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.	)	

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT THAT INTERIOR'S TRUST MANAGEMENT PLAN COMPORTS WITH THEIR OBLIGATION TO PERFORM AN ACCOUNTING AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") and the Secretary of the Treasury (collectively, "Defendants") move for partial summary judgment pursuant to Federal Rule of Civil Procedure 56(b) and Local Civil Rule 7.1(h), that the Interior Defendants' Fiduciary Obligations Compliance Plan (Jan. 6, 2003) ("Interior's Trust Management Plan"), comports with their obligation to perform an accounting.[1]

As argued in Defendants' appeal from, inter alia, the Court's September 17, 2002 Order holding them in civil contempt, Defendants are, respectfully, of the view that the Court lacks the authority to undertake a Phase 1.5 trial for the purpose of reviewing Interior Defendants' Trust Management and Historical Accounting Plans (whether or not in conjunction with Plaintiffs' plans) and thereupon entering injunctive relief dictating how they must comply with their

[1]Pursuant to LCvR 7.1(h), Defendants have filed herewith their Statement of Material Facts As To Which No Genuine Issue Exists.

obligation to account to individual Indian money ("IIM") account holders. See Brief for the Appellants ("Appellants' Brief") (Dec. 6, 2002). In Defendants' view, such a trial, held for the purpose of entering the contemplated injunctive relief, would exceed structural and statutory limits on the judicial authority by specifying how Executive-Branch agencies must fulfill their legal obligations, rather than simply ordering them to do so. See id. at 29-33.[2]

However, as argued below, if the Court holds the Phase 1.5 trial, it should review Interior's Trust Management Plan solely to determine whether it describes an approach that comports with Defendants' obligation to perform an accounting; the Phase 1.5 trial provides no basis for inquiring into Defendants' management of the IIM trust as a whole. If the Court reviews Interior's Plan, it should rule that Defendants are "entitled to . . . judgment as a matter of law," Fed. R. Civ. P. 56(c), that the Plan describes an approach that comports with their obligation to perform an accounting. In stark contrast, Plaintiffs' Compliance Action Plan Together with Applicable Trust Standards ("Plaintiffs' Trust Management Plan") is utterly unrealistic, unlawful, and defective. Even to consider it would necessarily cause further delay in providing the required accounting because of its failure to address, much less attempt to resolve, the complex

---

[2]See also Merrick B. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 564-65 (1985) (stating that "because the essence of the executive function is the exercise of discretion, a court transgresses the separation of powers when it dictates that an agency take one particular action instead of others within its discretionary prerogative," but that "when a court merely orders an agency to act, leaving the choice of action to the agency's discretion, no trespass occurs"); Catherine Zaller, Note, The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1), 42 Wm. & Mary L. Rev. 1545, 1548 (2001) (observing that the Senate Judiciary Committee report of May 1945 on a draft version of the Administrative Procedure Act ["APA"], 5 U.S.C. §§ 551 et seq., "noted that the authority granted to the judiciary under the [APA's] judicial review clause did not allow the courts to strip agencies of discretion in determining how an agency should carry out legislation[;] . . . [r]ather, the Senate simply wanted the court to direct the agency to act without dictating what process the agency should use" (internal citations omitted)).

issues – including statutory, congressional, budgetary, executive, and tribal – implicated by any process of trust reform.

I. The Court Should Review Interior Defendants' Trust Management Plan Solely To Determine Whether It Describes An Approach That Comports With Defendants' Obligation To Perform An Accounting And Should Not Inquire Into Defendants' Management Of The IIM Trust System As A Whole

The Plaintiffs "cannot treat the court as a grievance committee for the United States' mishandling of the trust. Whether plaintiffs like it or not, only Congress can play that type of role." Cobell v. Babbitt, 91 F. Supp. 2d 1, 7 (D.D.C. 1999).

Plaintiffs' claim is for an accounting, rather than for reform of the IIM trust as a whole. See 25 U.S.C. § 4011(a) (requiring that Interior Defendants "account for the daily and annual balance of all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938"); see also Cobell, 91 F. Supp. 2d at 24, 27 (stating that "plaintiffs' APA claims . . . stem from the statutory right to an accounting" and that plaintiffs "seek to enforce their statutory right to an accounting"); Cobell v. Babbitt, 52 F. Supp. 2d 11, 18 (D.D.C. 1999) (acknowledging "the narrow issue involved in this case and the ultimate relief sought by plaintiffs – an accounting of their trust fund money."). Accordingly, in determining that it had jurisdiction over this litigation pursuant to the waiver of sovereign immunity contained in the Administrative Procedure Act ["APA"], 5 U.S.C. § 551 et seq., the Court was careful to specify that Plaintiffs' claim is only for an accounting and does not extend to Interior Defendants' general management of natural resources and trust assets. Because claims for mismanagement sound more in common law (a claim for money damages) than in

equity (a claim for an accounting), and would thus be beyond the Court's jurisdiction under the APA, the Court struck the following references from Plaintiffs' Complaint:

> (1) '[T]he true totals would be far greater than those amounts, but for the breaches of trust herein complained of.' . . . ; (2) '[Defendants] have lost, dissipated, or converted to the United States' own use the money of the trust beneficiaries.' . . . ; (3) 'and to direct [the defendants] to restore trust funds wrongfully lost, dissipated, or converted.' . . . ; (4) 'Failure to exercise prudence and observe the requirements of law with respect to investment and deposit of IIM funds, and to maximize the return on investments within the constraints of law and prudence.'

30 F. Supp. 2d at 40 n.18 (quoting Plaintiffs' Complaint). For the same reason, Plaintiffs themselves have stated that "this action is not one to review the United States' management of the underlying trust assets." Plaintiffs' Revised Memorandum of Points and Authorities in Support of Motion for Class Certification at 6 (Jan. 14, 1997) (emphasis added).

That the Court's focus must be on the required accounting, and not on Interior Defendants' management of the IIM trust as a whole, is confirmed by the 2001 decision of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). See Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). It ruled that, because Plaintiffs' claim is for an accounting, the Court erred in holding that Interior Defendants had various non-accounting obligations, which they had breached. See id. at 1105 ("While there is a specific duty to provide a complete accounting, there is no specific duty to, for example, implement particular policies or retrieve information . . . ."). According to the D.C. Circuit, the Court is entitled to consider broader issues related to Interior Defendants' management of the IIM trust – such as whether they use "computer software capable of tracking and reconciling fund data" and whether they employ "staff sufficient to execute management duties," id. – only to the extent that the issues serve as evidence relevant to determining whether Interior Defendants have complied with their

obligation to perform an accounting, see id. at 1105-06 ("[T]hough the failure to take such steps may not constitute a breach, it . . . provides substantial evidence that such a breach has occurred."). As the Court explained, "[t]he actual legal breach is the failure to provide an accounting, not [the] failure to take the discrete individual steps that would facilitate an accounting." Id. at 1106.

In so holding, the D.C. Circuit cautioned that "defendants should be afforded sufficient discretion in determining the precise route they take" in seeking to comply with their accounting obligation. 240 F.3d at 1106. This follows from the fundamental principle of judicial review pursuant to the APA that courts "grant[] agencies that have acted in an unlawful manner 'discretion to determine in the first instance,' how to bring themselves into compliance." Id. at 1109 (internal citation omitted); see also Appellants' Brief at 29-33. That the Court must not interfere with Defendants' discretion is also due, however, to the fact that Plaintiffs' claim under provisions of the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"), is for an accounting, and not for reform of IIM trust management as a whole. In other words, because Plaintiffs' claim is for an accounting, rather than for reform of the individual Indian trust system, trust management is not reviewable as an end in itself.

Accordingly, the D.C. Circuit made clear that it "expect[ed] the district court to be mindful of the limits of its jurisdiction." 240 F.3d at 1110. In this regard, the D.C. Circuit observed:

> It remains to be seen whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, and the detection of such steps

> would fit within the court's jurisdiction to monitor the Department's remedying of the delay; beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction.

Id. (emphasis added). As this language suggests, the Court's focus must be on the Interior Defendants' "ultimate provision of an adequate accounting," and not on the broader question of IIM trust management. Id. Furthermore, in inquiring as to Interior Defendants' progress towards complying with its accounting obligation, the Court may ask, at most, whether Interior Defendants have "take[n] steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Id.

Notwithstanding the D.C. Circuit's admonition, the Court ordered Interior Defendants on September 17, 2002 to file, inter alia, "a plan for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM trust beneficiaries," as to which it would then grant injunctive relief. Cobell v. Norton, 226 F. Supp. 2d 1, 148 (D.D.C. 2002). The Court specified that this Plan must "describe, in detail, the standards by which they intend to administer the IIM trust accounts, and how their proposed actions would bring them into compliance with those standards." Id. at 148-49. According to the Court, it would examine Interior's Trust Management Plan and any plan submitted by Plaintiffs (as well as the litigants' respective Historical Accounting Plans), as part of a Phase 1.5 trial, based on which it would "consider granting further injunctive relief with respect to the fixing the system portion of the case and the historical accounting project." Id. at 148.

For the reasons outlined in Appellants' Brief, Defendants respectfully assert that the Court may not hold a Phase 1.5 trial for the purpose of entering an injunction dictating how Defendants must fulfill their trust management and accounting obligations, as this would exceed structural

and statutory limits on the judicial authority. See Appellants' Brief at 29-33. In addition, however, even if the Court pursues the Phase 1.5 trial, it should review Interior's Trust Management Plan solely to determine whether it comports with Defendants' obligation to perform an accounting, and not as a basis for inquiring into Defendants' management of the IIM trust as a whole.

II. Because The Trust Management Plan Ordered By The Court Is Not Final Agency Action, The Court's Review Is Limited To Assessing Whether It Is So Defective That It Will Necessarily Cause Further Delay

The Trust Management Plan filed by Interior Defendants on January 6, 2003, per the Court's Order of September 17, 2002, is not final agency action. Thus, if the Court reviews this Plan for the purpose of determining whether it comports with Defendants' accounting obligation, the Court must confine its review to the question whether the Plan, on its face, is so defective that it will necessarily cause further delay rather than accelerate performance of the required accounting.

In its 2001 opinion in this litigation, the D.C. Circuit disagreed with this Court's holdings, see Cobell, 30 F. Supp. 2d at 33-34 and Cobell, 91 F. Supp. 2d at 36-37, that Interior Defendants' High Level Implementation Plan ("HLIP") was reviewable final agency action under the APA because – like the Trust Management Plan at issue here – the HLIP concerned reform of the entire IIM program, rather than a specific agency action. See Cobell, 240 F.3d at 1095. As explained by both this Court and the D.C. Circuit, the HLIP was a comprehensive plan for how Interior Defendants would manage the entire IIM trust system. See Cobell, 91 F. Supp. 2d at 14 (defining the HLIP as "Interior's most comprehensive plan to discharge its trust duties"); Cobell,

240 F.3d at 1091 (explaining that the HLIP is a plan that "focus[es] on ensuring the accuracy of information regarding the IIM trust accounts and developing uniform policies and procedures to guide trust management in the future"). Precisely because the HLIP was a comprehensive plan for managing the IIM trust as a whole, rather than a specific measure, the D.C. Circuit held: "While a single step or measure is reviewable, an on-going program or policy is not, in itself, a 'final agency action' under the APA." Id. at 1095.

The rationale for this distinction between a reviewable "step or measure" and an unreviewable "program or policy" is the same as that underlying the limitations imposed on courts in reviewing agency action pursuant to the APA – namely, the constitutional principle of separation of powers. See Merrick B. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 564 (1985) (stating that "because the essence of the executive function is the exercise of discretion, a court transgresses the separation of powers when it dictates that an agency take one particular action instead of others within its discretionary prerogative"). As the D.C. Circuit observed in concluding that the HLIP was not final agency action, "'[a] plaintiff . . . seek[ing] wholesale improvement of [a] program'" must do so, not "'by court decree,'" but rather "'in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.'" 240 F.3d at 1095 (emphasis in original) (quoting Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891 (1990)); see also 2 Richard J. Pierce, Jr., Administrative Law Treatise 1099-1103 (4th ed. 2002) (collecting cases distinguishing between reviewable actions and unreviewable programs). Because the Trust Management Plan ordered by the Court is, like the HLIP, a comprehensive plan for how Interior Defendants will manage the IIM trust, it is not final agency action.

As the D.C. Circuit ruled, until Interior Defendants have undertaken final agency action regarding their obligation to account,[3] this Court's supervisory authority is limited, at most,[4] to inquiring "whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell, 240 F.3d at 1110. This follows from the well-established principle that, to the extent final agency action has not occurred, the only basis for judicial review under the APA is whether "agency action [has been] unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Thus, because Interior's Trust Management Plan is not final agency action, the Court may review it at most for the purpose of determining whether it is so defective that it will necessarily delay Interior Defendants' progress towards complying with their obligation to account.

As demonstrated below, Interior's Trust Management Plan describes an approach that comports with Defendants' obligation to perform an accounting. Thus, by definition, it is not so defective as necessarily to cause delay.

---

[3]The D.C. Circuit suggested in its 2001 ruling in this litigation that final agency action will occur – and thus may be reviewed by this Court – when the various accountings themselves are completed. See Cobell, 240 F.3d at 1110 ("Presumably, the district court plans to wait until a proper accounting can be performed, at which point it will assess appellants' compliance with their fiduciary obligations.").

[4]The D.C. Circuit's exact language suggests that it was not certain whether even this limited inquiry would be permissible: "It remains to be seen whether . . . the detection of such [defective] steps would fit within the court's jurisdiction to monitor the Department's remedying of the delay . . . ." 240 F.3d at 1110 (emphasis added).

III. Interior Defendants' Trust Management Plan Describes An Approach That Comports With Defendants' Obligation To Perform An Accounting

In developing their Trust Management Plan, the Interior Defendants had to take into account not only the requirements of the 1994 Act and this case, but also co-existing statutory obligations, the obligation to work within the parameters of the statutory and budgetary constraints imposed by Congress on this and all other major policy initiatives undertaken by Interior, and the obligation to consult with tribes and consider tribal sovereignty and the priorities to be accorded to tribal rights of self-governance and self-determination.

As discussed below, Interior's Trust Management Plan represents Interior's considered and expert judgment as trustee of the best means of harmonizing disparate – and, at times, competing – statutory, congressional, presidential, tribal, and trust interests and obligations while accomplishing the trust reform necessary to bring itself into compliance with its obligation to perform an accounting. Interior's Trust Management Plan minimizes further delay by anticipating and, to the extent possible, resolving potential issues associated with the statutory, congressional, tribal, and trust framework within which trust reform must be accomplished.

Interior's approach is based on the recommendations of outside business experts, who first studied what has not worked in the past and then developed and recommended an organized, systematic process that stands a realistic chance of success. It is a process that is already well underway, and one about which the Interior Defendants have informed Plaintiffs, the Court, and Congress. The approach has current funding to continue. In sum, Interior's Trust Management Plan describes a realistic approach to trust reform to bring Interior into full compliance with its accounting obligation. And it has a realistic chance of funding. For all these reasons, and those

discussed below, the Court should determine, as a matter of law, that Interior's Trust Management Plan comports with the Defendants' obligation to perform an accounting.

