UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEPARTMENT OF THE INTERIOR'S RESPONSE TO THE FOURTH REPORT OF THE COURT MONITOR AND THE SUPPLEMENTAL REPORT AMENDING THE SECOND AND FOURTH REPORTS OF THE COURT MONITOR

The Department of the Interior ("Interior") is committed to achieving trust reform. In its Notice of Proposed Department of the Interior Reorganization to Improve Indian Trust Assets Management ("Notice of Proposed Reorganization"), filed November 14, 2001, Interior responded positively to the question the Court posed at the October 30, 2001 status hearing, "[W]ho is in charge of trust reform"? See Tr. 42:25-43:1 (Ex. 1). This response addresses the factual assertions and conclusions contained in the Fourth Report of the Court Monitor ("Fourth Report") and in the Supplemental Report Amending the Second and Fourth Reports of the Court Monitor ("Supplemental Report").

I. INTRODUCTION

The Fourth Report, which reviewed the verification process for Interior's Seventh Quarterly Report, concluded that "[t]he Court-directed DOI trust reform effort is broken and has

not been and may not be capable of repair by the Interior defendants." Fourth Report at 28. The Fourth Report asserted that there has been little or no progress made on trust reform, either by this or the previous administration, and that the problems that led both to the current state of trust reform and the allegedly deficient Quarterly Reports are the result of "severe leadership, management, and systems problems that continue to exist and multiply within DOI." Id. at 28-29.

Interior acknowledges that the history of the management of the Individual Indian Money ("IIM") Accounts since 1887 has not been a model. Interior further acknowledges that the history of management over that 114 years has led to problems that are even more intractable than originally envisioned when Interior began to tackle trust reform following passage of the American Indian Trust Fund Management Reform Act of 1994. As a result, trust reform has not proceeded as quickly or as steadily as Interior, Congress, plaintiffs, or the Court would have liked. However, the Fourth Report's assessment of Interior's recent efforts is incorrect in three very significant ways. First, Interior's dedication to trust reform and to working openly and honestly with this Court is significant and unwavering. A response to the specific findings and conclusions to the contrary in the Fourth Report and the Supplemental Report appears below.

Second, Interior is capable of proceeding with trust reform. Interior's proposed reorganization, as discussed in the Notice of Proposed Reorganization, will consolidate Indian trust management functions under a new Assistant Secretary and bureau, which will provide accountability and align authority and responsibility. This will constitute the "paradigm shift in the management structure of the BIA and the conduct of trust reform by" Interior that the Fourth Report concluded was necessary to advance trust reform. Fourth Report at 23. Interior is

implementing an interim plan until the permanent reorganization can be completed. Third, in spite of the difficulties encountered over the past several years, Interior has made progress on which the new management structure will be able to build.

II. RELEVANT FACTUAL BACKGROUND[1]

Interior takes seriously its responsibility to produce quarterly reports that accurately and completely depict the status of trust reform. The Department of Justice ("DOJ") and Interior attorneys whose actions are discussed in the fourth and supplemental reports[2] took seriously their responsibilities to perform inquiries reasonable under the circumstances into the evidentiary support for their submissions to the Court. The Fourth Report and Supplemental Report focus on two broad factual areas. First, the Fourth Report and, in part, the Supplemental Report, focus on the verification process of Interior's Seventh Quarterly Report. As shown by the documents discussed below, the difficulty in that process resulted from an effort by Interior, including counsel, and DOJ counsel, to meet, not avoid, obligations to the Court. More importantly, in spite of that confusion, that verification process produced with respect to each substantive chapter of the report either: (1) certifications or assurances of accuracy without modification; or

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[1] Due to the relatively short span of time under which new counsel are operating in order to respond to the Court Monitor's reports and the lack of declarations from individuals, many of whom are the subject of contempt motions, this factual presentation is necessarily based largely on contemporaneous written records and the reasonable inferences that may be drawn from them. Interior reserves the right on behalf of itself and any individual employees or counsel to further challenge the factual assertions contained in these reports should further proceedings arise.

[2] The Court Monitor's findings of fact are subject to *de novo* review by the Court. See Order of Reference, April 16, 2001, ¶ 5 ("Mr. Kieffer's findings of fact shall be reviewed de novo.").

(2) written statements of specific objections or modifications, all of which were provided to the Court. Second, the Supplemental Report also focuses on DOJ's role in reviewing Interior's third and fourth quarterly reports. The evidence discussed below shows that DOJ conducted appropriate inquiry into Interior's process of creating these reports and that DOJ's review of those reports, including the Special Trustee Observations sections, sought to make the reports more clear, accurate, and complete.

A. The Verification and Review of the First Six Quarterly Reports

1. The Verification and Review of the First Quarterly Report and Revised High Level Implementation Plan ("Revised HLIP" or "HLIP II")

This Court's December 29, 1999 Order required Interior, beginning March 1, 2000, to submit quarterly reports "setting forth and explaining the steps that defendants have taken to rectify the breaches of trust declared today and to bring themselves into compliance with their statutory trust duties." Cobell v. Babbitt, 91 F. Supp. 2d 1, 56 (D.D.C. 1999), aff'd, 240 F.3d 1081 (D.C. Cir. 2001). The Court also ordered that "[e]ach quarterly report shall be limited, to the greatest extent practical, to actions taken since the issuance of the preceding quarterly report," and that the first report "shall encompass actions taken since June 10, 1999." Id.

a. *Interior's Compilation of the First Quarterly Report*

Because Interior's First Quarterly Report and Revised HLIP were filed on the same date, March 1, 2000, and covered much of the same information, the review processes for both documents overlapped. See Memorandum from Edith R. Blackwell, Deputy Associate Solicitor, Department of the Interior, to Jack Haugrud, Deputy Chief, Department of Justice, March 1, 2000 ("Mar. 1 Blackwell Memorandum") (Ex. 2) (explaining review process for both

documents). The Solicitor's Office at Interior and DOJ attorneys both reviewed each of these documents. See id. at 2-4; Memo from David Shuey, February 17, 2000 ("Feb. 17 Shuey Memo") (Ex. 3).

In preparing each chapter for the First Quarterly Report, after discussing the "information that needed to be part of the Quarterly Report" in meetings to review the Revised HLIP, each subproject manager drafted his or her section, "describ[ing] the changes from HLIP I to HLIP II and the changes and accomplishments since June, 1999." See Mar. 1 Blackwell Memorandum, Ex. 2 at 3. The process by which these sections were aggregated and reviewed was described by John Berry, Interior's Assistant Secretary of Policy, Management and Budget, whose office compiled the Revised HLIP and the First Quarterly Report. Letter from John Berry to Lois Schiffer, Assistant Attorney General, Mar. 1, 2000, at 2 (Ex. 4). Berry's letter indicated that Interior "exercised great care to verify that the reports are candid, complete, and accurate, and has employed an extensive process of redundant checks in developing these documents in order to verify the assertions in these reports." Id.

