IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' OPPOSITION TO "BILL OF PARTICULARS" FOR EDITH BLACKWELL IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE WHY INTERIOR DEFENDANTS, AND THEIR COUNSEL, SHOULD NOT BE HELD IN CIVIL AND CRIMINAL CONTEMPT FOR VIOLATING THE DECEMBER 21, 1999 ORDER TO CONDUCT AN ACCOUNTING OF INDIVIDUAL INDIAN TRUST FUNDS

Defendants hereby oppose the latest of plaintiffs' meritless diatribes against Edith Blackwell in her official capacity.[1] In what has unfortunately become a pattern of uncivil and unfounded personal attacks, plaintiffs seek civil and criminal contempt sanctions against Ms. Blackwell in their "Bill of Particulars" for Edith Blackwell in Support of Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Violating the December 21, 1999 Order to Conduct and Accounting of Individual Indian Trust Funds, served August 21, 2002 ("Plaintiffs' BOP"). To the extent discernible, plaintiffs' unfocused BOP apparently accuses Ms. Blackwell of violating the Court's December 21, 1999 ruling by participating in the Department of the Interior's Federal Register Notice process, about which Interior specifically notified this Court in advance; advising Department personnel to begin the historical accounting that the Court declared due with the period from 1994 forward while the December 21, 1999 decision was on appeal; preparing, commenting

[1]Ms. Blackwell is separately represented in her individual capacity.

upon, and revising draft DOI documents; and meeting with the new Secretary and her staff upon their arrival in early 2001.

In this fifth attempt[2], plaintiffs have again failed to identify any basis for holding Ms. Blackwell in contempt, despite the Court's March 15, 2002 directive that they do so.[3] Plaintiffs make no effort to tie any specific acts allegedly taken by Ms. Blackwell to the legal standards for civil and criminal contempt. Instead, plaintiffs' BOP is no more than yet another rambling litany of alleged "dirty deeds", some supposedly committed by Ms. Blackwell, some which she supposedly "aided and abetted", and some that have no clear relation to Ms. Blackwell at all.[4] Despite plaintiffs' attempts to skew and spin the facts to cast Ms. Blackwell's actions in the worst possible light, they fall far short of demonstrating either contemptuous acts or motives on her part. Moreover, plaintiffs do not even bother to discuss the legal principles at issue, much less attempt

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[2]*See* Plaintiffs' Consolidated Reply Brief in Support of Motion to Set a Trial Date for Phase II of this Action and Memorandum in Support of Motion for Order to Show Cause Why Past and Present Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt (filed Aug. 27, 2001); Plaintiffs' Consolidated Motion to Amend Their Motion to Reopen Trial One in this Action to Appoint a Receiver and Memorandum of Points and Authorities in Support Thereof and Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection With Trial One (filed Oct. 19, 2001); Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not Be Held in Contempt for Destroying E-Mail (filed March 20, 2002) ("Plaintiffs' March 20, 2002 Motion"); Bill of Particulars for Edith Blackwell in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not Be Held in Civil and Criminal Contempt for Destroying E-Mail (3/20/02) and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt (filed July 29, 2002) ("Plaintiffs' Blackwell E-Mail Memo").

[3]We incorporate here by reference our argument in opposition to Plaintiffs' Blackwell E-Mail Memo regarding the requirements of a sufficient bill of particulars, which Plaintiff's current BOP also clearly fails to satisfy. *See* Govt's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edith Blackwell Should Not Be Held in Contempt in Connection with the Overwriting of BackupTapes (filed Aug. 12, 2002) at 7.

[4]Indeed, the first 20 pages of Plaintiffs' BOP are entirely irrelevant because they relate only to matters that occurred **before** the Court's December 21, 1999 ruling and therefore could not possibly have "violated" that ruling.

to address a fatal flaw in their motion: *i.e.,* that a declaratory judgment, such as the one entered by the Court on December 21, 1999 regarding the historical accounting, **as a matter of law** cannot serve as the basis for a contempt finding.

ARGUMENT

A. Sovereign Immunity Precludes the Imposition of Criminal Penalties Against Ms. Blackwell in Her Official Capacity.

Plaintiffs once again request that Ms. Blackwell be referred for a prosecution for criminal contempt. As the government pointed out in previous filings[5], sovereign immunity bars criminal contempt sanctions against Ms. Blackwell in her official capacity.

Since the government has received notice and an opportunity to respond to the current contempt claim against Ms. Blackwell, the claim against her in her official capacity is to be treated as a claim against the government. *Coleman v. Espy*, 986 F.2d 1184, 1189 (8th Cir.), *cert. denied sub nom. Dye v. Espy*, 510 U.S. 913 (1993), *citing Kentucky v. Graham,* 473 U.S. 159 (1985). *See also Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002), and cases cited therein. The doctrine of sovereign immunity bars the imposition of fines or penalties against the government, except to the extent that the United States has explicitly consented to such sanctions. *United States v. Horn*, 29 F.3d 754, 761 (1st Cir. 1994). A waiver of sovereign immunity must be definitively and unequivocally expressed and must appear in the text of the statute itself. *In re Sealed Case*, 192 F.3d 995, 1000 (D.C. Cir. 1999), *citing Lane v. Pena*, 518

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[5]Government's Opposition to Plaintiffs' March 20, 2002 Motion for Orders to Show Cause Why Interior Defendants and their Employees and Counsel Should Not be Held in Contempt (filed April 3, 2002) ("Govt Opp. to 3/20/02 Motion"), at 13-16; Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edward B. Cohen Should Not Be Held in Criminal Contempt (filed Aug.5, 2002) at 3-4; Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edith Blackwell Should Not Be Held in Contempt in Connection with the Overwriting of Backup Tapes (filed Aug. 12, 2002), at 3-4.

U.S. 187, 192 (1996); *United States v. Horn*, 29 F.3d at 762, *citing United States v. Mitchell*, 445 U.S. 535, 538 (1980), and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

The United States has not waived sovereign immunity from citations for criminal contempt. *Coleman v. Espy,* 986 F.2d at 1191; *United States v. Horn*, 29 F.3d at 763; *see also In re Sealed Case*, 192 F.3d 995, 999-1000 (D.C. Cir. 1999) ("...it is far from clear that Congress has waived federal sovereign immunity in the context of criminal contempt . . . We know of no statutory provision expressly waiving federal sovereign immunity from criminal contempt proceedings.").[6] Similarly, the court in *In re Newlin*, 29 B.R. 781, 785 (E.D. Pa. 1983), held that a criminal contempt citation by a bankruptcy court against a federal agency violated sovereign immunity because the government had not expressly waived its immunity from citation for criminal contempt. Consequently, to the extent that plaintiffs now are attempting to have Ms. Blackwell in her official capacity prosecuted for criminal contempt, the plaintiffs' motion must be denied.

B. As a Matter of Both Law and Fact, Plaintiffs' "Bill of Particulars" Fails to Support a Referral for Criminal Contempt or a Show Cause Order for Civil Contempt.

1. Legal Standards for Contempt

Standards for civil contempt have been set forth in the initial contempt hearing in this case, *Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999), and other cases in this circuit. The court's power to find a party in civil contempt for violation of discovery orders may be based either on Federal Rule of Civil Procedure 37(b)(2) or the court's inherent power to protect its integrity and prevent abuses of the judicial process. *Cobell*, 37 F. Supp. 2d at 9. However, remedies drawn upon under the court's inherent power should be exercised only when the rules do not provide the court with sufficient authority to protect its integrity and prevent abuse of the judicial process;

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[6] *In re Sealed Case*, 192 F.3d 995 (D.C. Cir 1999), was not decided on the issue of whether sovereign immunity precluded criminal contempt against the United States, since the Court determined that a *prima facie* case of criminal contempt had not been alleged. 192 F.3d at 1000.

therefore, when a discovery order has been violated, the court should turn to its inherent powers only as a secondary measure. *Id.* at 11.

A party seeking a finding of contempt must initially show, by clear and convincing evidence, that (1) a court order was in effect, (2) the order required certain conduct by the respondents, and (3) the respondents failed to comply with the court's order. *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 16 (D.D.C. 2000); *Petties v. District of Columbia*, 897 F. Supp. 626, 629 (D.D.C. 1995). Once the movant has made a *prima facie* showing that the respondent did not comply with the court's orders, the burden shifts to respondent to produce evidence justifying the noncompliance. *Bilzerian*, 112 F. Supp. 2d at 16.

As this Court has noted, "the 'extraordinary nature' of the remedy of civil contempt leads courts to 'impose it with caution.'" *SEC v. Life Partners, Inc.*, 912 F. Supp. 4, 11 (D.D.C. 1996), *quoting Joshi v. Professional Health Services, Inc.*, 817 F.2d 877, 879 n.2 (D.C. Cir. 1987). Further, in light of the severity of the contempt sanction, it should not be resorted to "if there are any grounds for doubt as to the wrongfulness of the defendants' conduct." *Life Partners*, 912 F. Supp. at 11, *citing MAC Corp. v. Williams Patent Crusher & Pulverizer Co.*, 767 F.2d 882, 885 (Fed. Cir. 1985).

A civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damages sustained as a result of noncompliance." *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1016 (D.C. Cir. 1997), *quoting National Labor Relations Board v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981). The goal of a civil contempt order is not to punish, but to exert only so much of the court's authority as is required to assure compliance. *Petties*, 897 F. Supp. at 629. Finally, a party found to be in contempt should be given an opportunity to purge itself of the contempt prior to the imposition of any penalties. *Bilzerian*, 112 F. Supp. 2d at 16. This requirement stems from the remedial nature

of civil contempt. *See Food Lion*, 103 F.3d at 1016 (a civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance"), *quoting Blevins Popcorn*, 659 F.2d at 1184. Thus, a contempt order should be imposed, if at all, only at the conclusion of a three-stage proceeding involving:

> (1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party purges itself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled.

Blevins Popcorn, 659 F.2d at 1184, *citing Oil, Chemical & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 575, 581 (D.C. Cir. 1977); *Bilzerian*, 112 F.Supp.2d at 16.

Plaintiffs also ask that the Court refer Ms. Blackwell for prosecution under 18 U.S.C. § 401(3), which permits the court "to punish by fine or imprisonment, at its discretion, such contempt of its authority ... as ... [d]isobedience or resistance to its lawful . . . order." To convict a defendant of criminal contempt under this statute, the Court must find, beyond a reasonable doubt, that Ms. Blackwell willfully violated a "clear and reasonably specific" order of the court. *United States v. Roach*, 108 F. 3d 1477, 1481 (D.C. Cir. 1997), *citing United States v. NYNEX Corp.*, 8 F.3d 52, 54 (D.C. Cir.1993), and *United States v. Turner*, 812 F.2d 1552, 1563 (11th Cir.1987); *cf. Life Partners, Inc.*, 912 F. Supp.at 11 ("definite and specific" court order must be in effect for there to be civil contempt finding). For a violation to be "willful," the defendant must have acted with deliberate or reckless disregard of the obligations created by the court order. *Id., citing In re Holloway*, 995 F.2d 1080, 1082 (D.C. Cir.1993), *cert. denied*, 511 U.S. 1030 (1994), and *United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir.1974). Thus, in order to support a referral for criminal contempt, plaintiffs must initially show, by clear and convincing evidence, that (1) a clear

and reasonably specific court order was in effect, (2) the order required certain conduct by Ms. Blackwell, and (3) that Ms. Blackwell willfully violated the court's order.

Plaintiffs' "bill of particulars" meets neither the legal nor factual requirements of a *prima facie* showing for the imposition of civil contempt sanctions, much less the more demanding requirements for imposition of criminal contempt sanctions, upon Ms. Blackwell.

2. The Court's Declaratory Judgment of December 21, 1999 Is Not an Order That Can Give Rise to a Contempt Finding.

Plaintiffs' "bill of particulars" is fatally flawed at the outset by its reliance upon the Court's declaratory judgement in *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999), as the "order" that Ms. Blackwell supposedly violated by the actions set out in Plaintiffs' BOP. Plaintiffs BOP at 1 n.1. The Court explicitly labeled the portions of its ruling upon which plaintiffs rely as a "Declaratory Judgment."[7] As the government has previously pointed out on numerous occasions, the Court of Appeals for the D.C. Circuit has held unambiguously that noncompliance with a declaratory judgment is not contempt. *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (vacating a contempt order based in part on failure to comply with the declaratory judgment). *See* Defendants' Proposed Findings of Fact and Conclusions of Law Following Contempt Trial (filed March 1, 2002) ("Defendants' Proposed Findings"), at 130-32; Govt Opp. to 3/20/02 Motion at 10-11. As noted in Defendants' Proposed Findings at 130, the Court of Appeals explained in *Armstrong*:

> [E]ven though a declaratory judgment has "the force and effect of a final judgment," 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately

[7]Plaintiffs make much of a line taken from a filing by defendants that referred to the Court's judgment regarding an accounting as an "order." Plaintiffs' BOP at 20 n.15. Defendants' imprecise passing reference, however, cannot change the legal character of the Court's ruling: it was and remains a declaratory judgment, as recognized by the Court itself.

coercive; **noncompliance with it may be inappropriate, but is not contempt.**

Id. at 1290 (emphasis added). Yet plaintiffs make no mention of the *Armstrong* holding in their BOP. Given this unequivocal statement by the Court of Appeals, there is simply no legal basis for a contempt finding against Ms. Blackwell – or anyone else for that matter – for allegedly failing to comply with the declaratory judgment of December 21, 1999. Plaintiffs themselves elected the form of action – they chose to forego a suit for money damages (over which district courts lack jurisdiction) and instead pursued a declaratory judgment and other non-monetary relief. They cannot now be heard to complain about the limitations inherent in the very relief they sought.

Since plaintiffs' latest salvo relies exclusively upon the Court's December 21, 1999 declaratory judgment, their BOP fails – as a matter of law – to establish a *prima facie* case for imposing either civil or criminal contempt sanctions upon Ms. Blackwell. Accordingly, the BOP and the previous motions of August 27, 2001 and October 19, 2001, upon which plaintiffs purport to build the BOP, should be summarily dismissed.

3. Even assuming the December 21, 1999 declaratory judgment could give rise to a contempt finding, plaintiffs have failed to demonstrate that Ms. Blackwell personally did not comply with the judgment.

As noted above, in order for civil contempt to lie, there must first be a *prima facie* showing that the person accused of contempt has violated a "clear and reasonably specific" order. *Roach, supra.* While the portions of the Court's December 21, 1999 ruling upon which plaintiffs base their current BOP are part of the Court's declaratory judgment, and therefore not a proper legal basis for a contempt finding under binding precedent, plaintiffs have also failed to demonstrate that any of the conduct with which they charge Ms. Blackwell violated any specific portion of that judgment.

In declaring the plaintiffs' right to an accounting, this Court also acknowledged the limits of its constitutional authority to decide upon the means and methods defendants might use to accomplish the accounting:

> The court cannot simply take over the role of the agency or bring all actions of defendants under its authority. Courts cannot "become . . . enmeshed in the minutiae" of agency administration. *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).
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> . . .
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> The court feels that it is therefore its constitutional duty to allow defendants the opportunity to cure the breaches of trust declared in this Memorandum Opinion.

Cobell, 91 F. Supp. 2d at 54; *see also Cobell v. Babbitt*, 240 F.3d 1081, 1109 (D.C. Cir. 2001) (noting the "judicial policy of granting agencies that have acted in an unlawful manner 'discretion to determine in the first instance,' how to bring themselves into compliance" and concurring with District Court that "'the proper course is to remand the case for further agency consideration in harmony with the court's holding.'") (internal citations omitted). Although plaintiffs have offered no coherent legal analysis for their accusations against Ms. Blackwell in the current BOP, it appears that they charge her with (1) supporting the use of statistical sampling in conducting the accounting; (2) participating in what they claim was a "sham" Federal Register Notice process whose sole intent supposedly was to delay the performance of an accounting and ~~to~~ bolster defendants' appeal; (3) "aiding and abetting" defendants' election to commence the historical accounting with the period from 1994 forward; (4) commenting upon and revising various draft documents for presentation to Secretary Babbitt; and (5) briefing Secretary Norton and her staff upon their arrival in office, and revising draft documents to reflect the Secretary's viewpoint. Each of these contentions lacks a proper legal foundation and fails to meet the plaintiffs'

substantial burden of demonstrating a *prima facie* case of contempt by clear and convincing evidence.

(a) No Court Order Prohibits Defendants from Utilizing Statistical Sampling as Part of the Historical Accounting.

Significantly, this Court identified several legal issues relating to the accounting that its December 21, 1999 ruling intentionally did not address, but left open for the Phase II trial to be conducted **after** defendants have had a reasonable opportunity to cure the identified breaches. The accounting issues that this Court left open were: "(1) whether an applicable statute of limitations, if any, precludes any of plaintiffs' claims for an accounting; (2) **whether an accounting accomplished through a sampling technique will satisfy the requirements of the Trust Fund Management Reform Act**; and (3) the precise scope of plaintiffs' certified class." *Cobell*, 91 F. Supp. 2d at 32 & note 22 (emphasis added).

The Court of Appeals also acknowledged that defendants should have "sufficient discretion in determining the precise route they take" to correct the breaches identified by this Court. *Cobell*, 240 F.3d at 1106. Indeed, the Court of Appeals observed that "[t]he actual legal breach is the failure to provide an accounting, not [defendants'] failure to take the discrete individual steps that would facilitate an accounting." *Id.* Finally, the Court of Appeals specifically took note of the open issues identified by this Court, including the possible use of statistical sampling in performing the required accounting. *Id.* at 1110. Like this Court's ruling of December 21, 1999, the Court of Appeals' decision did not direct defendants to exclude statistical sampling from their accounting methodology. To the contrary, the Court of Appeals observed that decisions as to how to conduct an accounting, "and whether certain accounting methods, such as statistical sampling or something else, would be appropriate[,] . . . are properly left in the hands of administrative agencies." *Id.* at 1104.

It is, of course, logically untenable to seek to hold a person in contempt for "violating" a ruling that the Court expressly declined to make. Yet plaintiffs attempt to do just that in the current BOP when they repeatedly malign Ms. Blackwell and others for discussing the possible use of sampling techniques in internal discussions and in the Federal Register Notice published on April 3, 2000. Because no court has ever prohibited defendants from relying upon statistical sampling as the agency's chosen method of providing plaintiffs the accounting they are legally due, there clearly can be no basis for holding any person in contempt – in her official or individual capacity – for failing to comply with a non-order. Moreover, plaintiffs certainly cannot claim that Ms. Blackwell or anyone else concealed the fact that Interior officials were actively considering the use of statistical sampling in some form as part of the accounting methodology beginning at least when the Court issued its December 21, 1999 ruling. Interior's belief that some statistical sampling might be incorporated into the accounting methodology was clearly laid out in the Federal Register Notice published on April 3, 2000, and that Notice was provided to the Court on March 1, 2000 for review in advance of its publication. Accordingly, none of plaintiffs' allegations of "misconduct" against Ms. Blackwell concerning Interior's intent to rely upon statistical sampling in performing the accounting could possibly form the basis for a contempt sanction.

(b) The Federal Register Notice Process Cannot Serve as a Basis for a Contempt Finding.

Plaintiffs criticize defendants for initiating the Federal Register Notice process. However, they fail to cite any court order that prohibited Interior from undertaking this course of action. In fact, the Court of Appeals recognized that the Indian Trust Fund Management Reform Act (the "1994 Act"), Pub. L. No. 103-412 (1994), did not lay out precisely what steps Interior should take to perform the remedial accounting that this Court and the Court of Appeals held was due to

plaintiffs, and that decisions regarding the methods to be used in conducting the accounting "are properly left in the hands of administrative agencies." 240 F.3d at 1104.

As the government explained at length in its 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 (filed Nov. 15, 2001) ("Govt's Consolidated Opp.") at 22-29, the notice and comment process is commonly used by Federal agencies, and agencies have broad discretion to utilize the process in advance of making policy decisions like the ones made by Secretaries Babbitt and Norton regarding the use of statistical sampling in carrying out the historical accounting pursuant to the December 21, 1999 decision. Notably, Interior has engaged in the process on other occasions for the purpose of consulting with Native Americans.[8] Courts have consistently recognized that obtaining public input is a beneficial process. *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758 (1972); *Action for Children's Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977); *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 917 (D.C. Cir. 1982). Courts have also made clear that the agency is not, at the end of the process, obliged to adopt the views of a majority, or even an overwhelming majority, of participants. *See Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 877 (1st Cir. 1978) ("Witnesses may bring in new information or different points of view, but the agency's final decision need not reflect the public input. The witnesses are not the only source of evidence on which the Administrator may base his factual findings."). Interior's decision to employ the Federal Register notice and comment process concerning the methodology for a

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[8]As the government has noted previously, Interior utilized the Federal Register process following the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), in order to elicit comments about what action to take under the Indian Gaming Regulatory Act in view of the Supreme Court's decision. *See* Govt's Consolidated Opp. at 23 (citing 61 Fed. Reg. 21394).

historical accounting was also an efficient and entirely appropriate means of complying with the President's Executive Order directing consultation with Indian Tribal Governments.[9] Further, the government specifically informed this Court and the Court of Appeals before publishing the Federal Register Notice of its intent to initiate the notice and comment process. Motion for Entry of an Order Regarding a Public Administrative Process to Implement the American Indian Trust Fund Management Reform Act of 1994 (filed Mar. 1, 2000), Ex. 1 and 2. Despite plaintiffs' criticism of the process on essentially the same grounds as those upon which they base their current BOP[10], neither this Court nor the Court of Appeals indicated to Interior that it was improper to utilize the Federal Register notice and comment process in these circumstances.

While not necessary to defeat plaintiffs' legally untenable contention that the use of the Federal Register Notice process was somehow contemptuous, it is nevertheless worth noting that the witnesses at the most recent contempt trial agreed that there had been no final decision before August 2, 2000 to use statistical sampling to conduct the historical accounting. *See* Govt's Proposed Findings at 12 ¶ 14. However, even if those Interior officials involved in carrying out the accounting had already concluded that some form of statistical sampling should be utilized, that would not have made the Federal Register Notice process a "sham," since the notice and opportunity for comment served the plainly legitimate purposes of consulting with the Indian beneficiaries before the Secretary's directive on the matter and eliciting from the beneficiaries and the public at large information that the Interior officials had not considered that could affect either

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[9]*E.g.*, EO 13084 of May 14, 1998 ("Consultation and Coordination with Indian Tribal Governments"), 63 Fed. Reg. 27655 (May 19, 1998); EO 13175 of November 6, 2000 ("Consultation and Coordination with Indian Tribal Governments"), 65 Fed. Reg. 67249 (Nov. 9, 2000), both cited in Govt's Consolidated Opp. at 23.

[10]Plaintiffs' Opposition to Defendants' Motion for Entry of an Order Regarding a Public Administrative Process to Implement the American Indian Trust Fund Management Reform Act of 1994 (filed Mar. 20, 2000).

their inclination to use sampling at all or the manner in which they could most effectively use sampling to produce accurate results. Interior officials identified both of these goals as reasons for conducting the Federal Register Notice process. *See* First Report of the Court Monitor (July 11, 2001) at 28 ("[Former Assistant Secretary for Indian Affairs] Gover understood that the decision to do a Federal Register notice was driven as much by the need to consult with the IIM account holders as it was to support an appeal."); Testimony of Robert Lamb, Deputy Assistant Secretary for Budget and Finance (Jan. 11, 2002) at 2718-19 (describing the purposes of the Federal Register Notice process identified at Interior meetings).[11]

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[11]Mr. Lamb's cited testimony on this point is illuminating and worth quoting in full:

Q. Although you weren't in any of the deciding meetings, were you in meetings that discussed the Federal Register notice process?

A. Yes.

Q. Did you come to understand the basis or have an understanding of the basis for initiating the Federal Register notice process?

A. Yes. The reasons that were talked about was that this was a thing that we had to do. It was the proper thing to do. It was important to comply with the Administrative Procedures Act. The lawyers sometimes talked about the jurisdiction of the Court as well on the Administrative Procedures Act issues, something I never fully understood, but they seemed to understand. And it was also viewed as something important in terms of trying to get some outside information potentially.

Q. Do you know what outside information was being looked at as part of that process?

A. I sent our deputy chief financial officer, Sky Lesher, who heads the Office of Financial Management, I sent to some of the meetings that were occurring because I wanted to be sure that he could weigh in and say in a way that the Federal Register notice would be crafted that it might invite outside organizations that he would be familiar with to send in comments. This was a, I thought, potential bonanza for accounting firms and management firms and so forth, if they saw that we were embarking on what was going to be a very large project.

Q. Now during your -- the discussions that you attended involving the Federal

(continued...)

Plaintiffs have offered no legal basis for challenging the agency's discretion to consult and gather additional information in this manner, particularly given Interior's broad discretion to determine the appropriate accounting methodology recognized both by this Court in its December 21, 1999 ruling and by the Court of Appeals in its decision. Plaintiffs contend that the Federal Register Notice process was undertaken not for any legitimate reason, but simply to delay the accounting and to persuade the Solicitor General to authorize the appeal of the Court's December 21, 1999 decision. As shown above, there clearly were other, indisputably proper motives (consultation with beneficiaries and solicitation of new information) that underlay the decision to initiate the Federal Register Notice process. That the initiation of the process also satisfied the Solicitor General that Interior was moving forward with its responsibility to perform the historical accounting in compliance with the December 21, 1999 ruling does not vitiate the legitimacy of the process itself or the agency's discretion to use the process as one means of informing the public and of eliciting new information before the Secretary committed to any particular accounting methodology.

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[11](...continued)
Register process, was there -- did you ever get a sense, did anyone convey a sense that there was any other purpose for the Federal Register process than those that you described?

A. No.

Q. Did anyone convey the decision was somehow -- there was no legitimate purpose for the Federal Register process?

A. No.

Testimony of R. Lamb, Tr. 2718-19 (Jan. 11, 2002); *see also id.* at 2912-13 (noting that when he served at Minerals Management Service, Federal Register Notices would be put out by agency even though agency officials "knew quite well what the industry and environmental community would say, even before putting the regulation out. . . . But it is an effort to bring in additional information and any new pertinent information. And the fact those individuals have a long term history in these areas doesn't in any way deride the fact that they use the Federal Register process.").

Plaintiffs' charges of delay also fall far short of the mark they are aiming for: the Federal Register Notice was prepared and ready to go within just two and a half months after the Court handed down its ruling on December 21, 1999. The government informed both this Court and the Court of Appeals in early January 2000 of its intent to initiate the Federal Register process. On March 1, 2000, the government submitted the Notice itself to this Court to rule on whether the represented parties rule of the District of Columbia Rules of Professional Responsibility permitted Interior to conduct the hearings anticipated in the Notice. This Court ruled on March 28, 2000 that the process was not barred by the ethical rules, and the Notice was promptly published in the Federal Register on April 3, 2000. By August 2, 2000, the public hearings had been conducted. Eight months is not an unduly long period for a notice and comment process on such a substantial question as the proper methodology to employ in rendering the required accounting to hundreds of thousands of Indian beneficiaries.

There was a delay between the conclusion of the hearings and Secretary Babbitt's execution of the policy decision to employ statistical sampling methods in the accounting, but there is no basis in the record for holding Ms. Blackwell liable for the delay. Indeed, the Court Monitor described his views of the reasons for the delay in his first report as follows:

> Interviews of the parties to this process made clear that this four month delay in the publication of the Gover and Slonaker memoranda after the August 2, 2000 meeting was caused, in part, due to DOI officials and Solicitor's attorneys' negotiations over its and the other memoranda's substance. It is evident from correspondence between the Office of Solicitor's attorneys working on the draft memoranda and the key participants that the delay was caused because of strong disagreements between the key players about the substance and order of the memoranda.

First Report of the Court Monitor (filed July 11, 2001) ("Monitor's First Rpt."), at 21. The Monitor further observed that:

> [a]nother possible reason for the delay in publishing the memoranda was believed by some officials to be the ongoing settlement

> discussions with plaintiffs' counsel and the purported view of the Special Trustee that the historical accounting issue could be resolved through settlement as the Congress has encouraged in the Conference Committee report.

Id. at 27. Indeed, it appears from the Monitor's First Report that Ms. Blackwell – rather than seeking to delay the conclusion of the Federal Register Notice process – took steps to move the process along:

> According to Edith Blackwell, the Solicitor's office had encouraged the August meeting due to their concern that a decision on a means to accomplish an historical accounting was taking too long. It was August, five months since the decision had been announced to this Court and the Court of Appeals about the Federal Register information-gathering process. No decision had been made based on the Federal Register notice results, which had not been tallied. She went and talked to Anne Shields. The August 2, 2000 meeting was called to discuss the historical accounting.

Id. at 23.

Plaintiffs' BOP does not does not come close to demonstrating by clear and convincing evidence an effort by Ms. Blackwell to use the Federal Register Notice process as delaying tactic. Plaintiffs have clearly not met their burden to demonstrate a basis for holding Ms. Blackwell personally in contempt for any actions she took or advice she gave in connection with the Federal Register Notice process.

(c) There Is No Basis for Holding Ms. Blackwell in Contempt Because of Her Recommendation that Interior Begin the Historical Accounting with the Years from 1994 Forward.

Plaintiffs charge Ms. Blackwell with contemptuous motives for advocating that Interior begin its historical accounting obligations with data for the years 1994 forward. Plaintiffs' position is not only legally baseless but totally lacking in common sense. Although they fail in their BOP to specify how this advice could constitute contempt, it appears that they are essentially arguing that Interior's appeal regarding the scope of the required accounting and the arguments

made as part of that appeal were frivolous. While Interior ultimately lost its argument that the obligation to account commenced only in 1994, the Court of Appeals did not suggest in any part of its decision that the government's argument on this point was frivolous. Moreover, as part of the December 21, 1999 ruling, this Court certified its decision for interlocutory appeal. In doing so, this Court specifically found that "this order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation." 91 F. Supp. 2d at 57. Given this Court's recognition of the "substantial ground for difference of opinion," plaintiffs' assertion that Interior's argument regarding the scope of the required accounting was frivolous has no merit.

Plaintiffs' complaints regarding Interior's decision to start with the 1994 forward period also defy common sense. Given that the Court had certified the appeal of its ruling, including the scope of the accounting it had declared was due, it was perfectly appropriate for Interior to begin the historical accounting with the period of time that was **not** at issue in the appeal – *i.e.*, the period from 1994 forward. Obviously, Interior had to start somewhere, and it made perfect sense to begin with the period that everyone on both sides agreed was covered by the Department's accounting obligation. Further, there is no genuine dispute that Interior's data regarding IIM account transactions was more complete for more recent time periods because of computerization, *e.g.* Plaintiffs' BOP Ex. 34-36, and for this reason too, it made sense to start with the most recent time period.

In any event, plaintiffs offer no evidence that the decision to start the accounting process with the 1994 forward period caused any delay in conducting the required accounting. To the contrary, even before the Court of Appeals had issued its decision rejecting the government's argument regarding the scope of the required accounting, Secretary Babbitt had observed that "the Department, the Court, Congress, and IIM beneficiaries believe that we must examine past account

activity to discover information that will enable beneficiaries and the Department to evaluate whether income from individual trust assets was properly credited, maintained, and distributed to and from IIM accounts **before October 25, 1994**." Memorandum from Bruce Babbitt, Secretary of the Interior, to Chief of Staff, Solicitor, Special Trustee for American Indians, Assistant Secretary – Policy, Management and Budget, Assistant Secretary – Indian Affairs, Assistant Secretary – Land and Minerals Management, Chief Information Officer, dated Dec. 29, 2000 (emphasis added). Whatever Ms. Blackwell and others may have advised, this memorandum demonstrates that the ultimate policymaker, Secretary Babbitt, did not limit the historical accounting to 1994 forward even before the Court of Appeals had issued its ruling.

The Court expressly recognized Interior's discretion to determine **how** to conduct the accounting, and this discretion necessarily included the determination as to the most appropriate starting point. Thus, even if there had been no dispute as to the scope of the required accounting, it would have been entirely legitimate for Interior to begin with the 1994 forward period. Plainly, there is no legal or factual basis for plaintiffs' contention that Ms. Blackwell was somehow in contempt for advocating that Interior begin the accounting with the 1994 forward period.

(d) Ms. Blackwell's Involvement in Preparing, Revising and Commenting Upon Draft Documents is Not a Basis for Contempt.

Ms. Blackwell was a Deputy Associate Solicitor at the time of the events on which plaintiffs rest their charges of contempt. In this capacity, it was obviously Ms. Blackwell's job to prepare, review and comment upon internal documents and to revise them as necessary. Preparing, reviewing, commenting upon and revising – or even re-writing entirely – draft memoranda before finalization and public dissemination – are an inherent part of the deliberative process of government. There is, of course, nothing unlawful or improper about agency employees engaging in the sort of deliberative process that followed the Federal Register Notice process and

led up to Secretary Babbitt's December 29, 2000 policy memorandum. To the contrary, both the courts and Congress have recognized the value of, and sought to protect, the deliberative process from unnecessary intrusion. *E.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975); *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Dow Jones & Co. v. Department of Justice*, 917 F.2d 571, 573 (D.C. Cir. 1990) (the deliberative process privilege is "ancient . . . [and] predicated on the recognition ' that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.'") (quoting *Wolfe v. HHS*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc)); *see also* Freedom of Information Act, 5 U.S.C. § 552(a)(5) (providing exemption from FOIA's disclosure requirements for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."). The purpose of the deliberative process privilege was explained by Mr. Justice Reed in *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958):

> Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.
>
> There is a public policy involved in this claim of privilege for this advisory opinion – the policy of open, frank discussion between subordinate and chief concerning administrative action.

See NLRB v. Sears, 421 U.S. at 149, 150 (citing *Kaiser* in discussion of deliberative process privilege and its contours). Thus, as an initial matter, the courts and Congress have not only acknowledged that Executive agencies routinely engage in deliberative processes as part of policy development, but they have deemed such deliberative processes beneficial to the public.

Plaintiffs claim that "Ms. Blackwell Altered Memoranda that Were Filed with this Court in Order to Cover-up Interior Defendants' Willful Violation of the December 21, 1999 Order." Plaintiffs' BOP at 37. Plaintiffs' accusation falls flat first because plaintiffs never identify what part of the December 21, 1999 ruling Ms. Blackwell supposedly violated by preparing, commenting upon, and revising draft memoranda relating to the Federal Register Notice process.

Second, plaintiffs disingenuously suggest that Ms. Blackwell altered **final** documents, when the facts they recite pertain only to **draft, pre-decisional** documents. Specifically, plaintiffs accuse Ms. Blackwell of contempt for taking a draft memorandum prepared by Interior employee James Pace for then-Assistant Secretary for Indian Affairs Kevin Gover that described the process and the responses received in the Federal Register Notice process. Monitor's First Rpt. Ex. 15 (the "Pace draft"). The Pace draft was simply a report, and was not in the form of a policy recommendation. *See* U.S. Dept. of Interior Office of Inspector General, "Report: Allegations Concerning Conduct of Department of the Interior Employees Involved in Various Aspects of the *Cobell* Litigation," No. 2001-I-412-PSI (June 2002) (the "OIG Report") at 14 (In interview with OIG, Jim Pace stated he "'personally made it clear' to both Edith Blackwell and Gover that [his office] did not have the expertise to analyze the FRN results, and instead they could only collect the information."). Ms. Blackwell's supposed "crime" consisted of writing a policy recommendation that included parts, but not the entirety, of the Pace draft and that explained the decision to use a form of statistical sampling to conduct the accounting in a format the Secretary could sign. As Ms. Blackwell observed in her e-mail circulating her draft for comment, "I have tried to create a decisional document which provides the rational[e] for the decision." Monitor's First Rpt. Ex. 16 ("Blackwell draft"). Thus, Ms. Blackwell was completely honest about the purpose of her draft.

Plaintiffs accuse Ms. Blackwell of "summarily dismiss[ing] Mr. Pace's findings and materially alter[ing] the Pace memorandum solely to rationalize the imprudent decision in which she had participated to commence the bogus Federal Register Notice process. . . ." Plaintiffs' BOP at 37. It is difficult to understand how plaintiffs could have reached this conclusion when Ms. Blackwell's draft incorporates large elements of Mr. Pace's draft, including the point that "The majority of commentors wanted to see a transaction-by-transaction reconciliation in spite of the discussion [in] the Notice that Congress may be unwilling to fund an expensive transaction-by-transaction reconciliation." Blackwell draft at 3; *compare with* Pace draft, third page (". . . an overwhelming majority of those who voiced their preferences at the public meetings wanted to see a transaction-by-transaction reconciliation, in spite of the discouraging language contained in the Federal Register Notice stating that such a solution was not very likely since Congress had already dismissed such a solution."). The above comparison shows that there is no material difference between the two drafts. Significantly, there is no evidence of any intent by Ms. Blackwell to falsely depict the commentors' stated preferences, even though those preferences did not align with the recommendation contained in her draft.[12] Contrary to plaintiffs' arguments, Ms. Blackwell did not "summarily dismiss[]" the Pace draft: she incorporated relevant portions of it and then went beyond simply reporting on the Federal Register Notice process to create a decisional document for the Secretary's signature. Moreover, Ms. Blackwell's draft was also just that – a draft, an

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[12]Ms. Blackwell included in her draft, almost word for word, other language about the commentors' views from the Pace draft. *See* Blackwell draft at 3 ("On the issue of how to fairly compensate IIM account holders, there were fourteen mailed in responses along with numerous comments voiced at the public meetings. There were no specific comments that stood out as being more desirable or any more important than any others. The one common thread was that all respondents wanted some form of compensation based upon a complete of [sic] record as possible."); *compare with* Pace draft, third-fourth pages ("With regard to the second issue, compensation, there were fourteen mailed in responses along with numerous comments voiced during the public meetings. There were no specific comments that stood out as being more desirable or any more important than any of the others. The one common thread was that all of the respondents wanted some form of compensation based upon as complete a record as possible.").

element in the agency's deliberative process regarding the selection of an appropriate accounting methodology, that was distributed for comment and discussion.

Obviously, what plaintiffs really object to is Interior's exercise of its reasoned discretion – discretion that both this Court and the Court of Appeals acknowledged in their rulings in this case – to adopt an accounting methodology that plaintiffs do not like.[13] There is no foundation for plaintiffs' reckless accusations of a "cover-up", and accordingly, the accusations amount to no more than a complaint that Ms. Blackwell engaged in a deliberative process that resulted in a policy choice they find "imprudent." Plaintiffs are free to disagree with the policy adopted by Secretaries Babbitt and Norton and to seek whatever review of those policy directives the law allows, but they should not be permitted to attack government employees like Ms. Blackwell simply for offering "[f]ree and open comments on the advantages and disadvantages of a proposed course of governmental management." *Kaiser, supra.*

If possible, plaintiffs are on even thinner ice when they demand contempt sanctions against Ms. Blackwell's for her critical comments on former Special Trustee Thomas Slonaker's draft memorandum to the Secretary concerning the use of statistical sampling. Plaintiffs' BOP at 39-41. For starters, it is far from self-evident how plaintiffs conclude from Ms. Blackwell's comments that she "believe[d] that the Special Trustee's endorsement of the bogus Federal Register Notice process was essential," *id.* at 39-40, when the comment plaintiffs quote does not even mention the

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[13]The Blackwell draft recommends the following course of action to the Secretary:

> We believe that using statistical sampling we can perform a transaction-by-transaction analysis on a statistically significant portion of the total number of accounts. With a high degree of confidence we believe we can extrapolate to all account holders an error rate. We believe that this approach is best given the massive number of records, the complexity, and the condition of the records. We also note that GAO and Congress have suggested sampling.

Blackwell draft at 4.

Federal Register Notice process. There simply is nothing nefarious in Ms. Blackwell's suggestion that Mr. Slonaker revise his draft to reflect the receipt of congressional funding. It is a complete mystery why plaintiffs cite Mr. Elliott's comments on the Slonaker draft memorandum (Plaintiffs' BOP at 40 ¶ 79) as a supposed basis for finding Ms. Blackwell in contempt. Likewise, it is puzzling that plaintiffs accuse Ms. Blackwell of being in contempt for recommending the use of statistical sampling, but make no similar accusation against Mr. Slonaker when he also recommended statistical sampling.[14] In any event, Ms. Blackwell was entitled – indeed, she was required by the duties of her position – to provide "free and open comments", *Kaiser, supra*, on the Slonaker draft and to contribute to the deliberative process.

In a similar vein, although plaintiffs accuse Ms. Blackwell of "aid[ing] and abett[ing]" Secretary Norton in furtherance of the fraud perpetrated on this Court and the Court of Appeals," Plaintiffs' BOP at 46, in three pages of discussion on this topic, plaintiffs mention Ms. Blackwell only twice and assert only that she attended meetings with Secretary Norton and her Deputy Chief of Staff, Sue Ellen Wooldridge. *Id.* 46-48. Plaintiffs do not even bother to identify the supposed "fraud" perpetrated by Secretary Norton, much less explain Ms. Blackwell's alleged role in it. Of course, if plaintiffs mean to argue that Ms. Blackwell was in contempt simply by virtue of meeting

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[14]Government Exhibit 3 may explain why plaintiffs have not included Mr. Slonaker in their criminal and civil contempt motions. Exhibit 3 is a series of letters (which have not been sealed) between the Special Master and plaintiffs' counsel Dennis Gingold concerning communications Mr. Gingold had with Mr. Slonaker before the contempt trial earlier this year. In these letters, Mr. Gingold admitted to the Master that as part of what Mr. Gingold termed a "due diligence" process, he had advised Mr. Slonaker that his name would be removed from the list of people plaintiffs intended to charge with contempt if Mr. Slonaker took certain action discussed in the letters. We understand that the Special Master is in the process of producing a report based on recent depositions of both Mr. Slonaker and his former deputy, Thomas Thompson, that may bear on the issues in this BOP and in the numerous other pending contempt motions. *See Interior Defendants' Motion and Supporting Memorandum for Release of the Report of the Special Master Regarding IT Security and any Information Reported to the Court Regarding the Special Master's Investigation or Report* (filed Sept. 3, 2002). We accordingly reserve the right to seek leave to supplement this brief, if appropriate, once the Master has issued his report.

with the new Secretary and her Deputy Chief of Staff to discuss IIM trust reform, their motion again runs afoul of the constitutional discretion afforded to the Executive to deliberate upon and arrive at policy decisions, which both this Court and the Court of Appeals have acknowledged. Although it is far from clear, it may be that the "fraud" charged by plaintiffs is no more than Secretary Norton's decision to adopt former Secretary Babbitt's policy directive regarding the role of statistical sampling in performing the required accounting.

While plaintiffs baldly assert that "[e]veryone knew that the 'statistical accounting' would not comply with" this Court's December 21, 1999 judgment (Plaintiffs' BOP at 41), they do not bother to identify "everyone", nor do they cite any evidence in support of their unfounded claim besides the testimony of Mr. Thompson.[15] The scope of the Secretary's discretion to select a methodology for performing the accounting did not change simply because a new Secretary had arrived. Nor do plaintiffs cite any basis for their claim that Secretary Norton was not entitled to rely upon the policy directive made by Secretary Babbitt regarding the use of statistical sampling and had to begin afresh to study the issue.[16] Indeed, it was shortly after Secretary Norton's arrival at Interior that the Court of Appeals issued its decision **confirming** the Department's discretion to determine the means by which the accounting would be performed. Further, Secretary Norton did not simply adopt the Babbitt directive as is; rather she directed the Department to provide an

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[15]Curiously, though, plaintiffs accept at face value Mr. Thompson's assertion that he believed all along the statistical sampling would fail, despite the fact that Mr. Thompson's superior, Mr. Slonaker, joined in recommending to Secretary Babbitt in late 2000 that statistical sampling at least be attempted as part of the accounting. *See* Govt Ex. 1. If Mr. Thompson and Mr. Slonaker actually had believed the statistical sampling would fail, it was clearly their obligation to report their concerns to Secretary Babbitt. Mr. Slonaker's memorandum mentions no such concerns, and therefore casts considerable doubt upon the veracity on Mr. Thompson's assertion.

[16]There can be little doubt that plaintiffs would have loudly accused Interior of stalling if Secretary Norton had thrown out all of the work done under her predecessor and commenced a new study and/or notice and comment process concerning the feasibility of a pure transaction-by-transaction accounting versus an accounting that included sampling methods.

accounting of all funds held in trust by the United States since the act of June 24, 1938, *see* Govt. Ex. 2, consistent with the Court of Appeals' conclusion that the accounting must include "*all funds*, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)." *Cobell*, 240 F.3d at 1102 (emphasis in original).[17] Plaintiffs have provided absolutely no basis for their claims that the Secretary committed any fraud on the courts by adopting a modification of the Babbitt policy directive on statistical sampling. Nor have plaintiffs demonstrated any grounds for holding Ms. Blackwell in contempt simply for attending meetings with the new Secretary and her staff.

Plaintiffs conclude their diatribe with a sweeping claim that Ms. Blackwell "has exhibited a long-standing and comprehensive practice of expending great effort in keeping highly relevant evidence from this Court and plaintiffs." Plaintiffs' BOP at 49. Characteristically, plaintiffs' charges are backed up by, at most, the thinnest of evidence. Plaintiffs offer only two examples of this supposedly "long-standing and comprehensive practice", the first of which is the e-mail backup tape issue, which plaintiffs not only exaggerate, but also purposefully mischaracterize. Despite plaintiffs' insistence on referring to the backup tape overwriting as "destruction of e-mails", in none of the numerous motions they have filed seeking contempt on this issue have they

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[17]Plaintiffs' accusations that Secretary Norton conducted no research before adopting a modified version of the Babbitt policy decision apparently are based on conclusions made by the Court Monitor (Plaintiffs' BOP at 47). Ms. Wooldridge, however, refuted those conclusions in interviews with Interior's Office of Inspector General. OIG Report at 28-31. The OIG Report was filed with on the record in this action on August 5, 2002. Although the statements reported by the OIG are not sworn testimony, the Court can and should take judicial notice of the OIG Report since it addresses many of the matters plaintiffs condemn in their BOP. *E.g., Glaxo Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1295 & n.16 (E.D.N.C. 1996) (taking judicial notice of a discovery deposition of an expert witness after the expert had testified at trial). Moreover, the plaintiffs have cited the OIG Report as supplemental authority for another of their contempt motions. *See* Plaintiffs' Notice of Supplemental Authority in Support of "Bill of Particulars" for Edward B. Cohen in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Criminal Contempt for Destroying E-Mail and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt (July 22, 2002 (filed Aug. 13 or 14, 2002).

offered proof that Ms. Blackwell destroyed e-mail correspondence or failed to substantially meet Interior's obligation to produce e-mail correspondence responsive to plaintiffs' discovery requests. *See* Govt Opp. to 3/20/02 Motion; Govt's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edith Blackwell Should Not Be Held in Contempt in Connection with the Overwriting of BackupTapes (filed Aug. 12, 2002). Likewise, plaintiffs have never proven that they suffered any actual harm as a result of receiving e-mail correspondence that was produced from paper records as opposed to being derived from data on backup tapes.[18]

Plaintiffs' second "particular" in support of this supposed "long-standing and comprehensive practice" attacks Ms. Blackwell simply for agreeing with a colleague that the proper manner for the Special Trustee to express criticisms of Quarterly Reports is by separate letter. As the government has noted in Defendants' Memorandum of Points and Authorities in Support of Motion for Protective Order and to Quash Deposition Subpoenas (filed Aug. 21, 2002) at 9-10, the Executive is entitled to speak with a single voice. Mr. Slonaker certainly was entitled to his opinions, but the Secretary was entitled to file a report that reflected her own reasoned viewpoints, and she was not required to report on all the varying viewpoints that were raised but rejected in the course of the deliberative process undertaken in preparing the report. In any event, plaintiffs point to no Court order requiring her to do the contrary, and so there is no basis for contempt.

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[18]Plaintiffs apparently also seek to hold Ms. Blackwell in contempt for not writing e-mails at all. This Court has entered no order requiring Ms. Blackwell or anyone else to communicate by e-mail.

4. Even If Plaintiffs Could Show a Violation of a "Clear and Reasonably Specific" Order, Imposing Civil Contempt Sanctions Upon Ms. Blackwell Based on Plaintiffs' BOP Would Be Inappropriate Because She Could Not Comply with Such an Order, Nor Have Plaintiffs Suffered any Damages from the Alleged Misconduct.

For the reasons cited in Section A above, sovereign immunity precludes the imposition of criminal sanctions on Ms. Blackwell in her official capacity. Civil contempt sanctions are used either to obtain compliance with a court order or to compensate for damages sustained as a result of noncompliance. *Food Lion, Inc.* 103 F.3d 1016. Coercive contempt sanctions are intended to force the offending party to comply with the court's order. *Coleman v. Espy*, 986 F.2d 1184, 1190 (8th Cir.), *cert. denied sub nom. Dye v. Espy*, 510 U.S. 913 (1993). Compensatory contempt sanctions compensate the plaintiff for damages that the offending party has caused by its contempt. *Id.* Plaintiffs do not say in their BOP whether they seek coercive or compensatory sanctions against Ms. Blackwell. In any event, neither form of sanctions is appropriate.

Plainly, coercive sanctions could not force Ms. Blackwell to "undo" recommendations and comments that she made or advice that she gave many months or even years ago. Plaintiffs fail to specify what corrective action they believe Ms. Blackwell can take. Ms. Blackwell has been recused from working on the case since last year and therefore has no ability to implement any corrective action, even assuming there could be some type of corrective action. The remedial purpose of a contempt order cannot be served where, as here, the allegedly violative act cannot be corrected. *See In re Sealed Case*, 250 F.3d 764, 770 (D.C. Cir. 2001) ("Because the Government could not undo the July 18 disclosure [of grand jury material], holding the Government in civil contempt would serve no useful purpose. . . .").

Because of sovereign immunity, neither criminal nor civil fines are available against Ms. Blackwell in her official capacity.[19] As is discussed at length in our Govt. Opp. to 3/20/02 Motion at 13-16, the doctrine of sovereign immunity bars the imposition of fines, penalties or monetary damages against the government, except to the extent that the United States has explicitly consented to such sanctions. Plaintiffs have not specified any compensatory damages they claim to have suffered as a result of Ms. Blackwell's alleged non-compliance with the declaratory judgment. To the extent that plaintiffs are seeking money damages other than attorneys' fees and costs, their claims are barred because the United States has not waived its immunity to the imposition of compensatory monetary damages based on contempt. *Coleman v. Espy*, 986 F.2d at 1191; *United States v. Horn*, 29 F.3d at 763; *McBride v. Coleman*, 955 F.2d 571, 577-78 (8th Cir.), *cert. denied sub nom. McBride v. Madigan*, 506 U.S. 819 (1992); *Barry v. Bowen*, 884 F.2d 442, 444 (9th Cir. 1989).

Conclusion

Plaintiffs have now filed **five** show cause motions and "bills of particulars" against Ms. Blackwell, and not one of them has set forth a colorable legal or factual basis for the Court to hold her in contempt. These pleadings have been devoid of any merit and characterized by uncivil invective. Since Ms. Blackwell has not been in a position for nearly a year to do anything that plaintiffs could cite as a basis for contempt, the Court should restrain plaintiffs from filing any further show cause motions or "bills of particulars" against her. To permit plaintiffs to continue filing what are essentially no more than poison pen letters, to which Ms. Blackwell and the

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[19]"As long as the government entity receives notice and an opportunity to respond, a suit against a government employee in his official capacity is to be treated as a suit against the entity." *Coleman*, 986 F.2d at 1189, *citing Kentucky v. Graham,* 473 U.S. 159 (1985). *See also, Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002), and cases cited therein.

government must respond, would not only violate Ms. Blackwell's due process right to a clear statement of the precise charges against her, but would also continue to cause an inexcusable waste of Ms. Blackwell's resources, the government's resources and the Court's resources. Accordingly, Plaintiffs' BOP should be dismissed along with the motions upon which it is purportedly based to the extent they implicate Ms. Blackwell, and plaintiffs should be restrained from filing any further show cause motions or "bills of particulars" against Ms. Blackwell in this case.

Respectfully submitted,

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DATED: September 4, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-CV-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of Plaintiffs' "Bill of Particulars" for Edith Blackwell in Support of Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Violating the December 21, 1999 Order to Conduct an Accounting of Individual Indian Trust Funds, the Government's Opposition thereto, and the entire record in this case, it is this _____ day of _____, 2002, hereby

ORDERED that Plaintiffs' "Bill of Particulars" be, and hereby is, DISMISSED; and it is

FURTHER ORDERED that Plaintiffs' Consolidated Reply Brief in Support of Motion to Set a Trial Date for Phase II of this Action and Memorandum in Support of Motion for Order to Show Cause Why Past and Present Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt (filed Aug. 27, 2001), and Plaintiffs' Consolidated Motion to Amend Their Motion to Reopen Trial One in this Action to Appoint a Receiver and Memorandum of Points and Authorities in Support Thereof and Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Connection With Trial One (filed

Oct. 19, 2001) are DISMISSED as they relate to Edith Blackwell; and it is

FURTHER ORDERED, that plaintiffs shall not file any additional "bills of particulars" or motions seeking a finding of civil or criminal contempt against Edith Blackwell in this matter as to any alleged action that occurred before March 15, 2002.

Honorable Royce C. Lamberth
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 4, 2002 I served the foregoing *Defendants' Opposition to "Bill of Particulars" for Edith Blackwell in Support of Motion for Order to Show Cause Why Interior Defendants, and Their Counsel, Should Not Be Held in Civil and Criminal Contempt for Violating the December 21, 1999 Order to Conduct an Accounting of Individual Indian Trust Funds* by first-class mail, postage prepaid, and by facsimile transmission, pursuant to agreement, upon:

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K. P. Kingston

Kevin P. Kingston

THE SECRETARY OF THE INTERIOR

WASHINGTON

Memorandum

DEC 2 9 2000

To: Chief of Staff
Solicitor
Special Trustee for American Indians
Assistant Secretary – Policy, Management and Budget
Assistant Secretary – Indian Affairs
Assistant Secretary – Land and Minerals Management
Chief Information Officer

From: Secretary

Subject: Statistical Sampling of Individual Indian Money Accounts

As part of the Department's overall trust reform efforts, the Department must undertake an effort to evaluate the reliability of past individual Indian money (IIM) account activity. Part of this work is already underway for the period after the enactment of the American Indian Trust Fund Management Reform Act of 1994. However, the Department, the Court, the Congress, and IIM beneficiaries believe that we must examine past account activity to discover information that will enable beneficiaries and the Department to evaluate whether income from individual trust assets was properly credited, maintained, and distributed to and from IIM accounts before October 25, 1994. As part of this process, the Department is exploring approaches to gather such information so as to fairly compensate beneficiaries and finally resolve any discrepancies.

I have reviewed the attached memoranda from the Special Trustee for American Indians and the Assistant Secretary – Indian Affairs. I concur with the recommendation of each that the Department should use statistical sampling instead of attempting a transaction-by-transaction historical reconciliation of all IIM accounts. In addition, Congress, in the Conference Report accompanying the Department's FY 2001 Appropriation, in which approximately ten million dollars was appropriated for this purpose, agreed that some form of sampling is the most cost effective approach to provide an accounting for IIM beneficiaries.

I have asked the Special Trustee to plan, organize, direct, and carry-out this effort including developing the detailed plan required by Congress in the Conference Report. In addition, I ask that each of you provide the Special Trustee with your full support for this undertaking including the staff and expertise necessary to accomplish this critical task.

EXHIBIT

1

United States Department of the Interior

OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS
Washington, D.C. 20240

December 21, 2000

Memorandum

To: Secretary Babbitt

From: Tom Slonaker
Special Trustee for American Indians

Subject: IIM Historical Sampling Project

The following outlines a sampling project (the Project) for individual Indian trust accounting records, as well as the plans required to execute such a sampling. If you are in agreement, we recommend that you attach to this memorandum a directive (suggested draft attached) to the appropriate Department of the Interior (DOI) bureau and office heads indicating the need for their support.

This outline reflects the conclusions reached at a meeting on August 2, 2000, attended by Anne Shields, John Berry, Kevin Gover, Bob Lamb, Tom Thompson, Tim Elliott, Edith Blackwell, Tom Gernhofer, and me. Since that time the Federal Register Notice and consultation responses have been analyzed and compiled as noted below and by the attached memorandum.

The objective of the Project will be to determine, to the best of our ability with the records and resources available, the degree of accuracy which may be attributed to Individual Indian Money accounts for the period of 1952 through 1993. Such information should provide support for the accuracy of the starting balances for the current reconciliation of the period 1994 to date and possibly provide the basis for a Trial 2 settlement.

The basic methodology used will be a sampling technique, given the massive amount of records, the complexity, and the condition of the records. The attached memorandum regarding the results of the Federal Register Notice and consultation meetings also suggests that sampling is the most practical approach given the enormous potential expense and lengthy time required for a full accounting.

It is anticipated that an outside contractor will be chosen to perform the sampling. This contractor will be chosen through the normal Federal acquisition process.

As part of the process, a determination will be made by the Office of the Special Trustee for American Indians (OST) as to whether an initial study of a more limited scope in time and/or methodology (a "pilot") may provide sufficient information to determine the efficacy of the sampling project otherwise contemplated herein.

The time period chosen for review, 1952-1993, was selected given that annual GAO settlement of accounts prevailed through 1951 and that the OST has already commenced, pursuant to the 1994 Act, a review of the period 1994 to date.

The time required to complete the Project is unknown. The RFP process is estimated to require at least six months from its initial undertaking. The Project will consume at least a year and perhaps as long as two years from completion of the RFP process. For example, the recent Department-wide intensified effort to gather the named plaintiffs' records in the Cobell litigation has consumed over a year's time.

The cost to complete the Project is also unknown. A very rough cost estimate, based primarily on our experience with the plaintiffs' records in the Cobell case, was derived using some initial, preliminary assumptions as a starting point:

> Assume a sampling of 350 accounts. This number might be understated given the difference in records systems from year to year and agency to agency, as well as the availability of records and ease of accessing them.
>
> Assume a cost ranging from $50,000 per account (those more recently opened) to $200,000 per account (the approximate cost of the Cobell account analyses).
>
> Under these assumptions, the cost, excluding any DOI staff, OST's current budget, and related expenses, ranges from $17,500,000 to $70,000,000.

Please note that these are rough approximations based on our limited (although intensive) experience with records production, and that we will have a better idea as the RFP process nears completion.

It is also important to understand that completion of the Project will require the allocation of adequate funds by the Department, the Office of Management and Budget, and the Congress to complete the Project timely and fully within the range of all reasonable contingencies. To the extent the funds are not in place, the Project may not be able to be pursued to completion. If this sounds like I'm concerned about resources, money and staff not being available sufficiently and timely as the Project moves along in order to complete it properly, I am. Please note that the Congress has already indicated it will closely oversee our progress and will evaluate the sampling project plan before we can commence a full sampling project. Sums in addition to the $10 million recently provided by the Congress will likely be dependent upon adequate progress and reasonable costs and benefits.

As cost and time and staffing requirements are refined and/or funding uncertainties prevail, we may need to recommend significant changes in the Project to you.

The Special Trustee will assume oversight and supervision for the Project, subject to the direction of the Secretary and separately from the other organizational and legal responsibilities as the Special Trustee.

The Project will require the cooperation and support of the Bureau of Indian Affairs; Minerals Management Service; Policy, Management and Budget; Office of the Solicitor, and Bureau of Land Management.

Staffing for the Project will be from outside the OST and any of its constituent parts, given the workload already placed on the OST staff. While existing senior Office of Trust Funds Management staff in Albuquerque may be used in an advisory role, the Project staffing will be organizationally separate from OST. Additionally, any staffing from OST would be contingent upon the provision of additional staff for this Project. Outside staffing required (which may come from other parts of DOI) will include a senior project manager to direct the RFP process and oversee the completion of the Project along with the appropriate RFP and statistical persons. The exact staffing requirements need to be determined posthaste and the RFP process begun.

This can be an exciting and interesting, although often frustrating, Project. With the proper, sustainable commitment of resources, we can move forward.

Attachment(s)

cc: Anne Shields, Kevin Gover, Lisa Guide, Bob Lamb, John Leshy, Sharon Blackwell, Tim Elliott, Tom Thompson, Jim Douglas, Tom Gernhofer, and Edith Blackwell

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Memorandum

DEC 2 1 2000

To: Lisa Guide, Acting Assistant Secretary - Policy, Management, and Budget
Thomas N. Slonaker, Special Trustee for American Indians

From: Kevin Gover, Assistant Secretary - Indian Affairs

Subject: Results of Federal Register process to gather information on evaluating individual Indian money (IIM) accounts

To meet the goals of the American Indian Trust Fund Management Reform Act of 1994, the Bureau of Indian Affairs (BIA) placed a notice in the Federal Register on April 3, 2000, announcing a series of public meetings and soliciting written comments. The notice initiated an information gathering process to determine the most reasonable methods for providing IIM account holders with information to evaluate their accounts and to determine whether there are discrepancies due to past management practices. To shape the issue, the notice specified particular goals, identified issues that needed to be considered in meeting those goals, and listed alternative approaches already before the Department.

After providing an in-depth background on the history and progression of IIM accounts, the notice stated the following goals that the process hoped to achieve:

1) Develop a methodology, consistent with Congressional directives, to examine past account activity and discover information appropriate to enable beneficiaries and the Department to evaluate whether income from their trust assets was properly credited, maintained, and distributed to and from their IIM accounts before October 25, 1994;

2) Explore approaches to fairly compensate beneficiaries and finally resolve discrepancies.

65 Fed. Reg. 17525 (April 3, 2000).

In order to meet these goals, the notice outlined certain concerns that would potentially constrain the Department as follows:

> Each approach would require some tradeoff among the level of precision of account information provided to beneficiaries, the cost of obtaining and providing information, the impact on BIA's and OST's other responsibilities, and time needed to develop a basis for compensation. It is important that these tradeoffs be considered in evaluating the various options.

Id.

The tradeoff issue was brought about partly by concern over the potential cost of the process, a factor highlighted in the notice:

> While achieving the goals of this notice is likely to be expensive regardless of which approach is selected, there is a very large cost range within the various options - from millions of dollars for the sampling or settlement approach to hundreds of millions or more for a traditional transaction-by-transaction reconciliation for all accounts. As an example, the Department's current estimates are that it could cost over $15 million just to locate and organize all documents associated with the transactions of the five named plaintiffs (and 31 related individuals) in the Cobell litigation. Using this estimate as a guide, it is reasonable to conclude that merely collecting and organizing - but not analyzing - documents for the approximately 300,000 current account holders would cost hundreds of millions of dollars.

Id. at 17526.

The notice concluded with a discussion of various approaches considered. These included a complete transaction-by-transaction reconciliation of each account, a limited reconciliation within a fixed time frame, various statistical sampling approaches, an analysis of data currently in the accounts, and a formula for payment to each account holder. The transaction-by-transaction reconciliation was recognized as the most time-consuming and costly approach. The lastly mentioned "rough justice" payment option involved little or no reconciliation of accounts.

The information gathering process initiated by the Notice provided an opportunity to send in written comments through June 30, 2000. It also provided for a schedule of public meetings to be held nationwide by the Bureau of Indian Affairs to publicly collect this information.

To provide consistency to the manner in which the public meetings would be conducted and the information would be collected, the Office of American Indian Trust (OAIT) provided training to each of the Regional Directors, Superintendents, and Field Representatives that would conduct the public meetings. The training was held at the Bureau of Indian Affairs Managers Conference from April 18 to 19, 2000, in Phoenix, Arizona. It consisted of an intensive four hour course that included: a mock public meeting; an overview from the Office of the Solicitor on the Cobell case and the relevance that the case had to this collection of information; an overview of the historical records kept on IIM accounts; guidance on the compensation issues, including how to approach potential questions that might come up during the public meetings; and a complete information package that provided overhead transparencies and paper copies of all materials referenced during the training sessions for use in the meetings.

The training sessions emphasized that the guiding principal for conducting these meetings was to acknowledge that solutions needed to be found in order to gain the trust and confidence of the IIM account holders to foster a meaningful and productive trust relationship. Furthermore, the meeting coordinators were directed to remain focused on the following two objectives, commensurate with the goals of the process: 1) to hear from the participants about methods for providing IIM account

holders with information so that they might be able to evaluate their accounts for discrepancies; and 2) to hear from the participants on what approaches might be used to compensate them for these discrepancies. It was hoped that in clarifying these objectives and emphasizing the need to remain focused on them it would prevent the public meetings from becoming a forum for individual complaints or hearings regarding individual cases.

A total of eighty-six meetings were scheduled, of which eighty records have been received. Over one thousand participants attended the eighty meetings, sixty percent of whom identified themselves as IIM account holders. Only seven sets of written comments were received at the public meetings. Most of the comments were provided orally and are contained in the minutes of each of the meetings which were submitted in paper and electronic format and are currently being maintained by OAIT.

Regionally, there was an extremely high variance in the number of participants. Not surprisingly, those Regions with the highest number of IIM account holders, held the larger number of public meetings and experienced the highest number of participants. The total number of participants by region were:

Region	Total Number of Participants	Number who identified themselves as IIM account holders
Albuquerque	45	10
Eastern	0	0
Eastern Oklahoma	83	32
Great Plains	197	115
Midwest	5	2
Navajo	114	96
Northwest	178	140
Pacific	38	23
Rocky Mountain	101	70
Southern Plains	54	24
Western	201	100
Totals	1016	612

In addition to the seven written comments received at the public meetings, there were one-hundred-forty-six comments mailed in before the comment period closed on June 30, 2000. All of the comments were reviewed together to determine how each respondent addressed the two objectives.

With regard to the first issue, providing documentation to account holders, eighty-one of the respondents who wrote in and an overwhelming majority of those who voiced their preferences at the public meetings, wanted to see a transaction-by-transaction reconciliation in spite of the discouraging language contained in the Federal Register Notice stating that such a solution was not very likely since Congress had already dismissed such a solution. The other responses were varied and provided no other apparent trends.

With regard to the second issue, compensation, there were fourteen mailed in responses along with numerous comments voiced during the public meetings. There were no specific comments that stood out as being more desirable or any more important than any of the others. The one common thread among all of the respondents was for some form of compensation based upon as complete a record as possible.

In reviewing the minutes of the meetings, the suggestions and comments received on both issues ran across the entire spectrum of possible responses. Many of the comments dealt with general questions on IIM account management, or revolved around discussions of the alternative approaches that were articulated in Part IV of the Federal Register Notice. A matrix of the comments that were received is attached.

We are pleased with this information collection and the comments and suggestions received. Most importantly, the process has included a collection of information from those individuals who will be most impacted by it, the IIM account holders themselves. Now that the Department has fulfilled its administrative duty, it must determine how to evaluate the reliability of past account activity through a historical accounting process.

To solve this issue, Departmental staff, Congress, and outside third-parties have all reviewed the question of how to perform a historical accounting. Each agrees that a complete transaction-by-transaction accounting for every account would cost hundreds of millions of dollars and take many years to complete. Moreover, to accomplish this task would require the Department to significantly increase its BIA staff and would require Congress to double BIA's current appropriation. As Congress stated in the joint Explanatory Statement of the Committee of Conference with respect to this appropriation:

> The managers have provided $27,600,000 in emergency appropriations (in Title V) to address trust fund reform issues that could not be anticipated prior to the submission of the fiscal year 2001 budget request. These funds will: support work to address the breaches of trust identified in the recent District Court decision; allow the government to begin preparation for the second trial relating to an accounting for Individual Indian Money Accounts (IIM); and address critical trust fund reform shortfalls.
>
> The Department of the Interior has announced its intention to explore the use of sampling as the best, most cost effective approach to provide an accounting for

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IIM beneficiaries. While the Indian Trust Fund Reform Act contemplated that such an accounting would sometime occur, the managers have been concerned for years about the potential cost and effectiveness of any approach that might be used. After investing $20 million over five years in a tribal account reconciliation process, there has been no resolution of issues surrounding tribal accounts. The cost of a similar accounting for the approximately three hundred thousand IIM account holders could conceivably cost hundreds of millions of dollars.

Therefore, while approving the request to begin an IIM sampling approach, the managers direct the Department to develop a detailed plan for the sampling methodology it adopts, its costs and benefits, and the degree of confidence that can be placed on the likely results. This plan must be provided to the House and Senate Committees on Appropriations prior to commencing a full sampling project. Finally, the determination of the use of funds for sampling or any other approach for reconciling a historical IIM accounting must be done within the limits of funds made available by the Congress for such purposes.

Conf. Rep. 914, at 149-150, 106th Cong., 2d Sess. 18 (Sept. 29, 2000) (emphasis added).

With the administrative process complete and with the above direction from Congress, it is now up to the Department to decide on a course of action. Although the majority of comments received from the Federal Register notice preferred a complete transaction-by transaction reconciliation, Congress has made it clear in the above language that they are unlikely to fund such a process. Furthermore, I must take into consideration the critical unmet educational, infrastructure and economic needs of Indian people in allocating the limited appropriations available to the BIA. I believe that through statistical sampling, we can perform a transaction-by-transaction analysis on a statistically significant portion of the total number of accounts. This approach is best, given the massive number of records, the complexity, and the condition of the records. Therefore, taking into consideration the entire Federal Register process, Congress' directive and the other critical needs of the Department, I believe that a sampling approach represents the best alternative to meeting our goals under the 1994 American Indian Trust Fund Management Reform Act.

THE SECRETARY OF THE INTERIOR
WASHINGTON

FEB 27 2001

Memorandum

To: Chief of Staff
Acting Solicitor
Special Trustee for American Indians
Acting Assistant Secretary – Policy, Management and Budget
Acting Assistant Secretary – Indian Affairs
Acting Assistant Secretary – Land and Minerals Management
Chief Information Officer

From: Secretary Gale A. Norton

Subject: Statistical Sampling of Individual Indian Money Accounts

Attached are memoranda from Secretary Babbitt dated December 29, 2000, from the Special Trustee for American Indians dated December 21, 2000, and from the Assistant Secretary – Indian Affairs dated December 21, 2000. I concur in the directive that the Department proceed with a form of statistical sampling using a methodology which will provide the basis for an historical accounting of the IIM accounts. The purpose for this process should be to fulfill the court's directive to provide the IIM trust beneficiaries an accounting for their funds held in trust by the United States since the Act of June 24, 1938.

The Special Trustee for American Indians has been directed and has agreed to plan, organize, direct, and carry-out this effort. I ask that each of you provide the Special Trustee your active cooperation and support for this endeavor.

EXHIBIT
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Dennis M. Gingold
P.O. Box 14464
Washington, D.C. 20044-4464

BY FACSIMILE

August 16, 2002

The Hon. Alan Balaran
Special Master
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Discussions with Special Trustee

Dear Mr. Balaran:

Today, you asked me to confirm whether or not I have had conversations with the Honorable Thomas Slonaker, former Special Trustee, in addition to those that Mr. Slonaker and I had during the course of Phase I *Cobell* settlement negotiations, the result of which was vetoed by the Department of Justice.

In that regard, since termination of *Cobell* settlement discussions two years ago, I can recall five specific out-of court conversations that I have had with Mr. Slonaker, four of which occurred by telephone. They are as follows:

- The first was more than a year ago and it too involved settlement discussions; however, this involved another fruitless settlement effort – the two and one-half year old Infield retaliation matter. The circumstance surrounding this discussion are as follows: Mr. Brooks – the immediate past lead trial counsel for defendants – and I had engaged in comprehensive settlement discussions on the festering Infield matter and had tentatively worked out a complete settlement pending acceptance of one provision that was dependent on approval by Mr. Slonaker. Mr. Slonaker telephoned me following a discussion that he had with Mr. Brooks and informed me that the provision which involved OST was unacceptable.

- The second occurred shortly before we filed a motion for an order to show cause on 39 Interior, Justice, and Treasury officials relating to continuing fraud perpetrated on the Court and willful and repeated violations of Court orders. In accordance with our practice, we conducted due diligence prior to filing show cause motions on named contemnors. To the extent that we had material, unresolved questions about an individual's culpability, we made further inquiries into whether such person was responsible for the malfeasance and other misconduct that grounded each such motion. I conducted the due diligence on Mr. Slonaker and questioned Mr. Slonaker about the "verification" language – and its

EXHIBIT

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origin – in his Quarterly Report transmittal letters to the Department of Justice. Mr. Slonaker represented that he had been directed to include that language in each transmittal letter by Justice Department or Solicitor's Office lawyers. And, he confirmed that such instruction, in fact, had occurred. I asked Mr. Slonaker to confirm by declaration that he had received such instruction. He responded that he would do so by memorandum that he would provide to the Court Monitor. Upon review of Mr. Slonaker's October 15, 2001 memorandum – attached to the October 19, 2002 *Supplemental Report Amending the Second and Fourth Reports of the Court Monitor* as an exhibit – we concluded that Mr. Slonaker, like certain other Justice, Interior, or Treasury officials, demonstrated that his conduct did not rise to the level of contempt. We, therefore, removed Mr. Slonaker from list of contemnors against whom we were proceeding.

- The third telephone conversation occurred prior to Mr. Slonaker's testimony in the 2nd Contempt Trial of the Interior Secretary and the Assistant Secretary – Indian Affairs. Shortly before Mr. Slonaker was scheduled to testify I informed him when he would be called as a witness and that I would question him about the accuracy and completeness of the Court Monitor's findings and conclusions in reports that served as a basis for four of the five contempt specifications.

- The fourth telephone conversation also occurred at the instruction of the Court prior to Mr. Slonaker's testimony in the 2nd Contempt Trial. I specifically informed Mr. Slonaker that he would be asked to authenticate exhibits and identify handwritten notes on certain exhibits attached to Court Monitor's reports. I stated that I would deliver such exhibits to his house so he could review them with me prior to his testimony. I delivered such exhibits as promised.

- The fifth conversation occurred immediately prior to Mr. Slonaker's testimony in the 2nd Contempt Trial. Mr. Slonaker met with me and identified authors of handwritten notes in the margins of certain exhibits.

I trust this is responsive to your inquiry.

Very truly yours,

Dennis M. Gingold

cc: The Hon. Joseph Kieffer, III
Mark Nagel
Christopher Kohn
James P. Schaller

Dennis M. Gingold
P.O. Box 14464
Washington, D.C. 20044-4464

BY FACSIMILE

August 16, 2002

The Hon. Alan Balaran
Special Master
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Discussions with Special Trustee

Dear Mr. Balaran:

This is in response to your written request of this date for clarification regarding discussions I have had with the Hon. Thomas Slonaker.

With respect to your first question, the answer is yes. With respect to your second question, the answer is yes.

I trust this is responsive to your inquiry.

Very truly yours,

Dennis M. Gingold

cc: Hon. Joseph Kieffer, III
Mark Nagel
Christopher Kohn
James P. Schaller

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August 16, 2002

VIA FACSIMILE
Dennis M. Gingold, Esq.
1275 Pennsylvania Ave., N.W.
Ninth Floor
Washington, DC 20004

RE: Cobell et al. v. Norton et al., Civil Action No. 96-1285
Letter dated August 16, 2002 – Discussion with Special Trustee

Dear Mr. Gingold:

Thank you for your letter of this date, in which you responded to my inquiry concerning conversations you may have had with former Special Trustee Thomas Slonaker. Upon review of your letter, two questions come to mind. Specifically, in the second bullet point of your letter which begins at the bottom of page one and continues to page two, you discuss your conversation with Mr. Slonaker concerning his use of the word "verify" in the transmittal letters accompanying the Quarterly Reports.

First, did you represent to Mr. Slonaker during this conversation that you had included his name on the list of contemnors?

Second, during this conversation, did you represent to Mr. Slonaker that, if he confirmed in writing his oral representation to you that he was instructed by the Justice Department or the Solicitor's Office to include the word "verify" in the transmittal letters, you would remove his name from the list of contemnors?

Again, thank you for your cooperation in this matter.

Sincerely,

Alan L. Balaran
SPECIAL MASTER

cc: Sandra Spooner, Esq.