A. Overview Of Interior's Trust Management Plan

Interior's Trust Management Plan details the processes underway to reform Interior's trust management operations. See Interior's Trust Management Plan at 17-100. Interior's trust reform is guided by "applicable federal statutes, Interior regulations, the Departmental Manual,[5] Office of Management and Budget (OMB) circulars, Department of Treasury guidelines, generally accepted accounting and auditing standards, its employees' and consultants' experience and expertise, as well as other sources of relevant fiduciary practices." Id. at 15.

Interior's trust reform processes are not new and are not listed for the first time in its Trust Management Plan. They are underway, as has been reported to the Court progressively in Interior's Status Reports to the Court Numbers Eight through Eleven ("____th Quarterly Report"). Interior's Trust Management Plan, like the Quarterly Reports, identifies the progress made to date and describes future reform tasks as part of a "comprehensive and systematic plan to reform the management of [Interior's] trust responsibilities." Interior's Trust Management Plan at 4. Development of the larger comprehensive trust management plan began in January 2002 as a follow-on to and replacement of the High-Level Implementation Plan. See Interior's Trust Management Plan at 4-5; Eighth Quarterly Report at 3-8, 15-17; Ninth Quarterly Report at 43-

---

[5]The Departmental Manual includes specific trust principles that apply to all of Interior's trust activities, including those activities described in Interior's Trust Management Plan. See 303 DM 2, Indian Trust Responsibilities – Principles for Managing Indian Trust Assets (Oct. 31, 2000) (copy attached as Ex. 1). It also details responsibilities and procedures for consulting with tribes and considering Interior's trust responsibility when preparing management plans. See 512 DM 2 (copy attached as Ex. 2).

55; Tenth Quarterly Report at 3-4, 32-39; Eleventh Quarterly Report at 3-4; 29-38. Interior's Trust Management Plan, as part of the comprehensive trust reform effort, has two key components.

First, Interior will restructure and consolidate trust management and administration within the Bureau of Indian Affairs ("BIA") and the Office of the Special Trustee ("OST"), with BIA concentrating on managing the land and natural resources held in trust[6] and OST continuing to exercise its statutory trust oversight functions while assuming greater responsibility for financial management, receipt, and disbursement of trust funds and records management. Interior's Trust Management Plan at 5, 44-77, 81-82, Ex. 2; see also, e.g., Eleventh Quarterly Report at 29-30.

Second, Interior is now finalizing its in-depth analysis of its current trust-related business practices throughout the country to determine all existing practices and variations (the "As-Is" study). Interior's Trust Management Plan at 6-9, 26-36; see also e.g., Eleventh Quarterly Report at 4, 5-6, 29-30, 33-38. When this "As-Is" study is completed, Interior will develop a new model for conducting all future trust operations (the "To-Be" model) by adopting the existing best practices and re-engineering the ones that are not. Interior's Trust Management Plan at 9, 36-43; see also, e.g., Eleventh Quarterly Report at 3, 6, 29-30, 33-38.

It is important to note that significant progress has already been made on a number of Interior's trust reform initiatives. For example, Interior is already substantially in compliance with one of the most significant components of any trust operation – one that directly relates to

---

[6]As noted in section I, above, Interior's management of Indian trust assets generally – as distinct from accounting for the funds in IIM accounts – is beyond the scope of this case.

the accounting obligation at issue in this lawsuit. Interior currently can reliably and predictably account for current funds received into and disbursed from the "Trust Funds Accounting System" ("TFAS"), a state-of-the-art trust accounting and investment system that is widely used in private trust operations, and that is subject to regular third-party trust audits. Interior's Trust Management Plan at 44-62; see also, e.g., Eleventh Quarterly Report at 64, 65. As Interior's Trust Management Plan notes, however, although TFAS can handle and account for all funds that flow in and that are disbursed, it is only as good as the information that flows into it, and it is the on-going process of identifying and collecting IIM revenues, verifying account and beneficiary data, transmitting information regarding receipts and disbursements, and improving related trust processes that is the focus of Interior's Trust Management Plan. Interior's Trust Management Plan at 3, 44, 46, 53.

B. The Approach in Interior's Trust Management Plan Comports With The Defendants' Obligation to Perform an Accounting

Interior's past attempts to reform trust management were not "sufficiently designed and integrated to produce . . . material and long-term improvement in performance." Interior's Trust Management Plan at 6. In rethinking its approach to trust reform in light of that experience, Interior rejected "the impulse to offer quick fixes." Id.

Based on Interior's experience and given the complexity of the trust framework and related obligations, Interior decided to systematically and methodically examine existing trust processes to determine what works and what does not, to select best practices, to revise those practices that are not, and to continue monitoring the trust practices put in place to confirm that they remain best practices. This business-oriented approach to trust reform, in which Interior's

Trust Management Plan rests on developing a thorough understanding of all trust processes before reforming them, comports with the guidance provided by Congress "that an assessment of organization, staffing, and operations should come first, to provide a basis for planning," that "all elements of [Interior's] trust fund financial systems should be considered," that "all trust fund policies and procedures should be reviewed and revised, as appropriate," and that "the framework and a strategic plan need to fully address actions necessary to ensure that [Interior] has a reliable trust fund accounting system." Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499 ("Misplaced Trust"), at 53-54 (1992).

The Interior Defendants, in coordination with consultants, the Tribal Task Force, and personnel throughout Interior, identified eight core trust business processes for thorough examination in connection with the "As-Is" study: beneficiary services, probate, title, appraisal, cadastral survey, surface asset management, subsurface asset management, and accounting management (individual assets, tribal assets, and investments). Eleventh Quarterly Report at 29, 34-35. After an exhaustive analysis of the practices and variances in practice in each region, the As-Is study is being finalized, and work will begin on selecting existing best practices or adopting new best practices for implementation throughout Interior. Id. at 30, 33, 35.

While the As-Is process is underway, Interior has also undertaken an organizational restructuring process by which trust operations will be consolidated within OST and BIA and separated from non-trust operations. See Interior's Trust Management Plan at 5, 44-77, 81-82, Ex. 2; see also, e.g., Eleventh Quarterly Report at 29-30.

All of these reform initiatives are taking place in the context of the Indian Self-Determination Act and Education Assistance Act, which confirmed the major shift in United

States policy from a guardian-ward type relationship with tribes to a government-to-government relationship and that clarified congressional intent that tribes manage not only their own trust assets but also have a role in the management of assets of their individual citizens. See Pub. L. No. 93-638, 88 Stat. 2203 (1975) (25 U.S.C. §§ 450 et seq.); see also Executive Order 13175 (Nov. 6, 2000) (copy attached as Ex. 3); 25 C.F.R. Pt. 1000 ("Annual Funding Agreements Under the Tribal Self-Government Act"), id. at 1001 ("Self Governance Program"); 512 DM 2, Departmental Responsibility for Indian Trust Resources, at §§ 2.1 – 2.4 (articulating Interior policy toward tribes) (see Ex. 2). Tribes are thus not only trust beneficiaries but also governmental entities with jurisdiction over tribal and individual lands (and the assets thereon) and providers of trust services, including trust services directly related to individual Indian trust accounts. As a result, trust reform considerations in this case cannot, as a matter of law, be limited to whether tribal trust assets will be affected, but must also include the extent to which tribal management and administration will be affected and tribal interests will be implicated. Notwithstanding the Plaintiffs' attempts to characterize such considerations as a conflict requiring "the complete separation of [tribal and individual] trust administration," Plaintiffs' Trust Management Plan at 42, these considerations reflect the existing statutory framework within which the trusts must operate.

The time frames for Interior to accomplish specific reform-related tasks, see, e.g, Interior's Trust Management Plan at 50-51, 54, 58, 62, 76, 77, 83, 84, 94, were developed after taking into account Interior's experience, advice from outside experts, statutory constraints,

existing budget and appropriation requirements, the need for consultation with Congress and tribes, and Interior's considered judgment of the time required to implement large-scale institutional changes.

C. The Reorganization Described In Interior's Trust Management Plan Complies With Interior's Existing Statutory Authority And With Interior's Existing Authority under Budget Appropriations

Interior's restructuring effort is based on the business principle that trust operations should be handled, to the extent possible, separately from Interior's non-trust operations. See Interior's Trust Management Plan at 5, id. at Ex. 2; see also, e.g., Eleventh Quarterly Report at 29-30, 33, 37-38. Unlike private trusts and banks that separate their trust and non-trust operations, however, Interior's ability to restructure its trust operations is subject to existing statutory requirements and constraints, including budgetary considerations as dictated by congressional appropriations. For example, although representatives of Interior stated that Interior would support creation of an Under Secretary for Indian Trust, see Statement of Deputy Secretary J. Steven Griles and Assistant Secretary for Indian Affairs McCaleb to Committee on Senate Indian Affairs, July 30, 2002 (copy attached as Ex. 4), Congress has not enacted such a change in Interior's organizational structure.

Interior's Trust Management Plan utilizes the existing statutory trust organization mandated by Congress. In the 1994 Act, Congress created the Office of the Special Trustee for American Indians to "provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians," to "ensure that reform of such practices in the Department is carried out in a unified manner," and to "ensure the implementation of all reforms necessary for the proper discharge of the Secretary's

trust responsibilities to Indian Tribes and individual Indians." 1994 Act § 301 (emphasis added).

The Interior Defendants, as they provide trust services, proceed with trust reform, and develop their Plan, are no different from any other government entity engaged in official operations – they are bound by appropriations law. "The use of any government resources – whether salaries, employees, paper, or buildings – to accomplish [a task] would entail government expenditure. The government cannot make expenditures, and therefore cannot act, other than by appropriation." EDC v. Babbitt, 73 F.3d 867, 871-72 (9th Cir. 1995) (because of appropriations rider, "lack of available appropriated funds prevents the Secretary from complying with the [Endangered Species] Act."). The Court as well as the Executive Branch is bound by the constraints imposed by the congressional control of the appropriations process. OPM v. Richmond, 496 U.S. 414, 425 (1990); see also 31 U.S.C. § 1341 (generally prohibiting government officers and employees from entering into a contract or incurring an obligation before an appropriation is made and from making or authorizing expenditures that exceed existing appropriations), 31 U.S.C. at § 1342 (generally prohibiting government officers and employees from accepting "voluntary" services).

Any major restructuring – including creating a new organization within Interior, changing or displacing existing functions, or undertaking extensive and costly reform processes – requires Congressional approval. The continuing and active role of Congress in Interior's trust management and administration, and thus in its ability to reform trust management, is reflected in, for example, frequent congressional hearings, see Ex. 5 (listing trust-related hearings during 107th Congress), and in exchanges between Interior and members of Congress, see, e.g., Ex. 6, 7 (correspondence from Representative Pallone to Secretary Norton, and response).

Interior sought and obtained approval from the congressional appropriations committees for the reprogramming of existing appropriations necessary to fund in the short term the reorganization envisioned under the trust management plan. Interior's Trust Management Plan at 82; see also, e.g., Ex. 7 at 3-4. In addition, although Interior is under a continuing appropriations resolution pending the permanent fiscal year 2003 appropriation, funding exists to allow the specific initiatives discussed in connection with the Trust Management Plan to continue in 2003. See Interior's Trust Management Plan at 12-13; cf. Interior's Fiscal Year 2003 Budget Justifications, Office of the Special Trustee for American Indians, at 2338-39, 2354-57 (attached as Ex. 8). Funding to support these initiatives is being sought for fiscal year 2004 as well.

IV. Plaintiffs' Trust Management Plan Is Unrealistic, Contrary To Existing Law, And Inconsistent With This Court's Prior Rulings

In stark contrast to Interior's Trust Management Plan, the Plaintiffs' Trust Management Plan provides no systematic, detailed guidance regarding the specific actions necessary to achieve the trust reform necessary for compliance with Defendants' obligation to perform an accounting.[7] The Plaintiffs' Plan simply does not "fully address actions necessary to ensure that [Interior] has a reliable trust fund accounting system." Misplaced Trust at 54. The Plaintiffs' Plan perhaps describes the skeletal outline of a legislative proposal, but it is neither realistic nor lawful under existing law.

At best, the Plaintiffs' Trust Management Plan imposes hopelessly unrealistic deadlines

---

[7]The Plaintiffs' Trust Management Plan continues the Plaintiffs' pattern of using almost every submission as a vehicle for unwarranted ad hominem attacks on virtually all personnel and counsel involved in this litigation. Such attacks have no place in this litigation.

on new personnel in new offices, provides no guidance to those personnel regarding the tasks assigned to them, and reveals an astonishing lack of familiarity with the trust-related processes and the measures necessary to reform them. At worst, the Plaintiffs' Trust Management Plan fails to address the complexities of the Interior Defendants' relationship with Congress, tribes, and account holders, and utterly ignores the Interior Defendants' coexisting obligations, including statutes, Executive Orders, tribal consultation, and the annual appropriations process. See, e.g., Plaintiffs' Trust Management Plan at 33 ("immediately appoint new and independent trust administration management solely to administer the Individual Indian Trust") (emphasis omitted), id. at 42 ("Segregate administration of IIM trust records from tribal and other DOI records," because "divergent interests of individual Indian trust beneficiaries and tribal leaders require the complete separation of trust administration.")

Even if the Plaintiffs' Trust Management Plan were not so legally defective, it is nonetheless unacceptable because the additional time and effort required to address and resolve just the unanswered questions[8] arising from the small subset of alleged trust obligations that the Plaintiffs concentrate on would "necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell, 240 F.3d at 1110.

The Plaintiffs' Trust Management Plan, with its piecemeal and non-detailed approach, reflects not only a failure to learn from Interior's experience with trust reform but also a failure to heed the clear congressional guidance that a plan is fatally flawed when it proposes, inter alia,

---

[8]Because the Plaintiffs' Trust Management Plan is devoid of specific details regarding how reform is to be accomplished and how that reform will lead to compliance with the 1994 Act and the Interior Defendants' coexisting obligations, the examples that follow are necessarily illustrative rather than exhaustive.

"hir[ing] additional staff . . . without first analyzing how these staffing changes might impact on an overall strategic plan," failing to consider "whether the short-term corrective actions will be consistent with short- and long-term corrective actions developed for the strategic plan," omitting "key elements of a strategic plan," and neglecting to "plan for reviewing the current trust financial management systems and procedures even though such studies are necessary to support appropriate action." Misplaced Trust at 53, 54. The Plaintiffs thus fail to propose "a resolute action plan necessary to solve the structural problems that have besieged the financial management of the Indian trust fund for decades and provide a meaningful blueprint for hard-nosed application of sound management practices." Id. at 54.

A. Overview Of The Plaintiffs' Trust Management Plan

The Plaintiffs describe a number of "common law fiduciary standards," allegedly applicable wholesale to the Defendants,[9] Plaintiffs' Trust Management Plan at 16-25, concede that those trust standards are "consonant with the precepts" of the 1994 Act, id. at 26-29, and then provide an "Action Plan" that "represent[s] some of the basic steps to begin the process of rectifying defendants' many breaches,"[10] id. at 32–47.

