IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

NOTICE OF FILING

On September 17, 2002, the Court granted "leave to the Treasury defendant to make a pertinent submission [regarding plans for administering IIM trust accounts] . . . ." Cobell v. Norton, 226 F. Supp. 2d 1, 162 (D.D.C. 2002). The Treasury Defendant hereby gives notice of the filing of the attached Memorandum and Statement regarding the Court's September 17, 2002 Opinion and Order.

Respectfully submitted,

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

Dated: January 6, 2003

SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station

Washington, D.C. 20044-0875
(202) 514-7194

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

January 6, 2003

MEMORANDUM FOR: ROBERT D. McCALLUM, JR.
ASSISTANT ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION

FROM: BRIAN L. FERRELL
CHIEF COUNSEL
BUREAU OF THE PUBLIC DEBT
DEPARTMENT OF THE TREASURY

SUBJECT: Treasury's Statement Regarding the Court's September 17, 2002 Opinion and Order in *COBELL, ET AL. v. NORTON, ET AL.*

Included with this cover memorandum is "Treasury's Statement Regarding the Court's September 17, 2002 Opinion and Order in *Cobell, et al. v. Norton, et al.*" ("Treasury's Statement" or "Statement").

As you are aware, in its September 17, 2002 Memorandum Opinion and accompanying Order, the District Court directed the Secretary of the Interior to file, by January 6, 2003, a plan for conducting a historical accounting of the Individual Indian Money (IIM) accounts as well as a plan for bringing the Department of the Interior (Interior) into compliance with the fiduciary obligations owed to the IIM beneficiaries. In that same Opinion, the Court granted the Department of the Treasury leave so that it might make a "pertinent submission" akin to the plan which Interior has been ordered to file. September 17, 2002 Memorandum Opinion at 243, n. 158. Treasury has taken extensive steps to fulfill its trust-related obligations but does not have a separate "plan" from that of Interior since the role played by Treasury is a supporting one in assistance and furtherance of Interior's primary role in IIM trust and IIM trust-related matters. However, Treasury appreciates having an opportunity to summarize for the Court the important actions it has taken to date to assist Interior, and the Government, in accomplishing trust reform and has prepared this memorandum to demonstrate that – recognizing that this may not constitute a "plan" as construed by the Court.

Treasury's Statement includes information concerning the Financial Management Service, ("FMS"), Bureau of the Public Debt ("BPD") and certain Departmental Offices ("DO"). Treasury's Statement was prepared based on information provided by a number

of program offices from the above-described organizations. The preparation of Treasury's Statement included circulation of drafts of the Statement to program offices that are responsible for the actions described in the Statement. Comments were received from those offices and incorporated in the Statement.

Prior to submitting the Statement to the Department of Justice, senior officials of FMS, BPD and DO reviewed a final draft of the Statement.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

January 6, 2003

Treasury's Statement Regarding the Court's September 17, 2002 Opinion and Order in *Cobell, et al. v. Norton, et al.*

In its September 17, 2002 Memorandum Opinion and accompanying Order, the District Court directed the Secretary of the Interior to file, by January 6, 2003, a plan for conducting a historical accounting of the Individual Indian Money (IIM) accounts as well as a plan for bringing the Department of the Interior (Interior) into compliance with the fiduciary obligations owed to the IIM beneficiaries. In that same Opinion, the Court granted the Department of the Treasury leave so that it might make a "pertinent submission" akin to the plan which Interior has been ordered to file. September 17, 2002 Memorandum Opinion at 243, n. 158. Treasury has taken extensive steps to fulfill its trust-related obligations but does not have a separate "plan" from that of Interior since the important role played by Treasury is a supporting one in assistance and furtherance of Interior's primary role in IIM trust and IIM trust-related matters. However, Treasury appreciates having an opportunity to summarize for the Court the important actions it has taken to date to assist Interior, and the Government, in its ongoing efforts and has prepared this memorandum to accomplish that – recognizing that this may not constitute a "plan" as construed by the Court.