Berry's letter also explained that the report was compiled by a coordinator, who collected the chapters and circulated drafts, first among the offices submitting the information and later to a wider audience of "Bureaus charged with trust reform duties for their comments and questions." Id. Questions and disagreements were then "discussed and debated among the involved offices until all concerned reached agreement," drafts were circulated to DOJ, and the report was surnamed[3] "by all of the involved Bureaus, including my office and Office of Special

[3] Surnaming is a procedure that indicates concurrence with the content of a written document. Department of the Interior Secretarial Correspondence Procedures Handbook, at 26

Trustee, to ensure every office to the best of their knowledge and ability believes the assertions made in the documents were candid, accurate, and complete." Id. Berry concluded that "[t]he checks and re-checks inherent in the Department's process for developing these documents should provide the Department, the Court, and your office with the highest possible level of confidence in the completeness, candor, and accuracy of these documents." Id.

b. *DOJ's Role in the Review of the First Quarterly Report*

DOJ attorneys also played an independent role in reviewing the First Quarterly Report. This report, along with the Revised HLIP, provided an update to the Court with respect to the testimony and other evidence they had presented at trial. Therefore, during the five weeks leading up to the submission of the First Quarterly Report, three DOJ attorneys interviewed most of the Interior employees who had testified in the trial "about the representations they had made at trial . . . to provide a segue between the trial testimony . . . and the Revised HLIP." See Feb. 17 Shuey Memo, Ex. 3 at 1. In addition to interviewing these key individuals, DOJ attorneys participated in Interior's review of the report, including reviewing and commenting on multiple drafts. See Mar. 1 Blackwell Memorandum, Ex. 2 at 2-4.

2. The Verification and Review of the Second Quarterly Report

a. *Department of the Interior*

In preparing the Second Quarterly Report, Interior continued to "use the same process for finalizing report content and issues that we successfully utilized for the Revised HLIP" and the First Quarterly Report. E-mail from John Berry, May 19, 2000 (Ex. 5). John Berry, whose

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(ed. Oct. 1991) (Ex. 54).

office again prepared the report, noted that "[t]his report is a top priority of the department. It documents for the Court, Congress, and American Indians our commitment to and progress toward meaningful trust reform." Id. A March 28, 2000 memorandum from Anne Shields, Chief of Staff to the Secretary of the Interior, to the high level officials in charge of the various components of trust reform established a firm timetable for production of the Second Quarterly Report. See Mar. 28, 2000 Memorandum from Anne Shields (Ex. 6).

b. *Department of Justice*

The Second Quarterly Report was prepared in circumstances substantially different from those present three months earlier. First, an established process, involving many levels of review within Interior, was now in place for preparing the report. Second, the Revised HLIP was completed, leaving only the preparation of the Second Quarterly Report. Moreover, unlike the first report, which provided an update from the trial testimony put on by DOJ, the second report, consistent with the Court's order, updated only the first report, which was produced by Interior. Third, as ordered by the Court, the period covered by the second and subsequent reports was limited to the three months following the previous report, rather than the longer period following the trial in the summer of 1999 and January 31, 2000.

DOJ attorneys again reviewed drafts of the report, and the final report was accompanied by a transmittal letter from Lisa Guide, Acting Assistant Secretary of Policy, Management, and Budget. Letter from Lisa Guide to Lois Schiffer, Assistant Attorney General, June 1, 2000, at 1 (Ex. 7). Guide's letter stated that "the Department has exercised great care to verify that the reports are candid, complete, and accurate, and has employed a process of redundant checks in developing these documents in order to verify the assertions in these reports." Id. The letter

continued to describe the extensive process employed by Interior to ensure the accuracy of the reports. Although she noted that no "single person [could] have the first-hand knowledge to report on the status of each detail or confirm the complete accuracy of every underlying fact or assertion," Guide believed that the process overseen by her office, and which she described in detail, should provide Interior, the Court, and DOJ "with the highest possible level of confidence in the completeness, candor, and accuracy of these documents." Id.

3. Verification and Review of the Third through Sixth Quarterly Reports

a. *Department of the Interior*

The third and subsequent quarterly reports were prepared by the Office of the Special Trustee ("OST"). See Memorandum from Tom Slonaker dated July 14, 2000 (Ex. 8) ("The Office of the Special Trustee for American Indians has assumed responsibility for the preparation and submission of the quarterly status report to the Court."). The Special Trustee set a firm production schedule, establishing deadlines for review by OST, further internal review by Interior, review by DOJ, and surnaming by heads of the appropriate components within Interior. Id.

The Special Trustee's first draft transmittal letter was a one-line statement that did not provide the same assurances of accuracy and completeness as the first two transmittal letters in that it failed to include any detail about the process used by Interior in developing the report. See Ex. 9 ("This letter transmits Quarterly Report Number 3 on the Trust Management Improvement Project for the period May 1, 2000 to July 31, 2000 from the Department of the Interior to the Department of Justice."). In response to this draft transmittal, DOJ counsel David Shuey informed OST of DOJ's need for a transmittal memo on which DOJ could rely "to provide us

with the evidentiary basis for believing the facts in the 3rd Quarterly to be true." E-mail from David Shuey to Harriet Brown, copied to Principal Deputy Special Trustee, Thomas M. Thompson, August 29, 2000 (3:47pm) (Ex. 10). Mr. Shuey noted that a transmittal memo sufficient for this purpose "is essential for us to be able to file the document" and specifically referred to his obligations under Rule 11. Id. Later that same day, Mr. Shuey forwarded to the Principal Deputy Special Trustee draft language for such a transmittal letter, based on language included in the transmittal letters accompanying the first two quarterly reports. See E-mail from David Shuey to Thomas M. Thompson, Aug. 29, 2000 (5:01pm) (Ex. 11). On September 1, 2000, the Special Trustee transmitted the Third Quarterly Report with a cover letter that stated:

> Compilation of the Report is now done by the staff of OST under my direction and with the oversight of myself and my Principal Deputy, Tom Thompson, a senior career executive. As before, we require written input from all of our subproject managers, which is then edited and formatted. We use great care to verify the reports.
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> As the Report nears final form, drafts are sent for review and commentary to the most senior people in the bureaus and offices which touch trust reform within the Department. At the end of the process, a committee which I established since being confirmed . . . meets to finally approve the Report. This is followed by the 'surnaming' of the Report by, again, the senior Department people responsible for trust reform.

See Letter from Tom Slonaker to Lois Schiffer, Aug. 30, 2000 (Ex. 12). DOJ did not insist that the Special Trustee employ the specific language DOJ had proposed, as long as the language used provided the necessary assurances. In fact, the Special Trustee's language was very different. Compare language suggested at Ex. 11 ("The Department has exercised great care to verify that the reports are candid, complete, and accurate, and has employed a process of redundant checks in developing these documents in order to verify the assertions in these

reports.") with language quoted above. Along with the Special Trustee's transmittal letter, DOJ filed the Third Quarterly Report on September 1, 2000. The Special Trustee provided similar assurances of the accuracy and completeness of the fourth and fifth quarterly reports by continuing to describe the process by which the reports were prepared and vetted within the department, and by stating that OST used "great care to verify the content of the reports submitted." Letter from Tom Slonaker to Lois Schiffer, Nov. 30, 2000 (Ex. 13); Letter from Tom Slonaker to John Cruden, Feb. 28, 2001 ("Feb. 28, 2001 Letter") (Ex. 14). [4]

b. *Department of Justice*

As with the first two quarterly reports, DOJ reviewed and provided comments on the third through sixth quarterly reports. DOJ counsel David Shuey provided such comments on the Third Quarterly Report, on which the Supplemental Report focuses.[5] These comments pointed out inconsistencies in the report, asked for greater clarity, sought additional information, and provided general editorial advice. For example, in a set of comments dated August 9, 2000, Mr. Shuey recommended an expanded discussion in the TAAMS chapter of the report, stating that "[t]here needs to be a description here of how deployment will take place, what functions TAAMS will be capable of taking over, and how the existing LRIS systems will be shut down."

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[4] The Special Trustee and Carrie Moore of OST revised and updated the transmittal letter between the third and fourth quarterly reports. See E-mail exchange between Carrie Moore and Thomas Slonaker, Nov. 29-30, 2000 (Ex. 15). Among the changes was a modification of the phrase "we use great care to verify the reports," used in the Third Quarterly Report, to "we use great care to verify *the content* of the reports *submitted*." Id. (emphasis added).

