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.	)	
	)	

DEPARTMENT OF THE INTERIOR'S RESPONSE
TO THE EIGHTH REPORT OF THE COURT MONITOR

The Secretary of the Interior ("Secretary") and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") submit this Response to the Eighth Report of the Court Monitor ("Eighth Report"), filed July 11, 2002. The Eighth Report is a critique of Interior's July 2, 2002 Report to Congress on the Historical Accounting of Individual Indian Money Accounts ("Report to Congress"), which Interior prepared at the request of Congress. The Report to Congress explains how Interior intends to perform the accounting of "all funds held in trust by the United States for the benefit of . . . individual Indian[s]," 25 U.S.C. § 4011(a), "irrespective of when they were deposited," Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001). The Report to Congress states that the accounting, which will involve a review of every transaction in each of the hundreds of thousands of individual Indian accounts, will take many years to complete and will cost approximately $2.4 billion.

After earlier insisting that the "best and most complete" accounting should be Interior's goal, the Court Monitor in his Eighth Report now takes the seemingly incongruent position that

the Report to Congress, which describes just such an accounting, demonstrates Interior's "unwillingness and inability . . . to honor its trust obligations to the American Indian." Eighth Report at 35. In the Court Monitor's view, Interior has demonstrated its "unwillingness" to perform an "all funds" accounting by *actually planning* an "all funds" accounting. For the reasons set forth below, Interior objects to the Court Monitor's conclusion.

The Eighth Report also illustrates the Court Monitor's willingness to exceed the bounds of the authority this Court has delegated to him, as the Report sets forth the Court Monitor's opinions regarding legal issues (some of which are not even before the Court) notwithstanding his lack of authority to make conclusions of law. Finally, the Report contains numerous misstatements of "fact." Interior objects to all of the opinions, conclusions, and findings in the Eighth Report.[1]

I. The Court Monitor's Criticism Of Interior's Report To Congress Is Unwarranted And Inconsistent With His Own Admonitions Regarding The Historical Accounting.

The Eighth Report criticizes Interior's Report to Congress on the ground that it demonstrates Interior Defendants' "continue[d] . . . recalcitrance in their attempts to avoid their fiduciary trust obligations." Eighth Report at 34. The only "evidence" cited to support this assertion is the cost estimates contained in the Report to Congress. The Court Monitor supposes

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[1] The Eighth Report purports to be "based, for the most part, on the written record available to the Court Monitor," and attributes this to the alleged refusal of Interior Defendants to permit the Court Monitor to take depositions. Eighth Report at 8-9 n.7. Interior Defendants' position regarding the Court Monitor's formal discovery efforts is set forth in the Interior Defendants' Opposition To Plaintiffs' Motion For Order To Show Cause Why Interior Defendants And Their Senior Managers And Counsel Should Not Be Held In Civil Contempt For Violating The Court's April 16, 2001 And April 15, 2002 Orders, filed June 14, 2002, and in the May 22, 2002 and May 29, 2002 letters from Sandra P. Spooner, Department of Justice, to Joseph S. Kieffer, III, Court Monitor, attached thereto.

that the Report to Congress "raise[s] the overwhelming cost estimate of the historical accounting with Congress . . . [in the] hope that Congress will legislate away the Defendants' fiduciary trust obligations." Id. at 27. Likewise, the Court Monitor claims that because the "Report [to Congress] places the issue of funding once again before Congress . . . [and] state[s] that billions of dollars must be allocated" for the historical accounting, it follows "[t]hat the Defendants still do not accept that they have the highest fiduciary duty to carry out the historical accounting." Id. at 29-30. The Court Monitor is incorrect. In fact, Interior "places the issue of funding" before Congress in the Report to Congress because Congress required Interior to do so. In 2001, the House Committee on Appropriations stated that "[b]efore the Department agrees to any method for undertaking an historical IIM accounting, the Committee directs the Department to submit a comprehensive report to the Committee detailing the costs and benefits and likely results associated with any proposal." H.R. Rep. No. 107-103, at 89 (2001). The Conference report on Interior's fiscal year 2002 budget provides that funds appropriated for an historical accounting "may not be allocated prior to the report requested by the Committees detailing the methods and costs associated with an historical accounting." H.R. Conf. Rep. No. 107-234, at 99 (2001).

