligence of Interior and the Special Trustee’s document production efforts. (I note coincidentally the Special Master initiated a further document production request on this same date requesting ‘ALL instruction, regardless of format, issued by the Department of the Interior, the Office of the Solicitor and the Department of Justice to Interior personnel seeking compliance with my requests’).

The Special Trustee’s Office has strived - - apparently with varying degrees of success in Ms. Spooner’s view - - to comply fully with the Special Master’s requests. As you know, at this time the Special Trustee has with the Solicitor several outstanding requests for clarification of document production issues. In addition, the Special Trustee has recommended improvements for the document production process, including a request for on-site assistance by attorneys in Albuquerque.

Ms. Spooner’s restatement of her duty of candor apparently does not extend to the Special Trustee. This situation is further aggravating because as late as Friday, April 19, 2002, senior officials in the Secretary’s Office, and Ms. Spooner, denied the existence of this Document.

I would like to know why this document, material to the Special Trustee’s document production efforts, was not provided to OST in a timely manner. I would like to know, since document production outcomes are critically important and highly sensitive in this contentious litigation, why no one bothered to provide the Special Trustee or myself a timely copy of the document. I would like to see Interior’s response to Ms. Spooner’s letter, particularly since her letter contains obvious inaccuracies and adverse conclusions about the Special Trustee’s diligence in document production for the Special Master.

Unfortunately, this episode is all too representative of past events, and once again, at least for me, raises issues of trust, confidence, and an apparent conflict of interest within the Department of Justice.” *Id.* at 1-2.

The letter in question from Ms. Spooner, entitled, “Cobell v. Norton,” was written on March 29, 2002 and sent by facsimile to not only Larry Jensen but also the Deputy Secretary, Steve Griles (Tab 13, with attachments). Confirming the understanding of the Principal Deputy Special Trustee, Ms. Spooner stated in part in that memorandum:

“We previously identified our concern that a very small number of people in the Office of the Solicitor are responsible for addressing the large number of issues relating to Cobell v. Norton (and, now, the tribal trust cases as well). We reiterate that we are not criticizing the ability, commitment, or performance of anyone in the Office of the Solicitor; rather, it appears that serious understaffing and competing considerations result in errors, omissions and delays that are jeopardizing our position in the litigation....

....

**Another management and organizational difficulty relates to the Office of the Special Trustee. The Special Master is clearly focused on OST's operations and on its prior and current document productions. Nevertheless, some portions of the Office of the Special Trustee appear disinclined to work with the Office of the Solicitor to address the Special Master's concerns, including those raised in his March 19 letter regarding the incomplete production of Lee's Summit documents. For example, we understand that, on March 27, 2002 – two days before its response and first supplemental production was due to the Special Master – the Office of the Special Trustee issued a memo (enclosed) that 'supercedes the earlier note on this topic from Michele Singer of the Solicitor's Office received on or about March 22, 2002.' To the extent that memo is inconsistent with the legal advice given by the Office of the Solicitor, fails to address all of the relevant issues, or prevents or delays a response to the Special Master, Interior and the Office of the Special Trustee could suffer serious consequences. We also understand that the Office of the Special Trustee declined to ask its employees to comply with the Special Master's request that personnel who have previously turned over Lee's Summit documents 'verify in accordance with Local Civil Rule 5.1 that they have produced all relevant documentation,' or that they provide biweekly update regarding whether they have additional documents not previously provided. We are concerned about the adverse effects these actions and inactions could have on the Department of the Interior and the government as a whole. The problem is given increased significance by our ethical obligations to the Court, including our duty of candor.'" *Id.* at 1-2.**

No wonder the Special Trustee and his Principal Deputy were concerned. Pursuant to this Court's April 16, 2001 Order and the Secretary of the Interior's April 24, 2001 subsequent direction in light of that Order that the Court Monitor should be provided "access to any Interior offices or employees to gather information necessary or proper to fulfill his duties," the Court Monitor secured these memoranda in light of the issues presented that are of interest to this Court in its determination of the progress of trust reform and any actions of the Defendants and their counsel that might delay that reform.

Ms. Spooner's memorandum stated in graphic detail her apparent belief that the Special Trustee and his staff were not complying with the Special Master's direction or that of the Solicitor's office responding to that direction. To her knowledge, that direction was countermanded by the Special Trustee or his Principal Deputy. That memorandum, and the attachments to it, were provided to the Special Master as indicated by the Bates stamp designation at the bottom of each page of each document.

However, if the Special Trustee and his deputy can be believed, and the Court Monitor has no reasons to doubt their written statement, neither of them were told of this memorandum and the DOJ's conclusions or that it had been delivered to the Special Master. For just short of a month the Special Trustee was in the dark as to the DOJ attorney's opinion regarding his and his staff's potential contempt of the Special Master's orders.

Neither the lead counsel on the *Cobell* litigation, Ms. Spooner, nor the Counselor to the Solicitor, Mr. Jensen, nor the Deputy Secretary, Mr. Griles, who was in charge of trust reform for the Secretary, apparently saw fit to alert the Special Trustee to the fact that DOJ had put the Special Master on notice by the provision to him of this memorandum

that the Special Trustee was probably in contempt of his orders. Not only did they not tell the Special Trustee and Principal Deputy Special Trustee of the memorandum, its existence was denied in response to questions posed by the Principal Deputy directly to Ms. Spooner and senior officials within the Secretary's own office almost a month after its preparation and dissemination.

The disagreements between the Office of the Special Trustee and the DOJ and Solicitor's Office attorneys on the conduct of trust reform and the impact of litigation-driven decisions by the successive squads of attorneys who have led the legal effort have been reported to this Court through testimony and the Court Monitor's Reports. But the failure of the Defendants' attorneys to provide their Departmental client's key employees with guidance and information to help them avoid contempt and comply with this Court's orders possibly goes beyond mere hostility.