[5] The Court Monitor does not indicate that he had access to Mr. Shuey's comments or that he questioned Mr. Shuey in preparing the Fourth Report. See Supplemental Report at 8 (stating that it was "unconfirmed at this point as to exactly what the DOJ concerns were and what was edited out of those Observations due to those concerns . . .").

Ex. 16 at 2. Mr. Shuey also stated that the TAAMS section "would benefit from more explanation" about the status of interfaces, an "issue for both the Pls. and the Judge." Id. Similarly, Mr. Shuey suggested providing a citation to the Federal Register notice so that the Court could review it. Id. On August 24, 2000, Mr. Shuey e-mailed Sabrina McCarthy of Interior's Office of the Solicitor, stating the need to "beef[] up [the report's discussion of] TAAMS. Having one and a half pages on one of the keys to trust reform . . . is not acceptable." Ex. 17. A comparison of the TAAMS chapters in the August 21, 2000 "DRAFT for DOJ Review" (Ex. 18) and the final report (Ex. 19) indicates that the TAAMS discussion was expanded.

Mr. Shuey also provided comments on the Special Trustee Observations section of the Third Quarterly Report, which was new to the report. In an August 23, 2000 e-mail to Sabrina McCarthy and Susan Offley at Interior, Mr. Shuey observed "that the new Special Trustee's summary was a positive addition" to the report. Ex. 20. Mr. Shuey made additional comments on the Special Trustee Observations on August 28, 2000. See E-mail from David Shuey to Sabrina McCarthy, August 28, 2000 (Ex. 21). Like his other comments, these comments pointed out typographical errors, asked for greater clarity, identified an incorrect date, sought further explanation of comments, and identified inconsistencies between the observations and the body of the report. Id. The comments reveal no attempt to delete any of the Special Trustee's comments or to limit or slant the information presented to the Court. Id. To the contrary, Mr. Shuey's comments indicate an effort to make this "positive addition" to the report clearer and more informative. The evidence shows no effort to mislead or deceive the Court. DOJ also provided comments on subsequent quarterly reports. See, e.g., Shuey comments on the Fourth

Quarterly Report, E-mail from David Shuey to Sabrina McCarthy re comments on the 4th Quarterly Report, (Ex. 22).

c. *The Special Trustee Revised the Transmittal Letter*

Although the Special Trustee had used similar language in his cover letter transmitting the third through fifth quarterly reports and, from the earlier correspondence between OST and DOJ – a copy of which was sent to his Principal Deputy, Thomas Thompson (Ex. 11) – had been informed of DOJ's reliance on the language in his letter, he removed the statement that his office used "great care to verify the content of the reports submitted" when transmitting the Sixth Quarterly Report. Compare Feb. 28, 2001 Letter, Ex. 14, with Letter from Tom Slonaker to John Cruden, Acting Assistant Attorney General, May 31, 2001 (Ex. 51). The letter continued to describe the process used to compile the reports, stating

> During the development process, drafts of the report are sent for review and comment to the most senior people in the bureaus and offices within the Department who are involved in trust reform. The report is reviewed by the members of the Trust Management Improvement Project Steering Committee, then circulated for clearance and final approval by the appropriate senior Department officials. This report is the result of a significant vetting and cooperation within the Department.

Ex. 51. In his October 15, 2001 memorandum to the File, the Special Trustee explained that he decided to stop using the term "verify" in connection with the reports after being informed "by staff that the word could be interpreted more broadly, viz., to determine or prove the truth, accuracy, and completeness of the information in the Report." Ex. 23. We are aware of no evidence indicating that persons outside of OST were informed that the Special Trustee was considering deleting this language from the transmittal letter forwarding the Sixth Quarterly

Report.

Following the release of the Second Report of the Court Monitor, which discussed the Special Trustee's deletion of the "great care to verify" language in the transmittal letter accompanying the Sixth Quarterly Report, on August 27, 2001, DOJ sent a letter to Michael Rossetti, Counselor to the Secretary, stating the need for verification of the Seventh Quarterly Report. See Letter from Sarah D. Himmelhoch to Michael Rossetti, Aug. 27, 2001 (Ex. 24). Copies of the letter were sent to William G. Myers, Interior's Solicitor ("the Solicitor"), and Sabrina A. McCarthy, Assistant Solicitor, Trust Reform Branch. The letter stated that before DOJ could file the Seventh Quarterly Report, Interior had to provide a statement that it had taken the necessary steps to verify the accuracy of that report, as had been provided with the first five quarterly reports. Id. DOJ counsel noted that such verification could "come either from Mr. Slonaker (addressing the entire report), from another senior Interior official (addressing the entire report), or from each of the individual project managers and Mr. Slonaker (each addressing his or her section of the report)." Id.

B. **The Verification and Review of the Seventh Quarterly Report**

1. Interior's Response to the Special Trustee Observations Section.

On August 17, 2001, the Special Trustee distributed a draft of his Special Trustee Observations section for the Seventh Quarterly Report to several Interior officials and a DOJ attorney for comment. See Memorandum from Jim Douglas, Chief of Staff, OST, Aug. 17, 2001 ("Aug. 17 Memorandum") (Ex. 25). One week later, on Friday, August 24, 2001, a draft copy of

> you to recommend a delay in filing the report. If that assumption is incorrect and you believe that the draft report needs to be amended materially prior to filing, we need to know immediately. The Solicitor will call you later today regarding the immediacy of your concerns.
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> If your concerns are not of such a nature as to require a delay, I nevertheless want to address your concerns quickly. As I am committed to provide the Court with reports that are both complete and of high quality, please provide to me by close of business next Friday, September 8, 2001, a detailed explanation of your concerns regarding the deficiencies of the Seventh Quarterly Report. I welcome your thoughts for improving the readability and format of future reports. If there are weaknesses in the content of our reporting to the Court, please advise me of your recommendations of the actions we need to take. We may need to prepare a supplemental report that would further clarify the status of trust reform for the benefit of the Court.

Ex. 28. The Secretary also noted that because DOJ required "certification of the contents of the seventh report prior to it being filed with the Court," she would "seek certification from the subproject managers who contributed to the report." Id.

Also on August 29, 2001, in response to the Special Trustee's verification concerns, see Interior's Motion for an Extension of Time to File Its Seventh Quarterly Report ("Motion for Extension"), Aug. 31, 2001, at 2 n.3 (Ex. 29), the Solicitor sent a memorandum to the Special Trustee's Chief of Staff, Jim Douglas, asking him to provide each subproject manager "with the opportunity to certify that he or she has provided complete and accurate information regarding the status of his or her project," Memorandum from William G. Myers III to Jim Douglas, Aug. 29, 2001 (Ex. 30). Noting that DOJ would not file the report "in the absence of adequate certification," the Solicitor requested that all executed certifications be returned by the following day, August 30, 2001. Id. Douglas immediately circulated to the subproject managers forms

the entire Seventh Quarterly Report, including a revised and more emphatic version[6] of the Special Trustee Observations, was distributed to several Interior officials for surnaming by the following Tuesday, August 28, 2001. See Memorandum from Special Trustee for American Indians, Aug. 24, 2001 ("Aug. 24 Memorandum") (Ex. 26). This new version of the Special Trustee Observations included a new final paragraph, stating:

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

See attachment to the Aug. 24 Memorandum.