Moreover, the Court Monitor's supposition that the cost estimates contained in the Report to Congress evidence an intent on the part of Interior Defendants to cause Congress to "refuse to honor the United States' fiduciary trust obligations," Eighth Report at 27, is not correct. In the Eighth Report, the Court Monitor complains that Interior has "described to Congress and this Court an unlimited historical accounting that will take an unknown number of years and cost untold billions of dollars," id. at 23, and illogically concludes that Interior's "historical accounting proposal in the Report [to Congress] is just one more example of the continuing

historical unwillingness and inability of the Department of the Interior, as an institution, to honor its trust obligations to the American Indian." Id. at 35. In the Court Monitor's view, Interior has demonstrated its "unwillingness" to perform an "all funds" accounting by *actually planning* an "all funds" accounting.

The Court Monitor's conclusion is unfounded and inconsistent with the admonitions contained in his previous reports. In his Fifth Report, for example, the Court Monitor described the scope of the historical accounting Interior must conduct as follows: "'All funds' meant all funds – whenever deposited. This Court could place no finer point on that decision. 'Shall account' meant shall account for those funds – all of them. There is nothing left for the Interior defendants to do but devise a method or methods to do that full accounting." Fifth Report of the Court Monitor (Feb. 1, 2002) at 16. In marked contrast to the Eighth Report, which characterizes the "all funds" accounting described in Interior's Report to Congress as "a patently fiscally offensive . . . method of conducting the accounting," Eighth Report at 25, the Court Monitor's Fifth Report stated that:

> [t]he *best and most complete, not the cheapest*, method to perform the accounting should be the goal of the Secretary of the Interior and [the Executive Director of the Office of Historical Trust Accounting]. Congress, as the ultimate Trustee for the IIM accounts, may not appropriate funds for that accounting and find a legislative solution, but *the determination of how to do that accounting under the Court's ruling should not be limited by the prospective concern that Congress will not fund anything but the cheapest pecuniary alternative.*

Fifth Report Of The Court Monitor at 11 n.5 (emphasis added); see also First Report of the Court Monitor (July 11, 2001) at 50 (stating that "[o]ne thousand or more Indians, sixty-some percent IIM account holders, came to DOI sponsored meetings across the nation to register their

requested opinions – 'do a transaction-by-transaction accounting so we know what is in our accounts.'"). The Fifth Report concluded with the not-so-veiled threat that the actions of the Executive Director and staff of the Office of Historical Trust Accounting ("OHTA") had not "been contemptuous of this Court to this point," id. at 18 n.9, but the clear implication was that if OHTA attempted to limit the accounting, severe consequences would follow.

The Plaintiffs have similarly insisted that they will be satisfied with nothing less than a complete, transaction-by-transaction accounting. See, e.g., Answers Of Plaintiff Cobell To Defendants' Fourth Set Of Interrogatories, Requests For Admission And Requests For Production Dated October 15, 1999 (Nov. 23, 1999) at 2-3 (defining "accounting" as used in the complaint as "[a] statement of balances including without limitation any funds, wherever, whenever and however held, that should stand to the credit of the IIM Trust and each individual Indian trust beneficiary from the point in time that the United States first assumed trust responsibility for management of individual Indian lands and first owed a specific trust responsibility to each such person entitled to receive revenues generated from such trust lands . . . ."); Closing Argument By Counsel On Behalf Of Plaintiffs, Feb. 21, 2002, Trial Tr. at 4554 ("The results [of consultation on the accounting] were overwhelmingly in favor of a complete transaction by transaction accounting."). Both this Court and the Court of Appeals apparently left open the possibility that methods such as statistical sampling could satisfy Interior Defendants' accounting duties. See Cobell v. Babbitt, 91 F. Supp. 2d 1, 40 n.32 (D.D.C. 1999); Cobell v. Norton, 240 F.3d at 1110. Yet in the course of discussing the possibility of a second contempt trial, the Court characterized a statistical sampling approach as "so clearly

contemptuous, I don't understand what it is that we are going to try." Status Call Tr., Oct. 30, 2001, at 29.