---

[9]In proposing these "trust standards," however, the Plaintiffs utterly fail to address this Court's recognition in its September 17, 2002 ruling "that the plaintiffs' claims in this case are statutorily-based and that the federal government's fiduciary obligations may not be coextensive with those of an ordinary trustee." 226 F. Supp. 2d at 151 n.161. Furthermore, statements that the federal government, in administering Indian trust resources, is held to exacting fiduciary standards should not be given "talismanic effect." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 179 (1989) (rejecting assertion that congressional report attaching a letter in which the Secretary referred to providing tribes with "the greatest return from their property" demonstrated congressional intent "to guarantee Indian tribes the maximum profit available without regard to competing state interests.").

[10]Although the "defendants' many breaches" are not specified, the Plaintiffs presumably are referring to Interior's alleged failure to abide by Plaintiffs' asserted trust standards. However,

The specific trust reform actions proposed by the Plaintiffs include replacing all trust personnel affected by the current litigation with "new and independent trust administration management solely to administer the Individual Indian Trust"; the new positions, in an unspecified organizational structure and without any indication of what level these positions would occupy within Interior and the Civil Service, would consist of ten titled positions, at least 30 new Probate Judges, an "Independent Audit Committee," and unspecified numbers of supporting staff. Plaintiffs' Trust Management Plan at 33-35, 38. In addition, the Plaintiffs assert that "[t]he divergent interests of individual Indian trust beneficiaries and tribal leaders require the complete separation of trust administration . . . within 180 days" of the "Trust Manager" being appointed. Id. at 42; see also id. at 44 (proposing the "separation of [IIM] trust assets from all other tribal and DOI assets.").

The Plaintiffs also propose actions without regard to whether they overlap partially or completely with initiatives already commenced by Interior, including evaluating and potentially replacing computer systems that support trust operations, Plaintiffs' Trust Management Plan at 37; promulgating a comprehensive records retention policy and addressing records held by third parties to the extent necessary to support an accounting, id. at 38, 40, 41-43, 45-46; identifying and locating beneficiaries, including the so-called "whereabouts unknown" account holders, id.

---

this is not an issue properly within the scope of this case. As the D.C. Circuit recognized in agreeing with Interior that this Court mistakenly "found breaches of obligations that do not exist," the only breach properly at issue in this case is "that of failing to render an accounting. . . . [T]here is no specific duty to, for example, implement particular policies . . . ." 240 F.3d at 1105. Thus, as discussed in section I, inquiry in this case is limited to accomplishing the accounting. To the extent that Plaintiffs seek to use their "trust standards" to impose enforceable obligations beyond those relating to the required accounting, such relief is beyond the scope of this case. See 91 F. Supp. 2d at 32 -33 & n. 23 ("dismiss[ing] plaintiffs' pure common-law causes of action for breach of trust").

at 38; eliminating the backlog of probate cases, id. at 38-39; identifying and developing information regarding trust assets to the extent necessary to conduct an accounting, id. at 39, 40; reviewing the role of and need for new cadastral surveys to support an accounting, id. at 40; consulting with the Office of the Comptroller of the Currency regarding the extent to which its principles would provide useful guidelines regarding the required accounting, id. at 43; independently auditing trust balances and operations, id. at 43-44; providing accurate and complete account statements to IIM account holders, id. at 46; and properly monitoring and investing IIM funds, id. at 47. Information regarding the status of these initiatives was readily available to the Plaintiffs in the Eighth, Ninth, Tenth, and Eleventh Quarterly Reports. Any unnecessary duplication of efforts would only result in further delay as initiatives are disrupted, personnel are changed, and the learning process begun over again.

Finally, the Plaintiffs propose a number of actions that relate to the management and administration of trust assets, including actions intended to prevent "trespass, wasting, or improper exploitation" of trust assets, Plaintiffs' Trust Management Plan at 39, and actions "to make trust property and all other trust assets productive, to enforce claims on behalf of individual Indian trust beneficiaries, and to take affirmative action to preserve trust property," id. at 44-45. These particular actions are beyond the scope of this case and the authority of this Court because, as discussed in section I, above, they relate to the general management and administration of trust assets and natural resources rather than to providing an accounting.[11]

---

[11]The Plaintiffs also attempt to use their Trust Management Plan as a vehicle to lend support to their separate accounting plan. See Plaintiffs' Trust Management Plan at 3-6. However, contrary to their contention, id. at 5, Plaintiffs' proposed accounting is far from being the "cornerstone" of trust reform. Rather, as the motion in support of the Defendants' historical accounting plan demonstrates, Plaintiffs' accounting plan is nothing more than a claim for money

B. The Plaintiffs' Trust Management Plan Is Contrary To This Court's Prior Rulings

Notwithstanding this Court's prior ruling that "Plaintiffs cannot simply announce that this is a 'trust case' and therefore conclude that the government owes all typical trust duties under the common law," Cobell, 52 F. Supp. 2d at 27 n.15, that is precisely the premise of the Plaintiffs' Trust Management Plan. Their Plan begins not with the statute under which they sought relief, but with a recitation of various common law "[t]rustee [s]tandards and [d]uties." See Plaintiffs' Trust Management Plan at 16-25. Although Plaintiffs assert and, indeed, concede, that those trust standards are "consonant with the precepts of" the 1994 Act, id. at 29, they then proceed to propose reform actions and measure them solely against the common law trust standards rather than against the specific statutory requirements associated with performance of the accounting, id. at 32-47.

The Court has forbidden this approach. As this Court has already recognized and reiterated, standard trust law duties cannot be imported wholesale and applied to Interior simply because the IIM funds for which the accounting is sought are held in trust. See Cobell, 91 F. Supp. 2d at 29 ("it does not follow . . . that plaintiffs may simply claim that they are the beneficiaries of a trust relationship with the United States and therefore invoke all of the rights that a common law trust entails." (discussing case law)); see also Cobell, 226 F. Supp. 2d at 151 n.161 ("the federal government's fiduciary obligations may not be coextensive with those of an ordinary trustee"); Cobell, 52 F. Supp. 2d at 27 n.15 (cited and quoted above).

---

damages, which this Court has held to be beyond the scope of this litigation.

That the Plaintiffs' Trust Management Plan runs afoul of this Court's prior rulings is a necessary and sufficient basis for rejecting it, quite aside from its other defects.

C. The Reorganization And Personnel Actions Described In The Plaintiffs' Trust Management Plan Do Not Comply With Interior's Existing Statutory Authority And With Interior's Existing Authority Under Budget Appropriations

In addressing trust reform, the Plaintiffs and the Court, like the Interior Defendants, are bound by existing statutory and budgetary requirements. By proposing a new, but only vaguely defined trust organization, separating the management and administration of IIM trust operations from that for tribal trust, and requiring significant but unfunded expenditures to accomplish this new trust operation, the Plaintiffs' Trust Management Plan violates existing statutory and budgetary constraints.

Any major restructuring – such as that envisioned by either of the Trust Management Plans, and particularly the Plaintiffs' proposal to create and staff a trust organization and to separate trust functions – requires Congressional approval, either from Congress as a whole should existing statutes need to be changed, or from Congressional appropriators should existing appropriated funds need to be substantially reprogrammed. Furthermore, under the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, government agencies can neither retain personnel nor enter into contracts with third parties without having the necessary funding in place.[12]

---

[12]A principal issue that distinguishes this public trust from a private trust, unrelated to whether the government as trustee receives compensation from the account holders for operating the trust, Plaintiffs' Trust Management Plan at 21 & n.30, is the requirement, discussed in section III above, that Congress provide both the funds and the programmatic authorizations necessary for the government as trustee to carry out its trust responsibilities. Unlike a private trustee, the Defendants cannot commit to expenditures that have not been authorized and cannot impose structures or practices that are inconsistent with Congressional guidance provided in statutes and budgets, including the budget justifications and program descriptions on which Congress relies in enacting appropriations. The Defendants (like the Plaintiffs and the Court) cannot disregard

Unlike Interior's Trust Management Plan, Plaintiffs' Plan reflects no consideration of Congressional limitations and fails to even acknowledge that the ability to implement proposed trust reform actions, as well as the timing of that implementation, is dependent upon Congressional action, including funding. For example, Plaintiffs' proposal to "[h]ire at least thirty qualified probate judges . . . within 150 days of the Court's order," Plaintiffs' Trust Management Plan at 38, would drastically impact both the size and the budget of the Office of Hearings and Appeals ("OHA") in a manner not anticipated by current funding levels for OHA or the appropriations sought for fiscal year 2003. See, e.g., Interior's Fiscal Year 2003 Budget Justifications, Office of Hearings and Appeals, at 1774-79 (attached as Ex. 9).

Plaintiffs' radical approach to trust reform – trust reform without regard to the framework of applicable laws and Congressional guidance and influence in trust-related decisions – is a far cry from the "middle ground" chosen by Congress when it restructured and reorganized trust operations in the 1994 Act. See 91 F. Supp. 2d at 41 (discussing "middle ground" chosen by Congress).

1. Plaintiffs' Plan Conflicts With The Statute Creating The Office Of The Special Trustee

In Title III of the 1994 Act, Congress created the Office of the Special Trustee for American Indians to "provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians," "ensure that reform of such practices in the Department is carried out in a unified manner," and

---

Congressional direction regarding trust-related activities and must take the need for Congressional approval into account in all aspects of planning and budgeting for all significant undertakings, trust related or otherwise. The Plaintiffs' Trust Management Plan reflects no such considerations and acknowledges no such realities.

"ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian Tribes and individual Indians." 1994 Act § 301 (emphasis added). Furthermore, the Special Trustee "shall ensure continuation of the Office until all reforms identified in the strategic plan have been implemented to the satisfaction of the Special Trustee," at which point written notice must be given to the Secretary and Congress before the Office is terminated. 1994 Act § 302(c)(1). OST still exists, and the Plaintiffs' Trust Management Plan therefore violates these statutory requirements.

The Plaintiffs propose the "immediate[] appoint[ment of] new and independent trust administration management solely to administer the Individual Indian Trust," including a new "Trust Manager and staff . . . to bring the individual Indians trust into compliance." Plaintiffs' Trust Management Plan at 33-34, 37 (emphasis omitted). No statutory authorization for creation of this new and independent "trust administration management" is cited, no organizational structure is provided, and no explanation is given regarding the fate of the Office of the Special Trustee. Under the Plaintiffs' view of "conflict," id. at 33, 42, 44, OST would necessarily be conflicted out of continuing to provide trust oversight because it is not independent but instead reports to the Secretary, see Cobell, 91 F. Supp. 2d at 52 ("If Congress truly wanted an independent trustee to oversee trust management . . . then Congress surely would have explicitly restricted the Secretary's powers over the Special Trustee and his office."), because it is implicated in this litigation, and because it oversees and makes decisions that affect both individual and tribal trusts.

In drafting the 1994 Act, Congress could have chosen an organizational approach different from the current trust structure; instead, it chose to retain the existing structure under

the Secretary, with the addition of the Office of the Special Trustee. "[T]he Office of the Special Trustee, and its congressionally created structure, was Congress's considered judgment as to how [to] help try to solve the IIM administration problems." Cobell, 52 F. Supp. 2d at 29. Congress's "considered judgment" cannot be ignored.

2. Plaintiffs' Plan Conflicts With Congressionally Authorized Joint Trust Administration

The Plaintiffs' Plan requires "[s]egregate[d] administration of IIM trust records from tribal and other DOI records" and "the separation of trust assets from all other tribal and DOI assets." Plaintiffs' Trust Management Plan at 42, 44. Congress has long known that individual and tribal trust assets are being administered together, because Interior each year submits budget requests to Congress which make the joint administration clear. See, e.g., Interior's Fiscal Year 1996 Budget Justifications, Bureau of Indian Affairs, at 965(describing Area Office staff's "reconcil[ing] collections and disbursements of tribal and individual Indian monies" and "provid[ing] reports to individual Indians or tribes . . .") (attached as Ex. 10).

Congress could have chosen to separate the management and administration of individual and tribal trust assets, but it did not do so and has not, to date, indicated a belief that such a separation is necessary. Indeed, Congress explicitly vested responsibility in the Office of the Special Trustee for oversight of all trust assets, whether tribal or individual. 1994 Act § 301. The continuing joint administration of individual and tribal trusts is consistent with congressional indications of a strong preference to avoid duplicating programs and program functions. See, e.g., Interior's Fiscal Year 1997 Budget Appropriations, Conference Report, H. Rep. No. 104-863 at 1005 (attached as Ex. 11); Interior's Fiscal Year 1996 Budget Appropriations, Conference

Report, H. Rep. No. 104-173, at 51 (attached as Ex. 12); see also Interior's Fiscal Year 2003 Budget Justifications, Office of the Special Trustee, at 2339, 2355 (see Ex. 8). Neither the Plaintiffs nor this Court can alter the existing trust structure that Congress created or act in anticipation of future congressional action.

3. Plaintiffs' Plan Conflicts With Interior's Personnel Obligations

A Court order requiring Interior's trust-related hiring decisions to be made according to the specific requirements and criteria articulated by the Plaintiffs for "unconflicted" trust personnel would violate the authority of the President, and, by delegation, the Secretary, to make hiring decisions on behalf of the Executive Branch.[13]

To the extent that a Court order requiring the Interior Defendants to appoint a "Chief Legal Officer" would, in accordance with the Plaintiffs' Plan, contemplate vesting responsibility for all trust-related litigation in that new position, Plaintiffs' Trust Management Plan at 35, 38-39, 44-45, that responsibility would violate statutes governing litigating authority, which is vested in the Department of Justice. See 28 U.S.C. §§ 516-519; see also 5 U.S.C. § 3106 (generally barring the head of an Executive department from "employ[ing] an attorney or counsel for the conduct of litigation" and requiring referral to the Department of Justice).

---

[13]Plaintiffs assert in a footnote, with no explanation or discussion, that they "do not believe it is necessary to depart from the ordinary, applicable Indian preference policy of the Department of the Interior" in establishing and staffing the "new and independent trust administration" program within Interior to administer the individual Indian trust. Plaintiffs' Trust Management Plan at 33 n.43. First, based on the conflict principles that the Plaintiffs seek to import from private trust law in support of their Trust Management Plan, it would seem likely that tribal and class members would be conflicted out of the administration of such a system, in which case the Indian hiring preference would be to little or no avail. Second, the Plaintiffs fail to explain how such large-scale immediate hiring of personnel could, as a practical matter, be consistent with application of the "ordinary, applicable Indian preference policy."