First, if DOJ attorneys were aware that the Solicitor's Office was understaffed and having problems responding to the Special Master's requests and orders, and if they were aware of the disagreement between the OST and the SOL on just how to respond to these requests, why did they not intervene in accordance with their Rule 11 responsibilities and take charge of the effort and resolve the reporting discrepancies to legal orders possibly not understood by the laymen who were attempting to respond for the OST? Why did they do nothing but send a memorandum outlining all of these problems and their conclusions about the responsible party who in their opinion "might" be in contempt of Court to the Solicitor's office and to the Special Master? Candor was the explanation given by Ms. Spooner.

But candor to whom? The Special Master? The Special Trustee? This Court? Having failed to put the Special Trustee and his Principal Deputy on notice of their concerns expressed in the memorandum; having failed to apparently apprise the Special Master of the full picture of the Special Trustee's concerns and requests; having failed to provide the memorandum to the Special Trustee; having refused to acknowledge the existence of the memorandum; candor is the last reason for this series of actions.

From a reading of the available documents, it would appear that the hostility towards the Special Trustee for, perhaps, his criticism of the DOJ and Solicitor's Office attorneys' past conduct, his testimony and that of his Principal Deputy at the Secretary's contempt trial and in his recent memorandum to the Secretary about the poor status of trust reform (due in part to the litigation-driven decision-making of DOJ and the Solicitor's Office attorneys), has spilled over into an attempt to prejudice this Court regarding the credibility and honesty of the Special Trustee and his key subordinates.

The Solicitor sent a response to Mr. Thompson addressing the questions in his memorandum on April 26, 2002, entitled, "Document Production" (Tab 14). In it, he stated in part:

**"I first became aware of the March 29 letter when reading your memorandum. As you know, the letter was addressed to Larry Jensen. It was received by him shortly after he**

**began working at the Department as my Counselor. I have discussed the matter with Larry, and he informs me that he sincerely regrets not sharing the letter with you.**

**Larry has not yet responded to the letter in writing, though he has been addressing in other ways the concerns raised by Justice. He expects to have a draft response ready for review next week and will include you in the review process.**

**As for your more general concerns about Justice, I invite you to discuss them personally with Larry or me. We want to do all to ensure the best possible working relationship among those involved in the trust fund litigation.” *Id.***

This response did not answer any substantive questions posed by the Principal Deputy. It further complicated the picture for the Defendants. The Solicitor was not informed of this major contempt potential? Nor did anyone receiving the letter think it necessary to tell the Solicitor or the Special Trustee about it? Nor is the Solicitor apparently interested in finding out why Ms. Spooner or others within the Secretary’s office would deny the memorandum’s existence in response to the Principal Deputy’s questioning? Finally, the Solicitor did not offer any information to Mr. Thompson about whether he was aware prior to the preparation of this memorandum or was made aware afterwards of the substance of the memorandum regardless of whether he saw the actual memorandum.

Another document recently sent to the Special Trustee by the Secretary may cast even more light on the other possible motives for the recent interest in the Special Trustee’s credibility.

### **C. The Secretary’s Facsimile Direction**

On April 25, 2002, while in San Diego, California at the Tribal Task Force consultation, the Special Trustee received the a facsimile sent by the Secretary, entitled, “Declaration in Support of Department’s Response to the Special Master” (**Tab 15**).

In it the Secretary stated:

**“To properly respond to the findings of the Special Master in his Second Investigative Report Regarding the Office of Trust Records, I understand that you have been asked to provide a sworn declaration incorporating the information you presented to the Deputy Secretary in your April 22 memorandum. If the information is not presented in the form of a declaration, I am advised by the DOJ attorneys that the Court will give it little or no weight.**

**I am advised that you are refusing to provide a declaration for this purpose, even though the information that would be contained in such a declaration is entirely within your control and concerns a program under your direct supervision. Your unwillingness to attest to the truth of the information in your memorandum to the Deputy Secretary naturally raises a concern about the reliability of that information.**

**Your unwillingness to take responsibility for the information you have provided is a significant disservice to the Department and to those who might be held responsible for the failings perceived by the Special Master in a program under your supervision. It is also a**

disservice to the Court, since we all have an obligation to provide accurate information for its decisionmaking.

**I am communicating this to you in writing because we are both traveling, thus making direct communication difficult. I remind you that in the three meetings we have had in the last two weeks, one of the issues we discussed was your past unwillingness to verify the sections of the Quarterly Report to the Court having to do with the programs you supervise. You assured me that would no longer be a problem.**

**Obviously, you have complete freedom to craft a declaration that accurately states your views. I am not asking you to make any particular statement. I do, however, view the need to swear to the accuracy of your representations to the Court as a legitimate responsibility of your job.**

**I trust that upon reflection you will now be willing to provide the declaration needed to respond to the Special Master's Report. If you remain unwilling to do so, please inform the Deputy Secretary immediately, as the Department's response is due by midnight eastern time. *Id.***

Again, it is doubtful the Secretary personally knew about the circumstances of the preparation of the Special Trustee's memorandum on which she requested a declaration or the issues involved with it.<sup>19</sup> But that she believed whoever was advising her during her travel of those details and concurred with the tone of the letter is undeniable by her signature on the facsimile.

The DOJ memorandum and this Secretarial directive are both not only critical of the Special Trustee's actions regarding his staff's responses to the Special Master's requests and the direction of the DOJ and Solicitor, but also infer that his actions are contemptuous. They also infer that his representations of his actions and his statements to this Court are not credible. The specific effort to tie his refusal to sign a declaration to his purported refusal to verify "sections of the Quarterly Report to the Court having to do with the programs you supervise" is directed at discrediting his reasons for that refusal.

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<sup>19</sup> That memorandum, signed by the Special Trustee, was Exhibit 2 to the "Department of the Interior's Response to the Second Investigative Report of the Special Master Regarding The Office of Trust Records," submitted by DOJ to this Court on April 30, 2002. In his memorandum, the Special Trustee stated in part to the Deputy Secretary: **This responds to your request that I prepare and submit to you my suggested response to the Special Master's Second Report. I would appreciate a complete copy of his Report, including attachments.... Given the short response time and the absence of guidance or assistance from the Solicitor's Office, I have not prepared a point-by-point response to the Special Master's Report.** No wonder the Special Trustee would refuse to sign a declaration addressing a report that he had not been given a complete copy of or about which he had received no legal guidance on preparing a response from DOI or DOJ attorneys. Never-the-less, he prepared a comprehensive memorandum that was filed by DOJ with the Court and which, under Rule 11 guidelines, they were required when presenting "any pleading, written motion, or other paper" to a court, the presenting attorney "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,... the allegations and other factual contentions have evidentiary support..." See "Department of the Interior's Response to the Fourth Report of the Court Monitor and the Supplemental Report Amending the Second and Fourth Reports of the Court Monitor," submitted to this Court on November 15, 2001, at 28-29.