Interior's Report to Congress describes the "full accounting" of "all funds" that Plaintiffs have consistently urged and that the Court Monitor suggested was necessary in his earlier reports. The phased plan that the Report to Congress sets out is a comprehensive effort to accommodate the performance of the desired full historical accounting while recognizing the existence of potential fiscal limitations and objections.

The Court Monitor also criticizes the Report to Congress because it does not address "whether . . . the legal parameters potentially limiting the accounting, previously addressed by Defendants in the partial summary judgment motions, or others addressed by this Court, have been rejected and, if so, why."[2] Eighth Report at 23. In fact, Interior's Report to Congress states that "[u]ltimately, Interior's historical accounting activities will depend upon further direction as may be provided by the courts, other actions by Congress, or administrative action." Report to Congress at 5. As Interior explained at length in its Response to the Fifth Report of the Court Monitor, numerous idiosyncratic factual and/or legal factors may affect the particular accounting required for an individual IIM account holder (or group of account holders), and the complexity of these factors is likely to prohibit the development of a single, uniform methodology or an across-the-board determination regarding the scope of the accountings:

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[2] We are not aware that the Court has addressed any "legal parameters potentially limiting the accounting." Eighth Report at 23. In its 1999 opinion, the Court stated that it did "not purport to rule on whether an accounting accomplished through statistical sampling would satisfy defendants' statutory duties" and would "not now address other arguments that the government may make in the future on the 'historical' nature of the accounting (e.g. statute-of-limitations arguments)." Cobell v. Babbitt, 91 F. Supp. 2d at 41 n.32.

> Some of these factors, including but not limited to [the] relevant statute of limitations, the date an account was opened, the effect of probate proceedings for the estate of a predecessor, and judgments or settlements of previous claims may affect the "temporal scope" of the accounting due a particular individual. Determining the "start date" for an individual accounting must take into consideration all of these factors (and perhaps others not yet identified) and do so in compliance with the rulings of this Court and the Court of Appeals. This complexity will likely prohibit the development of a single, uniform methodology and across-the-board determinations regarding the scope of the accountings.

Interior's Response To The Fifth Report Of The Court Monitor (Mar. 1, 2002) at 3. These issues cannot, consistent with this Court's jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, be reviewed in the absence of a final agency decision and should not, in any event, be decided in the abstract without a developed factual context. See Interior's Response To The Fifth Report Of The Court Monitor at 12-17.

The Court Monitor's criticism of the Report to Congress on the ground that it is too comprehensive is unwarranted, particularly in light of his previous warnings against any limitation of the historical accounting. If, as the accounting work progresses, the unique legal and factual characteristics of a particular account (or group of accounts) warrant limitations on the scope of the accounting work for the account (or accounts), such limitations will be addressed in an appropriate manner.

II. No Factual Basis Exists For The Court Monitor's Conclusion That Interior Defendants Are Unwilling Or Unable To Perform An Historical Accounting.