On the first business day after the Special Trustee's new draft was circulated, the Solicitor sent a memorandum to Gale A. Norton, Secretary of the Interior ("the Secretary"), requesting a conference call with her to discuss the revised Special Trustee Observations section of the report. See Memorandum from Bill Myers to the Secretary, Aug. 27, 2001 (Ex. 27). On August 29, 2001, the Secretary sent a Memorandum to the Special Trustee, referencing the Special Trustee Observations section and, in particular, the Special Trustee's concern in the final paragraph of the section. The Secretary stated:

> Since I have not heard from you on this subject prior to my review of the draft, and since your office compiled the report, I assume that your concerns were of insufficient severity or immediacy for

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[6] For example, where the previous draft of the section had stated that the HLIP "came to a critical crossroads this spring and summer when decisions were required to be made on key projects," see attachment to Aug. 17 Memorandum, the new version stated that the HLIP "came to a critical point this spring and summer when certain subprojects reached a stage where their successful completion appeared to be at great risk," see attachment to Aug. 24 Memorandum.

providing the opportunity to certify, along with the Solicitor's memorandum and a copy of the Special Trustee observations. Memorandum from Douglas to HLIP/Breach Sub-Project Managers, Aug. 29, 2001 (Ex. 31). By August 30, only five subproject managers had submitted certifications.[7] See Memorandum from Jim Douglas to Solicitor, Aug. 30, 2001 (Ex. 32). A sixth certification was received the following day.[8] See Memorandum from Sabrina McCarthy, Aug. 31, 2001 (Ex. 33).

2. The Decision to File the Request for an Extension of Time.

On August 31, 2001, Interior filed its Motion for Extension. Ex. 29. In the motion, Interior informed the Court of the Special Trustee's concern with the report and stated that "additional review time is needed to allow for the filing of a verified report." Id. at 2. The motion noted that the Secretary had asked the Special Trustee to "detail his concerns relating to his ability to verify the accuracy of the Seventh Quarterly Report," and requested an extension of 30 days "merely to allow for the concerns the Special Trustee has expressed generally to be detailed and fully resolved before the Seventh Quarterly Report is filed in final form . . . ." Id. 2. Attached to the motion was a copy of the Seventh Quarterly Report, including the Special Trustee Observations and the written certifications that had been obtained at that point.

On September 4, 2001, John Miller, Deputy Special Trustee, "recapped" in a memorandum to Sabrina McCarthy, Assistant Solicitor, comments he had made to her and to the

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[7] The subproject managers for Probate, Trust Policies and Procedures, BIA Data Cleanup, MMS Systems Reengineering, and Computer and Business Systems Architecture submitted certifications by August 30, 2001. Ex. 34.

[8] The second subproject manager for Probate submitted this additional certification. Ex. 35.

Solicitor on the day of the filing of the motion for extension of time. Ex. 36. Miller stated that "the Special Trustee would not verify the report under any conceivable scenario encompassed by the proposed motion." Id.

3. The Alternative Certification Procedure.

The Special Trustee responded to the Secretary's request that he detail his concerns with the Seventh Quarterly Report on September 10, 2001. See Memorandum from the Special Trustee to the Secretary, Sept 10, 2001 (Ex. 37). The Special Trustee attached his Special Trustee Observation sections from previous quarterly reports to this memo and stated general concerns about the "serious and complex management problems faced by the Department." Id. Thereafter, Interior officials, including the Special Trustee, began to look for alternative methods for providing the necessary assurances of the accuracy and completeness of the quarterly report. On September 17, 2001, the Special Trustee forwarded to the Solicitor draft language for certifications from subproject managers. See Ex. 38. DOJ was also involved in refining the certification language. See Memorandum from the Solicitor to the HLIP/ Breach Subproject Managers from Solicitor, September 21, 2001 ("We have coordinated with the Department of Justice regarding the filing of the quarterly reports and refinement of the statement, attached.") (Ex. 39).

On September 21, 2001, the Solicitor sent to each subproject manager a memorandum with an attached certification. The memorandum was sent "through" three Assistant Secretaries and the Special Trustee, each of whom had line authority over one or more subproject managers. The certification stated:

I am the Subproject Manager of the above referenced project. I

> have asked those persons who provided information to me for compilation in this Report whether they believe the information they submitted to me is accurate. Based on the reasonable assurance I received in response to this inquiry, and to the best of my knowledge, information, and belief, this Report reasonably represents the current status of the tasks for which I am responsible.

Id. The memorandum required each subproject manager to exercise one of three options:(1) modify his or her respective portion of the report until he or she was comfortable signing the statement and then return the signed statement, the modification of the report, and a written explanation of the modification; (2) return a "detailed written explanation as to why you cannot sign the statement"; or (3) sign and return the certification. Id.

By the end of September, all but five subproject managers had provided written responses regarding the contents of their respective subchapters. Five signed certifications without modifications to the report. See Computer and Business Systems Architecture, September 25, 2001; TAAMS, September 25, 2001; Trust Policies and Procedures, September 26, 2001 (the word "certification" in the subject line of the document was changed to "statement"); MMS Systems Reengineering, September 26, 2001; Probate, September 27, 2001. See Ex. 40. Three others signed certifications accompanied by modifications. See Workforce Planning, September 2001; BIA Data Cleanup, September 26, 2001; Probate Implementation Project, September 26, 2001. See Ex. 41. The subproject manager for Appraisals declined to certify because he disagreed with a management decision reported in the chapter for which he was responsible, see Memorandum from Gabriel Sneezy, Appraisals Sub-Project Manager, to Solicitor, undated (Ex. 42); Declaration of Gabriel Sneezy ("Sneezy Decl.") at ¶ 5 (Ex. 53), and "the fact that [he] would not have an opportunity to review the final Appraisals chapter before the Quarterly Report was

filed with the Court." Ex. 53, ¶ 5. His response did not address the accuracy or completeness of the chapter. Ex. 42. The three certifications with modifications and the statement of the subproject manager for Appraisals were submitted to the Court as exhibits to the Notice of Filing.

Of the remaining five subproject managers, four wrote a memorandum to the Solicitor, dated September 27, 2001, stating reasons why they chose to exercise their option to decline to sign certifications.[9] Ex. 43. The memorandum provided a number of reasons, including (1) their belief that it was the responsibility of "officers of the Court" to certify to the Court and take responsibility for submissions to the Court; (2) the fear of having even an "innocuous" statement of theirs "challenged at some point by either the Plaintiffs, the Special Master, the Court Monitor, and/or the Judge"; and (3) the Court Monitor's recent "ridicule" of a subproject manager for certifying a subproject's status. Id. The four concluded the memorandum by stating that they would agree to follow the process of "surnaming [their] respective products" in the report. Id. The only remaining subproject manager, for Records Management, provided a written memorandum to the Solicitor stating he was unwilling to certify the report based on the advice of personal counsel. Ex. 44.

As a result of the concerns raised by these five subproject managers, counsel agreed to allow them the option of providing their assurances orally to counsel. See Notice of Filing of

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[9] The subproject managers for Information Collection, OST Data Cleanup, Internal Controls, and Training signed the memorandum. The copy of this memorandum attached to the Fourth Report also includes the subproject manager in charge of Records Management. This copy of the memorandum is apparently a draft, unsigned and dated one day before the date on the memorandum that was actually signed and sent to the Solicitor.

Interior's Seventh Quarterly Report and Related Papers, Oct. 3, 2001, at 3 n.2 (Ex. 45). Interior and DOJ counsel conducted telephone interviews of all five of these remaining subproject managers to inquire into the process used to prepare the report and to ensure that these individuals believed the report was an accurate summary of the status of their respective subprojects. See Notes of Interviews (Ex. 46). All five answered that the report was accurate. Id. The subproject manager for Records Management also provided an update of information related to his subproject by e-mail. Email from Ken Rossman, Oct. 1, 2001, Ex. 47. Thus, before the Seventh Quarterly Report was filed, each subproject manager had been contacted. Each had (1) provided written or oral assurances that their respective chapters were complete and accurate, and/or (2) provided written modifications or comments that were submitted to the Court as exhibits to the Notice of Filing.