Although the memorandum does not address which Quarterly Report he was supposed to have refused to verify, it can be assumed it speaks of the Seventh Quarterly Report. It really does not matter which report – the Seventh or the Sixth – he refused to verify. He did not refuse to verify them because of the status of his own personnel’s subproject reports but because his concerns related to the incomplete, inaccurate and misleading nature of the major subproject reports contained in them. His refusal to verify the Seventh Quarterly Report or agree to the month’s extension requested of this Court by the Secretary through the DOJ so that his concerns could be resolved was based on his belief that neither the Secretary’s subordinates (her counselor and Solicitor) had properly resolved those concerns or could in the time requested to obtain the verifications, certifications, or surnames they sought from the subproject managers.<sup>20</sup>

Not unlike her April 17, 2002 memorandum to the Special Trustee concerning his performance, this facsimile directive to sign a declaration cites to recent trust litigation history. It completely mischaracterizes the Special Trustee’s actions and makes them appear either inept or disingenuous. His actions were neither in the cases cited by the Secretary about which the Court Monitor is aware and has previously reported. *Someone* is either inept or has intentionally misled the Secretary and would like to mislead this Court. Why?

Perhaps the responsible parties are both inept and disingenuous. For what reason would they paint such a misleading picture of the Special Trustee’s actions and intentions through the words of the Secretary of the Interior or those of the DOJ attorney responsible for the *Cobell* litigation? The reader could be forgiven for putting two and two together and looking to the Defendants’ attorneys, once again, for an explanation.

A review of the trial transcripts of the testimony of Messrs. Slonaker and Thompson at the Secretary’s contempt trial may provide that explanation. The majority of the testimony and evidence produced by the Plaintiffs’ counsel at trial directly supporting the causes of action against the Defendants was provided in the testimony of the Special Trustee and Principal Deputy Special Trustee. That testimony, to a large extent, confirmed the findings and conclusions of the Court Monitor’s Reports that were the subject of much argument concerning their admissibility as evidence at trial. If the Reports were to ever be found improperly admitted into evidence by this Court, the foundation for any contempt finding of this Court would be based in large part on these two witnesses’ testimony.

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<sup>20</sup> The reasons for his refusal to verify the Sixth and Seventh Quarterly Reports and the involvement of the DOJ attorneys in his refusal to continue verifying the reports as well as their involvement in the Seventh Quarterly Report’s submission to this Court without proper verification is fully reviewed in the Court Monitor’s previous reports. See generally the Fourth Report of the Court Monitor and the Supplemental Report Amending The Second And Fourth Reports Of The Court Monitor. That the Special Trustee’s concerns about verifying the Seventh Report were justified and had nothing to do about the subproject’s under his own supervision is clear from the first Conclusion and discussion thereafter in the Fourth Report, **“The Special Trustee’s Concerns About The Accuracy and Completeness Of The Seventh Quarterly Report Remains Unresolved But Are Well-Founded.”** Id. at 22-23. That his subordinates refused the “invitation” of the Solicitor to “certify” their sections of the Seventh Quarterly Report was also fully explained by them and quoted in the Fourth Report of the Court Monitor at page 7.



But supposing that this Court, through its Special Master's reports about the conduct of the Special Trustee and his Principal Deputy, were to find that his or his Principal Deputy's actions and filings, based on their written declarations and memoranda, were contemptuous and incredible. What weight would the Special Trustee's and his Principal Deputy's contempt trial testimony carry then?

The Defendants' would likely characterize this scenario as unduly conspiratorial. Perhaps it is. But what other reason would the attorneys for the Defendants' allow the Secretary to challenge the Special Trustee's conduct and honesty in a forum so public that it can only bring further criticism about and mistrust of the Defendants' conduct of trust reform? If the Secretary or her senior staff have so little knowledge of the history of trust reform and the conduct of DOI officials either in the past administration or this one as displayed in this correspondence, what hope is there that the Defendants will ever be able to hold accountable those senior DOI officials and attorneys who have placed trust reform in such shape as it is in now (according to no other authority than the Special Trustee)?

What hope is there that committed experienced trust officials will ever be able to bring about trust reform in such an environment conducive to these unwarranted but sanctioned attacks on the Special Trustee and his Principal Deputy? Defendants do not seem to understand that the Secretary of the Interior and the Special Trustee are joined at the hip on trust reform. If neither can be trusted to bring about trust reform in each other's eyes, the Plaintiffs' will have again proved their case without even lifting a hand. The Secretary cannot separate her own ability to bring about trust reform from the performance of the Special Trustee. His management failures or hers to listen to his advice have the same result. But the blame cannot be placed upon him. That would be the same as the captain of the sinking Titanic blaming the navigator for the Captain's failure to respond to the navigator's warnings of icebergs dead ahead. Only Mr. Slonaker has been warning this Secretary of those "icebergs" even before her ship left the harbor.<sup>21</sup>

The detrimental effect of trust reform being driven by litigation strategy could have no better proof than this scenario played out in these memoranda. The focus on the contempt trial and the potential Secretary's defense on appeal attacking the credibility of the Special Trustee and his Principal Deputy, if filed, would explain why, once again, trust reform has taken a back seat to the litigation strategy possibly propounded by DOJ and the Solicitor's Office's attorneys. The only office that has sufficient trust knowledge and experience to guide trust reform within the DOI is the Office of the Special Trustee. By discrediting the Special Trustee, the Defendants only buttress the Plaintiffs' argument that there is no one capable of bringing about trust reform within DOI. By discrediting and disciplining the Special Trustee for his poor performance or alleged contemptuous

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<sup>21</sup> It is also true that in the summer of 2001, in response to his stated concerns and requests, the Secretary signed a memorandum and order that established that the Special Trustee was in charge of trust reform and gave him additional authority to direct its conduct by all Bureaus. However, that authority was not what he had asked for nor sufficient to allow him to quickly bring about trust reform and, as reported by the Court Monitor, his exercise of it was also frustrated by the BIA officials and Solicitor's Office attorneys. *See* Sixth Report of the Court Monitor at 13-17.

actions either against this Court or the Secretary, or both, the Defendants have left themselves naked, once again, with neither independent oversight nor sufficient trust experience to guide any effective trust reform directed by this Court.