The Court Monitor states that "the question must be asked if it is not time to consider that the Secretary, trustee-designate for the Indian Trust, not only will not – *but also cannot* – provide the historical accounting mandated by Congress and ordered by this Court." Eighth Report at 31

(emphasis in original). He states that "[i]f [the historical accounting] is impossible as it apparently is, then there must be another solution to satisfy the fiduciary trust obligations of the Unite[d] States to the IIM account holder beneficiaries." Id. He apparently bases his opinion that the historical accounting is "impossible" on an alleged "record of destroyed documents and insecure data bases." Id. He cites without reference an alleged "GAO letter reporting massive destruction of IIM account holder records." Id. Elsewhere, he states that the Report to Congress "illuminates just how relative [sic] little correct and locatable [sic] information is available that could serve as a foundation for an accurate and complete accounting." Id. at 32.

First, we are unaware of any "GAO letter reporting massive destruction of IIM account holder records." Eighth Report at 31. The Court Monitor does not identify the GAO letter to which he refers; indeed, to our knowledge, no such letter exists. Presumably, the Court Monitor is referring either to the August 27, 1999 letter from Gene L. Dodaro, Principal Assistant Comptroller General, to John Berry, Assistant Secretary for Policy, Management and Budget, Department of the Interior (attached as Exhibit 2 to Defendants' Opposition To Plaintiffs' February 15, 2002 Motion For Sanctions And A Contempt Finding Pursuant To Fed. R. Civ. P. 56(g), filed March 1, 2002), or to the April 19, 2002 letter from Anthony H. Gamboa, General Accounting Office General Counsel, to Bert T. Edwards, Executive Director of OHTA (attached to Interior Defendants' Notice Of Filing Of April 19, 2002 Letter From General Accounting Office General Counsel, filed April 23, 2002). Neither letter, however, contains any reference to massive destruction of IIM records. As the Report to Congress acknowledges, some paper records may have been destroyed in accordance with document retention schedules before this litigation began. See Report to Congress at 13. But we are unaware of any GAO letter reporting

that "massive destruction" of IIM account documents has occurred, and the Report to Congress in no way supports the Court Monitor's assertion that "little correct and locatable [sic] information" is available. Eighth Report at 32. Interior Defendants object strongly to the Court Monitor's unsupported presumption that massive destruction of documents has occurred.[3]

Nor does the Court Monitor cite any evidence to support his assumption that "insecure data bases" render the historical accounting "impossible." Eighth Report at 31. The Report to Congress notes that electronic records "may have erroneous entries, missing information, duplicate accounts, and gaps in data," but anticipates that Interior "may be able to verify the accuracy of the electronic data using contemporaneous, supporting hard-copy records." Report to Congress at 12.

The Report to Congress acknowledges the certainty that "gaps in documentation will be encountered during the historical accounting." Report to Congress at 21. But it also describes strategies, including forensic accounting methods, that will be used to address such gaps. See id. at 21-23. OHTA has already engaged *five* public accounting firms in addition to statistical experts, trust law experts, historians, and a trust-operations advisor to assist with the historical accounting, including the challenges presented by gaps in documentation.[4] In any event, the possibility that some accounts may not be capable of complete reconciliation is no reason to "throw in the towel" on the entire historical accounting project. Indeed, the Special Trustee

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[3] In the event the Court considers accepting or adopting the Court Monitor's assertions regarding alleged destruction of documents, or any other assertion of "fact" in the Eighth Report, Interior Defendants request a hearing on the record.

[4] Accordingly, the Court Monitor's suggestion that OHTA is not receiving the assistance of experienced trust advisors is incorrect. See Eighth Report at 34 n.22.

stated in a memorandum to the Executive Director of OHTA that "[r]econstructing the trust accounts to the extent allowed by the existing records is an important step in the Department's effort to bring integrity to the trust information database and to be more accountable to the beneficiaries." Memorandum from Thomas N. Slonaker, Special Trustee for American Indians, to Bert T. Edwards, Executive Director, OHTA, May 22, 2002 (quoted in Eighth Report at 11).

The Report to Congress setting forth Interior's plan to conduct the historical accounting refutes the Court Monitor's opinion that Interior "will not" provide the historical accounting, as does the accounting work already underway. The Report to Congress also refutes the Court Monitor's opinion that Interior "cannot" perform the accounting, as it explains in detail the steps necessary to perform the accounting, and sets forth strategies that Interior will utilize to overcome the challenges inherent in such a massive undertaking.