D. Plaintiffs' Trust Management Plan Does Not Address Tribal Consultation Or Compliance With Existing Law And Policy Regarding Tribal Involvement In Trust Operations

The requirement that Interior "[s]egregate administration of IIM trust records from tribal and other DOI records" because "divergent interests of individual Indian trust beneficiaries and tribal leaders require the complete separation of trust administration," Plaintiffs' Trust Management Plan at 42, interferes with sovereign relations between Interior and tribes, particularly with regard to those tribes that have assumed some of the Secretary's responsibilities related to the administration and management of tribal and individual trust accounts. To the extent that the Plaintiffs' Plan precludes tribes from entering into such arrangements in the future, it violates the Congressional mandate to encourage tribes to play increasingly active roles in the administration and management of trust assets for both the tribe and individual members of the tribe. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (25 U.S.C. §§ 450 et seq.); Executive Order 13175 (see Ex. 3); 25 C.F.R. Pt. 1000 ("Annual Funding Agreements Under the Tribal Self-Government Act"), id. at 1001 ("Self Governance Program").

Furthermore, notwithstanding the Plaintiffs' willingness to cite and attempt to insert into the record letters from tribal leaders regarding the process by which Interior developed its Trust Management Plan, the Plaintiffs' own plan does not address the issue of tribal consultation or assert that its contents were in any way a result of tribal consultation.

E. Plaintiffs' Trust Management Plan Fails To Provide For A Thorough Assessment Of, Or Familiarization Of New Personnel With, Existing Trust Business Practices Before Requiring New Personnel To Accomplish Tasks That Will Require Detailed Knowledge Of Existing Trust Operations

Although the Plaintiffs' Plan requires the retention of a number of new "unconflicted" personnel not previously connected with trust operations at Interior, it provides no guidance to that new staff regarding how and where this "new and independent trust administration management" intended "solely to administer the Individual Indian Trust" would fit into Interior's overall organizational structure. See Plaintiffs' Trust Management Plan at 33–35 (emphasis omitted). The Plaintiffs' Plan simply lists the results that those personnel are supposed to achieve without in any way describing the process necessary to accomplish those results, without providing sufficient time to understand the current processes and personnel, without addressing the possibility that some of the goals and timetables for achieving those results may not be feasible, and without contemplating any process similar to Interior's "As-Is" and "To-Be" assessments of core trust business processes. In essence, Plaintiffs' Plan proposes a quantum leap to a fully functional trust system without any intermediate steps.

The Plaintiffs propose a quick fix without a sufficient foundation, an approach that Interior has rejected as unworkable and ill-advised for all of the reasons discussed in section III, above, and that Congress has likewise condemned, see Misplaced Trust at 53, 54. As understandable as Plaintiffs' desire for quick trust reform might be, the reality is that a system that has experienced well-documented difficulties for over one hundred years cannot be corrected by a Court order to fix problem A in 60 days and problem B in 180 days, Plaintiffs' Trust Management Plan at 38-40, 42, 43, without building into the process the sufficient time and

planning necessary to develop a thorough understanding of problem A and problem B and to comply with other applicable statutory, congressional, and governmental requirements. Interior's Trust Management Plan provides that time; Plaintiffs' Plan does not.

Plaintiffs' Trust Management Plan, by leaping into trust reform without a methodical and systematic approach will "necessarily delay rather than accelerate the ultimate provision of an adequate accounting," Cobell, 240 F.3d at 1110, when, inevitably, deadlines are missed and unanticipated but otherwise foreseeable obstacles are encountered.

CONCLUSION

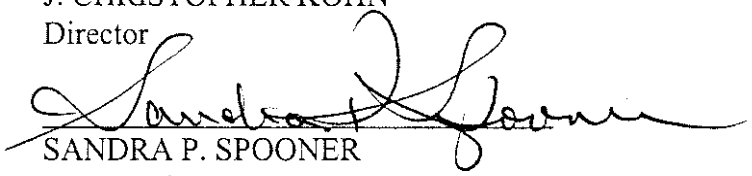
We respectfully submit that the Court lacks authority to hold the Phase 1.5 trial for the purpose of reviewing the Trust Management and Historical Accounting Plans and thereupon entering injunctive relief. However, if the Court proceeds down this path, it is clear that the Interior Defendants' Trust Management Plan, unlike that of the Plaintiffs, describes an approach to trust reform that comports with the Defendants' obligation to perform an accounting. Furthermore, Plaintiffs' Trust Management Plan is "so defective that [it] would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell, 226 F. Supp. 2d at 157.

Accordingly, the Court should enter partial summary judgment that, as a matter of law, the Interior Defendants' Trust Management Plan describes an approach to trust reform that comports with the Defendants' obligation to perform an accounting and Plaintiffs' Trust Management Plan does not.

Dated: January 31, 2003

Respectfully submitted,

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



SANDRA P. SPOONER
Deputy Director
D.C. Bar No. 261495
JOHN T. STEMPLEWICZ
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

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 A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS FOR MOTION FOR PARTIAL SUMMARY JUDGMENT THAT INTERIOR'S TRUST MANAGEMENT PLAN COMPORTS WITH THEIR OBLIGATION TO PERFORM AN ACCOUNTING

Pursuant to Local Civil Rule 7.1(h), Defendants submit the following Statement of Material Facts as to Which No Genuine Issue Exists, with regard to Defendants' Motion For Partial Summary Judgment That Interior's Trust Management Plan Comports With Their Obligation To Perform An Accounting.

1. The Secretary of the Interior and the Assistant Secretary of Interior-Indian Affairs ("Interior Defendants") serve as trustee-delegates of the Federal Government with regard to the administration of Individual Indian Money ("IIM") trust accounts. E.g., Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

2. By its Order filed September 17, 2002, this Court ordered "that the Interior Defendants shall file with the Court and serve upon plaintiffs a plan for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM beneficiaries." Cobell v. Norton, 226 F. Supp. 2d 1, 162 (D.D.C. 2002). The Order further requires that the plan detail "the standards by which [Interior Defendants] intend to administer the IIM trust accounts, and

how their proposed actions would bring them into compliance with those standards." Id.

3. On January 6, 2003, Interior Defendants filed with the Court their "Fiduciary Obligations Compliance Plan," pursuant to the Court's September 17, 2002 Order. Interior Defendants' Plan asserts that it is the relevant part of an ongoing trust reform planning and implementation process in which Interior is already engaged. Interior Defendants' Plan at 1-2. The plan also asserts that the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act") sets forth the specific standards governing the performance of the accounting; details these specific standards; and notes that Interior looks to various sources, identified throughout the plan, for guidance in carrying out the 1994 Act's requirements. Id. at 13-16.

4. On January 6, 2003, Plaintiffs filed with the Court "Plaintiffs' Compliance Action Plan Together With Applicable Standards." Plaintiffs' Plan asserts that meaningful trust reform depends upon the adoption of their concurrently filed accounting plan. Plaintiffs' Plan at 4-6.

January 31, 2003

Respectfully submitted,

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

SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

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 A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before the Court on Defendants' Motion for Partial Summary Judgment That Interior's Trust Management Plan Comports With Their Obligation to Perform an Accounting. After considering that motion, any responses thereto, and the record of the case, the Court finds that Defendants' motion for partial summary judgment should be, and hereby is, GRANTED. It is further

ORDERED that the Court finds that Interior's Trust Management Plan comports with Defendants' obligation to perform an accounting, and it is further

ORDERED that the Court finds that Plaintiffs' Compliance Action Plan Together With Applicable Trust Standards does not comport with Defendants' obligation to perform an accounting.

SO ORDERED this ___ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
Cynthia L. Alexander
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Fax (202) 514-9163

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
Fax (202) 318-2372

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
Fax (202) 822-0068

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

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006

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

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 31, 2003 I served the foregoing *Defendants' Motion for Partial Summary Judgment That Interior's Trust Management Plan is Consistent with Their Obligation to Perform an Accounting* by hand in accordance with their Agreement of January 31, 2003:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

By U.S. Mail upon:

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

First 25 pages by facsimile; a complete copy to be delivered by hand the morning of February 3, 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

Jay St. John

Department of the Interior

Departmental Manual

Effective Date: 10/31/00

Series: Departmental Management

Part 303: Indian Trust Responsibilities

Chapter 2: Principles for Managing Indian Trust Assets

Originating Office: Office of the Assistant Secretary - Indian Affairs

303 DM 2

2.1 Purpose. This Chapter provides Department-wide guidance for carrying out the Secretary's trust responsibility as it pertains to Indian trust assets.

2.2 Scope. The provisions of this Chapter are applicable to all Departmental bureaus and offices.

2.3 Authority. This Chapter is issued under the authority of the American Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. § 4001, et seq.), and its implementing regulations.

2.4 General Provision. This Chapter is intended to enhance the Department's management of the Secretary's trust responsibility. It is not intended to, and does not, create any right to administrative or judicial review, or any legal right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies, or instrumentalities, its officers or employees, or any other person.

2.5 Definitions. For purposes of this Chapter, the following definitions apply:

A. "Beneficial owner" means both Indian tribes and individual Indians who are the owners of Indian trust assets held by the federal government in trust or with a restriction against alienation.

B. "Persons who manage Indian trust assets" means Departmental employees who have been properly delegated specific authority to manage or administer Indian trust assets.

C. "Indian trust assets" means lands, natural resources, money, or other assets held by the federal government in trust or that are restricted against alienation for Indian tribes and individual Indians.

D. "Trust responsibility" as used in this Chapter only pertains to Indian trust assets.

2.6 Responsibilities.

A. Office of the Special Trustee for American Indians is responsible for ensuring compliance with the requirements of this Chapter.

B. Assistant Secretaries will ensure that bureaus and offices under their jurisdiction comply with this Chapter.

C. Heads of bureaus and offices are responsible for ensuring that the principles in Paragraph 2.7 of this Chapter are carried out by their organizations as they:

(1) Review, modify or promulgate new regulations, policy statements, instructions or manuals;

(2) Develop legislative and budgetary proposals; and

(3) Manage, administer, or take other actions directly relating to or potentially affecting assets held in trust by the United States for Indian tribes and individual Indians.

2.7 Trust Principles. It is the policy of the Department of the Interior to discharge, without limitation, the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty. The proper discharge of the Secretary's trust responsibilities requires that persons who manage Indian trust assets:

A. Protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste, and depletion;

B. Assure that any management of Indian trust assets that the Secretary has an obligation to undertake promotes the interest of the beneficial owner and supports, to the extent it is consistent with the Secretary's trust responsibility, the beneficial owner's intended use of the assets;

C. Enforce the terms of all leases or other agreements that provide for the use of trust assets, and take appropriate steps to remedy trespass on trust or restricted lands;

D. Promote tribal control and self-determination over tribal trust lands and resources;

E. Select and oversee persons who manage Indian trust assets;

F. Confirm that tribes that manage Indian trust assets pursuant to contracts and compacts authorized by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450, et seq., protect and prudently manage Indian trust assets;

G. Provide oversight and review of the performance of the Secretary's trust responsibility, including Indian trust asset and investment management programs, operational systems, and information systems;

H. Account for and timely identify, collect, deposit, invest, and distribute income due or held on behalf of beneficial owners;

I. Maintain a verifiable system of records that is capable, at a minimum, of identifying: (1) the location, the beneficial owners, any legal encumbrances (i.e., leases, permits, etc.), the user of the resource, the rents and monies paid, if any, and the value of trust or restricted lands and resources; (2) dates of collections, deposits, transfers, disbursements, third party obligations (i.e., court ordered child support, judgements, etc.), amount of earnings, investment instruments and closing of all trust fund accounts; (3) documents pertaining to actions taken to prevent or compensate for any diminishment of the Indian trust assets; and (4) documents that evidence the Department's actions regarding the management and disposition of Indian trust assets;

J. Establish and maintain a system of records that permits beneficial owners to obtain information regarding their Indian trust assets in a timely manner and protect the privacy of such information in accordance with applicable statutes;

K. Invest tribal and individual Indian trust funds to make the trust account reasonably productive for the beneficial owner consistent with market conditions existing at the time the investment is made;

L. Communicate with beneficial owners regarding the management and administration of Indian trust assets; and

M. Protect treaty-based fishing, hunting, gathering, and similar rights of access and resource use on traditional tribal lands.

10/31/00 #3346

New

Click here to download in WordPerfect format

Department of the Interior

Departmental Manual

Effective Date: 12/01/95

Series: Intergovernmental Relations

Part 512: American Indian and Alaska Native Programs

Chapter 2: Departmental Responsibilities for Indian Trust Resources

Originating Office: Office of American Indian Trust

512 DM 2

1. Purpose. This Chapter establishes the policies, responsibilities, and procedures for operating on a government-to-government basis with federally recognized Indian tribes for the identification, conservation, and protection of American Indian and Alaska Native trust resources to ensure the fulfillment of the Federal Indian Trust Responsibility.

2. Policy. It is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety.

3. Responsibilities.

A. Heads of bureaus and offices are responsible for identifying any impact of Departmental plans, projects, programs or activities on Indian trust resources. Department officials shall:

(1) Establish procedures to ensure that the activities of Departmental organizations impacting upon Indian trust resources are explicitly addressed in planning, decision, and operational documents;

(2) Ensure that bureaus and offices consult with the recognized tribal government whose trust resource, asset, or health and safety is potentially affected by the proposed action, plan, or activity;

(3) Remove procedural impediments to working directly and effectively with tribal governments;

(4) Provide drafts of all procedures or amendments to procedures developed pursuant to this Chapter to the Office of American Indian Trust for review and comment; and,

(5) Designate a senior staff member to serve as liaison between the bureau or office and the Office of

American Indian Trust.

B. Office of American Indian Trust is responsible for ensuring compliance with the procedures and requirements under this Chapter. The Office of American Indian Trust will serve as the Department's liaison and initial point of contact on all matters arising under this Chapter. All procedures and amendments to procedures shall be submitted by Departmental bureaus and offices to the Office of American Indian Trust for review and comment. After such review and comment, the procedures and amendments to procedures will be transmitted to the Assistant Secretary - Indian Affairs for final approval.

C. Assistant Secretary - Indian Affairs is responsible for approving bureau and office procedures, or amendments thereto, developed pursuant to this Chapter.

4. Procedures.

A. Reports. As part of the planning process, each bureau and office must identify any potential effects on Indian trust resources. Any effect must be explicitly addressed in the planning/decision documents, including, but not limited to, Environmental Assessments, Environmental Impact Statements, and/or Management Plans prepared for the project or activity. The documentation shall:

(1) Clearly state the rationale for the recommended decision; and

(2) Explain how the decision will be consistent with the Department's trust responsibility.

B. Consultation. In the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s), the appropriate office(s) of the Bureau of Indian Affairs, the Office of the Solicitor, and the Office of American Indian Trust. Each bureau and office within the Department shall be open and candid with tribal government(s) during consultations so that the affected tribe(s) may fully evaluate the potential impact of the proposal on trust resources and the affected bureau(s) or office(s), as trustee, may fully incorporate tribal views in its decision-making processes. These consultations, whether initiated by the tribe or the Department, shall be respectful of tribal sovereignty. Information received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s).

12/01/95 #3049

Replaces 5/23/95 #3040

Click here to download in WordPerfect format

Federal Register
Vol. 65, No. 218
Thursday, November 9, 2000

Presidential Documents

Title 3—

The President

Executive Order 13175 of November 6, 2000

Consultation and Coordination With Indian Tribal Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. *Fundamental Principles.* In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. *Policymaking Criteria.* In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

Defendants' Exhibit No.3
Motion for Partial S/J
Trust Management

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. *Special Requirements for Legislative Proposals.* Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. *Consultation.* (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the

need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. *Increasing Flexibility for Indian Tribal Waivers.*

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. *Accountability.*

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. *Independent Agencies.* Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. *General Provisions.* (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A–19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. *Judicial Review.* This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

THE WHITE HOUSE,
November 6, 2000.