#### **D. The Special Trustee's Memorandum Response**

Once again, the Special Trustee responded to the Secretary's facsimile directive by memorandum dated May 1, 2002, entitled, "Declaration to the Court" (Tab 16). It's substance, in pertinent part provided:

**"I have hesitated to respond to your faxed memo to me of April 25, 2002, because I believed the particular issue presented appeared to have been resolved. Last week I declined to sign a declaration on the Special Master's Second Investigative Report. However, after our conversation of yesterday, it is apparent that you may not be aware of some recent activities of the lawyers, especially DOJ.**

**I declined to sign a declaration because no one could explain why it was really necessary. The weight that the Court might give to my memo to the Deputy Secretary appears not to be a real issue. The Court is the fact finder in this matter and has had a chance to evaluate the integrity and performance of Mr. Thompson and myself in the courtroom under oath. In addition, I basically agree with the Special Master's opinion, so the Court is not asked to resolve a dispute.**

**Since no one could explain why a declaration was required to defend the Department's position, I and my Principal Deputy declined to sign a declaration for the following reasons.**

**First, on April 12, 2002, I sent a memo to the Solicitor concerning records production for the court at OST. That memo, a copy of which is attached (with its attachment), sets forth some of the problems OST has had with the assistance and representation - - or the lack thereof - - provide by the Solicitor's Office and DOJ. I am particularly concerned about the lack of legal advice concerning which trust documents are responsive to document production requests. The lack of legal advice concerning the production of documents responsive to Paragraph 19 was one of the root causes for the outcome of the first show-cause hearing.**

**Second, I have attached a copy of a memo (with its attachment) dated April 24, 2002, for Tom Thompson to the Solicitor setting forth additional problems with the DOJ's representation.**

**Third, I have attached a copy of a memo from the Deputy Secretary dated April 24, 2002. This memo outlines the failure of OST to properly perform records management and maintenance. His opinion apparently is based on a one-day visit by the Associate Deputy Secretary (ADS) to the Office of Trust Records in Albuquerque and discussion between the ADS, the Special Master, and the DOJ without any significant involvement by OST.**

**Fourth, on numerous occasions, I and my people have heard it stated that DOJ doesn't represent us but the Government. DOJ's focus is on litigation. Therefore, their advice does not necessarily serve either the best interests of DOI, including OST, and their employees, the beneficiaries, or trust reform in general.**

**Furthermore, signing or not signing a declaration has nothing to do with my willingness to take responsibility for the information I provided. I would not have submitted the April 22, 2002, memo to the Deputy Secretary if I believed it to be incorrect. In addition, I am quite willing to support it in Court, if the judge has questions about it, under oath, which is the highest standard of attestation. Thus, I respectfully decline your premise that I am doing a disservice to the Department and those who might be held responsible, especially since it appears that OST, Tom Thompson and I are those very people.**

**If, in fact, you or your staff believe the information provided in the memo is inaccurate, then it should not be submitted to the Court, with or without a declaration.**

**Again, I am quite willing to swear to the accuracy of my words to the Court and have done so recently. I hope my reticence to use the declaration approach suggested by DOJ and SOL is explained sufficiently here. I appreciate that you concede to me the freedom to craft a declaration that accurately states my views. I also believe not making a declaration accurately reflects my views...." *Id.* at 1-2.**

The Special Trustee's reference to OST's problems with the assistance and representation of the Solicitor's Office and DOJ is contained in the attached memorandum to the Solicitor from him dated April 12, 2002 and entitled, "Document Production Related to OST "Box Move." It states in part:

**"The DOJ request broadens the Special Master's request and seems to indicate that everyone involved in the search provide 'verifications' as well. (See number three on attachment hereto.) For instance, it is troubling that the DOJ attorney reached the conclusion that the documents were responsive without benefit of the explanation form the Department as to why they were not produced, and apparently did not critically analyze whether or not these documents were, in fact, responsive.**

**It is apparent to me that our approach for document production to the Special Master is not up to the high standards of SOL and DOJ. Non-lawyers and lay people across OST are being asked to make legally binding judgments as to what documents are 'relevant' or 'responsive,' even when we at the senior level have questions and concerns. And they are 'asked' to do this under the potential threat of legal sanctions and without on-site legal advice.**

**Therefore, as OST discussed with Jim Cason and Ms. Kessler, I think it is time to strengthen the structure and resources, and to firmly establish the production protocols for dealing with document requests from the Special Master.**

**First, OST must have experienced attorneys with relevant experience from DOJ and the Solicitor's Office on-site in Albuquerque supervising document production. These attorneys will verify under Local Civil Rule 5.1 and will provide valuable guidance in the management of the on-going effort to ensure complete and timely production.**

**Second, DOJ and the Solicitor should engage the services of a professional document production company to assist in the effort." *Id.* at 1-2.**

The Special Trustee's memoranda speak for themselves and need little additional comment. The Special Trustee wrote the April 12, 2002 memorandum to the Solicitor

requesting help from the Solicitor and DOJ in responding to document productions after the Solicitor's Counselor and the Deputy Secretary had received Ms. Spooner's memorandum alleging that some portions of the Special Trustee's office were "disinclined" to work with the Solicitor. One might ask just who was disinclined to work with whom? It was the attorneys' ethical and professional obligation to assist the Special Trustee in responding to these legal document requests and reports of the Special Master. Yet they apparently not only did not respond to the Special Trustee's request for help, but in response to his and Thompson's queries, they denied the existence of a memorandum sent by the DOJ in March 2002 about his office that would have enlightened the Special Trustee to just how little cooperation he was receiving from the Solicitor's Office and DOJ attorneys in answer to his requests.