III. The Court Monitor Is Not Authorized To Make Conclusions Of Law.

This Court appointed the Court Monitor to "monitor and review all of the Interior [D]efendants' trust reform activities and file written reports of his findings with the Court," and his reports are to "include a summary of the defendants' trust reform progress and any other matter Mr. Kieffer deems pertinent to trust reform." Order, April 15, 2002, at 2; Order, April 16, 2001, at ¶ 2. The Court Monitor's appointing orders do not authorize him to make conclusions of law. Nonetheless, much of the Eighth Report is devoted to the Court Monitor's opinions on legal issues – some of which are not even before the Court. Because opining on legal issues is not within the scope of the Court Monitor's authority, these opinions should not be considered by the Court, nor should the parties be obligated to respond to them.

For example, the section of the Eighth Report entitled "The Report [to Congress] as Final Agency Action," see Eighth Report at 28-29, is improper. In this section, the Court Monitor opines that "[t]here is no new final agency action required before this Court can consider the status and potential for success of the Defendants' proposed historical accounting," and suggests that the Court must determine "that the Report sets out a reasonable and fiduciary sound method for accomplishing the accounting" before Interior can "begin the appropriations process."[5] Id. at 29. Whether the Report to Congress is final agency action is not an issue presently before the Court (nor do the Court Monitor's opinions on this issue bring it before the Court). In any event, the Court Monitor appears to misapprehend the applicable law. An agency's submission of a Congressionally-mandated report to Congress typically does not constitute agency action within the meaning of the Administrative Procedure Act. See, e.g., Guerrero v. Clinton, 157 F.3d 1190, 1195-97 (9th Cir. 1998); Taylor Bay Protective Assoc. v. EPA, 884 F.2d 1073, 1080-81 (8th Cir. 1989); Natural Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 316-19 (D.C. Cir. 1988). As Interior set forth at length in its Response to the Fifth Report of the Court Monitor, the Administrative Procedure Act dictates the nature, extent, and timing of any review of Interior's historical accounting efforts. See Department of the Interior's Response To The Fifth Report Of

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[5] In the Eighth Report, the Court Monitor goes so far as to *instruct Congress* regarding the historical accounting. He states that Congress should not "consider limiting [the historical] accounting by accepting an argument that Defendants should not be required to do more than account for existing funds listed in unprotected, vulnerable and incomplete electronic databases and hard copy records going back only to 1985 unless this Court holds that it would be legally and practically tenable to so conduct the historical accounting." Eighth Report at 33. Just as attempting to direct the actions of Executive Branch officials is inconsistent with the Court Monitor's authority, see Interior Defendants' Memorandum In Support Of Motion To Revoke The Appointment Of Joseph S. Kieffer, III, And To Clarify The Role And Authority Of A Court Monitor (June 14, 2002), attempting to direct the actions of Legislative Branch officials is inconsistent with his authority.

The Court Monitor at 12-23. Indeed, the Court of Appeals presumed that "the district court plans to wait until a proper accounting can be performed, at which point it will assess [Defendants'] compliance with their fiduciary obligations." Cobell v. Norton, 240 F.3d at 1110.