[FR Doc. 00–29003
Filed 11–8–00; 8:45 am]
Billing code 3195–01–P

Federal Document Clearing House
Copyright (c) 2002 EMediaMillWorks, Inc.

Testimony
July 30, 2002

Senate
Indian Affairs

Tribal Trust Fund Overhaul

Statement of J. Steven Griles,
Deputy Secretary of the Department of the Interior
and Neal McCaleb, Assistant Secretary for Indian Affairs

Committee on Senate Indian Affairs
Trust Reform

July 30, 2002

Mr. Chairman and Members of the Committee, it is a pleasure for the two of us to appear before you again on a panel with the two co-chairs of the Joint Department of the Interior/Tribal Leaders Task Force on Trust Reform, Ms. Sue Masten, Chairwoman of the Yurok Tribe of Northern California, and Mr. Tex Hall, Chairman of the Three Affiliated Tribes of North Dakota. We are here today to brief the Committee on the status of the work of the Task Force.

Last week, the Task Force held its seventh meeting in Portland, Oregon. Earlier meetings were held around the country in Shepherdstown, WV, Phoenix, AZ, San Diego, CA, Minneapolis, MN, and Bismarck, ND. The Task Force was formed last December in response to the Department.s proposal to create a new organizational unit called the Bureau of Indian Trust Asset Management, which envisioned the consolidation of most trust reform and trust asset management functions located throughout the Department into a new bureau. This proposal was subsequently strongly opposed by the tribes.

The Task Force is charged with providing proposals to the Secretary on organizational alternatives for the management of

trust services within the Department. The Task Force's purpose is to evaluate organizational options and to submit to the Department one or more alternatives to reorganize the trust asset management system. The composition of the Tribal membership of the Task Force was determined by all the tribes and represents a broad cross-section of tribal interests on a regional basis. The Task Force consists of two tribal leaders from each region, with a third tribal leader, from each region, acting as an alternate. Members of the Federal team consist of senior Department officials, including myself and Assistant Secretary McCaleb.

The members of the Task Force have all come a long way personally and professionally as participants in this group. The two of us have attended every one of these meetings, as have our co-chairs here with us today. As we talk about the future of the Bureau of Indian Affairs and work together to resolve issues related to how the federal government carries out its trust responsibility to Indian people, we are building another kind of trust among ourselves.

While we have reached agreements on many key issues related to the organization of the Department of the Interior and management of our trust functions, our work is not done. We will be meeting in August in Anchorage Alaska, and have other meetings scheduled. On June 6, at a meeting of the National Congress of American Indians, the Department at the recommendation of the Task Force solicited comments on various options proposed by the Task Force for restructuring of the Department with respect to trust. We received back from the Tribes detailed and thoughtful comments. We heard the following themes:

- The Federal Government.s commitment to self-governance and self-determination must not suffer as a result of federal trust reform.

- Trust reform must not result in diminishment of the government.s trust obligation to Indian people.

- There is a need for creation of a high level position within the Department who will be the primary individual within the Department responsible for ensuring that the trust asset management responsibility is carried out appropriately throughout the Department.

- Trust asset management issues must be addressed at the regional and agency level of the Bureau of Indian Affairs (BIA).

- There can be no one-size-fits-all solution. Trust reform must recognize that there are three models for receiving services: through self-governance compacts, self-determination contracts, and direct services from the BIA.

- There is no bright line between fiduciary trust asset responsibilities and other trust responsibilities.

- We must ensure more accountability within the current BIA structure.

- Management of trust services and trust resources must be kept at the local level.

- We need a clear definition of the trust duty and responsibility for management of trust assets.

- There must be oversight of the BIA by an entity that has the authority to compel and enforce corrective action.

As the above illustrates, reform of our current system is not an easy task. At the Task Force meeting last week, we reached agreement as a group to recommend that Congress establish a new position, an Under Secretary for Indian Affairs, who would be appointed by the President, subject to confirmation by the Senate, and would report directly to the Secretary. The Under Secretary would have direct line authority over all aspects of Indian affairs within the Department. This authority would include the coordination of trust reform efforts across the relevant agencies and programs within the Department to ensure these functions are performed in a manner that is consistent with our trust responsibility, as well as a number of other duties carefully hammered out between the Department and the Tribal

Leaders on the Task Force. We believe reaching consensus on the creation of this position and the duties of this new senior official was a major accomplishment of the Task Force.

We have also reached agreement on creation of an Office of Self-Governance and Self-Determination within the Office of the

Secretary, reporting directly to the new Under Secretary for Indian Affairs. This will enhance the abilities of the tribes that are interested in moving toward more compacting and contracting to carry out the services due to Indian tribes. Similarly, we have agreed that any legislation should also include the creation of a Director of Trust Accountability reporting directly to the Under Secretary who will have the day-to-day responsibility for overseeing the trust programs of the Department.

Perhaps most importantly, last week in the working group we reached agreement on a restructuring of the Bureau of Indian Affairs. The Department and the Tribes agree that our trust duty requires a better way of managing than has been done in the past. The Department.s longstanding approach to trust management needed to change, and this change must be reflected in a system that is accountable at every level with people trained in the principles of trust management. When the we arrived in Portland last week, the Department brought a proposal to create Trust Centers at the regional level within the Bureau and trust officers at the agency level. It was the best way we could see to ensure that decisions made at the regional and local level were reviewed to ensure that we were meeting our fiduciary trust responsibility to both tribes and individual allottees.

Our tribal counterparts on the Task Force had a very different view of what changes needed to be made within the Bureau. The tribes expressed concern that these trust officers would involve themselves in most of the day-to-day activities at the agency level without being answerable to the Superintendent or the Regional Directors. The differences between us seemed too great to resolve in just a few days. However, once we stopped talking in concepts, rolled up our sleeves, and took the time to put on the table our real concerns, we were able to develop an organizational model that does its best to ensure that the Federal Government can exercise its fiduciary trust duty, and, at the same time, ensure that tribal governments can be active managers, to the degree desired, of their own trust assets. A copy of the working group consensus reorganization proposal is attached to this testimony for your information. This reorganization can be done administratively and does not require additional legislative authority. We believe that it is likely to have the greatest positive impact on the future management of

trust assets.

As we mentioned above, the work of the Task Force is not complete. We are exploring the possibility of creating a commission with oversight responsibilities for trust funds management. We have reached agreement within the Task Force to recommend creation of an independent commission on Indian trust funds within the Executive Branch. While we have mutual agreement on many of the functions this commission should have, we have mutual disagreements as well. We are not in agreement on the Commission.s duties and we have not discussed the Commission member qualifications or term of service. We have presented a number of commission ideas that we plan to discuss with the Task Force at the upcoming meeting in August. We plan to participate with a working group set up by the Task Force whose charge it is to try to resolve these differences and reach consensus on the details of this commission.s duties and responsibilities. Our goal is to have an agreement on this issue at our August meeting in Anchorage.

Finally, we were also asked by the tribal members of the Task Force to work with the tribes on draft statutory trust standards presented at our meeting last week. These standards will be carefully reviewed within the Administration in preparation for our next Task Force meeting. We have not reached any agreement on the trust standards. However, we will be having both our attorneys and attorneys at the Department of Justice look at them.

This concludes our statement. We would be happy to answer any questions the Committee might have at this time.

J. STEVEN GRILES
Deputy Secretary
Department of the Interior

2002 WL 1763677 (F.D.C.H.)
END OF DOCUMENT
2002 WL 1763677 (F.D.C.H.)

Trust Related Hearings during the 107th Congress

Oversight hearing on the role of the Special Trustee	September 24, 2002	Senate Indian Affairs	James Cason
H.R. 2880, the Five Nations Indian Reform Act	September 18, 2002	Senate Indian Affairs	Aurene Martin
Oversight hearing on Trust Reform	July 30, 2002	Senate Indian Affairs	Steve Griles
S. 2212, the proposed Indian Trust Asset and Trust Fund Management and Reform Act of 2002	July 30, 2002	Senate Indian Affairs	Neal McCaleb
Oversight hearing on the OHTA Report to Congress on the Historical Accounting of Individual Indian Money Accounts	July 25, 2002	Senate Indian Affairs	James Cason
Oversight hearing on Trust Reform	June 26, 2002	Senate Indian Affairs	Steve Griles and Neal McCaleb
S. 1340, a bill to amend the Indian Land Consolidation Act of 2000 to provide for probate reform with respect to trust or restricted lands.	May 22, 2002	Senate Indian Affairs	Neal McCaleb
FY-2003 Budget Request for Indian Programs	March 14, 2002	Senate Indian Affairs	Neal McCaleb
Bureau of Indian Affairs/Office of the Special Trustee	March 14, 2002	House Appropriations Subcommittee on Interior and Related Agencies	Steve Griles, Wayne Smith, Tom Slonaker, and Ross Swimmer

Oversight hearing on the Management of Indian Trust Funds	February 26, 2002	Senate Indian Affairs	James Cason, Neal McCaleb, and Tom Slonaker
S. 1857, an act to Encourage the Settlement of Tribal Claims.	February 7, 2002	Senate Indian Affairs	Phil Hogan
Oversight hearing on the Management of Indian Trust Funds	February 6, 2002	House Resources Committee	Secretary Norton accompanied by Steve Griles, Neal McCaleb, Tom Slonaker, and Ross Swimmer
Trust Reform	March 28, 2001	Senate Appropriations Subcommittee on Interior and Related Agencies	Tom Slonaker and Sharon Blackwell
Trust Reform	March 21, 2001	House Appropriations Subcommittee on Interior	Tom Slonaker and Sharon Blackwell
Oversight hearing on Indian Issues	February 28, 2001	Senate Indian Affairs	Secretary Norton

ENERGY AND COMMERCE COMMITTEE:
ENVIRONMENT AND HAZARDOUS MATERIALS SUBCOMMITTEE
RANKING MEMBER
HEALTH SUBCOMMITTEE
RESOURCES COMMITTEE:
FISHERIES CONSERVATION, WILDLIFE AND OCEANS SUBCOMMITTEE
NATIONAL PARKS, RECREATION AND PUBLIC LANDS SUBCOMMITTEE
DEMOCRATIC POLICY COMMITTEE:
COMMUNICATIONS VICE CHAIR
email:Frank.Pallone@mail.house.gov
http://www.house.gov/pallone

FRANK PALLONE, JR.
6TH DISTRICT, NEW JERSEY

Congress of the United States
House of Representatives
Washington, DC 20515–3006

REPLY TO:
WASHINGTON OFFICE:
☐ 420 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–3006
TELEPHONE: (202) 225–4671
DISTRICT OFFICES:
☐ 504 BROADWAY
LONG BRANCH, NJ 07740
(732) 571–1140
☐ 57/68 CHURCH ST.
KILMER SQUARE
NEW BRUNSWICK, NJ 08901
(732) 249–8892
☐ I.E.I., AIRPORT PLAZA
1390 RT. 36, #104
HAZLET, NJ 07730–1701
(732) 264–9104

December 23, 2002

Ms. Gail Norton, Secretary
Department of Interior
1849 C St., NW
Washington, DC 20240

Dear Secretary Norton:

You wrongly suggested during a press conference with Native American Journalists on December 19th, that Congress has given a green light to the reorganization of the BIA's trust accounts. Neither Congress, nor any committee of the House or Senate has voted on this issue. What really happened is that the Department of the Interior took advantage of the Congressional recess to reprogram monies to pay for the reorganization without informing tribal representatives exactly what Interior intends to do. It would be wholly inaccurate for you to represent to the federal court in the Cobell case on January 6th that you have either Congressional approval or tribal approval to move forward with trust account reform at this time.

When the Interior Department first proposed a reorganization of the Indian trust accounts last year, the House Resources Committee subsequently held a hearing in February 2002, and chastised you for failing to consult with tribes. You agreed to work with the Tribal Leaders Task Force, initiated by NCAI, and to hold a series of hearings around Indian Country. But, the Interior Department never arrived at a consensus with the task force and summarily dismissed its members this December.

Interior tried unsuccessfully last July to use a stealth maneuver that avoided the tribes as well as many Congressional friends of Native Americans. It initiated a floor amendment to the House Interior Appropriations bill in July that would have limited trust accounting to the years 1985 through 2000. At that time, you avoided both the committee of jurisdiction, the Resources Committee, and the Interior Appropriations Subcommittee, by bringing the amendment directly to the floor. When tribal representatives and most members of Congress finally saw the Department's amendment, they quickly galvanized opposition and overwhelmingly defeated it.

Now, you are trying to use the same stealth maneuver after the previous Congress finally adjourned in November and before the new Congress is sworn in, in January. The reprogramming took place in early December through a procedure that allows the

PRINTED ON RECYCLED PAPER

chairman and ranking member of the House Interior Appropriations Subcommittee to sign off on a reprogramming of funds within the Interior Department. A switch of funding from one account to another at the Department's request does not imply full Congressional approval of the Department's trust account reform.

You have yet to make public the details of the trust reform plan you intend to finance with the reprogrammed funds, or more important, what plan you intend to bring to the federal court on January 6th. The letter you sent to the chairman and ranking member of the House Interior Subcommittee on December 4th has some suggestions on pages 6 through 9 of how the new proposal differs from the one rejected by the tribes a year ago, but is lacking in important details. For example, the Department is proposing to create a group of trust officers, but there is very little information about their duties or how they relate to the existing BIA. Most important, it does not include trust standards; without standards, there is no way to measure performance or to ensure accountability. It would be improper for you to move forward with this plan without further meetings with the Tribal Leaders Task Force, as well as hearings before the Congressional committees of jurisdiction beginning in January. Failure to do so will simply confirm that you are keeping it quiet for fear that the plan cannot withstand public scrutiny.

It is also unlikely that the $5 million sum reprogrammed in December will make much of a dent in trust reform. The Department will likely use that as a down payment to persuade the federal court of its seriousness, but ask Congress to appropriate a lot more money next year if it gets judicial approval. I would ask that you forward a complete cost breakdown of your trust reform plan, through its completion, to tribal leaders and myself.

My concern is that you have no intention of coming to Congress in January to explain your latest trust reform proposal for fear of a repeat of what happened in July – a real Congressional vote on the floor or in Committee that would disapprove of your plan. From all accounts, your intention is to simply proceed to the judge in the Cobell case on January 6th, before the new Congress is even sworn-in, and represent that you have the approval of both Congress and the tribes. Under the circumstances, my only recourse, and that of my Congressional colleagues is to inform the federal court that your representation is inaccurate. I will be forwarding a letter to the judge in the Cobell case so he fully understands my opinion in this matter.

Sincerely,

Frank Pallone

Frank Pallone, Jr.
Member of Congress

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JAN - 3 2003

Honorable Frank Pallone, Jr.
House of Representatives
Washington, D.C. 20515

Dear Mr. Pallone:

This is in response to your December 23, 2002 letter concerning the Department of the Interior's Indian trust reorganization plan. Secretary Norton has asked me to respond.