These memoranda from the Special Trustee and his Principal Deputy show the level of duplicity practiced on them by the attorneys who are charged with the representation of the DOI and, in turn, assistance to its employees to ensure that this Court does not receive, and the DOI is properly protected from sanctions for, incomplete and inaccurate document filings. Is there any wonder that the former Secretary of the Interior and the Assistant Secretary – Indian Affairs were held in contempt for failure to properly respond to document production requests?

That the Special Trustee is less than enthusiastic about responding to DOJ's request for his declaration concerning the Special Master's reports or would prefer to testify to this Court rather than sign one provided by the DOI and DOJ attorneys is perfectly understandable.

### **E. Observations**

It is not the goal of this Seventh Report to review the machinations of the DOJ or Solicitor's Office attorneys regarding responses to the Special Master's Reports or document production requests. Nor will this Report comment on who may be in contempt of those requests if they are not complete or accurate.<sup>22</sup>

What is of relevance to this Report regarding the previously reviewed actions of the DOJ and Solicitor's Office attorneys is the hostility and lack of legal support faced by the Special Trustee and his Principal Deputy, the apparent reasons why, and the conclusions that can be drawn from this conduct. There is a pattern and practice that has developed over the past year regarding the conduct of all concerned parties within and without DOI toward the Special Trustee and his staff that has culminated in no less than the Secretary of the Interior being placed in a position to publicly criticize the performance and credibility of the Special Trustee and his staff.<sup>23</sup> That the Secretary has been

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<sup>22</sup> Therefore, no conclusion or discussion will be addressed in this Report about the DOJ or DOI attorneys' conduct and actions regarding the Special Trustee and the Special Master's Reports or document production requests. The absence of a formal conclusion is no indication that the DOJ and DOI attorneys have conducted themselves in a manner that should not subject them to this Court's attention should the Special Master find that the Defendants been contemptuous of his orders or that the responses to his Second Investigative and Emergency Reports have been less than complete or accurate.

<sup>23</sup> The Secretary's April 17, 2002 memorandum has found its way to the Lincoln Journal Star on May 2,

misinformed and the apparent reasons for the misinformation provided her has been dealt with previously in this Report.

The result of the pattern and practice of the conduct engaged in by the DOI officials and attorneys representing the DOI over the past year leads to several conclusions that are unavoidable with regard to the goal of this Report – the role of the Special Trustee and his ability to perform it as Congress directed.

## VII. CONCLUSIONS AND DISCUSSION

### A. The Special Trustee for American Indians Has Been Placed In An Untenable Position By The Defendants' And Their Attorneys' Actions And Cannot Fulfill His Duties Under the American Indian Trust Fund Management Reform Act of 1994

The Special Trustee has informed the Secretary of the Interior that several key trust reform initiatives are not moving forward expeditiously. The only experienced trust official within the organization established by the Secretary to begin to address trust reform has not had sufficient resources dedicated to her or the core efforts she is undertaking to accomplish them. Additionally, the EDS report recommendations touted by the Defendants as the source of their understanding of the problems with trust reform have not been evaluated in a concerted and disciplined effort to make recommendations to the Secretary for needed trust reform initiatives and languish in the face of other priorities. Finally, the Defendants, in the Special Trustee's opinion, are focused on the *Cobell* and Tribal litigation activities at the expense of basic trust reform. The Defendants are subject to legal advice and counsel driven by litigation objectives rather than fulfilling the fiduciary responsibilities owed by the Secretary – the Trustee delegate – to the Indian trust beneficiaries including the IIM accountholders.

Perhaps most troubling, the Special Trustee does not believe an historical “accounting, as that term is generally understood in the established trust scholarship, acceptable to either the beneficiaries or the Special Trustee can be constructed.” Nor has anyone provided him with an adequate definition of the characteristics of the accounting underway in OHTA of “anything more than the funds actually collected by the Department. That of course, is inadequate.” **Tab 11** at 3.

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2002. See **Tab 17**. Also, in her Observations to Status Report to the Court Number Nine, filed with this Court on May 1, 2002, she stated, “**I am aware that the performance of the Office of Special Trustee is being seriously questioned... I have discussed these issues with the Special Trustee. The Special Trustee has prepared memoranda responding to the Special Master's reports, but has been unwilling to submit a declaration (presumably with the same or similar factual content), of the type permitted by the local rules of the Court. I have asked the Deputy Secretary to review the performance of OST on these and other matters and to seek substantive ways of improving OST's contribution to the day-to-day efforts toward trust reform. During the next reporting period, we plan to clarify the roles, responsibilities and expectations associated with OST, for both oversight and operations, to ensure OST is working with the balance of the Department toward common goals and objectives.** *Id.* at 6-7.

The Special Trustee had come to the conclusion that his office must step in and go beyond their oversight role and take over direction of trust reform. The Secretary has denied the Special Trustee this role. In doing so, she has also ordered that he report to the Deputy Secretary who she has designated as the DOI official in charge of trust reform. She has also expressed her opinion that his performance has been less than desired and has asked the Deputy Secretary to review it.

The Special Trustee can no longer carry out those responsibilities mandated by Congress in the 1994 Reform Act at the very moment he has identified a renewed lack of trust reform progress within DOI. He can neither direct trust reform to ensure Congress and the Secretary that it is on track, nor can he provide oversight for Congress as he now is required to report to the Deputy Secretary – the official he is duty bound to oversee – in direct violation of the 1994 Reform Act.

The Secretary, on the apparent advice of her subordinates and attorneys, has placed the performance and credibility of the Special Trustee in doubt, however questionably, which has further destroyed the possibility of effective trust reform. If the Special Trustee and his staff cannot perform their statutory functions due to their lack of ability to manage, or because, more likely of harassment and obstruction, the Defendants will have absolutely no experienced trust leadership to guide them and build the effective trust reform that they testified to this Court they were capable of constructing.

The hostility shown by the Secretary's memoranda to the Special Trustee and the documented errors in her memoranda's reasoning (or that of those who advised her or prepared the memoranda for her) cast doubt on the ability of her office to continue to work and communicate with the Office of the Special Trustee. It places the Special Trustee and his career employees at risk, working under a cloud of suspicion even greater than found in the past between DOI, BIA, DOJ, and the OST.