III. RESPONSE TO COURT MONITOR'S CONCLUSIONS, DISCUSSION, AND REMARKS

A. The Verification Process of the Department of the Interior for the Seventh Quarterly Status Report Was Appropriate and Sufficient.

1. The Secretary's Response to the Special Trustee Observation Section Was Appropriate

On August 24, 2001, the Special Trustee circulated for surnaming the Seventh Quarterly Report, including his revised Special Trustee Observations section, which noted a concern about the "completeness [and] the quality of the information provided" in the report. Ex. 26. On the following business day, August 27, 2001, five business days before the filing deadline for the Seventh Quarterly Report, the Solicitor informed the Secretary about this statement. Ex. 27 at 6.

The Secretary's response, in a memorandum issued two days later, was to ask the Special Trustee (1) if his concerns merited delaying the filing of the report, modifying the report, or submitting a supplement to the report once filed; (2) to provide a detailed explanation of his concerns with the report; and (3) to provide his recommendation on how to proceed. Ex. 28.

The Fourth Report criticizes the Secretary for questioning the Special Trustee, rather than BIA senior managers, "regarding his expressed concerns about the Seventh Quarterly Report's accuracy and completeness." Fourth Report at 27. However, the Special Trustee – not BIA senior managers – expressed the concerns. Thus, it was reasonable for the Secretary to ask the Special Trustee about his concerns so she could address them. The Secretary's request for an explanation of the Special Trustee's concerns displays both an effort to insure an accurate and complete submission to the Court and an effort to address the Special Trustee's concerns.

The conclusion in the Fourth Report that "[t]he Interior defendants did not seek to resolve the Special Trustee's concerns," Fourth Report at 24, is mistaken. To the extent that the Special Trustee's concerns involved his inability to verify the information being provided by project managers not directly under his line control, Interior sought to address this concern by obtaining certifications directly from each subproject manager. See Motion for Extension, Ex. 29 at 2 n.3. To the extent that the Special Trustee's concerns involved the management structure of trust reform, they continue to be addressed, most recently in restructuring plans described above and in more detail in the Notice of Proposed Reorganization filed on November 14, 2001.

The Fourth Report concludes that the Secretary's and her attorneys' "efforts to have [the Special Trustee] . . . verify th[e] Quarterly Report show a continued willingness of this administration to mislead this Court to protect their litigation posture regarding their and their

subordinates' continuing management failures." Fourth Report at 27. We respectfully urge that this conclusion is not supported by the facts. First, the Fourth Report contains no evidence that the Secretary or her attorneys asked the Special Trustee to verify anything that he did not believe to be accurate and complete. Significantly, the Secretary's August 29, 2001 memorandum did not ask the Special Trustee to verify the report. Instead, it requested detailing of his concerns so that they could be addressed. Ex. 28.

Second, we respectfully urge that it is appropriate for the Secretary to request that one of her senior officials verify a report when: (1) the report explains the status of projects that he monitors; (2) he is in charge of producing the report; and (3) he knew he was preparing the document to be submitted to a Court. If the official's response is that the report is inaccurate or incomplete, that should raise serious concerns, and it is entirely appropriate to require an explanation of the ways in which the report is deficient and what can be done to correct the deficiencies.

2. The Motion for Extension of Time Was Not Misleading

The Fourth Report concluded that Interior's Motion for Extension inaccurately stated the reason for which extra time was requested. Fourth Report at 9-10. It further concluded that the real reason for the extension of time was to find a way to verify the report, and not to address the Special Trustee's concerns. Although the Fourth Report did not state explicitly any motive for Interior to misrepresent the reason for the request, it suggested that it was to hide the problems in the verification process and/or the concerns about the report. These conclusions and this implication are mistaken. The motion for extension of time stated explicitly that the Special Trustee had concerns about the completeness and quality of information in the report, and also

noted that each subproject manager was given the opportunity to certify the information he or she had provided and that only six had done so. Motion to Extend at 29 n.2. Interior, therefore, disclosed the precise concerns and verification problems with which it was dealing.

The Fourth Report relied on a memorandum from John Miller to Sabrina McCarthy indicating that Miller informed Ms. McCarthy and the Solicitor on August 31, 2001, the day the motion for extension was filed, that the Special Trustee "would not verify the report under any conceivable scenario encompassed by the motion." This reliance is misplaced for two reasons. First, it was reasonable for Interior officials to believe that they could address the Special Trustee's concerns, thereby allowing him to verify the report. The Secretary's request that the Special Trustee provide a detailed explanation of his concerns and her statement that she wanted to address quickly his concerns indicate that she thought this was possible.

Second, the Fourth Report mistakenly reads into the Motion for Extension a statement that the sole purpose of the motion was to obtain the Special Trustee's verification. The motion requests the extension to allow the Special Trustee's concerns to be "detailed and fully resolved." Ex. 29. Given the lack of specificity of the concerns stated in the Special Trustee Observation section of the Seventh Quarterly Report, it was reasonable to expect that it would be possible to detail and resolve these concerns, even if he ultimately declined to verify the report.[10]

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[10] The Fourth Report indicates that in an interview conducted after October 3, 2001, the Special Trustee confirmed John Miller's statement of his position and further stated that "[h]e had seen no possibility that he or BIA senior management would be able to resolve his concerns expressed in his Observations and later memorandum response to the Secretary within the time period requested in the DOJ motion for an extension of time." Fourth Report at 5. Significantly, the Special Trustee's memorandum was delivered six business days after the motion for extension was filed, and Miller's September 4, 2001 "recap" of his statements to Ms. McCarthy and the Solicitor on August 31, 2001, stated that the Special Trustee would not verify the report

3. Interior Acted Reasonably to Develop an Appropriate Alternative Process to Verify the Content of the Seventh Quarterly Report to DOJ and the Court

Although the Special Trustee declined to verify the Seventh Quarterly Report, DOJ continued to require from Interior an assurance of the accuracy and completeness of the report before DOJ would agree to file it. In the August 27, 2001 letter to Michael Rossetti, DOJ counsel identified three ways in which Interior could satisfy this requirement: (1) the Special Trustee could provide the appropriate assurance for the entire report; (2) another senior Interior official could provide the appropriate assurance for the entire report; or (3) the individual project managers, for their respective chapters, and the Special Trustee, for his observation section, could provide the appropriate assurances.[11] Ex. 24.

Although the first effort to obtain certifications from all subproject managers, in an effort to address the Special Trustee's concerns, had proved unsuccessful, Interior tried again after the Special Trustee's September 10, 2001 response to the Secretary's inquiry. This effort entailed providing the subproject managers with the opportunity to certify that they had inquired into the accuracy of the information provided to them, that they received reasonable assurances from this

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in the extra time sought by the extension, not that his as yet unarticulated concerns could not be detailed and addressed during that time.

[11] The Fourth Report apparently concluded that the third option required both that individual subproject managers verify their respective chapters and that the Special Trustee verify the entire report. See Fourth Report at 9 ("But in each case, a senior DOI official was expected to verify the Seventh Quarterly Report for the Secretary of the Interior."). This conclusion is mistaken. The third option, permitting an assurance "from each of the individual subproject managers and Mr. Slonaker (each addressing his or her section of the report)," provides that the Special Trustee's certification would address only "his . . . section of the report," the observations. Ex. 24. Otherwise, option three would essentially be a more redundant version of option one (i.e., having the Special Trustee certify the entire report).

inquiry, and that, to the best of their knowledge, the Seventh Quarterly Report "reasonably represents the current status of the tasks for which" they were responsible. Ex. 39. In the alternative, subproject managers were advised that they could modify their sections of the report until they believed the sections were accurate, and then sign the certification, or decline to sign the certification and provide an explanatory statement.