Your letter states your belief that the Secretary "wrongly suggested' that Congress has given a green light to the reorganization and that the Department of the Interior "took advantage" of the Congressional recess to reprogram monies without informing tribal representatives of what Interior intended to do. In addition, you state that Interior tried "to use a stealth maneuver" last July in the House Appropriations bill "by bringing the amendment [a provision relating to historical accounting] directly to the floor" and that the Secretary is "trying to use the same stealth maneuver" between Congresses.

Given the importance of this issue to the Department and the fact that the tenor and tone of your letter suggest you have a great interest in this as well, I am providing with this letter the official transcripts of the consultation meetings held by Interior on the issue of Indian trust reorganization, along with our reorganization charts and Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments." Once you have reviewed and read these documents, both Deputy Secretary Griles, who the Secretary has designated as the individual in charge of trust reform for the Department, and I would be happy to meet with you personally on the reorganization plan.

In November 2001, the Department proposed the creation of a new Assistant Secretary that would oversee a Bureau of Indian Trust Asset Management in recognition of the need for better management and oversight of Indian trust assets. This proposal came after much criticism over the fact that the Department did not have a senior management person whose sole responsibility was management of Indian trust assets, and after findings by the court in the *Cobell* litigation that meaningful organizational reform was needed.

The November 2001 proposal was met with much objection from Indian Tribes, primarily because of the lack of consultation leading up to it. In December 2001, the Senate Appropriations Subcommittee on Interior and Related Agencies requested that the Department resubmit a proposed reorganization after completion of additional consultation with the Indian community, a continued review of the management and organization of the Department's trust program, and further coordination with the authorizing committees of Congress.

Defendants' Exhibit No.7
Motion for Partial S/J
Trust Management

Consultation In December 2001, the Department committed to a consultation process on the issue of trust reform and organizational reform that was, to our knowledge, the most extensive consultation effort ever undertaken by the senior management level at the Department of the Interior on any issue relating to Indian Country.

The first meeting was in Albuquerque, New Mexico, on December 13, 2001. Eight additional meetings were held in different locations. During these meetings, a number of commenters requested a different format for consultation on this issue. Rather than simply providing views on the Department's proposal, the Tribes asked if the Department would participate in a Task Force where the Tribes and senior Departmental officers could sit down together and discuss the organizational issues inherent in trust reform collaboratively. Shortly thereafter, the Joint Tribal Leader/ Department of the Interior Task Force on Trust Reform (Task Force) was created.

The purpose of the Task Force, as defined in the protocol agreement, was to:

> "develop and evaluate organizational options to improve the integrity, efficiency, and effectiveness of the Departmental Indian Trust Operations consistent with Indian treaty rights, Indian trust law, and the government-to-government relationship."

The Task Force planned for and held ten joint multi-day meetings throughout the country. Meetings were held in Shepherdstown, WV, Phoenix, AZ, San Diego, CA, Minneapolis, MN, and Bismarck, ND, Portland OR, Anchorage, AK, Billings, MT, and Alexandria, VA.

Unfortunately, the Task Force did not result in a consensus in how trust reform should be accomplished. The impasse reached by the Task Force however surrounded issues related to trust standards and private rights of action, not organizational structures. The Task Force reached agreement on the creation of an Under Secretary for Indian Trust but the Tribal leaders would not agree with going forward on that proposal without the trust standards and rights of actions provisions which the Administration could not support. Despite this, Deputy Secretary Griles testified in July before the Senate Indian Affairs Committee that the Department would support the creation of such a position by the Congress. Congress did not act on this recommendation, and the Department is without the authority to create such a position administratively.

The Department's trust reorganization plan is closely aligned with, and is a product of, the insight gained from the intensive consultation process. Primarily, because the organizational approach is limited to operating within the current statutory structure, it does differ from the organizational approach developed by the Tribal Task Force.

Internal Review Over the course of the last year, the Department continued its internal review of its Indian trust practices. The quarterly reports we submitted to the court in the *Cobell* litigation contain detailed descriptions of this review. Copies of these reports are available on the Department's website. Since early in calendar year 2002, the Office of Indian Trust Transition has been developing a new Indian Trust Business Plan. This will be the first

comprehensive operational plan for Interior trust operations. The Mission Statement, Goals and Objectives of the Plan were approved by the managers of affected Interior agencies and by a subcommittee of the Tribal Task Force. The Plan will be a business plan intended to guide Interior's trust management efforts well into the future.

We realized that the lack of an integrated comprehensive business model has hampered previous trust reform efforts. Understanding how current trust services are provided by thousands of our employees in hundreds of locations is essential. We therefore have undertaken the meticulous, painstaking work of developing an "As-Is" trust business model that describes what documents are prepared by whom, what decisions must be made when, and what information is needed for each decision. This modeling is being applied to each of the core trust processes: beneficiary services, probate, title, appraisals, cadastral surveys, surface and subsurface asset management and accounting management. Ultimately, the "As-Is" trust business model will provide important information for development of the "To-Be" trust services business model.

Coordination with Authorizing Committees The Department testified on the issue of trust reform six times before these authorizing committees of the Congress. This included a February 6 2002 House Resources oversight hearing on Indian Trust Fund Accounts, a February 26, 2002 Senate Indian Affairs oversight hearing on the Management of Indian Trust Funds, a June 26, 2002 Senate Indian Affairs oversight hearing on the Status of the Department of the Interior/Tribal Trust Fund Management Reform Dialogue, a July 25, 2002 Senate Indian Affairs hearing on the DOI Report on Historical Accounting, a July 30, 2002 Senate Indian Affairs hearing, on a Legislative Proposal of the Task Force and on S. 2212 , the Indian Trust Asset and Trust Fund Management and Reform Act of 2002, and a September 24, 2002 Senate Indian Affairs hearing on the Role of the Special Trustee. In addition, both House and Senate Committee staff were invited to the numerous Task Force meetings, and other consultation meetings, held throughout 2002.

Cobell During the consultation process, the *Cobell* litigation continued. Based on a record that closed in February 2002, the U.S. District Court for the District of Columbia issued an opinion on September 17, 2002, holding Secretary Norton and Assistant Secretary McCaleb in contempt of court in their official capacities. In that opinion, the Court addressed the issue of the Department's promised reorganization of Indian trust functions. The Court noted that "For purposes of this contempt trial, it is sufficient for the Court to find that no reorganization has occurred, and, in fact, the Department did not even have a final plan that it was ready to implement at the time the record closed."

The Court's opinion orders the Department to file with the Court by January 6, 2003, "a plan for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM trust beneficiaries." The Judge's September 17, 2002 order noted that, despite the fact that the Department had been considering reorganization as a method of improving trust services, no progress had been made as of February 2002, the date the record closed for purposes of the proceedings concluded in September. It is apparent from Judge Lamberth's order that Interior needed to take action to achieve true Indian trust reform sooner rather than later.

Reprogramming Request In order to present to the court a working plan with the money

necessary to carry it out, the Department presented its proposed reorganization to the Appropriation Committees before December 6 so that the plan presented to the court on January 6, 2003 could reflect the result of that request . Both Committees acknowledged this fact in granting their approvals this December. Secretary Norton indicated that Congress had given the green light to the reorganization because reprogramming requests of this sort are approved when the committees so inform the Secretary – they are not the subject of a vote by the House or the Senate as your letter implies. In addition, the Department had complied with the December 2001 request of the Senate Appropriations Subcommittee concerning consultation, internal review, and authorizing committee interaction.

Court-Requested Plans The Department does intend to file with the court in the *Cobell* case the plans required by the court. Work in that regard has consumed the majority of the time of much of the Secretary's senior leadership since September 17, 2002. Your letter states that:

> "It would be improper for you to move forward with this plan without further meetings with the Tribal Leaders Task Force, as well as hearings before the Congressional committees of jurisdiction beginning in January. Failure to do so will simply confirm that you are keeping it quiet for fear that the plan cannot withstand public scrutiny."

The Department consulted on the issue of trust reorganization for almost a year. The Department now has the duty to move forward, taking into consideration the views heard in that consultation, and act. The courts expect that of us as they should. The individual Indians who are pursuing this case expect that of us as they should. We welcome any opportunity to testify before the 108th Congress on our course of action. We will also be happy to make public the details of our trust reform plan when it is completed and filed with the court.

House Appropriations Actions Finally, your letter states that Interior "initiated a floor amendment to the House Interior Appropriations bill in July" relating to limits on historical accounting. The provision to which you are referring was, in fact, included in the Interior Appropriations bill by the Appropriations Committee prior to floor consideration of the bill. An explanation of the provision appears on page 90 of House Report 107-564. The Committee's report speaks for itself, and makes clear that this was a Committee provision, not a provision proposed by the Department of the Interior.

Sincerely,

David L. Bernhardt
Counselor to the Secretary and Director, Office of
Congressional and Legislative Affairs

BUDGET JUSTIFICATIONS

The United States Department of the Interior

Fiscal Year 2003

OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS

Printed on Recycled Paper

(2331)

Defendants' Exhibit No. 8
Motion for Partial S/J
Trust Management

Sustaining efforts currently underway and planned for later this year into FY 2003 is critical to continue progress and address these longstanding trust management issues. A majority of these initiatives are and will continue to be performed by contractors. Some carryover funds may be available in FY 2003 for certain projects, such as Historical Accounting.

The FY 2003 Budget reflects an increased emphasis on implementation of Indian trust asset reform efforts and a funding level needed to sustain the operational and organizational improvements initiated in previous years. Eliminating Indian trust management deficiencies remains one of the highest priorities for the Department. The Department is fully aware of the magnitude of the financial and managerial challenges facing this Department and the daunting task of implementing trust reform improvements in systems, operations and policies that are critically needed to ensure that the Federal Government meets its fiduciary obligations to Indian Tribes and individual American Indians. Funds to continue to address needed trust management operations are also included in the budget for the Bureau of Indian Affairs (BIA).

PROGRAM RESPONSIBILITIES

The OST manages approximately $3.1 billion held in trust for Indian Tribes and individuals. Approximately $2.7 billion is held in about 1,400 Tribal accounts for about 290 Tribes. The balance of approximately $400 million is held on behalf of individual Indians in over 252,000 open accounts and other special trust funds, including the Alaska Native Escrow Fund. Most assets held in trust for Native Americans are owned by the trust beneficiaries and therefore are not Federal assets.

TRUST FUND ACCOUNTS

The balances that have accumulated in the Indian trust funds have resulted from claims and judgment awards, investment income, and revenues from approximately 56 million acres of trust land. Revenues are derived from subsurface mineral extractions (coal, oil, gas, and uranium) timber, grazing, and other surface leases. Judgment awards constitute approximately 50 percent of the Tribal funds, while individual Indian funds realize receipts primarily from royalties on natural resource use, land use agreements, enterprises having a direct relationship to trust fund resources, per capita payments, and investment income. Overall, the composition of the source of Indian trust funds has not changed significantly since April 1993. However, the value of the funds and number of the accounts has grown.

Under Title II of the *American Indian Trust Fund Management Reform Act of 1994*, a Tribe may voluntarily withdraw its funds from trust, subject to plan approval by the Secretary. As of December 31, 2001, only two Tribes had withdrawn their funds and two Tribes have made partial withdrawals. One Tribe is making partial withdrawals as invested securities mature. Approximately 70 percent of their funds have been withdrawn. One Tribe is currently going through the application process to withdraw funds under PL 103-412. One Tribe that previously

applied for withdrawal under the Act was successful in changing legislation to the Tribe's Settlement Act to change the trusteeship from the Secretary to the Tribe.

FIDUCIARY RESPONSIBILITY

In carrying out the management and oversight of the Indian trust funds, the Secretary has a fiduciary responsibility to ensure that trust accounts are properly maintained, invested, and reported in accordance with the *American Indian Trust Fund Management Reform Act of 1994*, Congressional action, and other applicable laws.

When Congress enacted the *American Indian Trust Fund Management Reform Act* in 1994, it recognized the Federal Government's preexisting trust responsibilities. The Reform Act further identified some of the Secretary of the Interior's duties to ensure proper discharge of the trust responsibilities of the United States. These include (but are not limited to) the following:

- Providing adequate systems for accounting for and reporting trust fund balances;
- Providing adequate controls over receipts and disbursements;
- Providing periodic, timely reconciliation to assure the accuracy of accounts;
- Preparing and supplying periodic statements of account performance and balances to account holders; and
- Establishing consistent, written policies and procedures for trust fund management and accounting.

The Reform Act also created the position of the Special Trustee for American Indians, who reports directly to the Secretary. The Office of the Special Trustee for American Indians oversees and coordinates Indian trust asset reform efforts Department-wide to ensure the establishment of policies, procedures, systems, and practices that allow the Secretary to effectively discharge her trust responsibilities.

The Special Trustee also has responsibility for the Office of Trust Funds Management (OTFM) and the related financial trust functions. The Special Trustee therefore was provided authority over and responsibility for trust monies of Indian Tribes and individual American Indians. OST, through OTFM has operating responsibility for financial trust service functions, including deposit, investment, and disbursement of trust funds. Additional trust asset management functions are carried out by other Interior Bureaus, as follows:

- BIA is responsible for the management of non-monetary Indian trust assets (lands, minerals, timber, etc.) and the leasing and other economic activity associated with those assets for the benefit of Indian Tribes and individual Indians.

In FY 2002, the Office of the Special Trustee will:

- Oversee Bureau efforts to implement trust reform;
- Continue implementation of new systems and appropriate reform efforts in managing Indian trust resources;
- Monitor systems put in place to protect and preserve Indian trust assets and to collect and accurately account for income;
- Continue outreach efforts to Tribes, Congress, and Departmental agencies and offices;
- Hold Advisory Board and Tribal meetings on trust related issues; and
- Continue efforts within the Department to implementation the recommendations of the EDS reports, as approved by the Secretary, for trust reform activities.

This activity also provides funding to support a cooperative agreement between the InterTribal Monitoring Association (ITMA) and OST, and the costs of operations for the Office of the Special Trustee's Advisory Board.

Justification of Program Changes:

		2003 Budget Request	Program Changes (+/-)
Total Executive Direction	$(000)	2,781	+251
	FTE	*15*	*0*

An additional $151,000 is needed for the increased support of activities associated with the immediate Office of the Special Trustee. Included within this amount is:

- $96,000 for short-term, specialized contracts or studies to address various technical advisory fiduciary and trust related issues. These studies will provide for trust or fiduciary expertise and advise that is not currently available within the Trustee's immediate office staff.
- $25,000 for additional travel costs is needed to provide for the Special Trustee and staff to attend the numerous BIA, and Tribal meetings and forums on trust related issues.
- $30,000 to provide for the additional space costs associated with increased OST office space requirements within the Main Interior building.