This Shakespearean tragedy has no end. Now the reputation of a trust professional with 36 years of experience in civilian business and banking who came to government service to help the DOI, the IIM accountholders, and all Indian Trust beneficiaries has been placed under a cloud by the Defendants' attorneys in an apparent effort to oppose and evade his and, possibly, this Court's oversight. His Principal Deputy, with over thirty years of honorable government service, has been painted, by the attorneys responsible for helping this layman respond to the Special Master's reports, with a bulls-eye marked "contempt" on his backside for target practice.

The actions Defendants have taken against these two officials and contempt trial witnesses and the methods used by them come very close to constituting retaliation. The reasons for these actions may be even more suspect and may require this Court's investigation.

**B. The Defendants' Actions Warrant Increased Court Oversight To Ensure Defendants Institute Credible Trust Reform Without Further Delay In The Absence Of An Independent Special Trustee Capable Of Unfettered Oversight**

Over the past three years, two Special Trustees and many current and former members of their staffs have testified in three trials and other hearings before this Court about the obstruction, pressure, delay, dissembling, and outright hostility they have faced in attempting to do their statutory and fiduciary duties from the senior management, attorneys, and officials of the DOI, DOJ and BIA. Nearly 40 former or current senior managers, attorneys, and employees of the DOI, BIA, Solicitor's Office, and DOJ are before this Court on allegations of contempt. In the same period, two Secretaries of the Interior and their Assistant Secretaries – Indian Affairs, and the Secretary of the Treasury, have been brought before this Court for trial in their official capacities under contempt causes of action.

The present Secretary's contempt trial was replete with testimony of the attempts of the Defendants including their attorneys to "go around" the Special Trustee to thwart his oversight responsibilities and authority and to block his candid observations about the Defendants' nonfeasance, misfeasance and malfeasance. Now, when the issue is ripe for review regarding the Secretary's and her subordinates' own accountability for possible contempt of this Court, Defendants have chosen to accuse none other than the Special Trustee and his staff of actions constituting contempt when the actions of her own subordinates and attorneys were the true factual predicates for the contempt causes of action before this Court.

The Secretary of the Interior has now seen fit to direct the Special Trustee to report to the Deputy Secretary who is in charge of all trust reform operations within the DOI. This is not the statutory role of the Special Trustee. Nor is it possible for him to oversee the official to whom he must report. It is a role that was forced on the last Special Trustee resulting in his resignation. But then, that Secretary was candid in his admission that he never wanted a Special Trustee in the first place. The following is Mr. Babbitt's testimony in the summer 1999 trial about the passage of the 1994 Reform Act:

**Q. And did you have occasion to evaluate those bills, or that bill?**

**A. Yes we did....**

**I also recall pretty clearly that I was concerned about the Special Trustee provision. In fact, I opposed it. The reason for that was, as a general matter, I felt that solving a problem by fragmenting authority was not good policy....** Trial Tr. at 3644.

The result of the fragmenting of authority was the eventual departure of the Mr. Homan after Secretary Babbitt took his authority away from him. Neither Secretary could stomach the independent oversight and power of the Special Trustee. No Secretary can allow a subordinate to publicly question his or her direction. But that is exactly what the Special Trustee must do on a regular basis if he is doing his job. The Special Trustee and his staff have a statutory duty to point out where the Secretary's subordinates are going

wrong on trust reform. The present Special Trustee has used his funding authority to block the Secretary's Bureaus from expending money on reform efforts that he viewed as wasteful or ill planned. He can report to Congress about whether the Secretary is fulfilling her fiduciary trust responsibilities. He is a critic within her tent. But he reports to her. He may have to tell the Congress (and through the *Cobell* litigation, this Court) that the Secretary has refused to take his advice and has impeded the progress of trust reform. Mr. Slonaker and his Deputy, Mr. Thompson, did that repeatedly in testimony before this Court about both Secretaries of the Interior they have served and many of the senior subordinates of those Secretaries. They now apparently are reaping the rewards for their candid testimony.<sup>24</sup>

The result with either pair of Secretaries and Special Trustees is obvious. The Secretary wins. Politically the position of Special Trustee is untenable because of its having been placed within the Department of the Interior. He can never have the independence or receive the support necessary from the effectively Secretary to do his job. The Special Trustee serves at the will of the Secretary. As this Court held in its December 21, 1999 decision:

**“The court agrees with plaintiffs that defendant Babbitt’s decision, without any input from or notice to the Special Trustee, to alter the chain of command between the Special Trustee and his own employees and transfer one of the Special Trustee’s Senior Executive Service Special Assistants frustrated the legislative intent of some key figures behind the passage of the Trust Fund Management Reform Act. There is no question that the creation of OST, as a general matter, was intended to place a more independent bureau within Interior in order to get results that had not been received under the sole reign of BIA and former Secretaries of the Interior. The way in which defendant Babbitt’s decision was made has now relegated the OST to just another of Interior’s bureaus, largely stripped of any independence that it may have had with regard to the IIM trust. Nonetheless, the court cannot say that defendant Babbitt’s poor decision was contrary to law. *Despite the best intentions of some lawmakers, the text of the statute they enacted said in no uncertain terms that ‘the Special Trustee . . . shall report . . . to the Secretary.’ If Congress truly wanted a completely independent trustee to oversee trust management, entirely independent from the well-documented historic recalcitrance of Interior, then Congress surely would have explicitly restricted the Secretary’s powers over the Special Trustee and his office.* 91 F. Supp 2d (D.D.C. 1999) at 52, emphasis added.**