Similarly improper is the Court Monitor's recommendation "that this Court set an immediate trial date for the Phase II historical accounting trial and authorize discovery on the Defendants' and their consultants' and contractors' research for and preparation of the Report [to Congress], their accounting activities to date, and any other research into accounting methods that they may have considered and accepted or rejected." Eighth Report at 34. As the Interior Defendants explained in their Response To The Fifth Report Of The Court Monitor and in their Opposition to Plaintiffs' Motion To Set A Trial Date For Phase II Of This Action, setting a trial date at this point would be inconsistent with this Court's jurisdiction. See Interior's Response To The Fifth Report Of The Court Monitor at 18-21; Defendants' Opposition To Plaintiffs' Motion To Set A Trial Date For Phase II Of This Action (Aug. 17, 2001); see also Cobell v. Norton, 240 F.3d at 1110 (noting that "supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction").[6]

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[6] The Eighth Report contains a footnote in which the Court Monitor poses rhetorical questions regarding a statement in the Report to Congress that Interior does not contemplate including direct pay arrangements (in which allotment owners elect to receive direct payments from lessees that are never taken into trust or deposited into IIM accounts) within the historical accounting. See Eighth Report at 17 n.13. The statement in the Report to Congress is consistent with the 1994 Reform Act, as the portion of the Court of Appeals decision quoted in the Eighth Report establishes: "Section 102 of the 1994 Act makes clear that the Interior Secretary owes IIM trust beneficiaries an accounting for '*all funds held in trust by the United States* for the benefit of an Indian tribe or an individual Indian *which are deposited or invested pursuant to the Act of June 24, 1938.*'" Cobell v. Norton, 240 F.3d at 1102 (quoted in Eighth Report at 2) (emphasis added). Funds paid by lessees directly to IIM account holders are neither "funds held in trust by the United States" nor funds "which are deposited or invested pursuant to the Act of

(continued...)

IV. The Court Monitor's Opinions Regarding Interior Officials' Understanding Of Their Trust Duties Are Unfounded.

In a section entitled "Legal Standards For The Historical Accounting," the Court Monitor presents his opinion regarding Interior Defendants' understanding of their fiduciary duties. See Eighth Report at 29-31. He opines that the Report to Congress and the June 18, 2002 testimony of Deputy Secretary Griles before the Senate Committee on Indian Affairs "exhibit a remarkable lack of knowledge about and understanding of the legal and fiduciary trust standards under which a trustee must conduct accountings for beneficiaries in general and for the IIM account holders . . . specifically." Id. at 29. The Court Monitor quotes selectively from the Deputy Secretary's testimony to Congress, but does not cite or attach a transcript of the testimony. Undersigned counsel are unable to obtain a copy of the transcript because it has not been publicly released, and, therefore, cannot address the Court Monitor's allegations regarding the Deputy Secretary's testimony at this time.[7] However, Interior Defendants' understanding of their fiduciary responsibilities is demonstrated by the exacting standards Interior has established for the historical accounting in its Report to Congress. The Court Monitor's statements that "Defendants have continued to cite the potential lack of funding for a reason for not pursuing a proper historical accounting," id., and issued the Report to Congress in an effort to "pursu[e], once again, a limitation of their obligations to conduct a full historical accounting," id. at 31, are untrue (and internally inconsistent with his criticism that the Report to Congress contains no limitations on the accounting). The Report to Congress establishes conclusively that Interior

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[6](...continued)
June 24, 1938." In any event, this issue is not presently before the Court.

[7] If further comment is warranted when the transcript of the Deputy Secretary's testimony becomes available, Interior Defendants will supplement this Response.

Defendants are, in fact, "pursuing a proper historical accounting," and are not "pursuing . . . a limitation of their obligations to conduct a full historical accounting." Id. at 29 & 31. The Court Monitor's opinion regarding Interior officials' understanding of their fiduciary duties is unfounded.

CONCLUSION

For the reasons set forth above, Interior objects to the opinions, findings, and conclusions in the Eighth Report of the Court Monitor.

Dated: July 25, 2002

Respectfully submitted,

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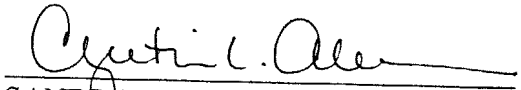

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on July 25, 2002 I served the Foregoing *Department of the Interior's Response to the Eighth Report of the Court Monitor,* by facsimile in accordance with their written request of October 31, 2001 upon:

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