The Fourth Report concluded that the Secretary's and her attorneys' "efforts to have . . . the subproject managers verify th[e] Quarterly Report show a continued willingness of this administration to mislead this Court to protect their litigation posture regarding their and their subordinates' continuing management failures." Fourth Report at 27. The evidence is to the contrary. First, although subproject managers were required to respond, at no time were they directed to certify the reports. Before the request for extension was filed, each subproject manager was to " be presented with opportunity to certify" a statement assuring the accuracy of information he or she provided. It is hard to imagine less coercive language. That more than half of the subproject managers did not respond to this opportunity indicates that they felt no coercion. The second time the subproject managers were given the opportunity to certify, they were given three options, including an option not to certify, but to explain reason(s) why they could not do so. That five subproject managers took advantage of this option not to certify shows again that they did not feel compelled to certify. These facts establish a deliberate and legitimate effort by Interior to determine from those most familiar with the information whether or not the information in the Seventh Quarterly Report was accurate, not to coerce certification.

Second, it was appropriate to request government officials to certify respective chapters of a report when: (1) they provided most, if not all, of the information in their respective

chapters; (2) they are the people most knowledgeable about the accuracy and completeness of the information in their respective chapters; (3) it is necessary to make sure that the information is accurate and complete in order to submit it to a Court; and (4) they were given the option of declining to certify and explaining their reasons. This was not an effort to mislead the Court, but, rather, to ensure that the Court received accurate and complete information, enhanced by the modifications submitted through this process.

4. Certifications and Oral Assurances Obtained from Subproject Managers Were Legally Sufficient to Verify the Accuracy of the Entire Report

While the verification process of the Seventh Quarterly Report, differed from the process for previous reports, and was not the product of an "agreement,"[12] the end result, which was disclosed fully to the Court, was a collection of written statements and oral assurances sufficient to satisfy Interior's obligation to this Court. Every subproject manager ultimately either: (1) signed a written certification without qualification, see Ex. 46; (2) provided an oral certification without qualification, see Ex. 46; (3) provided a written or oral certification and submitted modifications to his or her respective chapter, see Ex. 41; or (4) in one case, submitted a written statement explaining that he would not certify because he did not agree with a decision that was

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[12] The Fourth Report mistakenly concluded that the "agreement" referenced in the October 3, 2001 Notice of Filing applied to the Seventh Quarterly Report. See Fourth Report at 10 ("The subsequent 'agreement' to allow the subproject managers to either certify, surname, or orally report to DOJ counsel on the accuracy of their reports in the Seventh Quarterly Report . . . is farcical."). No document or other record was cited for the proposition that any Interior or DOJ officials considered the verification process for the Seventh Quarterly Report an "agreement." Rather, the Notice of Filing stated that "the Solicitor, subproject managers, and senior Interior managers" came to an agreement on "steps to improve the review of the Quarterly Reports." Ex. 45 at 2. The remainder of the paragraph makes clear that the agreed-upon steps will apply "for the Eighth and all future Quarterly Reports." Id. The subsequent paragraph in the notice discussed the process used in the Seventh Quarterly Report. Id. at 3.

described in the chapter (but did not disagree with the accuracy of the description of that decision), see Ex. 42. In the latter two categories, the written submissions of the subproject managers were attached to the Notice of Filing, thus disclosing to the Court the precise concerns of each subproject manager. Interior also attached to the Notice of Filing a copy of the memo sent by the four subproject managers who declined to certify in writing when first given the opportunity to do so. Ex. 45. Thus, Interior laid out for the Court its verification process, including the shortcomings. Notably, almost every document cited in the Fourth Report as a basis for concluding that the Interior defendants were hiding information from the Court was filed with the Court as an attachment to Interior's Motion for Extension and/or Notice of Filing.

The Fourth Report stated that "[a]t least two subproject managers (Policies and Procedures, and Appraisals) interviewed by the Court Monitor asserted that, contrary to the representations of DOJ counsel to this Court, they neither certified or re-certified their Chapters nor were interviewed by DOJ counsel concerning those Chapters' accuracy and completeness." Fourth Report at 12. These assertions are incorrect. First, the Policies and Procedures subproject manager twice provided assurances of the accuracy of the report. See Exs. 34 and 40. The subproject manager certified the first time he was given the opportunity. See Ex. 34. On the "re-certification," he replaced the word "certification" with the word "statement" in the subject line of the memorandum, but he did not alter the text in any way. See Ex. 40. Therefore, on September 26, 2001, he signed the statement that, *inter alia*, "to the best of [his] knowledge, information, and belief, this Report reasonably represents the current status of the tasks for which I am responsible." Id. There was no reason for him to be interviewed by DOJ counsel.

Second, the Notice of Filing does not represent that every subproject manager who did

not certify was interviewed by counsel. Rather, the Notice of Filing states that certain subproject managers required changes to the report before they could provide certifications. Included in this group was the Appraisals subproject manager, who had chosen the third option offered by the Solicitor, to "return a detailed written explanation as to why you cannot sign the statement." Ex. 26. The subproject manager's response stated his disagreement with a "decision made by senior management" not to realign authority over appraisers under him, which was described in the Appraisals chapter. Ex. 42; see also Sneezy Decl., Ex. 53, ¶ 5. He also disagreed with a "legal examination of the realignment" prepared by the Solicitor's Office, in which he claims not to have been involved. Ex. 42. In this "detailed written explanation as to why you cannot sign the statement," the subproject manager did not identify any concern with the accuracy or completeness of the Report. Ex. 42.[13] The statement in the Notice of Filing was accurate; although he was not interviewed, the subproject manager provided a statement as to the reason he had not certified and that statement was provided to the Court with the Notice of Filing.

B. The Verification Process of the Department of Justice for the Quarterly Status Reports Was Appropriate, and Satisfied the Requirements of Rule 11.

1. Federal Rule of Civil Procedure 11

Rule 11 of the Federal Rules of Civil Procedure states that by presenting any "pleading, written motion, or other paper" to a court, the presenting attorney

> is certifying that to the best of the person's knowledge, information,

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[13] Previous to being presented with the opportunity to certify, the subproject manager had reviewed a draft of the Appraisals chapter and had "not notice[d] anything in it that was inaccurate." Sneezy Decl., Ex. 53, ¶ 6. After having subsequently reviewed the final version, he has "no concerns or reservations regarding the accuracy or completeness of the information presented in the chapter." Id., ¶ 7.

> and belief, formed after an inquiry reasonable under the circumstances, . . . it is not being presented for any improper purpose, . . . [and] the allegations and other factual contentions have evidentiary support . . .

Rule 11 "does not extend to isolated factual errors, committed in good faith, so long as the pleading as a whole remains 'well-grounded in fact.'" See Forrest Creek Assoc., Ltd. v. McLean Sav. & Loan Ass'n 831 F.2d 1238, 1244-45 (4th Cir. 1987). As explained in the Advisory Committee notes,

> [t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Advisory Committee Note on 1983 Amendment to Rule 11. An attorney is permitted to rely on the objectively reasonable representations of his client. Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1329-30 (2d Cir. 1995); see also Recommendation and Report of the Special Master Regarding Plaintiffs' Allegation of Impropriety in the Creation of the March 19, 1999 Declaration of Carolyn Smalley at 2 n.1 (September 15, 2000) ("In this jurisdiction, counsel may rely on representations by a client as the basis for a filing, provided that the representation is based on statements or representations that are under the circumstances objectively reasonable.") (quotations and citation omitted); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401-02 (1990) (the amount of time available is also a factor affecting the reasonableness of counsel's inquiry).