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<sup>24</sup> Two colloquies with this Court and Plaintiffs’ counsel during Mr. Slonaker’s testimony at the Secretary’s contempt trial highlight the obvious concern about this potential retaliation: **Q. We’ve had a rocky voyage in this litigation, Mr. Slonaker. A. I got on part way across, and I’m not sure I should have (Laughter). Q. And there are also sharks in these waters, I might add. A. Got you. THE COURT: That’s Okay, Mr. Slonaker. I’ll tell you, you’re growing in the job. THE WITNESS: I’m worried about that. Mr. Gingold: Actually, based on his tenure, he’s growing in the job just because he’s still in the job, Your Honor. Trial Tr. at 2223-2224. In questioning him about his refusal to verify the Seventh Quarterly Report, the dialogue also addressed this concern: Q. THE COURT: In fact, you had a draft where you would have signed it; you just wanted that observation in their that it wasn’t complete? THE WITNESS: That’s right. THE COURT: Or accurate. You would have in fact transmitted it. THE WITNESS: Sure. THE COURT: As long as you had that in your observations. THE WITNESS: Sure. BY MR. GINGOLD: Q. But there was no desire to have that language in your observations; correct? A. I can’t guess at the motivations. Q. Was it enthusiastically embraced? Apparently not. Can I say that for the record, Mr. Slonaker (Laughter)? THE COURT: He’s probably fortunate he’s still here. Trial Tr. at 2442-2443.**



Undoubtedly, this Secretary, an accomplished and experienced attorney, is aware of this decision. The result, if Mr. Slonaker continues to do his duty, will be the same as Mr. Homan experienced. But this time, the Special Trustee has not backed down and resigned. He is attempting to do his duty and convince the Secretary it is in her best interest to listen to him and not those subordinates that have so badly mischaracterized the record in the memoranda sent by the Secretary to him. So the Secretary's minions have created out of whole cloth a fraudulent bill of particulars on which to base his discrediting and potential dismissal.

This time, the record before this Court leaves it with a harder question to answer than in its December 21, 1999 decision in light of the past two years' events as testified at this Secretary's contempt trial by many witnesses including Mr. Slonaker and Mr. Thompson. Who will provide the experienced trust direction and oversight that the Congress mandated and this Court relied on in limiting its own oversight? Who will bring accountability and experience to trust reform in the wake of this ship's renewed foundering?<sup>25</sup>

The actions of the Defendants subordinates and attorneys toward the Special Trustee and his Principal Deputy are unconscionable and smack of retaliation for and obstruction of, once again, the Special Trustee's Congressionally mandated oversight duties if not this Court's oversight. The method attempted to accomplish these ends and the reasons why may be sufficiently close to obstructing this Court's oversight to draw its attention and inquiry.

## VIII. REMARKS

**“Federal officials were aware of their fiduciary obligations long before the passage of the 1994 Act – let alone the initiation of this action – and yet little progress has been made in discharging those duties. What little progress the government has made appears more due to the litigation than diligence in discharging its fiduciary obligations.”** 240 F. 3d (D.C. Cir. 2001) at 1097.

What the Circuit Court of Appeals said in February 2001, over one year ago, could apply to this situation today. The only force behind proactive trust reform on the part of the Defendants has been this Court's oversight. That is true about the IT Security breaches and it is true regarding the BITAM reorganization proposed by the Secretary in answer to this Court's question of who was in charge of trust reform? The answer today to that question in the written opinion of the Special Trustee is no one is in charge that has the requisite trust knowledge and experience to know what he is doing evidenced by the lack of progress on trust reform identified by the Special Trustee.

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<sup>25</sup> Again, not unlike past Reports have indicated, the crew may be rowing as hard as possible – Mr. Swimmer and Ms. Erwin, their staffs, EDS, and the Tribal Task Force may be making some progress, however slowly – but the captain and her lieutenants are involved in all out warfare above decks. They must put their own ship on a sound management course or it will founder again regardless of the skill of the crew. And to do that they must retrace their past course errors, identify the true weak links in the chain of command and hold them accountable even if someone must walk the plank.

This Seventh Report of the Court Monitor started out to be, like so many others in the past, something other than what it has come to be. What was thought to be the case to be reviewed turned out to be something entirely different. However, unlike past Reports that reviewed events that already had occurred, this Report has been swept along by events and has reported them as they have occurred. The Seventh Report also is not composed of the examination of witnesses or their oral statements to the Court Monitor. It is based on the written record of their own actions and decisions as composed by each actor in this drama.

Where the Seventh Report was expected to review how the Special Trustee would fit into the picture painted for this Court by the Secretary and Deputy Secretary of what would be done to bring about trust reform, it has become a documentary on exactly the opposite – what has been done to keep the Special Trustee out of the picture of trust reform, limit his oversight capability, and discredit him in the eyes of this Court.

The Defendants' subordinates' attempts to question the Special Trustee's performance and discredit his integrity and that of his staff has only revealed, once again, their own poor performance and, unfortunately, cast doubt not only on their trust reform progress but also on their own credibility and failure to bring any accountability to the trust system. Once again, their attorneys' actions and conduct have played a central role in prompting the conclusions in this Report.

The tragic nature of this story for the Indian Trust beneficiaries is that, working together, the Secretary and the Special Trustee, and their respective staffs, that may have had the requisite organizational and trust management experience between them, could possibly have brought about trust reform in a relatively efficient and effective manner over a reasonable period of time starting when the first Special Trustee was appointed.

There are a number of reasons why this has not occurred and why it will not in the future without this Court's continued and increased involvement. The first, and most evident, is the "authority sharing and fragmentation" that Secretary Babbitt was so certain would be the result of introducing a trust reform overseer into the DOI. This aversion to power-sharing and Congressional oversight has encouraged both past and present Secretaries of the Interior to reject the Special Trustee's role, each as they saw fit. Secretary Babbitt made no pretenses and, without so much as informing Special Trustee Homan, took away his control and placed him under a subordinate without any trust experience. Secretary Norton (or, most likely, her subordinates and attorneys) has questioned the performance of the Special Trustee, characterized, in one case, that performance as possible obstruction of this Court's orders, and has placed him under the supervision of the official she has designated to be in charge of trust reform, the Deputy Secretary – directly violating the 1994 Reform Act and making it impossible for the Special Trustee to oversee trust reform.

Second, the career official's institutional recalcitrance, insensitivity to their fiduciary duties to the Indian Trust beneficiaries, management ineptitude and intransigence have

prevented both Special Trustees from introducing the needed trust reform and fiduciary trust culture where the interests of the beneficiaries (and not the government officials and their own priorities and programs) come first.