An additional $100,000 for a total of $450,000 is needed in FY 2003 to support ITMA activities. This additional $100,000 will provide the organization with resources to conduct regional and national meetings, and for a more active Tribal outreach program. ITMA represents Tribal views to the Department and Congress on reconciliation of past trust fund activity and the implementation of trust reforms impacting both Tribal and individual Indians. ITMA is a Tribal membership organization established in 1991, governed by a 12-member board of directors, and employs staff and consultants with expertise in legal, policy, and accounting issues related to trust fund management.

Activity: Program Operations, Support & Improvements

(Dollars in thousands)

Subactivities		2002 Estimate	Uncontrollable And Related Changes (+/-)	Program Changes (+/-)	2003 Budget Request	Change From 2002 (+/-)
Office of Trust Funds Management	$(000)	16,501	+15,766	−7,248	39,515	+23,014
	FTE	*252*	*+38*	*+26*	*316*	*+64*
Office of Trust Records	$(000)	2,549	+80	+500	3,129	+580
	FTE	*36*	*0*	*+3*	*39*	*+3*
Program Support Services	$(000)	4,728	-503	+1,226	5,451	+723
	FTE	*5*	*0*	*+2*	*7*	*+2*
Improvement Initiatives	$(000)	72,950	-14,124	−41,325	100,151	+27,201
	FTE	*104*	*-38*	*+27*	*93*	*-11*
Total	**$(000)**	**96,728**	**+1,219**	**+50,299**	**148,246**	**+51,518**
	FTE	***397***	***0***	***+58***	***455***	***+58***

Sub Activity: Office of Trust Funds Management

Activity/Sub-activity Narrative:

The Office of Trust Funds Management (OTFM) was established in response to General Accounting Office, the Inspector General, and independent accounting reports which cited significant internal control weaknesses including: inadequate training, inadequate separation of duties, and lack of standardized policies, practices and procedures.

The *American Indian Trust Fund Management Reform Act of 1994* provides that the Special Trustee shall advise on and oversee the Secretary's proper discharge of various trust responsibilities. The Special Trustee supports the following trust responsibilities through OTFM:

- Provide adequate systems for accounting and reporting trust fund balances;
- Provide adequate controls over receipts and disbursements;
- Provide periodic, timely reconciliation to assure the accuracy of accounts;
- Prepare and supply account holders with periodic statements of their account performance and with balances of their account, which shall be available on a daily basis;
- Establish consistent, written policies and procedures for trust fund management and accounting; and
- Provide adequate staffing, supervision and training for trust fund management and accounting.

OTFM consists of the Office of the Director and the following six divisions: Quality Assurance; Trust Funds Systems; Trust Funds Accounting; Trust Fund Services; Reporting/Reconciliation; and Field Operations. The goals of OTFM are to:

- Protect and preserve Indian trust funds, and accurately account for income due beneficiaries; and
- Provide timely and responsive customer service to account holders.

OTFM provides professional, technical, and managerial functions related to and affecting funds held in trust for Indian Tribes and individual Indians. OTFM oversees daily operations and develops, implements, and directs activities related to Indian trust funds improvement initiatives, described under the Improvement Initiatives program element. OTFM operates TFAS and provides a focus on continued improvements to Tribal and IIM accounts management, including electronic workflow, cash management improvements, data integrity, and coordination with the BIA on the development of the automated trust asset management portion of a Trust Asset and Accounting Management Systems (TAAMS). Additionally, the *Cobell v. Norton* litigation continues to place significant demands on OTFM in terms of trial preparation, responses to plaintiff discovery requests, depositions, and testimony.

This program also supports the personnel located in 11 regional offices and 50 agency offices. The Alaska, Southwest, and Navajo operations are centralized. The Eastern Oklahoma Region is partially centralized, with some staff located at the Osage Agency. The remaining regions have staff at both the regional and agency levels. Field Operations are managed through the Division of Field Operations in Shawnee, Oklahoma. Conversion to TFAS now allows regional and agency staff to devote their time primarily to customer services. An account holder can now go to any OTFM office and obtain real-time information on their account. Encoding for TFAS is centralized at Albuquerque, NM. Current OTFM processing of data to TFAS is very labor intensive, since approximately 70 percent of the BIA leasing data is performed manually, that is, outside of an automated system. Increased activity in leasing, forestry and other programs will continue to drive data workload increases.

OTFM manages approximately $3.1 billion of funds held in trust for Indian Tribes and individuals. Approximately $2.7 billion is held in approximately 1,400 Tribal accounts for approximately 290 Tribes. Approximately $400 million is held on behalf of individual Indians in over 252,000 accounts and other special trust funds, including the Alaska Native Escrow Fund. Most of these assets are held in trust for Indian Tribes and individual Indians and are therefore owned by the trust beneficiaries and are not Federal assets.

OST currently has self-governance agreements with two Tribes for IIM services. Similar to other non-BIA Bureaus, OST provides contract support for compacts and contracts, as well as other support and assistance to Tribes seeking to compact or contract for services.

The following is the estimated OST Self-Governance compact cost for IIM Services for FY 2002:

Tribe	Compact Amount	Compact Support Estimate	Total Compact Cost
Confederated Salish & Kootenai (Flathead)	$57,517	$9,548	$67,065
Wyandotte Tribe of Oklahoma	$4,303	$1,401	$5,704
Total Paid by OST	**$61,820**	**$10,949**	**$72,769**

The Trust Funds Accounting System (TFAS) was transferred to OTFM following the successful conversion in April 2000 of all Tribal and Individual Indian Monies trust fund accounts. It is now part of the day-to-day program operating activities of the OTFM and the funding and FTEs are reflected in the OTFM budget rather than under Improvement Initiatives.

TFAS is a commercial off-the-shelf trust accounting system suitable for both Tribal and IIM accounts and provides the basic accounting, investment, disbursing, and reporting functions common to commercial trust funds management operations. This system is operated and maintained by a contractor, SEI Investments, Inc. Currently, approximately 253,000 open Tribal and IIM accounts are maintained on the system.

Funds for the OTFM activity principally support the Departmental goal to protect and preserve Indian trust assets, receipt and accurately account for income due beneficiaries, and provide timely and responsive customer service to account holders.

Justification of Program Changes:

(dollars in thousands)

		2003 Budget Request	Program Changes (+/-)
Trust Funds Management	$(000) *FTE*	$39,515 316	+ $7,248 +26

An additional $7.248 million and 26 FTEs are requested in 2003 to provide for increased operating expenses of the trust fund management programs. Of this total increase, $4.748 million is requested for OTFM headquarters and field office operations and $2.5 million is requested for TFAS operations.

Headquarters and Field Operations
$4.748 million and 32 FTEs including $2.348 million and 9 FTEs for additional operational program costs and staff in OTFM headquarters functions located in Albuquerque, NM; and $2.400 million and 23 FTEs additional operating staff for field offices. Conversion to TFAS

Defendants' Exhibit No.9
Motion for Partial S/J
Trust Management

DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATIONS FOR 2003

Library
U.S. Department of the Interior
Washington, D.C. 20240

KF
27
.A64
2003
pt. 2

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

SUBCOMMITTEE ON THE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES

JOE SKEEN, New Mexico, *Chairman*

RALPH REGULA, Ohio
JIM KOLBE, Arizona
CHARLES H. TAYLOR, North Carolina
GEORGE R. NETHERCUTT, JR., Washington
ZACH WAMP, Tennessee
JACK KINGSTON, Georgia
JOHN E. PETERSON, Pennsylvania

NORMAN D. DICKS, Washington
JOHN P. MURTHA, Pennsylvania
JAMES P. MORAN, Virginia
MAURICE D. HINCHEY, New York
MARTIN OLAV SABO, Minnesota

NOTE: Under Committee Rules, Mr. Young, as Chairman of the Full Committee, and Mr. Obey, as Ranking Minority Member of the Full Committee, are authorized to sit as Members of all Subcommittees.

DEBORAH WEATHERLY, LORETTA BEAUMONT, JOEL KAPLAN, and CHRISTOPHER TOPIK, *Staff Assistants*

PART 2

Justification of the Budget Estimates

	Page
U.S. Geological Survey	**1**
Minerals Management Service	**436**
Office of Surface Mining Reclamation and Enforcement	**713**
Bureau of Indian Affairs	**897**
DOI Office of Insular Affairs	**1549**
DOI Departmental Management	**1655**
DOI Office of the Solicitor	**2163**
DOI Office of the Inspector General	**2255**
DOI Office of Special Trustee	**2331**
National Indian Gaming Commission	**2445**
Natural Resource Damage Assessment and Restoration Program	**2463**

U.S. GOVERNMENT PRINTING OFFICE

78-179 WASHINGTON : 2002

Justification of Program and Performance

Activity: Hearings and Appeals

	FY 2002 Estimate	Uncontrollable Changes	Program Changes	FY 2003 Budget Request	Change from FY 2002
($000)	8,039.1	+158.7	0.0	8,197.8	+158.7
FTE	75.0	0.0	0.0	75.0	0.0

Objective: The Office of Hearings and Appeals (OHA) is assigned the quasi-judicial and appellate responsibilities of the Department. Through its Hearings Division, appeals boards, and Director's Office, OHA provides a forum for parties who are affected by the decisions of the Department to seek independent review of those decisions.

Program Activities: Administrative Law Judges (ALJs) in OHA's Hearings Division and Administrative Judges in OHA's three designated boards of appeal render decisions in cases pertaining to public and acquired lands and their resources, the regulation of surface coal mining, contract disputes, appeals from determinations of the Bureau of Indian Affairs (BIA), and Indian Probate matters. The Director's Office provides management oversight and administrative support to the organization as a whole. In addition, the Director's Office staff conducts hearings in personnel grievance cases and decides various appeals not assigned to one of OHA's three permanent appeals boards. The decisions rendered by the Director or by the boards of appeal are generally final for the Department.

OHA is headquartered in Arlington, Virginia, with nine field offices located in Albuquerque, New Mexico; Billings, Montana; Bismarck, North Dakota; Oklahoma City, Oklahoma; Phoenix, Arizona; Rapid City, South Dakota; Sacramento, California; Salt Lake City, Utah; and Twin Cities, Minnesota.

Because of the important role alternative dispute resolutions are taking in the Department, this activity was moved from the Office of Hearings and Appeals and the Office of Collaborative Action and Dispute Resolution was formed. More about this office can be found on page DM - 105.

The following information describes each of OHA's main program activities.

Hearings Division

ALJs preside over hearings in all cases required by law that are conducted on the record pursuant to 5 U.S.C. section 554. They also conduct hearings arising within the Department that are referred to the Hearings Division by one of OHA's appeals boards, the

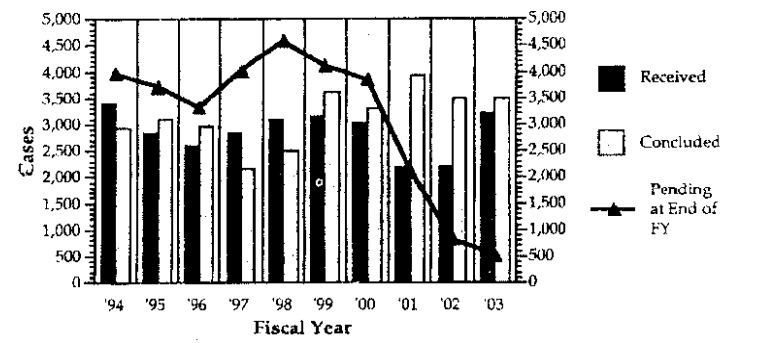
Director, or the Secretary. Cases routinely heard include those under the Mining Law of 1872, the Federal Land Policy and Management Act of 1976, the Surface Mining Control and Reclamation Act of 1977, the Federal Oil and Gas Royalty Management Act of 1982, the Endangered Species Act, and the Debt Collection Act. Cases referred to an ALJ for hearing may arise under any statute granting jurisdiction to the Department. The table below shows recent and anticipated changes in the Division's caseload in these areas.

Hearings Division - Departmental Caseload

	FY 2001 Actual	FY 2002 Estimate	FY 2003 Estimate
Start of the year	494	516	496
Received	136	130	130
Concluded	114	150	190
End of the year	516	496	436

In addition to the public lands and other departmental cases, ALJs exercise the Secretary's trust responsibility in conducting hearings and rendering decisions in Indian probate matters. Until recently, the number of new probate cases received each year exceeded the number of decisions that the OHA field offices could issue, given their resources and non-probate workload. In response, OHA and BIA established a joint project management team to oversee the elimination of the probate backlog in both organizations. They implemented a redesigned process to expedite probate decisions and received funding from the Office of the Special Trustee for American Indians that has allowed OHA to hire additional judges and support staff. The graph below shows caseload changes over a 10-year period, while the table on the next page shows recent

Indian Probate Caseload



and anticipated changes in the probate caseload

Hearings Division - Indian Probate Caseload

	FY 2001 Actual	FY 2002 Estimate	FY 2003 Estimate
Start of the year	3,836	2,121	821
Received	2,209	2,200	3,200
Concluded	3,924	3,500	3,500
End of the year	2,121	821	521

Finally, the Hearings Division renders heirship determinations pursuant to the White Earth Reservation Land Settlement Act of 1985 (WELSA). The decisions in these matters determine eligibility to receive compensation under the WELSA statute. Recent and anticipated changes in the Division's WELSA caseload are reflected in the following table.

Hearings Division - WELSA Caseload

	FY 2001 Actual	FY 2002 Estimate	FY 2003 Estimate
Start of the year	230	211	176
Received	125	125	125
Concluded	144	160	170
End of the year	211	176	131

Board of Contract Appeals

The Interior Board of Contract Appeals (IBCA) conducts hearings and issues decisions on procurement contract disputes pursuant to the Contract Disputes Act of 1978, and on other contracts pursuant to Secretarial delegation. The IBCA also handles contract cases by delegation from the Environmental Protection Agency, the Office of Personnel Management, and the Peace Corps. In addition, the IBCA has jurisdiction over Department of the Interior and Department of Health and Human Services contract and grant disputes involving Indian tribes pursuant to the Tribally Controlled Schools Act and the Indian Self-Determination and Education Assistance Act Amendments of 1988. The IBCA has experienced considerable success in recent years in encouraging early settlements through alternative dispute resolution negotiations. The recent and anticipated changes in the IBCA's caseload are reflected in the table below.

Board of Contract Appeals Caseload

	FY 2001 Actual	FY 2002 Estimate	FY 2003 Estimate
Start of the year	192	160	150
Received	87	90	85
Concluded	119	100	100
End of the year	160	150	135

Board of Land Appeals

The Interior Board of Land Appeals (IBLA) exercises appellate authority delegated by the Secretary over a wide variety of decisions made by subordinate Departmental officials relating to the use and disposition of public lands and their resources. These include land selections arising under the Alaska Native Claims Settlement Act; the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf; and the conduct of surface coal mining under the Surface Mining Control and Reclamation Act of 1977.

IBLA employees also assisted in a variety of other tasks for OHA, including adjudicating ad hoc appeals; drafting, reviewing, and commenting on proposed and final agency regulations; preparing materials and providing training for agency employees; and developing a comprehensive, searchable database of IBLA and other OHA decisions on the World Wide Web. The recent and anticipated changes in the IBLA's caseload are reflected in the table below.