Both the District Court and the Court of Appeals in Cobell v. Norton have found that the Government has certain responsibilities in relation to the IIM Trust. Within this set of responsibilities, Treasury's role is to: 1) Report on a summary-level account for the IIM pooled account, maintained at Treasury and administered by Interior; 2) Perform a limited check on deposit and disbursement information furnished by Interior; 3) Hold, report on, and execute Interior's investment instructions in non-marketable Treasury securities; and 4) Retain relevant records, in particular, copies of negotiated checks reflecting Interior's disbursements from the approximately 300,000 individual IIM accounts.

Treasury has already implemented measures to ensure retention and enhance retrievability of IIM records. Such measures meet Treasury's fiduciary obligations to the IIM beneficiaries. Treasury has also implemented measures to enhance Interior's investment of IIM and thereby increase interest earnings for IIM. Treasury has also conducted a study of "back end float," measuring the average time between issuance and negotiation of IIM checks. In addition, upon request from Interior, Treasury has provided and continues to provide assistance to Interior primarily in searching for records. This memorandum sets forth the important actions taken to date, including steps that continue with regard to records retention.

I. BACKGROUND

During the trial in 1999 on issues related to the operation of the system for handling IIM assets, Treasury instituted a series of eight stipulations designed to address matters involving IIM under Treasury's control. In its *Memorandum and Opinion: Findings of Fact and Conclusions of Law* ("Opinion"), issued on December 21, 1999 [91 F. Supp. 2d 1 (D. D.C. 1999)], the Court held that Treasury committed a single breach of its trust responsibilities by destroying IIM trust materials "after their age exceeded six years and seven months, without regard to the fact that the

United States (through its trustee-delegates) has not rendered an accounting of plaintiffs' IIM trust money." Id. at 50. The Court further stated in its Opinion: "It may very well be that the agreement reached in that instance [Stipulation paragraphs 4, 5 and 6, addressing record retention] would satisfactorily discharge Treasury's duty to retain these [IIM-related trust] documents beyond this litigation." Id. at 51. The Court held that Treasury's stipulations mooted the plaintiffs' concerns regarding non-segregability of IIM trust checks by payee name and the "front-end float" (Stipulation paragraphs 1, 2, 3, and 7). Id. at 34-5.

The Court directed Treasury to report to the Court on a quarterly basis on the steps taken by Treasury to rectify its breach of trust and to bring itself into compliance with its duty to retain necessary IIM-related trust documents. Id. at 58-9 (D.D.C. 1999).

II. TRUST REFORM MEASURES ALREADY IMPLEMENTED BY TREASURY

As Treasury has reported in two "Stipulation progress" reports filed October 6, 1999 and January 6, 2000 and in twelve Quarterly Reports filed beginning March 1, 2000 through and including December 2, 2002[1], Treasury implemented a series of 8 Stipulations that Treasury committed to undertake on July 6, 1999, accomplishing the following trust reforms:

A. Enhanced Retrievability of Check and Electronic Payment Records

As acknowledged in Treasury's Stipulation 1 filed on July 6, 1999, Treasury's systems did not allow Treasury to search for and retrieve IIM checks drawn on Treasury without predicate information (check symbol and serial number) from Interior. As promised in Stipulations 2 and 3, Treasury developed two new systems, OTFM Data Entry System ("ODES") and OTFM Activity Tracking System ("OATS"), both of which became operational April 21, 2000. ODES and OATS enable Treasury to retrieve, by payee name or other unique identifier, information about checks issued to and/or negotiated by IIM beneficiaries from and after April 2000. In addition, OATS enables Treasury to retrieve information about electronic funds transfer ("EFT") payments issued to IIM beneficiaries, by payee name or other unique identifier.

B. Revised Record Retention Schedules

In accordance with Treasury's Stipulations 4 and 5, Treasury consulted with Interior[2] to identify all IIM-related records maintained or created by Treasury, evaluated those records in

---

[1] Treasury has timely provided the requisite reports on March 1, 2000, June 1, 2000, September 1, 2000, December 1, 2000, March 1, 2001, June 1, 2001, September 4, 2001, December 3, 2001, March 1, 2002, June 3, 2002, August 30, 2002, and December 2, 2002(all with attachments evidencing the actions described therein), describing Treasury's progress toward compliance with this Court's Order. Plaintiffs have never directly challenged any of the statements made in the Quarterly Reports or any of the documents attached thereto.