Third, while the *Cobell* litigation has driven whatever few reforms have taken place, it also has allowed the attorneys within the DOI and at DOJ to control and influence the Secretaries' decision-making regarding trust reform measures in order to support the defense of the institution, with the argument that to do otherwise would allow the Plaintiffs to gain some legal advantage. This could not have been more clearly shown than in the First Report of the Court Monitor regarding the tortured decision-making surrounding the statistical sampling historical accounting and in the Second Report of the Court Monitor regarding the Defendants' failure to report to this Court in September 1999 that TAAMS could not live up to its billing provided this Court at the summer 1999 trial.

The result of litigation-driven decisions has placed both Secretaries before this Court in contempt proceedings for their or their subordinates' actions that looked to litigation advantage rather than true trust reform solutions. They were correct – litigation-driven decisions on trust reform objectives have given the Plaintiffs an advantage, not always the result of their own making, but certainly, in some cases, because of the Defendants' own actions.

Now, these same litigation-driven decisions may well have caused the Defendants' attorneys to target the Special Trustee and his Principal Deputy in a particularly callous manner. Not only is there the historical management dispute between the Secretary and the Special Trustee, there is apparently an additional litigation-driven desire to discredit the Special Trustee and his Principal Deputy for possibly no more than a tactical litigation advantage.

What began during the tenure of the first Special Trustee as a struggle over power and the past Secretary's concern of fragmenting that power has continued into the second administration and impacted on the first Special Trustee's successor. But it has been transformed by this administration into not only an apparent rejection of the oversight responsibility of the Special Trustee but also an attempt to discredit him and his senior staff before this Court in a most public and demeaning manner. In attempting to take what best can be characterized as retaliatory actions against the Special Trustee and his staff, however, the Defendants' or their attorneys, have again hoisted themselves on their own petard. By their unvarnished exhibition of a continuing pattern of contempt for this Special Trustee's authority and statutory responsibilities which were established by Congress to *help* them succeed at trust reform, they have managed to place him in a position where his responses to their attacks can only *harm* them in the eyes of this Court and the Congress.

Fourth, the unwillingness of all concerned parties to even consider whether or not the DOI is capable as a Cabinet-level Department of managing, in-house, the Indian Trust and whether the Indian Trust should be removed from DOI has stymied generations of

reformers from constructing workable solutions to the intractable historical problems associated with the DOI and BIA management of the Indian Trust. The short answer that was so well documented in the Synar report<sup>26</sup> ten years ago and by the last Special Trustee, Paul Homan, is that the DOI cannot do the job and will never be able to do the job without outside experienced trust management directing the effort with the authority and power to supervise and hold accountable those officials at DOI and its Bureaus working on trust operations and reform.

Without comprehensive authority of an outside agency over DOI to bring accountability to trust reform, the present DOI career leadership in Washington, DC and at the Regions and Agencies will continue to exhibit a bureaucratic expertise at thwarting and obstructing any solution to trust reform that would take their power and authority away from them or would make them accountable to the Indian Trust beneficiaries and their own political leadership. One need only review the histories of the two Special Trustees to understand the futility of placing the official in charge of trust reform inside of DOI without some outside body capable of giving him or her the power and authority to make decisions, take action, and hold the DOI officials working on trust reform accountable for their actions.

Fifth, Mr. Homan testified to the Clinton administration's plan to delay trust reform until the new administration arrived. His view has been borne out by the testimony at the present Secretary's contempt trial. This administration may just be running in place also. However, there are indications that they have committed to and started some basic programs to lay a foundation for trust reform. The Special Trustee has applauded the Secretary's efforts to form a new organization to handle trust reform and that process has been begun with the Tribal Task Force. The Deputy Special Trustee, Donna Erwin, and EDS have begun to form teams of experienced operational personnel throughout the Regions to examine the "as is" business plan leading to the development of a new business plan on which system requirements can be based. However, no administration will be able to bring about the needed trust reform in four years. As long as the career bureaucrats remain in charge without sufficient accountability during successive administrations, they will find ways to thwart the political leadership even if it was willing to devote the needed resources, money, and expertise to trust reform during its tenure.<sup>27</sup> While this is the case in all government agencies regarding controversial programs, this is not just another program; it is a *trust*. It requires long term experienced management not tied to the political process or the revolving door election cycle.

What is the solution and can this Court or Congress provide it? The Special Trustee and his Advisory Committee have spoken to this solution in recommending to Congress and this Court that consideration be given to removing the Indian Trust from DOI and placing it either in a government agency with experience in banking and trust or in a newly

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<sup>26</sup> Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, Seventeenth Report by the Committee on Government Operations, April 22, 1992. House Report 102-499.

<sup>27</sup> The Court Monitor is not willing to say this administration has not tried to do just that however slow trust reform is progressing in the eyes of the Special Trustee. Review of the Defendants' commitment to trust reform will be the subject of future Reports.

created agency wholly separate from DOI. He also has spoken of having an outside body direct DOI in trust operations and reform. Unless that commission, agency, or individual could direct the actions and provide for real accountability of the DOI officials handling trust operations and reform without interference or control from the DOI leadership, no official, inside or outside of the DOI will be able to bring about trust reform.<sup>28</sup>

Considering all of the above factors, the first Special Trustee's advice to this Court in 1999 regarding the appointment of a receiver may be more relevant and pressing to this Court's decision-making this time around in light of the position in which his successor now finds himself. It would appear to fall to this Court to once again address what might be possible for the judiciary branch of government to do to correct this historical breach of trust to the IIM accountholders and all Indian Trust beneficiaries that continues today and will into the distant future unless concrete actions are taken by Congress, this Court, or both.

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<sup>28</sup> Senators Thomas A. Daschle, Tim Johnson and John McCain have introduced legislation recently to "create an Interior Department position of deputy secretary for trust management and reform to handle all trust fund duties." See *The Washington Post*, National News, Monday, April 22, 2002, page A6. The Special Trustee has also suggested that if accountability of DOI or BIA officials to such an internal DOI leader, successful trust reform might be possible. The Court Monitor does not share this optimism.

Copies of the Seventh Report of the Court Monitor have been provided to:

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