2. The Supplemental Report's Contentions as to the Third and Fourth

Quarterly Reports[14]

a. *DOJ Counsel Acted Appropriately in Reviewing and Commenting on the Third and Fourth Quarterly Reports*

The Supplemental Report concludes that because DOJ attorneys were part of the review process for the quarterly reports and made comments on the Special Trustee observation sections of those reports, among other sections, the DOJ attorneys were aware of the process of "limiting the information that was provided to this Court of the concerns of the Special Trustee . . . and apparently played some role in it." Supplemental Report at 8. At least two significant problems undermine this assertion.

First, the Supplemental Report did not cite documents or other evidence showing that any DOJ attorneys were aware of any alleged effort by anyone to limit the Special Trustee's comments. Second and more importantly, the record of the actual comments made by DOJ attorney David Shuey shows that his concerns lay in ensuring that the reports, including the Special Trustee Observation sections, became more accurate, clear, informative, and complete. See Part II.A.3.b., supra. These contemporaneous records contradict the Supplemental Report's conclusions. For example, after noting that he believed "the new Special Trustee's summary was a positive addition" to the report on August 23, 2000, Ex. 20, Mr. Shuey made a series of comments on August 28, 2000, which asked the Special Trustee to provide more information and explanation, not less, in addition to making general editorial comments, Ex. 21. The Supplemental Report did not cite evidence that indicates that any DOJ attorney attempted to limit

[14] This section addresses only those quarterly reports discussed in the Supplemental Report, the third and fourth.

the Special Trustee's presentation of information. To the contrary, substantial and uncontroverted evidence reveals that David Shuey acted appropriately in providing helpful comments on the reports that encouraged the Special Trustee to provide more information and to further explain his concerns to the Court.

b. *DOJ Was Justified in Believing the Special Trustee Understood the Verification Concept*

The Supplemental Report concluded that the Office of the Solicitor and DOJ attorneys failed "to properly advise the Special Trustee on what his legal obligations were regarding the those documents." Supplemental Report at 7. The evidence does not support this contention. First, language quoted in the Supplemental Report reveals that, in the preparation of the Third Quarterly Report (the first one verified by the Special Trustee), DOJ attorney Shuey informed OST that DOJ would "rely on the ST's transmittal to provide us with the evidentiary basis for believing the facts in the 3rd Quarterly to be true." This notified the Special Trustee of the import of the language included in the letter. Second, as noted above, the language used by the Special Trustee in his transmittal letters was his own language, not that of DOJ. Compare Ex. 11 with Ex. 12. Significantly, the Special Trustee adopted a change to this language for the letter submitted with the Fourth Quarterly Report to indicate that his office verified *the content* of the reports, not just that he thought the sources were reliable. See Exs. 12, 13, 49. Third, "verify" is commonly understood to mean: "1. to prove the truth of; confirm. 2. to ascertain the truth, authenticity, or correctness of. . . ." The Random House College Dictionary, 1461 (1st ed.

1980).[15] Thus, it was reasonable for the DOJ and Office of the Solicitor attorneys to assume the meaning of the word "verify" was understood.

c. *The Special Trustee's Transmittal Letters Provided a Reasonable Basis for DOJ to Believe the Factual Assertions in the Third and Fourth Quarterly Reports*

The Supplemental Report concluded that "the requirement that a verification be made in the Quarterly Reports without more involvement of the DOJ in the process of review of the Quarterly Reports and the factual situations on which they were based is not sufficient to satisfy a Rule 11 review." Supplemental Report at 8. As reflected in the record, the DOJ attorney who signed the notices of filing for those two reports had the following assurances of the accuracy and completeness of the reports: (1) in each case, he received a letter from the Special Trustee describing the process by which the accuracy of the reports was secured and stating that OST – the office that produced all three reports and had supervisory authority over some of the components – had taken great care to verify the content of the reports, see Exs. 12, 13 and 49; (2)

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[15] The "legal" definition of "verify" is nearly identical:

1. To prove to be true; to confirm or establish the truth or truthfulness of; to authenticate.

2. To confirm or substantiate by oath or affidavit; to swear to the truth of.

Black's Law Dictionary (7th ed. 1999)

in each case, he personally reviewed and commented on drafts of the reports, giving him an opportunity to question items about which he had concerns; and (3) he had been closely involved in reviewing the First Quarterly Report and understood the process by which it was developed. Under the circumstances, this constituted a sufficient inquiry to satisfy Rule 11. See, e.g., Hadges, 48 F.3d at 1329-30 ("[A]n attorney is entitled to rely on the objectively reasonable representations of the client.").

3. The Fourth Report's Assertions as to the Seventh Quarterly Report

a. *DOJ Counsel Did Not Misrepresent the Need for an Extension to File the Seventh Quarterly Report*

The Fourth Report asserted that Interior's Motion for Extension inaccurately stated the reason for which extra time was requested. Fourth Report at 9-10. For the reasons stated above, that conclusion is incorrect. See Part III.A.2., supra. Moreover, to the extent that conclusion is based primarily on the September 4, 2001 memorandum in which John Miller stated that he had previously informed Sabrina McCarthy and the Solicitor that the Special Trustee "would not verify the report under any conceivable scenario encompassed by the proposed motion," Ex. 36, the Fourth Report provided no evidence suggesting that the DOJ counsel who signed the motion for extension saw or was informed about the conversations "recapped" in the Miller memorandum or the conversations referenced in it before the motion for extension was filed. The Fourth Report identifies no evidence suggesting that DOJ counsel believed the reason for the request for an extension was anything other than as stated in that motion.

b. *The Statements Made in the Notice of Filing of Interior's Seventh Quarterly Report and Related Papers Were Accurate*

The Fourth Report challenged the accuracy of at least two statements made in the Notice

of Filing of Interior's Seventh Quarterly Report and Related Papers. In doing so, it challenged DOJ counsel's compliance with Rule 11 obligations. Neither challenge has merit. First, the Fourth Report challenged the assertion that "Interior and undersigned counsel conducted inquiries of each subproject manager" based on the mistaken belief that two subproject managers had neither provided written assurances nor been contacted orally. As explained above in Part III.A.4., the Policies and Procedures subproject manager provided two written assurances and the Appraisals subproject manager provided a written response that was attached to the Notice of Filing.

Second, the Fourth Report indicated that the Notice of Filing's representation that an "'agreement' to allow the subproject managers to either certify, surname, or orally report to DOJ counsel on the accuracy of their reports in the Seventh Quarterly Report while still insisting that receiving these disparate assurances from the subproject managers was the equivalent of a verification by a senior DOI official is farcical." Fourth Report at 10. As explained above, the Fourth Report is mistaken as to what the Notice of Filing referred to as an "agreement." See supra, 23-24 n.11. Moreover, no one at Interior or DOJ has contended that assurances from subproject managers are "the equivalent of a verification by a senior DOI official." However, when the Special Trustee noted concerns regarding the verification of the Seventh Quarterly Report, DOJ and Interior sought an alternative that would still meet the requirements of Rule 11, or not filing quarterly reports, which would have put Interior in violation of the Court's December 29, 2001 Order. For the reasons explained below, the process described in the Notice of Filing satisfies the requirements of Rule 11, regardless of what other methods of satisfying Rule 11 may or may not have been available.

c. *DOJ Counsel Fulfilled Their Obligations Under Rule 11 in Filing the Seventh Quarterly Report*

DOJ counsel fully satisfied the requirements of Rule 11. While not orderly or accomplished by "agreement," the certifications and assurances provided by the subproject managers for the Seventh Quarterly Report that were forwarded to and obtained by DOJ counsel were reasonable, proper, and appropriate under the circumstances. As explained above in Parts III.A.3. and 4, for the Seventh Quarterly Report, Interior developed an alternate process by which the persons most knowledgeable about the accuracy and completeness of the information in the report – the subproject managers – were contacted regarding their respective chapters. Each subproject manager either (1) provided written or oral assurances that his or her respective chapter was complete and accurate, or (2) provided written modifications or comments regarding his or her chapter. On that basis, counsel's inquiry was objectively reasonable under the circumstances and her submission to the Court was well grounded in fact. Moreover, the fact that Seventh Quarterly Report came accompanied by the explanatory documents and modifications demonstrates counsels' efforts to ensure that the Court had complete and accurate information and that the process was transparent.

C. The Record Does Not Demonstrate that the Information Presented in the BIA Data Cleanup Chapter Was Inaccurate

The Fourth Report concludes that the BIA Data Cleanup chapter of the Seventh Quarterly Report is inaccurate because it only reports on the data cleanup activities of DataCom and does not report on the data cleanup work of BIA personnel. Fourth Report at 15-16. The Fourth Report also concludes that "BIA personnel . . . are faced with the major data cleanup work that is ongoing or left to be done." Id. at 16. The Fourth Report does not identify evidence supporting

these conclusions, although it appears that they are based on information provided to the Court Monitor at an August 28, 2001, BIA Data Cleanup meeting or in interviews with unnamed individuals. Id. at 15-16.

The BIA Data Cleanup subproject manager, in contrast, believed that the Seventh Quarterly Report was accurate because "[h]e did not believe that there was very much data cleanup work performed by BIA personnel," and "most of the data cleanup was being accomplished by the DataCom contractor." Id. at 15. He based his conclusion on "reports of his Regional Data Cleanup Administrators, the DataCom contractor, and his immediate subordinate." Id. at 14. Even so, the subproject manager is attempting to confirm his understanding through a process he described in his statement of modifications to the report accompanying his certification:

> The BIA has been asked to assess and report on the status of data cleanup work accomplished by BIA staff. A regional data call has been initiated and results will be reported in the next quarterly report. Based on preliminary feedback, however, this will not be a significant percentage of the total. The Regional status reports below indicate contractor status followed by an overview of BIA staff work.[16] The BIA sub-project manager will submit a white paper on the efficiency of collecting information that falls in to the category of data cleanup that is conducted as part of regular job duties to the Special Trustee during the next quarter.

Terrance L. Virden, Statement Regarding Status of Project Reported in Seventh Quarterly (Oct. 3, 2001) (Ex. 50). Should Interior, through the data call, determine that BIA personnel are

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[16] The overview of BIA staff work that followed in the Quarterly Report indicated that the Regions did not have staff dedicated to data cleanup, which is "conducted routinely in the performance of BIA staff regular work duties." Terrance L. Virden, Statement Regarding Status of Project Reported in Seventh Quarterly at 2 (Oct. 3, 2001) (Ex. 50).

conducting more data cleanup activities as part of the BIA Data Cleanup subproject than has been previously reported, any previous under-reporting of such activity will be remedied. Interior has stated that "[t]he Regional Data Administrators will report on the assignments and activities being completed by BIA personnel." Seventh Quarterly Report at 15.[17]

D. The Record Does Not Demonstrate that the Information Presented in the BIA Appraisals Chapter Was Inaccurate

Although the Fourth Report concluded that the BIA Appraisals Chapter of the Seventh Quarterly Report was "troubling," it did not conclude that the chapter was "inaccurate or incomplete." Fourth Report at 17; see also Sneezy Decl., Ex. 53, ¶ 7 ("I have no concerns or reservations regarding the accuracy or completeness of the information presented in the" Appraisals chapter of the Seventh Quarterly Report."). Rather, the "troubling" aspect was said to be the decision not to realign authority over appraisal staff in accord with the recommendation of the Special Trustee. Id. First, it is important to note that the Fourth Report's complaint here is not that the BIA Appraisal Chapter was inaccurate, but that it accurately described a decision with which the subproject manager disagreed. Second, the Fourth Report acknowledged that the Special Trustee did not attempt to use the authority given him by the Secretary's July 10, 2001 Memorandum and Order No. 3232 to "issue written directives detailing [an] appropriate change in policy or practice" when the Special Trustee determines that such policy or practice "either hinders or may hinder trust reform." Id. at 18. The Fourth Report did not provide evidence to indicate that the exercise of this power, which appears to be designed for this type of dispute,

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[17] See also Consolidated Opposition to Plaintiffs' August 27, 2001 And October 19, 2001 Motions for Orders to Show Cause Why Interior Defendants And Their Employees and Counsel Should Not Be Held in Contempt at IV.B.

would not have been effective.

In any event, in the attached memo from the Assistant Secretary-Indian Affairs to the Special Trustee, dated November 8, 2001, the Assistant Secretary stated that he is "in complete agreement that the appraisal function needs to be relocated outside of BIA." Ex. 52. Moreover, the Assistant Secretary sought and obtained the Special Trustee's "concurrence under the authority given you in Secretarial Order 3232." Id.

E. The Record Does Not Demonstrate that the Information Presented in the TAAMS Chapter Was Inaccurate

In his discussion of the TAAMS section of the seventh quarterly report the Court Monitor takes issue with the decision to postpone until the next quarterly a reporting on "the exact status of each of the four regional offices" that use the TAAMS current title module. Fourth Quarterly Report, 20. The Court Monitor states that the "Seventh Quarterly Report's failure to provide this known or easily retrievable information is tantamount to withholding information from this Court and makes the TAAMS subproject Chapter, as summary in nature as it is, misleading and inaccurate." Fourth Court Monitor Report at 21. Interior disagrees with this assessment. Although the decision to postpone reporting on the TAAMS title module might make the report less complete than it could have been, it does not make it "misleading" or "inaccurate," particularly where Interior stated explicitly that this information would be provided in the next quarterly report.

Furthermore, in the Seventh Quarterly Report, Interior reported to the Court that it had contracted with EDS "to provide an independent analysis of the TAAMS project and the associated BIA data cleanup effort." Seventh Quarterly Report at 5. This analysis would provide

the Special Trustee with an evaluation of "project management, software development, schedules, resources, functionality, contractors, system deployment, implementation, training, and documentation" during the time prior to the subsequent quarterly report. Id. This independent analysis of TAAMS would allow Interior to provide the Court with a more complete assessment of TAAMS for the Eighth Quarterly Report than Interior could provide at the time of the Seventh Quarterly Report. In light of the pending EDS analysis, Interior's decision to wait until the next Quarterly Report to discuss the exact status of the TAAMS title module was reasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2001, I served a copy of the foregoing DEPARTMENT OF THE INTERIOR'S RESPONSE TO THE FOURTH REPORT OF THE COURT MONITOR AND THE SUPPLEMENTAL REPORT AMENDING THE SECOND AND FOURTH REPORTS OF THE COURT MONITOR upon the following via the means indicated:

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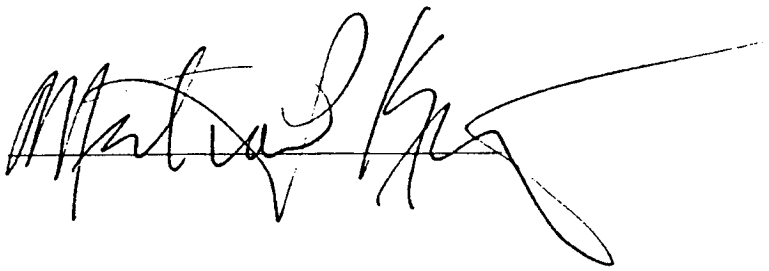
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