[2] These consultations were reported in Treasury's Second and Third Quarterly Reports filed June 1, 2000 and September 1, 2000, respectively. The final consultation was a teleconference on August 9, 2000, to discuss charts identifying categories of records Treasury

terms of utility for accounting purposes, and, at the end of September 2000, submitted revised retention schedules to the National Archives and Records Administration (NARA) for approval. Treasury's proposed revised schedules treat any records that contain or could contain IIM information as "IIM-related," including records in which IIM information is not segregated from non-IIM information and records containing summary level information that may or may not include IIM information.

On November 3, 2000, NARA published notice of the proposed schedules for comment in the Federal Register. The United States informed the Court and Plaintiffs' counsel of this development in a Notice of Filing on November 6, 2000. As reported in Treasury's Sixth and Eighth Quarterly Reports filed June 1, 2001 and December 3, 2001, respectively, Plaintiffs' counsel submitted comments to NARA concerning the proposed schedules, in letters dated January 8, 2001, May 3, 2001, and October 17, 2001. NARA responded to those comments in letters dated April 12, 2001 and September 25, 2001. In October 2001, Treasury provided NARA with amended cover pages for the proposed schedules, adding a legend to indicate that disposition of the records is subject to court order in this litigation.

As of the date of this memorandum, formal action by NARA is still pending with respect to the proposed schedules.

Treasury's proposed revised retention schedules reflect retention periods that Treasury considers appropriate, assuming a "fixed system" at Interior for providing accountings (i.e., post-litigation). As stated in the legend printed on each schedule, once approved by NARA, the revised schedules, like Treasury's existing schedules, will operate subject to the Court's August 12, 1999 Order Regarding Treasury Department IIM Records Retention ("August 12, 1999 Order"), or any modification or replacement of it. To the extent that existing orders and any further orders of this Court allow Treasury to follow normal retention periods and practices for particular records, Treasury will follow the NARA-approved schedule then in effect for those records.

C. Retention of All Records that Contain or Could Contain IIM Information

Treasury is currently ensuring the retention of all records that contain or could contain IIM information, in accordance with the Court's August 12, 1999 Order, which incorporates Treasury's Stipulation 6. On July 9, 2001, the Department of Justice filed the *Motion for a [New] Treasury Department Document Retention Order and Replacement of Paragraph 6 of the Stipulation Entered July 6, 1999* which seeks a more efficient and effective manner of retaining documents that contain or could contain IIM information. This Motion is currently pending before the Special Master. Treasury continues to work closely with the Special Master to ensure that all IIM records are being retained. For instance, periodically, Treasury sends reminders to

---

proposed for "extended," "standard," and "miscellaneous" retention periods and the rationale for the various retention periods. The charts were cross-referenced to materials that Treasury had provided to Interior in a prior consultation held in Albuquerque, New Mexico on May 8-11, 2000.

ensure the retention of the records described in Stipulation 6 and has kept the Court and plaintiffs apprised, through notification to the Special Master as to retention activity.

D. Enhanced Investment Earnings

In fulfillment of Treasury's Stipulation 7, effective July 1999, Treasury's Bureau of the Public Debt (BPD) began allowing Interior's Office of Trust Funds Management (OTFM) to make "as of" investments for deposits whose amounts are not immediately known, resulting in additional interest being earned on trust funds that OTFM administers. Beginning November 16, 2001, OTFM discontinued the practice of commingling overnight investments of IIM trust funds and tribal trust funds. Specifically, daily IIM investments in Government Account Series overnight securities are now reported separately to BPD and identified on BPD's books separately from any tribal funds. To further accommodate OTFM in maximizing earnings on the funds, BPD has, as of November 16, 2001, waived the $1,000 minimum increment investment requirement for the newly segregated IIM and tribal investments, allowing OTFM to invest increments as small as one penny.

E. Measurement of Back End Float

As promised in Treasury's Stipulation 8, in May 2000 Treasury completed a study of IIM check negotiation practices to determine the average time between issuance and negotiation of IIM checks, and Treasury provided a copy of the study to Interior. Treasury received no questions on the study. The study found that more than half of all issued IIM checks in the 3,255 item sample drawn were presented to Federal Reserve Banks for payment within nine days after issuance. The study also found that the average number of days that elapsed between check issuance and presentation for payment at Federal Reserve Banks was 13.7 days on a per check basis and 10.2 days on a per dollar basis. When 27 items that were not cashed by March 15, 2000 (including 15 checks that were canceled pursuant to the Competitive Equality Banking Act of 1987 (CEBA)) were added to the study, the average time between issuance and presentation increased to 16.9 days per check and to 10.8 days on a per-dollar basis. The inclusion of the 27 items did not alter the finding that more than half of all checks in the study were presented to Federal Reserve Banks within nine days after issuance.

III. TREASURY'S SUPPORT OF INTERIOR EFFORTS

As documented in Treasury's bi-weekly reports to the Special Master and in its quarterly reports to the Court, Treasury has supported Interior's efforts at trust reform in a variety of ways, from locating historical documents to attempting to resolve reconciliation issues. See, e.g., Treasury's Ninth Quarterly Report filed March 1, 2002, at page 6 and Attachment O, and United States' Status Report to the Special Master of April 2, 2002 at pages 5-6 and Attachment B (describing checks Treasury located at the National Archives in January 2002 after Interior asked Treasury to search again for particular checks identified but not located in reconstructing Mildred Cleghorn's account); Treasury's Eleventh Quarterly Report filed August 30, 2002, at page 3 (reporting the briefing Treasury provided for Justice, Interior and Treasury attorneys handling the Cobell and tribal trust litigation on July 25, 2002, to explain to them the FMS records and processes associated with deposit, payment and reporting transactions); Treasury's

Twelfth Quarterly Report filed December 2, 2002, at page 3 and Attachment C (referencing the letter Treasury sent to the Acting Special Trustee, in response to Interior's request for cooperation in resolving the IIM trust fund imbalance between Interior and Treasury); and United States' Status Report to the Special Master of October 5, 2000 at Attachment B (describing a September 15, 2000 meeting attended by Treasury, Justice, ITAD and Interior personnel to discuss missing settlement packages). Treasury will continue to support Interior's efforts.

IV. CONCLUSION

Treasury has committed to retain IIM-related trust documents indefinitely until such time as this litigation concludes, in accordance with the August 12, 1999 Order (which incorporates the commitments to retain documents made by Treasury in the July 6, 1999 Stipulation) or any modification thereto, see e.g., *Treasury's Motion for a Revised Retention Order*, dated July 9, 2001; thereafter, such retention would be in accordance with the revised retention schedules as approved by NARA. This commitment, as well as the commitment to assist Interior, when requested, in locating documentation Interior requires to do an accounting, such as was done in the Ernst and Young reconstruction, satisfies Treasury's trust obligations to the IIM beneficiaries, and thus requires no additional plan be submitted to the Court. As noted above in Sections II and Section III, Treasury has provided, and continues to provide, Interior with a wide range of supporting efforts (e.g., from searching for documentation to assisting with Interior's check issuance and investment operations), to meet the Government's trust obligations and to accomplish various trust reforms.

On September 28, 2001, the Court denied, without opinion or guidance, *Defendant Secretary of the Treasury's Motion for Determination That Defendant Secretary of the Treasury Has Rectified the Single Breach of His Trust Responsibilities Found by the Court and Request for Release from Quarterly Reporting Obligation.* Treasury maintains that it is satisfying its statutory obligations to the IIM beneficiaries, as well as those obligations imposed by the Court.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 6, 2003 I served the foregoing *Notice of Filing* by hand upon:

Dennis M Gingold, Esq.
Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

By U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

By Hand the Morning of January 7, 2003 upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958

K.P. Kingston

Kevin P. Kingston