Board of Land Appeals Caseload

	FY 2001 Actual	FY 2002 Estimate	FY 2003 Estimate
Start of the year	556	575	775
Received	447	650	650
Concluded	428	450	550
End of the year	575	775	875

Board of Indian Appeals

The Interior Board of Indian Appeals (IBIA) exercises the Secretary's trust responsibility in deciding appeals from decisions rendered by officials of the BIA. It also decides appeals of decisions rendered by the Hearings Division's ALJs in Indian probate cases, and from inheritance determinations under WELSA. Since the issuance of new regulations implementing the Indian Self-Determination Act in 1996, the IBIA has been receiving appeals from pre-contracting decisions made in the Department of Health and Human Services, as well as those made in the Department of the Interior.

The IBIA also receives appeals under BIA's new regulations concerning Federal acknowledgment of Indian tribes. These cases require a substantial expenditure of time because of their voluminous records. The IBIA continues to receive an increasing number of appeals involving tribal government disputes and acquisitions of land in trust. Both of these areas are highly sensitive, with impacts not only on the Department and the tribe involved, but also on other Federal and state agencies working with tribes. In FY 2002 and 2003, the IBIA anticipates receiving additional probate appeals because of the increased number of ALJ probate decisions.

The recent and anticipated changes in the IBIA's caseload are reflected in the table below. It should be noted, however, that the Department's planned reorganization of Indian trust functions might affect the IBIA's future workload in ways that cannot yet be quantified.

Board of Indian Appeals Caseload

	FY 2001 Actual	FY 2002 Estimate	FY 2003 Estimate
Start of the year	57	96	96
Received	203	175	175
Concluded	164	175	175
End of the year	96	96	96

Director's Office

The Director's Office decides all appeals to the Secretary which do not lie within the appellate review jurisdiction of an established appeals board and are not specifically excepted in the delegation of authority to the Director. The Director may appoint OHA judges or attorneys to conduct hearings and may appoint ad hoc boards of appeal. Cases heard by the Director's Office include Reclamation Reform Act acreage limitation appeals, property boards of survey appeals, appeals relating to civil penalties assessed under the Endangered Species Act, the determination of relocation assistance benefits, rental rate adjustments for Government-furnished quarters, National Indian Gaming Act Commission appeals, and other special cases. Other quasi-judicial responsibilities of the Office include responsibility for personnel grievance appeals, assignment of personnel to hold hearings under the Debt Collection Act, and rulemaking hearings or other public hearings required by law or regulation, or otherwise determined necessary or desirable by the Department. The recent and anticipated changes in the Director's Office caseload are reflected in the table below.

Director's Office Caseload

	FY 2001 Actual	FY 2002 Estimate	FY 2003 Estimate
Start of the year	293	342	302
Received	138	140	140
Concluded	89	180	200
End of the year	342	302	242

Major Accomplishments and Planned Activities

FY 2001 and FY 2002 Accomplishments:

During FY 2001, OHA and BIA implemented a new probate tracking system to expedite

the processing of Indian probate cases by the two organizations. Probate training was provided to all Hearings Division staff, many who were newly hired the previous fiscal year. OHA published an interim rule to update its probate regulations in light of new probate procedures adopted by BIA five months earlier. A wide area network has also been installed to link all field offices. These actions significantly increased the Hearings Division's ability to reduce its current backlog of probate cases and prevent future backlogs from developing.

Also in FY 2001, OHA unveiled a new Web site (http://hearingsandappeals.doi.gov), that provides access to thousands of IBIA and IBLA decisions in a searchable database. Developed with help from the Bureau of Land Management, the Minerals Management Service, and BIA, the new site has already proved to be of tremendous benefit to OHA judges and staff, the bureaus, and the public.

In the first few months of FY 2002, OHA published a final Indian probate rule, completing the process of updating its probate regulations to bring them into harmony with BIA's. Additional training was provided to all Hearings Division staff on both Indian probate and Departmental cases. The OHA headquarters office was brought within the wide area network, greatly facilitating the sharing of information between headquarters and the field offices.

FY 2002 and FY 2003 Planned Activities:

By the end of FY 2002, OHA expects to eliminate its present backlog of probate cases over 12-months-old. Thereafter, the Hearings Division expects to decide virtually all new probate cases within 12 months of the date they are received. OHA and BIA will collaborate on further revisions to both organization's probate rules as necessary to incorporate changes resulting from the recent Indian Land Consolidation Act Amendments and any new probate-related legislation that may be enacted.

OHA is also in the process of drafting new regulations governing the nature and timing of procedures for resolving non-probate cases brought before the Hearings Division. The proposed amendments include a section implementing the Administrative Dispute Resolution Act of 1996. The objective is to identify and facilitate ADR procedures, on a strictly voluntary basis, in order to reduce the parties' expenditures of time and money and the contentiousness often associated with adjudicatory proceedings. OHA plans to publish proposed regulations in FY 2002 and final regulations in FY 2003.

Program Change from FY 2002 Estimate: None.

Natural Resources Library
U.S. Department of the Interior
Washington, D.C. 20240

REF
KF
27
A64S4
1995
pt. 2
[Leg]

DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATIONS FOR 1996

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

SUBCOMMITTEE ON THE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES

RALPH REGULA, Ohio, *Chairman*

JOSEPH M. McDADE, Pennsylvania
JIM KOLBE, Arizona
JOE SKEEN, New Mexico
BARBARA F. VUCANOVICH, Nevada
CHARLES H. TAYLOR, North Carolina
GEORGE R. NETHERCUTT, JR., Washington
JIM BUNN, Oregon

SIDNEY R. YATES, Illinois
NORMAN D. DICKS, Washington
TOM BEVILL, Alabama
DAVID E. SKAGGS, Colorado

NOTE: Under Committee Rules, Mr. Livingston, as Chairman of the Full Committee, and Mr. Obey, as Ranking Minority Member of the Full Committee, are authorized to sit as Members of all Subcommittees.

DEBORAH WEATHERLY, LORETTA BEAUMONT, MARK MIODUSKI, and JOEL KAPLAN, *Staff Assistants*

PART 2

Justification of the Budget Estimates

	Page
Geological Survey	**1**
Minerals Management Service	**303**
Bureau of Mines	**493**
Office of Surface Mining Reclamation and Enforcement	**615**
Bureau of Indian Affairs	**773**
Territorial and International Affairs	**1201**

Printed for the use of the Committee on Appropriations

U.S. GOVERNMENT PRINTING OFFICE

88-940 O WASHINGTON : 1995

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-046960-0

Defendants' Exhibit No.10
Motion for Partial S/J
Trust Management

compliance with
for royalties paid
l programs under
ıreas to provide
nt negotiations.

ral rights, royalty
ist in monitoring
ıit revisions, coal
ıses and provide
ral development,

Justification of Program and Performance

Activity: Area Office Operations
Subactivity: Trust Services

Program Element		1995 Enacted To Date	Uncontrollable and One-Time Changes	Program Changes	1996 Budget Request	Change From 1995
Financial Trust Services	$(000)	2,390	58	0	2,448	58
	FTE	*55*	*0*	*0*	*55*	*0*
Trust Services, General	$(000)	812	17	0	829	17
	FTE	*11*	*0*	*0*	*11*	*0*
All Other Indian Rights Protection	$(000)	517	-9	0	508	-9
	FTE	*6*	*0*	*0*	*6*	*0*
Real Estate Services	$(000)	2,521	80	0	2,601	80
	FTE	*42*	*0*	*0*	*42*	*0*
Land Titles and Records Offices	$(000)	4,345	150	0	4,495	150
	FTE	*101*	*0*	*0*	*101*	*0*
Land Records Improvement	$(000)	1,169	50	600	1,819	650
	FTE	*33*	*0*	*0*	*33*	*0*
Environmental Quality Services	$(000)	153	121	0	274	121
	FTE	*2*	*0*	*0*	*2*	*0*
Total Requirements	$(000)	11,907	467	600	12,974	1,067
	FTE	*250*	*0*	*0*	*250*	*0*

Financial Trust Services

FY 1995 Plans and Accomplishments ($2,390,000; FTE 55): The Bureau is responsible for the accounting and disbursing of Individual Indian Monies (IIM) from the administration of trusts or restricted properties of individual Indians, or through per capita payments, judgments, awards, and claims. These responsibilities are discharged at the agency level, except for centralized IIM operations, which are conducted at four Area Offices. The Area Office staff coordinate the investment of trust funds, provide advisory services to agencies, reconcile collections and disbursements of tribal and individual Indian monies derived from the sale or lease of renewable and non-renewable trust resources (land, timber, minerals, and water), disburse per capita payments, judgments, awards, and claims, research special fiscal problems, and provide reports to individual Indians or tribes, the Treasury, the General Accounting Office, and Congress.

Trust Services, General

FY 1995 Plans and Accomplishments ($812,000; FTE 11): This program supports the administration of trust properties and protection of natural resources. Activities supported include studies, contracts, geographic information system agreements with tribes, and other

NOV 12 1996

Natural Resources Library
U.S. Department of the Interior
Washington, D.C. 20240

J
66

104TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
104–863

MAKING OMNIBUS CONSOLIDATED APPROPRIATIONS FOR FISCAL YEAR 1997

CONFERENCE REPORT

TO ACCOMPANY

H.R. 3610

SEPTEMBER 28, 1996.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1996

★ 27-557

Defendants' Exhibit No.11
Motion for Partial S/J
Trust Management

Funding is included as requested in the budget for the Haskell Indian Nations University and the Southwestern Indian Polytechnic Institute (SIPI). Funding constraints over the past few years have not allowed the Committees to provide the resources beyond those necessary to maintain current activities. To determine whether additional funds can be raised for these institutions through tuition fees, the Bureau should provide a report to the Committees by May 1, 1997 on the feasibility of charging tuition for both Haskell and SIPI. The report should explore options for reducing the impact of these fees, such as phasing the introduction of tuition fees and phasing the level of fees based on financial ability to pay. The report also should identify the number of students who would be able to pay tuition at each of these institutions. No action should be taken to implement any tuition fees until Congress has reviewed the feasibility of such fees.

The conference agreement earmarks $86,520,000 for welfare assistance payments as proposed by the Senate. The purpose of the cap is to preclude the Bureau from reprogramming from other programs or projects to pay welfare requirements. However, the cap is not intended to limit the flexibility of the tribes to reprogram funds within tribal priority allocations in order to provide welfare assistance payments as needed.

The Bureau of Indian Affairs has undergone significant downsizing during the past two years due to the Vice President's National Performance Review efforts and to reductions in personnel and funding. The Bureau is directed to proceed with reorganization and/or consolidation of central, area, and agency offices in consultation with the affected tribes and where opportunities for consolidation and/or closure exist due to significant progress made by Indian tribes to compact or contract Bureau operations. Any savings in resources made by these efforts should be made available for transfer to tribes and/or tribal priority allocations subject to reprogramming. The Bureau is further directed to report on its reorganization efforts within 120 days of enactment of this Act and submit a reprogramming prior to implementing reorganization and/or consolidation of these offices.

CONSTRUCTION

The conference agreement provides $94,531,000 for construction instead of $85,831,000 as proposed by the House and $93,933,000 as proposed by the Senate.

Increases above the House include $3,100,000 for education construction, facilities improvement and repair, of which $2,100,000 is to replace the unsafe Lac Courte Oreilles elementary school portable buildings with a permanent structure; $5,000,000 is for the Wapato irrigation project; and $600,000 is for construction program management.

The BIA should schedule planning and design of new or replacement school construction projects to keep pace with the BIA's ability to fund and construct these projects.

FY1996 JUL 17 1995

104TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 104–173

LAW REF

DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATIONS BILL, 1996

JUNE 30, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. REGULA, from the Committee on Appropriations, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 1977]

The Committee on Appropriations submits the following report in explanation of the accompanying bill making appropriations for the Department of the Interior and Related Agencies for the fiscal year ending September 30, 1996, the bill provides regular annual appropriations for the Department of the Interior (except the Bureau of Reclamation) and for other related agencies, including the Forest Service, the Department of Energy, the Indian Health Service, the Smithsonian Institution, and the National Foundation on the Arts and the Humanities.

CONTENTS

	Page number Bill	Report
Department of the Interior:		
Bureau of Land Management	2	12
U.S. Fish and Wildlife Service	9	22
National Biological Service		30
National Park Service	15	30
U.S. Geological Survey	18	39
Minerals Management Service	21	43
Bureau of Mines	23	47
Office of Surface Mining Reclamation and Enforcement	24	48
Bureau of Indian Affairs	27	51

91–751

Defendants' Exhibit No.12
Motion for Partial S/J
Trust Management

disapproving existing

ce Mining to make the
lete its environmental
roposed notice of rule-

N FUND

.....	$182,423,000
.....	185,120,000
.....	176,327,000
.....	−6,096,000
.....	−8,793,000

ion of $176,327,000 for
decrease of $8,793,000
elow the 1995 funding
on and the budget esti-
able:

(thousands of dollars) Budget Estimates	Committee Bill	Change from Estimates
146,543	140,000	−6,543
500	500	—
5,515	6,000	+485
26,739	25,000	−1,739
—	—	—
32,254	31,000	−1,254
—	—	—
789	686	−103
2,064	1,796	−268
2,950	2,345	−605
5,823	4,827	−996
186,120	176,327	−8,793

o initiate the Appalach-
id mine drainage prob-
es of streams. The Ad-
purpose.
inistration's request to
am (RAMP), which was
established capabilities
projects including those
interests of eliminating
lministrative costs, the

all Operator Assistance
ninistration, since suffi-
in 1996 to maintain an
vill review the need for

ecommended continuing
naintaining the Federal
ing expenditures in any
priated for Federal and
recommended for fiscal

year 1996 is $18,000,000. Bill language also is included to permit States to use prior year carryover funds from the emergency program without being subject to the 25 percent statutory limitation per State. The Committee also has recommended bill language which would fund minimum program State grants at $1,500,000 per State.

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

Appropriation enacted, 1995	$1,519,012,000
Budget estimate, 1996	1,609,842,000
Recommended, 1996	1,508,777,000
Comparison:	
Appropriation, 1995	−10,235,000
Budget estimate, 1996	−101,065,000

The Bureau of Indian Affairs was created in 1824, its mission is founded on a government-to-government relationship and trust responsibility that results from treaties with Native groups. The Bureau delivers services to over one million Native Americans through 12 area offices and 83 agency offices. In addition, the Bureau provides education programs to Native Americans through the operation of 117 day schools, 56 boarding schools, and 14 dormitories. Lastly the Bureau administers more than 46 million acres of tribally owned land.

Budgetary constraints coupled with significant reductions in domestic discretionary spending has resulted in the need to achieve savings for all of the agencies under the jurisdiction of the Interior Subcommittee. In light of this fact, the Committee's recommendation for the Bureau of Indian Affairs assumes that pay and fixed cost increases will be absorbed by the Bureau and that no new initiatives will be funded in fiscal year 1996.

The amounts recommended by the Committee for fiscal year 1996 compared with the budget estimates by activity are as follows: